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

The present volume consists of three parts. Part one contains the Commission’s report on the work of its twenty-ninth session, which was held in New York, from 28 May to 14 June 1996, 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 twenty-ninth session of the Commission are reproduced. These documents include reports of the Commission’s Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were before the Working Groups.

Part three contains the Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and related Means of Communication, UNCITRAL Notes on Organizing Arbitral Proceedings, a bibliography of recent writings related to the Commission’s work, a list of documents before the twenty-ninth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the Yearbook.

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

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Part One

REPORT OF THE COMMISSION
ON ITS ANNUAL SESSION;
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2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development (UNCTAD).

I. ORGANIZATION OF THE SESSION

A. Opening of the session

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twenty-ninth session on 28 May 1996. The session was opened by Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel.

B. Membership and attendance

4. The General Assembly, by its resolution 2205 (XXI), established the Commission with a membership of 29
States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 4 November 1991 and on 28 November 1994, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated:1


5. With the exception of Algeria, Cameroon, Ecuador, Saudi Arabia, the Sudan and Uganda, all members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Albania, Armenia, Azerbaijan, Belize, Canada, Congo, Costa Rica, Croatia, Czech Republic, Denmark, Eritrea, Guinea, Indonesia, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Lesotho, Morocco, Myanmar, Namibia, Pakistan, Paraguay, Philippines, Republic of Korea, South Africa, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Turkey, Ukraine and Yemen.

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

   (a) **United Nations bodies:** United Nations Development Programme (UNDP)
   (b) **Intergovernmental organizations:** Asian-African Legal Consultative Committee; International Institute for the Unification of Private Law (UNIDROIT); Organization of American States (OAS)
   (c) **Other international organizations:** Arab Association for International Arbitration (AAIA); Cairo Regional Centre for International Commercial Arbitration; Caribbean Law Institute Centre; Comité maritime international (CMI); Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional (GRULACI); Inter-American Bar Association (IABA); International Association of Ports and Harbours (IAPH); International Chamber of Commerce (ICC); Tribunal Internacional de Conciliación y de Arbitraje del Mercosur (TICAMER); Union internationale des avocats (UIA).

1Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the General Assembly at its forty-sixth session on 4 November 1991 (decision 46/309) and 17 were elected by the Assembly at its forty-ninth session on 28 November 1994 (decision 49/315). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its forty-sixth session will expire on the last day prior to the opening of the thirty-first session of the Commission, in 1999, while the term of those members elected at the forty-ninth session will expire on the last day prior to the opening of the thirty-fourth session of the Commission, in 2001.

C. **Election of officers**

8. The Commission elected the following officers:

   **Chairman:** Mrs. Ana Isabel Piaggi de Vanossi (Argentina)
   **Vice-Chairmen:** Mr. S. Thuita Mwangi (Kenya) Mr. Ján Varso (Slovakia) Mr. Piyavaj Niyom-Rerks (Thailand)
   **Rapporteur:** Mr. Rafael Illescas (Spain)

D. **Agenda**

9. The agenda of the session, as adopted by the Commission at its 583rd meeting, on 28 May 1996, was as follows:

   1. Opening of the session.
   2. Election of officers.
   3. Adoption of the agenda.
   5. Electronic data interchange: draft Model Law; possible future work.
   10. Case-law on UNCITRAL texts (CLOUT).
   11. Training and assistance.
   12. Status and promotion of UNCITRAL legal texts.
   14. Other business.
   15. Date and place of future meetings.
   16. Adoption of the report of the Commission.

E. **Adoption of the report**

10. At its 606th meeting, on 14 June 1996, the Commission adopted the present report by consensus.

2The election of the Chairman took place at the 583rd meeting, on 28 May 1996, the election of the Vice-Chairmen at the 596th and 598th meetings, on 5 and 6 June 1996, the election of the Rapporteur took place at the 593rd meeting, on 4 June 1996. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and the Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be represented on the bureau of the Commission (see the report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, 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, I, A).
II. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

11. The Commission, after an initial discussion of the project at its twenty-sixth session (1993), considered at its twenty-seventh session (1994) a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1). That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994 (see also paragraph 53 below). On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared draft Notes on Organizing Arbitral Proceedings (A/CN.9/410), which the Commission considered at its twenty-eighth session (1995). On the basis of those considerations, the Secretariat prepared a revision of the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423), which was discussed and finalized by the Commission at the current session. (For the decision on the adoption of the Notes, see paragraphs 52-54 below.)

B. Discussion of the draft Notes on Organizing Arbitral Proceedings

1. Text as a whole

12. The Commission considered that the draft prepared by the Secretariat (A/CN.9/423) was generally in line with the considerations at the Commission’s twenty-eighth session (1995) and that it presented a good basis for the Commission to consider and approve the text at the current session.

13. The Commission reiterated its approval of the principles underlying the drafting of the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any procedural principle had been violated or was a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.

14. A view was expressed that the non-binding nature of the Notes could better be reflected by using in the title an expression such as “guidelines”, “suggestions” or “recommendations” rather than “Notes”. It was said that the term “Notes” had no precedent in the work of UNCITRAL and that readers might not readily understand the nature of the text thus entitled. The Commission, however, considered that expressions such as those suggested might lead to a misunderstanding that the failure to use the Notes would constitute less than good practice. The current title was thought to be more in line with the purpose of the text, which was to be a reminder to practitioners of questions relating to the conduct of arbitrations, and not a text expressing a value judgement as to what practices were considered to be good.

2. Introductory part (paragraphs 1-14)

15. It was decided to delete the words “fundamental requirements of procedural justice” and to reword the first sentence of paragraph 4 along the following lines: “Laws governing the arbitral procedure and arbitration rules that the parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.” The purpose of the modification was to avoid giving the impression that the Notes attempted to define the fundamental procedural principles to be observed in arbitration.

16. With respect to the reference to multi-party arbitration, the Commission favoured variant 2, as expressed in paragraph 7.

17. In paragraph 9, it was agreed to add, after the words “conference telephone calls”, the words “or other electronic means”.

18. A suggestion was made to delete in paragraph 10 the expressions “pre-hearing conference” and “pre-hearing review”. It was said that they reflected a practice that was not universal, and that literal translations of those expressions into some other languages were unclear. The Commission, however, thought that it was useful to give some examples of the expressions used in practice for procedural meetings of arbitrators and that a possible misunderstanding might be avoided by including the English expressions “pre-hearing conference” and “pre-hearing review” also in language versions other than English.

19. In paragraph 14, it was decided to add, after the words “may be limited by arbitration rules”, the words “by other provisions agreed to by the parties”.

3. List of matters for possible consideration in organizing arbitral proceedings

20. The Commission noted that the list of matters for possible consideration in organizing arbitral proceedings (which followed the introductory part of the Notes) had value not only as a table of contents of the Annotations but also as an aide-mémoire, suitable for quick reference by practitioners. No comments were made on the substance and format of the list.
4. Annotations (paragraphs 15-91)

Set of arbitration rules (item 1, paragraphs 15-17)

21. It was decided to change in paragraph 15 the phrase "it would be necessary to secure the agreement of that institution" to read "it may be necessary to secure the agreement of that institution". The purpose of the change was to avoid the implication that, when the parties agreed on the rules of an arbitral institution, agreement would always have to be sought; on the other hand, the slightly modified wording still reminded the parties that when the rules provided that the institution might be called upon to perform certain functions in connection with the case (e.g. the challenge or replacement of an arbitrator, or keeping the files of the case), the parties should reach agreement with the institution regarding the performance of those functions.

22. As to paragraph 17, it was observed that the phrase "on the basis of the law governing the arbitral procedure" might be misunderstood as excluding the possibility that a case might be governed by provisions other than a national law on arbitral procedure. In order not to take a stand on that issue, on which the views were not uniform, the Commission decided to delete the phrase; it was, however, understood that the thrust of the sentence was thereby not intended to be changed.

Language of proceedings (item 2, paragraphs 18-21)

23. It was agreed to delete, in paragraph 19, the examples of documents that might not need to be translated so as not to appear to be discouraging the arbitral tribunal from requiring translations of those documents. The Commission approved the substance of the paragraph along the following lines:

"Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings."

24. The Commission did not adopt the suggestion to address cases where the parties disagreed over the accuracy of a translation or where there was no agreement as to the appointment of a translator.

25. The Commission decided to expand the first sentence of paragraph 20 along the following lines (the addition is underlined): "If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal."

Place of arbitration (item 3, paragraphs 22-24)

26. The substance of paragraphs 22 to 24 was approved.

Administrative services that may be needed for the arbitral tribunal to carry out its functions (item 4, paragraphs 25-28)

27. It was decided that the words "when the parties have submitted the case to an arbitral institution" were to be replaced by "when the arbitration is administered by an arbitral institution".

28. The following text was added at the end of paragraph 28: "However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal." The addition was considered necessary to clarify that the differing views referred to in paragraph 28 did not mean that a decision-making function might be delegated to the secretary of the arbitral tribunal.

Deposits in respect of costs (item 5, paragraphs 29-31)

29. A suggestion was made to indicate, at the end of paragraph 30, that, in deciding how the deposits would be managed, the arbitral tribunal should take into account the nature of the deposits, including any privileged status of the deposited money (e.g. as regards taxation or attachment). However, such an indication was considered to be too detailed and only one of several questions to be borne in mind in managing the deposits.

Confidentiality of information relating to the arbitration; possible agreement thereon (item 6, paragraphs 32 and 33)

30. It was observed that, while confidentiality was a feature of arbitration on which parties typically placed great value, it was not essential for an arbitration to be confidential. Furthermore, it was pointed out that recent court decisions had shown that the positions differed in national laws as to the extent of confidentiality of information relating to arbitration. It was thus desirable to remind the parties of a possible need to address that question expressly.

31. As a result, the Commission decided to reformulate paragraph 32 along the following lines:

"It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality."

32. As to paragraph 33, it was suggested to delete from the examples of information to be kept confidential the
identity of the arbitrators (since in practice that was not confidential) and the content of the award (since an award became public when it was contested before a court). The suggestion was not adopted because the information referred to could be covered by a commitment to keep it confidential, at least in certain respects.

Routing of written communications among the parties and the arbitrators (item 7, paragraphs 34 and 35)

33. The substance of paragraphs 34 and 35 was approved.

Telefax and other electronic means of sending information (item 8, paragraphs 36-38)

34. It was suggested that the issues in the use of telefax were essentially the same as the issues relating to other electronic means and that, therefore, all those means should be discussed together. However, the Commission thought that the issues relating to the security of telefax were sufficiently specific to justify a separate treatment.

35. Paragraph 36 was criticized as appearing to discourage unjustifiably the use of telefax. The Commission agreed and approved the wording of paragraph 36 along the following lines:

“Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.”

Arrangements for the exchange of written submissions (item 9, paragraphs 39-42)

36. The substance of paragraphs 39-42 was approved.

Practical details concerning written submissions and evidence (e.g. copies, numbering of items of evidence, references to documents, numbering of paragraphs) (item 10, paragraph 43)

37. The Commission adopted the following decisions: (a) to shorten the title to read “Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)”; (b) to include among the matters covered in paragraph 43 also the question “whether the submissions will be made as paper documents or by electronic means, or both (see above, paragraphs 36-38)”; (c) to expand the phrase “a system for numbering items of evidence” to read “a system for numbering documents and items of evidence”; and (d) to reword the last point relating to translations along the following lines: “when translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes”.

Defining points at issue; order of deciding issues; defining relief or remedy sought (item 11, paragraphs 44-47)

38. The Commission accepted the suggestion to add, in the second sentence of paragraph 44, other examples of disadvantages of preparing a list of points at issue. As a result, the last two sentences of the paragraph were reworded along the following lines:

“If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contained decisions on matters beyond the scope of the submission to arbitration.”

39. It was decided to add, at the end of paragraph 44, language along the following lines: “The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.”

40. The expression “the defendant” in the last sentence of paragraph 46 was replaced by “a party”.

Possible settlement negotiations and their effect on scheduling proceedings (item 12, paragraph 48)

41. The substance of paragraph 48 was approved.

Documentary evidence (item 13, paragraphs 49-55)

42. It was agreed to add, in paragraph 53, after the word “telefax” the words “or electronic message”.

43. It was suggested that the discussion of evidentiary matters in paragraph 53 was relevant in particular to the procedural systems based on common law, but that in the civil law systems arrangements along the lines of those suggested in the paragraph were either unnecessary or might even incite parties to raise objections to the evidentiary conclusions mentioned in the paragraph. The Commission, however, considered that, in the light of the fact that the Notes were entirely non-binding, the paragraph would be useful.
44. The word “findings” in the second sentence of paragraph 55 was replaced by the word “information”.

Physical evidence other than documents (item 14, paragraphs 56-59)

45. The Commission decided to include in paragraph 58, after the words “consider matters such as timing, meeting places” the words “other arrangements to provide the opportunity for all parties to be present”.

Witnesses (item 15, paragraphs 60-69)

46. The Commission decided to add, after the first sentence of paragraph 68, the clarification along the following lines: “In those legal systems such contacts are usually not permitted once the witness’s oral testimony has begun.”

Experts and expert witnesses (item 16, paragraphs 70-74)

47. It was agreed to add, after the second sentence in paragraph 72, the following sentence: “It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report.”

Hearings (item 17, paragraphs 75-86)

48. It was agreed to add, at the end of paragraph 76, the sentence: “The arbitral tribunal may wish to consult the parties on this matter.”

49. In the last sentence of paragraph 81, it was decided to add, after the words “In view of such differences”, the words “or when no arbitration rules apply”. It was considered that, instead of the word “defendant”, used in paragraph 81, the word “respondent”, as used in the UNCITRAL Arbitration Rules, was generally preferable.

Multi-party arbitration (item 18, paragraphs 87-89)

50. It was suggested that the substance of the last sentence of paragraph 89 should be moved to the end of paragraph 87.

Possible requirements concerning filing or delivering the award (item 19, paragraphs 90-91)

51. The substance of paragraphs 90-91 was approved.

C. Adoption of the UNCITRAL Notes on Organizing Arbitral Proceedings

52. Upon concluding its deliberations on the draft Notes, the Commission:

(a) Approved the substance of the draft Notes as modified by the Commission at the current session;

(b) Decided that the text adopted by the Commission be entitled “UNCITRAL Notes on Organizing Arbitral Proceedings”;

(c) Requested the Secretariat to edit the final text of the UNCITRAL Notes in accordance with the decisions taken at the session; to revise the language versions of the text so as to ensure concordance among them; to align the use of technical terms with other texts of the Commission, in particular the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration; to produce the UNCITRAL Notes as a separate publication; and to disseminate the publication widely, including to arbitral institutions, chambers of commerce and relevant national and international professional associations.

53. The Commission expressed its appreciation to the International Council for Commercial Arbitration (ICCA) for its active participation in considerations of drafts from which the UNCITRAL Notes emanated, and in particular for carrying out an extensive discussion of the draft text at the XIIIth International Arbitration Congress, which ICCA had held at Vienna from 3 to 6 November 1994.

54. The Commission was also appreciative of the suggestions given to the Secretariat during the preparatory work by numerous individual experts, international and national associations of law practitioners, and arbitral institutions.

III. DRAFT UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION

A. Introduction

1. Draft Model Law

55. Pursuant to a decision taken by the Commission at its twenty-fifth session (1992), the Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of draft model statutory provisions regarding the use of electronic data interchange (EDI) and other modern means of communication. Those draft provisions were approved by the Working Group in the form of a draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (hereinafter referred to as “the draft Model Law”) at the close of its twenty-eighth session (for the reports on those sessions, see A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406). The text of the draft articles of the Model Law as presented to the Commission by the Working Group was contained in the annex to document A/CN.9/406.

56. The Working Group carried out its task on the basis of background working papers prepared by the Secretariat on possible issues to be included in the Model Law. Those background papers included A/CN.9/WG.IV/WP.53 (possible issues to be included in the programme

of future work on the legal aspects of EDI) and A/CN.9/WG.IV/WP.55 (outline of possible uniform rules on the legal aspects of electronic data interchange). The draft articles of the Model Law were submitted by the Secretariat in documents A/CN.9/WG.IV/WP.57, A/CN.9/WG.IV/WP.60 and A/CN.9/WG.IV/WP.62. The Working Group had before it a proposal by the United Kingdom of Great Britain and Northern Ireland relating to the possible contents of the draft Model Law (A/CN.9/WG.IV/WP.58). The text of the draft Model Law as approved by the Working Group at its twenty-eighth session was sent to all Governments and to interested international organizations for comment. The comments received were reproduced in document A/CN.9/409 and Add.1-4.

57. At its twenty-eighth session (1995), the Commission adopted the text of articles 1 and 3 to 11 of the draft Model Law. At the current session, the Commission resumed its consideration of the draft Model Law.

2. Additional provisions concerning transport documents

58. The Commission, at its twenty-eighth session, recalled that, at its twenty-seventh session (1994), general support had been expressed in favour of a recommendation made by the Working Group that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, para. 106-118). At that session, the Working Group also considered proposals by the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) relating to the possible inclusion in the draft Model Law of additional provisions to the effect of ensuring that certain terms and conditions that might be incorporated in a data message by means of a mere reference would be recognized as having the same degree of legal effectiveness as if they had been fully stated in the text of the data message (for the report on the discussion, see A/CN.9/407, para. 100-105). It was agreed that the issue of incorporation by reference might need to be considered in the context of future work on negotiability and transferability of rights in goods (A/CN.9/407, para. 103). The Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of 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 made at the twenty-ninth session of the Working Group.10

59. On the basis of the study prepared by the Secretariat (A/CN.9/WG.IV/WP.69), the Working Group, at its thirtieth session, discussed the issues of transferability of rights in the context of transport documents and approved the text of draft statutory provisions dealing with the specific issues of contracts of carriage of goods involving the use of data messages (for the report on that session, see A/CN.9/421). The text of those draft provisions as presented to the Commission by the Working Group for final review and possible addition as part II of the Model Law was contained in the annex to document A/CN.9/421.

3. Draft Guide to Enactment of the Model Law

60. 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. In particular, at the twenty-eighth session of the Working Group, during which the text of the draft Model Law was finalized for submission to the Commission, there was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the travaux préparatoires of the draft Model Law, would also be helpful to users of electronic means of communication as well as to scholars in that area. The Working Group noted that, during its deliberations at that session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the guide so as to provide guidance to States enacting the draft Model Law. The Secretariat was requested to prepare a draft and submit it to the Working Group for consideration at its twenty-ninth session (A/CN.9/406, para. 177).

61. At its twenty-ninth session, the Working Group discussed the draft Guide to Enactment of the Model Law (hereinafter referred to as "the draft Guide") as set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/WP.64). The Secretariat was requested to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at that session.

62. At the current session, the Commission had before it the revised text of the draft Guide prepared by the Secretariat (A/CN.9/426).

B. Consideration of draft articles

Article 12. Acknowledgement of receipt

63. The Commission had before it the text of draft article 12 as approved by the Working Group at its twenty-eighth session, which read as follows:

"(1) This article applies where, on or before sending a data message, or by means of that data message, the

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originator has requested an acknowledgement of receipt.

“(2) Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the originator that the data message has been received.

“(3) Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message has no legal effect until the acknowledgement is received.

“(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time:

“(a) the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

“(b) if the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

“(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by the addressee. Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.”

General remarks

64. A concern was expressed that the notion of “acknowledgement of receipt” on which the draft article was based was insufficiently clear, possibly too broad, and that it did not adequately reflect the variety among the procedures used by the parties to acknowledge receipt of data messages. In particular, it was pointed out that the text of draft article 12 did not specifically address the situation where an acknowledgement of receipt of a message was automatically generated by the computer system of the addressee (a type of acknowledgement sometimes referred to as “system acknowledgement”), as distinct from situations where the issuance of an acknowledgement resulted from specific action by the addressee. It was suggested that situations where an acknowledgement of receipt was generated automatically without direct intervention of the addressee should be treated as exceptions to the general rules established by draft article 12.

65. In response, it was stated that the draft article had been drafted in broad terms precisely taking into account the fact that the functions of an acknowledgement of receipt might be performed through a variety of procedures, whether automated or otherwise. In that connection, it was pointed out that draft article 12, as the other provisions contained in chapter III, was to be regarded as a default provision, from which the parties were free to derogate. The automatic acknowledgement of receipt was but one of the forms in which an acknowledgement of receipt could be given under draft article 12, subject to any agreement by the parties who could, for example, agree to exclude the use of automatic acknowledgement or, on the contrary, establish more detailed provisions dealing with the consequences of operating automated systems. With a view to clarifying further that the functions assigned to an acknowledgement of receipt under draft article 12 could be performed by various kinds of procedures, a number of proposals were made to amend the reference to the “form” of an acknowledgement under paragraph (2). It was suggested that the words “be in a particular form” should be replaced by the words: “be in a particular form or contain specific information”; “be of a particular kind or in a particular form”; or “be in a particular form or use a specific method or procedure”.

66. However, a widely shared view was that the issue of the form of acknowledgments of receipt could not satisfactorily be dealt with through minor redrafting of paragraph (2). Rather, the issue should be discussed in the context of its possible implications with respect to such fundamental policy issues as: whether the form of the acknowledgement could be decided upon unilaterally by the originator or by the addressee; and the extent to which the sending of a particular kind of acknowledgement should create a presumption that the related message had been received by the addressee. As a matter of drafting, it was generally agreed that a reference to the “method” by which the acknowledgement might be given should be inserted in the provision, alongside the reference to the “form” of the acknowledgement.

67. In view of the concerns raised with respect to draft article 12, a number of delegations submitted a joint proposal for a revised draft article 12. The revised text, which the Commission decided to consider as a basis for discussion, was as follows:

“(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.

“(2) Where the originator has not requested or agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, the request for an acknowledgement may be satisfied by:

“(a) any communication by the addressee, automated or otherwise, or

“(b) any conduct of the addressee sufficient to indicate to the originator that the data message has been received.

“(3) Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message has no legal effect until the acknowledgement is received.

“(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement and the acknowledgement has not been received by the originator within the time specified or agreed or,
if no time has been specified or agreed, within a reasonable time:

“(a) the originator may give notice to the addressee stating that no acknowledgement has been received and specifying a time, which must be reasonable, by which the acknowledgement must be received; and

“(b) if the acknowledgement is not received within the time specified in subparagraph (a), the originator may, upon notice to the addressee, treat the data message as though it had never been transmitted, or exercise any other rights it may have.

“(5) Where the originator receives an acknowledgement of receipt, it is presumed that the related data message was received by the addressee. This presumption does not imply that the data message corresponds to the message received.

“(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards [such as those verifying the integrity of its contents], it is presumed that those requirements have been met.

“(7) Apart from establishing receipt of the data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt.”

New paragraph (1)

68. It was noted that new paragraph (1) was closely modelled on the text of paragraph (1) as approved by the Working Group at the twenty-eighth session of the Commission, with the only addition of a reference to the situation where the originator and the addressee had agreed that receipt of a data message had to be acknowledged. It was stated that such a reference was superfluous in view of the general recognition of party autonomy under article 10. The prevailing view, however, was that the additional reference served a useful purpose by emphasizing that draft article 12 should be regarded as a default rule. After discussion, the Commission found the substance of new paragraph (1) to be generally acceptable and referred it to the drafting group.

New paragraph (2)

69. The view was expressed that new paragraph (2) was better than the text of paragraph (2) as approved by the Working Group at the twenty-eighth session in that it expressly provided that, in the absence of any specific form requirement, an acknowledgement could be given validly by automatic means, a provision that was only implicit in the previous version of that paragraph.

70. It was noted that the text of new paragraph (2), as a default rule, dealt only with the situation where the originator had not requested or agreed with the addressee that the acknowledgement should be given in a particular form or by a particular method. Divergent views were expressed as to how the Model Law should deal with the reverse situation, i.e. where such a request or agreement had been made as to the form of the acknowledgement. One view was that new paragraph (2), following the previous version of that paragraph, had been appropriately drafted to allow an a contrario interpretation. The effect of such interpretation would be that, where the originator had unilaterally requested that the acknowledgement should be given in a particular form and the form requirement had not been met, then it should be considered that no acknowledgement had been received for the purposes of paragraphs (3) and (4) of draft article 12. In support of that view, it was recalled that draft article 12 was based on the policy decision that acknowledgement procedures should be used at the discretion of the originator. As a reason for reaffirming that policy decision, it was stated that a purpose of draft article 12 was to avoid situations where the originator might operate in a legal vacuum. Such situations might arise, in particular, in the context of communication techniques such as Open-edi, where the originator and the addressee were not linked by any pre-existing legal or commercial framework. For example, where the originator took the initiative of sending messages to circulate an offer to contract, it should be allowed to determine, in the absence of any prior agreement, how the corresponding messages should be acknowledged. In response, it was stated that, in such a case, the rights of the originator would typically be guaranteed by law applicable outside the Model Law, for example, the law applicable to the formation of contracts. In that connection, it was recalled that acknowledgement of receipt of an offer should be clearly distinguished from any communication related to the possible acceptance of the offer.

71. Another view was that, at least with respect to addressees whose computer systems automatically acknowledged receipt of messages by way of “system acknowledgements”, the Model Law should not allow the originator to impose unilateral form requirements, since such requirements might be incompatible with the normal operation of such automatic systems. It was stated that the development of the use of automated communication systems might be adversely affected if the originator of a message was allowed to interfere with the automatic operation of communication systems by establishing abusive form requirements. In response, it was stated that, should an exception to the policy underlying draft article 12 be made to cover the use of automatic acknowledgements, the power to establish the standards applicable to acknowledgements would be shifted from the originator to the addressee. The operation of automatic systems, which was said to be hardly conceivable in the absence of an agreement among their users, could be affected equally if the addressee, through the automatic generation of acknowledgements, was allowed to establish procedures that might not be compatible with the normal operation of the communication system of the originator.

72. Various proposals were made as to how the Model Law should deal with the allocation of the power to establish unilateral requirements as to the form of acknowledgements of receipt. One proposal was to redraft paragraph (2) along the following lines:

“(2) Where the originator has requested that an acknowledgement be given in a particular form or by a particular method, an acknowledgement is only suffi-
cient for the purposes of paragraphs (3) and (4) if given in that form or by that method, provided that the form or method requested is not unreasonable in the circumstances. Where the originator has not requested that the acknowledgement be in a particular form, the request for an acknowledgement may be satisfied by any communication or conduct of the addressee sufficient to indicate to the originator that the data message has been received."

That proposal was objected to on the grounds that the reference to the reasonable character of the requested procedure might introduce a factor of uncertainty in the operation of the Model Law. It was pointed out that the addressee of the data message who had issued an acknowledgement, although not in the requested form (for example where the addressee was unable to meet the form requirement), should not be burdened with the obligation to make an assessment as to the reasonableness of the form requirement.

73. Another proposal was to rephrase paragraph (2) in positive terms to deal primarily with the situation where the originator had requested that the acknowledgement should be given in a specific form. In such a case, paragraph (2) should provide that an acknowledgement could only be valid under draft article 12 if it was given in the requested form. As an exception to that rule, if an acknowledgement was issued automatically by the communication system of the addressee, in a form that might not be the form requested by the originator, such an acknowledgement would none the less constitute a valid acknowledgement under draft article 12, provided that it reached the originator.

74. Support was expressed in favour of the above-mentioned proposal. Support was also expressed in favour of maintaining the text of paragraph (2) as approved by the Working Group at its twenty-eighth session. The prevailing view, however, was that the text of new paragraph (2) should focus on situations where the originator and the addressee had agreed on acknowledgement procedures and that situations where an acknowledgement had been requested to be given in a specific form should not be expressly dealt with under that article. It was decided that the words "requested or" should be deleted from the text of new paragraph (2), which was adopted by the Commission. It was noted that a possible consequence of that decision was that a unilateral requirement by the originator as to the form of acknowledgements would not affect the right of the addressee to acknowledge receipt by any communication or conduct sufficient to indicate to the originator that the message had been received. It was generally agreed that such a decision made it particularly necessary to emphasize in the Model Law the distinction to be drawn between the effects of an acknowledgement of receipt of a data message and any communication in response to the content of that data message, a reason why paragraph (7) was needed.

75. After deliberation, the Commission adopted the substance of new paragraph (2) as amended and referred it to the drafting group.

New paragraph (3)

76. It was noted that the text of new paragraph (3) reproduced the text of paragraph (3) as approved by the Working Group at the twenty-eighth session. The Commission found the substance of new paragraph (3) to be generally acceptable. A proposal was made to add the following sentence at the end of the paragraph: "Where the originator has stated that the data message is conditional on receipt of an acknowledgement given in a particular form or by a particular method, the data message has no legal effect until an acknowledgement given in that form or by that method is received." No support was expressed in favour of that proposal.

77. As a matter of drafting, the view was expressed that the words "the data message has no legal effect" might be inconsistent with the text of new paragraph (7), which indicated that draft article 12 was not intended to deal with the legal consequences that might flow from the data message. Furthermore, questions might be raised as to whether the reference to a data message having "no legal effect" in paragraph (3) should be interpreted differently from the reference to the data message being treated "as though it had never been transmitted" in paragraph (4)(b).

78. After deliberation, the Commission decided that the words "the data message has no legal effect" should be replaced by wording parallel to that of paragraph (4)(b). The matter was referred to the drafting group. It was agreed that the possible inconsistency between new paragraphs (3) and (7) would need to be considered further in the context of the discussion of new paragraph (7) (see paragraphs 84-86, below).

New paragraph (4)

79. It was noted that the text of new paragraph (4) reproduced the text of paragraph (4) as approved by the Working Group at its twenty-eighth session. The view was expressed that the reference to a "reasonable time" in new paragraph (4) was unclear and should be replaced by a reference to a specified period of time. No support was expressed in favour of that proposal. After deliberation, the Commission found the substance of new paragraph (4) to be generally acceptable and referred it to the drafting group.

New paragraph (5)

80. It was noted that the first sentence of new paragraph (5) reproduced the first sentence of paragraph (5) as approved by the Working Group at the twenty-eighth session. The view was expressed that the text should indicate more clearly that the presumption created with respect to receipt of the data message should not be misinterpreted as involving approval of the contents of the message by the addressee. It was generally agreed that both the draft Guide (A/CN.9/426, para. 98) and new paragraph (7) were sufficient to avoid such misinterpretation.

81. As to the second sentence of new paragraph (5), doubts were expressed as to whether that provision was consistent with the provision of article 11(5), which es-
tablished the conditions under which, in case of an inconsistency between the text of the data message as sent and the text as received, the text as received would prevail. The prevailing view was that the two provisions were not incompatible.

82. After discussion, the Commission adopted the substance of new paragraph (5) and referred it to the drafting group.

New paragraph (6)

83. The Commission found the substance of new paragraph (6) to be generally acceptable and referred it to the drafting group. As to the words between square brackets ("such as those verifying the integrity of its contents"), it was pointed out that they were only intended to provide examples of the "applicable standards" referred to in the paragraph. It was generally agreed that such examples would better be dealt with in the Guide to Enactment than in the text of the Model Law.

New paragraph (7)

84. The view was expressed that new paragraph (7) was superfluous since the effect of draft article 12 was limited to setting forth conditions under which an acknowledgement of receipt and the corresponding data message would be deemed to be received. It was thus sufficiently clear that draft article 12 was not intended to deal with the legal consequences that might flow from receipt of the data message. It was stated that the inclusion of such a provision in draft article 12 might raise questions as to the need to include a similar provision in draft articles 11 and 14. In favour of deletion of new paragraph (7), it was also stated that, should the legal effect of an acknowledgement of receipt be dealt with in the Guide to Enactment, more detailed explanations could be given than in the text of the Model Law.

85. Another view was that new paragraph (7) might serve a useful educational purpose by dispelling uncertainties that might exist as to the legal effect of an acknowledgement of receipt. For example, new paragraph (7) was useful in that it indicated clearly that an acknowledgement of receipt should not be confused with any communication related to the contents of the acknowledged message. The prevailing view was that, since no strong objection was made to the retention of new paragraph (7) in the text of draft article 12, and since such a provision might be regarded as useful in a number of countries, a provision along the lines of new paragraph (7) should be adopted.

86. As indicated in the context of the discussion of new paragraph (3) (see paragraphs 76-78 above), the Commission generally felt that there might be an inconsistency between the text of new paragraph (3) and new paragraph (7). In particular, it was pointed out that, by establishing rules under which a data message "would have no legal effect" or would be treated "as though it had never been transmitted", new paragraphs (3) and (4) did deal with certain legal consequences that might result from the transmission of a data message.

87. Various proposals were made as to how that inconsistency might be dealt with. One suggestion was that the opening words of new paragraph (7) should read as follows: "Apart from establishing receipt of the data message, and unless otherwise provided for in this Law ..." It was generally felt that adopting such a wording would empty the provision of meaning. Another suggestion was that the opening words of new paragraph (7) should read as follows: "Apart from establishing receipt of the data message, and subject to paragraphs (3) and (4) ..." The reference to new paragraph (7) being subject to new paragraph (4) was said to be superfluous since new paragraph (4) dealt with the time and place of receipt of the data message and was thus sufficiently covered in the opening words of new paragraph (7). Yet another suggestion was that new paragraph (7) should read as follows: "Except in so far as it relates to the transmission or receipt of a data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

88. After discussion, the Commission adopted the last suggestion and referred the text of new paragraph (7) to the drafting group.

Article 13. Formation and validity of contracts

89. The Commission had before it the text of draft article 13 as approved by the Working Group at its twenty-eighth session, which read as follows:

"(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

"(2) The provisions of this article do not apply to the following: [..]"

Paragraph (1)

90. Various views were expressed with respect to the words "unless otherwise agreed by the parties" in the first sentence of the paragraph. One view was that those words should be deleted, since they merely restated the principle already embodied in article 10. It was stated that such a restatement in the context of draft article 13 was confusing and might lead to the unduly narrow interpretation that article 10 did not cover the situation addressed in draft article 13.

91. The opposing view was that the words should be retained, since they served a useful purpose in recalling and clarifying that the use of data messages in contract formation was subject to party autonomy. A concern was expressed about the risk that article 10 might be interpreted a contrario. Since article 10 conferred upon parties "involved" in electronic communication the right to deviate by agreement from the provisions of chapter III, it might be misread as refusing such a right to parties that were not involved in electronic communication. According to that interpretation, for example in the context of
contract formation, parties who normally dealt with each other by way of paper-based communication and might even be linked by a master agreement providing that subsequent contracts would have to be formed by paper-based means, would not necessarily be regarded under article 10 as free to derogate from the provisions of draft article 13. Unless it expressly provided for party autonomy, draft article 13 would thus lead to the unacceptable result that it could be relied upon to override such a master agreement.

92. In response to the above-mentioned concern, it was recalled that the purpose of draft article 13 was not to impose the use of electronic means of communication on parties who relied on the use of paper-based communication to form contracts. Rather, draft article 13 was intended to implement, in the context of contract formation, the general principle embodied in article 4 that the use of electronic means of communication should not be discriminated against. The question whether to maintain a reference to party autonomy in the text of draft article 13 was merely one of whether it was useful to restate and clarify the general rule laid down in article 10.

93. After discussion, the Commission decided to adopt the text of paragraph (1) unchanged, so as to accommodate the concern that the deletion of the words “unless otherwise agreed by the parties” might have unintended consequences. It was also decided that the draft Guide should make it clear that the purpose of article 13 was merely to clarify and restate the principle of party autonomy expressed in article 10. As to the scope of article 10, the draft Guide should make it clear that it should not be interpreted as restricting in any way party autonomy with respect to parties not involved in the use of electronic communication.

Paragraph (2)

94. The Commission found the substance of paragraph (2) to be generally acceptable and referred it to the drafting group.

Proposal for new article 13 bis

95. It was observed that article 13 was limited to dealing with data messages that were geared to the conclusion of a contract, but that the draft Model Law did not contain specific provisions on data messages that related not to the conclusion of contracts but to the performance of contractual obligations (e.g. notice of defective goods, an offer to pay, notice of place where a contract would be performed, recognition of debt). It was proposed that a provision covering expressions of will other than an offer or an acceptance of an offer should be included in the Model Law.

96. The proposal was objected to on the grounds that the addressee of a data message might not have expected to receive a message in electronic form. Thus, it was stated, it might be unfair to impose on the addressee the legal consequences of a message, if the use of a non-paper-based method for its transmission came as a surprise to the addressee.

97. In response, it was recalled that, as indicated with respect to draft article 13 (see paragraph 92, above), the purpose of the Model Law was not to impose the use of electronic means of communication but to validate its use, subject to contrary agreement by the parties. Since modern means of communication were used in a context of legal uncertainty, in the absence of specific legislation in most countries, it was appropriate for the Model Law not only to establish the general principle that the use of electronic communication should not be discriminated against, as expressed in article 4, but also to include specific illustrations of that principle. Contract formation was but one of the areas where such an illustration was useful and the legal validity of unilateral expressions of will, as well as other notices or statements that might be issued in the form of data messages, also needed to be mentioned.

98. Several suggestions were made as to how the proposed provision might be worded. One suggestion was that an additional paragraph should be included in draft article 13 along the following lines: “Where a data message is used in a transaction, that transaction shall not be denied legal validity or enforceability on the sole ground that a data message was used.” Other suggestions were made for inclusion, either in a new paragraph of draft article 13 or as a separate article that would mirror the structure of draft article 13, of a reference to such notions as “any communication” or “any transaction or other communication”. The use of such notions was objected to on the grounds that they might be insufficiently precise to convey any significant legal meaning. Further suggestions referred to legal categories such as “declaration of intent”, “manifestation of will or knowledge”, “legal act” and “notice or statement”.

99. After discussion, the Commission decided that, for reasons of legal certainty and facilitation of the use of electronic means of communication, a new article should be included in the text of the draft Model Law and requested the drafting group to prepare a provision taking into account the above suggestions.

Article 14. Time and place of dispatch and receipt of data messages

100. The text of draft article 14 as considered by the Commission read as follows:

“(1) Unless otherwise agreed between the originator and the addressee of a data message, the dispatch of a data message occurs when it enters an information system outside the control of the originator.

“(2) Unless otherwise agreed between the originator and the addressee of a data message, the time of receipt of a data message is determined as follows:

“(a) if the addressee has designated an information system for the purpose of receiving such data messages, receipt occurs at the time when the data message enters the designated information system, but if the data message is sent to an information system of the addressee that is not the designated information system, receipt occurs when the data message is retrieved by the addressee;
“(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee.

“(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is received under paragraph (4).

“(4) Unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message, a data message is deemed to be received at the place where the addressee has its place of business, and is deemed to be dispatched at the place where the originator has its place of business. For the purposes of this paragraph:

“(a) if the addressee or the originator has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

“(b) if the addressee or the originator does not have a place of business, reference is to be made to its habitual residence.

“(5) Paragraph (4) shall not apply to the determination of place of receipt or dispatch for the purpose of any administrative, criminal or data-protection law.”

**Paragraph (1)**

101. A concern was expressed that it might be inappropriate to define the “dispatch” of a data message in paragraph (1) by reference to an event that occurred in fact after the dispatch, namely the moment when the message entered an information system outside the control of the originator. In response, it was pointed out that, in an electronic environment, no strict equivalent could be given to a “mailbox rule” of the kind that existed in many national laws with respect to paper-based communications. However, the rule contained in paragraph (1) was intended to fulfil, in an electronic environment, the function of a “mailbox rule”, i.e. to provide certainty as to the time of dispatch of a data message. To alleviate the above-mentioned concern, it was stated that, when the parties corresponded directly in an electronic environment, the dispatch and receipt of a message might occur almost simultaneously. It was recalled that the Working Group had extensively considered this matter, including the consequences of the addressee’s intentional failure to retrieve the message. The Working Group had felt that the only objective way for determining when a message had been dispatched was the one embodied in paragraph (1), i.e. when the message entered an information system outside the originator’s control. Such information system might be the addressee’s own, or an information system maintained by a third-party service provider.

102. After discussion, the Commission found the substance of paragraph (1) to be generally acceptable and referred it to the drafting group. It was agreed that the reference to “an information system outside the control of the originator” at the end of paragraph (1) might need to be reworded to make it clear that it was intended as a reference to the control of the originator itself or the control of the person who sent the data message on behalf of the originator, as the case might be.

**Paragraph (2)**

103. A view was expressed that the Commission should also consider addressing in paragraph (2) situations where the actual knowledge of the content of a message by its addressee was a requirement for the formation of an agreement between the originator and the addressee. Thus, it was proposed to add the words “except when actual knowledge by the addressee is of the essence of the transaction” immediately after the opening clause of subparagraph (a) of paragraph (2). However, there was not sufficient support for that proposal, as it was felt that the proposed addition amounted in fact to introducing a new substantive rule in the Model Law with respect to the legal effectiveness of data messages, i.e. a rule based on information of the addressee as to the contents of the data message. It was recalled that the general policy underlying the Model Law was that data messages were effective from the time they had been received by the addressee.

104. After discussion, the Commission found the substance of paragraph (2) to be generally acceptable and referred it to the drafting group.

**Paragraph (3)**

105. The Commission found the substance of paragraph (3) to be generally acceptable and referred it to the drafting group. It was decided that the words “deemed to be” should be added before the word “received”, so as to make paragraph (3) entirely consistent with the text of paragraph (4).

**Paragraph (4)**

106. It was questioned why paragraph (4) referred to a “computerized transmission of a data message” and paragraph (3) referred to a “data message”. In response, it was stated that the words “of a computerized transmission” had been added to qualify the words “data message” in the first sentence of paragraph (4) because that paragraph was meant to solve difficulties which would only arise in the context of a computerized message interchange. There was general agreement, however, that it was preferable to delete the words “of a computerized transmission” from paragraph (4), as those words might generate undesirable doubts as to the scope of paragraph (4) and, in general, to the meaning of the words “data message”, as used elsewhere in the Model Law, since not all transmissions to which the Model Law applied were “computerized”.

107. The view was expressed that the current wording of subparagraph (b) was not entirely clear and that it would be preferable to delete the phrase “reference is to be made to its habitual residence” and replace it by the phrase “the place of its habitual residence is to be regarded as its place of business”. However, it was pointed out that the current wording of subparagraph (b) derived from article 10 of the United Nations Convention on Contracts for the International Sale of Goods and it was generally agreed that, for the sake of uniformity, the same wording should be used in the Model Law.
108. After discussion, the Commission found the substance of paragraph (4) to be generally acceptable and referred it to the drafting group. As a matter of drafting, the view was expressed that, since the dispatch of a message necessarily preceded its receipt, the various elements of paragraph (4) should be rearranged so as to deal first with the question where a message was deemed to have been dispatched, before establishing where a message was deemed to have been received.

**Paragraph (5)**

109. The view was expressed that, in addition to the determination of the place of receipt or dispatch for the purpose of any administrative, criminal or data-protection laws, paragraph (5) should also exclude the application of paragraph (4) to the determination of the place of receipt or dispatch for the purpose of determining the jurisdiction of national courts or other organs. It was felt that paragraphs (4) and (5), in their current form, made it possible for the parties to avoid the application of jurisdictional or procedural rules by agreeing on where the messages should be deemed to have been dispatched or received. In order to avoid giving the parties such an unfettered freedom to evade the jurisdiction of national courts or other organs, it was proposed to delete the words “unless otherwise agreed between the originator and the addressee” in paragraph (4) and to add the word “procedural” after the word “administrative” in paragraph (5).

110. Some support was expressed for the proposed deletion in paragraph (4), as the words “unless otherwise agreed between the originator and the addressee” in paragraph (4) were regarded as an unnecessary repetition of the rule contained in paragraph (1) of article 10, according to which the provisions of chapter III of the Model Law might be varied by agreement between the originator and the addressee. However, it was recalled that this matter had been discussed in the Working Group, where the prevailing view had been in favour of maintaining those words. The Commission thus agreed to retain the wording of paragraph (4).

111. There was objection to the proposed addition of the word “procedural” to paragraph (5). It was emphasized that conflict-of-laws and jurisdictional questions were outside the scope of the Model Law in general, and of paragraph (5) in particular. It was questioned whether there was any need for maintaining paragraph (5), which was felt to open more questions and create more difficulties than it purported to solve. Furthermore, it was pointed out that it was essential to keep paragraph (4) as a default rule and to retain the parties’ ability to determine where their actions would take place.

112. As to the proposed addition to paragraph (5), it was stated that it would be not only unnecessary but undesirable, as it would broaden the scope of an exceptional provision which already contained very broad exceptions to paragraph (4). Besides, public policy concerns were no convincing reason for causing such an expansion of the scope of paragraph (5), since it was unlikely that national courts would enforce a private agreement to the detriment of mandatory laws.

113. The Commission engaged in a general debate as to the scope of paragraph (5) in its current form. It was noted that in some legal systems the words “administrative, criminal or data-protection law” were broad enough to encompass jurisdictional or procedural laws, with no need for any further addition. It was also noted that paragraph (5) carried with it the risk of leading to varying results in different legal systems, as it referred to fields of legislation that were not harmonized and were differently understood in national laws. It was also pointed out that article 1 of the Model Law, as clarified in the last of its footnotes, already gave States the possibility to identify the situations to which the provisions of the Model Law did not apply.

114. The view was expressed, however, that article 1, which defined the general sphere of application of the Model Law, was not the appropriate place for inclusion of a provision specifically aimed at ruling out the possibility that the parties evade the competence of national courts by means of agreement as to the place where a message was deemed to be dispatched or received. It was suggested that, if the Commission were seriously concerned about that possibility, it could add a specific provision to article 14 that would make it possible for States to exclude special situations from the field of application of article 14, similarly to the provision contained in paragraph (2) of article 6.

115. After discussion, the Commission decided to delete paragraph (5) and replace it with the following text:

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

**Article 2. Definitions**

116. The text of draft article 2 as considered by the Commission read as follows:

“For the purposes of this Law:

“(a) ‘Data message’ means information generated, stored or communicated by electronic, optical or analogous means including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy;

“(b) ‘Electronic data interchange (EDI)’ means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

“(c) ‘Originator’ of a data message means a person by whom, or on whose behalf, the data message purports to have been generated, stored or communicated, but it does not include a person acting as an intermediary with respect to that data message;

“(d) ‘Addressee’ of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

“(e) ‘Intermediary’, with respect to a particular data message, means a person who, on behalf of another person, receives, transmits or stores that data message;
or provides other services with respect to that data message;

“(f) ‘Information system’ means a system for generating, transmitting, receiving or storing information in a data message.”

Subparagraph (a) (Definition of “Data message”)

117. The view was expressed that the reference to “telegram, telex or teletypewriter” was not appropriate in the definition of “data message”, as it might imply that the Model Law was also applicable to any kind of paper-based communication. The Commission generally agreed that the Model Law should not be applicable to any kind of paper-based communication. However, it was generally felt that the reference to telegram, telex and teletypewriter was necessary, since the generation or communication of messages through such means of communication was not exclusively paper-based and included an element of de-materialization of the support of the information.

118. The Commission engaged in a general discussion concerning the reference, in subparagraph (a), to the means used for generating, storing or communicating information (i.e. “electronic, optical or analogous means”), as well as to the illustrative list thereof (e.g. “electronic data interchange (EDI), electronic mail, telegram, telex or teletypewriter”) that was to be encompassed by the definition of “data message”. The view was expressed that the reference to “electronic, optical or analogous means” was incomplete and that it was not clear what was meant by the expression “analogous means”. The use of the words “analogous means” might give many readers the understanding that “analogous” referred to “analog” (as opposed to “digital”). Thereby, the definition would refer to any set of data, including spoken words. As a way of clarifying that definition, it was suggested to use the word “digital” instead of “analogous”.

119. Various objections were raised to that proposal and a number of alternative suggestions were formulated. It was pointed out that the definition of “data message” had been the subject of extensive discussions in the Working Group and adequately took into account technologies currently available, while not excluding possible future technologies. Great care should therefore be exercised in amending that definition, particularly in view of the need for ensuring that the definition would be compatible with the remaining provisions of the Model Law. The word “analogous”, in that context, was used so as to make clear that the list was merely illustrative. The deletion of that word and its replacement by the word “digital” would have the undesirable result of making the list appear to be exhaustive, thus rendering the definition too narrow.

120. It was also noted that the word “digital” related to the information, rather than to the medium by which such information was generated, stored or communicated and that digital data, as well as analog data, could be transmitted electronically or optically. Therefore, it would not be accurate to refer to “digital means”. It was instead suggested, if the Commission deemed such a reference to be necessary, that the word “digital” be inserted before the word “information”. However, the view was also expressed that a reference to “digital information” would constitute an undesirable limitation to the meaning of the word “information” as it would, for instance, exclude analog information. There were also objections to an alternative proposal to insert the words “in digital or analog form” after the word “communicated”, since it was felt that, in general, any attempt to qualify either the nature of the information or the means by which the information was generated, stored or communicated by referring to currently available technologies might render the Model Law inadequate for technologies that might become available in the future.

121. Since the main difficulty with the use of the word “analogous” was the possible confusion with the word “analog”, it was suggested that the reference to “analogous means” could be replaced by a reference to “similar means”. However, it was pointed out that the meaning of the word “similar” was not identical with the meaning of the word “analogous”. In the context of subparagraph (a), the expression “analogous means” would encompass other means that might be used to perform functions parallel to the functions performed by the means listed therein, without necessarily being “similar” in substance to those means. It was noted in that connection that “electric” and “optical” means, while “analogous”, were not, strictly speaking, “similar”.

122. It was generally felt that the thrust of the provision, as well as of the Model Law as a whole, was to cover messages that were generated, stored, or communicated in essentially paperless form. It was thus proposed that the Guide to Enactment could further clarify the thrust of the definition and address some of the concerns expressed during the discussions in the Commission. There was general agreement that the difficulties identified by the Commission in the definition of “data message” as contained in draft article 2(a) were in fact of a linguistic rather than a substantive nature, which could be solved with appropriate comments in the Guide. After discussion, the Commission thus found the substance of subparagraph (a) to be generally acceptable and referred it to the drafting group (for continuation of the discussion, see paragraph 197 below).

Subparagraph (b) (Definition of “Electronic data interchange (EDI)”)  

123. The view was expressed that the expression “transfer from computer to computer” was somehow restrictive, as the transfer of information might not always take place directly between computers. Information could in fact be generated in a computer, be stored in digital form (e.g. on a diskette) and be transferred manually for later retrieval in another computer. It was thus proposed to use the word “computer-based information” to cover also situations where digital data were not directly transferred from computer to computer.

124. In response it was pointed out that the definition used in subparagraph (b) was based on a text adopted by the Working Party on Facilitation of International Trade
Procedures (WP.4) of the Economic Commission for Europe, which defined EDI as follows:

"Electronic Data Interchange (EDI): The electronic transfer from computer to computer of commercial or administrative transactions using an agreed standard to structure the transaction or message data."

It was generally agreed that the definition of EDI in the Model Law should be consistent with that definition. The Commission decided to retain the wording of subparagraph (b) and recommended that the Guide to Enactment should make it clear that digital data manually transferred, irrespective of whether they would be regarded as covered by the definition of EDI in subparagraph (b), would be covered by the definition of "data message" in subparagraph (a).

Subparagraph (c) (Definition of "Originator")

125. Concerns were expressed that, in its current wording, the definition of "originator" might encompass not only the actual generator of a data message, but also a recipient who stored a data message, or another person who received a data message and forwarded it to the ultimate addressee. Moreover, the current wording of subparagraph (c) seemed to make it possible that a message might have two originators: one who generated the message, and one who stored it. The concern was also expressed that, as currently drafted, the definition of "originator" might encompass agents of the actual originators. With a view to clarifying the scope of the definition, it was proposed to insert the words "prior to being" before the words "stored or communicated". Such an addition would make it clear that a person who merely received and stored, or received and forwarded, a data message was not an "originator" within the meaning of the Model Law.

126. The Commission engaged in a general discussion of the use of the words "generated, stored or communicated" in subparagraph (c). It was recalled that the reference to "storage" of a data message had been inserted in subparagraph (c) so as to make it clear that the Model Law covered not only information that was generated and communicated, but also information that was stored without being communicated, such as records and accounts. However, it was observed that, in its current wording, subparagraph (c) seemed to attribute equal weight to the actions of generating, storing and communicating a message, which was not actually intended by the Model Law. It was felt important to emphasize the action of generating a message as the basic criterion for defining the originator.

127. In reply to the above-mentioned proposal, it was pointed out that the addition of the words "prior to" would also qualify the action of communicating a data message, thus relegating such action, which constituted the thrust of chapter III of the Model Law, to a somewhat secondary position. Several alternative proposals were formulated, including: (a) deletion of the word "stored" and retention of the remainder of the text; and (b) replacement of the words "generated, stored or communicated" by the words "generated and communicated prior to storage" or by the words "generated or communicated, prior to storage, if any".

128. After discussion, the Commission confirmed the general policy that the definition of "originator" should cover not only information that was generated and communicated, but also information that was generated and stored without being communicated. It was also decided that the definition of "originator" should be drafted so as to eliminate the possibility that a recipient who merely stored a data message might be regarded as an originator.

129. It was questioned whether the words "purports to have been" were necessary in the context of subparagraph (c) in view of the fact that questions relating to the attribution of a data message were covered in article 11 of the Model Law. It was recalled that those words had been retained in the definition of "originator" because the word "originator" was also used in other provisions, particularly in chapter II of the Model Law, and not only in article 11. It was suggested that the word "originator" should be deleted from article 6 and replaced by the word "signer", to the effect that there would no longer be a need for retaining the words "purports to have been" in subparagraph (c). In reply it was pointed out that the words "purports to have been" were essential in the context of subparagraph (c), since article 11 also dealt with situations where a data message might be attributed to the originator even though it was sent by a different person. It was thus necessary to make clear the difference between an originator and an impersonator pursuant to paragraph (3)(b) of article 11. The proposed amendment to article 6 was also objected to on the ground that, whereas the term "originator" was well defined, there was no definition of "signer" in the Model Law and the use of such a term might lead to confusion.

Subparagraph (d) (Definition of "Addressee")

130. A concern was expressed that the word "person" in subparagraph (d) might be given a restrictive interpretation so as to cover only individuals. In reply, it was said that the word "person" was also used elsewhere in the Model Law and in other texts adopted by the Commission and that it had always been the understanding of the Commission and the Working Group that the word "person" also covered legal entities.

131. The view was expressed that the definition of "addressee" was not sufficiently precise and that it might be preferable to use a notion such as "the ultimate recipient of a data message" instead of the words "a person who is intended by the originator to receive the data message". It was stated that the notion of "ultimate recipient" provided an objective criterion, which did not make it necessary to investigate the intent of the originator to identify the addressee. However, the suggested wording was not adopted, in view of the difficulties it might create where the message was misdirected and the "ultimate recipient" was not the intended addressee. After discussion, the Commission found the substance of subparagraph (d) to be generally acceptable and referred it to the drafting group.
Subparagraph (e) (Definition of “Intermediary”)  

132. A question was raised as to the purpose of including a definition of “intermediary” in article 2, since that expression did not appear in any other provision of the Model Law. It was pointed out that references to “intermediary” were made only in subparagraphs (c) and (d) of article 2 and with the sole purpose of excluding intermediaries from the scope of the definitions of “originator” and “addressee”. The view was also expressed that the definition of “intermediary” was too broad and that it might be interpreted as encompassing all agents or employees of the originator or the addressee.

133. In reply, it was pointed out that the presence of a definition of “intermediary” and the fact that the Model Law expressly provided that intermediaries were neither “originators” nor “addressees” had been regarded as necessary by individuals and organizations engaging in electronic commerce. It was felt that the presence of that definition was a reassurance that the Model Law would not interfere with the activities of such intermediaries. At the same time, it was felt that the definition did not exclude from the field of application of the Model Law any persons or categories of persons that were supposed to be covered by the Model Law. With regard to agents, it was pointed out that, to the extent that agents acted on behalf of the originator or the addressee, their actions were deemed to be those of the originator or the addressee, as the case might be. They were not “intermediaries” for the purposes of the Model Law, which was clear from the formulation of subparagraphs (c) and (d). It was pointed out that the definition of “intermediary” had been extensively discussed in the Working Group, which had considered possible alternative wordings, such as an express reference to “service providers”. It was recalled that, in view of the difficulties raised by the need to define the functions of “service providers”, the Working Group had eventually agreed to maintain the reference to “intermediary”.

134. A proposal was made to clarify the scope of the definition contained in subparagraph (e) by defining “intermediary” as a person “whose business is to provide services of receiving, transmitting or storing data messages to another person” or “on behalf of another person”. With a view to improving on that proposal, it was suggested that wording could be introduced to make it clear that the definition did not cover only those persons whose sole activity was to act as “intermediaries”. Alternative phrases such as “in the business of” or “as part of its business” were suggested for inclusion after the word “person”. Those proposals were objected to on the ground that, as had been previously discussed in the Working Group, it might happen that a person received, transmitted or stored data messages for another person without such activities being regarded as that person’s main business. It was generally agreed that the Model Law should be flexible enough to cover also those persons who only sporadically acted as intermediaries.

135. The prevailing view was that the definition of “intermediary” was necessary so as to limit the scope of the definitions of “originator” and “addressee” and that a restrictive wording in subparagraph (e) might leave out categories that should be covered by the definition of “intermediary”. After discussion, the Commission found the substance of subparagraph (e) to be generally acceptable and referred it to the drafting group.

Subparagraph (f) (Definition of “Information system”)  

136. It was suggested that, for semantic reasons, the word “system” should not be used in the definition of “information system” and that the word “technology” should be used instead. However, it was pointed out that “technology” might not be a satisfactory alternative, since that word was generally used to refer to a specific know-how or means of performing an activity or achieving a result (e.g. computer technology). The word “system”, in turn, had the usual connotation of an operational capability.

137. It was generally agreed that, since subparagraph (a) defined “data message” as “information” generated, stored or communicated by electronic means, the reference to “information in a data message” in subparagraph (f) seemed to be redundant. It was thus agreed to replace the words “information in a data message” by the words “data messages”. It was also felt that, for reasons of consistency, the wording of subparagraph (f) should mirror that of paragraph (1) of article 10. The Commission thus decided that the words “or otherwise processing” should be added after the word “storing”.

138. After discussion, the Commission found the substance of subparagraph (f), as amended, to be generally acceptable and referred it to the drafting group.

Specific rules concerning transport documents  

139. The Commission had before it the text of a draft article x approved by the Working Group at its thirtieth session (A/CN.9/421), which read as follows:

“PART II. RULES CONCERNING TRANSPORT DOCUMENTS

Draft article x. Contracts of carriage of goods involving data messages

“(1) This article applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but without limitation to:

"(a) (i) furnishing the marks, number, quantity or weight of goods;

(ii) stating or declaring the nature or value of goods;

(iii) issuing a receipt for goods;

(iv) confirming that goods have been loaded;

"(b) (i) notifying a person of terms and conditions of the contract;

(ii) giving instructions to a carrier;

"(c) (i) claiming delivery of goods;

(ii) authorizing release of goods;

(iii) giving notice of loss of, or damage to, goods;

"(d) giving any other notice in connection with the performance of the contract;
“(c) undertaking, irrevocably or not, to deliver goods to a named person or a person authorized to claim delivery;
“(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
“(g) acquiring or transferring rights and obligations under the contract.
“(2) Where a rule of law requires that any action referred to in paragraph (1) be carried out in writing or by using a paper document, or provides for certain consequences if it is not, that rule is satisfied if the action is carried out by using one or more data message.
“(3) Where one or more data message is used to effect the actions in paragraph (1)(f) and (g) of this article, no paper document used to effect such actions is valid unless the use of data messages has been terminated and substituted by the use of paper documents. Such a substitution shall not affect the rights, or relieve the obligations, of the parties involved.
“(4) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if a rule of law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that rule is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data message, provided a method is used to give reliable assurance that the right or obligation has become that of the intended person and of no other person.
“(5) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any agreement between the parties.
“(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be rendered inapplicable to a contract of carriage of goods which is evidenced by one or more data message by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.
“(7) The provisions of this article do not apply to the following: [..]

Scope of draft article x

140. It was noted that the carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of such communications was most urgently needed. It was also noted that draft article x contained provisions that applied equally to non-negotiable transport documents and to transfer of rights in goods by way of transferable bills of lading. It was generally felt it should be made clear that the principles embodied in draft article x were applicable not only to maritime transport but also to transport of goods by other means, such as road, railroad and multimodal transport.

Relationship between draft article x and the other provisions of the draft Model Law

141. It was pointed out that draft article x contained rules of a rather specific nature, as distinct from the general rules contained in part I of the Model Law, and that the Commission had to decide on the adequate location of draft article x in the Model Law. In that connection, it was recalled that the Working Group had considered various suggestions as to how best to make it clear in the structure of the text that the Model Law combined rules that were aimed to be of general application with provisions specifically designed for transport documents and, possibly, with other specific provisions that might be added at a later stage. The Working Group had decided to place draft article x in a separate part II of the Model Law.

142. A proposal was made to place draft article x in an annex to the Model Law. It was stated that the advantage of placing the provisions of draft article x in an annex was that it might make it easier to add other specific provisions, possibly to be developed at a later stage. However, a concern was expressed that placing draft article x in an annex could have the unintended result of raising doubt as to the legal value of that article, as to its relevance to the rest of the Model Law and as to the level of approval with which it was met in the Commission. It was also stated that, if the Commission wished to retain the possibility of adding other specific provisions to the Model Law in the future, it might be preferable, from a systematic viewpoint, to divide the Model Law into two parts (e.g. “General Part” and “Specific Part”), each subdivided into chapters.

143. After discussion, the Commission agreed that the draft article should appear in the Model Law in a way that reflected both the specific nature of the provisions regarding transport documents and their legal status, which should be the same as that of the general provisions contained in chapters I to III of the draft Model Law. It was agreed that draft article x should form chapter I of part II. It was stated that adopting such a structure would make it easier to add further specific provisions to the Model Law, as the need might arise, in the form of additional chapters in part II. In addition, it was agreed that the interplay of draft article x and the other provisions of the draft Model Law might need to be explained in the text of the Guide to Enactment of the Model Law.

144. As to the structure of draft article x itself, there was general agreement that, as its individual provisions would constitute the entirety of chapter I of part II, they should, to the extent possible, be divided into separate articles. In addition to improving the readability of the provisions, such a division would also ensure the symmetry with the remaining chapters of the Model Law, which all consisted of more than one article. The matter was referred to the drafting group.

Paragraph (1)

145. A concern was expressed that the adoption of a specific set of rules dealing with transport documents might imply that the other provisions of the draft Model Law would not be applicable to such documents. In particular, it was stated that some jurisdictions might not wish to implement the provisions of draft article x concerning transfer of rights in goods unless an assurance was given that the guarantees of reliability and authenticity contained in articles 6 and 7 of the Model Law were also applicable to electronic equivalents to transport
documents. It was generally agreed that draft article x did not in any way limit or restrict the field of application of the general provisions of the draft Model Law and that its purpose was to provide for a specific application of those general provisions in the context of the use of transport documents.

146. After deliberation, the Commission decided that appropriate wording should be added to paragraph (1) of article x to clarify that the general rules contained in part I of the Model Law applied to the subject matter covered by draft article x and that a corresponding explanatory note to that effect should be contained in the Guide to Enactment of the Model Law. The matter was referred to the drafting group.

147. For purposes of clarity, the Commission decided to add the words "or statement" after the word "notice" in paragraph (1)(d). The Commission further decided to delete the words "irrevocably or not" in paragraph (1)(e). It was felt that those words, which had been originally included in the text for illustrative purposes, were unnecessary, as the rule contained in paragraph (1)(e) was broad enough to encompass both revocable and irrevocable undertakings.

Paragraph (2)

148. Various views were expressed and suggestions were made with respect to the substance and the wording of paragraph (2). It was pointed out that the phrase "or provides for certain consequences if it is not" had been inserted in paragraph (2) to deal with the situation where, although it was not required by law that information be in writing, a rule of law would provide for certain consequences if such information were voluntarily put in writing. It was observed that the wording adopted by the Working Group might not unequivocally solve the question of whether, in the above-mentioned situation, data messages would be regarded as functionally equivalent to paper. It was generally felt that paragraph (2) needed to be redrafted to make it clear that data messages would be regarded as equivalent to paper, both where the use of specific documents was mandated by law and where parties could freely choose to perform an act by means other than writing, but doing so would carry an adverse consequence. A suggestion was made that the words "or provides for certain consequences if it is not" should be deleted and that a second sentence should be inserted along the following lines:

"This paragraph applies whether the requirement imposes an obligation or whether it is a condition of the validity, effectiveness or enforceability of the action."

In that connection, it was noted that articles 5, 6 and 7 of the draft Model Law contained provisions that shared the structure of paragraph (2) (for continuation of the discussion in the context of articles 5, 6 and 7 of the draft Model Law, see paragraph 181, below). There was general agreement that the issue was purely one of drafting, and the matter was referred to the drafting group, together with the remainder of the substance of paragraph (2), which was found to be generally acceptable.

Paragraph (3)

149. The Commission was reminded of the discussion that took place in the Working Group regarding concerns that paper documents and data messages might be simultaneously used in connection with the same contract of transport. It was noted that paragraph (3) attempted to deal with the situation where, while preserving the possibility of the parties reverting from data message interchange to paper-based transactions, if the circumstances so required. A question was raised as to the need for a provision such as paragraph (3), which was felt to impose a requirement of exclusivity and thus to impinge upon party autonomy. In response it was noted that paragraph (3) was a necessary complement to the guarantee of singularity contained in paragraph (4). The need for security was an overriding consideration and it was essential to ensure not only that a method was used that gave reasonable assurance that the same data message was not multiplied, but also that no two media would be simultaneously used for the same purpose. Paragraph (4) itself did not address that problem directly. With a view to making patent the complementary nature of paragraph (3) vis-à-vis paragraph (4), it was suggested that the order of those paragraphs should be reversed.

150. The Commission generally felt that paragraph (3) was useful in that it addressed the fundamental need to avoid the risk of duplicate transport documents. In that connection, it was observed that the use of multiple forms of communication for different purposes, e.g. paper-based communications for ancillary messages and electronic communications for bills of lading, did not pose a problem. However, it was essential for the operation of any system relying on electronic equivalents of bills of lading to avoid the possibility that the same rights could at any given time be embodied both in data messages and in a paper document.

151. Paragraph (3) was also useful in that it envisaged the situation where a party having initially agreed to engage in electronic communications had to switch to paper communications where it later became unable to sustain electronic communications. Various views were expressed as to how the decision to "drop down" to paper could be made. One view was that, since EDI communications were usually based on the agreement of the parties, a decision to return to paper communications should also be subject to the agreement of all interested parties. Otherwise, the originator would be given the power to choose unilaterally the means of communication. Another view was that a rule along the lines of paragraph (3) would have to be applied by the bearer of a bill of lading and that it should be up to the bearer to decide whether it preferred to exercise its rights on the basis of a paper bill of lading or on the basis of the electronic equivalent of such a document, and to bear the costs for its decision.

152. With a view to accommodating some of the concerns expressed during the discussion of paragraph (3), the following alternative text was proposed for consideration by the Commission:

"(3) Where one or more data messages have been used to effect any of the actions in paragraph (1)(f) or (g) of
this article, and a paper document is subsequently to be used to effect any such action, no such paper document is effective for the purpose of any rule of law mentioned in paragraph (4) of this article, unless:

“(a) as between the person subject to the obligation to deliver and the holder of a right acquired by means of a data message, the use of data messages for this purpose has ceased to be valid; and

“(b) the paper document contains a statement that data messages may no longer validly be used for such purposes in place of the paper document.

“Any such replacement of a data message by a paper document shall not have the effect of modifying any existing right or obligation.”

153. It was explained by the proponents of the alternative text that subparagraph (a) had been added to the original text to make it clear that the rule contained therein was intended to apply to the person subject to the obligation to deliver and the holder of a right in the goods, and not to other parties to the contract of carriage or to the transaction underlying the contract of carriage. Subparagraph (b) had been added to create an obligation to give notice to possible future parties that there had been exchange of data messages prior to the parties issuing paper documents. A number of objections were raised to the substance and the form of the above proposal. One objection stemmed from the interpretation that subparagraph (b) would prevent the parties from reverting to data messages once they had “dropped down” to paper. Another objection was that making the inclusion of such a statement a condition of validity of the bill of lading would in fact result in penalizing the holder for the intentional or unintentional failure by the previous holder to include the statement in the bill of lading.

154. As another alternative to paragraph (3), the following text was also proposed:

“(3) Where one or more data messages are used to effect the actions in paragraph (1)(f) and (g) of this article, and a paper document is subsequently to be used to effect such actions, no such paper document is valid for this purpose unless the use of data messages has been discontinued and unless it contains a statement that the use of data messages has been replaced by the use of the paper document. Such replacement shall not have the effect of modifying any existing right or obligation of the parties involved.”

155. That proposal did not meet with sufficient support. After discussion, there was general agreement that the alternative provision was in fact very similar in substance to the original paragraph (3) and that it was preferable to use the original text as the basis for deliberation by the Commission. It was agreed that, in order to provide the desired notice to third parties of the previous existence of data messages interchange, which the Commission considered to be good practice, as provided in the CMI Rules for Electronic Bills of Lading, the following sentence would be added after the first sentence of paragraph (3):

“Any paper documents issued shall contain a statement of such termination.”

156. The Commission found that, with the addition of that sentence, the substance of paragraph (3) was generally acceptable and referred it to the drafting group, which was also requested to consider the question of the appropriate location of paragraph (3).

Paragraph (4)

157. It was generally agreed that paragraph (4) was the core provision of the article. Paragraph (4) was intended to ensure that a right could only be conveyed to one person, and that it would not be possible for more than one person at any point in time to lay claim to it. That effect of the paragraph was to introduce a requirement commonly referred to as the “guarantee of singularity”.

158. An objection was raised with respect to the use of the words “one person and no other person”. It was pointed out that those words might be interpreted as excluding situations where more than one person might jointly hold title to the goods. However, it was pointed out that the word “person” in the above proposal would not necessarily entail that there could not be multiple consignees, if all parties so agreed. It was pointed out that the word “person” was used, for example, in article 15 of the United Nations Convention on International Bills of Exchange and International Promissory Notes, without such limiting connotation. It was felt that, in order to avoid misunderstandings as to the meaning of the above-mentioned phrase, the Guide to Enactment of the Model Law should contain a comment to the effect that the reference to “one person” would not exclude joint ownership of rights in the goods or other rights embodied in a bill of lading.

159. The Commission discussed the method for giving the reliable assurance required by paragraph (3) that “the right or obligation has become that of the intended person and of no other person”. It was pointed out that the thrust of the provision was to require that the means for transferring the rights or acquiring obligations, as the case might be, should be sufficiently secure so as to reasonably rule out the possibility that such rights or obligations could also be transferred to, or acquired by, other persons. As a matter of drafting, the view was expressed that the formulation contained in paragraph (4) did not adequately express the thrust of that provision, since the “method” itself could not generate the desired “reliable assurance”.

160. Various proposals were made to clarify the scope of paragraph (4) and improve its wording. One proposal was to substitute the words “provided that the method used to effect such conveyance was sufficiently reliable so as to designate as beneficiary of such conveyance the intended person only and no other person”. Another proposal was to delete that same clause and replace it with the words "provided a method is used to give reliable assurance that the right or obligation becomes vested in the intended person and in no other person". After discussion, the following consolidated proposal was submitted to the Commission:

“Under a contract of carriage, if a right is to be granted to, or an obligation is to be acquired by, one person
and no other person, and the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use, of a paper document, that requirement is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data messages, provided a method is used to give reliable assurance that the right or obligation becomes vested in the intended person and in no other person.”

161. The Commission continued the discussion on the basis of the consolidated proposal. As a matter of drafting, it was agreed that the words “[u]nder a contract of carriage” should be deleted, since they restated unnecessarily the sphere of application of the article. It was also agreed that the words “any means which includes” were redundant and should be deleted. With respect to substance, the discussion focused on the last clause of the proposed text. It was generally felt that the formulation contained therein did not solve the difficulties encountered in the original text of paragraph (4). The view was expressed that both paragraph (4) as adopted by the Working Group and the above consolidated proposal were flawed from the standpoint of logic, in that they made the validity of the transfer of a right dependent on the use of a method that was apt to ensure that the right had been transferred to a certain person. In order to overcome the circular aspect of the provision, it was suggested that the final proviso in paragraph (4) should refer not to any legal consequence of the communication (e.g. the transfer of a right) but to a fact (e.g. guarantee of singularity of the message). In that respect, there was general agreement that the difficulties identified in the current wording of paragraph (4) would be probably resolved if the notion of “reliable assurance” were to be linked to the concrete situations that the provision aimed at avoiding, namely, that multiple messages might be sent to different addresses for the purpose of conveying the same right or creating the same obligation.

162. A suggestion was made to replace the proviso at the end of paragraph (3) by the words: “provided that a method is used to give a reliable assurance that no other data message has been or may be used by the transferor for the purpose of transferring such right or obligation to more than one person at any given time”. Another proposal aimed at the same result was to replace the phrase “right or obligation becomes vested in the intended person and in no other person” with a wording such as “such data messages are unique”.

163. After discussion, the Commission agreed on the need to amend the end of paragraph (3) as suggested. For the sake of brevity, it was decided that wording along the lines of “such data messages are unique” was to be preferred. The matter was referred to the drafting group.

Paragraph (5)

164. Having regard to the specific field of application of article x, it was proposed to add the words “to the contract of carriage” after the words “the parties” in paragraph (5). However, that proposal was felt to be too restrictive and not in line with paragraph (1), which listed actions that might not necessarily be performed by the actual parties in the contract of carriage, but also by other participants in the process of carriage and in related transactions.

165. As a matter of drafting, it was agreed that the words “[w]here any question is raised as to whether” seemed to require that a question should be actually raised in order for the reliability test provided for in that provision to be applied. Those words were generally found to be unclear and it was decided to replace them by the words “[f]or the purposes of paragraph (4)”.

166. After discussion, the Commission found the substance of paragraph (5) to be generally acceptable and referred it to the drafting group.

Paragraph (6)

167. It was recalled that the purpose of paragraph (6) was to deal directly with the application of certain laws to contracts for the carriage of goods by sea. For example, under the Hague and Hague-Visby Rules, a contract of carriage meant a contract that was covered by a bill of lading. Use of a bill of lading or similar document of title resulted in the Hague and Hague-Visby Rules applying compulsorily to a contract of carriage. It was noted that, at present, those rules would not automatically apply to contracts effected by one or more data message. Thus, a provision such as paragraph (6) was needed to ensure that the application of those rules would not be excluded by the mere fact that data messages were used instead of a bill of lading in paper form.

168. There was general agreement that it was necessary to provide clearly for the applicability to a carriage contract contained in, or evidenced by, data messages of the rules of law that would have been applicable to the same contract, had it been contained in, or evidenced by, a paper bill of lading.

169. It was questioned whether the result intended by paragraph (6) was not already achieved by paragraph (2), which provided that, where a law required that any of the actions listed in paragraph (1) had to be carried out in writing or by using a paper document, that requirement was satisfied if the action was carried out by using one or more data messages. In response, it was stated that, while paragraph (2) ensured that data messages would be effective means for carrying out any of the actions listed in paragraph (1), that provision did not deal with the substantive rules of law that might apply to a contract contained in, or evidenced by, data messages.

170. Views were exchanged concerning the meaning of the phrase “that rule shall not be rendered inapplicable” in paragraph (6). It was suggested that a simpler way of expressing the same idea would be to provide that rules applicable to contracts of carriage evidenced by paper documents should also apply to contracts of carriage evidenced by data messages. In response, it was stated that, given the broad scope of application of draft article x, which covered not only bills of lading but also a variety of other transport documents, such a simplified provision...
might have the undesirable effect of extending the applicability of rules such as the Hamburg Rules and the Hague-Visby Rules to contracts to which such rules were never intended to apply. In the context of the proposed addition to draft article x, it was important to overcome the obstacle resulting from the fact that the Hague-Visby Rules and other rules compulsorily applicable to bills of lading would not automatically apply to contracts of carriage evidenced by data messages, without inadvertently extending the application of such rules to other types of contracts.

171. The wording of paragraph (6) was found to be difficult of understanding, and the Commission considered a number of alternative formulations to the draft text. It was agreed, for purposes of clarity, to delete the word “rendered” and to insert the word “such” before the words “a contract of carriage of goods which is evidenced by one or more data message”. As to the remainder of the provision, it was generally felt that the substance of paragraph (6) adequately reflected the policy adopted by the Commission. It was also held that an attempt to arrive at a simpler formulation, however desirable such a formulation might be, was not likely to result in a substantive improvement to the text. After discussion, the Commission found the amended text of paragraph (6) to be generally acceptable and referred it to the drafting group.

Paragraph (7)

172. The Commission found the substance of paragraph (7) to be generally acceptable and referred it to the drafting group.

C. Other issues to be considered with respect to the draft Model Law

173. The Commission proceeded with a discussion of issues related to the title of the Model Law and to articles 1 and 3 to 11, on which it had postponed its final decision at its twenty-eighth session. It was also felt that certain changes might have to be made to the text of articles 1 and 3 to 11 as a result of the adoption of articles 2 and 12 to 17. Subject to the decisions reflected below, the Commission approved the substance of articles 1 and 3 to 11 and referred them to the drafting group for final review.

1. Title of the draft Model Law

174. The Commission noted that, at its twenty-eighth session, it had postponed its final decision with respect to the title of the Model Law. It had been agreed that the issue would need to be reverted to after the Commission had completed its review of draft articles 1 and 2.11

175. There was agreement in the Commission that the title of the draft Model Law (“UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication”) was too long, and did not describe the content of the draft Model Law with sufficient clarity. As to the particular words used in the title, a number of concerns were expressed. One concern was that the words “model law on legal aspects” were redundant and too vague for the title of a legislative text. Alternatively, those words were said to create the mistaken impression that the text dealt with all the legal issues that might be related to the use of EDI. Another concern was that the words “electronic data interchange and related means of communication” were inappropriate. While the words “related means of communication” were too vague to convey any clear meaning in the context of a title, the focus being placed on EDI might lead to the erroneous conclusion that the Model Law was of relevance only to a limited range of techniques involving the highest degrees of automation in computer-based communication. Such a title would therefore not convey the information that, in fact, the Model Law dealt with activities that went far beyond EDI, as was clearly indicated in subparagraph (a) of article 2.

176. It was proposed that the draft Model Law should be entitled “Model Law on Electronic Commerce”. It was noted that the proposal had been made at the twenty-eighth session of the Commission and rejected mainly for the reason that it raised questions relating to the scope of application of the draft Model Law.12 It had then been feared that such a title might be misread as restricting the ambit of the draft Model Law to commercial activities, while the intention was to allow enacting States to apply the draft Model Law to a wider range of activities in which modern communication techniques were being used.

177. While the Commission reaffirmed that the scope of the Model Law did not have to be restricted to the commercial sphere, it was generally felt that recent developments had made it clear that the expression “electronic commerce” had become widely used to refer to a broad range of activities that had in common the use of telecommunication and might encompass such varied techniques as electronic mail communicated with or without the use of such infrastructure as the Internet, EDI and telecopy or telex. In addition, it was pointed out that the notion of “electronic commerce” had become so broadly used that it covered the use of modern means of communication not only in the commercial sphere but also in other areas. It was generally agreed that a reference to “electronic commerce” was the only way to convey in a short title sufficient information as to the broad scope of communication and storage techniques covered by the Model Law. After discussion, the Commission adopted the above proposal.

2. Footnote **** to article 1

178. The Commission noted that, as adopted at its twenty-eighth session, the text of footnote **** to article 1 (“Sphere of application”) contained two alternative wordings between square brackets. Footnote **** read as follows:

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

11Ibid., para. 212.

12Ibid., para. 211.
“This Law applies to any kind of information in the form of a data message [used in the context of ...] [. except in the following situations: ...].”

179. The Commission adopted the second alternative wording, so that the suggested text would read: “This Law applies to any kind of information in the form of a data message, except in the following situations: [...]”. The first alternative was rejected on the ground that, by enumerating the areas of application of the Model Law, the legislator might unintentionally leave out areas that deserved to be covered by the uniform legislation. The adopted text was referred to the drafting group.

3. Paragraph (1) of articles 5, 6 and 7

180. A concern was expressed with respect to the way in which the opening words of paragraph (1) of articles 5, 6 and 7, as adopted by the Commission at its twenty-eighth session, would operate. Paragraph (1) of article 5 (“Writing”) of the draft Model Law as adopted by the Commission at its twenty-eighth session read as follows:

“(1) Where a rule of law requires information to be in writing or to be presented in writing, or provides for certain consequences if it is not, a data message satisfies that rule if the information contained therein is accessible so as to be usable for subsequent reference.”

Paragraph (1) of article 6 (“Signature”) of the draft Model Law as adopted by the Commission at its twenty-eighth session read as follows:

“(1) Where a rule of law requires a signature, or provides for certain consequences in the absence of a signature, that rule shall be satisfied in relation to a data message if:

“(a) a method is used to identify the originator of the data message and to indicate the originator’s approval of the information contained therein; 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 agreement between the originator and the addressee of the data message.”

Paragraph (1) of article 7 (“Original”) of the draft Model Law as adopted by the Commission at its twenty-eighth session read as follows:

“(1) Where a rule of law requires information to be presented or retained in its original form, or provides for certain consequences if it is not, a data message satisfies that rule if:

“(a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and

“(b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.”

181. It was noted that these paragraphs shared a common structure to the effect that a “rule of law”, which “provides for certain consequences if” the relevant paper document “is not” presented, “shall be satisfied” by a data message. It was observed that the adopted wording might not unequivocally solve the question whether, under such a structure, data messages would in all cases be regarded as functionally equivalent to paper. It was generally felt that those paragraphs needed to be redrafted to make it clear that data messages would be regarded as equivalent to paper both where the use of specific documents was mandated by law, and where parties could freely choose to perform an act by means other than writing, but doing so would carry an adverse consequence. The drafting group was entrusted with the redrafting of those provisions.

4. Notion of “originator” in paragraph (1) of article 6

182. The view was expressed that the references to “originator” in paragraph (1) of article 6 (“Signature”) unduly restricted the scope of the article. As currently drafted, article 6 provided a functional equivalent for the written signature of the originator of a data message but not for the signatures of other persons that might appear on a paper document. For example, where a document carried the signature of the originator and was subsequently endorsed by a third party, article 6 did not expressively provide a functional equivalent for the endorsement. It was generally agreed that the reference to the originator should be replaced by a reference to the person whose signature was required. The drafting group was entrusted with the redrafting of that article.

5. Rule of interpretation of contracts

183. It was recalled that the Commission, at its twenty-eighth session in 1995, had considered and had not definitively decided the question whether there was a need for a rule of interpretation for situations where contracts, especially those concluded prior to the entry into force of the Model Law, created an obligation to use a “writing” without specifying the meaning of “writing”.1

184. The Commission took the view that it was preferable to leave that question to the interpretation of the will of the parties, to the rules of interpretation of the provisions enacted pursuant to the Model Law, and to any transitory provisions that a State might wish to enact along with the Model Law. In support of that decision it was said that, if the Model Law provided that a contractual requirement for a “writing” could be met by an electronic data message, such a provision could unjustifiably displace the agreement of the parties.

6. Notion of “rule of law” in articles 5, 6, 7 and 9

185. The Commission considered the meaning of the notion of “rule of law”, as used in articles 5, 6, 7 and 9. It was generally agreed that the notion should be under-

1Ibid., para. 236.
stood to include statutory law; case-law to the extent it was recognized as a source of law; and any customs and practices in so far as they had been incorporated into the legal system of the State. The views did not entirely coincide as to whether the customs and practices could become part of the law of a State only by express incorporation or also by implication or interpretation. It was, however, generally felt that "rules of law", as used in the Model Law, were not meant to include areas of law that had not become part of the law of a State and were sometimes, somewhat imprecisely, referred to by expressions such as "lex mercatoria" or "law merchant".

186. It was noted that the UNCITRAL Model Law on International Commercial Arbitration in its article 28(1) also contained the concept "rules of law", but that it had been generally understood that, there, the concept was indeed intended to include also bodies of law that did not form part of the law of a State.14

187. In order to express better the concept as described in paragraph 185 above, and in order not give to the expression "rules of law" different meanings in two texts elaborated by the Commission, the Commission decided to replace in the draft Model Law the expression "rule of law" by the term "the law". It was agreed that the Guide to Enactment would clarify the understanding of the Commission as to the meaning of the term "the law".

7. Location of article 10

188. The Commission noted that, at its twenty-eighth session, it had reserved for subsequent discussion the issue of the location of article 10 ("Variation by agreement").15 In view of the decision made at that session to include in that article two paragraphs dealing with party autonomy in the context of chapters III and II, respectively, it was generally agreed that article 10 should be moved from chapter III to chapter I, which contained other general provisions common to the entire Model Law. The drafting group was entrusted with the necessary redrafting of paragraph (1).

8. Article 11

189. Subject to decisions reflected below with respect to paragraphs (2), (3)(a) and (6), the Commission approved the substance of article 11 ("Attribution of data messages") and referred it to the drafting group for review.

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Paragraph (2)

190. It was suggested, and the Commission agreed, that paragraph (2) should expressly cover also situations where a message was generated and sent automatically pursuant to a computer program operated by or on behalf of the originator.

Paragraph (3)(a)

191. The Commission recalled its discussion, at its twenty-eighth session in 1995, of the provision in paragraph (3)(a)(ii) and the serious concerns that had been expressed regarding the provision.16 Those concerns were restated. It was particularly emphasized that it would be inappropriate to provide that the addressee would be entitled to regard a data message as that of the originator even though the purported originator might never have sent that message, for example, when the message had been sent by a fraudulent impersonator. Such a provision would, without good reason, change the basic principle of contract law that a person was not bound by actions of an impersonator or an agent without authority, unless there existed special reasons for a different conclusion. After discussion, the Commission decided to delete paragraph (3)(a)(ii).

192. A suggestion was made to add at the end of paragraph (3)(a)(i) the words "and was reasonable in the circumstances". The purpose of the suggestion was to exclude the possibility that the addressee would rely on the message in bad faith, even if the addressee was or should be aware that the message had not been authorized by the originator. The suggestion was not accepted on the ground that it was unnecessary in the Model Law to provide for bad-faith reliance on a message and that the addition might be construed as subjecting the effectiveness of agreements of parties relating to authentication to vague criteria of reasonableness.

193. It was observed that agreements as to the procedures for verifying the source of messages were not necessarily entered into directly between the originator and the addressee, but could also be concluded, on the one hand, between the originator and a third-party service provider and, on the other hand, between the third-party service provider and the addressee. It was considered useful not to exclude from paragraph (3)(a) agreements that became effective not through direct agreement between the originator and the addressee but through the participation of third-party service providers. The Commission adopted the suggestion and requested that it be reflected either in the provision or in the Guide to Enactment. It was also suggested to clarify in the Guide to Enactment that paragraph (3)(a) applied only when the communication between the originator and the addressee was based on a previous agreement, but that it did not apply in an "Open-edi" environment.

Paragraph (6)

194. The substance of paragraph (6) was approved, and the square brackets were removed.

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16Ibid., paras. 282 and 283.
D. Report of the drafting group

195. The entire text of the draft Model Law was submitted to a drafting group for implementation of the decisions of the Commission and revision to ensure consistency within the text and among the language versions. The Commission, at its 604th and 605th meetings, on 11 and 12 June 1996, considered the report of the drafting group.

196. Various views and concerns were expressed with respect to the titles of Part One and Part Two of the draft Model Law and about the title of chapter I in Part One. A concern was expressed that the title “Electronic commerce in general”, particularly in language versions other than English, might be misunderstood as dealing with trade in goods such as computer hardware or software. It was thus suggested that the title of Part One should read “General provisions”, while the title of chapter I might be amended to enumerate the titles of the articles contained therein. It was generally felt, however, that the term “electronic commerce” should be used in the title of Part One, as it was used in the title of the Model Law itself, to describe the various kinds of communication and storage techniques covered by the general provisions of the Model Law contained in Part One. It was also felt that it would be inappropriate to deviate in chapter I from the title “General provisions” adopted for similar provisions in other UNCITRAL texts, such as the UNCITRAL Model Law on International Credit Transfers. As to the title of Part Two as presented by the drafting group (“Specific aspects of electronic commerce”), the Commission decided that it should be replaced by “Electronic commerce in specific areas”, to mirror the structure of the title of Part One and to reflect better the contents of Part Two.

197. With respect to subparagraph (a) of article 2 (definition of “data message”), the Commission resumed its earlier discussion of whether the text of the definition should make reference to “analogous” means of communication (see paragraphs 121-122, above). The view was expressed that including explanations in the Guide to Enactment as to the meaning of the word “analogous” might not be sufficient to dispel the risk that it could be confused with a reference to “analog” information. Replacing the word “analogous” by “similar”, although not fully satisfactory, might create fewer difficulties than maintaining the wording of subparagraph (a) as previously adopted. After discussion, the Commission decided to replace the word “analogous” by the word “similar”. It was agreed that the Guide to Enactment would clarify that the word “similar” in that context would connote “functionally equivalent”.

198. Various concerns were expressed with regard to new article 17 (“Transport documents”) as presented by the drafting group. Paragraph (5) of article 17 as presented by the drafting group (corresponding to paragraph (3) of draft article x as approved by the Working Group at its twenty-eighth session) read as follows:

“For instance, where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article (16), no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination. The replacement of data messages by paper messages shall not affect the rights or obligations of the parties involved.”

199. The view was expressed that the reference to “terminating” the use of data messages was overly general and unclear. In particular, it did not provide information as to: who would effect the termination; whether the termination would have to be permanent; and what was the scope of the termination. It was stated that the text as drafted was not limited to the use of data messages for the purpose of transferring any particular right or obligation. Even if it was read as meaning that the use of data messages for transferring a particular right or obligation had been terminated, the paragraph was still unclear as to whether it intended to prevent a data message being used even where the paper document had been surrendered to the issuer. It was suggested that the paragraph needed to be amended to clarify that the switch from data messages to a paper document would not affect any right that there might exist to surrender the paper document to the issuer and start again using data messages. To that effect, it was suggested that the following sentence should be inserted in the paragraph:

“Nothing in this paragraph shall affect any right to resume the use of data messages for the purpose of conveying a right or obligation, provided that any paper document previously used for this purpose has first been rendered invalid.”

200. Support was expressed for the inclusion of the suggested wording to clarify that paragraph (5), while expressly dealing with the situation where the use of data messages was replaced by the use of a paper document, was not intended to exclude the reverse situation. The prevailing view was that the wording adopted by the drafting group was sufficiently neutral in that respect. After discussion, the Commission adopted the paragraph as proposed by the drafting group and agreed that appropriate explanations should be contained in the Guide to Enactment.

201. Paragraph (3) of article 17 as presented by the drafting group (corresponding to paragraph (4) of draft article x as approved by the Working Group at its twenty-eighth session) read as follows:

“(3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique”.

202. The view was expressed that the notion that a data message should be “unique” was unclear. On the one hand, it was stated, all data messages were necessarily unique, even if they duplicated an earlier data message,
since each data message was sent at a different time from any earlier data message sent to the same person. If a data message was sent to a different person, it was even more obviously unique, even though it might be transferring the same right or obligation. Yet, all but the first transfer might be fraudulent. On the other hand, if “unique” was interpreted as referring to a data message of a unique kind, or a transfer of a unique kind, then in that sense no data message was unique, and no transfer by means of a data message was unique. It was thus suggested that uniqueness of the data message, and uniqueness of the transfer, were wrong concepts for the purposes of article 17. A proposal was made to replace the words “provided that a reliable method is used to render such data message or messages unique” by the following: “provided that a reliable method is used to secure that data messages purporting to convey any right or obligation of a person may not be used by or on behalf of that person inconsistently with any other data messages by which the right or obligation was conveyed by or on behalf of that person”.

203. In response, it was pointed out that the notions of “uniqueness” or “singularity” of transport documents were not unknown to practitioners of transport law and users of transport documents. It was generally felt, however, that the notion of “uniqueness” as used in paragraph (3) with respect to data messages needed to be clarified. Rather than attempting to redraft the text of paragraph (3), the Commission felt that the matter could be dealt with by introducing appropriate explanations in the Guide to Enactment. It was generally felt that such explanations could be based in part on the wording of the above proposal. After discussion, the Commission adopted the text of paragraph (3) as presented by the drafting group.

204. Subject to the above-mentioned changes, the Commission approved the text of the draft Model Law presented by the drafting group. The text of the Model Law, as adopted by the Commission, is reproduced in annex I to the present report.

E. Draft Guide to Enactment of the Model Law


206. It was generally agreed that the draft Guide adequately reflected the deliberations and decisions made by the Commission and the Working Group at various stages of the process that had led to the adoption of the draft Model Law. The general structure of the draft Guide was found to be acceptable. With a view to enhancing the readability of the Guide, it was decided that the somewhat lengthy description of the history and background of the Model Law should be placed at the end of the document, possibly in an annex. It was also decided that a short “executive summary” of the Model Law should precede the introduction to the Model Law in the opening section of the Guide. It was further decided that the structure and substance of the draft Guide should be adjusted to reflect the structure of the Model Law as adopted at the current session. In particular, appropriate remarks should be included with respect to the newly adopted provisions dealing with declarations of will and other statements (see paragraphs 95-99, above), and with transport documents (see paragraphs 139-172, above).

207. As to the substance of the Guide, both the introduction to the Model Law and the article-by-article remarks prepared by the Secretariat were found to be generally acceptable, subject to the changes indicated below. The Secretariat was requested:

(a) To mention in the part of the Guide dealing with the scope of application of the Model Law that, while the Model Law was recommended to be enacted as a single statute, some States might find it appropriate to incorporate the provisions of the Model Law in several pieces of legislation, as indicated in the opening section of the current draft (A/CN.9/426, paras. 24 and 25);

(b) To clarify in the Guide that the Commission would monitor the technical and commercial developments underlying the Model Law and that it might, should it regard it advisable, decide to add new model provisions to the Model Law or modify the existing ones;

(c) To modify, where necessary, the use of the term “electronic data interchange (EDI)” in view of the decision to eliminate that term from the title of the Model Law (see paragraphs 175-177, above), and bearing in mind the restrictive meaning given to the term in article 2 of the Model Law;

(d) To re-examine the passages where the Guide spoke of “minimal” requirements established in the Model Law; it was considered that those passages should be modified so as to avoid the implication that States were invited to establish requirements stricter than those contained in the Model Law;

(e) To clarify in paragraphs 28 and 29 of the draft Guide, which described the “framework” nature of the Model Law, that the Model Law did not cover every aspect of the use of electronic commerce, and refrain from recommending that States adopt “technical regulations” on matters dealt with in the Model Law, because such regulations might reduce the beneficial flexibility of the provisions in the Model Law;

(f) To explain in paragraph 34 of the draft Guide that article 10 and the notion of “agreement” therein, which enshrined the principle of party autonomy, encompassed interchange agreements, general terms provided by communication networks and specific rules that might be included in those general terms to deal with bilateral relationships between originators and addressees of data messages;

(g) To revise paragraph 39 and possibly other paragraphs of the draft Guide to reflect the considerations of the Commission regarding the application of the Model Law to “paperless” means of communication and to clarify that, except to the extent expressly provided by the Model Law, the Model Law was not intended to alter traditional rules on paper-based communications;

(h) To emphasize in paragraph 55, and possibly elsewhere, that the purpose of the Model Law was to facilitate the use of electronic means of communication without in any way imposing their use;
(i) To align paragraph 78 of the draft Guide with the decision taken with respect to the expression “rule of law” (see paragraphs 185-187, above).

208. After discussion, the Commission requested the Secretariat to prepare a final version of the Guide to Enactment of the Model Law, reflecting the deliberations and decisions made at the current session. The Commission mandated the publication of the final version of the Guide to be prepared by the Secretariat together with the text of the Model Law, as a single document.

F. Adoption of the Model Law and recommendation

209. The Commission, after consideration of the text of the draft Model Law as revised by the drafting group, adopted the following decision at its 605th meeting, on 12 June 1996:

“The United Nations Commission on International Trade Law,

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

“Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication commonly referred to as ‘electronic commerce’, which involve the use of alternatives to paper-based forms of communication and storage 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 calling 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,

“Being of the opinion that the establishment of a model law facilitating the use of electronic commerce, and acceptable to States with different legal, social and economic systems, contributes to the development of harmonious international economic relations,

“Being convinced that the UNCITRAL Model Law on Electronic Commerce will significantly assist all States in enhancing their legislation governing the use of alternatives to paper-based forms of communication and storage of information, and in formulating such legislation where none currently exists,

1. Adopts the UNCITRAL Model Law on Electronic Commerce as it appears in annex I to the report on the current session;

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

3. Recommends that all States give favourable consideration to the UNCITRAL Model Law on Electronic Commerce 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 and storage of information.”

G. Future work

I. Future work on issues of transport law

210. It was proposed that the Commission should 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 in the areas where no such rules existed and with a view to achieving greater uniformity of laws than has so far been achieved. In making the suggestion, reference was made to the preliminary discussion that had taken place at the thirtieth session (1996) of the Working Group on Electronic Data Interchange about possible future work on issues of transport law other than those concerning EDI (A/4017), paras. 104-108). It was said that existing national laws and international conventions left significant gaps regarding issues such as the functioning of the bills of lading and sea waybills, the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods and to 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.

211. It was 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. It was also suggested that obtaining the views of the commercial sectors involved would be very important. 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. It was said that such information-gathering exercise by the Secretariat should encompass a broad range of issues in the carriage of goods by sea and in related areas such as terminal operations and multimodal carriage.

212. 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. Engaging for that purpose the resources of the Secretariat and the time of the Commission or a working group would delay work on other topics that were, or were about to be put, on the agenda of the Commission. Those topics, it was said, should be given priority relative to the suggested work on transport law.

213. Furthermore, 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, the danger existed that the disharmony of laws would increase.

214. 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 any investigation was to be carried out, it should not cover the liability regime, since the Hamburg Rules, elaborated by the United Nations, had already provided modern solutions. 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 were not or were not adequately dealt with in treaties.

215. In view of the differing views, the Commission did not include the consideration of the suggested issues on its agenda at present. 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 Comité maritime international (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 (IAPH). An analysis of such information should be prepared for a future session of the Commission by the Secretariat when its resources so permitted without adversely affecting the work on current items of its work programme. On the basis of that analysis the Commission would be able to decide on the nature and scope of any future work that might usefully be undertaken by it.

2. Future work with respect to electronic commerce

216. The Commission proceeded with a discussion of future work in the field of electronic commerce, based on a preliminary debate held by the Working Group at its thirtieth session (A/CN.9/421, paras. 109-119). It was generally agreed that UNCITRAL should continue its work on the preparation of legal standards that could bring predictability to electronic commerce, thereby enhancing trade in all regions.

217. New proposals were made as to possible topics and priorities for future work. One proposal was that the Commission should start preparing rules on digital signatures. It was stated that the establishment of digital signature laws, together with laws recognizing the actions of "certifying authorities", or other persons authorized to issue electronic certificates or other forms of assurances as to the origin and attribution of messages "signed" digitally, was regarded in many countries as essential for the development of electronic commerce. It was pointed out that the ability to rely on digital signatures would be a key to the growth of contracting as well as the transferability of rights to goods or other interests through electronic media. In a number of jurisdictions, new laws governing digital signatures were currently being prepared. It was reported that such law development was already non-uniform. Should the Commission decide to undertake work in that area, it would have an opportunity to harmonize the new laws, or at least to establish common principles in the field of electronic signatures, and thus to provide an international infrastructure for such commercial activity.

218. Considerable support was expressed in favour of the proposal. It was generally felt, however, that, should the Commission decide to undertake work in the field of digital signatures through its Working Group on Electronic Data Interchange, it should give the Working Group a precise mandate. It was also felt that, since it was impossible for UNCITRAL to embark on the preparation of technical standards, care should be taken that it would not become involved in the technical issues of digital signatures. It was recalled that the Working
Group, at its thirtieth session, had recognized that work with respect to certifying authorities might be needed, and that such work would probably need to be carried out in the context of registries and service providers. However, the Working Group had also felt that it should not embark on any technical consideration regarding the appropriateness of using any given standard (A/CN.9/421, para. 111). A concern was expressed that work on digital signatures might go beyond the sphere of trade law and also involve general issues of civil or administrative law. It was stated in response that the same was true of the provisions of the Model Law and that the Commission should not shy away from preparing useful rules for the reason that such rules might also be useful beyond the sphere of commercial relationships.

219. Another proposal, based on the preliminary debate held by the Working Group, was that future work should focus on service providers. The following were mentioned as possible issues to be considered with respect to service providers: the minimum standards for performance in the absence of party agreement; the scope of assumption of risk by the end parties; the effect of such rules or agreements on third parties; allocation of the risks of interlopers’ or other unauthorized actions; and the extent of mandatory warranties, if any, or other obligations when providing value-added services (see A/CN.9/421, para. 116).

220. It was widely felt that it would be appropriate for UNCITRAL to examine the relationship between service providers, users and third parties. It was said that it would be very important to direct such an effort towards the development of international norms and standards for commercial conduct in the field, with the intent of supporting trade through electronic media, and not have as a goal the establishment of a regulatory regime for service providers, or other rules which could create costs unacceptable for market applications of EDI (see A/CN.9/421, para. 117). It was also felt, however, that the subject matter of service providers might be too broad and cover too many different factual situations to be treated as a single work item. It was generally agreed that issues pertaining to service providers could appropriately be dealt with in the context of each new area of work addressed by the Working Group.

221. Yet another proposal was that the Commission should begin work on the preparation of the new general rules that were needed to clarify how traditional contract functions could be performed through electronic commerce. Uncertainties were said to abound as to what “performance”, “delivery” and other terms meant in the context of electronic commerce, where offers and acceptances and product delivery could take place on open computer networks across the world. The rapid growth of computer-based commerce as well as transactions over the Internet and other systems had made that a priority topic. It was suggested that a study by the Secretariat could clarify the scope of such work. Should the Commission, after examination of the study, decide to pursue this task, one option would be to place such rules in the “Special provisions” section of the Model Law on Electronic Commerce.

222. A further proposal was that the Commission should focus its attention on the issue of incorporation by reference. It was recalled that the Working Group had agreed that that topic would appropriately be dealt with in the context of more general work on the issues of registries and service providers (A/CN.9/421, para. 114). The Commission was generally agreed that the issue could be dealt with in the context of work on certification authorities.

223. After discussion, the Commission agreed that placing the issue of digital signatures and certification authorities on the agenda of the Commission was appropriate, provided that it was used as an opportunity to deal with the other topics suggested by the Working Group for future work. It was also agreed as to a more precise mandate for the Working Group that the uniform rules to be prepared should deal with such issues as: the legal basis supporting certification processes, including emerging digital authentication and certification technology; the applicability of the certification process; the allocation of risk and liabilities of users, providers and third parties in the context of the use of certification techniques; the specific issues of certification through the use of registries; and incorporation by reference.

224. The Commission requested the Secretariat to prepare a background study of the issues of digital signatures and service providers, based on an analysis of laws currently being prepared in various countries. On the basis of that study, the Working Group should examine the desirability and feasibility of preparing uniform rules on the above-mentioned topics. It was agreed that work to be carried out by the Working Group at its thirty-first session could involve the preparation of draft rules on certain aspects of the above-mentioned topics. The Working Group was requested to provide the Commission with sufficient elements for an informed decision to be made as to the scope of the uniform rules to be prepared. In view of the broad scope of activities covered by the Model Law adopted at the current session and by possible future work in the area of electronic commerce, it was decided that the Working Group on Electronic Data Interchange would be renamed “Working Group on Electronic Commerce”.

IV. BUILD-OPERATE-TRANSFER PROJECTS

225. At its twenty-seventh session, in 1994, the Commission, after consideration of a note prepared by the Secretariat (A/CN.9/399), emphasized the relevance of build-operate-transfer projects (BOT) and requested the Secretariat to prepare a note on possible future work on that subject. The requested note (A/CN.9/414) was considered by the Commission at its twenty-eighth session, in 1995, when wide support was voiced in the Commission for taking up work in the area of BOT. The Secretariat was then requested to prepare a report on the issues proposed for future work with a view to facilitating discussion of the matter at the Commission’s twenty-ninth session in 1996. The Commission also requested that the

Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 394-400.
Secretariat, in identifying issues proposed for future work, should take into account the work being undertaken by other organizations in the field of BOT, in particular the Guidelines that were being prepared by the United Nations Industrial Development Organization (UNIDO), so as not to duplicate work carried out by those organizations.

226. At its current session, the Commission had before it a report prepared by the Secretariat pursuant to that request (A/CN.9/424). That report contained information on work being undertaken by other organizations on BOT, as well as an outline of issues covered by national laws on BOT and similar arrangements, followed by proposals for work by the Commission. In the preparation of that report, the Secretariat had reviewed national legislation on BOT and BOT-related matters from a number of countries and had summarized the various solutions found in national laws on the main topics covered by such legislation.

227. It was reported that BOT transactions could play a major role in the economic policy of a State and that, in the experience of a good number of States, it had been necessary to adopt legislation on such transactions in order to attract investors for BOT projects. The solutions included in national laws showed different approaches, as well as different levels of detail and sophistication. While some States had enacted general legislation on BOT projects, others had adopted specific legislation on various industrial sectors, such as power generation, development of maritime terminals or water treatment. In some cases, laws had been adopted for individual BOT projects. National laws also provided different solutions to apparently similar or identical issues. Those solutions were likely to have an impact on the country’s ability to attract foreign investment through BOT projects.

228. The Commission took note with appreciation of the report submitted by the Secretariat and endorsed the proposals for work set out in its paragraphs 85 to 92. It was pointed out that the BOT project-financing mechanism had raised a considerable amount of interest in many States, in particular in developing countries. BOT projects usually required considerable amounts of funds and often involved foreign investors and contractors. The successful implementation of such projects had often enabled States to achieve significant savings in public expenditure and to reallocate resources that otherwise would have been invested in infrastructure in order to meet more pressing social needs. However, BOT and similar projects required an adequate legal framework that fostered the confidence of potential investors, national and foreign. Furthermore, such projects usually involved contractual arrangements of considerable complexity and might require lengthy negotiations. Work by the Commission in that area would help such States in tackling the problems that had been identified. In particular, it was felt that it would be useful to provide legislative guidance to States preparing or modernizing their legislation relating to BOT projects. It was noted that organizations that had done work in the area of BOT transactions were not working to provide comprehensive guidance to national legislators regarding BOT projects.

Given its universal representation and its record in preparing trade law texts, there was general agreement that UNCITRAL was the appropriate body to undertake such work, due attention being paid to the need to avoid possible duplication of work being done by other organizations.

229. As regards the form of such guidance, the Commission considered that any preparatory work should aim at providing legislative guidance by describing legislative objectives, considering possible statutory solutions for achieving those objectives and possibly also discussing their advantages and disadvantages. The Commission thus requested the Secretariat to review, with the assistance of experts and in cooperation with other international organizations having the expertise in BOT arrangements, issues on which legislative guidance might be useful and prepare first draft chapters of a legislative guide for consideration by the Commission. As for any work on contractual aspects of BOT, the Commission requested the Secretariat to continue monitoring the work of other organizations and, should it become desirable for the Commission to undertake work on contractual aspects of BOT, to formulate appropriate proposals for such future work.

230. Bearing in mind the limited financial resources available to the Secretariat, the Commission requested that, in the preparation of the legislative guide, the Secretariat should attempt, to the extent possible, to draw from expertise of government officials and the private sector in countries at different levels of economic development, of different economic systems and of different legal traditions. The Commission further requested States to cooperate with the Secretariat in its work, in particular by facilitating the provision of information on pertinent national legislation.

V. ASSIGNMENT IN RECEIVABLES FINANCING


233. At the current session, the Commission had before it the report of that session of the Working Group (A/CN.9/420). The Commission noted that, at the close of that session, the Working Group had requested the Secre-
tariat to prepare a revised version of the draft uniform rules for the twenty-fifth session of the Working Group, which was scheduled to take place from 8 to 19 July 1996 in New York (A/CN.9/420, para. 204).

234. The Commission expressed appreciation for the work accomplished so far and requested the Working Group to proceed with the work expeditiously.

VI. CROSS-BORDER INSOLVENCY

235. Pursuant to extensive consultations, including with the International Association of Insolvency Practitioners (INSOL), the Commission considered at its twenty-eighth session (Vienna, 2-26 May 1995) that it would be worthwhile to prepare uniform legislative provisions on judicial cooperation in cross-border insolvencies on court access for foreign insolvency administrators and on recognition of foreign insolvency proceedings.22 The task of preparing such uniform provisions was entrusted to the Working Group on Insolvency Law, which prior to that decision had worked under the title “Working Group on the New International Economic Order”.

236. The Working Group commenced the work at its eighteenth session (Vienna, 30 October-10 November 1995)23 and continued it at its nineteenth session (New York, 1-12 April 1996).24 On the basis of the considerations of the Working Group, which resulted in first draft provisions on judicial cooperation and access and recognition in cross-border insolvency, the Working Group requested the Secretariat to prepare a revised version of the draft model provisions as well as a first draft of a guide to enactment of the model provisions (A/CN.9/422, para. 200). It was noted that, while the Working Group had not yet adopted a view as to whether the uniform rules should take the form of model legislation or a convention, it had proceeded under the working assumption that the text should take the form of model legislation.

237. The Commission, which had before it the reports of the two above-mentioned sessions of the Working Groups (A/CN.9/419 and Corr.1 and A/CN.9/422), was pleased with the progress of the work. It was noted that the project had aroused the interest of many practitioners as well as Governments and that the uniform text that was to result from that work was eagerly awaited. Therefore, the Commission expressed the hope that the Working Group would proceed with its work expeditiously so that, after two more sessions of the Working Group scheduled to take place at Vienna from 7 to 18 October 1996, and in New York from 20 to 31 January 1997, the Working Group would be able to submit a draft legislative text for consideration by the Commission at its thirtieth session in 1997.

238. The Commission recalled its consideration at its twenty-eighth session in 1995 of the project of collecting information relating to the legislative implementation in the Contracting States of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).25 It was noted that, in carrying out the preparatory work on the project, the Secretariat had cooperated with Committee D of the International Bar Association (IBA).

239. It was also noted that the project was limited to reviewing the way the Convention was incorporated into the national laws of the Contracting States, and, in particular, that it was not its purpose to monitor individual court decisions applying the Convention. Monitoring such case-law, which was beyond the resources of the Secretariat, was not necessary for the project; furthermore, case-law applying the Convention was being collected and published by other organizations, most notably in the Yearbook of Commercial Arbitration by the International Council for Commercial Arbitration (ICCA).

240. The primary objective of the project was to publish the findings of the survey of legislation. Once the Commission had the findings before it, it might wish to decide whether, in addition to publishing the findings, any further action by the Commission would be desirable, such as the preparation of a guide for the implementation of the Convention.

241. It was reported that the Secretariat had sent to the States parties to the Convention a questionnaire designed to obtain information relating to the implementation of the Convention, so as to be able to prepare a report for consideration by the Commission. By 12 June 1996, the Secretariat had received some 32 replies to the questionnaire.

242. The Commission welcomed the project. It was said that similar work might at a later stage also be undertaken with respect to other conventions that had resulted from the work of the Commission. It was added that such work was useful in that it fostered uniformity of laws.

243. The Commission called upon the States parties to the Convention that had not yet replied to the questionnaire of the Secretariat to do so. The Secretariat was requested to prepare, for consideration by the Commission at a future session, a note presenting the findings based on the analysis of the information gathered.

VIII. CASE-LAW ON UNCITRAL TEXTS (CLOUT)

244. The Commission noted with appreciation that since its twenty-eighth session in 1995 two additional sets of abstracts with court decisions and arbitral awards relating

245. The Commission also noted with appreciation that a thesaurus of the United Nations Convention on Contracts for the International Sale of Goods (i.e. an analytical list of issues arising in the context of the Convention), which had been prepared by the Secretariat and finalized by Professor John O. Honnold, had been published (A/CN.9/SER.C/INDEX/1). The Commission further noted that the Secretariat was currently preparing a thesaurus for the UNCITRAL Model Law on International Commercial Arbitration and requested the Secretariat to expedite the preparation of that thesaurus.

246. The Commission expressed its appreciation to the National Correspondents for their work and urged States to cooperate with the Secretariat in the operation of CLOUT and to facilitate the carrying out of the tasks of the National Correspondents. The Commission emphasized the importance of CLOUT for the purpose of promoting the uniform application of the legal texts that resulted from its work. The Commission noted that, by being issued in the six United Nations languages, CLOUT constituted an invaluable tool for practitioners, academics and government officials. The Commission urged the States that had not yet appointed a National Correspondent to do so.

247. The Secretariat reported on the steps taken to establish and operate a database, accessible via the Internet, of CLOUT decisions and other documents. The Commission welcomed those steps and encouraged the Secretariat to pursue them further. The Commission noted, in that connection, that the work of the Secretariat in editing abstracts, storing decisions and awards in their original form, translating abstracts into the other five United Nations languages, publishing them in the six United Nations languages, forwarding abstracts and full texts of decisions and awards to interested parties upon request and establishing and operating a data bank would substantially increase as the number of decisions and awards covered by CLOUT increased. The Commission therefore requested that adequate resources be made available to its secretariat for the effective operation of CLOUT.

IX. TRAINING AND TECHNICAL ASSISTANCE

248. The Commission had before it a note by the Secretariat (A/CN.9/427) outlining the activities that had taken place since the previous session and indicating the direction of future activities being planned. It was noted that UNCITRAL seminars and briefing missions for government officials were designed to explain the salient features and utility of international trade law instruments of UNCITRAL.

249. It was reported that since the previous session the following seminars and briefing missions had taken place: Minsk (29-30 May 1995); Tehran (9-12 September 1995); Almaty (22-26 August 1995); Bogota (10 November 1995); Asunción (22-24 November 1995); Santiago (27-29 November 1995); Conakry (15-19 January 1996); Libreville (22-25 January 1996); Abu Dhabi (27 June 1995); Dubai (4 July 1995); Auckland and Wellington, New Zealand (5 and 14 July 1995); Athens (18-19 October 1995); Ankara (4-7 December 1995); Ljubljana (31 January 1996). The Secretariat reported that for the remainder of 1996 and up to the next session of the Commission in May 1997, seminars and briefing missions were being planned in Africa, Asia and Latin America.

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

251. The Commission noted the various forms of technical assistance that might be provided by the Secretariat, such as review of preparatory drafts of legislation, assistance in the preparation of drafts, comments on reports of law reform commissions and briefings for legislators, judges, arbitrators and other end-users of UNCITRAL legal texts embodied in national legislation. The Commission encouraged the Secretariat to devise ways to address the continuing and significant increase in the importance being attributed by Governments, by domestic and international business communities and by multilateral and bilateral aid agencies to improvement of the legal framework for international trade and investment.

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

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

254. The Commission noted that the General Assembly had not had the opportunity, during its fiftieth session, to consider the request that had been made by the Commission at its last session that the UNCITRAL Trust Fund for Symposia be placed on the agenda of the pledging conference taking place within the framework of the Assembly session, on the understanding that that would not have any effect on the obligation of a State to pay its assessed contribution to the Organization.26 The Commission therefore requested that the Sixth Committee recommend to the Assembly the adoption of a resolution including the UNCITRAL Trust Fund for Symposia and the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL on the agenda of the United Nations Pledging Conference for Development Activities.

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

255. The Commission, on the basis of a note by the Secretariat (A/CN.9/428), considered the status of the conventions and model laws emanating from its work, as well as the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The Commission noted with pleasure the new actions of States after 26 May 1995 (date of the conclusion of the twenty-eighth session of the Commission) regarding the following instruments:


(b) Protocol amending the Limitation Period Convention (Vienna, 1980). New actions: accession by Poland and Slovenia;


(f) United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991). The Convention had been signed by five States; new action: accession by Georgia; one State party; five adherences to the Convention were necessary for the Convention to enter into force;

(g) UNCITRAL Model Law on International Commercial Arbitration (1985). New jurisdictions that had enacted legislation based on the Model Law: Guatemala, India, Kenya, Malta, Sri Lanka; total number of the jurisdictions with such legislation: 39;


256. Appreciation was expressed for those legislative actions on the texts of the Commission.

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

XI. GENERAL ASSEMBLY RESOLUTIONS ON THE WORK OF THE COMMISSION

258. The Commission took note with appreciation of General Assembly resolution 50/48 of 11 December 1995, in which the Assembly adopted and opened for signature or accession the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and in which the Assembly also expressed its appreciation to the Commission for having prepared the draft of that Convention. In paragraph 3 of the resolution, the General Assembly called upon all Governments to consider becoming party to the Convention.

259. The Commission took note with appreciation of General Assembly resolution 50/47, also of 11 December 1995, on the report of the Commission on its twenty-eighth session, held in 1995. In particular, it was noted that, in paragraph 5, the Assembly 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 in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law, and in that connection recommended that the Commission, through its secre-
tariat, should continue to maintain close cooperation with
the other international organs and organizations, including
regional organizations, active in the field of interna-
tional trade law.

260. The Commission further noted with appreciation
the decision of the General Assembly, in paragraph 6, 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 interna-
tional trade law, such as assistance in the preparation of
national legislation based on legal texts of the Commissi-
on, and that, in paragraph 7, the Assembly expressed
the desirability for increased efforts by the Commission
in sponsoring seminars and symposia to provide such
training and assistance.

261. The Commission also noted with appreciation the
appeal, in paragraph 7(b), to Governments, the relevant
United Nations organs, organizations and institutions and
individuals to make voluntary contributions to the
UNCITRAL Trust Fund for Symposia and, where appro-
priate, to the financing of special projects. Furthermore, it
was noted that the Assembly appealed, in paragraph 7(c),
to the United Nations Development Programme and other
bodies responsible for development assistance, as well as
to Governments in their bilateral aid programmes, to sup-
port the training and technical assistance programme of the
Commission and to cooperate and coordinate their activi-
ties with those of the Commission.

262. It was also appreciated that the Assembly ap-
ppealed, in paragraph 8, to Governments, the relevant
United Nations organs, organizations and institutions and
individuals, in order to ensure full participation by all
Member States in the sessions of the Commission and its
working groups, to make voluntary contributions to the
Trust Fund for travel assistance to developing countries
that were members of the Commission, at their request
and in consultation with the Secretary-General. That
Trust Fund was established pursuant to Assembly resolu-
tion 48/32 of 9 December 1993. The Commission further
noted with appreciation the decision of the General As-
ssembly, in paragraph 9, to continue its consideration in
the competent Main Committee during the fiftieth session
of the Assembly of granting travel assistance, within
existing resources, to the least developed countries that
were members of the Commission, at their request and in
consultation with the Secretary-General.

263. The Commission welcomed the request, in para-
graph 10, by the General Assembly to the Secretary-Gen-
eral to ensure that adequate resources were allocated for
the effective implementation of the programmes of the
Commission. The Commission in particular hoped that
the Secretariat would be allocated sufficient resources to
meet the increased demands for training and assistance.

264. The Commission also noted with appreciation that
the General Assembly, in paragraph 11, stressed the im-
portance of bringing into effect the conventions emanat-
ing from the work of the Commission and that, to that
end, it urged States that had not yet done so to consider
signing, ratifying or acceding to those conventions.

XII. OTHER BUSINESS

A. Reduction of documentation requirements

265. The Commission took note of General Assembly
resolution 50/206 C of 23 December 1995 and considered
the requests and suggestions contained in paragraphs 6 to
8 to exercise restraint in making proposals containing re-
quests for new reports, to consider the possibility of biennializing or triennializing the presentation of reports,
to review the necessity of all recurrent documents and to
consider the possibility of oral reports as well as consoli-
dated reports on related topics. While recognizing the
need for achieving further savings in the field of docu-
mentation, the Commission concluded that, beyond the
restraint it had been exercising for some time already, no
additional measures of the kind suggested could be taken
without adversely affecting the fulfilment of its mandate.

B. Principles of interpretation

266. Reference was made to provisions on principles of
interpretation included in conventions prepared in recent
years, for example, in article 7(1) of the United Nations
Convention on Contracts for the International Sale of
Goods. Such provisions contained a similar wording to the
effect that, in the interpretation of the convention,
regard was to be had to its international character, the
need to promote uniformity in its application and the
need to promote the observance of good faith in interna-
tional trade. A suggestion was made that, when similar
provisions were to be drafted for new conventions, con-
sideration should be given to including reference also to
the observance of principles of international trade law
and legal texts elaborated by recognized international
organizations, as well as customs and practices in the area
covered by the convention in question. The suggestion
was not discussed at the current session.

C. UNCITRAL Yearbook

267. The Commission reiterated the usefulness of the
Yearbook of the United Nations Commission on Interna-
tional Trade Law, in which the travaux préparatoires for
the texts elaborated by the Commission were compiled. It
was stressed that it was essential for many users of its
texts (e.g. legislators, attorneys, academics, judges or
arbitrators) to have access to those travaux préparatoires,
and that the Yearbook was for many of them the only
practical source of such information. The Commission
requested the Secretariat to continue editing the Yearbook
in the English, French, Russian and Spanish languages,
and, in view of the broad and keen interest in the texts
being prepared by the Commission, to publish the vol-
umes of the Yearbook soon after the conclusion of the
annual sessions of the Commission.

D. Cooperation with the Organization of American
States

268. The Commission was informed, by a statement on
behalf of the Organization of American States (OAS), of
the preparatives for the Sixth Inter-American Specialized Conference on Private International Law ("CIDIP-VI"), the agenda of which might include matters that are of direct concern to the Commission (e.g. international bankruptcy). The Commission was appreciative of the wish of OAS to strengthen the cooperation between the two organizations in areas of common interest.

E. Bibliography

269. The Commission noted that the Secretariat had been unable to publish the bibliography of recent writings related to the work of the Commission (A/CN.9/429) in time to make it available at the current session, but that the publication would be printed and distributed soon thereafter.

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

F. Willem C. Vis International Commercial Arbitration Moot

271. It was reported to the Commission that the Institute of International Commercial Law at the Pace University School of Law, New York, had organized the third Willem C. Vis International Commercial Arbitration Moot (Vienna, 27-31 March 1996). Legal issues that the teams of students participating in the Moot dealt with were based on the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration. In the 1996 Moot, 38 teams participated from law schools from 19 countries. The fourth Moot would be held in April 1997 at Vienna.

272. The Commission heard the report with interest and appreciation. It regarded the Moot, with its international participation, as an excellent method of teaching international trade law and disseminating information about current uniform texts.

G. Six hundredth meeting of the Commission

273. The Commission noted that the afternoon meeting on 7 June 1996 was its 600th meeting, and that occasion was used to point out with pride and satisfaction the remarkable achievements of the Commission since its first session in 1968. Confidence was expressed that the Commission would continue to play a central role in the progressive harmonization of international trade law.

H. Date and place of the thirtieth session of the Commission

274. It was decided that the Commission would hold its thirtieth session from 12 to 30 May 1997 at Vienna.

I. Sessions of working groups

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


(b) The Working Group on Insolvency Law would hold its twentieth session from 7 to 18 October 1996 at Vienna, and its twenty-first session from 20 to 31 January 1997 in New York;

(c) The Working Group on Electronic Commerce would hold its thirty-first session from 18 to 28 February 1997 in New York.

ANNEXES

I. UNCITRAL Model Law on Electronic Commerce

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

II. List of documents before the Commission at its twenty-ninth session

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

B. United Nations Conference on Trade and Development: extract from the report of the Trade and Development Board on its forty-third session (TD/B/43/12(Vol. I))*


1. For its consideration of sub-item 8(a), the Board had before it the report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, held in New York from 28 May to 14 June 1996 (A/51/17), which had been circulated to the Board under cover of a note by the UNCTAD secretariat (TD/B/43/3).

Action by the Board

2. At its 880th meeting, on 16 October 1996, the Board took note of the report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session (A/51/17)."

INTRODUCTION

1. At its 3rd plenary meeting, on 20 September 1996, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its fifty-first session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session” and to allocate it to the Sixth Committee.

2. The Sixth Committee considered the item at its 3rd, 4th and 47th meetings, on 23 and 24 September and 26 November 1996. The views of the representatives who spoke during the Committee’s consideration of the item are set out in the relevant summary records (A/C.6/51/SR.3, 4 and 47).

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 twenty-ninth session;¹

   (b) Report of the Secretary-General on the implementation of paragraph 9 of General Assembly resolution 50/47 on granting travel assistance to delegates of developing countries (A/51/382);

   (c) Letter dated 21 May 1996 from the Permanent Representative of Colombia to the United Nations addressed to the Secretary-General transmitting the communique issued by the Ministers for Foreign Affairs and heads of delegation of the Movement of Non-Aligned Countries on the occasion of the Meeting of the Ministerial Committee on Methodology, held at Cartagena de Indias on 15 and 16 May 1996.

4. At the 3rd meeting, on 23 September, the Chairman of the United Nations Commission on International Trade Law at its twenty-ninth session introduced the report of the Commission on that session (see A/C.6/51/SR.3).

5. At the 4th meeting, on 24 September, the Chairman of the Commission made a closing statement (see A/C.6/51/SR.4).

I. CONSIDERATION OF PROPOSALS

A. Draft resolution A/C.6/51/L.7

6. At the 47th meeting, on 26 November, the representative of Austria, on behalf of Albania, Algeria, Argentina, Australia, Austria, Belgium, Bosnia and Herze-


govina, Botswana, Brazil, Bulgaria, Cameroon, Canada, Chile, Colombia, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, India, Israel, Italy, Kenya, Mexico, Mongolia, Morocco, Nigeria, Norway, Peru, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Thailand, Turkey, Uganda, Uruguay and Venezuela, later joined by Bolivia, Malaysia and Nepal, introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session” (A/C.6/51/L.7). The representative of Austria then proposed the following amendments to draft resolution A/C.6/51/L.7:

(a) In operative paragraph 12, deletion of the word “, within existing resources,”;

(b) In operative paragraph 13, deletion of the words “that adequate resources are allocated for”.

7. At the same meeting, the Committee adopted draft resolution A/C.6/51/L.7, as orally amended, without a vote (see paragraph 10, draft resolution I).

B. Draft resolution A/C.6/51/L.8

8. At the 47th meeting, on 26 November, the representative of Austria, on behalf of Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Ecuador, Finland, France, Germany, Guatemala, Hungary, Israel, Italy, Kenya, Mexico, Norway, Portugal, Singapore, Slovakia, Slovenia, Spain, Sweden, Thailand, United States of America, Uruguay, and Venezuela, later joined by Japan, introduced a draft resolution entitled “Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law” (A/C.6/51/L.8).

9. At the same meeting, the Committee adopted draft resolution A/C.6/51/L.8 without a vote (see paragraph 10, draft resolution II).

II. RECOMMENDATIONS OF THE SIXTH COMMITTEE

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

[The texts are not reproduced in this section. Draft resolutions I and II were adopted, with editorial changes, as General Assembly resolutions 51/161 and 51/162 (see section D below).]
D. General Assembly resolutions 51/161 and 51/162 of 16 December 1996


The General Assembly,

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

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

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

Having considered the report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session,¹

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

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

Having considered the report of the Secretary-General on the implementation of paragraph 9 of General Assembly resolution 50/47,²


2. Notes with satisfaction the completion and adoption by the Commission of the Model Law on Electronic Commerce;⁴

3. Commends the Commission for the finalization of the Notes on Organizing Arbitral Proceedings;⁵

4. Expresses its appreciation for the progress made in its work on the subjects of receivables financing and cross-border insolvency;

5. Welcomes the decision of the Commission to request the Secretariat to review, with the assistance of experts and in cooperation with other international organizations having expertise in build-operate-transfer arrangements, issues on which legislative guidance might be useful, and to commence the preparation of a legislative guide on build-operate-transfer projects;⁶

6. Reaffirms the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field and, in this connection:

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

(b) Recommends that the Commission, through its secretariat, continue to maintain close cooperation with the other international organs and organizations, including regional organizations as well as other bodies such as the International Institute for the Unification of Private Law, which are active in the field of international trade law and other related areas;

7. Also reaffirms the importance, in particular for developing countries, of the work of the Commission concerned with training and technical assistance in the field of international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission;

8. Expresses the desirability for increased efforts by the Commission, in sponsoring seminars and symposia, to provide such training and technical assistance, and in this connection:

(a) Expresses its appreciation to the Commission for organizing seminars and briefing missions in Belarus, Chile, Colombia, Gabon, Greece, Guinea, the Islamic Republic of Iran, Kazakhstan, New Zealand, Paraguay, Slovenia, Turkey and the United Arab Emirates;

(b) Expresses its appreciation to the Governments whose contributions made it possible for the seminars and briefing missions to take place, and appeals to Governments, the relevant United Nations organs, organizations and 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 fel-

²A/51/382.
⁴Ibid., Supplement No. 17 (A/51/17), chap. II.
⁵Ibid., chap. IV, para. 229.
lowships to candidates from developing countries to enable them to participate in such seminars and symposia;

9. **Appeals** to the United Nations Development Programme and other bodies responsible for development assistance, such as the International Bank for Reconstruction and Development and the European Bank for Reconstruction and Development, as well as to Governments in their bilateral aid programmes, to support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission;

10. **Appeals** to Governments, the relevant United Nations organs, organizations and institutions and individuals, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to make voluntary contributions to the trust fund for travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General;

11. **Decides** 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;

12. **Also decides**, in order to ensure full participation by all Member States in the sessions of the Commission and its working groups, to continue its consideration in the competent Main Committee during the fifty-first session of the General Assembly 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. **Requests** the Secretary-General to ensure the effective implementation of the programmes of the Commission;

14. **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 16 December 1996


The General Assembly,

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

Noting that an increasing number of transactions in international trade are carried out by means of electronic data interchange and other means of communication, commonly referred to as “electronic commerce”, which involve the use of alternatives to paper-based methods of communication and storage 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,

Convinced that the establishment of a model law facilitating the use of electronic commerce that is acceptable to States with different legal, social and economic systems could contribute significantly to the development of harmonious international economic relations,

Noting that the Model Law on Electronic Commerce was adopted by the Commission at its twenty-ninth session after consideration of the observations of Governments and interested organizations,

Believing that the adoption of the Model Law on Electronic Commerce by the Commission will assist all States significantly in enhancing their legislation governing the use of alternatives to paper-based methods of communication and storage of information and in formulating such legislation where none currently exists,

1. **Expresses its appreciation** to the United Nations Commission on International Trade Law for completing and adopting the Model Law on Electronic Commerce 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 when they enact or revise 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;

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

85th plenary meeting 16 December 1996

ANNEX

Model Law on Electronic Commerce of the United Nations Commission on International Trade Law

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

Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS
I. INTERNATIONAL COMMERCIAL ARBITRATION

A. Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/423) [Original: English]

Pursuant to those discussions, the Secretariat prepared a text entitled draft Notes on Organizing Arbitral Proceedings (A/CN.9/410). The draft Notes were considered at the twenty-eighth session of the Commission in 1995; on the basis of those considerations the Secretariat prepared the revised draft Notes, reproduced in the annex.

ANNEX

[Recommended for inclusion at suitable place at beginning of publication]

Origin of the Notes

The Commission finalized the Notes at its twenty-ninth session (New York, 28 May-14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993, considered in 1994 a draft entitled “Draft Guidelines for Preparatory Conferences in Arbitral Proceedings”. That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994. On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared “draft Notes on Organizing Arbitral Proceedings”. The Commission considered the draft Notes in 1995, and a revised draft in 1996, when the Notes were finalized.

Draft notes on Organizing Arbitral Proceedings

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

**Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings**

4. Subject to the law governing the arbitral procedure, including fundamental requirements of procedural justice, arbitration rules agreed upon by parties typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings. This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

**Multi-party arbitration**

[Variant 1:]

If this variant is used, paragraphs 87-89 (item 18) should be deleted.

6. Two-party arbitration and multi-party arbitration (i.e. a single arbitration that involves more than two parties) are not different as regards considerations about the need to organize arbitral proceedings, and as regards the kinds of matters that may be considered in that connection. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. Another difference, which, however, falls outside the scope of the Notes, concerns the drafting of a multi-party arbitration agreement and the constitution of the arbitral tribunal, both issues that may give rise to special difficulties in multi-party arbitration. Therefore, the Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, can be used in two-party as well as multi-party proceedings.

[Variant 2:]

7. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 87-89 (item 18).

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8. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

9. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls. Meetings may be held at the venue of arbitration or at some other appropriate location.

10. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

**List of matters for possible consideration in organizing arbitral proceedings**

11. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

12. Bearing in mind that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, the Notes do not attempt to describe in detail different arbitral practices or express a preference for any of them.

13. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order to not create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

14. When using the Notes, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.
### LIST OF MATTERS FOR POSSIBLE CONSIDERATION IN ORGANIZING ARBITRAL PROCEEDINGS

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1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so?

15. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it would be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

16. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

17. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine, on the basis of the law governing the arbitral procedure, how the case will be conducted.

2. Language of proceedings

18. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

19. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. It may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings. Documents that, in the interest of economy, might not need to be translated, or may have to be translated only in part, are, for example, business records (e.g. invoices, transport documents, construction records) or texts concerning the law applicable to the substance of the dispute (e.g. statutes, court decisions or commentaries).

(b) Possible need for interpretation of oral presentations

20. If interpretation will be necessary during oral hearings, it is advisable to consider whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

21. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

22. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

23. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether the is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; (e) location of the subject matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

24. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration “the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents” (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

25. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the parties have submitted the case to an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

26. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.
27. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

28. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto.

5. Deposits in respect of costs

(a) Amount to be deposited

29. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

30. When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

31. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

32. It is widely viewed that confidentiality is one of the essential and helpful features of arbitration. Nevertheless, the participants in an arbitration might not have the same understand-

7. Routing of written communications among the parties and the arbitrators

33. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by many users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole, (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

8. Telefax and other electronic means of sending documents

(a) Telefax

34. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

35. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters, (e.g. dates for hearings) more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.
37. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the attitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

38. When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. computer disks or electronic mail) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files, and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identifying persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

39. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or defences, they may wish, or the arbitral tribunal might request, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40. It is advisable that the arbitral tribunal set time limits for written submissions. In enforcing the time limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

41. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submission be made after the hearings.

(b) Other electronic means (e.g. electronic mail, magnetic or optical disk)

42. Written submissions on an issue may be made consecutively, i.e. the party who receives a submission is given a period of time to react with its counter-submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. copies, numbering of items of evidence, references to documents, numbering of paragraphs)

43. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- number of copies in which each document is to be submitted;
- a system for numbering items of evidence, and a method for marking them, including by tabs;
- form for references to documents (e.g. by the heading and the number assigned to the document or its date);
- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- inclusion of translations in the same volume as original texts or in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

44. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages (such as delay and possible adverse effect on the flexibility of the proceedings), it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute.

(b) In which order should the points at issue be decided

45. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g. a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be
decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

46. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of the defendant.

(c) Is there a need to define more precisely the relief or remedy sought

47. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

48. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Having regard to the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

49. Often the written submissions of the parties contain insufficient information for the arbitral tribunal to fix the time limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

50. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

51. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

52. The arbitral tribunal may wish to establish time limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

53. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document, (b) a copy of a dispatched communication (e.g. letter, telex, telefax) is accepted without further proof as having been received by the addressee, and (c) a photocopy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

54. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject matter. It is useful to keep a table of contents of the documents, for example by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

55. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present findings in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

56. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.
(a) What arrangements should be made if physical evidence will be submitted

57. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

58. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

59. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

60. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses’ statements

61. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; and (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party’s allegations.

62. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness’s statement containing testimony itself. It should be noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 68, below). Notwithstanding these reservations, signed witness’s testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

63. If a signed witness’s statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

64. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal’s view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

65. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

66. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.
(c) In which order will the witnesses be called

67. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

68. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

69. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g. certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

70. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

71. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

72. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time-schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

73. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

74. If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 61-63, above).

17. Hearings

(a) Decision whether to hold hearings

75. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

76. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings.

(b) Whether one period of hearings should be held or separate periods of hearings

77. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of
hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

78. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only “target dates” as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

79. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

80. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

81. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant has the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

82. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties’ preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

83. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

84. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

85. Some legal counsel are accustomed to giving notes summarizing their oral arguments. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparation for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

86. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

87. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings.
88. The areas of possibly increased complexity are, for example, the flow of communications among the parties and the arbitral tribunal (paragraphs 34, 35 and 39-42, above); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 45 and 46); the manner in which the parties will participate in hearing witnesses (paragraph 64); appointment of experts and the participation of the parties in considering their reports (paragraphs 71-73); the scheduling of hearings (paragraph 77); the order in which the parties will present their arguments and evidence at hearings (paragraph 81).

89. The Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not discuss the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions as compared to two-party arbitration. Thus, the Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in two-party as well as multi-party proceedings.


INTRODUCTION

1. The Commission, at its twenty-eighth session in 1995, considered the project of collecting information relating to the legislative implementation in national laws of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). The project is carried out in cooperation with Committee D of the International Bar Association (IBA).

PURPOSE OF THE PROJECT

2. The Commission noted that the purpose of the project was in particular to look into the following questions: is the Convention incorporated into the national legal system of the States parties so that its provisions have the force of law; have States parties added to the uniform regime of the Convention provisions, whether pursuant to declared reservations to the Convention or otherwise, which modifies the conditions of recognition or enforcement of awards; which requirements for obtaining recognition and enforcement not contemplated in the Convention have been added in national laws.

3. It was stressed at the session that it was not the purpose of the project to monitor individual court decisions applying the Convention. Such an exercise would be beyond the resources of the Secretariat and is not necessary for the project as outlined above; furthermore, case law applying the Convention was being collected and published by other organizations, most notably in the Yearbook of Commercial Arbitration by the International Council for Commercial Arbitration (ICCA).

4. The primary objective of the project is to prepare a note by the Secretariat containing the findings based on the survey of legislation. When the Commission would have the note before it, it may wish to decide whether in addition to such a note any further action by the Commission would be desirable, such as, for instance, the preparation of a guide for the enactment of the Convention.

COLLECTION OF INFORMATION

5. In November 1995, the Secretariat sent to the States party to the Convention a note verbale containing a questionnaire in which the States were requested to answer a series of questions relating to:

(a) The manner in which the Convention gained the force of law in the State (including, e.g. whether the relevant national law refers to, or incorporates, the text of the Convention or whether the implementing legislation paraphrases the text, and whether the method of implementation results in any substantial differences between the implementing legislation and the provisions of the Convention);

(b) The court or authority competent to decide on a request for recognition or enforcement;

(c) The procedural rules and requirements applicable to a request for recognition and enforcement of an award covered by the Convention (including, e.g. requirements

3 Ibid., para. 401.
4 Ibid., para. 402.
5 Ibid., para. 403.
concerning the authentication of the award as required by article IV of the Convention; fees, levies, taxes or duties to be paid in connection with a request; any time limit for a request for recognition and enforcement; recourse against a decision refusing to enforce an award or against a decision to grant recognition or enforcement).

6. In February 1996, the Secretariat sent another note verbale to States that had not responded to the first one requesting the information by the end of April 1996.

7. As of 8 May 1996, the Secretariat had received replies to the questionnaire from the following 27 States: Algeria, Argentina, Australia, Austria, Belarus, Cuba, Finland, France, Germany, Holy See, India, Italy, Japan, Kuwait, Mexico, Norway, Peru, Republic of Korea, Singapore, Slovakia, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Venezuela.

8. The Commission may wish to call upon the States party to the Convention that have not yet replied to the questionnaire to do so. As of 7 May 1996, 108 States were party to the Convention.

FURTHER WORK

9. The Commission may wish to request the Secretariat to prepare, for consideration of a future session of the Commission, a note presenting the findings based on the analysis of the gathered information.
II. ELECTRONIC DATA INTERCHANGE (EDI)


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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-fifth session, in 1992, the Working Group on Electronic Data Interchange (EDI) devoted its twenty-fifth to twenty-eighth sessions to the preparation of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (reports of those sessions are found in A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406). The text of the draft Model Law, together with a compilation of comments by Governments and interested organizations (A/CN.9/409 and Add. 1-3) was placed before the Commission at its twenty-eighth session for review and adoption.

2. At its twenty-ninth session, the Working Group considered a draft Guide to Enactment of the Model Law (the report of that session is found in A/CN.9/407). The Working Group also considered in the context of a general debate on possible future work the issues of incorporation by reference and of negotiability of rights in goods in an electronic environment. As regards incorporation by reference, the Working Group had before it two proposals for a draft provision, one submitted by the observer for the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and another submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66). After discussion, the prevailing view was that the issue of incorporation by reference was not mature for inclusion in the Model Law and deserved further study. A view was expressed that the issue should be addressed in the context of future work on negotiability of rights in goods (A/CN.9/407, paras. 100-105).

3. With respect to the issues of negotiability and transferability of rights in goods in an EDI context, the Working Group had before it two brief notes, one submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) and another submitted by the United States of America (A/CN.9/WG.IV/WP.67).

4. It was noted that the functions of bills of lading that might be affected by the use of EDI communications included those of serving: (a) as a receipt for the cargo by the carrier; (b) as evidence of the contract of carriage with regard to its general terms and the particular details of vessel, loading and discharge ports, and nature, quantity and condition of the cargo; and (c) as a document giving the holder a number of rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit.

5. The first two functions could be easily performed by EDI since the receipt for the cargo and information about the contract of carriage could be given by means of data messages such as the UN/EDIFACT messages. However, the third function (as document of title) raised difficulties in an EDI environment since, in the absence of a single piece of paper, it was difficult to establish the identity of the exclusive holder to whom the carrier could deliver the goods without running the risk of being faced with a claim by another party for misdelivery. In that regard, the Working Group noted that a central problem in the use of EDI bills of lading was to guarantee the singularity, or uniqueness, of the message to be relied upon by the carrier for delivering the goods. While any data message could probably be rendered unique through the use of cryptography, the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded. The Working Group noted that solutions to that problem might be found in security, time-stamping or similar techniques or through a central registry in which the holder could register its rights.

6. The Working Group also noted that work on negotiability and transferability of documents of title in goods by EDI means could include establishing a preliminary list of areas of commercial practice to be covered, validating agreements for negotiability and transferability of rights in goods through EDI, establishing criteria for parties to be holders in due course for the transfer of rights in goods or subsequently to negotiate such rights through EDI, determining the effect of negotiation of documents of title in EDI, establishing default rules for allocation of risk and electronic registries. With regard to electronic registries, it was noted that they could be governmental, central or private. The purpose, the access, the administrator, the costs, the insurance, the allocation of risks and the security could vary depending on the nature of the registry.
7. The Working Group engaged in a general debate, with a view to identifying the scope of possible future work and issues that could be addressed. With regard to the scope of future work, one suggestion was that the work should cover multimodal transport documents of title since they essentially fulfilled the same functions and raised similar issues. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be placed on maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop.

8. In support, it was pointed out that EDI messaging was currently restricted to the exchange of information messages in the North Atlantic maritime routes and could not develop without the support of a legal regime that would validate, and provide certainty about, transport documents in electronic form. For example, it was stated that there was a need to facilitate delivery of the cargo at the port of discharge without production of a paper bill of lading, which was often necessary for a number of reasons. One reason was that the cargo might reach the port of discharge before the documents necessary for delivery. Another reason was that often the buyer had to receive delivery and sell the cargo in order to be able to pay the price of the cargo and the freight. In addition, it was stated that there was a need to remove the legal uncertainty as to who bore the risk of the cargo not corresponding to its description when discharged. It was pointed out that usually the shipper provided the description of the goods and the bill of lading included a disclaimer that the description was that of the shipper; such disclaimer clauses were not always valid. Moreover, it was stated that there was a need to establish a functional equivalent replicating the uniqueness of the paper bill of lading, which was essential for its function as a title document.

9. Other suggestions were to address all documents of title covering tangible goods (e.g. warehouse receipts), or all documents of title covering tangible and intangible goods, or all negotiable (or even non-negotiable) instruments. In opposition to those suggestions, it was pointed out that covering such a broad range of documents would complicate work since the functions of the respective documents were different, which would make the elaboration of specific rules necessary.

10. After discussion, it was agreed that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation concerning maritime transport. After having established a set of rules for the maritime bills of lading, the Working Group could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

11. The Working Group then turned to a discussion of possible issues that could be addressed in the context of future work on maritime bills of lading. A number of issues were mentioned. One issue was to ensure the uniqueness of an electronic bill of lading that would allow its “holder” to dispose of the cargo in transit by electronic means while protecting the carrier from the risk of misdelivery. A number of possible ways to address that issue were suggested, including private keys to be used in communications from party to party, electronic certificates, smartcards and registries. With regard to registries, it was pointed out that a legal regime would need to be devised addressing issues such as subject of registration, parties that could register, parties that would have access to the registry and towards whom the registration could produce effects, confidentiality, accuracy and completeness of the information registered, liability for errors and effects on third parties.

12. Another issue was the definition of the holder in an EDI environment. It was pointed out that in a paper context the holder was defined on the basis of physical possession of the paper bill of lading and was protected against good faith acquisition of rights in the goods by third parties in that possession of the bill of lading functioned as notice to third parties. In an EDI environment, where possession was not possible, the holder might be protected by other means (e.g. registration, use of public and private key sets) or might not be protected at all. Another issue involved the rights and obligations of the holder and the issuer of EDI transport documents (e.g. right of the holder to give instructions in transit and obligation of the issuer to receive and execute those instructions). It was pointed out that, in a paper-based environment, the rights of a holder were based on three principles: (a) the bill of lading was conclusive evidence of title in the goods only after endorsement (conclusive evidence rule); (b) the endorsee was the only party entitled to claim delivery of the cargo at the discharge point; and (c) only the endorsee was entitled to instruct the carrier to vary the contract and make another endorsement. In this respect, it was stated that negotiability needed to be studied in the context of trade law, security law and transportation law. It was explained that property would not be of use if acquired under trade law but effectively lost under transportation law because no right of stoppage or control could be exercised.

13. In addition, it was pointed out that the holder could have a right to possess the goods, a property right in the goods, or a right to receive delivery of the goods arising from a sales contract. It was explained that from the point of view of the carrier the most important question was who had possessory title in the goods, in other terms, to whom should the carrier deliver the goods. Yet another issue was the allocation of liability among the shipper, carrier, consignee and, possibly, a registry.

14. Other issues suggested for study were: the effects of transfer of EDI transport documents on third parties (e.g. when transfer is effective towards the carrier, third parties in the chain of endorseses, third parties not shown in the EDI bill of lading); the rights of the rightful holder in case of a wrongful transfer of the goods and the rights of the transferee incase its title proved to be defective (subject to other parties’ rights); timeliness of transfer in an EDI environment; relative priority among multiple claimants of the same cargo; timeliness of messages (e.g. some messages related to pre-contractual terms might create rights and obligations); incorporation by reference; issues
of security (principles of identification, authentication, integrity, non-repudiation) designed to promote negotiability in an open EDI environment. It was stated that the issues of security should be considered with respect to a broad range of issues regarding negotiability. In connection with its discussion of security issues, in particular the use of cryptography, the Working Group agreed that possible future work by UNCITRAL should not affect mandatory rules of national legislation adopted for public policy reasons in certain States to restrict the use of cryptography or the export of cryptography-related techniques.

15. After discussion, the Working Group 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 made with regard to the scope of future work and the issues that could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. In that connection, the view was expressed that work undertaken within the Comité maritime international (CMI), or the BOLERO project, were aimed at facilitating the use of EDI transport documents but did not, in general, deal with the legal effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights (AlCN.9/407, paras. 106-118).

16. At its twenty-eighth session, in 1995, the Commission adopted the text of articles 1 and 3 to 11 of the draft Model Law. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide to Enactment of the Model Law, on the agenda of its twenty-ninth session to be held in New York from 28 May to 14 June 1996. It was agreed that the discussion should be resumed at the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

17. With respect to future work in the area of EDI, the Commission noted that, at its twenty-seventh session, in 1994, general support had been expressed in favour of a recommendation made by the Working Group at its twenty-seventh session that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was also noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the context of electronic data interchange had been held in the context of the twenty-ninth session of the Working Group (for the report on that debate, see A/CN.9/407, paras. 106-118).

18. After discussion, the Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents (see paragraph 15, above). The Commission expressed the wish that the requested background study, for the preparation of which the cooperation of other interested organizations such as the CMI might be sought, would provide the basis on which to make an informed decision as to the feasibility and desirability of undertaking work in the area.

19. The Working Group on Electronic Data Interchange, which was composed of all the States members of the Commission, held its thirtieth session at Vienna from 26 February to 8 March 1996. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bulgaria, Chile, China, Ecuador, France, Germany, Hungary, Iran (Islamic Republic of), Italy, Japan, Mexico, Poland, Russian Federation, Saudi Arabia, Singapore, Slovenia, Spain, Sudan, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

20. The session was attended by observers from the following States: Azerbaijan, Belarus, Canada, Czech Republic, Guatemala, Indonesia, Jordan, Kazakhstan, Lebanon, Morocco, Netherlands, Oman, Pakistan, Portugal, Republic of Korea, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic and Turkey.

21. The session was attended by observers from the following international organizations: United Nations Conference on Trade and Development (UNCTAD), World Intellectual Property Organization (WIPO), Cairo Regional Centre for International Commercial Arbitration, Comité maritime international (CMI), International Association of Ports and Harbors (IAPH), International Chamber of Commerce (ICC) and Society for Worldwide Interbank Financial Telecommunication (S.W.I.F.T.).

22. The Working Group elected the following officers:

Chairman: Mr. José-María Abascal Zamora (Mexico);
Rapporteur: Mr. Eu Jin Chua (Singapore).

23. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.68) and a note by the Secretariat (A/CN.9/WG.IV/WP.69).

24. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
4. Preliminary discussion of other possible topics for future work: issues of registration, incorporation by reference, code of conduct for service providers.
5. Other business.
6. Adoption of the report.
I. DELIBERATIONS AND DECISIONS

25. The Working Group discussed the issues of negotiability and transferability of rights in goods in the context of transport documents, with particular emphasis on maritime bills of lading, on the basis of the note prepared by the Secretariat (A/CN.9/WG.1/VP.69). The deliberations and conclusions of the Working Group with respect to those issues are reflected in section II below. The Working Group also discussed the text of draft provisions prepared on those issues, pursuant to the mandate received from the Commission, at a meeting of a joint CMI-UNCITRAL ad hoc group of experts convened by the Secretariat. After discussion, the text of those draft provisions, with some modifications, was adopted by the Working Group. It was noted that the revised draft provisions would be placed before the Commission at its twenty-ninth session, to be held in New York from 28 May to 14 June 1996, for final review and possible insertion in the draft UNCITRAL Model Law on Legal Issues of Electronic Data Interchange (EDI) and Related Means of Communication. The deliberations and conclusions of the Working Group on the draft provisions are set forth in section III below. The text of the draft provisions is annexed to the present report. The Working Group also discussed possible topics to be considered for future work in the areas of EDI and transport law. The preliminary deliberations and tentative conclusions of the Working Group with respect to those topics are set forth in section IV below.

II. CONSIDERATION OF LEGAL ISSUES OF MARITIME TRANSPORT DOCUMENTS IN AN ELECTRONIC ENVIRONMENT

26. At the outset, the Working Group agreed that, pursuant to the mandate received from the Commission and with a view to providing the basis on which the Commission could make an informed decision as to the feasibility of preparing legal rules in the area of transfer of rights by electronic means, it would proceed with a general exchange of information regarding the law and practice of transport documents, with particular emphasis on maritime negotiable and non-negotiable transport documents.

A. Negotiable and non-negotiable transport documents

1. General remarks

27. Views were exchanged regarding the use of negotiable and non-negotiable maritime transport documents. There was agreement in the Working Group that there existed a worldwide trend for the promotion of non-negotiable sea waybills. As to the frequency of use of such non-negotiable documents in practice, the attention of the Working Group was brought to the results of a recent survey conducted by the International Chamber of Shipping (ICS). It was stated that the survey had showed that negotiable bills of lading had virtually passed out of use in certain trades, for example on the Short Sea Liner routes in north-western Europe. On the North Atlantic routes, between North America and western Europe, non-negotiable documents were also used for a very significant majority of shipments. It was pointed out that these were high-volume trades where transit times were short and where the consequent requirements for fast modern documentary procedures encouraged the use of non-negotiable documents.

28. It was also stated, however, that negotiable bills of lading continued to predominate in many other routes or trades. While such a situation might be due in part simply to lack of awareness among shippers, banks, shipowners and agents, of the benefits of sea waybills, the following factors were identified by ICS as contributing to the continued use of negotiable bills of lading: banks' instructions to exporters to demand a full set of negotiable bills of lading for transactions where payment was effected by documentary credit; customs import regulations in some countries, which prescribed negotiable bills of lading; higher rates of revenue stamp duty imposed by some countries on waybills than on negotiable bills of lading; requirements by some countries for original bills of lading to be presented to a consul for legalization; lack of recognition until recently of sea waybills in the Uniform Customs and Practice for Documentary Credits (UCP) and INCOTERMS published by ICC; the fact that the CMI Uniform Rules for Sea Waybills lacked the international convention status of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (hereinafter referred to as the Warsaw Convention) regarding air waybills; non-acceptance, sometimes, by cargo underwriters of waybills as supporting documents for claims in respect of carrier's identity and evidence of contract of carriage; and discouragement by shipping lines, seeking to ensure the payment of freight before releasing the goods, of the use of non-negotiable documents.

2. Legal regime

29. The Working Group engaged in a general discussion about the distinction generally made between negotiable and non-negotiable transport documents in legal theory and about the ways in which that distinction was reflected in transport practice and could be expected to affect the use of electronic communications in that area. It was agreed that the functions performed by transport documents needed to be analyzed with respect to both the contractual relationship between the shipper and the carrier, and the contractual relationship between the shipper and the consignee. A further contractual relationship that required consideration was the relationship between the consignee or the shipper and the credit institutions that might become involved in the financing of the underlying transaction between the shipper and the consignee.

30. Within the legal relationship between the shipper and the carrier, i.e. in the context of the contract of carriage, a document of transport or its functional equivalent was needed first as receipt for the goods by the carrier and as evidence of the contract of carriage. In addition,
the document of transport was needed to embody what
was generally referred to as the "right of control of the
goods", i.e. the right to give instructions with respect to
the goods in transit. It was noted that the term "right of
control" was used as a label indicating the right to give
all sorts of new instructions to the carrier as to the fulfil-
ment of the contract of carriage. For example, the right of
control covered the following instructions: to stop the
goods in transit; to unload, to warehouse or to re-route the
goods; to bring back the goods to the port of embar-
kation; and to deliver the goods to some other person than
the first consignee indicated in the transport document at
any stage of the transit, as well as to change the place of
delivery of the goods. Within the contractual relationship
between the shipper and the consignee, for example in the
context of a contract of sale, the document of transport or
its functional equivalent might be used to embody the
"title" to the goods, i.e. to command the right to claim
delivery of the goods and the fulfilment of the seller's
obligation under the contract of sale.

31. The function of the document of transport as receipt
for the goods by the carrier and as evidence of the con-
tract of carriage was common to all negotiable and non-
negotiable transport documents. As regards the right of
control of the goods, it was generally felt that no doubt
existed as to whether a transport document embodied the
right of control initially vested in the shipper, irrespective
of whether the transport document was labelled "negotia-
able" or not. As to the ways in which the initial right of
control of the goods could be transferred by the shipper,
for example to the consignee in the case where payment
for the goods had been received before shipment or dur-
ing transit, it was observed that the right of control could
be transferred under a non-negotiable transport document,
although such a transfer could be more easily performed
under a negotiable bill of lading. It was stated that the
right of control initially vested in the shipper could be
transferred either through negotiation of a bill of lading,
by operation of a specific clause in the sea waybill or,
after issuance of the sea waybill, through an additional
clause, often stamped on a non-negotiable sea waybill to
indicate that the shipper ceased to have control of the
goods. In the absence of a specific clause, the insertion of
which necessarily required the agreement of the carrier, a
sea waybill would establish the right of control vested in
the shipper but it could not be used to transfer that right.
It was stated that under legal regimes applicable to non-
maritime modes of transport, the right of control was
connected to a certain copy of the transport document.
Transfer of the right of control would be operated by the
transmission of a specified copy of, for example, a con-
signment note under the Convention on the Contract for
the International Carriage of Goods by Road (CMR), or
an air waybill under the Warsaw Convention.

32. The function of the transport document as embody-
ing title to the goods was specific to negotiable bills of
lading. It was pointed out that transactions involving bills
of lading normally linked the transfer of the right of
control with the transfer of property or other possessory
rights in the goods. Bills of lading were, for that reason,
only described as "the link" between the contract of sale
and the contract of carriage. In that respect, it was widely
felt that any attempt to devise a functional equivalent to
the bill of lading as a document of title should recognize
the need to synchronize the transfer of the right of control
under the contract of carriage and the transfer of the
possessory rights under the contract of sale.

33. It was stated that the specific function of the nego-
tiable bill of lading as a document of title, although rec-
ognized throughout the world, was of uncertain legal
origin in many countries, and that it seemed to be rooted
in established practice more than in any rule of law.
Examples were provided, illustrating the fact that the
legal regime of negotiable bills of lading was essentially
a combination of various maritime usages and practices
that had developed over a long period of time. While
those various usages and practices were reflected in statu-
tory law in certain countries and in case law in most
countries, the area of maritime transport documents was
characterized by a lack of uniformity in the applicable
legal regimes, and practice suffered from such a lack of
uniformity. As an example of the difficulties encountered
in practice, it was stated that conflicts might arise as to
which party had the right to stop the goods during transit.
The carrier might be faced with conflicting court orders
from two different countries, based on differing interpre-
tations as to which party held the right of control and the
title to the goods. It was noted that there existed no in-
ternational convention dealing with the rights and obliga-
tions of the various parties involved and it was generally
agreed that the possibility and feasibility of undertaking
the preparation of a uniform legal regime for bills of
lading, with possible extensions to cover other transport
documents, might need to be further discussed by the
Commission (see paragraphs 104-108, below). It was
generally agreed, however, that possible uncertainties and
disparities as to the legal origin of the bill of lading as a
document of title should not deter the Working Group
from attempting to devise a functional equivalent of that
document, for use in an electronic environment. Adopting
the functional-equivalent approach would be neutral with
respect to the need to solve substantive law problems that
might have existed for many years in the context of tra-
ditional paper-based practice. However, it would have the
advantage of providing guidance as to how current prac-
tice should evolve so as not to be made even less satis-
factory by the introduction of electronic communications.

34. As to the way in which the distinction between ne-
gotiable and non-negotiable transport documents operated
in current practice, it was stated that the distinction be-
tween the two kinds of instruments was not always clear
and that one of the effects of the introduction of EDI
might be to blur the distinction further. Examples were
given regarding the obligations that prevailed in various
countries with respect to delivery of the goods. It was
stated that, under the law of certain countries, a transport
document would in any event be regarded as negotiable,
irrespective of whether it was regarded as non-negotiable
in the country where it had been initially issued. As to
banking practice, it was stated that, in many countries,
banks would require a negotiable document of title in
order to ensure that they had a tangible security in the
goods. However, the view was expressed that, under
banking practice, it was not uncommon to accept sea
waybills or other non-negotiable transport documents such as air waybills for the purposes of documentary credit, a practice also recognized under UCP 500. However, it was stated that the legal basis for such banking practice might be found not in the transfer of any right under the transport document but in other contractual relationships between the bank and its customer, for example, in the main account relationship, in an individual agreement granting credit facility, in a specific assignment of its rights by the applicant for the documentary credit, or in any other transaction through which the bank might become pledgee of the goods. It was pointed out that, in most circumstances, acceptance of non-negotiable documents by banks in the context of documentary credit would be determined by the bank’s assessment of the credit-worthiness of the applicant and by the availability of legal mechanisms external to the transport document, through which the bank would obtain the same level of legal safety as would have resulted from the transfer of a full set of original bills of lading.

35. As to the impact to be expected from the use of electronic communications on the above-described practices, it was stated that the use of data messages would further reduce the practical distinction between negotiable and non-negotiable transport documents, at least with respect to transfer of the right of control of the goods. With the exchange of a number of EDI messages between the interested parties being envisaged, for example under the CMI Rules for Electronic Bills of Lading (hereinafter referred to as the CMI Rules), to replace the issuance and transfer of a paper transport document, it was stated that the same messages would be exchanged between the shipper, the carrier, the consignee and the bank, irrespective of whether they would have relied on a negotiable or a non-negotiable document in a paper-based environment.

36. However, it was generally felt that such practical changes to be expected from the introduction of EDI would carry no immediate effect as to the legal distinction between negotiable and non-negotiable transport documents, which prevailed in many countries and entailed a number of mandatory requirements as to the labelling of such documents. In that respect, the attention of the Working Group was brought to the fact that certain EDIFACT messages made it possible to use a number of codes to indicate what rights were transferred with the information contained in the message. It was widely felt that, to the extent possible, the distinction between negotiable and non-negotiable rights would need to be carried over to any functional equivalent to transport documents (for continuation of the discussion, see paragraphs 89-91, below).

3. Multiple originals

37. A question was raised as to how the use of electronic communications could be combined with the current practice to issue more than one original bill of lading. It was pointed out that, in certain countries, such a practice resulted from statutory requirements to issue more than one original, for example with a view to producing an original version of the bill of lading to customs authorities. In response, it was stated that the use of electronic communications would almost necessarily prevent the issuance of multiple originals, since electronic systems would be equipped with security devices intended to prevent such a duplication of messages. It was pointed out that the functional equivalent of a bill of lading would thus be equivalent to a full set of bills of lading. Under current practice, the right of control of the goods could only be exercised by the holder of a full set of bills of lading, but delivery of the goods could be claimed by presentation of only one original bill of lading. While the Working Group widely shared the view that the change to be foreseen with the introduction of EDI should be regarded as an improvement of current practice and a welcome opportunity for a number of States to update their legislation, a question was raised as to whether it was appropriate for the Model Law to encourage the establishment of a new EDI practice, which would not merely imitate paper practice but, in that respect, change it substantially.

38. In response, it was pointed out that, with the development of EDI, the perceived need to protect the issuer against the risk of loss of the original document would no longer exist. In addition, it was stated that the provisions of the draft Model Law and the suggested additional provisions contained in draft article “x” did not affect the statutory provisions that might prescribe the issuance of more than one original in certain States. Moreover, it was stated that the effect of legal rules such as the CMI Rules was not to prohibit the issuance of multiple original bills of lading. While the issuance of multiple originals had not been envisaged, it was not inconceivable under those Rules, although the issuance of several originals would require the issuance of several private keys for the same bill of lading.

4. Combination of paper documents and dematerialized equivalents

39. Questions were raised as to the possible interplay of EDI and transactions effected by transfer of paper documents. It was generally felt that the Model Law might need to address situations in which paper-based and EDI communication techniques would be used concurrently in the context of a given transaction. It was suggested that, in the case where a paper bill of lading was converted into a series of data messages after it had been issued in the form of a paper document, specific provisions were needed to avoid that the original paper document could be used at a later point in the transaction, either in good faith or fraudulently. In response to that suggestion, it was stated that, under the current paper-based practice, changes might also occur during carriage that might require the issuance of a new bill of lading, for example where a shipment originally addressed to a single consignee was subsequently split between several consignees. In such a situation, the original bill of lading would be cancelled and new bills of lading would be issued. The prevailing view, however, was that the issue might be more complex if various modes of communications were used and that specific provisions might be needed. As to how best that issue should be addressed, one suggestion was to incorporate provisions in the text of the draft
Model Law. Another suggestion was to draw the attention of legislators considering possible enactment of the Model Law to the issue by way of a mention in the Guide to Enactment. It was agreed that further consideration should be given to the need to establish rules to avoid discriminating against parties that would continue to rely on paper documentation, and also to solve the potential conflict between rights that might be evidenced, at any point in time, simultaneously in electronic form and in the form of paper documents, and that might be transferred in those different forms. A suggestion was made that a rule should be established to the effect that, at any given point in time, a paper title and its equivalent in electronic form could not circulate simultaneously (for continuation of the discussion, see paragraphs 76 and 92-103, below).

B. Registries

40. The Working Group noted that, in devising a functional approach in establishing rules for an electronic bill of lading (see A/CN.9/WG.IV/WP.69, paras. 49-52), there were in particular two functions inherent in a paper bill of lading that posed particular difficulties; the ability of the holder of the bill of lading to transfer the right of the shipper to control the goods and the ability to transfer the title in the goods. Those two functions required reliable assurance that the right or the title had been transferred to the intended, and no other than intended, person (the "singularity" or "uniqueness" feature of the message). It was thought that, in order to create an electronic equivalent to those two functions that possessed the required singularity, it was necessary to establish a form of "registry" of the information about the transfer, although other means were possible.

41. The discussion covered various ways in which such a registry might be established. One method was the one envisaged in the CMI Rules. Under the CMI Rules, it was the carrier who had the registry function in the sense that the carrier gave a unique secret code ("private key") to the shipper and that the shipper, by possessing that private key, was the only person holding the control of, and the title to, the goods, until, by using that private key, the shipper instructed the carrier to cancel the issued private key and issue a new and unique private key to a new holder of those rights. The party who possessed the private key was thus considered to be the holder of the right of control over the goods and the holder of the title to the goods. Through keeping the information about the private key and by issuing any successive and new private keys, the carrier acted as a registry of unique information about the rights in the goods.

42. Another method for establishing a registry was the one used under the "BOLERO project" (see A/CN.9/WG.IV/WP.69, paras. 79-81). The BOLERO system was similar to the system of the CMI Rules, except that the person who registered and held the information about the person having the rights in the goods was not the carrier but an entity other than the carrier. The involvement of such an entity gave rise to questions such as: on whose behalf the registry was acting; the liability for loss that could be attributed to a failure of the computer program; and the liability for negligence of the registry.

43. It was noted that, while both methods were devised specifically to deal with EDI messages replacing the transfer of bills of lading, the method of the CMI Rules had not been tested in practice and the BOLERO method had not gone beyond being tested as a pilot project involving a small number of selected traders and carriers.

44. Various observations were made with respect to the two methods. Under the CMI Rules, unless special measures were taken, the carrier would have the knowledge about the identity of each successive owner of the goods; that knowledge, it was observed, the carrier did not necessarily have and often did not have in the case of a paper bill of lading. It was said that that knowledge made it easier for the carrier to suspect and detect that the person who presented itself as the holder of the private key was not the rightful owner of the goods. Under the BOLERO project, under which the information about the successive owners of the goods were kept by a person other than the carrier, the question arose as to whether the carrier should have access to the information about the identity of the successive owners of the goods. That question, with respect to which opinions differed, and which would influence the acceptability of the BOLERO project to the users, remained to be answered.

45. The question of the access to information about the sellers and buyers of goods in transit gave rise to a consideration of the broader issue of confidentiality of transport-related information stored in electronic form. The matters that were mentioned in that connection were, in particular: the use of encryption techniques; the access of law-enforcement officers to information; whether under the CMI Rules the goods could be consigned not to a named person but to the bearer of the private key; and the possibility for an endorsee of a bill of lading to conceal from the next endorsee or endorsee the identity of the shipper, which might be done by obtaining from the carrier a new bill of lading on which the endorsee appeared as the shipper. It was generally felt that the issues of confidentiality were influenced by different areas of law such as transport law, criminal law as well as trade usages and that, therefore, it was beyond the scope of the draft Model Law to attempt to provide solutions. Furthermore, whatever systems of registry were to be used, the level of confidentiality and the measures to ensure it would have to be acceptable to the users. In that connection, it was remarked that the question of confidentiality in a registry such as the one under BOLERO, in which information of a great number of transactions were to be kept, was potentially more sensitive than a registry under the CMI Rules, where the information held by the carrier only concerned goods in charge of that carrier.

46. Next, it was observed that, under a paper bill of lading, the carrier was responsible for any misdelivery of goods, i.e. delivery to the person who was not the holder of the bill of lading. That responsibility was said to be essentially the same under the CMI Rules in that the carrier was responsible to ascertain who was the person entitled to take delivery of the goods (by virtue of being
the holder of the private key) and was responsible for delivering the goods to the right person. Because of this parallelism of responsibility there was no need to elaborate special provisions on liability of the carrier for misdelivery under the CMI Rules.

47. Under the BOLERO project, however, the carrier might not be at fault for misdelivery of goods if the reason for the misdelivery was a mistake committed by the person maintaining the registry or a failure of the computer program. Thus, from the viewpoint of cargo owners, BOLERO gave rise to questions such as the distribution of risk for misdelivery between the cargo owner, the carrier and the registry, and the standard of liability in case misdelivery was a consequence of a mistake. An answer to that question was said to be crucial for a successful launching of the project.

48. Yet another type of registry that was mentioned was one used in some States for recording in electronic form transactions in stocks and bonds. Such registries typically functioned under authorization by the State and had the exclusive right and duty to evidence those transactions. A significant difference between such a registry and the registry under the CMI Rules or BOLERO was that the access to the registry for transactions in stocks and bonds was usually restricted to stockbrokers, while the other registries were meant to be accessed by a broader range of commercial persons such as buyers and sellers of goods, freight forwarders or banks.

C. Digital signatures

49. The Working Group heard a presentation on “digital signatures”, i.e. mathematical codes used in electronic communications in order to ensure: that a particular data message originated from a particular person (authentication function); that the data message had not been altered since its creation and transfer (verification of integrity function); and that the recipient could not alter the message received (non-repudiation function).

50. At the outset, it was stated that digital-signature technology was only one of the methods currently used in practice in order to ensure the security of electronic communications and was not necessarily suitable to all types of electronic communications. On the other hand, it was observed, other methods, such as the one relying on the use of hardware-based cryptographic tokens, known in practice as “smartcards”, were not yet fully developed.

51. It was explained that, through the use of particular hardware and software, traders could create a pair of mathematical codes, namely a “private key”, which was known only to its author, and a “public key”, which was known to the public. In addition, it was stated that the digital signature was the result of a combination of a mathematical code created by the originator to secure the uniqueness of a particular message and of the private and public keys of the originator. The recipient of that data message, using particular software separating the message from the digital signature, could verify both the integrity of the data message and the identity of its author.

52. In response to a question that was raised, it was explained that one of the problems arising in the context of the use of digital signatures was the uncertainty existing with regard to public keys of traders. In order to address that problem, the practice developed the use of trusted third parties, known as certification authorities, public or private, the function of which was to issue certificates identifying a trader and assigning it a public key for use in electronic communications. It was observed that the number of certification authorities was growing rapidly. However, in view of the fact that their operation was based on new technology, the efficiency of which would need to be proven by a longer period of use, there still existed some uncertainty as to whether certification authorities would be able to fully address the need for security in electronic communications.

III. CONSIDERATION OF DRAFT MODEL STATUTORY PROVISIONS ON MARITIME TRANSPORT DOCUMENTS IN AN ELECTRONIC ENVIRONMENT

53. The Working Group based its deliberations on the text of a draft article, which had been placed before it in the note prepared by the secretariat for the current session, as a result of a meeting of a CMI-UNCITRAL ad hoc group of experts (A/CN.9/WG.IV/WP.69, para. 95). The text of the draft article read as follows:

“Draft Article ‘x’. Contracts of carriage involving data messages

“(1) This Article applies to any of the following actions in connection with or in pursuance of a contract of carriage:

“(a)(i) furnishing the marks, number, quantity or weight of goods;

(ii) stating or declaring the nature or value of goods;

(iii) issuing a receipt for goods;

(iv) confirming that the goods have been loaded;

“(b)(i) notifying a person of terms and conditions of the contract;

(ii) giving instructions to a carrier;

“(c)(i) claiming delivery of goods;

(ii) authorizing release of goods;

(iii) giving notice of loss of, or damage to, goods;

“(d) giving any other notice in connection with the performance of the contract;

“(e) undertaking, irrevocably or not, to deliver goods to a named person or a person authorized to claim delivery;

“(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;

“(g) acquiring or transferring rights [, including rights of suit,] and obligations under the contract.
“(2) Where a rule of law requires that, when any action in paragraph (1) is carried out, information be in writing or be presented in writing or in a paper document, in order that a person may acquire or fulfil an obligation or acquire or exercise a right in connection with or in pursuance of a contract of carriage, or provides for certain consequences if the information is not in writing, that rule shall be satisfied if the information is contained in one or more data messages.

“(3) If it is intended, through any of the actions in paragraph (1), that a right or obligation is to become exclusively that of one person and if a rule of law requires that, in order to give effect to that intention, information concerning the right or obligation must be communicated to that person in writing or in a paper document, that rule is satisfied if the communication of the information includes the use of one or more data messages, provided a method is also used to give reliable assurance that the right or the obligation has become that of the intended person and of no other person.

“(4) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the communication was made and in the light of all the circumstances, including any agreement between the parties.

“(5) Where a rule of law requires information in connection with a contract of carriage to be stored, communicated, received or otherwise processed, that rule may be satisfied by operation of a registry or of a database [by one of the parties to the contract of carriage or by a third party].

“(6) The provisions of this Article do not apply to the following: [...]."

A. General remarks

54. Before entering into an analysis of the individual provisions of draft article “x”, the Working Group held a general discussion concerning the relationship between draft article “x” and the main body of the draft Model Law. The Working Group also discussed a number of general issues raised by the matters dealt with in draft article “x”, and the manner in which they were dealt with therein.

1. Scope of draft article “x”

55. It was noted, at the outset, that draft article “x” focused on negotiability of rights arising from the contract of carriage of goods, and thus contained provisions of a rather specific nature. The view was expressed that such industry-specific provisions were not consistent with the other provisions contained in the draft Model Law, which were of a general nature and did not establish rules specifically geared to any particular type of trade or commercial transaction. With a view to ensuring consistency with the general approach taken under the draft Model Law, it was suggested that the work should focus on the preparation of provisions dealing with negotiability of rights in goods in general, to be placed in chapter II of the draft Model Law, together with other provisions dealing with the general application of legal requirements to data messages. Furthermore, it was stated that combining in the same model law a set of general provisions along the lines of chapters I to III of the draft Model Law, and specific provisions dealing with transport documents, might raise questions as to the reasons why specific rules were needed only in the area of transport and not in the other areas listed in the definition of the term “commercial” in the footnote to article I. It was suggested that explanations in that respect would need to be included in the Guide to Enactment of the Model Law.

56. In response, it was recalled that the Commission, at its twenty-eighth session, had endorsed the recommendation of the Working Group that the study to be prepared by the Secretariat should focus on EDI maritime transport documents. The prevailing view was that the recommendation made by the Working Group at its twenty-ninth session was particularly appropriate in view of the need for industry-specific provisions in the area of transport of goods by sea. It was pointed out that the carriage of goods was the context in which electronic communications were most likely to be used and in which a legal framework facilitating the use of those communications was most urgently needed. It was also recalled that, throughout the preparation of the draft Model Law, while the Working Group had focused on the general provisions that were necessary to facilitate the use of EDI, it had never excluded the possibility of preparing also industry-specific provisions if the need for such provisions was recognized. It was further recalled that, at the twenty-seventh session of the Commission, while the Working Group had been requested to prepare a draft set of basic “core” provisions regarding the use of EDI for consideration at the twenty-eighth session of the Commission, it had been pointed out that further provisions could be added at a later stage, particularly since EDI was an area of rapid technological development.

57. As to the scope of draft article “x”, it was stated that, while the work should be focused on transferable maritime bills of lading, solutions should also be sought for the transposition of other transport documents, particularly non-negotiable transport documents, in an electronic environment (see A/CN.9/WG.1V/ WP.69, para. 83). It was noted that draft article “x” contained provisions that applied equally to non-negotiable transport documents and to transfer of rights in goods by way of transferable bills of lading. It was generally felt that it should be made clear that the principles embodied in draft article “x” were applicable not only to maritime transport but also to transport of goods by other means, such as road, railroad and multimodal transport. It was noted that the preparation of rules applicable to transport documents and not merely to transferable bills of lading was consistent with the mandate received from the Commission.


58. After deliberation, the Working Group decided to proceed with the preparation of provisions regarding transport documents, along the lines of draft article “x”, the substance of which was found to be generally acceptable. It was agreed that, should the discussion reveal that some of the rules developed for transport documents provided useful guidance as to how the general issues of transfer of rights through electronic communications should be dealt with, further discussion might be needed as to how to incorporate such principles in a more generally applicable provision.

2. Relationship of draft article “x” with other provisions of the draft Model Law

59. As to the possible location of draft article “x” in the Model Law, various suggestions were made as to how best to make it clear in the structure of the text that the Model Law combined rules that were aimed to be of general application, with provisions specifically designed for transport documents and, possibly, with other industry-specific provisions that might be added at a later stage. A proposal was made to place draft article “x” in a separate chapter of the Model Law. That suggestion was objected to on the grounds that it might insufficiently differentiate the general rules contained in chapters I to III and the specific provisions of article “x”. Another suggestion was made to place draft article “x” in an annex to the Model Law. It was stated that the advantage of placing the provisions of draft article “x” in an annex was that it might make it easier to add other industry-specific provisions, possibly to be developed at a later stage. However, a concern was expressed that placing draft article “x” in an annex could have the unintended result of raising doubt as to the legal value of that article, as to its relevance to the rest of the Model Law, and as to the level of approval with which it was met in the Working Group and the Commission.

60. After discussion, the Working Group agreed that the draft article should appear in the Model Law in a way that reflected both the specific nature of the provisions regarding transport documents and their legal status, which should be the same as that of the general provisions contained in chapters I to III of the draft Model Law. It was agreed that placing the two kinds of provisions on an equal footing was necessary in view of the fact that the specific rules would need to be applied cumulatively with the general rules. Of particular relevance in that respect were the requirements contained in chapter II as to the conditions to be met by functional equivalents of "writing", "signature" and "original", which would also be applicable to functional equivalents of bills of lading. The Working Group decided to suggest to the Commission that chapters I to III of the draft Model Law should be embodied as Part I of the Model Law, while draft article “x” should form Part II. It was stated that adopting such a structure would make it easier to add further industry-specific provisions to the Model Law, as the need might arise. In addition, it was agreed that the interplay of draft article “x” and the other provisions of the draft Model Law might need to be explained in the text of the decision to be made by the Commission when adopting the Model Law, and in its recommendation to the General Assembly.

3. Possible extension of the principles embodied in draft article “x”

61. A suggestion was made that it should be possible to derive general rules from draft article “x” (in particular its paragraphs (3) and (4)) with respect to the transfer of rights through the use of functional equivalents of documents of title in an electronic environment.

62. While it was generally agreed that general rules in that respect might be desirable, doubts were expressed as to whether it would be feasible to create functional equivalents for all documents of title merely by extending the principles contained in draft article “x”. For example, it was generally felt that work with respect to such documents of title as bills of exchange and stock exchange certificates might reveal complex problems that could not be solved by simple provisions along the lines of draft article “x”. While those issues might be suitable for future work, to be undertaken in consultation with the banking industry, it was generally felt that the Working Group could not embark in the preparation of such general rules at the current session.

4. Substance of draft article “x”

63. A suggestion was made to add provisions regarding the time as of which possessory rights in goods would be transferred under functional equivalents to bills of lading. It was stated that it might be necessary to establish the point in time when transmission of data messages would carry the legal effect obtained from the physical transmission of a paper bill of lading. That suggestion did not attract sufficient support. It was stated that any attempt to determine the time of transfer of rights in goods would necessarily go into the substance of the legal regime of paper bills of lading, a topic that might be suitable for future work on substantive law (see paragraphs 104-108, below) but that needed not be touched upon when establishing the functional equivalent to a paper bill of lading. It was pointed out that uncertainties as to the legal situation between the time when a paper bill of lading was sent and the time when it was received already existed in paper-based practice. In many countries, legal rules existed regarding the time as of which rights embodied, for example, in a paper bill of lading sent by mail, were transferred to a consignee. It was generally felt that the Model Law should not interfere with such rules. It was noted, in addition, that the draft Model Law already contained an optional rule regarding the time and place of dispatch and receipt of data messages. That rule, currently embodied in draft article 14, was generally regarded as offering a solution for the users that might wish to adopt it, and as constituting sufficient guidance for the States that might consider enacting it.
B. Individual provisions of draft article “x”

I. Paragraph (1)

64. The Working Group found the substance of paragraph (1) to be generally acceptable. A concern was expressed that paragraph (1), which established the scope of draft article “x”, might be too broadly drafted. It was stated that paragraph (1) would encompass a wide variety of documents used in the context of the carriage of goods, including, for example, charter parties. The view was expressed that the inclusion of such documents as charter parties in the scope of article “x” might be regarded as inappropriate under the legislation of certain countries. In response, it was stated that, by dealing comprehensively with contracts of carriage of goods, paragraph (1) was consistent with the decision of the Working Group to cover all transport documents, whether negotiable or non-negotiable, without excluding any specific document such as charter parties. It was pointed out that, if an enacting State did not wish draft article “x” to apply to a particular kind of document or contract, it could make use of the exclusion clause contained in paragraph (6).

65. It was generally agreed that paragraph (1) was of an illustrative nature and that, although the actions mentioned therein were more common in maritime trade, they were not exclusive to such type of trade and could be performed in connection with air transport or multimodal carriage of goods. It was suggested that the illustrative nature of paragraph (1) should be more clearly indicated, by the introduction of the words “including, but not limited to” in the opening words of paragraph (1). It was also agreed that all references to a “contract of carriage” in draft article “x” should be restricted to the carriage of goods.

66. With respect to subparagraph (g), the Working Group considered whether the words “including rights of suit” in square brackets should be retained. In support of retaining those words, it was stated that a reference to the rights of suit might be needed to make it clear that the transfer of certain rights was intended to entail transfer of the corresponding rights to engage legal proceedings. The view was also expressed that mentioning the rights of suit might facilitate the recognition of the rights of persons who were not parties to the contract of carriage, e.g. consignees and their agents, to sue for delivery of the goods. However, the prevailing view was that, under the laws of most countries, transfer of the substantive rights entailed ipso facto transfer of the corresponding “rights of suit”. The retention of the words between square brackets might thus lead to confusion. Furthermore, the Working Group generally agreed that its mandate did not include such vast matters as agency, representation and privity of contract, and that it would be inappropriate for draft article “x” to interfere with national requirements and international conventions on such matters.

II. Paragraph (2)

67. The view was expressed that paragraph (2), which, in essence, mirrored the provisions of article 5, inappropriately focused on the transmission of information. It was stated that, in the context of transport documents, it was necessary to establish not only functional equivalents of written information about the actions referred to in paragraph (1), but also functional equivalents of the performance of such actions through the use of paper documents. It was explained that functional equivalents were particularly needed for the transfer of rights and obligations by transfer of written documents. In response, it was stated that, while article 5 dealt with information in writing, paragraph (2) was precisely intended to address the question whether the actions or functions listed in paragraph (1) could be carried out by electronic means. For example, paragraph (2) was intended to replace both the requirement for a written contract of carriage and the requirements for endorsement and transfer of possession of an electronic bill of lading. It was generally felt, however, that the focus of the provision on the action referred to in paragraph (1) should be expressed more clearly, particularly in view of the difficulties that might exist, in certain countries, for recognizing the transmission of a data message as functionally equivalent to the physical transfer of goods, or to the transfer of a document of title representing the goods. After deliberation, the Working Group decided that the references to “information” in paragraph (2) should be replaced by references to the “actions” referred to in paragraph (1). In response to a suggestion that a reference to written information should be maintained in paragraph (2), it was generally felt that functional equivalents of written information were sufficiently covered by the general provisions of article 5 of the draft Model Law.

68. Various views were expressed and suggestions were made with respect to the substance of paragraph (2). One view was that, while article 5 of the draft Model Law dealt with the situation where the law required information to be in writing, it did not satisfactorily deal with the situation in which, although it was not required by law that information be in writing, a rule of law would provide for certain consequences if such information were voluntarily put in writing. Paragraph (2) might thus provide an opportunity to deal with the latter situation. As they were not necessary in the context of paragraph (2), it was suggested that the words “or provides for certain consequences if the information is not in writing” should be deleted. While some support was expressed in favour of that suggestion, it was generally felt that both of the above-described situations were sufficiently covered by article 5 and by paragraph (2).

69. As a matter of drafting, it was generally felt that wording along the lines of “where a rule of law requires information to be in writing, or provides for certain consequences if it is not, a data message satisfies that rule” might lend itself to misinterpretation. In particular, it was felt that such wording did not make it sufficiently clear that a data message would be regarded as equivalent to writing in both situations where a rule of law required information to be in writing, and where a rule of law provided for certain consequences if that information was not in writing. After discussion, the Working Group agreed that the wording in paragraph (2) should continue to mirror the text of article 5. It was strongly felt, how-
ever, that the attention of the Commission should be brought to the ambiguity potentially arising from the text of article 5.

70. With respect to the reference to “a rule of law” in paragraph (2) and, more generally, in draft article “x”, the view was expressed that the reference to rules of law should be supplemented by a reference to customs and practice. It was pointed out that, in some jurisdictions, the requirements that information should be produced in documentary form did not derive from a “rule of law” but from customs and practices which were so consistently followed that they acquired a de facto authority, even though they might not have been recognized as binding rules by judicial decision. In support of that suggestion, it was observed that parties, such as port authorities, should not be allowed to interfere with the decision of the shipper and the carrier to use data messages in their contract of carriage, by imposing on them arbitrary customs and practices requiring the use of paper documents. That suggestion was objected to on the ground that, if the Model Law were to overrule requirements of custom or practice which were contractual in nature, the Model Law would have the unintended result of forcing parties to use EDI means of communication. It was recalled that, in the context of its discussion of article 5 of the draft Model Law, the Commission had decided that the scope of article 5 should be confined to rules of law. After discussion, the Working Group decided that no reference to custom and practice should be included in paragraph (2). A concern was expressed, however, that a narrow understanding of the words “rule of law” might be inconsistent with the broad meaning of the expression “rules of law” in article 28 of the UNCITRAL Model Law on International Commercial Arbitration, as distinct from the narrower expression “law or legal system of a given State” in that same article. It was noted that the issue might need to be further discussed by the Commission.

71. After discussion, the Working Group was agreed that paragraph (2) should be redrafted to read along the following lines: “Where a rule of law requires that any action referred to in paragraph (1) be carried out in writing or by using a paper document, or provides for certain consequences if it is not, that rule is satisfied if the action is carried out by using one or more data messages”.

3. Paragraph (3)

72. It was pointed out that paragraph (3), in combination with paragraph (4), was intended to ensure that a right could only be conveyed to one person, and that it would not be possible for more than one person at any point in time to lay claim to it. That effect of the two paragraphs was to introduce a requirement which was referred to as the “guarantee of singularity”. It was stated that, if procedures were made available to enable a right or obligation to be conveyed by electronic methods instead of by using a paper document, it was necessary that the guarantee of singularity be one of the essential features of such procedures. Technical security devices providing such a guarantee of singularity would almost necessarily be built into any communication system offered to the trading communities and would need to demonstrate their reliability. However, there was also a need to overcome requirements of law that the guarantee of singularity be demonstrated, for example in the case where paper documents such as bills of lading were traditionally used. It was generally felt that a provision along the lines of paragraph (3) was necessary to permit the use of electronic communication instead of paper documents.

73. The view was expressed that paragraph (3) did not quite achieve its objective in that it merely referred to communicating information concerning the right or obligation. For the reasons discussed in the context of paragraph (2), it was generally agreed that a reference to the transfer of the rights or obligations conveyed in the paper document was needed (see paragraph 67, above). For that purpose, it was proposed to replace the words “information concerning the right or obligation must be communicated” with the words “the right or obligation must be conveyed”.

74. Various proposals were made to improve the drafting of paragraph (3). For purposes of clarity, it was proposed that the words “a right or obligation is to become” should be replaced by the phrase “a right is to be granted to, or an obligation is to be acquired by”. In order to clearly establish the scope of the guarantee of singularity contained in paragraph (3), it was proposed to replace the word “exclusively that of one person” by the words “that of one person and of no other person”. It was further proposed to delete the words “intended” and “intention”, as those words were considered to give rise to questions connected with the definition of intention and the identity of the person having that intention. The following wording was thus proposed for paragraph (3):

“If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if a rule of law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer of a paper document, that rule is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data message, provided a method is used to give reliable assurance that the right or obligation has become that of the intended person and of no other person.”

75. The Working Group based its deliberations on the above-proposed revised version of paragraph (3). An objection was raised with respect to the proposed deletion of the word “exclusively” and its replacement by the words “one person and no other person”. It was pointed out that the latter expression might be interpreted as excluding situations where more than one person might jointly be assigned, in whole or in part, the rights in the goods described in a bill of lading. However, it was realized that, in practice, such situations would not arise, as carriers did not customarily accept to carry goods under a bill of lading which mentioned multiple assignees, so as to avoid the risk of having to deal with conflicting in-

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3Ibid., paras. 231-235.
structural exchanges coming from different consignees. It was also pointed out that the word “person” in the above proposal would not necessarily entail that there could not be multiple consignees, if all parties so agreed. It was pointed out that the word “person” was used, for example, in article 15 of the United Nations Convention on International Bills of Exchange and International Promissory Notes (General Assembly resolution 43/165, annex, of 9 December 1988), without such limiting connotation. It was felt that, in order to avoid misunderstandings as to the meaning of the above-mentioned phrase, the Guide to Enactment of the Model Law should contain a comment to the effect that the reference to “one person” would not exclude joint ownership of rights in the goods or other rights embodied in a bill of lading.

76. The Working Group discussed the method for giving the reliable assurance required by paragraph (3) that “the right or obligation has become that of the intended person and of no other person”. The view was expressed that such a reliable assurance would require preventing the simultaneous use of electronic and paper bills of lading, a situation which was not dealt with by paragraph (3) or any other provision of draft article “x”. It was proposed that a specific provision to that effect should be inserted in draft article “x” (see paragraphs 92-103, below). However, it was stated that, in practice, it would not be cost-effective or meaningful for carriers to conduct transactions both by EDI and by traditional means and that it was unlikely that there would be bills of lading issued in both forms. It was also stated that the parties themselves, and such third parties as banks, would demand the assurance that there was no duplication of a document of title, since no level of confidence would be achieved by any system that permitted the use of both media at the same time. A question was raised as to whether the reliable assurance referred to in paragraph (3) concerned an assurance as to the integrity of the data transmitted through EDI, or whether it concerned an assurance that, in law, the right or obligation was “that of the intended person and of no other person”. In response to that question, it was stated that draft article “x” was not concerned with matters of substantive law, but merely with the system used for transmitting the information or conveying the right or obligation, as the case might be. In that respect, the reliable assurance referred to in paragraph (3) concerned the overall security and reliability requirements of the system as such.

77. It was pointed out that rights or obligations could be assigned by other means than the actual transfer of a bill of lading. In order to clarify that the scope of paragraph (3) was not limited to situations requiring the actual transfer of the document itself, it was agreed that the words “or use” should be inserted between the words “by the transfer” and “of a paper document”. After discussion, the Working Group adopted the text of the revised paragraph (3).

4. Paragraph (4)

78. It was generally agreed that security was a crucial element for the success of an EDI-based system of international trade. The Working Group considered the functioning of possible security devices and mechanisms, such as the use of time-stamping, cryptography, access keys, and digital signature. In that connection, the view was expressed that technological advancements were unpredictable and that, as the Working Group lacked the technical expertise in the field of security of electronic information, it should focus its attention on the system of registry, which was held to be the only reliable system thus far established. The Working Group generally felt that it would not be advisable to refer, in the context of draft article “x”, to any particular security system or mechanism, so as not to tie down the Model Law to technologies that might conceivably become obsolete in the near future. The view was expressed that, however elaborate and craftily formulated, security standards did not provide an absolute guarantee against the possibility of fraud, which also happened in a paper-based environment. In the event the Working Group considered establishing security standards, the Working Group would also have to consider the sanctions that would follow from the non-observance of such standards. In that connection, the view was expressed that the parties involved (shippers, carriers, banks, buyers) would naturally develop a workable solution, as some particular groups (such as banks) had already done or were in the process of doing. It was added that security was primarily a matter of system reliability and liability for its failures. Furthermore, whoever exercised the registry function would be liable for the negligence of its own personnel or for the failure to protect the system from unauthorized use.

79. The substance of paragraph (4) was found to be generally acceptable. It was generally felt that paragraph (4) adequately addressed the issue of security and that it would be difficult, at this stage, to formulate a more precise standard of security that would address all possible problems.

80. As a matter of drafting, the view was expressed that a few amendments were required to harmonize paragraph (4) with the new wording of paragraph (3) as adopted by the Working Group. It was thus proposed to replace the words “the communication was made” by the words “the right or obligation was conveyed”. After discussion, the Working Group adopted the following text of paragraph (4):

“Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any agreement between the parties.”

5. Paragraph (5)

81. It was observed that the text of paragraph (5) had been placed between square brackets, in order to serve as a reminder to the Working Group of the importance of registry systems, which were likely to be used for transferring rights in maritime transport in the future. It was generally felt that future work might be needed with respect to the role of registries, and particularly as regards
their rights and obligations (see paragraphs 112-113, below). However, it was generally felt that a provision along the lines of paragraph (5) was not needed in the Model Law and that its inclusion might raise difficult questions, for example, as to the definition of a registry. It was observed that there was no need to authorize specifically the use of registries, since parties were free to establish a registry and there appeared to be no general rule of law prohibiting their use.

82. After discussion, the Working Group decided to delete paragraph (5). It was agreed that the Guide to Enactment of the Model Law should contain an indication as to the importance and foreseeable role of registries with respect to the transfer of rights and obligations.

6. Paragraph (6)

83. The Working Group found the substance of paragraph (6) to be generally acceptable.

C. Additional provisions proposed for insertion in draft article “x”

I. Application of laws or international transport conventions

84. It was pointed out that, as presently drafted, draft article “x” did not deal directly with the application of certain laws to contracts for the carriage of goods by sea. For example, under the Hague and Hague-Visby Rules, a contract of carriage meant a contract which was covered by a bill of lading. Use of a bill of lading or similar document of title resulted in the Hague and Hague-Visby Rules applying compulsorily to a contract of carriage.

85. It was recalled that a bill of lading was traditionally in the form of a paper document, and that data messages, although functionally equivalent to a bill of lading, were different in nature from a traditional bill of lading. There was general agreement that it was necessary to provide clearly for the applicability to a carriage contract contained in, or evidenced by, data messages, of the rules of law that would have been applicable to the same contract, had it been contained in, or evidenced by, a bill of lading.

86. It was questioned whether the result intended by the proposed addition of draft paragraph (n) to draft article “x” was not already achieved by article 4 of the draft Model Law, which provided that information should not be denied legal effectiveness, validity or enforceability solely on the grounds that it was in the form of a data message. In that connection, a concern was expressed that the proposed addition might be perceived as limiting the scope of article 4 of the draft Model Law. In response, it was observed that, while article 4 of the draft Model Law ensured that information contained in data messages would be given legal effect, that provision did not deal with the substantive rules of law that might apply to a contract contained in, or evidenced by, data messages. It was also recalled that the purpose of such international conventions as the Hamburg Rules, the Hague Rules, the Hague-Visby Rules or the Warsaw Convention was to establish a liability regime applicable to carriers in international carriage of goods by sea or by air. Each of these instruments contained specific requirements governing its applicability to any given contract. In the absence of a provision such as the proposed paragraph (n), it would be possible for a contractual party wishing to exclude the application of any of those instruments, to argue that contracts of carriage contained in, or evidenced by, data messages did not fulfill the requirements posed for the application of the liability regime. It was added that such an undesirable situation would not be avoided only by a provision such as article 4 of the draft Model Law.

87. Views were exchanged as to the reference, in the proposed paragraph (n), to rules “compulsorily applicable” to a contract of carriage, and the meaning of the phrase “that rule shall not be rendered inapplicable” contained therein. It was suggested that a simpler way of achieving the same result would be to provide that rules applicable to contract of carriage evidenced by paper documents should also apply to contracts of carriage evidenced by data messages. In response, it was stated that, given the broad scope of application of draft article “x”, which covered not only bills of lading but also a variety of other transport documents, such a simplified provision might have the undesirable effect of extending the applicability of rules such as the Hamburg Rules and the Hague-Visby Rules to contracts to which such rules were never intended to apply. In the context of the proposed addition to draft article “x”, it was important to overcome the obstacle resulting from the fact that the Hague-Visby Rules and other rules compulsorily applicable to bills of lading would not automatically apply to contracts of carriage evidenced by data messages, without inadvertently extending the application of such rules to other types of contracts.

88. After discussion, the Working Group adopted the proposed paragraph (n). It was agreed that an appropriate comment in the Guide to Enactment of the Model Law should explain the precise scope of the proposed paragraph (n) and clarify that it complemented article 4, without limiting or otherwise affecting the status of that article.

2. Negotiable or non-negotiable character of the rights contained in, or evidenced by, data messages

89. It was recalled that, as previously discussed by the Working Group (see paragraph 36, above), transport
documents were subject to various substantive legal regimes and that, in some jurisdictions, the application of one or other legal regime might depend on whether the document was labelled as "negotiable" or "non-negotiable". A concern was expressed that, since draft article "x" did not contain any requirement for data messages to bear such labels, practical difficulties might arise as to determining the legal regime applicable to a contract of transport contained in, or evidenced by, data messages. With a view to accommodating that concern, it was proposed to add the following provision to draft article "x":

"(*) Where a contract for the carriage of goods under a paper document would have contained the notation 'negotiable' or 'non-negotiable' then the data messages for forming such a contract shall indicate by a code or otherwise if it is 'negotiable' or 'non-negotiable'."

90. Some support was expressed in favour of including the proposed paragraph (*) on the condition that it were amended to indicate whether the negotiability of bills of lading was based on law or contract. In response to a concern that the proposed paragraph (*) dealt essentially with a matter of substantive law, which would better be left for the parties to settle within the framework established by applicable national laws and international conventions, it was stated that the suggested provision did not address directly the issue of negotiability of bills of lading but referred to the will, or obligation, of the issuer to mark transport documents as negotiable or not.

91. The prevailing view, however, was that the suggested paragraph (*) should not be adopted. It was generally felt that the proposed rule unnecessarily interfered with substantive law. It was also felt that adopting such a rule might raise difficulties, particularly in view of the fact that, as previously observed by the Working Group, there might be cases where a given transport document would be regarded as non-negotiable under the laws of the country where it had been issued, and as negotiable in the countries where the goods were delivered. Furthermore, doubts were expressed as to the need for the proposed rule. It was pointed out that paragraph (n) of article "x" provided that, where a rule of law was compulsorily applicable to a contract of carriage which was in, or was evidenced by, a paper document, that rule was not rendered inapplicable to a contract of carriage of goods which was evidenced by one or more data message. Thus, any requirements of substantive law concerning the labelling of transport documents that would have applied to paper documents, would also apply to data messages. It was observed that, in practice, the law applicable to the carriage of goods by sea might require the issuer of a bill of lading to note on it that it was negotiable, but did not usually require that mention be made of the non-negotiable character of a transport document. If the issuer marked the bill of lading as negotiable, the matter was resolved and the draft provision was not necessary. A question might arise in cases where the issuer failed to mark the bill of lading, but the draft provision did not address that situation. After discussion, the Working Group decided not to adopt the suggested paragraph (*).

3. Situations where paper documents and data messages might be used simultaneously

92. The Working Group was reminded of concerns previously expressed by some delegations that paper documents and data messages might be simultaneously used in connection with the same contract of transport (see paragraph 39, above). It was stated that such concerns should be addressed, while the possibility that the parties revert from data message interchange to paper-based transactions should be preserved, if the circumstances so required. It was pointed out that, while the parties to a carriage contract might conduct their transactions through data messages, third parties, such as customs and port authorities, might continue to require that information be provided in paper form. A provision permitting such conversion to paper should thus be contained in the Model Law. The following provision, inspired from article 10 of the CMI Rules, was proposed for addition to article "x":

"(**) Any person who is a party to a contract for the carriage of goods under data messages shall have the option to discontinue the use of data messages, and revert to the use of paper documents for such contract, provided that this would not cause undue delay or cause disruption in the delivery of the goods."

93. Various views were expressed with respect to the merits of the proposed paragraph (**). One view was that the inclusion in article "x" of a rule along the lines proposed was not appropriate. In support of that view, it was observed that the dangers of a hybrid system of communications, namely a system involving both paper and electronic communications, were twofold: that the system might be inefficient or that it might be insecure. If the system were inefficient, e.g. if it presented operational difficulties, parties should be left free to resolve them. If the system were insecure, paragraphs (3) and (4) of article "x" referring to acceptable standards of reliability sufficiently dealt with the matter. With regard to party autonomy, the example was given of the BOLERO system, under which EDI communications were foreseen to take place only among the members of the BOLERO Users Association, while communications with outsiders had to be in paper form. It was observed that there was no reason to impinge on the freedom of such associations to regulate the form of their communications. Moreover, it was observed that the draft provision might, without any good reason, disallow practices in which parties used different means of communications for different purposes.

94. The prevailing view, however, was that the draft provision was useful in that it addressed the fundamental need to avoid the risk of duplicate bills of lading. In support of that view, it was observed that a party, having initially agreed to engage in electronic communications, should be allowed to switch to paper communications if later it became unable to sustain electronic communications. It was stated that, in such a case, party autonomy could produce unfair results in that the stronger party could abuse of its position to force the weaker party to continue EDI communications. In addition, it was observed that the use of multiple forms of communication
for different purposes, e.g. paper for ancillary messages and electronic for the bill of lading, did not pose a problem. Even article 10 of the CMI Rules, from which the draft provision was drawn, allowed the issuer of an electronic bill of lading to require a printout of ancillary messages.

95. Several suggestions were made in order to improve on the draft provision. One suggestion was that emphasis should be placed on the legal effect of the decision of the parties to return to paper communications, rather than on that decision itself, which was a matter to be left to party autonomy. It was suggested that the first sentence of the draft provision should be replaced by language along the following lines: “Any switch between the use of data messages and the use of writing or paper documents, and vice versa, shall not affect the previous paragraphs of this article”. While the suggested amendment was found to contain positive elements, the concern was expressed that it might inadvertently result in applying the Model Law provision in its current version interfered with party autonomy and failed to provide that the parties could use only one means of communication at a time.

96. Another suggestion was that, in order to avoid abuse of the rule and unfair distribution of the cost of switching to paper communications, the rule should be amended so as to provide that the party deciding to “drop down” to paper should bear reasonable costs for its decision. Yet another suggestion was that, in view of the fact that EDI communications were usually based on the agreement of the parties, a decision to return to paper communications should also be subject to the agreement of the parties. That suggestion was opposed to on the ground that a rule along the lines of the draft provision would have to be applied by the bearer of a bill of lading and that it should be up to the bearer to decide whether it preferred to exercise its rights on the basis of a paper bill of lading or on the basis of the electronic equivalent of such a document, and to bear the costs for its decision.

97. Pursuant to the above-mentioned discussion, the Working Group entrusted an ad hoc drafting group with the task of revising the draft provision. The Working Group continued its deliberation on the basis of a revised draft provision, which read as follows:

“The use of data messages for the transfer of rights and obligations in connection with a contract of carriage of goods can be discontinued and substituted by the use of paper documents, and vice versa. Such a substitution shall only take effect after notification of the parties, and shall not affect or relieve the rights and obligations of the parties involved.”

98. Several views and concerns were expressed with regard to the draft provision as revised. One view was that paragraphs (3) and (4) of draft article “x” sufficiently dealt with the risk of duplicate bills of lading. In addition, it was observed that the risk of duplicate bills of lading was also addressed in article 9 of the draft Model Law, which would ensure that data messages were recognized in court as equivalent to bills of lading. In case of fraudulent duplicate bills of lading, the courts would be left to determine which one was the authentic one. In response, it was observed that, while national laws dealt sufficiently with fraudulent bills of lading, they failed to provide certainty with regard to the unconscious issuance of duplicate bills of lading. In that regard, the example was given of the local agent of a party issuing a paper bill of lading, while the main parties, communicating electronically, issued an electronic bill of lading.

99. A concern was expressed that the revised provision dealt not only with the simultaneous use of multiple means of communication, a practice to be discouraged in any case, but that it also interfered with the freedom of the parties to use one or another means of communication. It was stated that the draft provision could override agreements of the parties, in particular since it was not clear yet whether article 10(1) of the draft Model Law would apply to the provisions of the chapter in which the draft provision might be included. In response, it was observed that the first sentence of the draft provision was permissive and did not affect party autonomy in that it used the verb “can”. It was suggested that, in order to avoid interference with party autonomy, the verb “may” might be better used and language along the following lines might be added: “without prejudice to the parties providing otherwise”. Those suggestions were objected to on the ground that allowing parties to deviate from that rule would have the effect of reintroducing the problem which the rule attempted to address, namely the risk of duplicate bills of lading and of the unfair treatment of the party which could not continue communicating electronically.

100. Other concerns expressed with regard to the draft provision as revised included: that the draft provision introduced uncertainty, since it was not clear who should give notification and to whom; and that it might produce undesirable results to all parties concerned in the contract of carriage, shippers, carriers, consignees and financing institutions providing documentary credit, since the words “vice versa” indicated that, upon notification of the other party, a party might switch from paper to electronic communications. In response to the latter concern, it was observed that, while that possibility theoretically existed, the words “vice versa”, in practice, would be meaningless unless the parties had the capacity to communicate electronically.

101. In order to alleviate the above-mentioned concerns, the suggestion was made that the first sentence of the draft provision should be amended to read as follows: “Where data messages are to be used to transfer rights and obligations in connection with a contract of carriage of goods, no paper document affecting such rights is valid unless the data message has been terminated in favour of paper documents”.

102. It was noted that the draft provision as revised still raised some questions, including what would be the context in which data messages could be used to transfer rights and obligations, what was the meaning of the term
"data message method", who would notify whom, how and when. In order to address those questions, a second ad hoc drafting group was requested to revise the provision. The revised provision read as follows:

"Where one or more data message is used to effect the actions in paragraph (1)(f) and (g) of this article, no paper document used to effect such actions is valid unless the use of data messages has been terminated and substituted by the use of paper documents. Such a substitution shall not affect the rights, or relieve the obligations, of the parties involved".

While a concern was expressed that the revised draft provision did not establish any condition for the decision of a party to revert to paper communications, such as the ones included in previous versions of paragraph (**), e.g. notification or absence of undue delay or disruption in the delivery of the goods, the Working Group adopted the revised draft provision and decided that it should be placed immediately after paragraph (2) of draft article “x”.

103. Upon conclusion of its deliberations regarding draft article “x”, the Working Group considered a revised draft of that draft article prepared by the Secretariat to reflect the decisions taken by the Working Group. The text of draft article “x” as adopted by the Working Group is reproduced as an annex to the present report.

IV. PRELIMINARY DISCUSSION OF POSSIBLE FUTURE WORK

A. Future work on issues of transport law other than those concerning electronic data interchange

104. At various points during the discussion it was recalled that treaties on the carriage of goods by sea did not deal, or dealt fragmentarily, with issues such as the functioning of bills of lading and sea waybills and the relation of those transport documents to the rights and obligations between the seller and the buyer of the goods, negotiability and non-negotiability of transport documents, title to goods, retention of title, right of control of goods including the right to stop goods during transit, rights of security created by the transfer of transport documents (see paragraphs 33 and 63, above). Also national laws on the carriage of goods by sea, but for a few exceptions, did not provide comprehensive and harmonized solutions to those issues. Answers were thus largely to be found in usages, customs and case law, which were not harmonized. The consequence was legal uncertainty in practice.

105. It was considered that the Model Law was not the proper place for providing solutions to those issues, since the Model Law applied to trade law in general, while those issues concerned the law of transport.

106. It was generally thought that it would be useful to review current international practices and international texts governing the carriage of goods by sea with a view to preparing modern, harmonized and more comprehensive solutions to those issues. Among the issues on which uniform law might be needed, it was suggested that issues regarding the functions served by transport documents with respect to the transfer of rights and obligations with respect to goods in transit might need to be dealt with in priority.

107. The view was also expressed that work in that area would provide a useful opportunity to discuss issues of liability under the legal regime of carriage of goods by sea. Among the texts that were suggested to be included in the review were the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules); the different regimes based on the International Convention for the Unification of Certain Rules relating to Bills of Lading, 1924 (Hague Rules) and the subsequent amendments to the Hague Rules; the United Nations Convention on the Liability of Operators of Transport Terminals; and the United Nations Convention on International Multimodal Transport of Goods, 1980.

108. The Working Group considered that it was for the Commission to discuss and decide on the desirability of such future work, its scope and the most appropriate methods of work. It was considered important that the work, from its initial stages, should be carried out in close cooperation with relevant organizations, including those that represented the industries concerned, such as the CMI, ICC, the International Union of Marine Insurers (IUMI), the International Federation of Freight Forwarders Associations (FIATA), the International Chamber of Shipping (ICS) and IAPH.

B. Future work on specific issues regarding the use of electronic data interchange and related means of communication

109. Among the topics possibly to be considered for future work by the Commission in the area of electronic communications, the Working Group considered the following: possible standards for digital signatures; issues of registries; incorporation by reference; rights and obligations of service providers; and review of existing international conventions.

1. Possible standards for digital signatures

110. The view was expressed that, aside from those aspects relating to “signature” and reliance on messages that were already dealt with in the draft Model Law, more might need to be done on rules for EDI infrastructure before it could achieve its real potential. This was said to be the case especially in international communications involving remote parties, or transactions in which the speed with which contractual events took place in computer systems would necessitate a major upgrading of legal standards on signatures and, more generally, on authentication as to the source and content of data messages. Such standards might take several forms but most current analyses carried out by practitioners focused on
the expected growth of "certifying authorities", which could be either private or public actors, operating under some appropriate regulatory standards, which could provide grounds on which reliance could be based on digitalized authorization and identification of messages. This was said to be especially important in an age of information service providers, such as the Internet, which would bring into commercial contact remote parties whose only identification capacity was through computer media.

111. While the Working Group felt that work with respect to certifying authorities might be needed, and that such work would probably need to be carried out in the context of registries and service providers, it was generally agreed that it should not embark in any technical consideration regarding the appropriateness of using any given standard.

2. Issues of registries

112. It was stated that the development of harmonized minimum standards that would permit private or governmental registries to interface with each other in cross-border transactions was a key to future development of certain important sectors where electronic communications would be used. Harmonized standards might need to be different for different categories of commercial undertakings. A first step presumably would be to identify key factors that might be necessary for each sector, and then to establish which factors could be provided for in uniform rules. Such an approach could permit collaborative work between UNCITRAL and the International Institute for the Unification of Private Law (UNIDROIT), since the latter would shortly be holding a meeting covering registration of certain types of mobile equipment.

113. It was generally felt that the topic might need further consideration. When examining the feasibility of undertaking work in that area, the following might need to be considered: the standards for authorization of private or governmental registries; the criteria for acceptance (and possibly enforcement) of registrations from one jurisdiction to another; the standards for minimum information required to assure reasonable notice and entitlement to register; the effects of registration and notice on third parties in the country of registration and elsewhere; possibly, the implications of registration on secured interests or other commercial finance rights and obligations; the degree of reliance by third parties on such registration as the basis on which contractual, financial or other obligations or actions would be taken; and the extent to which, if any, third parties would have the right to access registries. Agreement or guidance on international standards before disparate systems were established might have the potential to achieve much greater harmonization and benefits.

3. Incorporation by reference

114. The Working Group was generally agreed that work with respect to incorporation by reference in the context of EDI was needed. The view was expressed that, in any attempt to establish legal norms for such incorporation of reference clauses in data messages, the following three conditions should be met: (a) the reference clause should be inserted in the data message; (b) the document being referred to, e.g. general terms and conditions, had actually to be known to the party against whom the reference document might be relied upon; and (c) the reference document had to be accepted, in addition to being known, by that party. It was generally agreed that the topic of incorporation by reference would appropriately be dealt with in the context of more general work on the issues of registries and service providers.

4. Information service providers

115. It was recalled that in its prior work with respect to the draft Model Law, the Working Group had focused on the relationship between the sender and the recipient of a data message, in an attempt to address the legal significance of such messages and the rights and responsibilities of the sender and recipient. To a great extent, the draft Model Law omitted an essential participant in electronic commerce: the intermediary or information service provider who would be responsible for the interface between transmissions from the sender to the recipient, and who would often provide value-added services such as message logging or date stamping, set security standards for message transmission, and serve an important role with regard to assuring users about the reliability of the communication system.

116. The following were mentioned as possible issues to be considered with respect to service providers: the minimum standards for performance in the absence of party agreement; the scope of assumption of risk by the end parties; the effect of such rules or agreements on third parties; allocation of the risks of interlopers' or other unauthorized actions; the extent of mandatory warranties, if any, or other obligations when providing value-added services.

117. It was widely felt that it would be appropriate for UNCITRAL to examine the relationship between service providers, users and third parties. It was said that it would be very important to direct such an effort toward the development of international norms and standards for commercial conduct in the field, with the intent of supporting trade through electronic media, and not have as a goal the establishment of a regulatory regime for service providers, or other rules which could create costs unacceptable for market applications of EDI.

5. Review of existing international conventions

118. It was stated that the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe had been engaged for several years in a survey of definitions of such notions such as "writing" and "signature" in existing international con-
ventions applicable to international trade. It had often been pointed out that most existing definitions did not apply satisfactorily in the context of the use of EDI. In addition, it was stated that WP.4 had also circulated a questionnaire, which was aimed at assessing, more generally, the nature of obstacles to the increased use of EDI, whether such obstacles might arise from legal, administrative, or other requirements.

119. It was generally felt that it would be particularly appropriate for UNCITRAL to review the results of those two projects undertaken by WP.4, with a view to assessing the desirability and feasibility of undertaking work in those areas. The Working Group expressed the wish that the results of those two projects would soon become available and welcomed the possibility to collaborate more closely with WP.4.

ANNEX

Text proposed for addition to the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and related Means of Communication

(as approved by the UNCITRAL Working Group on Electronic Data Interchange at its thirtieth session, held at Vienna, from 26 February to 8 March 1996)

PART II. RULES CONCERNING TRANSPORT DOCUMENTS

Draft article "x". Contracts of carriage of goods involving data messages

(1) This article applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but without limitation to:

(a) (i) furnishing the marks, number, quantity or weight of goods;
    (ii) stating or declaring the nature or value of goods;
    (iii) issuing a receipt for goods;
    (iv) confirming that goods have been loaded;
(b) (i) notifying a person of terms and conditions of the contract;
    (ii) giving instructions to a carrier;

(c) (i) claiming delivery of goods;
    (ii) authorizing release of goods;
    (iii) giving notice of loss of, or damage to, goods;
    (d) giving any other notice in connection with the performance of the contract;
    (e) undertaking, irrevocably or not, to deliver goods to a named person or a person authorized to claim delivery;
    (f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;
    (g) acquiring or transferring rights and obligations under the contract.

(2) Where a rule of law requires that any action referred to in paragraph (1) be carried out in writing or by using a paper document, or provides for certain consequences if it is not, that rule is satisfied if the action is carried out by using one or more data message.

(3) Where one or more data message is used to effect the actions in paragraph (1)(f) and (g) of this article, no paper document used to effect such actions is valid unless the use of data messages has been terminated and substituted by the use of paper documents. Such a substitution shall not affect the rights, or relieve the obligations, of the parties involved.

(4) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if a rule of law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that rule is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data message, provided a method is used to give reliable assurance that the right or obligation has become that of the intended person and of no other person.

(5) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any agreement between the parties.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be rendered inapplicable to a contract of carriage of goods which is evidenced by one or more data message by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following: [...].
B. Working paper submitted to the Working Group on Electronic Data Interchange at its thirtieth session: note by the Secretariat (A/CN.9/WG.IV/WP.69) [Original: English]

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INTRODUCTION

1. Pursuant to a decision taken by the Commission at its twenty-fifth session, in 1992, the Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (reports of those sessions are found in A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406). The text of the draft Model Law, together with a compilation of comments by Governments and interested organizations (A/CN.9/409 and Add. 1-3) was placed before the Commission at its twenty-eighth session for final review and adoption.

2. At its twenty-ninth session, the Working Group considered a draft Guide to Enactment of the Model Law (the report of that session is found in A/CN.9/407). The Working Group also considered in the context of a general debate on possible future work the issues of incorporation by reference and of negotiability of rights in goods in an electronic environment. As regards incorporation by reference, the Working Group had before it two proposals for a draft provision, one submitted by the observer for the International Chamber of Commerce (A/CN.9/WG.IV/WP.65) and another submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66). After discussion, the prevailing view was that the issue of incorporation by reference was not mature for inclusion in the Model Law and deserved further study. A view was expressed that the issue should be addressed in the context of future work on negotiability of rights in goods (A/CN.9/407, paras. 100-105).

3. With respect to the issues of negotiability and transferability of rights in goods in an EDI context, the Working Group had before it two brief notes, one submitted by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.IV/WP.66) and another submitted by the United States of America (A/CN.9/WG.IV/WP.67).

4. It was noted that the functions of bills of lading that might be affected by the use of EDI communications included those of serving: (a) as a receipt for the cargo by the carrier; (b) as evidence of the contract of carriage with regard to its general terms and the particular details of vessel, loading and discharge ports, and nature, quantity and condition of the cargo; and (c) as a document giving the holder a number of rights, including the right to claim and receive delivery of the goods at the port of discharge and the right to dispose of the goods in transit.

5. The first two functions could be easily performed by EDI since the receipt for the cargo and information about the contract of carriage could be given by means of data messages such as the UN/EDIFACT messages. However, the third function (as document of title) raised difficulties in an EDI environment since, in the absence of a single piece of paper, it was difficult to establish the identity of the exclusive holder to whom the carrier could deliver the goods without running the risk of being faced with a claim by another party for misdelivery. In that regard, the Working Group noted that a central problem in the use of EDI bills of lading was to guarantee the singularity, or uniqueness, of the message to be relied upon by the carrier for delivering the goods. While any data message could probably be rendered unique through the use of cryptography, the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded. The Working Group noted that solutions to that problem might be found in security, time-stamping or similar techniques or through a central registry in which the holder could register its rights.

6. The Working Group also noted that work on negotiability and transferability of documents of title in goods by EDI means could include establishing a preliminary list of areas of commercial practice to be covered, validating agreements for negotiability and transferability of rights in goods through EDI, establishing criteria for parties to be holders in due course for the transfer of rights in goods or subsequently to negotiate such rights through EDI, determining the effect of negotiation of documents of title in EDI, establishing default rules for allocation of risk and electronic registries. With regard to electronic registries, it was noted that they could be governmental, central or private. The purpose, the access, the administrator, the costs, the insurance, the allocation of risks and the security could vary depending on the nature of the registry.

7. The Working Group engaged in a general debate, with a view to identifying the scope of possible future work and issues that could be addressed. With regard to the scope of future work, one suggestion was that the work should cover multimodal transport documents of title since they essentially fulfilled the same functions and raised similar issues. Another suggestion was that, while work could include transport documents of title in general, particular emphasis should be placed on maritime bills of lading since the maritime transport area was the area in which EDI was predominantly practised and in which unification of law was urgently needed in order to remove existing impediments and to allow the practice to develop.

8. In support, it was pointed out that EDI messaging was currently restricted to the exchange of information messages in the North Atlantic maritime routes and could not develop without the support of a legal regime that would validate, and provide certainty about, transport documents in electronic form. For example, it was stated that there was a need to facilitate delivery of the cargo at the port of discharge without production of a paper bill of lading, which was often necessary for a number of reasons. One reason was that the cargo might reach the port of discharge before the documents necessary for delivery. Another reason was that the buyer had to receive delivery and sell the cargo in order to be able to pay the price of the cargo and the freight. In addition, it was stated that there was a need to remove the legal uncertainty as to who bore the risk of the cargo not corresponding to its description when discharged. It was pointed out that usually the shipper provided the description of the

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goods and the bill of lading included a disclaimer that the description was that of the shipper; such disclaimer clauses were not always valid. Moreover, it was stated that there was a need to establish a functional equivalent replicating the uniqueness of the paper bill of lading, which was essential for its function as a title document.

9. Other suggestions were to address all documents of title covering tangible goods (e.g. warehouse receipts), or all documents of title covering tangible and intangible goods, or all negotiable (or even non-negotiable) instruments. In opposition to those suggestions, it was pointed out that covering such a broad range of documents would complicate work since the functions of the respective documents were different, which would make the elaboration of specific rules necessary.

10. After discussion, it was agreed that future work could focus on EDI transport documents, with particular emphasis on maritime electronic bills of lading and the possibility of their use in the context of the existing national and international legislation dealing with maritime transport. After having established a set of rules for the maritime bills of lading, the Working Group could examine the question whether issues arising in multimodal transport could be addressed by the same set of rules or whether specific rules would need to be elaborated.

11. The Working Group then turned to a discussion of possible issues that could be addressed in the context of future work on maritime bills of lading. A number of issues were mentioned. One issue was to ensure the uniqueness of an electronic bill of lading that would allow its “holder” to dispose of the cargo in transit by electronic means while protecting the carrier from the risk of misdelivery. A number of possible ways to address that issue were suggested, including private keys to be used in communications from party to party, electronic certificates, smartcards and registries. With regard to registries, it was pointed out that a legal regime would need to be devised addressing issues such as subject of registration, parties that could register, parties that would have access to the registry and towards whom the registration could produce effects, confidentiality, accuracy and completeness of the information registered, liability for errors and effects on third parties.

12. Another issue was the definition of the holder in an EDI environment. It was pointed out that in a paper context the holder was defined on the basis of physical possession of the paper bill of lading and was protected against good faith acquisition of rights in the goods by third parties in that possession of the bill of lading functioned as notice to third parties. In an EDI environment, where possession was not possible, the holder might be protected by other means (e.g. registration, use of public and private key sets) or might not be protected at all. Another issue involved the rights and obligations of the holder and the issuer of EDI transport documents (e.g. right of the holder to give instructions in transit and obligation of the issuer to receive and execute those instructions). It was pointed out that, in a paper-based environment, the rights of a holder were based on three principles: (a) the bill of lading was conclusive evidence of title in the goods only after endorsement (conclusive evidence rule); (b) the endorsee was the only party entitled to claim delivery of the cargo at the discharge point; and (c) only the endorsee was entitled to instruct the carrier to vary the contract and make another endorsement. In this respect, it was stated that negotiability needed to be studied in the context of trade law, security law and transportation law. It was explained that property would not be of use if acquired under trade law but effectively lost under transportation law because no right of stoppage or control could be exercised.

13. In addition, it was pointed out that the holder could have a right to possess the goods, a property right in the goods, or a right to receive delivery of the goods arising from a sales contract. It was explained that from the point of view of the carrier the most important question was who had possessory title in the goods, in other terms, to whom should the carrier deliver the goods. Yet another issue was the allocation of liability among the shipper, carrier, consignee and, possibly, a registry.

14. Other issues suggested for study were: the effects of transfer of EDI transport documents on third parties (e.g. when transfer is effective towards the carrier, third parties in the chain of endorseses, third parties not shown in the EDI bill of lading); the rights of the rightful holder in case of a wrongful transfer of the goods and the rights of the transferee in case its title proved to be defective (subject to other parties’ rights); timeliness of transfer in an EDI environment; relative priority among multiple claimants of the same cargo; timeliness of messages (e.g. some messages related to precontractual terms might create rights and obligations); incorporation by reference; issues of security (principles of identification, authentication, integrity, non-repudiation) designed to promote negotiability in an open EDI environment. It was stated that the issues of security should be considered with respect to a broad range of issues regarding negotiability. In connection with its discussion of security issues, in particular the use of cryptography, the Working Group agreed that possible future work by UNCITRAL should not affect mandatory rules of national legislation adopted for public policy reasons in certain States to restrict the use of cryptography or the export of cryptography-related techniques.

15. After discussion, the Working Group 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 made with regard to the scope of future work and the issues that could be addressed. A number of other topics were suggested for inclusion in the study, including a report on the potential problems for the use of EDI in maritime transport under existing international instruments and a report on the work undertaken by other organizations in related areas of work. In that connection, the view was expressed that work undertaken within the Comité maritime international (CMI), or the BOLERO project, were aimed at facilitating the use of EDI transport documents but did not, in general, deal with the legal
effects of EDI transport documents. It was stated that particular attention should be given in the study to the ways in which future work by UNCITRAL could bring legal support to the new methods being developed in the field of electronic transfer of rights (A/CN.9/407, paras. 106-118).

16. At its twenty-eighth session, in 1995, the Commission adopted the text of articles 1 and 3 to 11 of the draft Model Law. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide to Enactment of the Model Law, on the agenda of its twenty-ninth session to be held in New York from 28 May to 14 June 1996. It was agreed that the discussion should be resumed at the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

17. With respect to future work in the area of electronic data interchange, the Commission noted that, at its twenty-seventh session, in 1994, general support had been expressed in favour of a recommendation made by the Working Group at its twenty-seventh session that preliminary work should be undertaken on the issue of negotiability and transferability of rights in goods in a computer-based environment as soon as the preparation of the Model Law had been completed. It was also noted that, on that basis, a preliminary debate with respect to future work to be undertaken in the field of electronic data interchange had been held in the context of the twenty-ninth session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide to Enactment at that session.

18. After discussion, the Commission endorsed the recommendation made by the Working Group that the Secretariat should be entrusted with the preparation of a background study on negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents (see paragraph 15, above). The Commission expressed the wish that the requested background study, for the preparation of which the cooperation of other interested organizations such as CMI might be sought, would provide the basis on which to make an informed decision as to the feasibility and desirability of undertaking work in the area.

19. This note contains a preliminary study of the issues of transferable bills of lading in an electronic environment. It was prepared taking into account the work of other organizations, in particular the various reports on the form of bills lading considered by the International Academy of Comparative Law at its XIVth Congress. Cooperation of the CMI was also sought and this note reflects the result of a meeting of an ad hoc group of experts which brought together experts from CMI and the Secretariat of UNCITRAL.2

I. BILLS OF LADING AND OTHER MARITIME TRANSPORT DOCUMENTS

A. In a paper-based environment

20. It should be noted that developments in the present section are not intended to provide a detailed analysis of bills of lading and other maritime transport documents but merely to describe the functions performed by such documents and the requirements that were established in a paper-based environment for the performance of such functions. Requirements as to the form of such documents may result from law or from practice, and may affect legal relationships between the various parties to the contract of carriage and between the parties involved in the underlying sale transaction.

21. Many comparative law developments in this section reflect the proceedings of a session entitled “Current developments concerning the form of bills of lading”, which took place in the context of the XIVth International Congress of Comparative Law held at Athens from 31 July to 6 August 1994 by the International Academy of Comparative Law (hereinafter referred to as “the Academy”) with the participation of leading scholars in the field of maritime transport.3, 4 With respect to developments involving the use of electronic communications to replicate the functions of transferable bills of lading, the Academy noted that what was to be expected was not a mere evolution of the form of bills of lading but the creation of new species of bills of lading.

I. Bills of lading

(a) General remarks and definitions

22. Throughout this note, the terms “bill of lading”, “transferable bill of lading” or “ocean bill of lading” refer to a document used in the international carriage of goods by sea and defined by paragraph 7 of article 1 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (hereinafter referred to as “the Hamburg Rules”). Under that definition, also used in the ECE/FAL Recommendation No. 12 (“Measures to Facilitate Maritime Transport Document Procedures”), “bill of lading” means a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking”. In most if not all legal systems, traditional bills of lading perform three distinct functions. Requirements as to the form of such documents may result from law or from practice, and may affect legal relationships between the various parties to the contract of carriage and between the parties involved in the underlying sale transaction.

2The Secretariat expresses its gratitude to Professor A. N. Yiannopoulos, Eason-Weinmann Professor of Comparative Law, Tulane Law School, New Orleans, Louisiana, and General Reporter of the Session, for his help in the preparation of this note.

functions. First, a bill of lading is a receipt for the goods, i.e. an acknowledgment that the carrier has received the cargo from the shipper for shipment. Second, the bill of lading is evidence of the contract of carriage between the parties. Third, a transferable bill of lading serves as a document of title to the cargo.

23. In addition to applicable legislation of national origin, the legal regime of ocean bills of lading are covered by a variety of international conventions such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels on 25 August 1924 (hereinafter referred to as "the Hague Rules"), which was amended on 28 February 1968 by the Protocol amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (hereinafter referred to as "the Visby Rules"), the Hamburg Rules and the United Nations Convention on International Multimodal Transport of Goods adopted in 1980.

(b) Bill of lading as receipt for the goods

24. In the first instance, a bill of lading is an ordinary receipt by the carrier evidencing that the goods have been received from the shipper in a certain order and condition.\(^5\) It may be noted that the receipt function, which also entails the promise to deliver the goods to the consignee at the place of destination is effective only in the context of the shipper/carrier relationship. That function is not specific to bills of lading and may also be performed by other transport documents that may be created in the context of the legal relationship between the shipper and the carrier of the goods. The receipt function performed by a bill of lading entails form requirements as to its written form and the use of signature. In that respect, a bill of lading is not substantially different from any other written and signed document.

25. Neither the Hague-Visby Rules nor the Hamburg Rules expressly state that a bill of lading for the carriage of goods by sea must be written on paper or manually signed. However, both Rules impose on the carrier the duty to "issue" a bill of lading upon the demand of the shipper, refer to "documents", and list the information that must be stated in the bill of lading. Article 1 of the Hamburg Rules expressly states that "‘writing’ includes, inter alia, telegram and telex". As to the signature requirement, paragraph 3 of article 14 of the Hamburg Rules states that "the signature on the bill of lading may be written and signed by the carrier or the carrier’s agent." Such laws often do not mention the effect that the omission of a written signature has on the validity of a bill of lading. In certain countries, however, a bill of lading without a handwritten signature is null. Under certain national laws, the requirement of a signature may be satisfied by the typed or rubber-stamped name of the signer, accompanied by the signer's seal impression. In actual practice, however, this option seems never to be used in ocean bills of lading. In other countries, a writing is required but there is no mention of a signature requirement, and the implication is that a signature is not a requisite formality for the validity of a bill of lading. In yet other countries, an unreadable signature on the bill of lading that does not permit identification of the signer cannot be a receipt for the goods; however, it is not certain that the bill of lading is null in such a case.

(c) Bill of lading as evidence of the contract of carriage

27. While the content of the contract of carriage may vary with the various legal rules that may be applicable under national law, it was noted that "the promise to carry and to deliver the goods given by the master or the shipowner constitutes the core of the contract of carriage as evidenced by the bill of lading".\(^7\) Like the receipt function, the evidentiary function of the bill of lading is not specific to bills of lading. Other transport documents that may be created in the context of the shipper-carrier relationship may perform the same function.

28. Both the Hague-Visby Rules and the Hamburg rules require that a bill of lading issued by the carrier must contain the marks necessary for the identification of the goods; the number of packages or pieces, or the quantity or weight; and the apparent order and condition of the goods. Additional information is often inserted into bills of lading, including: identification of the carrier and of the shipper or consignee; identification of the vessel and its master, of the port of loading, and of the port of discharge; determination of the freight charges and of the number of original bills of lading; reference to the carrier's general terms and conditions; and date and place of issuance.

29. Paragraph (3) of article 15 of the Hamburg Rules states that the absence in the bill of lading of one or more required particulars "does not affect the legal character of the document as a bill of lading provided that it nevertheless meets the requirements" set out in the above-mentioned definition of a bill of lading. However, there may be some uncertainty concerning the effect that the omission of any of the above terms or information has on the validity of a bill of lading. Under the law of certain countries, there are indications that the omission of "essential"\(^9\) terms renders a bill of lading null, whereas the omission of other terms has no effect on its validity.

30. The content of the contract of carriage as evidenced by the bill of lading may also vary with the intent of the parties. A characteristic feature of a paper bill of lading

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in its complete form (often referred to as the “long form”) is the presence of contract clauses printed on the paper document, often in small print on the back of the document. The long form of the traditional (paper) bill of lading is the one predominantly used in many countries. The carrier’s general terms and conditions are ordinarily printed on the reverse side of this form. Short forms of bills of lading commonly incorporate the carrier’s general terms and conditions by reference. In many countries, non-transferable bills of lading, like sea waybills, are typically issued in the short form.9

(d) Bill of lading as title to the goods

31. The function of the bill of lading as a document of title is a unique feature of the bill of lading compared with other transport documents used in commercial transactions. As to the legal relationships affected by that function, it should be noted that it is through its function as document of title that a bill of lading produces effects not only in the context of the shipper/carrier relationship where it was created, but also in the context of the carrier/consignee and buyer/seller relationships.

32. When describing that function, it is often said that the bill of lading represents the goods. That representative function makes it possible to trade with the goods during the period of transit through a unique mechanism for the release of the goods. Delivery is due by the carrier only against surrender of the document that represents the goods. As noted by a leading scholar, “The bill-of-lading pattern for releasing the goods builds on a very simple idea. One unique piece of paper has to be produced by the consignee and thus functions as the key that alone can give access to the hiding-place where the goods are stored ... Against surrender of the document means the simultaneous change of the bill of lading against the goods, described and referred to in the bill of lading at the place of final destination ... From this arrangement, two important consequences follow, building on the symbolic function of the document. It opens up the possibility to trade with the goods also when in transit by using the document as a substitute for the cargo, as the buyer of the bill of lading knows that he finally can change it against the cargo in its physical shape. In principle, this fact also makes it possible for the carrier to know who holds the right to the goods and thus controls the goods”.10 This feature of a bill of lading is particularly important in the ocean carriage of commodities, such as oil or grain which, due to changing market conditions, may change ownership several times during a single voyage.

33. The functions of the bill of lading as title to the goods raise a number of issues.

(i) Number of originals issued

34. In many countries, for a variety of commercial reasons, multiple originals are routinely issued. Of course, when one of the originals is “accomplished,” the others are nullified. However, in such a situation, a valid title to the goods may be held by various parties in various places at the same time. In such a case, there exists an increased risk that the goods be fraudulently claimed during the transit, while the holder of an original bill of lading might still claim delivery of the goods, in good faith, against surrender of the document at the place of final destination of the goods. In order to limit that risk, commercial practice requires the possession of all original bills of lading from the person who claims to have the right to control the goods during transit. Such a practice is recorded, for example, in article 23(a)(iv) of the Uniform Customs and Practice for Documentary Credits (UCP 500) published by the International Chamber of Commerce. However, it was noted that “as a matter of course, the issuance of many originals creates a risk of disturbing the functions of the bill of lading as title to the goods”.11

(ii) Right of control and right to claim delivery of the goods

35. The contract between the shipper and the carrier determines who has what is generally referred to as the “right of control of the goods”, i.e. who is entitled to give instructions with respect to the goods in transit and who has the right to claim delivery at destination. The term “right of control” is used as a label indicating the right to give all sorts of new instructions to the carrier as to the fulfilment of the contract of carriage. The contents of the right of control cover such instructions as to stop the goods in transit, including their withdrawal already at the terminal of departure, to unload, to warehouse or to re-route the goods, and to deliver the goods to some other person than the first consignee indicated in the bill of lading at any stage of the transit, as well as to change the place of delivery of the goods.12

36. The shipper (or “consignor”) has the exclusive right of control from the moment the carrier takes charge of the goods and the consignor retains all originals of the bill of lading. As soon as the consignor has given away at least one original bill of lading, the consignor loses that right of control. A person who buys one original has the right to demand delivery of the goods as soon as they reach the place of final destination. The right to intervene before that time with new instructions belongs only to the person who holds the complete set of original bills of lading.

37. Apart from its “positive” aspects, the right of control also entails an important “negative” (or “exclusive”) aspect. One of the main features of the right of control transferred with the bill of lading is that the person having the right of control must be able to rely on the knowledge that no outsider can interfere with the execution of the contract of carriage. That exclusive aspect is particularly important for banks and other financial institutions financing the underlying sales contract. If the bank has the right of control, it has security in the goods in a way that is similar to possession of the goods themselves.13

10See Grönfors loc. cit., pp. 11-12.  
11Ibid., p. 12.  
12Ibid., p. 13.  
13Ibid., p. 13.
(iii) Link between the contract of carriage and the contract of sale

38. The above-described mechanism of the “right of control” of the goods represented by the bill of lading is often described as linking the contract of carriage between the shipper and the carrier with the contract of sale between the shipper and the consignee. The bill of lading created in the context of the shipper/carrier relationship is an important instrument for the proper execution of the contract of sale in that it commands the right to claim delivery of the goods and the fulfillment of the seller's obligations to deliver the goods. However, under certain national laws, particularly in common law jurisdictions, legal doctrines have created difficulties in conferring independent rights to a party other than the carrier's contracting party and, thus, to bring the consignee into a contractual relationship with the carrier, entitling the consignee to claim the goods. It is in this context that the bill of lading has been recognized as an extremely important tool in international trade, since the possession of at least one original bill of lading would entitle the holder to claim the goods from the carrier. Thus, as noted by a leading scholar, “it is the paper document as such which contains the solution to the problem.”

39. The paper document may also serve another important function, namely to enable buyers of goods to transfer the right to claim those goods from the carrier simply by handing over the paper document to the next buyer. By the use of bills of lading, successive transfers may be achieved. That so-called transferability function of the bill of lading has been internationally recognized, resting upon statutory enactments in bill-of-lading acts or maritime codes. Because rights to the goods may pass from one party to another by the handing over of the bill of lading, in appropriate cases endorsed by the prior holder, a bill of lading does resemble a negotiable instrument. However, the bill of lading is only concerned with the right of the holder to claim the goods from the carrier and not with the other aspects of negotiability. For that reason, the bill of lading is sometimes called a “transferable” or “quasi-negotiable” document.

2. The need for alternatives to bills of lading

(a) Advantages and disadvantages of bills of lading

40. As noted in the general report of the Academy, the advantages of the traditional bills of lading pertain to: the function of the bill of lading as transferable commercial paper that makes the transfer of rights in the goods easy, especially by endorsement and delivery of the bill of lading; the resulting quality of the bill of lading as reliable collateral for maritime financing and documentary credit; the parties' ability to determine who has title to the goods by virtue of a visual inspection of the bill of lading; the high degree of uniformity in the use of bills of lading forms in international trade; and the inclusion of the terms and conditions of the contract of carriage in the bill of lading itself.

41. According to the same source, the disadvantages of the traditional bills of lading are linked with: delayed arrival; high cost; fraudulent issuance of bills of lading; and inaccurate or insufficient information.

42. The modernization of the shipping industry has resulted in accelerated arrival of the goods at the destination port, but not in accelerated arrival of the shipping documents. Transfer of the bill of lading and of the right to claim the goods shipped takes considerable time. The arrival of documents at the port of discharge is usually delayed by a detour to a bank along the way for purposes of a documentary credit. Many countries report that delayed arrival of the bill of lading at the port of discharge is a primary problem with the use of traditional paper bills of lading. This creates jams at ports because the carrier cannot rightfully release the goods until the consignee presents the bill of lading. Delays also create additional costs relative to the custody and insurance of the goods. Yet another side effect of the delayed arrival of the bill of lading is the unauthorized release of the goods without presentation of the bill of lading by the carrier or the port authority. This puts the seller in the unenviable position of not having been paid for the released cargo.

43. Another disadvantage of paper bills of lading is the high cost of issuing and processing the documents. A 1989 report of the Commission of the European Communities estimated that “in the transport industry, the cost of raising conventional documents and the attendant delays involved in their issuance and verification constitute 10 to 15 per cent of total transportation costs.”

44. The ease with which a fake set can be issued is still another disadvantage of traditional bills of lading. A blank form of bill of lading may be used to create and negotiate a fraudulent bill of lading without much difficulty. The defrauder may thus trade in goods that do not exist and he may also obtain bank credit based on nonexistent collateral. Such fraud necessarily entails the forgery of the authorized signatures on the bill of lading. An entire bill of lading may be counterfeited, the signature may be forged, the quantity of the goods may be altered, and the consignor may fraudulently sell the same goods two or three times to different buyers. The above-mentioned examples are by no means exhaustive of the types of fraud that can occur.

45. The inclusion of inaccurate or insufficient information in traditional bills of lading is an ever recurring problem. Discrepancies in bills of lading usually relate to data.

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15Ibid., p. 186.
17Ibid., p. 18.
concerning the goods or the consignee. Such discrepancies delay the release of the goods, because the carrier may have to survey the goods, amend the ship's manifest, and, possibly, amend the bill of lading. A report of the Commission of the European Communities attests to the costly nature of such discrepancies. Costs involved in the completion of documents, inaccuracies in duplication data, and "delays in offices, factories, and at customs account for 10 per cent of the cost of exported finished products."

(b) Substitutes for bills of lading: sea waybills

46. As noted in the general report of the Academy, there is undoubtedly a trend toward an increased use of sea waybills as substitutes for traditional bills of lading. A sea waybill is a non-negotiable document that constitutes evidence of the contract of carriage and of the receipt of the goods by the carrier. It is not a document of title and it cannot be used to transfer ownership of the goods. A sea waybill need not be presented for taking delivery of the goods; the carrier tenders delivery to the named consignee who need only prove his identity.

47. Sea waybills enjoy several advantages over traditional bills of lading. They can travel with the goods; they avoid lengthy and complex documentary processes; and they reduce the carrier’s risk toward the consignee. Sea waybills, however, have also significant disadvantages. They are not negotiable and, although accepted by banks for documentary credit, they do not afford the security that traditional bills of lading provide. A buyer who has prepaid for the goods faces the risk that the seller may direct the carrier to change the identity of the consignee while the goods are in transit. The shipper always has the right to demand under the Hague-Visby Rules that a traditional "shipped" bill of lading be issued and this renders the sea waybill nugatory.

48. Nevertheless, the popularity of sea waybills continues to increase. In many countries, sea waybills are used as an alternative to traditional bills of lading. Unless transferability is essential for a particular carriage, the use of sea waybills is recommendable for the avoidance of delays and costs associated with traditional bills of lading.

B. In an electronic environment

I. The functional approach

49. Consistent with the approach taken by the Working Group in the preparation of the Model Law, the Working Group may wish to envisage the issues related to maritime transport documents using a functional approach. As an analytical tool, the suggested "functional approach" is also consistent with the approach taken by the International Academy of Comparative Law in its work on the form of bills of lading. It may be recalled that such an approach, also referred to as 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 could be fulfilled through EDI techniques. For example, with respect to the functions of paper in general, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met.

50. A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the “functional-equivalent” approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a "threshold requirement") is not to be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act".

51. The Model Law does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as the corresponding paper document performing the same function.

52. In the context of maritime transport documents, the functional approach offers the advantage that it can be used as a tool to analyse a variety of documents, irrespective of whether such documents are transferable or not, such as transferable bills of lading and non-transferable sea waybills. Among the advantages to be expected from legal solutions developed under such a functional approach is the neutrality of such rules with respect to the commercial practices developed in the context of paper-based trade.

2. Legal and technical obstacles to dematerialised transport documents

53. The general report of the Academy noted that the replacement of traditional bills of lading with electronic equivalents presupposes the resolution of the following legal and technological issues: the satisfaction of writing and signing requirements; the probative effect of electronic communications; the determination of the place of contract formation; the allocation of liability for errone-

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52For an informative discussion of the nature and function of sea waybills, see "Draft discussion paper: Proposals for reform of Australian bills of lading legislation", prepared by the International Trade Law Section of the Attorney General’s Department of Australia in conjunction with the Department of Transport and Communications (1993), p. 14-16.

ous messages, communication failures, and system breakdowns; the incorporation of general terms and conditions; and the safeguarding of privacy. Among these matters, some have already been addressed in the Model Law, while others may need to be further discussed by the Working Group.

(a) Matters already addressed in the Model Law

54. Among the legal obstacles to the implementation of dematerialised maritime transport documents, those arising from the existence of writing and signature requirements and the probative effect of electronic communications have already been settled in articles 4-8 of the draft UNCTRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication. Matters pertaining to contract formation in an electronic environment are expected to be settled in draft articles 13 and 14, which remain to be discussed by the Commission at its twenty-ninth session.

(b) Possible issues to be discussed by the Working Group

(i) Negotiability or transferability

55. It was noted in the general report of the Academy that “Surmounting the issues of writing and signature in an EDI 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.” Under the legal rules that govern negotiable bills of lading, rights in goods, such as ownership, are conditioned by the physical possession of an original paper document, the traditional bill of lading. That same report noted that “There 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.” 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.” Having noted that “The CMI Rules attempt to obviate the paper title requirement by stating that an electronic transfer ‘shall have the same effect as the transfer of such rights under a paper bill of lading’”, the report indicates that “the difficulty with this provision is that mandatory rules of law cannot be discarded by mere agreement of the parties, because they serve other useful purposes, such as the protection of third parties. In jurisdictions in which physical endorsement and delivery of a document of title are

56. It is submitted that, when attempting to devise a functional equivalent to the transferable bill of lading by way of a model statutory provision, the Working Group might decide not to solve all existing difficulties as to the legal regime of paper-based bills of lading. In particular, the Working Group might wish to consider that all the issues regarding the linkage between the contract of carriage and the contract of sale are not currently solved with respect to paper bills of lading. It was noted by a leading scholar that “The transfer of title to goods is a difficult legal problem and one for which there is no international convention or agreement to serve as a common denominator. Indeed, the latest international convention dealing with the sale of goods, the United Nations Convention on Contracts for the International Sale of Goods of 1980, in article 4(b), expressly declares that it is not concerned with ‘[the effect which the contract may have on the property of] the goods sold’. Similarly, the rules for the interpretation of the most commonly used trade terms, sponsored by the International Chamber of Commerce [the INCOTERMS] also refrain from dealing with that matter.”

57. Should the Working Group decide not to deal with the implications of bills of lading with respect to the ownership of the goods under the contract of sale, and focus its attention on the transferability function performed by the bill of lading under the contract of carriage, its decision would be consistent with the functional-equivalent approach taken during the preparation of the Model Law. It may be recalled that the Working Group decided that the adoption of the functional-equivalent approach should not result in imposing on users of electronic means of communication more stringent standards (and the related costs) than in a paper-based environment.

58. Within the contract of carriage, the bill of lading as title to the goods (as described in paragraphs 31-39, above), can be characterized as a transferable promise by the carrier to deliver the goods exclusively to the holder of an original statement recorded in a unique document or set of documents. The Working Group may wish to consider that such characteristics constitute a variant, or a specific combination, of characteristics already discussed, at a higher level of generality, in the context of the preparation of the Model Law, especially under the rubrics “authentication” and “original”.

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21Ibid.


23CMI Rules, article 7(d).


(ii) General terms and conditions

59. General terms and conditions are typically found on the reverse side of the long-form paper bill of lading. In the EDI context, data is necessarily compressed, so additional terms and conditions would not normally be transmitted. A solution to that difficulty is "to incorporate the standard terms in a communication agreement between the trading partners." (A/CN.9/333, para. 67) Such agreements are commonly known as master agreements. In the absence of such agreements, substantive law, the course of dealing between the parties, and usage of trade may fill the gaps in the electronic transmission.

60. As the Working Group noted during the preparation of the Model Law, electronic means of communication are not equipped, or even intended, to transmit all the legal terms of the general conditions that were printed on the backs of paper documents traditionally used by trading partners (A/CN.9/360, para. 91). The Working Group may find it appropriate to resume its discussion of the issue of incorporation by reference in the context of bills of lading. As an example of an incorporation clause, the following text discussed in the context of the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe, also quoted by a leading scholar, may be considered:

"The terms of the transport operator's/carrier's standard conditions of carriage (including those relating to pre-carriage and on-carriage) and tariff applicable on the date of taking in charge of the goods for transportation, are incorporated herein as well as any international convention or national law which is compulsorily applicable to the contract evidenced in this document.

"A copy of the transport operator's/carrier's standard conditions of carriage applicable hereto may be inspected or will be supplied on request at the office of the transport operator/carrier or their principal agents."27

(iii) Liability for erroneous messages, communication failures and system breakdowns

61. The general report of the Academy noted that "a question that must be addressed before parties will commit themselves to electronic transactions is who bears the liability for erroneous messages, failures in communications, and system breakdowns (A/CN.9/333, para. 76). Liability must be apportioned in a fair and predictable manner before carriers and other parties to international shipping transactions will accede to the widespread use of EDI".28

62. That report also noted that "one major drawback of the CMI Rules is the absence of provisions governing apportionment of liability".29 The report, which was prepared against the background of an earlier draft of the Model Law, which contained provisions on liability, welcomed the guidance provided in draft article 15 of the Model Law under which the parties were liable for direct damage caused by failure to follow the rules, except when the failure was caused by unforeseeable circumstances beyond a party's control. The Working Group may wish to discuss whether it would be appropriate to reintroduce such a rule in the context of provisions dealing with functional equivalents to maritime transport documents. Additional issues to be discussed might involve whether the parties should be exempted from liability for special, indirect or consequential damages and the issue of who is liable in the event of systems breakdown. As noted in the general report of the Academy, "even though a situation may fall under the force majeure exception, someone must bear the burden of the loss, particularly if innocent third parties are involved".

(iv) Privacy

63. The general report of the Academy states that "most major international trading and shipping companies have historically maintained a cloak of secrecy, and would be agnostic to have their trading patterns or methods, or pricing, subject to examination by competitors. Because of such concerns, a single central registry that would accumulate data on all trading would present unacceptable hazards. Indeed, such concerns were part of the reason the SeaDocs experiment failed".30 Certain authors, however, believe a central registry system that makes the data accessible to the public is a desirable trait that would increase the secondary market for goods in transit. It has also been suggested that the information in a central bill of lading registry must become public and acquire the legal status of public notice in order to protect banks and other secured lenders who take security interests in goods negotiated under electronic bills of lading.31 Privacy concerns do persist. The carrier registry system envisioned by the CMI Rules reduces the privacy concerns to a certain extent because each carrier would only maintain trade data for its own shipments, rather than having all trade data for trades worldwide in one registry. Domestic legislation criminalizing or otherwise punishing unauthorized access, use, or modification of electronic data provides a deterrent against invading another's computerized files. Existing laws do not, however, address concerns over an electronic communications systems that contemplates access of the data in the registry by its members or by the public. For a system of electronic bills of lading to gain widespread acceptance, those privacy concerns must be met.

64. In view of the fact that issues of privacy and data protection have not been dealt with in the Model Law, the Working Group may wish to consider whether specific provisions dealing with those issues might be needed in the context of provisions establishing functional equivalents to maritime transport documents.

29Ibid.
30Ibid., p. 40.
31Ibid.
(c) Conclusions

65. The following conclusions were reached by the International Academy of Comparative Law in its general report on bills of lading:

"The main thrust of the national reports and of the general report relates to the use of electronic bills of lading in lieu of the traditional documents. This current development concerning the form of bills of lading has already given rise to a rich technical and legal literature. [...] National reports discuss, and the general report summarizes, the advantages of electronic bills of lading that are many, including lower cost, higher efficiency, improved security, and speedier delivery of goods at the end of the voyage. Nevertheless, electronic bills of lading are not in use in any of the reporting countries and, [with one exception], there is no provision for implementation of electronic bills of lading in the near future. The main obstacle is what has been termed traditional inertia.

"The legal problems that electronic bills of lading involve are few and relate to the need for legislative authorization attributing to electronic communication the function of traditional writing and signature requirements, determining the probative effect of electronically generated prints, and establishing the negotiability of electronic bills of lading. These legal problems may be easily resolved. However, legislative action cannot alone promote the generalized use of electronic bills of lading.

"The use of electronic bills of lading is, essentially, a business rather than a legal decision. The law may provide the legal framework for the function of electronic bills of lading in the same way and with the same effects as the traditional bills of lading. However, business interests will eventually determine whether the availability of, and the economic incentives for, the use of electronic bills of lading outweigh concerns for privacy and the safeguarding of trade secrets, for accuracy of information, and for security of transactions and acquisition. Such concerns call for technological rather than legal solutions".35

II. PREVIOUS ATTEMPTS TO DEAL WITH ISSUES OF BILLS OF LADING IN AN ELECTRONIC ENVIRONMENT

66. 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 solve the problems that arise from the difficulty to reproduce the functions of a traditional paper-based bill of lading in an electronic environment. These attempts have been made using two different approaches: an indirect approach that encourages the use of substitutes to transferable bills of lading and a direct approach that relies on various methods used to reproduce the functions of transferable bills of lading in an electronic environment.

A. The indirect approach: use of substitutes for bills of lading

1. ICC INCOTERMS

67. The willingness to promote the use of substitutes for traditional bills of lading can be noted in the latest revision of the INCOTERMS published by the International Chamber of Commerce in 1990 (ICC INCOTERMS). The traditional reference to bills of lading has been replaced by a reference to "the usual transport document" with examples given, such as a "negotiable bill of lading, a non-negotiable sea waybill or an inland waterway document". Thus INCOTERMS no longer contain a requirement that the maritime transport document must be a transferable bill of lading. The introduction to the INCOTERMS draws specific attention to the fact that: "in recent years, a considerable simplification of documentary practices has been achieved. Bills of lading are frequently replaced by non-negotiable documents similar to those which are used for other modes of transport than carriage by sea. These documents are called 'sea waybills', 'liner waybills', freight receipts or variants of such expressions. These non-negotiable documents are quite satisfactory to use except where the buyer wishes to sell the goods in transit by surrendering a paper document to the new buyer. In order to make this possible, the obligation of the seller to provide a bill of lading under CFR and CIF must necessarily be retained. However, when the contracting parties know that the buyer does not contemplate selling the goods in transit, they may use CPT and CIP where there is no requirement to provide a bill of lading." The revised INCOTERMS also advance the concept of an "equivalent electronic message" as a replacement for the traditional paper document.

2. Revision of ECE/FAL Recommendation No. 12

68. The Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe, at its ninth session in March 1979, adopted recommendation No. 12 "Measures to facilitate maritime transport documents procedures". This recommendation sought a change in official and commercial practice in order to minimize the use of transferable transport documents and encourage the use of alternative sea waybills or other non-transferable transport documents. It also sought to encourage the use of single original, blank back and standard transport documents. At its thirty-seventh session in March 1993, the Working Party approved a new revised recommendation 12. The revision took into account changes in trade and administrative practices and

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35In the United Kingdom of Great Britain and Northern Ireland, the Carriage of Goods by Sea Act 1992 empowers the Secretary of State to make provisions for the application of the Act to cases where a telecommunication system is used for effecting transactions.

69. The operative part of the recommendation reads as follows:

"... [I]t is suggested that the commercial parties should:

(i) appreciate the advantages and encourage the use of the non-negotiable sea waybill instead of the bill of lading, where goods are not traded in during the course of transit;

(ii) appreciate the disadvantages of using the negotiable bill of lading when not essential to the commercial transaction and consequent disadvantages, cost and risk of achieving release of the goods at destination against a bank letter of indemnity in the absence of an original bill of lading;

(iii) welcome the trend on the part of carriers to refer to the terms and conditions of the contract of carriage (the small print on the reverse of a Bill of lading) by reference only (short form/blank back document), noting that such terms and conditions are not negotiable except perhaps in case of a charter and are influenced by the appropriate international conventions;

(iv) require a negotiable bill of lading—or its electronic equivalent—only in cases where the goods to which it relates are traded in during course of transit, noting the possibilities offered by the registry schemes [...], and that this is a development which takes advantage of the benefits offered by EDI and is of sufficient standing to be attractive to both commerce and administration;

(v) consider the advisability as an anti-fraud measure of requiring a negotiable paper maritime transport document to be issued in a set of one original only.

In turn administrative authorities should:

(i) appreciate the possibility of administrative needs or mandatory demands (including those in domestic law and/or international conventions) being met by the non-negotiable sea waybill in preference to the negotiable bill of lading;

(ii) consider the possibility of developing legislation making possible the replacement of a paper maritime transport by an equivalent electronic message.

Both the commercial parties and administration authorities should appreciate the advantages, whether concerning paper transport documents or "equivalent electronic messages", of the use of WP. 4/Recommendation No. 8 "Unique identification code methodology (UNIC)" which seeks to simplify trade procedures and give greater security."

B. The direct approach: imitation of bills of lading in an electronic environment

1. The SeaDocs experiment

70. SeaDocs Registry Limited was a London-based Delaware corporation formed by Chase Manhattan Bank and INTERTANKO, an association of independent oil tanker operators, for the purpose of electronically negotiating bills of lading issued for oil shipments.34 It has been called "the first serious effort by a major concern to facilitate electronic transfer of negotiable bills of lading". The project, which started in 1986, lasted less than one year. Under the SeaDocs system, the carrier issued a traditional bill of lading. This bill of lading was immediately taken out of circulation and deposited with SeaDocs, which functioned as a depositary-custodian of the paper based original bill as well as a registry of bill of lading negotiations. SeaDocs acted as the agent for all parties in the shipping transaction, with authority to endorse the bill of lading and effectuate transfers of ownership during transit. As agent, SeaDocs also had authority to deliver the original paper bill of lading to the final consignee.

71. Electronic communication entered the picture to effectuate transfers of ownership during transit. When SeaDocs received the original paper bill of lading from the shipper, it issued a "test key" or code to the shipper. When the shipper negotiated the bill of lading, it notified SeaDocs by computer and gave the buyer a portion of the test key. The buyer would also notify SeaDocs. Only after receiving and testing both messages did SeaDocs record in the registry the name of the buyer as the new owner. SeaDocs also recorded this information on the original paper bill of lading in its possession. When the goods arrived at their destination, SeaDocs transmitted a code to the carrier and to the last owner of record. This code allowed the owner to claim delivery of the goods.

72. SeaDocs did not eliminate paper documents entirely due to the apparent legal difficulties of doing so. In discussions regarding the SeaDocs project before it was implemented, Chase Manhattan Bank maintained that SeaDocs operations would be legal under the current law governing the transfer of bills of lading because "the Registry 'mirrors' current business practices. . . Because they have the documents [i.e. they retain legal ownership of them], the positions of disputing parties would not be affected under the law." Although the SeaDocs project reported no operational difficulties and required a relatively low registration fee, it failed to attract a sufficient number of trading partners and banks to survive. The reasons given for its failure include: (a) the potential high cost of registry operations' insurance, especially since the participants' liability had not been established; (b) the unwillingness of commodity traders to record their transactions in a central registry subject to inspection by competitors and tax authorities; (c) the reticence by the ultimate buyers of spot crude oil to acquire bills of lading from an entity designed to service intermediaries and

speculators; and (d) the banks' discomfort with the exclusive control of the registry business by one of their competitors.35

2. The CMI Rules for Electronic Bills of Lading

73. The CMI Rules for Electronic Bills of Lading ("the CMI Rules") were adopted in 1990 and briefly discussed by the Working Group at its twenty-fourth session, in 1992. The main feature of the CMI Rules is the creation of an electronic bill of lading by the carrier who also acts as an unofficial registry of negotiations. The CMI Rules are not intended to replace substantive laws governing bills of lading, such as the Hamburg Rules or the Hague Rules. They "are intended to fill gaps in existing master and individual agreements and trading partner rules, and to provide norms to facilitate the enforceability of telecommunications in jurisdictions reluctant to accept such communications as binding".36 A brief overview of the mechanics of the CMI Rules follows.

74. The CMI Rules are contractual in nature. First, parties must agree that the Rules apply to their transactions. Then, after the carrier has confirmed the shipper's "booking note" specifying the shipper's requirements and after the shipper has delivered the goods to the carrier, the carrier issues a receipt for the goods. That receipt is in the form of a "receipt message" transmitted to the shipper's electronic address. The receipt message contains the description of the quantity, quality and condition of the goods, the date and place of receipt of the goods and a reference to the carrier's terms and conditions of carriage. Together with the receipt, the carrier transfers to the shipper a secret code ("private key") to be used for securing the authenticity and integrity of any future instruction to the carrier regarding the goods. The private key can be any technically appropriate code, such as a combination of numbers or letters that the parties might agree on. The party who possesses a valid private key is the "holder" and, by virtue of being the holder of the private key, has the "right of control and transfer" over the goods, i.e. the exclusive right to claim delivery of the goods, to nominate a consignee, to transfer ownership or any of the holder's rights to another party, and instruct the carrier on any other subject concerning the goods.

75. Immediately after receiving the receipt message, the shipper must confirm to the carrier agreement with the description of the goods in the receipt. The shipper does not become the holder until that confirmation is sent. For the transfer of the right to control and transfer the following steps are necessary: a notification from the current holder of the private key to the carrier of the intention to transfer to another person the right of control and transfer; the carrier's confirmation of that notification; the carrier's transmission to the proposed new holder of the description of the goods; notification by the proposed new holder to the carrier of acceptance of the description of the goods; and cancellation by the carrier of the current private key and issuance of a new private key to the new holder. The new holder of the private key can then transfer its rights regarding the goods to a new holder following the same steps. At the port of destination, the carrier must deliver the goods in accordance with the delivery instructions as verified by the private key.

76. It should be noted that the private key is unique to each successive holder. The previous holder does not transfer its private key to the subsequent holder. The carrier acts as a central registry and cancels the previous private key before issuing a new one to the new holder. Furthermore, it should be noted that mere possession of the currently valid private key is not sufficient to transfer the right of control and transfer. The carrier, in communicating with the holder of the key, also verifies whether the instruction for transfer was given by the person identified by the previous holder. Such verification of identity is done by electronic means of authentication in addition to the private key.

77. It has been noted that, to date, the CMI Rules "represent the best attempt to implement negotiable electronic bills of lading. They are not without shortcomings, however. First, they fail to provide a way to readily determine the date and place of the issuance of the bill of lading. As a result, questions of choice of law and jurisdiction are especially difficult to resolve. Second, the Rules fail to address the allocation of liability for a systems breakdown or failure. Third, the Rules place excessive responsibility on the carrier. The carrier must 'acknowledge receipt of the goods, confirm notification of intended transfer of control, transmit information to a proposed new holder, receive the new holder's acceptance message, cancel the old private key and issue the new one, notify the holder of the place and date of delivery, and deliver the goods.' The Rules do not specify the liability that accompanies this responsibility. Without clear apportionment of liability, carriers undoubtedly will be hesitant to assume responsibilities of such magnitude".37

78. The following doubts have been expressed as to whether the private key procedure can legally function as a transferable bill of lading: "The buyer by his acceptance of the receipt message obtains rights in the goods and becomes the new holder. The carrier issues a new private key to the buyer on the assumption that the buyer accepted a genuine receipt message. If a fraudulent receipt message is sent, the buyer may have 'accepted nonexisting rights'. Therefore, 'the rights incorporated into the private key ... depend not only on the lawful acquisition of the private key, but also on the text of the carrier's valid receipt message'. It is doubtful whether this difficulty may be obviated by a stipulation that the receipt message and the private key constitute a negotiable bill of lading, because 'as a rule, the creation of negotiable documents of title is a prerogative reserved solely for the legislature.'"38
3. The BOLERO project

79. 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, "In 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 pilot project started in April 1994. It involved 8 trading chains from Europe to the United States and Hong Kong, with a total of 26 pilot users, and operated on a trial basis from July to September 1995. The objective of the project was to test "the technical, security, and legal aspects of providing bills of lading in an electronic format".

80. The BOLERO pilot project was 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 central 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 summary, it can be said that the BOLERO combines the procedures established in the CMI Rules with a central registry, where the registry function is performed by an independent operator instead of being performed by the carrier.

81. The potential users of a BOLERO system, including exporters, importers, shipping companies, freight forwarders and banks have formed the BOLERO User Association, intended to be a permanent platform for the development of BOLERO. The BOLERO User Association has expressed its intention to carry the concept forward into a full commercial pilot and, on a successful completion, to commercial implementation. It should be noted that the BOLERO User Association constitutes a closed system where users would contractually agree on an acceptable substitute for bills of lading electronically. That contractual framework, X.500 Directory standard and EDIFACT messaging and EDIFACT messaging and also the CMI Rules for electronic bills of lading would be available to all EDI users, even in the absence of a specific contractual framework. It was generally agreed that both approaches should, if possible, constitute additional provisions of the Model Law.

III. POSSIBLE ADDITION TO THE UNCITRAL MODEL LAW

A. Joint CMI-UNCITRAL group of experts

82. Pursuant to the mandate received from the Commission, the Secretariat convened a meeting of a joint CMI-UNCITRAL ad hoc group of experts (hereinafter referred to as "the group of experts"). The main purpose of the meeting was to have a preliminary exchange of views to assist the Working Group in its deliberations as to the form and contents of possible future work by UNCITRAL dealing with the removal of legal obstacles to the use of electronic equivalents to bills of lading. The group of experts met in London on 4 and 5 December 1995.

1. Possible scope of future work

83. The mandate given to the Working Group was to work on issues of negotiability and transferability of EDI transport documents, with particular emphasis on EDI maritime transport documents. A first question to be discussed was whether the study to be prepared should cover exclusively the issues of transferable bills of lading or whether it should also cover non-negotiable transport documents, such as "straight bills" and sea waybills. The group of experts took into account the existing trend in many countries among legal writers and law reformers to promote the use of non-negotiable transport documents in trade rather than to address directly the issues of transferability of rights in an electronic context. It was emphasized that non-negotiable transport documents could be adapted to an electronic environment more easily than transferable bills of lading. It was felt that the work of UNCITRAL at this stage should be focused on the transferable bill of lading, which would also provide solutions for the transposition of other transport documents in an electronic environment. It was also felt that work on bills of lading would provide an opportunity to consider whether general principles developed for electronic bills of lading could be extended to other transferable or negotiable instruments.

84. When laying the ground for future work in the area of bills of lading, it was borne in mind that the draft legislation or general principles to be prepared should be in line with the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication ("the Model Law") and that future developments on substitutes for bills of lading should, if possible, constitute additional provisions of the Model Law.

85. Another question discussed was whether the purpose of future work in the area of bills of lading was to enable the establishment of closed systems where users would contractually agree on an acceptable substitute for bills of lading in an electronic context, or whether it was feasible to envisage the establishment of a legislative environment where the functions traditionally performed by paper bills of lading would be available to all EDI users, even in the absence of a specific contractual framework. It was generally agreed that both approaches should, if possible, be taken simultaneously.

86. The group of experts noted that, when attempting to create successful ways of dealing with the issues of electronic communications and bills of lading, three stages needed to be considered. First, it was necessary to remove any current legal impediment to the use of electronic communications. For that purpose, changes needed to be made to existing laws or regulations (which had been made with paper in mind) so that they could apply equally to electronic transactions and to paper-based transactions. In that connection, it was noted that many of
the existing legal impediments could be removed through an enactment of the general rules contained in the Model Law. However, it was generally agreed that the peculiar nature of bills of lading made it necessary to give them their own individual treatment. Second, it was necessary to invent 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. 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, in the case of transactions that would have used transferable or quasi-negotiable documents to transfer rights which were intended to be exclusive. Third, it was necessary to offer to the potential users of such systems solutions that would be sufficiently attractive in terms of cost and security for a critical mass of commercial operators to start using them. While the second and third stages needed to be dealt with predominantly by the potential users and their commercial and technical experts, changes in law that were necessary at the first stage could only result from action by legislators.

87. It was agreed that the difficulties with dealing with the issues of bills of lading in an electronic environment stemmed from provisions contained in most national laws along the lines of article 14(1) of the Hamburg Rules under which "the carrier must, on demand of the shipper, issue to the shipper a bill of lading". When considering the means through which that obligation could be satisfied by the issuance of one or more data messages, consideration was given to the possibility of extending the definition of a "bill of lading" to cover electronic transmissions, in the same way as article 14(3) of the Hamburg Rules had extended the definition of a "signature". It was recalled that the same questions had been discussed by the Working Group in the preparation of the Model Law and that it had been found that an approach based on such an extension of paper-based concepts was generally inappropriate. Any attempt to introduce such concepts as "electronic bill of lading" or "electronic document" would be flawed, since the concepts of "bill of lading" and "document" were rooted in paper-based practice and there existed no strict equivalent to such concepts in an electronic environment. For example, it was stated that the ordinary meaning of the word "document" was clearly not the same as that of a dematerialised series of electronic impulses. While both paper and data messages constituted a medium that could be used to transfer information, their characteristics as a medium varied greatly. Often a complex process was involved in the use of a single document. For example, the delivery of an endorsed bill of lading constituted one action of communication: the handing over of the document. The same process in EDI could involve a multiple exchange of messages. Under CMI Rules, the "delivery" would involve at least two and probably as many as six communicative actions, not any one of which on its own would replicate the delivery of a paper bill of lading but all of which, when completed, would produce the same result as (and therefore constitute a functional equivalent of) the delivery of the paper bill of lading.

88. Having settled on a functional approach, the group of experts proceeded with a review of the actions performed with respect to traditional bills of lading (e.g. "issuing", "signing", "holding", "endorsing", "delivering" and "surrendering"), with a view to determining how equivalent effects could be achieved in an electronic environment. Issuing a signed bill of lading evidenced receipt of the goods and the promise made exclusively to the shipper by the carrier under the contract of carriage to carry the goods and deliver them to the consignee (in the case of a consigned bill of lading), to the last endorsee of a transferable bill of lading, or to anyone who surrenders the bill of lading if the bill of lading was endorsed "open". Holding a bill of lading was having evidence of exclusive rights and obligations under the contract of carriage in respect of the goods, e.g. the right to claim delivery of the goods, the right of suit against the carrier and the obligations to the carrier in respect of freight, demurrage or storage, as stated in the bill of lading. Endorsing and delivering a bill of lading was renouncing the exclusive right attached to the bill of lading under the contract of carriage and transferring them irrevocably and exclusively to the endorsee. Surrendering the bill of lading was exercising the exclusive right of the holder to claim the goods.

89. The group of experts found that the functions of the bill of lading in the context of the contract of carriage could be performed in an electronic environment (see paragraphs 91-94, below). As to the effect of the legal regime of traditional bills of lading in the contract of sale, it was recalled that there existed no international convention regarding the transfer of title to goods in transit. While it was generally felt that work in that area might be desirable, it was also felt that no attempt should be made to solve such complex issues in the context of the functional equivalent to a bill of lading.

90. It was agreed, however, that, when establishing a functional equivalent to a document of title, particular attention should be given to preserving the functions served by such a document of title for the purposes of the contract of sale. In certain legal systems, under the doctrine of privity of contract, the consignee would not be able to proceed against the carrier unless the consignee could be considered a party to the contract of carriage. Possession of a bill of lading was a traditional way of overcoming that difficulty in that it gave the consignee a right to claim the goods independently of the shipper (or "right to sue"). Furthermore, without a bill of lading, the seller might not be able to satisfy the requirement under article 58 of the United Nations Sales Convention and corresponding national legislation under which a document controlling the disposition of the goods must be tendered to the buyer to make the buyer liable to pay the price for the goods.

2. **Functional equivalent of traditional bills of lading**

(a) **First two functions: receipt for the cargo and evidence of the contract of carriage**

91. In its preliminary discussion of the matter, the Working Group had come to the conclusion that the first two functions could be easily performed by EDI (see
paragraph 5, above). However, with respect to the general terms and other clauses of the contract of carriage, it was noted that the question of incorporation by reference might require further discussion.

(b) Third function: title to the goods

92. It was felt that the main question was to establish the identity of the exclusive holder, or the uniqueness of the message to be relied upon by the carrier for delivering the goods. It seemed that the option was to rely either on some form of registry or on another type of security device. While reliance on registry or on registry was appealing, and was a common characteristic of previous attempts to create electronic bills of lading, it was recalled that these attempts, so far, had not been fully successful. Questions such as the identity of the registrar and the technical feasibility of establishing a worldwide registration system might need to be further discussed by the Working Group.

93. Possible reliance on other security devices might also raise a number of questions. Such a system would presumably involve the use of cryptography and other technical devices. When these questions were discussed in the context of the preparation of both the Model Law and the UNCITRAL Model Law on International Credit Transfers, it was generally agreed that legal rules on issues of electronic data interchange should be "media-neutral", i.e. that they should avoid promoting the use of any particular security measure, thus avoiding the establishment of a link between the effectiveness of the rules and any given state of technical development. Words such as "appropriate" or "commercially reasonable method of authentication" was intentionally used. While such "media neutrality" might be appropriate for general rules on EDI, doubts were expressed as to whether useful work could be done in the field of bills of lading without sufficiently detailed references to the technical means through which "originality" or "uniqueness" of an electronic bill of lading would be secured.

94. A concern expressed during the preliminary discussion held by the Working Group was that "the possibility that the message might be fraudulently or mistakenly multiplied could not be excluded". However, it was generally felt by the group of experts that requirements applying to electronic bills of lading should not necessarily be more stringent than existing requirements imposed on paper bills of lading. In that respect, it was recalled that the "possibility" that a paper bill of lading "be fraudulently multiplied" could not be excluded either.

B. Proposal for insertion of additional provisions in the Model Law

95. After discussion, the CMI-UNCITRAL ad hoc group of experts suggested the following provision for consideration by the Working Group:

"Draft Article 'x'. Contracts of Carriage involving data messages"

“(1) This Article applies to any of the following actions in connection with or in pursuance of a contract of carriage:

“(a) (i) furnishing the marks, number, quantity or weight of goods;

(ii) stating or declaring the nature or value of goods;

(iii) issuing a receipt for goods;

(iv) confirming that the goods have been loaded;

“(b) (i) notifying a person of terms and conditions of the contract;

(ii) giving instructions to a carrier;

“(c) (i) claiming delivery of goods;

(ii) authorizing release of goods;

(iii) giving notice of loss of, or damage to, goods;

“(d) giving any other notice in connection with the performance of the contract;

“(e) undertaking, irrevocably or not, to deliver goods to a named person or a person authorised to claim delivery;

“(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;

“(g) acquiring or transferring rights [including rights of suit] and obligations under the contract.

“(2) Where a rule of law requires that, when any action in paragraph (1) is carried out, information be in writing or be presented in writing or in a paper document, in order that a person may acquire or fulfil an obligation or acquire or exercise a right in connection with or in pursuit of a contract of carriage, or provided for certain consequences if the information is not in writing, that rule shall be satisfied if the information is contained in one or more data message.

“(3) If it is intended, through any of the actions in paragraph (1), that a right or obligation is to become exclusively that of one person and if a rule of law requires that, in order to give effect to that intention, information concerning the right or obligation must be communicated to that person in writing or in a paper document, that rule is satisfied if the communication of the information includes the use of one or more data messages, provided a method is also used to give reliable assurance that the right or the obligation has become that of the intended person and of no other person.

“(4) Where any question is raised as to whether paragraph (3) of this article is satisfied, the standard of reliability required shall be assessed in the light of the purpose for which the communication was made and in the light of all the circumstances, including any agreement between the parties.

“(5) Where a rule of law requires information in connection with a contract of carriage to be stored, communicated, received or otherwise processed, that rule may be satisfied by operation of a registry or of a database [by one of the parties to the contract of carriage or by a third party].]

“(6) The provisions of this Article do not apply to the following: [...]"
C. Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426) [Original: English]

1. Pursuant to a decision taken by the Commission at its twenty-fifth session\(^1\) (1992), the Working Group on Electronic Data Interchange devoted its twenty-fifth to twenty-eighth sessions to the preparation of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (hereinafter referred to as “the Model Law”). Reports of those sessions are found in A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406. 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. In particular, at the twenty-eighth session of the Working Group, during which the text of the draft Model Law was finalized for submission to the Commission, there was general support for a suggestion that the draft Model Law should be accompanied by a guide to assist States in enacting and applying the draft Model Law. The guide, much of which could be drawn from the travaux préparatoires of the draft Model Law, would also be helpful to EDI users as well as to scholars in the area of EDI. The Working Group noted that, during its deliberations at that session, it had proceeded on the assumption that the draft Model Law would be accompanied by a guide. For example, the Working Group had decided in respect of a number of issues not to settle them in the draft Model Law but to address them in the guide so as to provide guidance to States enacting the draft Model Law. As to the timing and method of preparation of the guide, the Working Group agreed that the Secretariat should prepare a draft and submit it to the Working Group for consideration at its twentieth session (A/CN.9/406, para. 177).

2. At its twenty-ninth session, the Working Group discussed the draft Guide to Enactment (hereinafter referred to as “the draft Guide”) of the Model Law as set forth in a note prepared by the Secretariat (A/CN.9/WG.IV/ WP.64) and requested the Secretariat to prepare a revised version of the draft Guide reflecting the decisions made by the Working Group and taking into account the various views, suggestions and concerns that had been expressed at that session. The report of that session is found in A/CN.9/407.

3. At its twenty-eighth session (1995), the Commission adopted the text of articles 1 and 3-11 of the draft Model Law. At the close of the discussion on draft article 11, the Commission noted that it had not completed its consideration of the draft Model Law and decided to place the draft Model Law, together with the draft Guide, on the agenda of the current session. It was agreed that the discussion should be resumed at the current session of the Commission with a view to finalizing the text of the Model Law and adopting the Guide at that session.

4. The annex to the present note contains the revised text of the draft Guide prepared by the Secretariat.


ANNEX

Revised text of the draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication*

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*The draft Guide is geared to the text of the draft Model Law as adopted by the Commission at its twenty-eighth session (articles 1 and 3-11) and to the text as established by the Working Group upon the conclusion of its twenty-eighth session (draft articles 2 and 12-14). Once the Commission has completed its review and adoption of the Model Law, it is the intention of the Secretariat to finalize the Guide to take account of the deliberations and decisions of the Commission. For the convenience of the reader, it may be preferable to publish the text of the Model Law together with the Guide. This has not been done in the present document owing to the availability to the Commission of the text of the draft Model Law in the report of the Commission on the work of its twenty-eighth session (Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), annex II.)
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HISTORY AND BACKGROUND OF THE MODEL LAW


2. The Model Law was prepared in response to a major change in the means by which communications are made between parties using computerized or other modern techniques in doing business (sometimes referred to as "trading partners"). The Model Law is intended to serve as a model to countries for the evaluation and modernization of certain aspects of their laws and practices in the field of commercial relationships involving the use of computerized or other modern communication techniques, and for the establishment of relevant legislation where none presently exists. The text of the Model Law is set forth in annex I to the report of UNCITRAL on the work of its twenty-ninth session.

3. The Commission, at its seventeenth session (1984), considered a report of the Secretary-General entitled "Legal aspects of automatic data processing" (A/CN.9/254), which identified several legal issues relating to the legal value of computer records, the requirement of a "writing", authentication, general conditions, liability and bills of lading. The Commission took note of a report of the Working Party on Facilitation of International Trade Procedures (WP.4), which is jointly sponsored by the Economic Commission for Europe and the United Nations Conference on Trade and Development, and is responsible for the development of UN/EDIFACT standard messages. That report suggested that, since the legal problems arising in this field were essentially those of international trade law, the Commission as the core legal body in the field of international trade law appeared to be the appropriate central forum to undertake and coordinate the necessary action. The Commission decided to place the subject of the legal implications of automatic data processing to the flow of international trade on its programme of work as a priority item.

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4. At its eighteenth session (1985), the Commission had before it a report by the Secretariat entitled "Legal value of computer records" (A/CN.9/265). That report came to the conclusion that, on a global level, there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. It noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arose out of requirements that documents had to be signed or be in paper form. After discussion of the report, the Commission adopted the following recommendation, which expresses some of the principles on which the Model Law is based:

"The United Nations Commission on International Trade Law,

"Noting that the use of automatic data processing (ADP) is about to become firmly established throughout the world in many phases of domestic and international trade as well as in administrative services,

"Noting also that legal rules based upon pre-ADP paper-based means of documenting international trade may create an obstacle to such use of ADP in that they lead to legal insecurity or impede the efficient use of ADP where its use is otherwise justified,

"Noting further with appreciation the efforts of the Council of Europe, the Customs Co-operation Council and the United Nations Economic Commission for Europe to overcome obstacles to the use of ADP in international trade arising out of these legal rules,

"Considering at the same time that there is no need for a unification of the rules of evidence regarding the use of computer records in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far no noticeable harm to the development of international trade,

"Considering also that the developments in the use of ADP are creating a desirability in a number of legal systems for an adaptation of existing legal rules to these developments, having due regard, however, to the need to encourage the employment of such ADP means that would provide the same or greater reliability as paper-based documentation,

"1. Recommends to Governments:

"(a) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records;

"(b) to review legal requirements that certain trade transactions or trade related documents be in writing, whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the transaction or document to be recorded and transmitted in computer-readable form;

"(c) to review legal requirements of a handwritten signature or other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication;

"(d) to review legal requirements that documents for submission to governments be in writing and manually signed with a view to permitting, where appropriate, such documents to be submitted in computer-readable form to those administrative services which have acquired the necessary equipment and established the necessary procedures;

"2. Recommends to international organizations elaborating legal texts related to trade to take account of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation."5

5. That recommendation (hereinafter referred to as the "1985 UNCITRAL recommendation") was endorsed by the General Assembly in resolution 40/71, paragraph 5(b), of 11 December 1985 as follows:

"The General Assembly,

"... Calls upon Governments and international organizations to take action, where appropriate, in conformity with the Commission's recommendation so as to ensure legal security in the context of the widest possible use of automated data processing in international trade; ..."5

6. As was pointed out in several documents and meetings involving the international EDI community, e.g. in meetings of WP. 4, there was a general feeling that, in spite of the efforts made through the 1985 UNCITRAL recommendation, little progress had been made to achieve the removal of the mandatory requirements in national legislation regarding the use of paper and handwritten signatures. It has been suggested by the Norwegian Committee on Trade Procedures (NORPRO) in a letter to the Secretariat that "one reason for this could be that the 1985 UNCITRAL recommendation advises on the need for legal update, but does not give any indication of how it could be done". In this vein, the Commission considered what follow-up action to the 1985 UNCITRAL recommendation could usefully be taken so as to enhance the needed modernization of legislation. The decision by UNCITRAL to formulate model legislation on legal issues of electronic data interchange and related means of communication may be regarded as a consequence of the process that led to the adoption by the Commission of the 1985 UNCITRAL recommendation.

7. At its twenty-first session (1988), the Commission considered a proposal to examine the need to provide for the legal principles that would apply to the formation of international commercial contracts by electronic means. It was noted that there existed no refined legal structure for the important and rapidly growing field of formation of contracts by electronic means and that future work in that area could help to fill a legal vacuum and to reduce uncertainties and difficulties encountered in practice. The Commission requested the Secretariat to prepare a preliminary study on the topic.6

8. At its twenty-third session (1990), the Commission had before it a report entitled "Preliminary study of legal issues related to the formation of contracts by electronic means"(A/CN.9/333). The report summarized work that had been undertaken in the European Communities and in the United States of America on the requirement of a "writing" as well as other issues that had been identified as arising in the formation of contracts by electronic means. The efforts to overcome some of those problems by the use of model communication agreements were also discussed.7

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*Resolution 40/71 was reproduced in United Nations Commission on International Trade Law, Yearbook, Volume XVI: 1985, (United Nations publication, Sales No. E.87.V.4), part one, section D.


9. At its twenty-fourth session (1991), the Commission had before it a report entitled "Electronic data interchange" (A/CN.9/350). The report described the current activities in the various organizations involved in the legal issues of electronic data interchange (EDI) and analysed the contents of a number of standard interchange agreements already developed or then being developed. It pointed out that such documents varied considerably according to the various needs of the different categories of users they were intended to serve and that the variety of contractual arrangements had sometimes been described as hindering the development of a satisfactory legal framework for the business use of EDI. It suggested that there was a need for a general framework that would identify the issues and provide a set of legal principles and basic legal rules governing communication through EDI. It concluded that such a basic framework could, to a certain extent, be created by contractual arrangements between parties to an EDI relationship and that the existing contractual frameworks that were proposed to the community of EDI users were often incomplete, mutually incompatible, and inappropriate for international use since they relied to a large extent upon the structures of local law.

10. With a view to achieving the harmonization of basic EDI rules for the promotion of EDI in international trade, the report suggested that the Commission might wish to consider the desirability of preparing a standard communication agreement for use in international trade. It pointed out that work by the Commission in this field would be of particular importance since it would involve participation of all legal systems, including those of developing countries that were already or would soon be confronted with the issues of EDI.

11. The Commission was agreed that the legal issues of EDI would become increasingly important as the use of EDI developed and that it should undertake work in that field. There was wide support for the suggestion that the Commission should undertake the preparation of a set of legal principles and basic legal rules governing communication through EDI. The Commission came to the conclusion that it would be premature to engage immediately in the preparation of a standard communication agreement and that it might be preferable to monitor developments in other organizations, particularly the Commission of the European Communities and the Economic Commission for Europe. It was pointed out that high-speed electronic commerce required a new examination of basic contract issues such as offer and acceptance, and that consideration should be given to legal implications of the role of central data managers in international commercial law.

12. After deliberation, the Commission decided that a session of the Working Group on International Payments would be devoted to identifying the legal issues involved and to considering possible statutory provisions, and that the Working Group would report to the Commission on the desirability and feasibility of undertaking further work such as the preparation of a standard communication agreement.

13. The Working Group on International Payments, at its twenty-fourth session, recommended that the Commission should undertake work towards establishing uniform legal rules on EDI. It was agreed that the goals of such work should be to facilitate the increased use of EDI and to meet the need for statutory provisions to be developed in the field of EDI, particularly with respect to such issues as formation of contracts; risk and liability of commercial partners and third-party service providers involved in EDI relationships; extended definitions of "writing" and "original" to be used in an EDI environment; and issues of negotiability and documents of title (A/CN.9/360).

14. While it was generally felt that it was desirable to seek the high degree of legal certainty and harmonization provided by the detailed provisions of a uniform law, it was also felt that care should be taken to preserve a flexible approach to some issues where legislative action might be premature or inappropriate. As an example of such an issue, it was stated that it might be fruitless to attempt providing legislative unification of rules on evidence applicable to EDI messaging. It was agreed that no decision should be taken at that early stage as to the final form or the final content of the legal rules to be prepared. In line with the flexible approach to be taken, it was noted that situations might arise where the preparation of model contractual clauses would be regarded as an appropriate way of addressing specific issues (A/CN.9/360, para. 132).


16. The Working Group devoted its twenty-fifth to twenty-eighth sessions to the preparation of legal rules applicable to "EDI and related means of communications" (reports of those sessions are found in documents A/CN.9/373, A/CN.9/387, A/CN.9/390 and A/CN.9/406). The notion of "EDI and related means of communication" is not to be construed as a reference to narrowly defined EDI under article 2(b) of the Model Law but to a variety of trade-related uses of modern communication techniques that might be referred to broadly under the rubric of "electronic commerce". The Model Law is not intended only for application in the context of existing communication techniques but rather as a set of flexible rules that should accommodate foreseeable technical developments. It should also be emphasized that the purpose of the Model Law is not only to establish rules for the movement of information communicated by means of data messages but equally to deal with the storage of information in data messages that are not intended for communication.

17. The Working Group noted that, while practical solutions to the legal difficulties raised by the use of EDI were often sought within contracts (A/CN.9/9/WP.53, paras. 35-36), the contractual approach to EDI was developed not only because of its intrinsic advantages such as its flexibility, but also for lack of specific provisions of statutory or case law. The contractual approach is limited in that it cannot overcome any of the legal obstacles to the use of EDI that might result from mandatory provisions of applicable statutory or case law. In that respect, one difficulty inherent in the use of communication agreements results from uncertainty as to the weight that would be carried by some contractual stipulations in case of litigation. Another limitation to the contractual approach results from the fact that parties to a contract cannot effectively regulate the rights and obligations of third parties. At least for those parties not participating in the contractual arrangement, statutory law based on a model law or an international convention seems to be needed (see A/CN.9/350, para. 107).

18. The Working Group considered preparing uniform rules with the aim of eliminating the legal obstacles to, and uncer-
tainties in, the use of modern communication techniques, where effective removal of such obstacles and uncertainties could only be achieved by statutory provisions. One purpose of the uniform rules is to enable potential EDI users to establish where effective removal of such obstacles and uncertainties should be as secure as possible, so as to facilitate the use of EDI between communicating parties.

19. As to the form of the uniform rules, the Working Group was agreed that it should proceed with its work on the assumption that the uniform rules should be prepared in the form of statutory provisions. While it was agreed that the form of the text should be that of a "model law", it was felt, at first, that, owing to the special nature of the legal text being prepared, a more flexible term than "model law" needed to be found. It was observed that the title should reflect that the text contained a variety of provisions relating to existing rules scattered throughout various parts of the national laws in an enacting State. It was thus a possibility that enacting States would not incorporate the text as a whole and that the provisions of such a "model law" might not appear together in any one particular place in the national law. The text could be described, in the parlance of one legal system, as a "miscellaneous statute amendment act". The Working Group agreed that this special nature of the text would be better reflected by the use of the term "model statutory provisions". The view was also expressed that the nature and purpose of the "model statutory provisions" could be explained in an introduction or guidelines accompanying the text.

20. At its twenty-eighth session, however, the Working Group reviewed its earlier decision to formulate a legal text in the form of "model statutory provisions" (A/CN.9/390, para. 16). It was widely felt that the use of the term "model statutory provisions" might raise uncertainties as to the legal nature of the instrument. While some support was expressed for the retention of the term "model statutory provisions", the widely prevailing view was that the term "model law" should be preferred. It was widely felt that, as a result of the course taken by the Working Group as its work progressed towards the completion of the text, the model statutory provisions could be regarded as a balanced and discrete set of rules, which could also be implemented as a whole in a single instrument. Depending on the situation in each implementing State, however, the Model Law could be enacted in various ways, either as a single statute or in various pieces of legislation.

21. In preparing and adopting the Model Law, the Commission was mindful that the Model Law would be a more effective tool for States modernizing their legislation if background and explanatory information would be 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. The information presented in this Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a statutory device designed to achieve the objectives of the Model Law. Such information might assist States also in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances.

I. INTRODUCTION TO THE MODEL LAW

A. Objectives

22. The decision by UNCITRAL to formulate model legislation on EDI and related means of communication was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of EDI and related means of communication. In certain cases, existing legislation imposes or implies restrictions on the use of modern means of communication. While a few countries have adopted specific provisions to deal with certain aspects of EDI, there exists no legislation dealing with EDI and related means of communication as a whole. This may result in uncertainty as to the legal nature and validity of information presented in a form other than a traditional paper-based document. Furthermore, while sound laws and practices are necessary in all countries where the use of EDI and electronic mail is becoming widespread, this need is also felt in many countries with respect to such communication techniques as telex and telex.

23. Furthermore, the Model Law may help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities among, and uncertainty about, national legal regimes governing the use of such communication techniques may contribute to limiting the extent to which businesses may access international markets.

24. The objectives of the Model Law, which include enabling, or facilitating, the use of EDI and related means of communication and providing equal treatment to users of paper-based documentation and to users of computer-based information, are essential for fostering economy and efficiency in international trade. By incorporating the procedures prescribed in the Model Law in its national legislation for those situations where parties opt to use electronic means of communication, an enacting State would create a media-neutral environment.

B. Scope

25. The title of the Model Law refers to "EDI and related means of communication". While a definition of "EDI" is provided in article 2, the Model Law does not specify what "related means of communication" are envisaged. In preparing the Model Law, the Commission decided that, in addressing the subject matter before it, it would have in mind a broad notion of EDI, covering a variety of trade-related uses of EDI that might be referred to broadly under the rubric of "electronic commerce" (see A/CN.9/360, paras. 28-29), although other descriptive terms could also be used. Among the means of communication encompassed in the notion of "electronic commerce" are the following modes of transmission based on the use of electronic techniques: communication by means of EDI defined narrowly as the computer-to-computer transmission of data in a standardized format; transmission of electronic messages involving the use of either publicly available standards or proprietary standards; transmission of free-formatted text by electronic means, for example through the INTERNET. It was also noted that, in certain circumstances, the notion of "electronic commerce" might cover the use of techniques such as telex and telexy.

26. It should be noted that, while the Model Law was drafted with constant reference to the more modern communication
techniques, e.g. EDI and electronic mail, the principles on which the Model Law is based, as well as its provisions, are intended to apply also in the context of less advanced communication techniques, such as telecopy. There may exist situations where digitalized information initially dispatched in the form of a standardized EDI message might, at some point in the communication chain between the sender and the recipient, be forwarded in the form of a computer-generated telex or in the form of a teletype of a computer print out. A data message may be initiated as an oral communication and end up in the form of a teletype, or it may start as a teletype and end up as an EDI message. A characteristic of EDI and related means of communication is that they cover programmable messages, the computer programming of which is the essential difference between such messages and traditional paper-based documents. Such situations are intended to be covered by the Model Law, based on a consideration of the users' need for a consistent set of rules to govern a variety of communication techniques that might be used interchangeably. More generally, it may be noted that, as a matter of principle, no communication technique is excluded from the scope of the Model Law since future technical developments might need to be accommodated.

27. The objectives of the Model Law are best served by the widest possible application of the Model Law. Thus, although there is provision made in the Model Law for exclusion of certain situations from the scope of articles 5, 6, 7, 13 and 14, an enacting State may well decide not to enact in its legislation substantial restrictions on the scope of application of the Model Law.

C. A "framework" law to be supplemented by technical regulations

28. The Model Law is intended to provide essential procedures and principles for facilitating the use of modern techniques for recording and communicating information in various types of circumstances. However, it is a "framework" law that does not itself set forth all the rules and regulations that may be necessary to implement those techniques in an enacting State. 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.

29. It should be noted that the techniques for recording and communicating information considered in the Model Law, beyond raising matters of procedure 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 was not intended to deal with.

D. The "functional-equivalent" approach

30. The Model Law is based on the recognition that legal requirements prescribing the use of traditional paper-based documentation constitute the main obstacle to the development of modern means of communication. In the preparation of the Model Law, consideration was given to a possibility of dealing with impediments to the use of EDI posed by such requirements in national laws by way of an extension of the scope of such notions as "writing", "signature" and "original", with a view to encompassing computer-based techniques. Such an approach is used in a number of existing legal instruments, e.g. article 7 of the UNCITRAL Model Law on International Commercial Arbitration and article 13 of the United Nations Convention on Contracts for the International Sale of Goods. It was observed that the Model Law should permit States to adapt their domestic legislation to developments in communication technology applicable to trade law without necessitating the wholesale removal of the paper-based requirements themselves or disturbing the legal concepts and approaches underlying those requirements. At the same time, it was said that the electronic fulfillment of writing requirements might in some cases necessitate the development of new rules. This was due to one of many distinctions between EDI messages and paper-based documents, namely, that the latter were readable by the human eye, while the former were not so readable unless reduced to paper or displayed on a screen.

31. The Model Law thus relies on a new approach, sometimes referred to as the "functional-equivalent approach", which 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 could be fulfilled through EDI techniques. For example, among the functions served by a paper document are the following: to provide that a document would be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts. It should be noted that in respect of all of the above-mentioned functions of paper, electronic records can provide the same level of security as paper and, in most cases, a much higher degree of reliability and speed, especially with respect to the identification of the source and content of the data, provided that a number of technical and legal requirements are met. However, the adoption of the functional-equivalent approach should not result in imposing on EDI users more stringent standards of security (and the related costs) than in a paper-based environment.

32. A data message, in and of itself, cannot be regarded as an equivalent of a paper document in that it is of a different nature and does not necessarily perform all conceivable functions of a paper document. That is why the Model Law adopted a flexible standard, taking into account the various layers of existing requirements in a paper-based environment: when adopting the "functional-equivalent" approach, attention was given to the existing hierarchy of form requirements, which provides distinct levels of reliability, traceability and unalterability with respect to paper-based documents. For example, the requirement that data be presented in written form (which constitutes a "threshold requirement") is not to be confused with more stringent requirements such as "signed writing", "signed original" or "authenticated legal act".

33. The Model Law does not attempt to define a computer-based equivalent to any kind of paper document. Instead, it singles out basic functions of paper-based form requirements, with a view to providing criteria which, once they are met by data messages, enable such data messages to enjoy the same level of legal recognition as corresponding paper documents performing the same function. It should be noted that the functional-equivalent approach has been taken in articles 5-7 of the Model Law with respect to the concepts of "writing", "signature" and "original" but not with respect to other legal concepts dealt with in the Model Law. For example, article 14 does not attempt to create a functional equivalent of existing storage requirements.
E. Default rules and mandatory law

34. The decision to undertake the preparation of the Model Law was based on the recognition that, in practice, solutions to most of the legal difficulties raised by the use of modern means of communication are sought within contracts. The Model Law embodies the principle of party autonomy in article 10 with respect to the provisions contained in chapter III. Chapter III contains a set of rules of the kind that would typically be found in agreements between parties, e.g. interchange agreements or “system rules”. It should be noted that the notion of “system rules” might cover two different categories of rules, namely, general terms provided by communication networks and specific rules that might be included in those general terms to deal with bilateral relationships between originators and addressees of data messages. The Model Law deals only with the narrower category.

35. The rules contained in chapter III may be used by parties as a basis for concluding such agreements. They may also be used to supplement the terms of agreements in cases of gaps or omissions in contractual stipulations. In addition, they may be regarded as setting a basic standard for situations where data messages are exchanged without a previous agreement being entered into by the communicating parties, e.g. in the context of “open-edl”.

36. The provisions contained in chapter II are of a different nature. One of the main purposes of the Model Law is to facilitate the use of modern communication techniques and to provide certainty with the use of such techniques where obstacles or uncertainty resulting from statutory provisions could not be avoided by contractual stipulations. The provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, of a mandatory nature, unless expressly stated otherwise in those provisions.

F. Assistance from UNCITRAL secretariat

37. In line with its training and assistance activities, the UNCITRAL secretariat may provide technical consultations for Governments preparing legislation based on the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, as it may for Governments considering legislation based on other UNCITRAL model laws, or considering adhesion to one of the international trade law conventions prepared by UNCITRAL.

38. Further information concerning the Model Law, as well as the Guide, and other model laws and conventions developed by UNCITRAL, may be obtained from the secretariat at the address below. The secretariat welcomes comments concerning the Model Law and the Guide, as well as information concerning enactment of legislation based on the Model Law.

International Trade Law Branch, Office of Legal Affairs, United Nations Vienna International Centre P.O. Box 500 A-1400, Vienna, Austria
Telex: 135612 uno a
Fax: (43-1) 21345-5813 or (43-1) 232156
Phone: (43-1) 21345-4060

III. ARTICLE-BY-ARTICLE REMARKS

Chapter I. General Provisions

Article 1. Sphere of application

39. The purpose of article 1, which is to be read in conjunction with the definition of “data message” under article 2(a), 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 information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law that exclusion of any form of 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.

40. However, it was also 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 trade relationships. 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 Model Law on International Commercial Arbitration. In certain countries, the use of footnotes in a statutory text would not be regarded as acceptable legislative practice. National authorities implementing the Model Law might thus consider the possible inclusion of the text of footnotes in the body of the Law itself.

41. The Model Law applies to all kinds of data messages that might be generated, stored or communicated, and nothing in the Model Law should prevent an implementing State to extend the scope of the Model Law to cover uses of EDI and related means outside the commercial sphere. For example, while the focus of the Model Law is not on the relationships between EDI users and public authorities, the Model Law is not intended to be inapplicable to such relationships. Footnote **** provides for alternative wordings, for possible use by implementing States that would consider it appropriate to extend the scope of the Model Law beyond the commercial sphere.

42. 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), 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 appropriate for consumer protection, depending on legislation in each implementing State. Footnote * thus recognizes that any such consumer protection law may take precedence over the provisions in the Model Law. Legislators implementing the Model Law may wish to consider whether the piece of legislation enacting the Model Law should apply to consumers. The question of which individuals or corporate bodies would be regarded as “consumers” is left to applicable law outside the Model Law.
43. Another possible limitation of the scope of the Model Law is contained in the second footnote. In principle, the Model Law applies to both international and domestic uses of data messages. Footnote ** is intended for use by implementing States that might wish to limit the applicability of the Model Law to international cases. It indicates a possible test of internationality for use by those States as a possible criterion for distinguishing international cases from domestic ones. It should be noted, however, that in some jurisdictions, particularly in federal States, considerable difficulties might arise in distinguishing international trade from domestic trade. The Model Law should not be interpreted as encouraging implementing States to limit its applicability to international cases.

44. 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 data messages, 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 (particularly articles 5-7) to limit the use of data messages if necessary (e.g. for purposes of public policy) may make it less necessary to limit the scope of the Model Law. As the Model Law contains a number of articles (articles 5-7) that allow a degree of flexibility to implementing States to limit the scope of application of specific aspects of the Model Law, a narrowing of the scope of application of the text to international trade should not be necessary. Moreover, dividing communications in international trade into purely domestic and international parts might be difficult in practice. 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 means of recording and communication of data might create a serious obstacle to the use of such means.

References:
A/50/17, paras. 213-219
A/CN.9/407, paras. 37-40
A/CN.9/406, paras. 80-85
A/CN.9/WG.IV/WP.62, article 1
A/CN.9/390, paras. 21-43
A/CN.9/WG.IV/WP.60, article 1
A/CN.9/387, paras. 15-28
A/CN.9/WG.IV/WP.57, article 1
A/CN.9/WG.IV/WP.73, paras. 21-25 and 29-33
A/CN.9/WG.IV/WP.55, paras. 15-20

Article 2. Definitions

"Data message"

45. 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". However, a definition of "record" in line with the characteristic elements of "writing" in article 5 may be added in jurisdictions where that would appear to be necessary. The reference to "analogous 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.

46. The definition of "data message" is also intended to cover the 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.

"Electronic Data Interchange (EDI)"

47. The definition of EDI is drawn from the definition adopted by the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe, which is the United Nations body responsible for the development of UN/EDIFACT technical standards.

"Originator" and "Addressee"

48. In most legal systems, the notion of "person" is used to designate the subjects of rights and obligations and should be interpreted as covering both natural persons and corporate bodies or other legal entities. Data messages that are generated automatically by computers without direct human intervention are intended to be covered by subparagraph (c). However, the Model Law should not be misinterpreted as allowing for a computer to be made the subject of rights and obligations. Data messages that are generated automatically by computers without direct human intervention should be regarded as "originating" from the legal entity on behalf of which the computer is operated. Questions relevant to agency that might arise in that context are to be settled under rules outside the Model Law.

49. The "addressee" under the Model Law is the person with whom the originator intends to communicate by transmitting the data message, as opposed to any person who might receive, forward or copy the data message in the course of transmission. The "originator" is the person who generated the data message even if that message was transmitted by another person. The definition of "addressee" contrasts with the definition of "originator", which is not focused on intent. It should be noted that, under the definitions of "originator" and "addressee" in the Model Law, the originator and the addressee of a given data message could be the same person, for example in the case where the data message was intended for storage by its author. However, the addressee who stores a message transmitted by an originator is not itself intended to be covered by the definition of "originator".

"Intermediary"

50. The focus of the Model Law is on the relationship between the originator and the addressee, and not on the relationship between either the originator or the addressee and any intermediary. However, the Model Law does not ignore the paramount importance of intermediaries in the field of electronic communications. In addition, the notion of "intermediary" is needed in the Model Law to establish the necessary distinction between originators or addressees and third parties.

51. The definition of "intermediary" is intended to cover both professional and non-professional intermediaries, i.e. any person, other than the originator and the addressee, who performs any of the functions of an intermediary. The main functions of an intermediary are listed in subparagraph (e), namely receiving, transmitting or storing data messages on behalf of another person. Additional "value-added services" may be performed by network operators and other intermediaries, such as formatting, translating, recording, authenticating, certificating and...
preserving data messages and providing security services for electronic transactions. “Intermediary” under the Model Law is defined not as a generic category but with respect to each data message, thus recognizing that the same person could be the originator or addressee of one data message and an intermediary with respect to another data message. The Model Law, which is focused on the relationships between originators and addressees, does not, in general, deal with the rights and obligations of intermediaries.

“Information system”

52. The definition of “information system” is intended to cover the entire range of technical means used for transmitting, receiving and storing information. For example, depending on the factual situation, the notion of “information system” could be indicating a communications network, and in other instances could include an electronic mailbox or even a telex. The Model Law does not address the question of whether the information system is located on the premises of the addressee or on other premises, since location of information systems is not an operative criterion under the Model Law.

References:
A/CN.9/407, paras. 41-52
A/CN.9/406, paras. 132-156
A/CN.9/WG.IV/WP.62, article 2
A/CN.9/390, paras. 44-65
A/CN.9/WG.IV/WP.60, article 2
A/CN.9/387, paras. 29-52
A/CN.9/WG.IV/WP.57, article 1
A/CN.9/373, paras. 11-20, 26-28 and 35-36
A/CN.9/360, paras. 29-31

Article 3. Interpretation

53. Article 3 is inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods. It is intended to provide guidance for the interpretation of the Model Law by courts and other national or local authorities. The expected effect of article 3 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.

54. The purpose of paragraph (1) is to draw the attention of courts and other national authorities 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 various countries.

55. As to the general principles on which the Model Law is based, the following non-exhaustive list may be considered: (a) to facilitate electronic commerce among and within nations; (b) to validate transactions entered into by means of new information technologies; (c) to promote and encourage the implementation of new information technologies; (d) to promote the uniformity of law; and (e) to support commercial practice.

References:
A/50/17, paras. 220-224
A/CN.9/407, paras. 53-54
A/CN.9/406, paras. 86-87
A/CN.9/WG.IV/WP.62, article 3
A/CN.9/390, paras. 66-73
A/CN.9/WG.IV/WP.60, article 3
A/CN.9/387, paras. 53-58
A/CN.9/WG.IV/WP.57, article 3
A/CN.9/373, paras. 38-42
A/CN.9/WG.IV/WP.55, paras. 30-31

Chapter II. Application of legal requirements to data messages

Article 4. Legal recognition of data messages

56. Article 4 embodies the fundamental principle that data messages should not be discriminated against, i.e. that there should be no disparity of treatment between data messages and paper-based documents. It is intended to apply notwithstanding any statutory requirements for a “writing” or an original. That fundamental principle is intended to find general application and its scope should not be limited to evidence or other matters covered in chapter II. It should be noted, however, that such a principle is not intended to override any of the requirements contained in articles 5-9. By stating that “information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message”, article 4 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 4 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein.

References:
A/50/17, paras. 225-227
A/CN.9/407, para. 55
A/CN.9/406, paras. 91-94
A/CN.9/WG.IV/WP.62, article 5 bis
A/CN.9/390, paras. 79-87
A/CN.9/WG.IV/WP.60, article 5 bis
A/CN.9/387, paras. 93-94

Article 5. Writing

57. Article 5 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement (which may result from statute, regulation or other paper-based instrument). It may be noted that article 5 is part of a set of three articles (articles 5, 6 and 7), which share the same structure and should be read together.

58. In the preparation of the Model Law, particular attention was paid to the functions traditionally performed by various kinds of “writings” in a paper-based environment. For example, the following non-exhaustive list indicates reasons why national laws require the use of “writings”: (a) to ensure that there would be tangible evidence of the existence and nature of the intent of the parties to bind themselves; (b) to help the parties be aware of the consequences of their entering into a contract; (c) to provide that a document would be legible by all; (d) to provide that a document would remain unaltered over time and provide a permanent record of a transaction; (e) to allow for the reproduction of a document so that each party would hold a copy of the same data; (f) to allow for the authentication of data by means of a signature; (g) to provide that a document would be in a form acceptable to public authorities and courts; (h) to finalize the intent of the author of the “writing” and provide a record of that intent; (i) to allow for the easy storage of data in a tangible form; (j) to facilitate control and subsequent audit for
accounting, tax or regulatory purposes; and (k) to bring legal rights and obligations into existence in those cases where a “writing” was required for validity purposes.

59. However, in the preparation of the Model Law, it was found that it would be inappropriate to adopt an overly comprehensive notion of the functions performed by writing. Existing requirements that data be presented in written form often combine the requirement of a “writing” with concepts distinct from writing, such as signature and original. Thus, when adopting a functional approach, attention should be given to the fact that the requirement of a “writing” should be considered as the lowest layer in a hierarchy of form requirements, which provide distinct levels of reliability, traceability and unalterability with respect to paper-based documents. The requirement that data be presented in written form (which can be described as a “threshold requirement”) should thus not be confused with more stringent requirements such as “signed writing”, “signed original” or “authenticated legal act”. For example, under certain national laws, a written document that is neither dated nor signed, and the author of which either is not identified in the written document or is identified by a mere letterhead, would be regarded as a “writing” although it might be of little evidential weight in the absence of other evidence (e.g. testimony) regarding the authorship of the document. In addition, the notion of unalterability should not be considered as built into the concept of writing as an absolute requirement since a “writing” in pencil might still be considered a “writing” under certain existing legal definitions. Taking into account the way in which such issues as integrity of the data and protection against fraud are dealt with in a paper-based environment, a fraudulent document would nonetheless be regarded as a “writing”. In general, notions such as “evidence” and “intent of the parties to bind themselves” are to be tied to the more general issues of reliability and authentication of the data and should not be included in the definition of a “writing”.

60. The purpose of article 5 is not to establish a requirement that, in all instances, data messages should fulfill all conceivable functions of a writing. Rather than focusing upon specific functions of a “writing”, for example, its evidentiary function in the context of tax law or its warning function in the context of civil law, article 5 focuses upon the basic notion of the information being reproduced and read. That notion is expressed in article 5 in terms that were found to provide an objective criterion, namely that the information in a data message must be accessible so as to be usable for subsequent reference. The use of the word “accessible” is meant to imply that information in the form of computer data should be readable and interpretable, and that the software that might be necessary to render such information readable should be retained. The word “usable” is not intended to cover only human use but also computer processing. As to the notion of “subsequent reference”, it was preferred to such notions as “durability” or “non-alterability”, which would have established too harsh standards, and to such notions as “readability” or “intelligibility”, which might constitute too subjective criteria.

61. The principle embodied in paragraph (2) of articles 5-7 is that an enacting State may exclude from the application of those articles 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 of the formal requirement in question. One such type of situation may be the case of writing requirements intended to provide notice or warning of specific factual or legal risks, for example, requirements for warnings to be placed on certain types of products. Other specific exclusion might be considered, for example in the context of formalities required pursuant to international treaty obligations of the enacting State (e.g. the requirement that a cheque be in writing pursuant to the Convention providing a Uniform Law for Cheques, Geneva, 1931) 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.

62. Paragraph (2) 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 (2) were used to establish blanket exceptions, and the opportunity provided by paragraph (2) in that respect should be avoided. Numerous exclusions from the scope of articles 5-7 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

References:
A/50/17, paras. 228-241
A/CN.9/407, paras. 56-63
A/CN.9/406, paras. 95-101
A/CN.9/WG.1/V/WP.62, article 6
A/CN.9/390, paras. 88-96
A/CN.9/WG.1/V/WP.60, article 6
A/CN.9/387, paras. 66-80
A/CN.9/WG.1/V/WP.57, article 6
A/CN.9/WG.1/V/WP.58, annex
A/CN.9/373, paras. 45-62
A/CN.9/WG.1/V/WP.55, paras. 36-49
A/CN.9/360, paras. 32-43
A/CN.9/WG.1/V/WP.53, paras. 37-45
A/CN.9/350, paras. 68-78
A/CN.9/333, paras. 20-28
A/CN.9/265, paras. 59-72

Article 6. Signature

63. Article 6 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.

64. It may be noted that, alongside the traditional handwritten signature, there exist various types of procedures (e.g. stamping, perforation), sometimes also referred to as “signatures”, which provide various levels of certainty. For example, in some countries, there exists a general requirement that contracts for the sale of goods above a certain amount should be “signed” in order to be enforceable. However, the concept of a signature adopted in that context is such that a stamp, perforation or even a typewritten signature or a printed letterhead might be regarded as sufficient to fulfil the signature requirement. At the other end of the spectrum, there exist requirements that combine the traditional handwritten signature with additional security procedures such as the confirmation of the signature by witnesses.
65. It might be desirable to develop functional equivalents for the various types and levels of signature requirements in existence. Such an approach would increase the level of certainty as to the degree of legal recognition that could be expected from the use of the various means of authentication used in EDI practice as substitutes for “signatures”. However, the notion of a signature is intimately linked to the use of paper and there might exist no technical solutions for accommodating all existing types and uses of “signature” in a dematerialized environment. Furthermore, any attempt to develop rules on standards and procedures to be used as substitutes for specific instances of “signatures” might create the risk of tying the legal framework provided by the Model Law to a given state of technical development.

66. 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 6 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 which currently present barriers to electronic commerce. Article 6 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.

67. 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.

68. In determining whether the method used under paragraph (1)(a) is appropriate, legal, technical and commercial factors that may be taken into account include the following: (a) the sophistication of the equipment used by each of the parties; (b) the nature of their trade activity; (c) the frequency at which commercial transactions take place between the parties; (d) the kind and size of the transaction; (e) the function of signature requirements in a given statutory and regulatory environment; (f) the capability of communication systems; (g) compliance with authentication procedures set forth by intermediaries; (h) the range of authentication procedures made available by any intermediary; (i) compliance with trade customs and practice; (j) the existence of insurance coverage mechanisms against unauthorized messages; (k) the importance and the value of the information contained in the data message; (l) the availability of alternative methods of identification and the cost of implementation; (m) 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 (n) any other relevant factor.

69. Paragraph (1)(b) does not introduce a distinction between the situation in which EDI users are linked by a communication agreement and the situation in which parties had no prior contractual relationship regarding the use of EDI. Thus, article 6 may be regarded as establishing a minimum standard of authentication for EDI messages that might be exchanged in the absence of a prior contractual relationship and, at the same time, to provide guidance as to what might constitute an appropriate substitute for a signature if the parties used EDI communications in the context of a communication agreement. The Model Law is thus intended to provide useful guidance both in a context where national laws would leave the question of authentication of data messages entirely to the discretion of the parties and in a context where requirements for signature, which were usually set by mandatory provisions of national law, should not be made subject to alteration by agreement of the parties.

70. The notion of an “agreement between the originator and the addressee of a data message” is to be interpreted as covering not only bilateral or multilateral agreements concluded between parties exchanging directly data messages (e.g. “trading partners agreements”, “communication agreements” or “interchange agreements”) but also agreements involving intermediaries such as networks (e.g. “third-party service agreements”). Agreements concluded between EDI users and networks may incorporate “system rules”, i.e. administrative and technical rules and procedures to be applied when communicating data messages. However, possible agreement between originators and addressees of data messages as to the use of a method of authentication is not conclusive evidence of whether that method is reliable or not.

71. It should be noted that, under the Model Law, the mere signing of a data message by means of a functional equivalent of a handwritten signature is not intended, in and of itself, to confer legal validity to the data message. Whether a data message that fulfilled the requirement of a signature has legal validity is to be settled under applicable law outside the Model Law.

References:
A/50/17, paras. 242-248
A/CN.9/407, paras. 64-70
A/CN.9/406, paras. 102-105
A/CN.9/WG.IV/WP.62, article 7
A/CN.9/390, paras. 97-109
A/CN.9/WG.IV/WP.60, article 7
A/CN.9/387, paras. 81-90
A/CN.9/WG.IV/WP.57, article 7
A/CN.9/WG.IV/WP.58, annex
A/CN.9/373, paras. 63-76
A/CN.9/WG.IV/WP.55, paras. 50-63
A/CN.9/360, paras. 71-75
A/CN.9/WG.IV/WP.53, paras. 61-66
A/CN.9/350, paras. 86-89
A/CN.9/333, paras. 50-59
A/CN.9/265, paras. 49-58 and 79-80

Article 7. Original

72. If “original” were defined as a medium on which information was fixed for the first time, it would be impossible to speak of “original” data messages, since the addressee of a data message would always receive a copy thereof. However, article 7 should be put in a different context. The notion of “original” in article 7 is useful since in practice many disputes relate to the question of originality of documents and in electronic commerce the requirement for presentation of originals constituted one of the main obstacles that the Model Law attempts to remove. Although in some jurisdictions the concepts of “writing”, “original” and “signature” may overlap, the Model Law approaches them as three separate and distinct concepts. Article 7 is also useful in clarifying the notions of “writing” and “original”, in particular in view of their importance for purposes of evidence.

73. Article 7 is pertinent to documents of title and negotiable instruments, in which the notion of uniqueness of an original is particularly relevant. However, attention is drawn to the fact
74. Article 7 should be regarded as stating the minimum acceptable form requirement to be met by a data message for it to be regarded as the functional equivalent of an original. The provisions of article 7 should be regarded as mandatory, to the same extent that existing provisions regarding the use of paper-based original documents would be regarded as mandatory.

75. Article 7 emphasizes the importance of the integrity of the information for its originality and sets out criteria to be taken into account when assessing integrity by reference to systematic recording of the information, assurance that the information was recorded without lacunae and protection of the data against alteration. It links the concept of originality to a method of authentication and puts the focus on the method of authentication to be followed in order to meet the requirement. It is based on the following elements: a simple criterion as to "integrity" of the data; a description of the elements to be taken into account in assessing the integrity; and an element of flexibility, i.e. a reference to circumstances.

76. As regards the words "the time when it was first composed" in paragraph (1)(b), it should be noted that the provision is intended to encompass the situation where information was first composed as a paper document and subsequently transferred on to a computer. In such a situation, paragraph (1)(b) is to be interpreted as requiring assurances that the information has remained complete and unaltered from the time when it was composed as a paper document onwards, and not only as from the time when it was translated into electronic form. However, where several drafts were created and stored before the final message was composed, paragraph (1)(b) should not be misinterpreted as requiring assurance as to the integrity of the drafts.

77. Paragraph (2)(a) sets forth the criteria for assessing integrity, taking care to except necessary additions to the first (or "original") data message such as endorsements, certifications, notarizations, etc. from other alterations. As long as the contents of a data message remain complete and unaltered, necessary additions to that data message would not affect its "originality". Thus when an electronic certificate is added to the end of an "original" data message to attest to the "originality" of that data message, or when data is automatically added by computer systems at the start and the finish of a data message, that the provision is intended to encompass the situation where the integrity of the drafts.

78. As in other articles of chapter II, the words "a rule of law" in the opening phrase of article 7 are to be understood as encompassing not only statutory or regulatory law but also judicially-created law and other procedural law. In certain common law countries, where the words "a rule of law" would normally be interpreted as referring to common law rules, as opposed to statutory requirements, it should be noted that, in the context of the Model Law, the words "a rule of law" are intended to encompass those various sources of law.

79. Paragraph (3), as was the case with similar provisions in articles 5 and 6, 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 (3) were used to establish blanket exceptions. Numerous exclusions from the scope of articles 5-7 would raise needless obstacles to the development of modern communication techniques, since what the Model Law contains are very fundamental principles and approaches that are expected to find general application.

References:
A/50/17, paras. 249-255
A/CN.9/407, paras. 71-79
A/CN.9/406, paras. 106-110
A/CN.9/WG.1/WP.62, article 8
A/CN.9/390, paras. 110-133
A/CN.9/WG.1/WP.60, article 8
A/CN.9/387, paras. 91-97
A/CN.9/WG.1/WP.57, article 8
A/CN.9/WG.1/WP.58, annex
A/CN.9/373, paras. 77-96
A/CN.9/WG.1/WP.55, paras. 64-70
A/CN.9/360, paras. 60-70
A/CN.9/WG.1/WP.53, paras. 56-60
A/CN.9/350, paras. 84-85
A/CN.9/265, paras. 43-48

Article 8. Admissibility and evidential weight of data messages

80. The purpose of article 8 is to establish both the admissibility of data messages as evidence in legal proceedings and their evidential value. With respect to admissibility, paragraph (1), establishing that data messages should not be denied admissibility as evidence in legal proceedings on the sole ground that they are in electronic form, puts emphasis on the general principle stated in article 4 and is needed to make it expressly applicable to admissibility of evidence, an area in which particularly complex issues might arise in certain jurisdictions. The term "best evidence" is a term understood in and necessary for certain common law jurisdictions. However, the notion of "best evidence" could raise a great deal of uncertainty in legal systems in which such a rule is unknown. States in which the term would be regarded as meaningless and potentially misleading may wish to enact the Model Law without the reference to the "best evidence" rule contained in paragraph (1).

81. As regards the assessment of the evidential weight of a data message, paragraph (2) provides useful guidance as to how the evidential value of data messages should be assessed (e.g. depending on whether they were generated, stored or communicated in a reliable manner).

References:
A/50/17, paras. 256-263
A/CN.9/407, paras. 80-81
A/CN.9/406, paras. 111-113
A/CN.9/WG.1/WP.62, article 9
Chapter III. Communication of data messages

Article 10. Variation by agreement

86. 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, that principle is embodied only with respect to the provisions of the Model Law contained in chapter III. The reason for such a limitation is that the provisions contained in chapter II may, to some extent, be regarded as a collection of exceptions to well-established rules regarding the form of legal transactions. Such well-established rules are normally of a mandatory nature since they generally reflect decisions of public policy. An unqualified statement regarding the freedom of parties to derogate from the Model Law might thus be misinterpreted as allowing parties, through a derogation to the Model Law, to derogate from mandatory rules adopted for reasons of public policy. The provisions contained in chapter II should be regarded as stating the minimum acceptable form requirement and are, for that reason, to be regarded as mandatory, unless expressly stated otherwise.

Article 11. Attribution of data messages

88. Article 11 has its origin in article 5 of the UNCITRAL Model Law on International Credit Transfers, which defines the obligations of the sender of a payment order. Article 11 is intended to apply where there is a question as to whether a data message was really sent by the person who is indicated as the originator. In the case of a paper-based communication the problem would arise as the result of an alleged forged signature of the purported originator. In an electronic environ-
ment, an unauthorized person may have sent the message but the authentication by code, encryption or the like would be accurate. The purpose of article 11 is not to assign responsibility. It deals rather with attribution of data messages by establishing a presumption that under certain circumstances a data message would be considered as a message of the originator, and goes on to qualify that presumption in case the addressee knew or ought to have known that the data message was not that of the originator.

89. Paragraph (1) recalls the principle that an originator is bound by a data message if it has effectively sent that message. Paragraph (2) refers to the situation where the message was sent by a person other than the originator who had the authority to act on behalf of the originator. Paragraph (2) is not intended to displace the domestic law of agency, and the question as to whether the other person did in fact and in law have the authority to act on behalf of the originator is left to the appropriate legal rules outside the Model Law.

90. Paragraph (3) deals with three kinds of situations, in which the addressee could rely on a data message as being that of the originator: firstly, situations in which the addressee properly applied an authentication procedure previously agreed by the originator; secondly, situations in which the addressee properly applied a procedure which was reasonable in the circumstances; and thirdly, situations in which the data message resulted from the actions of a person who, by virtue of its relationship with the originator, had access to the originator’s authentication procedures. By stating that the addressee “is entitled to regard a data as being that of the originator”, paragraph (3) read in conjunction with paragraph (4)(a) is intended to indicate that the addressee could act on the assumption that the data message is that of the originator up to the point in time it received notice from the originator that the data message was not that of the originator, or up to the point in time when it knew or should have known that the data message was not that of the originator.

91. Under paragraph (3)(a)(i), if the addressee applies any authentication procedures previously agreed by the originator and such application results in the proper verification of the originator as the source of the message, the message is presumed to be that of the originator. That covers not only the situation where an authentication procedure has been agreed upon by the originator and the addressee but also situations where an originator, unilaterally or as a result of an agreement with an intermediary, identified a procedure and agreed to be bound by a data message that met the requirements corresponding to that procedure. Paragraph (3)(a)(ii) establishes that a purported originator may be bound by a data message even though the purported originator might never have sent that message (for example in a case of fraud) provided that the addressee applied a procedure that was "reasonable under the circumstances". However, the risk placed on the purported originator is balanced by the heavy burden of proof placed on the addressee, who would have to prove what was "reasonable in the circumstances".

92. The effect of paragraph (3)(b), read in conjunction with paragraph (4)(a), is that the originator or the addressee, as the case may be, would be responsible for any unauthorized data message that could be shown to have been sent as a result of negligence of that party.

93. Paragraph (4)(a) should not be misinterpreted as relieving the originator from the consequences of sending a data message, with retroactive effect, irrespective of whether the addressee had acted on the assumption that the data message was that of the originator. Paragraph (4) is not intended to provide that receipt of a notice under subparagraph (a) would nullify the original message retroactively. Under subparagraph (a), the originator is released from the binding effect of the message after the time notice is received and not before that time. Moreover, paragraph (4) should not be read as allowing the originator to avoid being bound by the data message by sending notice to the addressee under subparagraph (a), in a case where the message had, in fact, been sent by the originator and the addressee properly applied agreed or reasonable authentication procedures. If the addressee can prove that the message is that of the originator, paragraph (1) would apply and not paragraph (4)(a). As to the meaning of “notice within a reasonable time”, the notice should be such as to give the addressee sufficient time to react, for example in the case of just-in-time supply where the addressee should be given time to adjust its production chain.

94. With respect to paragraph (4)(b), it should be noted that the Model Law could lead to the result that the addressee would be entitled to rely on a data message if it had properly applied the agreed authentication procedures, even if it knew that the data message was not that of the originator. It was generally felt when preparing the Model Law that the risk that such a situation would arise should be accepted, with a view to preserving the reliability of authentication procedures.

95. Paragraph (5) is intended to preclude the originator from disavowing the message once it was sent, unless the addressee knew, or should have known, that the data message was not that of the originator. In addition, paragraph (5) is intended to deal with errors in the content of the message arising from errors in transmission.

96. Paragraph (6) deals with the issue of erroneous duplication of data messages, an issue of considerable practical importance. It establishes the standard of care to be applied by the addressee to distinguish an erroneous duplicate of a data message from a separate data message. [Remark on paragraph (6): the Commission, at its twenty-eighth session, failed to achieve consensus on the substance of paragraph (6), which is to be discussed further at the twenty-ninth session.]

97. Early drafts of article 11 contained an additional paragraph, expressing the principle that the attribution of authorship of a data message to the originator should not interfere with the legal consequences of that message, which should be determined by other applicable rules of national law. It was later felt that it was not necessary to express that principle in the Model Law but that it should be mentioned in this Guide.

References:
A/50/17, paras. 275-303
A/199/407, paras. 86-89
A/199/406, paras. 114-131
A/199/429, article 10
A/199/390, paras. 144-153
A/199/429, article 10
A/199/387, paras. 110-132
A/199/429, article 10
A/199/373, paras. 109-115
A/199/429, article 55, paras. 82-86

Article 12. Acknowledgement of receipt

98. The use of functional acknowledgements is a business decision to be made by EDI users; the Model Law does not intend to impose the use of any such procedure. However, taking into account the commercial value of a system of acknowledgement of receipt and the widespread use of such systems in the context of EDI, it was felt that the Model Law should address a
number of legal issues arising from the use of acknowledgement procedures. It should be noted that the notion of "acknowledgement" is sometimes used to cover a variety of procedures, ranging from a mere acknowledgement of receipt of an unspecified message to an expression of agreement with the content of a specific data message. In many instances, the procedure of "acknowledgement" would parallel the system known as "return receipt requested" in postal systems. Acknowledgements of receipt may be required in a variety of instruments, e.g. in the data message itself, in bilateral or multilateral communication agreements, or in "system rules". It should be borne in mind that variety among acknowledgement procedures implies variety of the related costs. The provisions of article 12 are based on the assumption that acknowledgement procedures are to be used at the discretion of the originator. Article 12 is not intended to deal with the legal consequences that may flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message. For example, where an originator sends an offer in a data message and requests acknowledgement of receipt, the acknowledgement of receipt simply evidences that the offer has been received. Whether or not sending that acknowledgement amounted to accepting the offer is not dealt with by the Model Law but by contract law outside the Model Law.

99. The purpose of paragraph (2) is to validate acknowledgement by any communication or conduct of the addressee (e.g. the shipment of the goods as an acknowledgement of receipt of a purchase order) where the originator has not requested that the acknowledgement be in a particular form. Paragraph (3), which deals with the situation where the originator has stated that the data message is conditional on receipt of an acknowledgement, applies whether or not the originator has specified that the acknowledgement should be received by a certain time.

100. The purpose of paragraph (4) is to deal with the more common situation where an acknowledgement is requested, without any statement being made by the originator that the data message is of no effect until an acknowledgement has been received. Such a provision is needed to establish the point in time when the originator of a data message who has requested an acknowledgement of receipt is relieved from any legal implication of sending that data message if the requested acknowledgement has not been received. An example of a factual situation where a provision along the lines of paragraph (4) would be particularly useful would be that the originator of an offer to contract who has not received the requested acknowledgement may not automatically treat the offer as having been withdrawn. Paragraph (4) is needed since the fact that electronic data messages expressing offer and acceptance may be generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainty is inherent in the mode of communication and results from the absence of a paper document.

101. The rebuttable presumption established in paragraph (5) is needed to create certainty and would be particularly useful in the context of electronic communication between parties that were not linked by a trading-partners agreement. Paragraph (5) corresponds to a certain type of acknowledgement, for example, an EDIFACT message establishing that the data message received is syntactically correct, i.e. that it can be processed by the receiving computer. The reference to a technical requirement, which is to be construed primarily as a reference to "data syntax" in the context of EDI communications, may be less relevant in the context of the use of other means of communication, such as telegram or telex.

References:
A/CN.9/407, paras. 90-92
A/CN.9/406, paras. 15-33
A/CN.9/WG.IV/WP.60, article 11
A/CN.9/387, paras. 133-144
A/CN.9/WG.IV/WP.57, article 11
A/CN.9/373, paras. 116-122
A/CN.9/WG.IV/WP.55, paras. 87-93
A/CN.9/360, paras. 125
A/CN.9/WG.IV/WP.53, paras. 80-81
A/CN.9/350, para. 92
A/CN.9/333, paras. 48-49.

Article 13. Formation and validity of contracts

102. Article 13 is not intended to interfere with law on the formation of contracts but rather to promote international trade by providing increased legal certainty as to the conclusion of contracts by electronic means. It deals not only with the issue of contract formation but also with the form in which an offer and an acceptance may be expressed. In certain countries, a provision along the lines of paragraph (1) might be regarded as merely stating the obvious, namely that an offer and an acceptance, as any other expression of will, can be communicated by any means, including data messages. However, the provision is needed in view of the remaining uncertainties in a number of countries as to whether contracts can validly be concluded by electronic means. The need for such a provision results from the doubt that may exist in many countries as to the validity of contracts concluded through the use of computer because the data messages expressing offer and acceptance may be generated by computers without immediate human intervention, thus raising doubts as to the expression of intent by the parties. Another reason for such uncertainty is inherent in the mode of communication and results from the absence of a paper document.

103. It may also be noted that paragraph (1) reinforces, in the context of contract formation, a principle already embodied in other articles of the Model Law, such as articles 4, 8 and 11, all of which establish the legal effectiveness of data messages. However, paragraph (1) is needed since the fact that electronic messages may have legal value as evidence and produce a number of effects, including those provided in articles 8 and 11, does not necessarily mean that they can be used for the purpose of concluding valid contracts.

104. Paragraph (1) covers not merely the cases in which both the offer and the acceptance are communicated by electronic means but also cases in which only the offer or only the acceptance is communicated electronically. As to the time and place of formation of contracts in cases where an offer or the acceptance of an offer is expressed by means of a data message, no specific rule has been included in the Model Law in order to interfere with national law applicable to contract formation. It was felt that such a provision might exceed the aim of the Model Law, which should be limited to providing that elec-
tronic communications would achieve the same degree of legal certainty as paper-based communications. The combination of existing rules on the formation of contracts with the provisions contained in article 14 is designed to dispel uncertainty as to the time and place of formation of contracts in cases where the offer or the acceptance are exchanged electronically.

105. During the preparation of paragraph (1), it was felt that the provision might have the harmful effect of overruling otherwise applicable provisions of national law, which might prescribe specific formalities for the formation of certain contracts. Such forms include notarization and other requirements for "writings", and might respond to considerations of public policy, such as the need to protect certain parties or to warn them against specific risks. For that reason, paragraph (2) provides that an enacting State can exclude the application of paragraph (1) in certain instances to be specified in the legislation enacting the Model Law.

References:
A/CN.9/407, para. 93
A/CN.9/406, paras. 34-41
A/CN.9/WG.IV/WP.60, article 12
A/CN.9/387, paras. 145-151
A/CN.9/WG.IV/WP.57, article 12
A/CN.9/WG.IV/WP.55, paras. 95-102
A/CN.9/360, paras. 76-86
A/CN.9/WG.IV/WP.53, paras. 67-73
A/CN.9/350, paras. 93-96
A/CN.9/333, paras. 60-68.

Article 14. Time and place of dispatch and receipt of data messages

106. Article 14 results from the recognition that, for the operation of many existing rules of law, it is important to ascertain the time and place of receipt of information. The use of electronic communication techniques makes those difficult to ascertain. It is not uncommon for users of EDI and related means of communication to communicate from one State to another without knowing the location of information systems through which communication is operated. In addition, the location of certain communication systems may change without either of the parties being aware of the change. The Model Law is thus intended to reflect the fact that the location of information systems is irrelevant and sets forth a more objective criterion, namely, the place of business of the parties. In that connection, it should be noted that article 14 is not intended to establish a conflict-of-laws rule.

107. Paragraph (1) defines the time of dispatch of a data message as the time when the data message enters an information system outside the control of the originator, which may be the information system of an intermediary or an information system of the addressee. The concept of "dispatch" refers to the commencement of the electronic transmission of the data message. Where "dispatch" already has an established meaning, it should be noted that article 14 is intended to supplement national rules on dispatch and not to displace them. If dispatch occurs when the data message reaches an information system of the addressee, dispatch under paragraph (1) and receipt under paragraph (2) are simultaneous, except where the data message is sent to an information system of the addressee that is not the information system designated by the addressee under paragraph (2)(a).

108. Paragraph (2), the purpose of which is to define the time of receipt of a data message, addresses the situation where the addressee unilaterally designates a specific information system for the receipt of a message (in which case the designated system may or may not be an information system of the addressee), and the data message reaches an information system of the addressee that is not the designated system. In such a situation, receipt is deemed to occur when the data message is retrieved by the addressee. By "designated information system", the Model Law is intended to cover a system that has been specifically designated by a party, for instance in the case where an offer expressly specifies the address to which acceptance should be sent. The mere indication of an electronic mail or telecopy address on a letterhead or other document should not be regarded as express designation of one or more information systems.

109. Attention is drawn to the notion of "entry" into an information system, which is used for both the definition of dispatch and that of receipt of a data message. A data message enters an information system at the time when it becomes available for processing within that information system. Whether a data message which enters an information system is intelligible or usable by the addressee is outside the purview of the Model Law. The Model Law does not intend to overrule provisions of national law under which receipt of a message may occur at the time when the message enters the sphere of the addressee, irrespective of whether the message is intelligible or usable by the addressee. Nor is the Model Law intended to run counter to trade usages, under which certain encoded messages are deemed to be received even before they are usable by, or intelligible for, the addressee. It was felt that the Model Law should not create a more stringent requirement than currently exists in a paper-based environment, where a message can be considered to be received even if it is not intelligible for the addressee or not intended to be intelligible to the addressee (e.g. where encrypted data is transmitted to a depository for the sole purpose of retention in the context of intellectual property rights protection).

110. A data message should not be considered to be dispatched if it merely reached the information system of the addressee but failed to enter it. It may be noted that the Model Law does not expressly address the question of possible malfunctioning of information systems as a basis for liability. In particular, where the information system of the addressee does not function at all or functions improperly or, while functioning properly, cannot be entered into by the data message (e.g. in the case of a telex machine that is constantly occupied), dispatch under the Model Law does not occur. It was felt during the preparation of the Model Law that the addressee should not be placed under the burdensome obligation to maintain its information system functioning at all times by way of a general provision.

111. The purpose of paragraph (4) is to deal with the place of receipt of a data message. The principal reason for including a rule on the place of receipt of a data message is to address a circumstance characteristic of electronic commerce that might not be treated adequately under existing law, namely, that very often the information system of the addressee where the data message is received, or from which the data message is retrieved, is located in a jurisdiction other than that in which the addressee itself is located. Thus, the rationale behind the provision is to ensure that the location of an information system is not the determinant element, and that there is some reasonable connection between the addressee and what is deemed to be the place of receipt, and that that place can be readily ascertained by the originator. It may be noted that the Model Law does not contain specific provisions as to how the designation of an information system should be made, or whether a change could be made after such a designation by the addressee.
112. It may be noted that paragraph (4), which contains a reference to the "underlying transaction", is intended to refer to both actual and contemplated underlying transactions. References to "place of business", "principal place of business" and "place of habitual residence" were adopted to bring the text in line with article 10 of the United Nations Convention on Contracts for the International Sale of Goods.

113. The effect of paragraph (4) is to introduce a distinction between the deemed place of receipt and the place actually reached by a data message at the time of its receipt under paragraph (2). That distinction is not to be interpreted as apportioning risks between the originator and the addressee in case of damage or loss of a data message between the time of its receipt under paragraph (2) and the time when it reached its place of receipt under paragraph (4). Paragraph (4) merely establishes an irrebuttable presumption regarding a legal fact, to be used where another body of law (e.g. on formation of contracts or conflict of laws) require determination of the place of receipt of a data message. However, it was felt during the preparation of the Model Law that introducing a deemed place of receipt, as distinct from the place actually reached by that data message at the time of its receipt, would be inappropriate outside the context of computerized transmissions (e.g. in the context of telegram or telex). The provision was thus limited in scope to cover only computerized transmissions of data messages. A further limitation is contained in paragraph (5), which excludes matters of administrative, criminal and data-protection law from the scope of paragraph (4). However, it should be noted that paragraph (5) only indicates that article 14, by its own force, does not apply to those matters. The use of the Model Law by an enacting State for determining the place of receipt or dispatch under administrative, criminal or data-protection law is not intended to be precluded.

References:
A/CN.9/407, paras. 94-99
A/CN.9/406, paras. 42-58
A/CN.9/WG.IV/WP.60, article 13
A/CN.9/387, paras. 152-163
A/CN.9/WG.IV/WP.57, article 13
A/CN.9/373, paras. 134-146
A/CN.9/WG.IV/WP.55, paras. 103-108
A/CN.9/360, paras. 87-89
A/CN.9/WG.IV/WP.53, paras. 74-76
A/CN.9/350, paras. 97-100
A/CN.9/333, paras. 69-75.
# III. CROSS-BORDER INSOLVENCY

(A/CN.9/419 and Corr.1) [Original: English]

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law commenced its work, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), to embark on the development of a legal instrument relating to cross-border insolvency.\(^1\)

2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). The Commission decided at its twenty-sixth session to pursue those suggestions further.\(^2\) Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.\(^3\)

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at this stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as "judicial cooperation" and "access and recognition"). It was also suggested that an international meeting of judges take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favourably by the Commission at its twenty-seventh session.\(^4\)

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held (Toronto, 22-23 March 1995). The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition.\(^5\) The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group, which was composed of all States members of the Commission, commenced its work at its eighteenth session, held at Vienna from 30 October to 11 November 1995. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Brazil, Chile, China, Ecuador, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Nigeria, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Thailand, Uganda, United Kingdom of Great Britain, and Northern Ireland, United States of America and Uruguay.

6. The session was attended by observers from the following States: Bosnia and Herzegovina, Canada, Costa Rica, Gabon, Greece, Indonesia, Iraq, Kuwait, Netherlands, Paraguay, Philippines, Republic of Korea, Sweden, Switzerland, Turkey and Yemen.

7. The session was attended by observers from the following international organizations: Banking Federation of the European Union, European Insolvency Practitioners Association (EIPA), International Association of Insolvency Practitioners (INSOL), International Bar Association, and International Credit Insurance Association (ICIA).

8. The Working Group elected the following officers: Chairman: Ms. Kathryn Sabo (Canada) Rapporteur: Mr. Ruthai Hong Siri (Thailand)

9. The Working Group had before it the following documents: the provisional agenda (A/CN.9/WP.V/WP.41) and a note by the Secretariat containing a review of possible issues to be covered in a legal instrument dealing with judicial cooperation and access and recognition in cases of cross-border insolvency, which was used as a basis for the Working Group's deliberations (A/CN.9/WG.V/WP.42).

10. The Working Group adopted the following provisional agenda:

1. Election of officers;
2. Adoption of the agenda;
3. Cross-border insolvency;
4. Other business;
5. Adoption of the report.


\(^{3}\)The report on the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency presented by the Secretariat to the Commission at the twenty-seventh session is set forth in document A/CN.9/398.

I. DELIBERATIONS AND DECISIONS


12. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.42, it established an informal drafting group to prepare preliminary draft provisions on a number of issues, reflecting the deliberations and decisions that had taken place. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth below in chapters III and IV.

II. JUDICIAL COOPERATION AND ACCESS AND RECOGNITION IN CROSS-BORDER INSOLVENCY

A. General remarks

13. The Working Group commenced the session with a discussion of various background and general aspects of the work being undertaken by the Commission in the field of cross-border insolvency.

14. The Working Group noted the apparent progression in the view with which matters of insolvency law were held, as regards possible work by the Commission. That progression was illustrated by the fact that at earlier points in its history the Commission had refrained from work on a subject such as security interests in part because of its significant implication of insolvency law, while now it was embarking on a project relating to the latter subject. Factors cited as underlying the current view in the Commission as to the desirability and feasibility of work on cross-border insolvency included in particular the significant regional harmonization efforts that had taken place in the intervening period, the increased incidence of cross-border insolvency that naturally attended the continuing globalization of trade and investment, and the limited scope and goals of the work being undertaken.

15. Another factor cited as an indication that at this point in time a positive contribution could be made by the Commission in this field was the close cooperation with practitioners that had characterized the preparatory work undertaken thus far for the project and that had been a key element in defining the parameters of the project. Reference was made to the Judicial Colloquium, which had taken place as an outgrowth of that cooperation and which had provided evidence of the interest and willingness of judges from different countries and legal systems to engage in cooperative efforts in dealing with cross-border insolvency, and of their interest in the work being undertaken by the Commission.

16. Concerning the parameters of the work being undertaken, various interventions emphasized that, with a view to preserving the feasibility of a successful outcome of the project, it would be necessary to confine the work to a relatively modest scale and goals, as had in fact been envisaged by the Commission. It was noted that, in view of the current disharmony of law and wide lack of provisions dealing with cross-border insolvency, the work on access and recognition envisaged by the Commission, though of relatively modest proportions, could nevertheless make a significant contribution in support of international trade and investment by increasing predictability and legal certainty.

17. The view was expressed that part of that effort to maintain the project within parameters of a modest but feasible scope would have to be the avoidance to the degree possible of certain terminological or conceptual formulations that would be likely to engender difficulties. Cited as an example in this regard was the notion of "reciprocity", which could be understood in sharply differing ways. Another example cited was the notion of "domicile", which was described as difficult of determination and therefore capable of generating uncertainty.

18. As a further aspect of keeping the project within the confines of feasibility, the Working Group was urged to keep in mind the inevitability that significantly differing policy approaches would continue to characterize national attitudes to matters of insolvency and that it was not the goal of the Commission's work to overcome or eliminate those differences. It was emphasized that the work should rather be confined to establishing a limited number of basic principles and threshold rules that would facilitate efficiency and speed in responding to cross-border insolvency cases and that would apply both in States that used judicial means for dealing with insolvency and those that applied administrative approaches.

19. More specific remarks directed at the substantive scope and structure of the work being undertaken included the suggestion that it could usefully be approached analytically from two basic aspects. The first aspect was the protection and gathering of assets, the second being the distribution of assets. Emphasis was also placed on the importance of indicating the essential elements of the types of proceedings to be covered. Suggestions for such essential elements included that the proceedings to be encompassed should be of a collective character, should involve supervision of the debtor by an independent party and should not cover financial adjustment measures undertaken by parties purely on a private basis, without court or administrative involvement.

20. A number of suggestions were made aimed at expanding upon or supplementing the issues raised in the working paper before the Working Group. One such suggestion was that a fundamental premise that the Commission could usefully promote was that national insolvency laws should accord foreign creditors "national treatment", to the effect that creditors would not be discriminated against on the ground of nationality. At the same time, it was observed that the notion of "national treatment" might be seen as related to the question of the distribution of assets, and that consideration of it might more appropriately follow deliberations on issues related to protection and gathering of assets.

21. Another suggestion concerned the nature of the notice of insolvency proceedings provided to creditors. It was stated that a particularly prevalent case, perhaps
more so than the case of a debtor with multinational attributes, was the case of a debtor with creditors in more than one jurisdiction. It was suggested that the latter type of case highlighted in many instances the inadequacy of existing notice requirements, which often were limited to publication, in effectively providing foreign creditors with the opportunity to participate in insolvency proceedings. The Working Group agreed to consider those and other possible additional issues in its deliberations.

B. Possible decisive factors for access and recognition

1. Competence

22. The Working Group noted that there were jurisdictions that premised their response to requests for recognition of foreign insolvency proceedings on examining in the first place the question of whether the foreign proceedings were validly opened. It was suggested that it would be appropriate to reflect in the instrument to be prepared by the Commission such an approach, which involved, as a requirement for recognition, the presence of requisite "connecting factors" between the debtor and the jurisdiction in which the insolvency proceedings were opened.

23. Views were exchanged as to possible methods of expressing such a requirement, and as to which of several possible connecting factors should be key in assessing, for the purposes of recognition, the competence of the foreign jurisdiction to open the proceedings sought to be recognized. Possible factors included domicile, habitual residence, place of a company's registered office, principal place of business, centre of the debtor's main interests, and location of assets.

24. One view was that, from the standpoint of providing the greatest possible degree of predictability, the dispositive connecting factor should be, in the case of a legal person, its seat or registered place of business, and, in the case of a natural person, domicile. It was suggested that such an approach would provide the maximum possible degree of predictability and certainty. Cited as a disadvantage of such an approach was its lack of flexibility to take into account other possibly significant connecting factors and to deal with cases in which it would be desirable to recognize proceedings emanating from jurisdictions other than the domicile or seat of the debtor. It was suggested that a more appropriate formulation would therefore be to refer to the "centre of the main interests of the debtor".

25. A third suggested approach, relating to assessment of the validity of the foreign proceeding involved, rather than a reference to one or the other particular connecting factor, simply the establishment of a rebuttable presumption in favour of the validity of the foreign insolvency proceeding. Advantages cited in favour of such an approach included that it would facilitate cross-border assistance while still preserving the opportunity for a challenge to recognition related to the question of the competence of the foreign jurisdiction. It was also pointed out that such an approach would take into account that in a large number of cases the validity of the foreign proceeding would not necessarily be contested because, for example, there might not be in the recognizing jurisdiction creditors to challenge validity. A further attractive aspect of the third approach was that it would avoid the potentially undesirable exclusionary effect of a test based on a single factor, namely, that proceedings founded on other than the connecting factor used as a filter would be precluded from recognition.

2. Foreign proceedings emanating from prescribed countries

26. The Working Group noted that an approach used in a number of countries was to provide for assistance to be accorded to foreign insolvency proceedings from countries on lists of countries prescribed for such assistance.

3. Court discretion

27. The Working Group noted that another approach relating to recognition of foreign insolvency proceedings involved the exercise of court discretion based on statutory guidelines. The view was expressed that such an approach might be discussed further in the context of the effects of recognition.

4. Types of proceedings

28. The Working Group considered the question of which types of proceedings should fall within the scope of the recognition provisions. Mention was made of including in a definition of the proceedings covered certain basic elements such as the collective representation of creditors and removal of assets from the control of the debtor.

29. Wide support was expressed for the view that recognition should be limited to proceedings that were somehow officially sanctioned, whether by way of a court order or an order issued by an administrative authority. It was stated that private financial adjustment arrangements that might be entered into by the parties outside of judicial or administrative proceedings could take a potentially large number of forms and were not suitable material for a general rule on recognition. It was widely felt that providing for recognition of proceedings under a judicial or an administrative authority would address the normal type of case and would be an appropriate limit to the scope of the work.

30. The question was raised as to how to deal with the fact that there existed in certain jurisdictions forms of reorganization proceedings that were unknown or that would not be readily recognized in some other jurisdictions. An example of such a case was the "debtor in possession" type of reorganization proceeding. A related concern was that the recognition provisions should not place the recognizing court in the position of having to determine de novo whether the proceeding sought to be recognized in fact involved an insolvency. One suggestion for dealing with such concerns was to include a re-
requirement that the debtor should be under the supervision of an independent party. Another suggestion was to provide a rule to the effect that the foreign proceeding would be recognized as an insolvency proceeding if it were treated as such a proceeding in the originating jurisdiction. The point was also made that, to the extent that requests for recognition were made directly by one court to another, the problem of a requested court feeling that it needed to determine the basic question of whether an insolvency proceeding was involved could be alleviated.

31. In the discussion, it was observed that a distinction could be drawn between, on the one hand, access and recognition for the purposes of a foreign debtor determining the assets that fell within the estate and, on the other hand, for the purposes of foreign creditors making claims to the debtor’s assets located outside of the jurisdiction in which the insolvency proceedings were taking place (recognition of foreign creditors). The question was raised whether different prerequisites might apply to the two cases.

32. The view was expressed that some of these difficulties might be avoided if, at least as a working method, the Working Group would first focus on liquidation and turn later to reorganization proceedings. In support of such an approach, it was suggested that it might be easier to reach consensus on recognition of foreign liquidation rather than on reorganization proceedings, since the latter were unknown in a number of jurisdictions. It was stated that, once a set of rules had been agreed on for liquidation proceedings, the Working Group could consider the question whether those rules could be applied to reorganization proceedings. Moreover, it was stated that addressing both liquidation and reorganization proceedings would require making a distinction between those two types of proceedings, which might be difficult, since often liquidation involved reorganization of assets and vice versa.

5. Types of debtors

33. The Working Group engaged in a preliminary discussion of the question whether there should be any restriction on the types of debtors that should be covered in the text to be prepared, and in particular whether insolventcies of non-traders or of consumers should be excluded from coverage. It was noted that one way of accomplishing such an exclusion would be to limit the scope to legal persons. Reasons cited for exclusion of “consumer” insolvencies included that they were of relative unimportance in economic terms, particularly in the cross-border context, and that they would embroil foreign courts in the complexities of special rules and privileges applicable in other jurisdictions to protect consumers (e.g. exemptions of certain of the debtor’s family or personal property). However, in favour of encompassing both natural and legal persons, it was stated that excluding natural persons would result in failing to cover significant cases in which substantial sums of money were owed by non-traders. In that connection, it was pointed out that, if non-traders persons were to be included in the scope of work, some types of property, such as family or personal property, might have to be exempted from the debtor’s estate. A further factor cited was that it would be difficult to draw a clear distinction between consumer and commercial insolventcies, since no widely accepted criteria would necessarily be found for drawing such a distinction. A suggested approach to addressing the latter complication was to refer for the purpose of defining an insolvency as “consumer”, to debts incurred for private or personal purposes.

34. Another possible issue of exclusion raised concerned certain types of institutional debtors, such as banks, insurance and investment companies. It was pointed out that certain such financial institutions were, under some rational legislation, excluded from coverage of ordinary insolvency law because they were normally, as regulated bodies, subject to separate regulatory law and authorities. It was pointed out that winding up of banks was often conducted in a special administrative setting and that coverage under normal insolvency legislation could be complicated by the presence of deposit insurance, a subject normally regulated by the law of the jurisdiction in which the bank might be located. Another element was that whether such institutions would be covered could depend on the particular circumstances. For example, a bank operating in a jurisdiction in a manner that made it subject to domestic regulatory law might normally not be subject to the normal domestic insolvency law, while a bank only with assets in a particular jurisdiction might see those assets subject to a secondary proceeding in that jurisdiction with respect to those assets.

35. The view was expressed that, at least at this stage, it would not be advisable to presume the exclusion of the possibility of covering banks and similar institutions, in particular since some of the most substantial cross-border insolventcies involved banks. It was also pointed out that, increasingly, large banks were subsidiaries of large trading corporations, and recognition of such banks’ insolventcies could be crucial to maximizing the value of the overall insolvency estate.

6. Authority of foreign representative to act

36. The Working Group considered the question of the extent to and manner in which the recognizing court might wish to assure itself that the foreign representative had authority from the jurisdiction of the recognized proceeding to act abroad, in particular with respect to assets located abroad. It was reported that the question did not raise insurmountable problems as such in practice, since in most jurisdictions the accreditation of a representative purported to have universal effect. However, the question was nevertheless felt to be significant since it did involve a matter of some concern to courts.

37. The view was expressed that, for a foreign representative to be recognized abroad, its identity and functions should be self-evident, and that this might not always be the case, unless the foreign representative was authorized for this purpose by a court in the originating jurisdiction and evidence of this could be produced. It was pointed out, however, that a requirement of an additional specific court order beyond the act of appointment could present a serious obstacle to effective action by the
foreign representative, to the extent that it would deprive the representative of the crucial ability to protect assets in an expeditious fashion. It was also suggested that an alternative source of assurance to the foreign, recognizing court as to the authority of the foreign representative to act abroad might be found in a general statutory grant of authority to act abroad by the representative's home State to representatives of the type presenting the petition for recognition to the foreign court.

38. In the discussion, the question was raised as to the extent to which special agencies that existed in some countries for the purpose of supervising the operation of insolvent representatives, in the public interest or in the interest of creditors, might be entitled to judicial assistance abroad. The view was expressed that the question would raise less of a problem to the extent that such agencies, although perhaps appointed by an authority other than a court, would be acting as quasi foreign representatives in the pursuit of assets. It was also suggested that they should not have any more powers than a normal foreign representative, even though they might be associated with or appointed by Governments.

39. It was further stated that this as well as other aspects of the question of the foreign representative weighed in favour of a functional definition of a "foreign representative", rather than one using specific terminology, which may be capable of varying interpretations or degrees of understanding. It was also added that to some extent the questions that might be raised in the mind of a recognizing court as to the authority of a foreign representative to act abroad might be diminished if the application for recognition were to come from the foreign court rather than from the foreign representative.

7. Public policy considerations

40. It was generally felt that the future set of rules should include a provision recognizing the right of States to withhold recognition on grounds of public policy. It was noted that such an exception was found in multilateral instruments and in national legislation dealing with recognition of foreign proceedings. The Working Group considered whether it would be feasible or advisable to include such an exception in the model law as well. One approach, less desirable according to that view, which was characterized as "positive" reciprocity, would require proof that reciprocal treatment would be accorded; the other, less deleterious approach, referred to as "negative" reciprocity, involved a rebuttable presumption that reciprocity was available in the jurisdiction whose proceeding was being recognized.

41. Suggestions for additional issues relevant to factors that might be decisive for granting recognition included the proposal that definitions of terms such as "foreign representative", as noted above, and "foreign proceedings" should focus on functional aspects. Such an approach was said to be useful in preventing uncertainty due to terminological differences among legal systems.

42. As regards possible additional factors themselves, the Working Group considered whether to include a reference to reciprocity. In favour of inclusion of a reference to reciprocity, which was applied in some countries, it was suggested that such a reference would foster greater harmonization of law by increasing pressure on States to include in their own laws also provisions on cross-border insolvency.

43. At the same time, various interventions were directed at what could be viewed as disadvantages of including references to a reciprocity factor in the instrument to be prepared by the Commission. One such view was that including a reference to reciprocity would contribute to uncertainty, due to differing understandings and legislative concepts of the notion and due to difficulties in determining the extent to which reciprocity was actually available. It was also stated that inclusion of such a factor would be inconsistent with the basic aim of the project to foster greater international cooperation, and would send an inappropriate signal not in accordance with that aim.

44. The view was expressed that, in an effort to reduce the negative effects of a reciprocity provision, one might at the least distinguish between two approaches to reciprocity. One approach, less desirable according to that view, which was characterized as "positive" reciprocity, would require proof that reciprocal treatment would be accorded; the other, less deleterious approach, referred to as "negative" reciprocity, involved a rebuttable presumption that reciprocity was available in the jurisdiction whose proceeding was being recognized.

45. It was further observed that the aim of reciprocal treatment, which might be seen as being served most directly if the instrument were in the form of a convention, could conceivably be embodied in a model law as well. It was further suggested that a successful model law that was widely accepted could accomplish the goal of reciprocity without the inclusion in the model law of a reciprocity provision.

C. Effects of recognition

1. Possible legislative approaches

46. The Working Group exchanged views as to various possible ways of addressing the central question of the effects that would flow from recognition of a foreign insolvency within the parameters of the project undertaken by the Commission.

47. Underlying the discussion was the basic understanding that there were a range of possible effects that could be attributed to recognition, including provisional measures designed to gather and protect assets, such as staying
or freezing of individual creditor action against the assets in the recognizing jurisdiction and authorizing the foreign representative to obtain information and evidence concerning the assets and economic activities of the debtor and to manage and administer assets, and, at the more final end of the spectrum of effects, authorizing the foreign representative to transfer assets and proceeds out of the recognizing jurisdiction.

48. It was also understood as a basic premise of the work being undertaken by the Commission that the implementation by the foreign representative of effects of recognition would typically involve, at least initially, some sort of intervention by a court or administrative authority in the recognizing jurisdiction. Accordingly, it would not be within the scope of the project to establish for all States a system for empowering foreign representatives to act in foreign jurisdictions in the absence of some such official sanction or assistance. However, it was noted that such an approach might be a possibility that would be considered by States willing to go in that direction and might be considered for inclusion in a menu of options presented to States by the Commission.

49. One possible approach considered for indicating the effects of recognition could involve an attempt at an exhaustive enumeration of the effects of recognition, akin, for example, to the approach followed in the European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention). Such an approach did not attract wide support, in particular because of a concern that the potentially wide range of effects would render futile an attempt to enumerate them in a general and comprehensive fashion.

50. Differing views were exchanged as to a second category of approaches considered for indicating the effects of recognition, which involved reference to applicable law. A number of variants of such an approach could be considered, depending upon whether the recognizing court would be authorized to determine the effects of recognition in accordance with its own law, or by application of the law of the jurisdiction whose insolvency proceeding was being recognized. A further possibility was that the recognizing court would be authorized to apply either of those two laws.

51. Considerations adduced in favour of an approach based on application of the law of the recognizing court centered on the relative ease with which such a court could apply its own, familiar law, rather than a foreign law, with which it was likely to be unfamiliar. It was said that this approach would therefore make assistance to the foreign proceeding easier to grant and thus more likely, in addition to making for such reasons the Commission’s instrument more acceptable to States.

52. Advantages cited in favour of an approach based on application of the law of the recognized proceeding stemmed from the likelihood that it would lead to a more consistent, harmonized result, in view of divergences among national insolvency laws, divergences that might be brought to the fore if the recognizing court were to apply a law at variance with the law of the main proceeding. It was also suggested that application of the law of the main proceeding was preferable so as to avoid abetting debtors seeking to conceal assets behind another law that might provide a haven for those assets from administration under the main insolvency proceeding, for example, by not deeming those assets to be part of the estate.

53. The Working Group also discussed an approach occupying something of a middle ground between the two alternative “applicable law” approaches referred to in the preceding paragraphs, one which would involve authorizing the recognizing court to apply either its own law or that of the jurisdiction from which the recognized proceeding emanated. It was said in favour of such a mixed approach that it would provide flexibility needed to limit insulation of assets from insolvency proceedings and would therefore be in the best interests of creditors and of the maximization of the value of the estate. In regard to such an approach, the question was raised as to whether it might lead to a situation in which the foreign representative would be enabled to exercise more powers than those that would be available to the representative under the law of the appointing jurisdiction.

54. As a further aspect of the discussion of how to provide for effects of recognition, the Working Group noted that to one extent or another, depending in part on the applicable legal tradition and system, the precise effects of recognition could involve exercise by judges of judgment, or, in particular as understood in some legal systems, “judicial discretion”, taking into account the circumstances involved in each individual case. It was further noted that, while judges in various legal systems were called upon and were used to exercise such judgment, there were traditional differences among legal systems as to notions of how much could be left to “judicial discretion”.

55. As a way to achieve the basic, limited purpose of a quick and efficient opportunity to establish a cooperative link between jurisdictions in case of a cross-border insolvency, while still allowing room for different traditions and applicable legal notions, the Working Group viewed with considerable interest a proposal for an approach that would combine and bridge some of the considerations and approaches raised in the discussion. Under the proposed combined approach, the instrument being prepared by the Commission would establish a “minimum” list of measures or effects that would be triggered by recognition, centering on the need quickly to protect assets against dissipation and to allow time for a comprehensive assessment to be made of the situation, while at the same time leaving room for the possibility that the recognizing court could provide additional effects.

56. It was suggested that the latter aspect of the provision, which would leave open a window for judges to grant additional effects beyond those on the minimum list, could be crafted so as to involve factors or guidelines that would be familiar and well known to judges in different legal systems. Such factors could at the same time accommodate the degree of flexibility available for judicial action in various legal systems and could include in particular an assessment of whether local creditors would
be disadvantaged in the main, foreign proceeding, of local procedural requirements, and of general considerations of public policy.

57. As regards effects that would be candidates for inclusion on the minimum list of effects, it was broadly agreed that the effects in a “minimum list” should focus on what would be needed to serve the immediate need of preserving the possibility that local assets could be considered for inclusion in a coordinated or comprehensive solution to the insolvency. The prime example of such effects was the staying or freezing, upon recognition, or perhaps even upon mere filing of an application for recognition, of individual creditor action and of transfer by the debtor of its interest in assets. It was suggested that the latter, earlier point of the effectiveness of such a stay would be more meaningful in view of the potentially critical time factor involved in preventing dissipation of assets. Other candidates for inclusion in the minimum list included empowering the foreign representative to obtain information and testimony concerning the assets and affairs of the debtor, and to take control of and to manage debtor assets.

58. In support of the above approach, it was stated that it would accomplish a fundamental purpose of the project, which was to introduce basic “enabling” legislative provisions that would create the capacity for judicial cooperation and recognition of foreign insolvency proceedings, as there was currently a significant lack of such capacity in many national laws. At the same time, it would avoid relying merely on exercise of “judicial discretion” in a manner that raised the concern of diminished harmonization and acceptability across legal systems. Rather, in the area beyond the minimum list measures, it would recognize a degree of flexibility needed to enable judges to deal in a practical manner with cross-border insolvency cases, taking into account the particular circumstances of individual cases brought before them and other relevant factors, as they were generally accustomed to doing in all legal systems in other types of cases.

59. The question was raised as to whether the “minimum list” should include the possibility of overturning certain transactions of the debtor unfavourable to creditors generally, which took place within a period of time prior to the declaration of insolvency, a remedy referred to in some systems as “avoidance of preferential transfers”. However, hesitation was expressed as to including this item on the ground that it involved particularly complex questions that were treated in significantly different ways from State to State. As regards the factors to guide the identification of possible additional measures beyond the measures on the minimum list, the view was expressed that mention should also be made of what was referred to earlier as “positive reciprocity” (see paragraph 44, above). That suggestion did not draw sufficient support.

2. Exclusion of certain types of assets

60. It was noted that national laws contained exclusions of various types of assets either from the application of insolvency measures generally or specifically from rules governing disposition of assets in the cross-border context. For example, certain types of personal or family property might be excluded from the complete application of insolvency law, and, as evidenced in article 5 of the draft European Union Convention, rights in rem of third parties might be excluded from coverage under rules on cross-border effects of the opening of insolvency proceedings. Reference was also made to the possible exclusion of immovable property from such rules.

61. A number of interventions suggested a possible tendency that the instrument to be prepared by the Commission might not attempt to disturb such exemptions, in particular since they may involve notions of public policy and sovereignty that States would wish to retain as subject to their own national law or private international law rules. However, the Working Group noted that this was a question that would need to be considered further. It was also noted that in considering the question of possible exclusion of rights in rem, attention would be given to the related question of assets in which a seizure had already been obtained.

3. Procedural aspects of effecting recognition

62. The Working Group surveyed possible aspects of a provision that might be included in the instrument to be prepared by the Commission on giving effect to recognition and considerations related thereto. The range of possible approaches that might be considered differed in the degree of formality and the type and specificity of procedural detail. At one end of the spectrum were approaches that would require an express decision of recognition by a competent court, possibly involving also the initiation by the foreign representative of a local insolvency proceeding. At the other end would be an “immediate effect approach”, in which, for example, effects of recognition and empowerment of the foreign representative to act in the recognizing jurisdiction would flow as an effect of the opening of the foreign proceeding. It was pointed out that the former approach would provide the highest degree of legal certainty, while the latter approach was oriented toward serving the need of the foreign representative to obtain protective measures expeditiously. The Working Group also considered degrees of formality and procedure in between those two points.

63. A question underlying the discussion and possibly affecting the ultimate content of a provision on procedures concerned the extent to which the specific procedures might be left to the applicable law of the recognizing jurisdiction. Another motif in the discussion was that the content of a provision on procedure could be linked to the nature of the remedies or to the stage of recognition involved. The general thrust of such an approach would mean that the extent of procedural requirements and formality might depend upon whether the measures involved were of an emergency, provisional nature required for the immediate protection of assets, or whether the measures were of a more final nature, such as a final decision on recognition of the foreign representative or a general stay of creditor action. The former type of measures might be subject to a lesser degree of procedural formality,
while the latter would likely be subject to a higher degree of formality.

64. Another backdrop to the discussion was the generally held assumption that, in the context of the instrument being prepared by the Commission, giving effect to recognition would require some degree of judicial or quasi-judicial action and control, in particular were the instrument to be in the form of a model law, subject to unilateral legislative adoption, and since it would not in any case be an instrument limited to adoption in a regional context. Thus, there was little indication that an “immediate effect” type of approach was a practical option for inclusion as the approach to be followed by States generally.

65. With the above elements as possible guidelines for considering a provision on procedures, the Working Group discussed more detailed aspects of procedures. One question was the extent and timing of notification to creditors of the recognition of the foreign representative or of effects of that recognition such as a freeze of assets. It was noted generally that jurisdictions typically imposed notification and publication requirements, for example, advertisements inviting proofs of claims to be brought forward, at one or more stages of insolvency proceedings. Considerations raised in this regard were that any such publication requirement should not apply too early in the process. Such a timing might defeat the ability of the foreign representative to meaningfully protect assets against dissipation or concealment, in particular if a publication or notification would be required before an emergency freeze of assets would take effect and would provide a window for a debtor or creditors to dispose of assets prior to the taking hold of a freeze.

66. It was also pointed out that notification of measures granted to a foreign representative should not be assumed to be appropriate at an early stage in the process in particular if a final decision on recognition had not yet been reached and the possibility still existed that recognition would be denied. The concern in this regard was that a premature notification or publication could unjustifiably harm the reputation of the debtor as well as its ability to carry on commercial activity, in addition to possibly running afoul of constitutional due process doctrines. At the same time, it was noted that notification given at too late a stage could prejudice the legitimate interests of creditors and would fail to address what was reported to be a common complaint of creditors, namely, lack of sufficient information concerning the insolvency proceedings.

67. The further point was made that it could probably be generally assumed that the applicable insolvency law and jurisprudence of the recognizing jurisdiction would lead to adequate notification and publication, which would limit the extent to which the matter would need to be addressed in any great detail in the instrument being prepared by the Commission. At the same time, some basic treatment of the question might be helpful since approaches in national laws did vary and some common minimum ground might have to be found concerning notification of measures for which provision would be made. Examples of various approaches in national law included a national law that provided publication only once a final decision on recognition was issued. There was support expressed in the discussion for the notion that for certain aspects there might usefully be an earlier point of notification. It was suggested, for example, that, when a provisional measure was put in place freezing an asset prior to the decision on recognition it might well be appropriate to notify the specific parties directly affected by the freezing order.

68. The above discussion suggested that, as regards the notice requirement, an appropriate approach might be to leave the exact details of the notice and publication requirement to the court involved in issuing a recognition order or in ordering specific protective measures. Beyond that aspect, a suggestion was made that some measures of a protective nature may have to be provided that would take effect upon application for recognition, rather than waiting to take effect until the decision on recognition, and that this possibility needed to be recognized. In addition, there was a broadly held view that the text should affirm that the foreign representative should have access to the court competent to issue the necessary recognition and protective orders, and in particular that some protective order may have to be issued in a particularly prompt manner, perhaps involving an *ex parte* proceeding. It was noted that such *ex parte* avenues were not unfamiliar to legal systems generally and typically provided an opportunity for notification and challenge after the initial *ex parte* stage. (See also the discussion of notice questions in paragraphs 84-87, and 170, below.)

69. As to which court in a particular country would be competent, reference was made to several potential factors, including the proximity of a court to assets in question and to the possibility that a court being requested to issue emergency protective measures might not necessarily be the court competent ultimately to rule on the application for recognition. It was generally felt that because of the diversity of such factors it would not be feasible or appropriate to attempt to refer to a specific court or courts in the instrument being prepared by the Commission. It was suggested, however, that it might be helpful to state that there should be court access and to provide for an indication by enacting States themselves of which of their courts would be competent in these matters.

D. Secondary insolvency proceedings

70. The Working Group next turned to a discussion of the question of the implications for judicial recognition and court access for, and recognition of, foreign insolvency proceedings of the opening of a separate insolvency proceeding in the recognizing State. It was noted that the effects of recognition of a foreign insolvency proceedings could be blocked to one degree or another by the opening of a separate insolvency proceeding, and, in order to limit such blocking effects, various limitations could be placed on the opening of such a separate proceeding (sometimes referred to as “secondary proceedings”).

71. It was also noted that there were various ways found in legal systems for linking such secondary proceedings
to the foreign proceedings, including providing that in view of the existence of a foreign insolvency proceeding it was not necessary to prove the insolvency of the debtor as a prerequisite for the opening of a secondary proceeding. Another important link may be to permit the foreign representative to request the opening of such proceedings. Varying degrees of precedence may be assigned to the foreign proceeding by: restricting the jurisdiction to open secondary proceedings; restricting the right of creditors to request the opening of such a proceeding; and restricting the right of creditors to payment from the proceeds of the liquidation of assets in the secondary proceeding. The attention of the Working Group was also drawn to a system in which recognition of a foreign proceeding automatically triggered the opening of a secondary proceeding.

72. Various observations were made as to the relative desirability of such secondary proceedings. Those observations included, on the one hand, an acknowledgment of the possible undesirability and disadvantages of such proceedings from the standpoint of the goal of recognition of foreign insolvency proceedings, and, on the other hand, an emphasis on the possibility that such proceedings could actually serve a positive purpose. That being said, the view was widely shared that the instrument to be prepared should acknowledge rather than resist the possible phenomenon of a plurality of insolvency proceedings. It was felt that, rather than attempting to restrict secondary proceedings, a goal which, it was said, would not be appropriate for the Commission's work though it may be so within the context of a regional convention as in the case of the European Union draft, the instrument should seek to facilitate and maximize the degree of cooperation and coordination between proceedings in more than one jurisdiction. It was generally felt that such an approach would heighten acceptability of the legal text to be prepared, while leaving room for a realistic and effective contribution to be made by the Commission in the field of cross-border insolvency.

73. A number of considerations and questions were raised which could affect the content of provisions in line with the above approach. One basic question concerned the extent to which the legal text could deal in a detailed fashion with the specific manner and procedures of coordination and cooperation between insolvency proceedings. Possible aspects and techniques of cooperation and coordination included: according national treatment to foreign creditors, to the effect that preference to local creditors would only be given on the basis of the nature of their claims, rather than on the basis of their nationality; exchange of information regarding the proceedings and the assets of the debtor; a duty of administrators from the proceedings to cooperate; a right of the foreign representative to intervene in the local proceedings; continuation of rights accorded to the foreign representative at least until actual commencement of local proceedings, rather than interruption of those rights by the mere filing of an application for local proceedings which may remain pending for a period of time; right of repatriation of assets and proceeds of the local liquidation; and application of the rule that a creditor who has received part payment in one proceeding may not receive a dividend for the same claim in another proceeding until other creditors of the same ranking or category have in that other proceeding obtained an equivalent dividend (referred to in some jurisdictions as the "hotchpot" rule).

74. The attention of the Working Group was also drawn to various distinctions that might be addressed in detailing the relationship between proceedings in different jurisdictions. Those included the manner of determining which proceeding would be deemed the "main" proceeding, as opposed to a "secondary" proceeding, a question which would not necessarily depend on chronology as much as on purposes of proceedings, and whether a local proceeding was opened exclusively for the purpose of granting assistance to a foreign proceeding, or was in the nature of an actual local insolvency proceeding.

75. In view of the above range of variable circumstances, possibly affecting the nature of cooperation and coordination that might be applied, and the nature of different possible insolvency proceedings taking place in parallel, considerable support was expressed for the view that the Commission legal text should neither attempt to draw specific distinctions in the nature of a hierarchy of proceedings in the context of plurality, nor attempt to define extensively the exact measure of cooperation and coordination among those proceedings. Rather, according to that view, the contribution to be made by the Commission would lie in affirming the principle of maximizing cooperation and coordination and providing legislative, enabling authority for judges inclined to cooperate in any given case. It was recalled in this regard that it was the lack of such enabling provisions in many jurisdictions that constituted an obstacle to effectively dealing with cross-border insolvencies.

76. At the same time, the view was expressed that a simple hortatory statement of principle concerning cooperation and coordination might be deemed insufficient in legal systems that would seek in legislation greater guidance as to what courts could do in response to requests for cooperation or coordination. Suggestions to address that concern included to refer in an indicative list to certain basic measures such as communication of information regarding assets of the debtor and to other aspects of cooperation and coordination. Another suggestion was to focus on a duty on the part of administrators to cooperate, though it was observed that a significant role would always remain for the court, despite the fact that in some jurisdiction administrators might be assigned a relatively larger share of the responsibility for implementing cooperative activities. It was furthermore pointed out that the degree to which defining the details of cooperation would be left to courts would be tempered by the likelihood that measures adopted by courts would often largely be based on requests from counsel.

E. Access for foreign representative

77. It was noted that at earlier points in the discussion, a convergence of views had emerged as to the desirability of providing the foreign representative with direct access to the competent court for the purpose of applying for
recognition and obtaining the appropriate protective measures. At this stage of the discussion, the attention of the Working Group was focused on what might be said beyond that general principle in the legal instrument to be prepared by the Commission. The widely shared view was that the maximum possible degree of flexibility should be encouraged and the minimum degree of obstacles should be involved in the process.

78. In terms of an actual provision reflecting the above principles, considerable support was expressed for basing a provision on the foreign representative providing, in a simplified process, proof of appointment in the foreign proceeding. This could involve presentation of a certified copy of the document of appointment in the foreign insolvency proceeding. It was observed that such an approach would meet the test of simplicity, while still addressing issues raised in the discussion of the assurance that the recognizing court would wish to have of the authority of the foreign representative to act. It was further observed that such an approach would be along the lines of the technique utilized in the draft European Union Convention.

79. Requiring the foreign representative to prove, at the application stage, that assets existed in the recognizing jurisdiction did not attract support. It was felt that the imposition of such a threshold requirement would create an obstacle to the basic purpose of an application for recognition and obtaining the appropriate protective measures. At this stage of the discussion, the attention of the Working Group was focused on what might be said beyond that general principle in the legal instrument to be prepared by the Commission. The widely shared view was that the maximum possible degree of flexibility should be encouraged and the minimum degree of obstacles should be involved in the process.

80. Beyond what had been discussed at earlier points in the session as to the desirability of encouraging and facilitating cooperation among jurisdictions involved in cross-border insolvencies, the Working Group considered the role that could be played by ad hoc protocols or concordats that were sometimes agreed by the parties involved, and sanctioned by courts, as a tool for laying down the specific aspects and terms of reference of cooperation and coordination. It was noted that such protocols had been successfully utilized in a number of large, particularly prominent cases of cross-border insolvency. It was further noted that the International Bar Association had developed a model Concordat that parties might use as a guideline in formulating a protocol dealing with issues such as designation of the administrative forum and choice of applicable law to govern various issues including avoidance of transfers and priority rules for distribution of assets.

81. The Working Group recognized the potential utility of ad hoc protocols in establishing the orderly resolution of cross-border insolvency cases, and it was generally agreed that the instrument to be prepared by the Commission should avoid throwing obstacles in the way of adoption of such protocols. At the same time, it was pointed out that possible questions regarding such protocols included their implications for rights sought to be enforced by individual creditors. In response to that question, it was stated that such protocols should not be regarded as precluding the rights of individual creditors. It was also noted that the International Bar Association model Concordat dealt with the basic question of the treatment of claims by providing that general or common claims should receive the same pro-rata treatments in all proceedings, and that priority claims were to be dealt with according to the law of each jurisdiction involved.

82. Another aspect of cooperation addressed at this stage of the discussion was the possibility of judicial communication in furtherance of cooperation. Aspects of that question included: the fact that different stances may be taken by legal systems as to judicial communication, with some States encouraging communication and other States prohibiting it and emphasizing traditional diplomatic and treaty-based channels for communication; varying degrees to which the onus of cooperative activities and communication would be placed on the insolvency administrators from the different jurisdictions involved; varying degrees of formality or informality that may be involved in such communication depending upon the stance towards such communication of the legal systems involved; and varying degrees of procedural due process that may be required in the exercise of such communication, for example the requirement of the presence or notification of the parties and the right of parties to participate in the communication, and bearing in mind that judicial communication could well be prompted by suggestions from counsel. Aside from strictures of a legal nature that might affect the exercise of judicial communication, reference was made to possible logistical obstacles related to language.

83. The generally shared conclusion at this stage with regard to the issue of judicial communication was that the instrument being developed should avoid placing obstacles in the way of such communication.

G. Additional issues

1. Duty to inform creditors

84. The Working Group considered the extent to which the instrument being prepared by the Commission could deal with what was reported to be a common problem in the cross-border insolvency context, namely, that creditors often got information about the opening of an insolvency proceedings in another country late, or not at all. By way of background, it was further reported in this context that traditional notice procedures may be ill-suited for the cross-border context, in which foreign creditors may be handicapped by factors such as language, geographical distance and lack of understanding of the foreign proceedings. It was also pointed out that national systems differed as to whether a duty was imposed on the administrator to seek out creditor claims. Some national systems imposed an obligation on the administrator to seek out claims and to agree on the amount of payment, while in other systems the burden essentially was placed on claimants and no obligation was imposed on the administrator to make a reservation for claims that were not brought forward.
85. By reference to notice provisions in the draft European Union Convention, the Istanbul Convention and certain national laws, the Working Group noted various possible elements of a notice system tailored to the cross-border environment, including: providing additional explanatory information concerning the foreign proceedings, such as whether a meeting of creditors would be held and whether failure to attend would result in waiver of a claim, and other information concerning filing of claims; allowing foreign creditors an additional period of time for filing of claims; providing multilingual forms for filing of claims, and allowing filing in foreign languages; and permitting the filing of claims in writing from abroad.

86. In terms of the content of a possible provision on notice that could be included in the Commission legal text, it was acknowledged that there would be limitations as to the degree of detail and regulation that could be attempted. It was generally felt that an affirmation of the requirement that foreign creditors should be notified of the opening of insolvency proceedings might be feasible, possibly along with a statement of principle concerning facilitation of participation of foreign creditors.

87. On a more detailed level, no objection was raised to setting forth a requirement concerning information to be included about the foreign proceedings, an approach which might make a useful contribution to the standardization of notice procedures internationally. Concerning the question of the timing of the notification of foreign creditors, the view was expressed that it should coincide with the issuance of notices to domestic creditors in the foreign proceeding. Regarding the question of the language of the notice, support was not evident for requiring the foreign representative to address the notice in a foreign language, based on a concern that imposition of such a requirement as a general rule would place an excessive burden on the representative.

2. Duty of administrators to communicate information between themselves

88. It was generally acknowledged that cooperation and coordination in cross-border insolvencies would be facilitated by communication of information between administrators of the proceedings involved. Information that could be exchanged concerned, for example, lists of admitted creditors and disposed assets. While the desirability of exchange of information was emphasized, several interventions suggested that it would be difficult to define and formulate a provision that would go beyond a relatively vague statement of a duty to exchange information. The view was also expressed that the imposition of such duty might be complicated to the extent that representatives were lawyers subject to strictures based on attorney-client privilege.

3. Equalization of rate of payment of claims

89. The Working Group noted that a basic principle of coordination and fairness in administration of cross-bor-der insolvencies was that a creditor who had received part payment in one proceeding should not receive a dividend for the same claim in another jurisdiction until other creditors of the same ranking or category had in that other proceeding obtained an equivalent dividend (“hotchpot” rule). Inclusion of a reference to that principle was generally considered to be desirable and feasible.

90. The Working Group also considered whether to address in the instrument being prepared another technique used to ensure to the degree possible that some creditors would not enjoy undue advantage over other creditors in the liquidation of claims. That technique involved permitting each representative of a proceeding to “cross-file” claims from its respective proceeding in the other proceeding.

91. The question was raised whether such an approach was indeed the only or the optimal method for achieving the goal of equitable distribution that could be presented. It was suggested that an alternate avenue, perhaps more efficient for achieving the same end, would be to rely on an accounting approach involving adjustment of claims. It was suggested that such an approach might be more efficient as it did not rely on affirmative actions being taken by the representatives, and that the instrument should therefore take cognizance of that approach as well, in addition to reflecting the possibility of cross-filing. In support of including mention of cross-filing, it was emphasized that that technique was transparent and was of particular importance to small creditors, who could thereby see their claims pursued without the necessity of hiring local counsel in foreign proceedings.

92. Reference was made in the discussion to another technique employed for equalization of payment to creditors, namely, that of disgorgement or return of the benefit received by a creditor of individual action to enforce a claim on the debtor’s assets. While no substantive objection was raised to the principle as such, and it was indeed possibly a particularly effective tool for achieving equalization, there was hesitation to address such measures, which would typically be treated under local law as a matter of liquidation of claims. It was further noted that, though disgorgement may fall outside the scope of the instrument being prepared by the Commission, it may well be within the scope of a regionally based convention (European Union draft Convention, article 20(1)).

93. A similar view was shared as to the probable difficulty of including mention of the principle of “marshaling”, according to one notion of which creditors would be subject to an obligation in exercising rights with respect to assets to do so to the minimum disadvantage of certain other classes of creditors. While the principle was not questioned, it was said to be difficult to apply and enforce, and likely to raise questions such as what creditors would be entitled to for actual losses and whether they could claim for non-monetary damages. It was also noted that there existed differing concepts of “marshaling”.

III. CONSIDERATION OF PRELIMINARY DRAFT PROVISIONS

94. Subsequent to its review of the issues set forth in document A/CN.9/WP.42, the Working Group considered a number of preliminary draft provisions developed by the small ad hoc drafting group it had established.

A. Definition of “foreign proceeding”

95. The Working Group considered the following preliminary draft of a definition of “foreign proceeding”:

"Foreign proceeding’ means a judicial or administrative proceeding in a foreign country for the purpose of liquidating the assets of a debtor for distribution to its creditors or adjusting the debts of a debtor to its creditors.

Variant A

A foreign proceeding shall be presumed to have been properly opened in the absence of proof to the contrary.

Variant B

The debtor in a foreign proceeding may be only a natural or a legal person which has its domicile, [principal] place of business or [principal] assets in the foreign country [and which is not subject to provisions for liquidation under regulatory laws of this country]."

96. The discussion of the above draft definition indicated a widely held view that the “foreign proceeding” to be recognized should mainly have three characteristics: it should be an insolvency proceeding in the broad sense, so as to cover both liquidation and reorganization proceedings; it should be a collective proceeding, in the sense that representation of the mass of creditors would be involved; and it should be a proceeding that was somehow officially sanctioned, whether by a court or an administrative authority. At the same time, a view was expressed that some matters referred to might be dealt with in the context of a provision dealing with the scope of application of the instrument to be prepared.

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97. It was suggested that the words “adjusting the debts of a debtor” might not be universally understood as a reference to reorganization proceedings, which were intended to be covered.

98. A number of further elements were suggested for inclusion in the definition of “foreign proceeding”. One suggestion was that the term “collective” should be used to describe the proceedings. Another view was that this would not suffice, and that it would be clearer to refer, as a common denominator of what was intended to be covered, to equal (“pari passu”) treatment of unsecured creditors. However, that suggestion raised the question whether it might inadvertently be read as excluding proceedings involving unsecured creditors. Another element suggested was to refer to “open and existing” proceedings, so as to avoid capturing mere pending applications. In addition, it was suggested that other elements that might be referred to in the definition could include the notion that the debtor, as a result of the opening of the foreign proceeding, should be divested, i.e. lose control over its assets. The concern was expressed, however, that such a reference might be understood differently from State to State and might lead inadvertently to exclusion of “debtor in possession” type of proceedings in which the debtor remained in place, through its activities were subject to court supervision or approval. In the discussion of possible basic elements of a definition, the Working Group was urged to adopt an approach that would be as inclusive as possible, and to avoid including numerous conditions in the definition to the degree that the definition would limit the achievement of the goal of facilitating recognition of foreign insolvency proceedings.

Variants A and B

99. The Working Group then turned to a discussion of the variants presented to embody two different possible approaches for referring to the assessment of the competence of the foreign court for opening the proceeding sought to be recognized. Variant A reflected the proposal that had been made that it would suffice to establish a rebuttable presumption that, from a jurisdictional standpoint, the foreign proceeding was validly opened. Variant B represented an approach based on assessing the competence of the foreign jurisdiction in the light of one or the other connecting factor.

100. It was observed that variants A and B did not necessarily constitute alternatives, since the approach in variant A might itself result in an assessment by the court based on factors referred to in variant B.

101. With regard to variant A, the concern was expressed that the words “properly opened” introduced some uncertainty, since the meaning of a “proper” opening of proceedings was not clear. In response, it was stated that the foreign proceeding should be recognized as having been “properly opened” if it were treated as such in the originating jurisdiction.

102. In the discussion, the view was expressed that at some point in the preparation of the Commission legal text, consideration would have to be given to whether a plurality of foreign proceedings could be recognized by virtue of the rules being established.

103. As regards variant B, it was observed that the reference to the “principal” place of business of the debtor might be problematic in the contemporary environment as it could be difficult to determine for a multinational entity which of various significant places of business it might have should be regarded as the “principal” one. It was also said to potentially raise the risk that, after an initial recognition of a proceeding on the basis of a “principal place” test, a later application may be made from another jurisdiction on the basis of the same factor. It was suggested in various interventions that for such reasons an approach along the lines of variant A might be preferable as an effective way of providing courts with an opportunity to apply appropriately considerations of competence of the foreign jurisdiction.
104. As a further development of the formulation of variant A, it was suggested that the presumption in variant A of valid opening of the foreign proceeding could be phrased so as to provide exclusion of proceedings that did not involve a “substantial connection” between the debtor and the foreign jurisdiction.

105. Subsequently, and in view of the above discussion, the Working Group considered the following further revision of a draft definition of “foreign proceeding”:

“(1) ‘Foreign proceeding’ means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign country in which the debtor is subject to control or supervision by a competent person, body or authority, for the purpose of:

(a) the reorganization of a debtor’s affairs, or

(b) liquidating the assets of a debtor.

(2) For the purpose of this law, foreign proceedings do not include proceedings where there is no substantial connection between the debtor and the jurisdiction in which those proceedings were opened.”

Paragraph (1)

106. There was general agreement that the revised version of paragraph (1) represented measurable progress in the direction of a provision that could gain wide acceptance. It was noted, in particular, that the notion of “collectivity” of the proceeding was explicitly mentioned. Furthermore, the provision also now referred to the foreign insolvency proceeding as being pursuant to the insolvency law of the foreign country. This, it was observed, would permit the recognizing court to avoid examining de novo whether the proceeding was an insolvency proceeding.

107. However, a number of concerns and suggestions were expressed. One concern was that the reference to “control or supervision” might not be sufficient to make it clear that control under a State authority was meant. Another concern was that the order in which the references to reorganization and to liquidation were listed might be inappropriate and should be reversed in view of traditional preferences for liquidation in various jurisdictions. In support of the existing order, it was stated that there was an increasing trend toward greater attempts at reorganization and in that light the present order could be left in place, as well as for the reason that it reflected a logical progression of possible steps.

108. The proposal was made to add to paragraph (1) a reference to composition proceedings, namely, proceedings in which indebtedness was reduced while the debtor remained in control of its assets. The Working Group hesitated to add such a specific reference to composition proceedings. One view in that direction was that the broad category of “reorganization”, which might be read more as an economic than as a legal term, would widely be understood as encompassing composition and other such proceedings. It was felt that adding such a specific reference to any particular form of reorganization might actually create uncertainty. Furthermore, it was observed that attempting a list of reorganization proceedings would run the risk of excluding some types of proceedings intended to be covered. While it was generally agreed that composition proceedings should be covered, the Working Group was not ready to reach a definitive decision on how best to achieve that result and deferred consideration of the matter to a later stage of its work. Possible approaches suggested included a definition of the term “reorganization” to cover the point, or a reference to it in a guide to enactment.

109. A number of suggestions or questions of a drafting nature were raised, including that: the term “body” could be deleted as it might be unclear and, in any event, was covered by the terms “person or authority”; it might be made clear that the terms “control or supervision” referred to the assets and not to the person of the debtor; and that reorganization could refer to the debtor’s assets as well as to the debtor’s affairs. In the discussion, the question was again raised as to whether the proceedings as defined were intended to apply to insolvencies of natural persons to the extent of encompassing consumer insolvencies.

Paragraph (2)

110. It was widely viewed that paragraph (2) referred to a rule on recognition of foreign proceedings, rather than to an element to be included in a definition of “foreign proceeding”, and that the matter could be dealt with elsewhere in the text. The view was also expressed that stating that “foreign proceeding” did not refer to a proceeding in which there was no substantial link with the foreign jurisdiction might be confusing, since, with or without such a link to the foreign jurisdiction, the proceeding would be emanating from a foreign jurisdiction.

B. Definition of “foreign representative”

111. The Working Group considered the following preliminary draft of a definition of “foreign representative”:

“Foreign representative’ means a duly appointed trustee, administrator or other representative of an estate in a foreign proceeding who has been [specifically] authorized by statute or other order of court (administrative body) to act in connection with a foreign proceeding involving the debtor or its assets.”

112. The concern was expressed that defining “foreign representative” by reference to various specific terms and titles used in various jurisdictions might create uncertainty in jurisdictions where the expressions would be unfamiliar and might have the unintended effect of being unduly restrictive, since the list would inevitably be incomplete. An alternative approach, which drew support, was to base the definition on the functions of the foreign representative, an approach of the type found in article 2(b) and (d) of the European Union draft convention. It was also observed that such an approach might tie in well with the functional approach of the definition of “foreign proceeding”.

113. The Working Group was urged to avoid including the word “specifically” in the definition, since it would be unusual for a State to appoint an insolvency repre-
sentative specifically to act abroad. Rather, it was pointed out, representatives or administrators were typically appointed with a general grant of authority to act in relation to the debtor and its assets.

114. After the above discussion, and in light of the views that had been expressed, the informal drafting group revised the draft provision to read along the following lines:

"'Foreign representative' means a person or body duly appointed in a foreign proceeding, who is authorized by statute, court or other competent authority to act in connection with the debtor's assets or affairs."

115. The revised definition of "foreign representative" was generally felt to be acceptable in principle. However, a number of concerns were expressed as to its precise formulation. One concern was that the words "to act in connection with the debtor's assets or affairs" introduced some uncertainty, since in various jurisdictions a number of persons could have the authority "to act in connection with" the debtor's assets or affairs, without necessarily being insolvency representatives. Such individuals might include, for example, judges, accountants, and supervising commissioners. In order to address that concern, the suggestion was made to replace the words "to act in connection with ..." by words along the following lines: "to administer or supervise the debtor's assets in the context of reorganization or liquidation proceedings". That suggestion was objected to on the ground that it might inadvertently lead to the exclusion of "debtor in possession" or "suspension of payment" types of proceedings, in which the debtor remained in control of its assets and could technically be regarded as exercising administration type of functions, although under the supervision of a judicial or administrative authority. An alternative suggestion aimed at ensuring that those types of proceedings would not be excluded was to refer to the exercise of the powers of administration or supervision of the debtor's assets or affairs, since, as previously noted, the debtor in possession could exercise those powers. That suggestion also was objected to on the ground that reference to administration and supervision did not sufficiently clarify what persons or bodies were being referred to.

116. After discussion, the Working Group agreed that words along the lines of "person or body appointed ... to reorganize the debtor's assets or affairs, or to liquidate the debtor's assets" might be sufficient to address the concerns expressed, in particular the concern to make it clear that representatives of proceedings, in which a "debtor in possession" or suspension of payments in which the debtor remains in possession of assets were involved, were intended to be covered.

117. Another concern was that the word "duly" might give the impression that the recognizing court could refuse to recognize a foreign representative on the ground that the appointment was not in accordance with the procedural law of the originating jurisdiction. The prevailing view was that the provision did not intend to place that aspect before the recognizing court and that the word "duly" should therefore be deleted.

C. Judicial cooperation

118. The Working Group considered the following preliminary draft of a provision on judicial cooperation:

"(1) Where collective insolvency proceedings have been opened by the courts of this country and the courts of another country, the court shall have the authority to cooperate with the other court for the purpose of achieving the efficient administration of the debtor's assets and liabilities.

(2) The administrator shall comply with any order made by the court for the purpose of ensuring the cooperation provided for the above.

(3) The cooperation between [courts] shall be subject to
   (a) the procedural requirements of the court;
   (b) the protection of local creditors against undue prejudice or inconvenience;
   (c) public policy."

119. It was recalled that the above provision had been developed in response to the view in the Working Group in the initial phase of the discussion (see paragraphs 75-76, above) that a provision on judicial cooperation would be necessitated in order to address the phenomenon of plurality of insolvency proceedings. It was noted that a provision on that subject would be particularly helpful to judges in jurisdictions that did not currently have a legislative framework or authorization for judicial cooperation and where the lack of such legislative support constituted an obstacle to judicial action in pursuit of cooperation. In the discussion of the specific aspects of the draft article, a number of questions, described below, arose. The Working Group was urged, during the consideration of those questions, to retain in its sight that the primary purpose of the provision was to serve as a basic enabling provision to make possible judicial cooperation, which in turn was one of the principle aims of the project.

Paragraph (1)

120. Questions were raised as to the types of possible contexts in which the draft provision on judicial cooperation was intended to apply. Those possible contexts could include, depending upon the intended scope of application of the provision, the case in which there was a main proceeding and one or more secondary proceedings, the latter being somehow subordinated to or limited in relation to, that main proceeding; the case of parallel proceedings claiming what might be referred to as "primary" jurisdiction; and the case of an "ancillary" proceeding opened in a jurisdiction for the purpose of providing assistance to a foreign insolvency proceeding. It was suggested that the appearance of those questions in the discussion had implications not only for the content of the present provision, but also suggested the possible need to tackle more fully at a later stage in the discussion the question of whether and how the instrument being prepared might deal more fully with the question of plurality of proceedings. That basic inquiry might address, for example, how one proceeding might be assigned primacy over another. The point was also made that it perhaps might not be necessary to delve into those aspects, at
least as regards the present provision on judicial coopera-
tion, since it was essentially a statement of general prin-
ciple of cooperation, and, beyond that, the specific mea-
tures taken would be within the power of the court to fit
to the specific circumstances involved.

121. As regards the particular question of the type of
context at which the current provision on judicial co-
operation was aimed, it was noted that the provision had
in mind generally the case of more than one proceeding
taking place contemporaneously. It had not been specific-
ally formulated to address the case of ancillary proceed-
ings, an expansion of the scope of the provision that the
Working Group was urged to consider. No objection was
made to such an expansion of the scope of the provision.

122. The question was raised as to whether it would be
desirable or, for that matter, feasible to identify the mea-
sures that should be understood to fall within the notion
of “cooperation”. While it was generally understood that
precision would be helpful, in particular in those jurisdic-
tions in which judges would require an indication of the
measures they were empowered to take, hesitation was
expressed as to including a definition as such of “co-
operation”. The concern was that such an approach would
have the undesirable effect of limiting the degree of flex-
ibility available to judges and thereby limiting their abil-
ty to fashion the measures to best fit the circumstances
of individual cases brought before them, thus limiting the
extent of cooperation.

123. At the same time, however, the Working Group
was generally inclined to the view that something could
be done to accommodate the desire for a description or
indication of what was meant by “cooperation”, without
compromising the degree of flexibility needed to make
cooperation in any given case meet meaningfully the cir-
cumstances at hand. Accordingly, it accepted favourably
the suggestion that an attempt should be made to include
an indicative or illustrative, i.e. non-exhaustive, list of
possible cooperation measures.

124. As a further point relating to the definition of what
in any given case might constitute cooperation, the atten-
tion of the Working Group was drawn to the possibility
that one way in which cooperation between courts might
be structured could involve the approval by the courts of
an ad hoc protocol concerning various aspects of coordin-
nating and establishing cooperation between the courts
and parties involved. A model for such an agreement, it
was noted, was the Concordat developed by the Interna-
tional Bar Association.

Paragraph (2)
125. A number of interventions were directed at clarify-
ing the intended purpose and subject parties of paragraph
(2). In particular, the question was raised as to whether
the obligation imposed on the administrator to comply
with orders of the court aimed at implementing coopera-
tion was addressed to an administrator appointed by the
recognizing court, or perhaps also at the foreign admin-
istrator being recognized.

126. In response to the above line of inquiry, it was
pointed out that the original intent of paragraph (2) was
to assist a court that might not be in a position to engage
directly in judicial communication with the court in a
foreign jurisdiction to conduct such communication
through the local administrator it had appointed. As such,
the provision was directed at the local court and admin-
istrator of the recognizing country. At the same time, it
was recognized that in some jurisdictions particular em-
phasis was placed, in cooperation and coordination mat-
ters, on the role of the administrators involved, rather
than placing primary responsibility on the courts. It was
suggested that this approach should be acknowledged by
emphasizing also the duty of administrators to cooperate
and expanding the scope of paragraph (2) to cover the
foreign administrator.

127. That suggestion to expand paragraph (2) to cover
the foreign representative did not encounter objections as
such. However, it was stated that consideration should be
given to providing at some point in the text for a “limited
appearance” by the foreign representative. Under that no-
ton, an appearance by the foreign representative before
the foreign court would not expose the foreign representa-
tive and the assets controlled by the representative to the
full jurisdiction of the recognizing court. It was agreed
that this was an issue that, in view of its importance to
the basic questions of access and recognition, needed to
be discussed more fully than would be possible at the
present session, which did not mean, however, that fur-
ther preparation of a draft provision on judicial coopera-
tion would necessarily have to await the outcome of that
discussion.

128. As a matter of drafting, it was suggested that para-
graph (2) might be reformulated so as to refer to the
authorization for the court to issue orders directed at
achieving cooperation, rather than addressing compliance
by administrators. It was said that this might be a way of
avoiding a specific statement as to the addressees of the
article, and the attendant questions that had been raised
above (paragraphs 125-126). It was also suggested that
the provision might be reformulated so as to avoid giving
rise to the unintended interpretation that the administrator
could choose not to comply with instructions of the court
that were not considered to be for the purpose of ensuring
cooperation.

129. A last point in the discussion of paragraph (2) was
that it would probably be possible for the Working Group
to engage in a more defined discussion of the issues that
had been raised once it had before it a generally more
developed provision on judicial cooperation, taking into
account the points that had been made in the discussion
of paragraph (1).

Paragraph (3)
130. Support was expressed for the inclusion of a provi-
sion along the lines of paragraph (3), which it was said
would provide assurance that the text being prepared
would be sensitive to the concern that the rights of local
creditors and the procedural and public policy interests of
the requested State should be taken into account.
131. As to the specific formulation of paragraph (3), it was suggested that the reference to the possible limitations on cooperation contained in subparagraphs (a), (b) and (c) could usefully be clarified so as to ensure that they would be understood, as they were intended, to be possible limitations on, rather than sources of authority for, cooperation. It was urged that any such reformulation should be sensitive to avoiding the suggestion that any and all cooperation should be withheld the instant that a possible inconsistency, no matter how minor, with local procedure, the interests of local creditors, or public policy had been detected.

132. A question was raised as to the meaning of the reference in subparagraph (b) to protection of local creditors against “undue prejudice or inconvenience”. In response, it was stated that, while by its nature any insolvency prejudiced and inconvenienced creditors, the provision in question was intended to ensure that States enacting the text would not be prevented from protecting their local creditors from discrimination or particularly burdensome inconvenience. An example cited was the case of local creditors being prevented from filing claims in the foreign proceeding.

133. Another question as to subparagraph (b) was whether it needed to be included at all, since the notion of protecting local creditors might be subsumed in the reference to public policy found in subparagraph (c). While it was acknowledged that the factors could conceivably be truncated in such a fashion, the general view was that, in particular in view of the specific purpose of the provision, as outlined in the previous paragraph, it was advisable to distinguish the provision from the general reference to public policy.

D. Effects of recognition

134. The Working Group considered the following preliminary draft provision on effects of recognition:

“(1) The recognition of a foreign proceeding by a competent authority (a) operates as a stay against (i) the commencement or continuation of judicial, administrative or private actions against the debtor or its assets, except collective proceedings for liquidation or adjustment of debts (“local proceedings”), and (ii) the transfer of any interests in assets by the debtor; (b) authorizes the foreign representative, subject to public policy, to compel testimony or the delivery of written or electronic information by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor; (c) authorizes the foreign representative to take custody and management of assets of the debtor, subject to rights in rem; (d) authorizes the foreign representative to intervene in local proceedings; (e) authorizes the foreign representative to ask the court to grant such other appropriate relief as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened (unless forbidden by local law) [and of the jurisdiction in which the limited proceeding has been commenced], subject in all cases to (i) the procedural requirements of the court or authority; (ii) the protection of local creditors against undue prejudice or inconvenience; (iii) public policy.

(2) The effects of the recognition of a foreign proceeding shall continue until modified or terminated by the competent local court, or authority.

(3) A foreign representative may apply for recognition of a foreign proceeding and for provisional relief directly in a competent court or authority.

(4) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative, provided that notice of the making of such order shall be made as ordered by the court. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings is determined.”

135. While the Working Group was aware that it would engage at later stages in further discussion of the bases on which recognition would be granted, it was noted that the above provisions were an attempt to reflect the stage that had been reached in the discussion earlier concerning effects to be attributed to recognition of the foreign insolvency proceedings (see paragraphs 54-59, above). In accordance with suggestions that had found favour with the Working Group in the earlier discussion, the draft article reflected a bifurcated approach along the following lines. Subparagraphs (a)-(d) of paragraph (1) listed the effects of recognition that would take hold automatically upon recognition of the foreign proceeding, while subparagraph (e) provided an open window for the possibility of the recognizing court granting additional forms of relief that might be appropriate in the given circumstances of individual cases. The granting of such additional forms of relief was predicated upon compatibility with local procedural requirements, protection of local creditors against undue prejudice or inconvenience, and public policy.

136. Further elements of the system established in the draft provision included: a provision, in paragraph (2), referring to the continuation in place of the effects referred to above until their modification or termination by the competent court or authority; establishment, by virtue of paragraph (2), of the right of the foreign representative to apply for recognition directly to the competent court or other authority; and the provision, in paragraph (4), of the possibility of obtaining provisional or interim measures in case such steps were warranted.
Paragraph (1)

Subparagraph (a)

137. Various observations, both of a substantive and of a drafting nature, were made concerning the stay provisions set forth in subparagraph (a). It was observed that the stay in subparagraph (a)(i) may be difficult to accept for jurisdictions that exempted enforcement of claims of secured creditors from treatment under insolvency proceedings to the point that such enforcement action was not subject to stays of execution of individual claims. The view was expressed that this might be an issue on which States would wish to have options presented in the legal text.

138. Another observation was that some jurisdictions may wish to be able to go beyond the stay provided, so as to stay not only individual creditor action, but to stay also collective creditor action. It was noted in response to the latter comment that such a broadened stay would be possible under the draft article before the Working Group, pursuant to the discretionary relief courts were empowered to grant by virtue of subparagraph (e).

139. In the discussion of paragraph (1), the Working Group was urged in a number of interventions to consider making the stay provided for by subparagraph (a) subject to exclusion on public policy grounds. Reference to the possible primacy of public policy considerations was already included as one to the limiting factors or guidelines for the granting of discretionary relief beyond the minimum list, as provided by subparagraph (e), as well as in subparagraph (b), concerning the automatic authorization of the foreign representative to obtain information in the recognizing State upon recognition.

140. In favour of specifically subjugating the stay provisions to possible exclusion on public policy grounds, it was stated that a general provision providing for exclusion of recognition on public policy grounds would fail to take into account a distinction that could be drawn between the basic recognition decision and the scope of possible effects of that recognition, some of which may run afoul of public policy considerations in the recognizing State. Other grounds for or examples of exclusions included actions for injury or bodily harm, marital actions, civil status, alimony, and various administrative and criminal procedures. It was suggested that one approach may be to specify in greater detail the types of actions that would be stayed. The view was also expressed that the formulation of the stay provisions revealed a possible lack of limitations on the effects provisions in the minimum list, in this case, as to the duration of the stay or of the other effects.

141. In response to those suggestions, the view was expressed that caution should be exercised so as to limit the extent to which emphasis was placed in the text on exceptions to what had already been agreed would be a minimum list of effects of recognition necessary in order to protect in an expeditious manner assets against dissipation and to achieve the basic aims of access and recognition. It was suggested in that vein that adequate consideration could be given to public policy considerations in the recognition decision as well as in a court review of a possible challenge on public policy grounds that could at any rate be made to enforcement of this and other effects of recognition.

142. The Working Group noted the comments that had been made as to the question of whether to specifically provide for a public policy exclusion of the stay provisions, and noted that the issues raised would be considered at future sessions on the basis of further provisions to be placed before it.

143. Additional comments included the suggestion that the mention in subparagraph (a)(ii) of the stay on transfer of the debtor's assets needed to be made subject to transfers that may be necessitated by the ordinary course of business. An example cited of this type of transfer, which would presumably be approved by the supervising authority, was the payment of salaries to employees. That suggestion did not draw objections, as it was recognized to reflect the needs of practice and, therefore, not intended to be precluded. Suggestions of a drafting nature included the observation that the notion of a "stay" of commencement of proceedings, rather than of an existing proceeding, might not be readily understood universally and might therefore be reformulated, and that, as had been noted earlier in the deliberations, the expression "adjustment of debts" would be reviewed and aligned with revised terminology to be used elsewhere in the text.

Subparagraph (b)

144. The Working Group noted that subparagraph (b), which referred, as one of the items on the minimum list of effects of recognition, to the right of the foreign representative to compel production of information concerning the affairs of the debtor, had been made subject to public policy limitations in the recognizing State. It was noted that such an approach would make the provision more palatable in legal systems that were not accustomed to the same level of or procedures for searching for information practised in some other legal systems. The view was expressed that such concerns could be further ameliorated by some making the provision subject to the local law. However, the inclusion of such a further proviso did not draw wide support. It was pointed out that the intent of the legal text would indeed be to provide the local law on the subject, even if that meant that in this respect some modification of traditional practice or rules would be necessitated. A note of caution was also struck against imposing, with respect to this and other items on the minimum list of effects, conditions which might complicate the process of giving effect to recognition to the extent that achievement of basic goals of the exercise might be jeopardized. At the same time, it was noted in a number of interventions that the rule as presently constituted would not have the effect of enabling the foreign representative to go about obtaining information without regard to local procedural law.

145. The Working Group was inclined, however, to see express reference made in a future draft of the provision to the obtaining by the foreign representative of a court
order for the purpose of compelling the production of information. It was considered that the addition of such a reference might be a way of addressing concerns that had been raised without compromising the efficacy of the provision.

146. The attention of the Working Group was drawn in the discussion to the question of how the information requirements would interrelate with rules concerning professional secrets. In response, it was stated that such considerations, which, incidentally, it was stated, did not relate directly to accountants, were more likely to be relevant in the context of criminal and civil proceedings and were less likely to be so in the context of insolvency proceedings. It was pointed out, however, that a secrecy problem that did affect insolvency proceedings stemmed from notions of bank secrecy.

147. As regards the reference to information in electronic form, the Working Group noted that consideration would be given at a later stage to the need to consider aligning terminology used to describe such forms of information with terminology used in other UNCITRAL legal texts, including those being prepared by the Commission specifically in the area of electronic data interchange.

Subparagraph (c)

148. As had been noted with respect to other effects of recognition in the minimum list of effects, the question was raised as to whether it would be desirable to provide for some types of limits on those effects. The point made in the context of subparagraph (c) concerned possible exceptions, for example, of family property.

149. Views were exchanged as to the appropriateness of the manner in which the exemption of “rights in rem”, i.e. rights of third parties in certain types of chattel, was phrased. A view was expressed that that particular terminology might not be universally understood. It was therefore suggested that a better formulation might be to refer to the right of the foreign representative to take custody and control of the assets to the fullest extent permitted under the local law. That particular phraseology did not attract wide support, however, as it was not regarded as providing the requisite degree of precision.

150. On a more fundamental level, the question was raised whether it was sufficient that an exemption of rights in rem was accorded only with respect to this specific effect of recognition, and not, in particular, with respect to the stay under subparagraph (a). It was stated that a broader exemption of in rem rights, which some jurisdictions considered as exempt from insolvency proceedings, would contribute to the greater acceptability of the text being prepared. A countervailing view was that it was inadvisable to extend the in rem exemption to other effects of recognition, as this would dilute the value of recognition in protecting the assets against dissipation, and since the holders of in rem rights would in any event be permitted under paragraph (2) to apply for relief from application of the stay.

151. In the discussion, the question was raised as to whether exemptions of in rem rights from the effects of the recognition provisions would preclude avoidance of transfers by the debtor of such in rem rights in a manner detrimental to other creditors. In response, it was stated that exemption of in rem rights from the operation of the legal text should not necessarily be regarded as precluding avoidance of such transfers. It was also pointed out that the approach followed in a number of jurisdictions for identifying the law applicable to such questions was based on the lex rei sitae notion.

152. After its deliberations on the issues raised in connection with subparagraph (c), the Working Group was of the opinion that the provision and the matters raised would have to be considered further, in particular in the light of other provisions in the text as they were developed further.

Subparagraph (d)

153. The Working Group noted that the purpose of the rule in subparagraph (d), which vested the foreign representative with the right to intervene in local proceedings, was linked to the fact that the stay of proceedings provided by subparagraph (a) did not affect local collective proceedings.

Subparagraph (e)

154. The Working Group noted a suggestion that an indication should be added to the text of the subparagraph to provide for the continuation of measures that might be granted by the court on an interim basis pursuant to paragraph (4), as one of the optional forms of relief the court was empowered to grant by virtue of subparagraph (e).

155. There was general agreement with the approach of subparagraph (e), as regards the reference to the factors in subparagraphs (e)(i) to (iii) that may serve in some cases to limit the granting of relief to the foreign representative beyond the effects provided in the minimum list (subparagraphs (a) to (d)). The point was made, however, that perhaps it might be possible to draft the reference to those factors in a way that it might be even clearer that they were intended to serve as a possible limitation on the obligation to grant additional forms of relief rather than as a source of authority for such additional relief. The suggestion was that the words “subject to” might not be sufficiently clear in that regard.

156. Considerable attention was devoted by the Working Group to the manner and extent of the reference in subparagraph (e) to the law to be applied by the recognizing court in determining what additional relief could be granted beyond the effects on the minimum list. The point made was that application of the law of the recognizing State would have the particular advantage of being familiar to and well understood by the recognizing court. While the view was expressed that application of the foreign law was more likely to be acceptable were the instrument to take the form of a convention rather than a model law, it was pointed out that there was precedent for national insolvency laws to refer to application of the
foreign law for the purposes of determining the effects of recognition. However, the Working Group did not take the position that the legal text being prepared should have reference solely to that law.

157. The Working Group attached particular importance to the understanding that in practice it was most typical for a foreign representative to seek in the recognizing jurisdiction implementation of powers with which the representative was vested by the home jurisdiction, i.e. the jurisdiction that opened the proceeding being recognized. It was reported that problems were most likely to arise when the law of the recognizing State would be unfamiliar with or silent as regards a power sought to be exercised by the foreign representative, and that reference to the law of the foreign proceeding would be helpful in this respect. At the same time, it was widely recognized that to one degree or another the granting of relief beyond the effects on the minimum list could not be addressed in a vacuum, without reference to the local law of the recognizing court.

158. In view of the above considerations, there was broad agreement with the approach in the draft provision that the powers of the foreign representative under the law of the jurisdiction in which the foreign proceeding was opened should be retained. Concomitantly, the Working Group favoured retention of a proviso along the lines of that contained in the draft provision excluding the granting of powers that were granted to the foreign representative under the foreign law but that ran afoul of prohibitions in the local law.

159. Beyond that area of fairly broad agreement, various views and suggestions were adduced as to what additional scope there might be for application of the local law as a basis for according effects of recognition beyond the effects in the minimum list, and what the proper mix might be between the foreign and the local law.

160. A number of interventions were directed at the favourable aspects, from the standpoint of the interests of creditors and of maximizing the value of the estate, of allowing the foreign representative to pick and choose powers that may be available under either of the laws of the foreign proceeding or of the recognizing State. It was pointed out that such an approach would discourage forum shopping and thereby limit the degree to which assets could be dissipated or otherwise insulated from insolvency administration. However, those considerations could be offset to one degree or another by the hesitation that States might feel at the prospect that a foreign representative, by virtue of having a pick of powers granted by either law, would through recognition in a foreign jurisdiction potentially acquire more power than was vested in the representative by the home jurisdiction.

161. Other observations were made in the discussion as to the mix of local and foreign law that might determine the powers of the foreign representative and the measures granted beyond the minimum list. It was stated that one might distinguish between the foreign law as the source of authority or power of the foreign representative, and the local law as providing the procedures for implementing those powers. An observation along similar lines was that the local law might be regarded as the source of authority for enforcement of the rights of the foreign representative, which might present an attractive analytical framework for legal systems that placed particular emphasis on distinguishing between a right and the enforcement of that right. It was further observed that systems involving a combination of two laws would raise the difficulty of drawing borderlines as to the specific areas of application of each law.

162. Reference was also made to the possibility that it might be useful to draw a distinction between the case of an ancillary, assisting proceeding, and the case of parallel insolvency proceedings. The view was expressed that providing a rule for the former case might be less difficult a task than for the latter case. In response to that suggestion, however, it was stated that the question of compatibility of measures with the local law would be present in the ancillary proceeding case, as well as in the context of parallel proceedings.

163. A suggestion was made that various of the above factors might be taken into account by including a formulation calling on the court to have “due regard” to both the law of the foreign proceeding and to its own law. A somewhat different approach that drew some interest was that it might be possible to formulate a provision without reference to one or the other possible applicable law, but rather to leave the matter in the hands of the court. It was suggested that such an approach would enable the foreign representative to request the measures thought necessary for the exercise of the representative’s mission, and the recognizing court in turn could respond on a similar basis, by granting the measures that it thought were appropriate and that were within its power to grant. In support of such an approach it was said that it would be in line with the basic presumption that assistance and cooperation should be afforded to the maximum degree feasible.

164. Yet another observation was that in designing the provisions in this area regard should be had to the types of procedures and practices provided under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, in particular as regards the notion of activity by the foreign representative having to be compatible with the local law. It was suggested in this regard that practice under that Convention might be a useful guideline as to how far various States would be prepared to go in matters of the type being discussed.

165. In concluding its discussion of which of the possible applicable laws should be referred to in authorizing measures beyond the minimum list of effects of recognition, the Working Group noted that there was a prevailing view in favour of an approach based on application of the law of the foreign proceeding. At the same time, it was widely felt that reference would have to be made to a limitation based on prohibitions in the local law. The view was also widely shared that application of the local law should not lead to an enhancement of the powers of the foreign representative beyond those accorded by the
representative’s home law. That being said, the Working Group agreed that the matters that had been raised warranted further consideration and it agreed to return to them at a later stage.

166. By way of a drafting suggestion, it was noted that the term “liquidator”, appearing in subparagraph (e), would be replaced by the term “foreign representative”. It was also suggested that the expression “under the law” might be overly restrictive. A suggestion of a more structural nature was that the matters in subparagraph (e) might be dealt with in a provision on judicial cooperation.

Paragraph (2)

167. Questions were raised as to the exact function of paragraph (2). A concern was expressed that paragraph (2) might be seen as inconsistent with the intent of paragraph (1) and that it might be better therefore to delete it. In response, it was noted that the provision was intended to provide a basis for an application by a party aggrieved by effects of recognition to seek relief from application of those effects. In light of that analysis, it was suggested that a clearer approach might be to include a straightforward provision to the effect that there was a right to petition for relief from effects of recognition. The question was raised in this regard whether provision for the modification of effects of recognition needed to be made solely for those effects that were automatic, or also for those that were issued at the discretion of the court pursuant to its power under paragraph (1)(e).

168. Another function of the provision was to address the situation in some jurisdictions that effects of recognition, in particular measures of an interim nature, might automatically lapse after a certain period of time. It was noted, however, that the provision may be understood as dealing not with interim measures, which were the subject of paragraph (4) and for which such a rule might well be necessary, but with effects of recognition, for which a rule concerning continuation in effect might not be necessary as such.

169. The above discussion did nevertheless raise the question of whether some provision should be included on the question of the period of continuation in force or point of termination of effects of recognition. One approach was that it could be assumed that the court in providing for effects would ensure that they remained in place for as long as was needed. It was also suggested that to one degree or another, certain of the effects would automatically cease to have relevance or effect once their purpose had been fulfilled by the natural progression of events related to those effects. The view was expressed that it may well be desirable to include a provision providing a degree of certainty as to the question of the validity period or termination of the effects of recognition.

170. The question was raised in the discussion as to what effect might be attributed to termination of the foreign proceeding, especially as regards the question of the termination of the effects of recognition. A related question was whether there should be any particular publication requirements associated with termination either of the foreign proceeding or of the effects of recognition. The view was expressed that the imposition of some sort of formality in connection with the termination of the effects of recognition might be a useful measure in view of the implication of recognition for the rights of local creditors. It was observed in this regard that the local law may well cover the question of publication requirements and that it might in that light suffice to refer to “such notice as is required by the local court”. At the same time, it was acknowledged that such an approach might be more difficult to rely on to the extent that there might not be in a particular jurisdiction a central publication in which creditors could be expected to find notifications of the type in question.

171. The Working Group noted that it would continue its deliberations on the questions that had been raised on the basis of provisions that were developed further taking into account the above discussion.

Paragraph (3)

172. The Working Group expressed its understanding that the word “directly” in paragraph (3) was intended to establish the right of the foreign representative to petition the recognizing court directly, rather than having to proceed through some indirect channel, such as a diplomatic channel. It was noted that the provision was not intended, however, to override requirements that may be applied in some jurisdiction as to appearance through local counsel.

173. As regards the placement of paragraph (3), the view was expressed that it would be more appropriate to place it at the head of the provision currently being discussed.

Paragraph (4)

174. The Working Group generally supported the inclusion of a provision authorizing the recognizing court to grant provisional measures in appropriate circumstances upon application by the foreign representative. That approach was supported on the grounds that, absent such a possibility, the effects of recognition, in particular the stay of individual creditor action and of transfer of assets, could only take effect upon the decision on an application for recognition, by which time there would often be little left in the way of assets to be protected.

175. The question was raised whether the Working Group, in a further development of paragraph (4), might wish to consider identifying one or the other provisional measure that was contemplated, or whether the matter might simply be left fully to the local law. Candidate measures suggested for consideration referred to bringing assets within the custody of the foreign representative, entitling the foreign representative to seize certain assets and prohibiting creditor enforcement of claims against assets of the debtor.
176. The Working Group expressed its understanding that the provision as presently drafted permitted provisional measures to be granted on an *ex parte* basis where such measures would be permissible under local law.

177. As regards matters of drafting, it was observed that the expression “until the application for recognition … is determined” might not be understood and that it may be clearer to use words along the lines of “… until the application has been decided by the court”. It was also suggested that it be clarified that paragraph (4) referred in its opening words to assets of the debtor.

### E. Proof concerning foreign proceeding

178. The Working Group considered the following preliminary draft provision on proof concerning foreign proceedings:

“(1) The existence of a foreign proceeding shall be evidenced by a certified copy of documents demonstrating the opening of foreign proceedings.

(2) The appointment of a foreign representative shall be evidenced by a certified copy of the order or decision of appointment or other proof to the satisfaction of the court.

(3) A translation into an official language of the country in which the local proceeding is pending may be required.

(4) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction.”

179. It was noted that the above provision reflected the views expressed in the Working Group at an earlier stage of the discussion (see paragraphs 36-38 and 113, above) that provision should be made for providing the recognizing court with assurance that the foreign representative had authority from the appointing jurisdiction to act abroad, in particular with respect to assets located abroad. At the same time, it was noted that the draft provision was formulated so as to avoid mentioning a literal requirement of authorization to act abroad, since it had been observed that including such a specific requirement would not be in line with practice. It was pointed out in this regard that the appointment of a representative would typically be phrased in a general manner, without reference to territorial limitation of ability to act.

180. It was further noted that paragraphs (1) and (2) had been developed in response to the view that presentation of a certified copy of the act of appointment, or in its absence, of other proof of appointment, should be sufficient. It was also noted that paragraph (4), creating a presumption that the foreign proceeding had been properly opened was based on the view that no unnecessary obstacles should be placed in the way of the foreign representative acquiring the ability to act expeditiously in order to preserve assets.

### Paragraphs (1) and (2)

181. While there was agreement that paragraphs (1) and (2) addressed in an acceptable way the problem of the necessary accreditation of the foreign representative before the competent court in the recognizing jurisdiction, a number of observations were made. One observation was that paragraphs (1) and (2) might be misinterpreted as requiring in all cases two separate documents, one establishing the opening of the foreign proceeding and another evidencing the appointment of the foreign representative, when in fact there would be instances in which the foreign court would issue a single document covering both points. A number of suggestions of a drafting nature were made in order to address this concern, including: to predicate paragraph (2) on paragraph (1); to replace the word “shall” by the word “may”; and to combine paragraphs (1) and (2) in one paragraph along the following lines: “Proof of the opening of the foreign proceeding and the appointment of the foreign representative shall be given. Such proof may be in the form of a certified copy or in any other form required by the court.”

182. Another observation was that reference to “other proof to the satisfaction of the court” might defeat the purpose of specifically referring to the court order or other decision appointing the foreign representative and introduce some uncertainty. In order to alleviate this concern, the suggestion was made that paragraph (2) should be revised to clarify that other proof could be required only in the absence of a court order or other decision of appointment. It was noted that the provision might be made more specific by requiring the presentation of a certified copy of a statutory rule in those cases in which a foreign representative was relying on such a statutory grant of authority, to the extent that such cases actually did occur. Yet another observation was that reference to certification of the court order or decision of other competent authority could introduce some uncertainty unless it was made clear that what was being referred to was an indication of authenticity by the issuer of the document, and not “legalization”, namely, more complicated proceedings usually conducted by an administrative authority, or through diplomatic or consular channels.

183. The Working Group agreed on the substance of paragraphs (1) and (2) and requested the Secretariat to revise them taking into account the concerns and suggestions expressed.

### Paragraph (3)

184. While the view was expressed that the provision may be self-evident and unnecessary, or would raise questions as to certification of the translation, the Working Group hesitated to delete paragraph (3), since it felt that the possible requirement set forth in paragraph (3) was useful to mention and would add to the acceptability of the text.

### Paragraph (4)

185. A number of concerns were expressed as to the exact formulation of paragraph (4). One concern was that
the reference to the "proper" opening of the foreign proceeding might suggest that the recognizing court should involve itself in an examination of whether the foreign proceeding had been opened in accordance with the detailed procedural requirements of the foreign jurisdiction. The focus of the examination by the recognizing court was instead rather to be limited to the question of jurisdiction. It was generally felt that issues of the former type were beyond the authority of the recognizing court to examine. A suggestion to deal with that concern was to recast paragraph (4) along the following lines: "A foreign proceeding shall not be recognized if there is no substantial connection between the debtor and the foreign jurisdiction in which that proceeding was opened." Another suggestion was to delete paragraph (4), since the matter might be covered in paragraph (2) of the definition of "foreign proceeding". That suggestion did not attract sufficient support on the grounds that the Working Group, in its discussion of that provision (see paragraph 110, above), had widely shared the view that such a rule related to recognition of foreign proceedings and should be placed elsewhere in the text.

186. It was further observed that certain unusual cases in which the foreign proceeding met the jurisdictional test, but might not merit recognition, could be dealt with on public policy grounds. An example was the case in which foreign proceedings were being pursued in collusion between the debtor and the foreign representative for the purpose of concealment of assets. In the discussion, the view was also expressed that the content of the "substantial connection" test would differ depending on whether recognition was sought for an ancillary or for a parallel proceeding.

187. Another concern was that the matter of the jurisdiction of the recognizing court could not be appropriately addressed unless the question of the jurisdiction of the court of the originating State were also addressed, as there could be an interplay between those questions. In order to address that concern, the suggestion was made that international jurisdiction of a court opening insolvency proceedings might be dealt with in a comprehensive manner, an approach illustrated by article 3 of the European Union draft Convention. The view was expressed in this context that attention needed to be given to the possibility that provisions on recognition might have the effect of limiting the jurisdiction of the recognizing State to open its own local proceedings.

188. The view was also expressed that it was important to determine the stage of the foreign proceeding that should be considered as signifying the actual "opening" of the foreign insolvency proceeding for the purpose of according recognition to it. It was observed in that regard that jurisdictions varied as to steps and stages involved in the opening of a proceeding. It was further observed that that issue was of some importance, since a request for provisional relief in the recognizing jurisdiction would often be filed while the application for the opening of an insolvency proceeding in the originating State was pending.

189. While the Working Group agreed that the question of assessing the jurisdiction basis of the foreign proceeding was an important one and should be dealt with in the text, it was not prepared to reach a definitive decision as to what might be an acceptable answer. It therefore decided to leave paragraph (4) in square brackets subject to further consideration.

IV. FUTURE WORK

190. Upon concluding its deliberations as described above, the Working Group heard a number of interventions concerning the progress achieved at the current session and further issues that might be addressed.

191. It was generally felt that measurable progress had been made with regard to a number of important issues, including the definitions of "foreign proceeding" and "foreign representative", the effects of recognition, judicial cooperation and proof of foreign proceedings. It was stated that the fact that the Working Group engaged in fruitful discussions and considered a number of preliminary draft provisions at the session set the stage well for continued work.

192. A number of issues were mentioned for future work, including: jurisdiction of the foreign court and recognition of such jurisdiction by a court in the recognizing State; the applicability of the draft provisions to ancillary or to parallel proceedings, and their applicability when there were no local proceedings; definitions of the debtor and of reorganization proceedings; comity and reciprocity issues; the scope of judicial cooperation; the possibility of the foreign representative appearing in the recognizing jurisdiction without being subject to full jurisdiction ("limited appearance"); national treatment of foreign creditors as well as the form and time-frame for notification of foreign creditors; process of equalization of distributions to common creditors; recognition of foreign Government or revenue claims; mechanism for terminating a limited or secondary proceeding; effects of recognition and of provisional relief on secured creditors, in particular in the context of rights in rem and reservation of title arrangements; set-off in a cross-border context; exceptions to automatic relief; discharge of debts owed to the debtor; mechanism for modifying or terminating provisional relief; distribution and repatriation of assets; and preservation of assets in a cross-border insolvency context by creating a legal framework for provisional relief to be granted, in particular with regard to assets in the hands of third parties by virtue of court orders or contracts.

193. The Working Group requested the Secretariat to prepare for the next session of the Working Group draft provisions on judicial cooperation and access and recognition, taking into account the views and suggestions expressed at the current session. It was noted that, in line with a decision made by the Commission at its twenty-eighth session,6 the nineteenth session of the Working Group would be held in New York, from 1 to 12 April 1996.

B. Working paper submitted to the Working Group on Insolvency Law at its eighteenth session: Possible issues relating to judicial cooperation and access and recognition in cases of cross-border insolvency

(A/CN.9/WG.V/WP.42) [original: English]
INTRODUCTION

1. At the present session, the Working Group on Insolvency Law commences its work, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), to embark on the development of a legal instrument relating to cross-border insolvency.¹

2. The Commission’s decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, “Uniform Commercial Law in the 21st Century” (held in New York in conjunction with the twenty-fifth session, 18-22 May 1992). The Commission decided at its twenty-sixth session to pursue those suggestions further.² Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving, from many countries, insolvency practitioners from various disciplines, judges, Government officials and representatives of other interested sectors including lenders.³

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should at this stage have the limited goal of facilitating judicial cooperation, court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as “judicial cooperation” and “access and recognition”). It was understood that this would not include any attempt at substantive unification of insolvency law, an objective that is widely perceived as unattainable, at least at the present stage. It was also suggested that an international meeting of judges take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favourably by the Commission at its twenty-seventh session.⁴

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held in Toronto, from 22 to 23 March 1995. The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition.⁵ The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition.

5. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared. Particular interest was expressed by the Commission in the possibility that the legal framework to be prepared for judicial cooperation and access and recognition would include a “menu of options” for legislators as to some aspects. Such a “menu” approach would reflect the reality that not only were there distinct differences remaining among States as to substantive aspects of their insolvency laws, but also that States differed as to the extent and manner of judicial cooperation and access and recognition they would be willing to provide for in their legislation. At the same time, given the prevailing lack of such provisions in many States, it can be foreseen that even the less ambitious selections on the menu of options developed by the Commission may bring a significant measure of improvement to the present situation. However, it should be noted that the various options set forth in this note are presented for the consideration by the Working Group to solicit individual expressions of preference.

6. The present note is intended to serve as a skeletal, annotated list of issues and possible solutions that might be covered by the instrument to be prepared by the Commission. The note does not presume to be exhaustive, and it is anticipated that issues will be raised in the discussion that have not been addressed in the note. In addition, the Secretariat is continuing its process of consultations with practitioners and other interested circles, for example through INSOL and Committee J of the Section of Business Law of the International Bar Association (IBA), fruits of which may be brought to the attention of the Working Group at the session.

I. GENERAL BACKGROUND REMARKS

7. In the preparation of this note and the selection of issues referred to in it, the Secretariat has taken into account and relied upon earlier efforts and instruments at the national and regional levels dealing with judicial cooperation and access and recognition. At the regional and multilateral level, those include the Convention on Private International Law, Havana 1928 (“Bustamante Code”), the two Treaties on Commercial International Law, 1889 and 1940 (“Montevideo Treaties”), the Convention between Denmark, Finland, Iceland, Norway and Sweden regarding Bankruptcy (“Nordic Bankruptcy Convention”, 1933, amended 1977 and 1982), the European Convention on Certain International Aspects of Bank-

⁵The report on the Judicial Colloquium presented by the Secretariat to the Commission at the twenty-eighth session (1995) is set forth in document A/CN.9/413.
ruptcy (“Istanbul Convention”, 5 June 1990 (not in force)), and the European Union draft Convention on Insolvency Proceedings of 1992 (“European Union draft”), as well as the Model International Insolvency Cooperation Act (MIICA), prepared by Committee J of the Section on Business Law of IBA.4

8. The Secretariat has been guided in its selection of issues for this note by the range of issues dealt with in the above instruments, as well as in national legislative provisions dealing with cross-border insolvency. The Secretariat has also had at its disposal a draft of a study of national laws and multilateral treaty efforts in the area of cross-border insolvency prepared by an expert committee assembled by INSOL.

9. The draft paper of the INSOL expert group summarized the current legal environment in which solutions to cases of cross-border insolvency must be crafted. That environment was characterized by diversity and often inconsistency in legal approaches, including the degree of discretion that might be available to judges in the absence of statutory authorization for dealing with cross-border insolvencies. Such a situation may jeopardize in any given case the possibility of implementing a liquidation or reorganization plan that maximizes the value of the debtor’s assets and save as much employment as is possible. For example, some States adhere to a “territoriality” principle which may deny recognition to foreign insolvency proceedings and assert the control over domestic assets, while States in a bilateral or multilateral treaty arrangement might be bound to apply approaches aiming at a single or common administration of the insolvency (e.g. the Montevideo Treaties of 1889 and 1940 and the Nordic Bankruptcy Convention), or at harmonization among any concurrent proceedings.

10. The report described the legislation found in a limited number of States specifically dealing with judicial cooperation and with access and recognition in the insolvency context. Such legislation varies as regards the extent to which cooperation and assistance are mandatory or subject to the discretion of the requested court. For example, in one country recognition and assistance is mandatory for proceedings in certain prescribed countries, based on an assessment as to the nature of the proceedings carried out in those other countries. Another approach is to authorize cooperation and assistance, but to leave the actual extent of cooperation and assistance to the discretion of the court.

11. Also described were various techniques and notions employed in pursuit of judicial cooperation in particular in the absence of a specific legislative or treaty framework for judicial cooperation and access and recognition. Those techniques include: application of the doctrine of comity by courts in common law jurisdictions; issuance for equivalent purposes of enabling orders (exequatur) in civil law jurisdictions; conclusion of ad hoc protocols to establish cooperation among jurisdictions involved in cross-border insolvency cases and to facilitate cross-border administration; enforcement of foreign insolvency orders by way of general legislation on recognition of foreign judgments and procedures such as letters of request (letters rogatory) from foreign jurisdictions. It was further observed that approaches based purely on the doctrine of comity or on the exequatur approach were unlikely to provide the same desired degree of predictability and reliability as would a specific legislative framework for judicial cooperation and access and recognition.

12. It was reported that, though there are exceptions, general legislation on reciprocal recognition of judgments, including exequatur statutes, may as a whole be considered particularly unpredictable for dealing with cross-border insolvency cases. This is because such procedures might be confined in a given legal system to enforcement of specific money judgements or injunctive orders in two-party disputes, rather than in collective proceedings typical in the insolvency context. Furthermore, recognition of foreign insolvency proceedings, for example for the purpose of providing ancillary relief to those proceedings, might not be considered a matter of recognizing a “judgment”.

13. Rather, decisions or orders of a foreign court might be enforced only if they were considered final and binding under the law of the jurisdiction in which they were issued, and if they were not regarded as unenforceable. Non-enforcement might be the fate of a foreign decision if, for example, the requested court ruled that the foreign court did not have jurisdiction under the principles of the law of the requested court, if the debtor was not given adequate notice in the foreign proceeding, if enforcement would be inconsistent with a previous decision or ongoing proceedings in the requested State, or in case of conflict with public policy (ordre public) type.

14. It was reported that the prospect of successfully utilizing, for the purpose of recognizing foreign insolvency proceedings, statutes on reciprocal recognition of judgments was further limited by the possibility that the declarations or orders of a court in the insolvency context might be considered as declarations of status in the nature of exercise of State power, rather than as true judgments or orders intended to be dealt with by the reciprocal legislation. Additional conceptual obstacles may arise when the insolvency proceedings sought to be recognized had been initiated voluntarily by the debtor.

15. The report as well as the consultations that the Secretariat has held with practitioners and other circles directly interested in cross-border insolvency indicate that work by the Commission, without being so ambitious as to attempt the substantive unification of insolvency law, could make a practical contribution to addressing a variety of needs. The potential utility of work by the Commission is further heightened by the continuing increase in instances of cross-border insolvency, which is a natural by-product of the rapid globalization of economic activity currently taking place.

16. Those needs affect a variety of individuals or entities, including: the debtor, who has an interest in relief

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4 Additional information concerning the regional and multilateral instruments referred to can be found in the Secretariat note in document A/CN 9/378/Add.4.
from the individual creditors’ actions, and perhaps in rescue and rehabilitation of the business; unsecured creditors, whose return on the debts owed to them would be maximized to the extent cross-border cooperation could be instituted as a replacement for the “race to the court house”; employees of the debtor, whose interest lies in payments of wages owed and in maximizing the possibility of saving businesses, and thus jobs; secured creditors, who seek recognition and enforcement of their security interests; Governments, which have an interest not only in enforcing governmental claims but also in saving employment and assuring inventors that the applicable legal system will provide some measure of predictability and the possibility of enforcing claims; courts, which require an adequate legal framework for dealing with cross-border insolvency; and insolvency administrators, whose efficacy requires a legal framework that is predictable and efficient.

17. At the same time, the record of cross-border insolvency cases, as well as the colloquia and the consultations that the Secretariat has held, show clearly that States differ as to the extent to which and the manner in which they accommodate judicial cooperation and access and recognition for the purposes of addressing those needs in a cross-border context. This stems from factors including differences among legal systems as to the degree of discretion afforded to courts and the degree of adherence to traditional territorial notions of the applicability of insolvency law.

18. Prior to proceeding with the detailed consideration of issues, it may be useful to recapitulate how certain basic terms used in this note may be understood. Most legal systems contain rules on various types of proceedings that may be initiated when a debtor is unable to pay its debts. "Insolvency proceedings" is the generic expression used in this note for those types of proceedings. Two types of insolvency proceedings may be distinguished, for which a uniform terminology has not emerged.

19. In one type of proceedings (hereafter referred to as "liquidation"), a public authority, usually a court, and typically acting through an officer appointed for the purpose (referred to here as “administrator”, or, in some contexts, "insolvency representative"), takes charge of the insolvent debtor’s assets with a view to transforming the proceeds proportionately to the creditors, and, at the end of the proceedings, liquidating the debtor as a commercial entity. In some States this is the only type of proceedings used. Other terms that are often used for this type of proceedings are for example, bankruptcy, winding-up, faillite, quiebra, Konkursverfahren. It may be noted, however, that terms such as "bankruptcy" might be understood as having a broader meaning which includes also composition proceedings as described in the next paragraph.

20. The other type of proceedings (hereafter referred to as "composition") is an alternative to liquidation proceedings. The purpose of the alternative proceedings is not to liquidate the insolvent debtor, but to allow it to overcome the financial crisis and resume normal participation in commerce. Such proceedings, also usually carried out under the supervision of a court, are typically aimed at reaching an agreement, or composition, between the debtor and its creditors about relief that should allow the debtor to reorganize and restore its commercial viability. The relief may be in the form, for example, of partial abatement of the claims against the debtor, prolongation of payment periods, or renegotiation of the debtor’s obligations. While such relief is being negotiated, the debtor enjoys protection from enforcement actions of creditors over its assets. It may be possible for composition proceedings to be initiated during liquidation proceedings. Other terms used for this type of insolvency proceedings are, for example, reorganization, arrangement, concordat préventif de faillite, suspensión de pagos, administración judicial de empresas, Vergleichsverfahren.

21. For insolvency proceedings to be initiated, a court order is typically needed. The initiative to open such proceedings may be taken by the insolvent debtor itself (voluntary insolvency) or by a creditor or creditors (involuntary insolvency). In some States the same type of insolvency proceedings apply to all insolvent enterprises or merchants, whereas others use two types of proceedings, one for legal persons and another for natural persons.

II. POSSIBLE DECISIVE FACTORS FOR ACCESS AND RECOGNITION

22. The suggested issues contained in this and in the following section focus on some of the main problems a national legislature usually has to resolve when it intends to enact statutory provisions concerning cooperation in the field of cross-border insolvency. The suggestions try to give indications how model provisions which might be attractive for national legislators could be structured.

A. Competence

23. A basic question in many jurisdictions is what connecting factor must exist between the debtor and the State in which an insolvency proceeding concerning that debtor was opened, in order that the recognition of such an insolvency proceeding in another country is to be considered justified. Because of those jurisdictions, this question (sometimes referred to as “indirect competence”) would have to be faced in the elaboration of model provisions on the recognition of foreign insolvency proceedings.

24. A variety of possible connecting factors is conceivable, including: domicile, habitual residence, place of a company’s registered office, principal place of business, centre of the debtor’s main interests, and location of assets.

25. A clear answer to the question of the decisive connecting factor is found in article 166(1) of the Swiss Private International Law (PILS), which provides that a foreign insolvency proceeding can only be recognized if it was opened in the State where the debtor has its domicile (article 166(1)), or, in the case of a company, where the debtor has its seat (article 166(1), in conjunction with article 21).
26. The advantage of this approach is the legal certainty achievable by its application. A drawback, however, might be seen in the apparent lack of any room for adjustments in exceptional cases in which the application of the generally pre-formulated “centre of gravity” test (i.e. domicile, seat) would not lead, due to specific circumstances, to reasonable results.

27. A compromise solution between the requirement for legal certainty and the possibility of taking into account specific circumstances of the case is provided in the Istanbul Convention (article 4) and the European Union draft (article 2). Both instruments define the decisive connecting factor with a flexible formula (“centre of the main interests of the debtor”), which is coupled with a presumption for companies (“In the case of a company and legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary”).

B. Foreign proceedings emanating from prescribed countries

28. It may be recalled at this point, and when considering the range of options to be reflected by the Commission, that there are a number of jurisdictions that provide for assistance to foreign insolvency proceedings from countries appearing on a list of “prescribed” countries, with the disposition of requests from yet other foreign countries left to the discretion of the court. The statutes of Australia and the United Kingdom are examples of a combination of mandatory assistance with regard to prescribed countries, and discretionary assistance to other, non-prescribed countries.

C. Court discretion

29. To the extent that a statute leaves the decision as to whether to grant assistance to the discretion of the court, that court would be bound to, or at least be free to, take into account in exercising its discretion the question of the connecting factor, for example, if the statute called for the court, in exercising its discretion, to take into account rules of private international law.

30. Section 304 of the United States Bankruptcy Code provides an example of a statute that provides for assistance generally, but leaves every case up to the discretion of the court. It also serves as an example of factors for guiding the court. Those factors include the overriding factor of an economical and expeditious administration of the bankrupt estate, consistent with: (a) just treatment of all holders of claims against or interests in such estate; (b) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding; (c) prevention of preferential or fraudulent dispositions of property of such estate; (d) distribution of proceeds of such estate substantially in accordance with the order prescribed by the United States Bankruptcy Code concerning the question of priorities; (e) comity; and (f) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

D. Types of proceedings covered

31. In some jurisdictions a filter is applied which limits recognition to foreign proceedings that qualify as “insolvency” proceedings according to the law of the forum (i.e. under the law of the State in which is located the court requested to give assistance). Provisions of this type might have the effect, for example, that foreign proceedings (e.g. reorganization proceedings voluntarily initiated by a debtor not technically declared bankrupt) that did not fall within the definition of insolvency proceedings under the law of the requested court would not receive assistance.

32. The example cited raises a number of aspects of this question that the Working Group may wish to consider, including whether the text to be prepared should distinguish between: liquidation and reorganization proceedings; between voluntary, debtor-initiated proceedings and those initiated by creditors; between judicial and administrative proceedings; between proceedings in which the debtor is fully deprived of control of its assets and “debtor in possession” type of proceedings; and between those that involve a debtor that has actually become insolvent and those in which a debtor in trouble is seeking to avoid insolvency.

33. For the purpose of facilitating the discussion of the above issues, the following definition from Section 101 of the United States Bankruptcy Code is provided:

“(23) ‘foreign proceeding’ means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor’s domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.”

34. The definition set forth in MIICA (section 6(b)) provides an alternative formulation, with reference to the jurisdiction of the opening forum phrased in general terms, rather than by reference to specific connecting factors:

“‘Foreign proceeding’ means an insolvency proceeding, whether judicial or administrative, in a foreign country, provided that the foreign court or administrative agency conducting the proceeding has proper jurisdiction over the debtor and its estate”.

The Working Group may wish to consider whether it would be helpful to include other elements in a definition, for example, a reference to the proceedings being for the collective benefit of all, or of most, creditors.

35. As an additional aspect, the Working Group may wish to consider how absolute should be a requirement that the foreign proceedings be administered by a court or be of an administrative nature. One has in mind here the possibility that there exist under some national laws proceedings of a quasi-insolvency, contractual nature that are initiated by the parties themselves with a view to staving off insolvency.
E. Type of debtor

36. The question may be raised whether the work by the Commission should encompass both debtors that are legal persons, and debtors that are natural persons. An objection to covering natural persons may be that it would raise basic social and other policy issues beyond the scope of the project. At the same time, it may be thought that excluding coverage of natural persons would seriously limit the scope of the legal instrument to be prepared, since it is not uncommon for significant commercial activities and enterprises in international trade to be conducted by a private individual not assuming any particular type of corporate garb. This in turn raises the question whether it would be feasible or, for that matter, advisable to exclude "consumer" bankruptcies from the scope of the work.

F. Authority of foreign representative to act

37. A question that may arise in any number of jurisdictions prior to a decision in favour of granting a request from a foreign insolvency representative is whether the foreign representative has authority under the foreign proceeding to act on behalf of the debtor with respect to foreign assets. The definition contained in MIICA (section 6(a)) may be a helpful reference:

"Foreign representative' means a person who, irrespective of designation, is assigned under the laws of a country outside of this jurisdiction to perform functions in connection with a foreign proceeding that are equivalent to those performed by a trustee, liquidator, administrator, sequestrator, receiver, receiver-manager or other representative of a debtor or an estate of a debtor in this jurisdiction."

G. Public policy considerations

38. States that provide cooperation in cross-border insolvencies typically reserve the right to refuse recognition in the case of incompatibility with their ordre public. The Working Group may wish to consider the feasibility of a model provision on this point. Legislative examples are for instance article 14(2)(b) of the Istanbul Convention, article 18 of the European Union draft, and article 166(1)(b) (in conjunction with article 27) of the Swiss Private International Law.

"Limitations to the exercise of the liquidator's powers"

2. The liquidator cannot perform in another Party an act which is:

b. manifestly contrary to the public policy of that Party."

"Public Policy"

"Recognition of insolvency proceedings or the enforcement of a judgment handed down in the context of such proceedings may be withheld by a Contracting State where its effects would be manifestly contrary to the public policy of that State."

III. EFFECTS OF RECOGNITION

39. The next major question the legislator of a country which is willing to recognize foreign insolvency proceedings has to decide is what legal effects such recognition should create in the "recognizing country". A variety of possible sub-questions flow from that major question, including, but not limited to: Is the debtor, as a result of the recognition of the foreign insolvency proceeding, disinvested as if an insolvency proceeding would have been opened by the courts of the recognizing country? What power does the foreign administrator have in the recognizing country? What is the legal position of the creditors of the debtor? Are they barred from exercising their claims against the debtor in the recognizing country? What is their position if they have already instituted individual legal proceedings against the debtors before the courts of the recognizing country? Are there exceptions for specific categories of claims where already instituted legal proceedings may continue?

40. It is obvious that this list could be prolonged considerably and the Working Group may wish to consider additional questions to be added to the above list, bearing in mind that legislators may be expected to provide as clear answers as possible.

A. Possible legislative approaches

41. A comparison of various national laws and international instruments shows that there exist different methods of addressing the problem.

I. Detailed enumeration of effects

42. One method is to provide an exhaustive list in which, in a detailed manner, all the consequences which follow from the recognition of the foreign insolvency proceedings are enumerated, for example: the acts in relation to the assets situated in the recognizing country that the foreign administrator is entitled to take, including: to obtain information, testimony and records concerning the accounts, assets and other relevant aspects of the debtor; the measures of protection and preservation of the assets the foreign administrator may take (including avoidance of preferential transfers executed prior to the opening of insolvency proceedings); the status of the debtor in relation to the assets situated in that State; the position of the debtor's creditors relating to their right to pursue the claims and to commence or pursue individual court proceedings against the debtor, including whether a stay of such proceedings would result from recognition; and the question of discharge by payment to the debtor or to the foreign administrator.

43. The Working Group may wish to consider other possible effects, or principles related thereto, that could be included in an enumeration approach. For example, according to the principle referred to in some Common Law countries as "hotchpot", and elsewhere as "marshalling", a creditor who has received part payment in one proceed-
ing may not receive a dividend for the same claim in
another proceeding until other creditors of the same rank-
ing or category have in that other proceeding obtained an
equivalent dividend. That principle, which aims to estab-
lish justice between creditors, is embodied in several
national laws (e.g. Section 508(a) of the United States
Bankruptcy Code) and international instruments
(article 5, Istanbul Convention; article 12(2), European
Union draft). The Working Group may consider whether
a model provision on this subject would be feasible.

44. An example of the enumeration approach is found
in chapter II of the Istanbul Convention. That Convention
does not provide that the effects of the foreign insolvency
proceeding are exported in their entirety into the recog-
nizing State (as in the European Union draft, described
below) or that the insolvency effects of the foreign pro-
ceeding (lex concursus) are converted into the effects an
insolvency would entail if the proceedings had been
opened in the recognizing State (as under the Swiss law,
also described below).

45. The Istanbul Convention system contains on the
contrary a set of provisions (chapter II, articles 6-14) which
vest in the foreign administrator certain rights that may be
exercised in the recognizing State, and which also regulate
certain features of the legal position of the debtor’s credi-
tors as well as of the debtors of the debtor. It is provided,
for example (article 8), that the foreign administrator may
take, in accordance with the local law, measures to protect
or preserve the value of the debtor's assets, including to
seek assistance from the competent local authorities to that
effect. The administrator may take or cause to be taken any
act to administer, manage or dispose of the debtor’s assets,
including removing them from that country (article 10).
The right to commence or pursue individual legal action
against the debtor's assets is vested (article 11) only in
certain categories of creditors (public law claims and
claims arising from the operation of an establishment of
the debtor in that country or from an employment there).
The list also contains a provision on the discharge of
payment or delivery of assets to the foreign administrator
or to the debtor (article 13).

46. The advantages or disadvantages of that system
could not yet be tested in practice because the Conven-
tion has not entered into force. It might be, however, that
two particular aspects of the Istanbul Convention may
affect its eventual fate. The first point is that this system
confers on the one hand certain rights upon the foreign
administrator to act on behalf of the debtor in relation to
the debtor’s local assets, but does not on the other hand
disinvest the debtor of the right to dispose of the local
assets. The second point is that the powers conferred
upon the foreign administrator by article 10 (to adminis-
ter, manage or dispose of the debtor’s assets) are
suspended during a period of two months commencing
after the obligatory publication of the opening of the foreign
insolvency decision in the recognizing State (ar-
ticle 11(1)).

47. The intention behind the suspension rule seems to be
to give the creditors the possibility to request the opening
of a so-called secondary insolvency proceeding in the
recognizing State (chapter III of the Convention) which
would bar the exercise of the administrator’s powers in
that country (on secondary proceedings, see further dis-
ussion below, paragraphs 60-91). The non-disinvestment
of the debtor coupled with the two-month suspension
period concerning the powers of the administrator might
give the debtor, however, ample time to transfer assets
into another country. This could only be blocked if the
foreign administrator manages to take timely and appro-
priate protective measures according to article 8.

2. Effects of recognition by reference
to applicable law

48. A second, quite different approach is to determine
the effects of recognition by application of the law of one
of the two countries involved. Here one may provide
either (variant 1) that, when the recognition becomes
operative, the opening of the foreign insolvency proceed-
ing will have in the recognizing State the same effects as
under the law of the State in which the foreign proceed-
ing was opened (subject to certain enumerated excep-
tions) or (variant 2) that in the case of recognition the
foreign insolvency proceeding will have in the recognizing
State the same effects as if the insolvency proceeding
had been opened in the recognizing State (subject to cer-
tain enumerated exceptions). Legislative examples of
these two variants are discussed in the following par-
agraphs.

(a) Recognition imports effects of
foreign insolvency law

49. Variant 1 can be found for instance in the European
Union draft. Its article 9(1) provides: “The judgement
opening proceedings taken by a court that has jurisdiction
pursuant to article 2(1) shall with no further formalities
have the same effects in the other Contracting States as
under the law of the State in which insolvency proceed-
ings were opened, unless the Convention provides other-
wise and as long as no proceedings are opened in those
States by a court which has jurisdiction pursuant to article
2(2)”. Article 10 (with the heading “powers of the liqui-
dator”) continues to the effect that “[t]he liquidator ap-
pointed by a court which has jurisdiction pursuant to
article 2(1) may exercise all the powers conferred on him
by the law of the State of the opening of insolvency
proceedings in another Contracting State, as long as no
other insolvency proceedings have been opened there . . .”

(b) Recognition triggers application of local law

50. An example of variant 2 is article 170(1) of the
Swiss PILS. The provision provides that the recognition
of the foreign bankruptcy proceeding produces for the
debtor’s assets situated in Switzerland the bankruptcy
effects of the Swiss law.

51. If one tries to assess the advantages and disadvan-
tages of the two variants described above, it seems that
variant 1 is justified from a dogmatic point of view,
whereas variant 2 is probably more easily applied in prac-
tice. If the legal consequences of the recognition in the recognizing State are governed by the foreign lex concursus (variant 1), it could be necessary in certain situations to ascertain the content of a foreign insolvency law in a time-consuming exercise.

52. Without suggesting that it is an approach the Commission should necessarily follow or offer as an option, it is noted that, as regards the question of the law applicable to avoidance of preferential transfers, there is found in the German law an example of the “combination” of both the foreign insolvency law and the law governing the effects of the transaction. Under that approach, the foreign representative may challenge under the foreign insolvency law a preferential transfer whose effects are governed by the law of the recognizing State, if that preferential transfer is itself subject to challenge under the law of the recognizing State. The requirement that the challenge have a basis under local law could be met by reference, for example, to the law of torts or to contract law. This takes into account the German conflicts rule subjecting the setting aside of a transaction to the law applicable to that transaction.

(c) Choice of law left to recognizing court

53. It may be noted that it is possible that a legislature would empower the courts to apply either the law that could be applied by the court in the State in which the insolvency proceeding being recognized was opened, or the law of the recognizing State. An example of such an approach is found in Section 426(5) of the Insolvency Act of the United Kingdom, which exhorts courts in exercising such discretion to have regard in particular to the rules of private international law.

3. Court discretion in determining effects of recognition

54. Particularly in legal systems that have a tradition of inherent judicial discretion, the effects of recognition may to one extent or another be left to the discretion of the court. An example of this approach is found in Section 304 of the United States Bankruptcy Code, which provides for discretion at two levels. In the first place, the whole matter of whether to grant a petition for an ancillary, “assisting” proceeding is left to the discretion of the court, which is to be guided by the principles already referred to above (see paragraph 30, above). Secondly, as regards specific measures that may be ordered by the court in aid of a foreign proceeding, mention is made of the permissibility of enjoining or staying local creditor action and of turnover of property to the foreign administrator, followed by mention of authorization for the court to “order other appropriate relief”.

4. Exclusion of certain types of assets

55. It should be noted that some jurisdictions exempt immovables, and rights in rem of creditors or third parties with respect to local assets of the debtor, from recognition accorded to foreign insolvency proceedings. An example of such an approach is found in article 4 of the European Union draft. It may be considered, however, that a general model rule to that effect would not necessarily be desirable.

5. Procedural aspects of effecting recognition

56. If the legal requirements for recognition are met, the question arises by what means this recognition comes into operation. In this respect national laws follow, in principle, two different approaches. There are countries, for example Switzerland (articles 166 and 167, PILS), in which recognition must be triggered by an express decision of the competent court of the recognizing State. In other systems, the foreign insolvency proceeding may have effects in the recognizing State without any formality.

57. Both types of systems have their merits. The formal approach may provide greater legal certainty, whereas the “immediate effect-approach” gives the foreign administrator the possibility of quick action in relation to the local assets of the debtor.

58. It may be, however, that the question of which approach to follow would be seen by the national legislators in the broader context of their general procedural law, which differs considerably from State to State. It might be preferable therefore to leave the subject entirely to the discretion of the national legislators, with no model provision or optional provisions presented.

59. Alternatively, the Working Group may wish to consider a solution midway between the two approaches referred to above. This would involve obligating the foreign administrator to cause the publication of the essential elements of the foreign decision (opening the insolvency proceeding) in the recognizing State (see, for example, article 9 of the Istanbul Convention, and article 13(2) of the European Union draft).

IV. SECONDARY INSOLVENCY PROCEEDINGS

60. One of the most important questions in the field of cooperation in international insolvency is whether, under what circumstances and with what consequences the effects of the recognition of a foreign insolvency proceeding could be blocked by the opening of a separate insolvency proceeding in the other State. Such proceedings are sometimes referred to as “secondary insolvency proceedings”.

61. The attitudes of legislators towards such proceedings may vary, in particular due to policy differences from country to country regarding cooperation in cross-border insolvencies. This section contains a discussion of various techniques a legislator can use when designing statutory provisions on secondary insolvency proceedings in order to bring about results which reflect the prevailing policy considerations.
62. An analysis of various national jurisdictions representing different legal systems reveals that even the countries which do not follow the territoriality principle provide the possibility that under certain circumstances their courts may open a separate territorial insolvency proceeding despite the fact that another insolvency proceeding relating to the same debtor has already been opened in another State to which the debtor has its closest connection. The difference between the various jurisdictions is whether or not they provide the possibility of separate territorial proceedings, but whether and to what extent the requirements and effects of these proceedings, compared with normal local insolvency proceedings, are limited.

63. The consequences of a separate territorial insolvency proceeding in relation to the extra-territorial effects of the main insolvency proceeding are almost everywhere the same: the extra-territorial effects are blocked; by the opening of the territorial insolvency proceeding, the foreign administrator is barred from exercising in that country the powers it may have had if the territorial proceeding had not been opened.

64. A territorial insolvency proceeding has the most far-reaching blocking effect it if is an entirely separate proceeding, without any difference as opposed to the normal national insolvency proceeding. In such a context, there are neither restrictions on the exercise of jurisdiction to open such proceeding nor are there limitations as to the categories of creditors entitled to payment from the proceeds of the liquidation of the local assets in the separate territorial proceedings.

A. Possible links to foreign main proceeding

65. A first step in the direction of some coordination between the separate territorial insolvency proceeding and the foreign main insolvency proceeding may be to provide that, because of the existence of the foreign main insolvency proceeding, it is not necessary to prove the insolvency of the debtor as a prerequisite for the opening of the territorial proceeding.

66. Another link between the foreign main insolvency proceeding and the separate territorial proceeding would be established if, in addition to the persons entitled under the local insolvency law, also the foreign administrator would be empowered to request the opening of a territorial insolvency proceeding.

67. If a legislator intends to attach more precedence to the foreign insolvency proceeding in comparison to the above links, this may be accomplished, alternatively or cumulatively, by the following means: (1) restriction of the jurisdiction to open a separate territorial proceeding; (2) restriction of the right of creditors to request the opening of such a proceeding; (3) restriction of the right of creditors to payment from the proceeds of the territorial liquidation of the local assets. Territorial proceedings characterized by one or more of those elements, which are discussed below, are commonly referred to as "secondary insolvency proceedings".

I. Restriction of jurisdiction

68. A far-reaching restriction on the exercise of jurisdiction to open a secondary insolvency proceeding can be found in the European Union draft. Pursuant to article 19 (in conjunction with article 2(2)), a secondary insolvency proceeding can only be opened if the debtor has an establishment within the State of the secondary proceeding. In that case, a secondary insolvency proceeding, covering the debtor's assets situated in that State, can be opened without further proof of the insolvency of the debtor.

69. Thus, if there exist only assets and not also an establishment of the debtor in that country, a secondary insolvency proceeding may not be opened. In such a case the foreign administrator cannot be barred from exercising all powers the law of the main insolvency proceeding conferred on it, which may result in the transfer of the local assets to the control of the foreign main insolvency proceeding. Such a transfer is not dependent on an approval of the courts of the States in which the assets are situated.

70. It may be noted that in the context of this system the powers of a foreign administrator are only recognized if the administrator was appointed in an insolvency proceeding opened in the State in which the centre of the debtor's main interests is situated (see paragraphs 23-27, above).

71. In contrast to the European Union draft, the Istanbul Convention does not provide any restriction on exercise of jurisdiction to open a secondary insolvency proceeding. Such proceedings can be opened, without further proof of the debtor's insolvency, if the debtor has either an establishment or assets in that State, without prejudice to additional other grounds of competence which might be provided by national law (article 17).

72. The approach in the Swiss law is an example of a middle ground between the above two approaches. An entirely independent Swiss insolvency proceeding can only be opened if the debtor has an establishment in that country. If only assets are situated there (or if, in the case of a local establishment, the opening of a separate national insolvency proceeding has not been requested), the foreign administrator appointed in the main insolvency proceeding is not automatically empowered to remove the assets for the purpose of distributing them in the foreign insolvency proceeding (as he could do under the system of the European Union-draft). Rather, in such cases, a secondary insolvency proceeding covering the assets situated in Switzerland has to be opened by the competent Swiss court. In such a secondary proceeding, the right of the creditors to payment from the proceeds of the liquidation of the local assets is restricted (see further discussion below, under section 3, paragraphs 76-87).

2. Restriction of the right of creditors to request the opening of a secondary insolvency proceeding

73. Any restriction of jurisdiction as discussed above amounts to a reduction of the number of cases where the blocking of the effects of a foreign main insolvency pro-
ceeding by the opening of a secondary insolvency proceeding is possible. Another means to reach this result could be to limit the right to apply for the opening of a secondary insolvency proceeding, rather than to make such proceedings available to all the creditors that have the right to request the opening of a normal local insolvency proceeding.

74. In such an approach, the insolvency law of the State of the secondary insolvency proceeding would, due to policy considerations, remain applicable only for certain categories of creditors even in the event that a foreign main insolvency proceeding has been opened. Those creditors might include, for example, the holders of preferential and secured claims, of public-law claims, and of claims arising from the operation of an establishment of the debtor in the State of the secondary insolvency proceeding, in particular the claims of employees of such establishments.

75. The approach of entitling only certain categories of creditors to request the opening of a secondary insolvency proceeding is embodied, for example, in the Montevideo Treaties. According to those instruments, only local creditors are enabled to file a petition for a separate local insolvency proceeding (article 45 of the Treaty 1940, article 39 of the Treaty 1889). The "local creditors" are defined as creditors whose claims are payable in the State of the secondary insolvency proceeding.

3. Restriction of the rights of creditors to payment in secondary insolvency proceeding

76. Two types of legislative techniques have been used to determine the privileged categories of creditors entitled to payment from the proceeds of the liquidation of the local assets in the secondary insolvency proceeding. One approach is to provide an exhaustive list of those categories of creditors. Such a technique is used, for example, in the Istanbul Convention, which enumerates in its article 21 the following claims: secured or preferential claims; public-law claims; claims of employees in the State of the secondary insolvency proceedings; claims from the operation of an establishment of the debtor in the State of the secondary insolvency proceeding (the justification of privileging the latter category of creditors may be seen in the argument that creditors dealing with a local establishment have a right to rely on the assets of the establishment located there).

77. Another approach could be, rather than to provide a positive list of the categories of creditors entitled to have access to the local assets, to give that right to all creditors who would have in the foreign main insolvency proceeding a less favourable legal position than they would have in a secondary insolvency proceeding by the application of the local insolvency law. The policy behind this approach would be that an "unjustified deterioration" (seen from the policy viewpoint of the State of the secondary proceeding) of the legal situation of creditors in the foreign main insolvency proceeding should be counterbalanced by privileging those creditors in the secondary insolvency proceeding.

78. A combination of the two legislative techniques discussed above can be found in articles 173 and 174 of the Swiss PILS. Since Switzerland is one of the few civil law countries with detailed provisions on the recognition of foreign insolvency proceedings, it might be helpful to summarize at first the Swiss system before turning to the two protection rules contained in articles 173 and 174 of PILS.

79. A foreign insolvency proceeding can be recognized in Switzerland if that proceeding was opened in a State in which the debtor has its domicile, or, in the case of a company, where the debtor company has its seat (see paragraphs 25-26, above). The recognition of an insolvency proceeding opened in the State of the debtor's domicile (or seat, as the case may be) can be blocked by the commencement of a normal, entirely separate Swiss insolvency proceeding if the debtor has an establishment in Switzerland.

80. The fact alone that the debtor has assets in Switzerland is not a sufficient ground to exercise jurisdiction for a normal Swiss insolvency proceedings concerning the assets (restriction of jurisdiction, see paragraph 72, above). In such a case only secondary insolvency proceedings can be opened. Those proceedings are governed by different rules (articles 166-175 PILS) compared with those applicable to the normal local insolvency proceedings. The opening of such secondary insolvency proceedings may be requested by the administrator of the foreign main insolvency proceeding or by any creditor, as there is no restriction of the rights of creditors to request secondary proceedings.

81. The essential difference between this secondary insolvency proceeding and normal local insolvency proceedings consists in a restriction of the right of creditors to payment from the proceeds of the liquidation in the secondary insolvency proceedings. This right is unconditionally reserved to the creditors secured by a lien and to the creditors that have a preferential claim under the Swiss bankruptcy law (enumeration method).

82. This does not mean, however, that the remaining assets are automatically transferred to the foreign administrator. Articles 173 and 174 referred to above enter into play, with the aim of protecting creditors domiciled, or with their seat, in Switzerland against discriminatory treatment in the foreign main insolvency proceeding. Before the remaining proceeds are transferred to the foreign administrator, the distribution plan of the foreign insolvency proceeding must be recognized by the Swiss court that opened the secondary proceeding.

83. In such a context, the Swiss court has to examine whether the claims of creditors domiciled, or with their seat, in Switzerland "have been reasonably taken into consideration" in the foreign distribution plan (article 173 PILS). If the foreign distribution plan is not recognized by the Swiss court or has not been submitted to the court, the remaining proceeds are distributed among the rest of the creditors domiciled or with their seat in Switzerland (article 174 PILS).
84. The policy consideration behind articles 173 and 174 PILS is similar to that behind Section 304(c)(2) of the United States Bankruptcy Code. Both approaches intend to counterbalance an unfavourable treatment (as seen from the protecting country’s point of view) that certain creditors would face in the foreign main insolvency proceeding.

85. In that connection it may be noted that the Istanbul Convention does not contain similar anti-discrimination clauses which have to be applied in the secondary proceeding. The Istanbul Convention rather attempts to enhance equality of creditors in the main insolvency proceeding by providing, in its article 24, that creditors in the main proceeding who are entitled to share assets coming from the secondary insolvency proceeding are to be treated equally, regardless of any privileges or other exceptions to the principle of equality between creditors provided by the law of the main insolvency proceeding.

86. It seems, however, that a provision like article 24 of the Istanbul Convention would only work in the framework of a Convention to which both States involved, the States of the main and of the secondary insolvency proceeding, adhere. A national legislator can hardly follow this example because it would be beyond its competence to enact provisions concerning the legal position of creditors in insolvency proceedings conducted in other States.

87. To facilitate the deliberations of the Working Group, the following summary of how the approaches described in section A have been grouped in various legal instruments thus far may be distinguished:

System 1: Jurisdiction to open a territorial (secondary) insolvency proceeding in State B if the debtor has an establishment there (no jurisdiction if only assets are situated there); no restriction of the right of creditors to request a secondary insolvency proceeding in State B; no restriction of the access of creditors to the proceeds of the liquidation in the secondary proceeding (European Union draft).

System 2: Jurisdiction to open a secondary insolvency proceeding in State B not only in the case of an establishment but also if only assets of the debtor are situated there; no restriction of the right of creditors to request a secondary insolvency proceeding in State B; restriction of the access of creditors to the proceeds of the liquidation in the secondary insolvency proceeding (Istanbul Convention).

System 3: Jurisdiction to open a territorial (secondary) insolvency proceeding in State B not only in the case of an establishment in State B but also if only assets of the debtor are situated in State B; no restriction of the right of creditors to request the opening of a territorial (secondary) insolvency proceeding; restriction of the access of creditors to the proceeds of the liquidation in the secondary insolvency proceeding, except in the case that the debtor has an establishment in State B what can lead, upon request of creditors, to a quite separate local insolvency proceeding (Swiss law).

System 4: As system 3, but under no circumstances restriction of the access of creditors to the proceeds of the liquidation in the secondary proceeding (Germany, as of 1 January 1999).

B. Ancillary proceedings in aid of foreign main proceedings

88. Another approach that may be considered for inclusion in a menu of options for legislators, one that may be seen as related to the question of secondary proceedings, would be to provide for the possibility of opening ancillary proceedings specifically for the purpose of assisting a foreign main insolvency proceeding. As previously noted, a primary example of this approach is found in Section 304 of the United States Bankruptcy Code. Such type of approach is also encompassed in MIICA.

89. As set forth in those instruments, the purposes of such ancillary proceedings may include: enjoining the commencement or continuation of local insolvency proceedings and the enforcement of judgments against the debtor with respect to its local assets, or consolidation of pending local insolvency proceedings with the ancillary case; turnover to the foreign main proceedings of property or of the proceeds thereof; obtaining testimony or production of books, records or other documents relating to an insolvency; obtaining recognition and enforcement of a foreign judgment or court order; and obtaining any other appropriate relief.

90. It is noteworthy that under the ancillary proceeding approach, in the event that such a proceeding is unavailable or denied, the foreign representative remains free to commence independent local insolvency proceedings.

91. The Working Group may wish to consider other issues that might be dealt with regarding ancillary proceedings, for example, the question of the law to be applied by the court opening the ancillary proceeding. In this regard, MIICA obligates the ancillary court to apply the substantive insolvency law of the foreign court conducting the main proceedings.

V. ACCESS FOR FOREIGN INSOLVENCY REPRESENTATIVE

92. The term “access” may be understood as the procedural mechanism utilized by the foreign representative to seek recognition. The Working Group may wish to consider whether it would be desirable and feasible to include provisions on such procedural mechanisms for achieving access and recognition.

93. As regards categories of procedural mechanisms, the distinction might be drawn between formal diplomatic processes, processes involving direct communications between courts of different States, and an exequatur type of process operating through an administrative or quasi-judicial process. As regards such possible procedures, it might be observed that it is not typical international usage for a letter of request to be sent directly by a court to the corresponding foreign court. Such direct contact would typically require an agreement by the two States involved. In other cases, the letter of request would be transmitted through the diplomatic channel. This typical approach is codified in the multilateral Hague Conven-
tion on the Taking of Evidence Abroad (1970), which provides for the transmission of requests through “central authorities” of the two States involved.

94. At the same time, it may be recalled that in various national jurisdictions and in the Istanbul Convention and the European Union draft, a foreign insolvency proceeding, including the authority of a foreign administrator, is recognized *ipso jure* if specific requirements are fulfilled. Thus immediate “access” is provided without any court intervention or other formality.

95. Whether under the rubric of “access” or elsewhere, it may be considered essential to include a provision to the effect that an appearance by the foreign representative seeking recognition would not subject the representative to the full jurisdiction of the court. Other issues that might be considered for treatment include the type of evidentiary material to be provided by the representative seeking access and who the entity should be that applies for recognition.

VI. JUDICIAL COOPERATION

96. While the notion of judicial cooperation may be considered as substantially intertwined with the notions of access and recognition, thus forming a bundle of cooperative activities between jurisdictions involved in a cross-border insolvency, there may be some benefit, at least at this stage, in considering the concepts separately to the extent feasible. Accordingly, the Working Group may wish to consider which aspects or procedures might be presented under the rubric of judicial cooperation. The following items thus do not presume to constitute a comprehensive listing of possible issues in this area.

A. Approval of ad hoc protocols

97. One aspect of judicial cooperation may be approval by the courts from the jurisdictions involved of ad hoc protocols agreed to by the parties concerning various aspects of the administration of a cross-border insolvency and establishing a regime of cooperation. Such protocols may be particularly relevant when a debtor has substantial business activity in more than one jurisdiction, thus resulting in primary jurisdiction vesting in more than one jurisdiction.

98. Notable examples of such protocols being successfully utilized have surfaced in a number of major cross-border insolvency cases. In addition, Committee J of the Section on Business Law of the IBA has recently developed a model for such ad hoc protocols (entitled “Cross-Border Insolvency Concordat”). The purpose of the Concordat, the fundamental approach of which is based on rules of private international law, is to suggest rules, some of which may be applicable in any cross-border insolvency, that the participants or courts could adopt for dealing with a variety of issues. Those issues include, for example, designation of the administrative forum, application of that forum’s priority rules, certain rules for cases in which there is more than one administrative forum, and designation of applicable rules for avoidance of transfers of assets that took place in the period preceding the insolvency.

B. Judicial communication

99. Another issue that might be tackled under the rubric of judicial cooperation concerns communication between judges from different jurisdictions involved in a cross-border insolvency case. Such communication may be particularly helpful for the purpose of enabling judges to obtain accurate information and to coordinate their actions, proceedings and orders.

100. Despite their potential utility, communications between judges may raise varying degrees of concern in particular in legal systems that are not accustomed to such initiatives by judges, and also concerns about procedural safeguards for the parties. A variety of techniques may be contemplated in order to address such concerns, including, for example, one or more of the following: notice to the parties of a forthcoming communication; opportunity for presence during the communication; record of the communication made available to the parties; communication through a third-party intermediary agreed by the parties.

VII. ADDITIONAL ISSUES

101. As noted at the outset, it is assumed that the present note does not touch on all the issues that may prove relevant to the cross-border insolvency project. The Working Group may wish therefore to consider other possible aspects to be dealt with, including perhaps those below, which are presented to spur the discussion.

A. Duty to inform the creditors

102. Creditors often get information about the opening of an insolvency proceeding in another country late, or not at all. It might be desirable and feasible to draw up a model provision to the effect that as soon as an insolvency proceeding is opened the competent authority or the administrator shall inform promptly and individually the known creditors residing in another country. Legislative examples can be found in article 30 of the Istanbul Convention, and in article 32(1) of the European Union draft.

B. Duty to communicate information between administrators

103. It presumably would strengthen cooperation in cross-border insolvencies if administrators appointed in a main insolvency proceeding and in a territorial (secondary) insolvency proceeding would communicate to each other any information which may be relevant to the other proceeding (see article 25 of the Istanbul Convention, and article 24 of the European Union draft).
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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continued its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995) on the development of a legal instrument relating to cross-border insolvency.¹

2. The Commission’s decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, “Uniform Commercial Law in the 21st Century”, held in New York in conjunction with the twenty-fifth session of the Commission, from 18 to 22 May 1992.² The Commission decided at its twenty-sixth session to pursue those suggestions further.³ Subsequently, in order to assess the desirability and feasibility of work in this area, and to define appropriately the scope of the work, UNCITRAL and the International Association of Insolvency Practitioners (INSOL) held a Colloquium on Cross-Border Insolvency (Vienna, 17-19 April 1994), involving insolvency practitioners from various disciplines, judges, government officials and representatives of other interested sectors including lenders.⁴

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at the current stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as “judicial cooperation” and “access and recognition”). It was also suggested that an international meeting of judges should take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favourably by the Commission at its twenty-seventh session.⁵

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held at Toronto on 22 and 23 March 1995.⁶ The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition. The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group commenced that examination at its previous session, held at Vienna from 30 October to 10 November 1995,⁷ which included consideration of draft provisions on various issues including definitions of certain terms, rules on recognition of foreign proceedings, effects of recognition, modalities of court access for foreign insolvency representatives and judicial cooperation in the context of concurrent proceedings. At the end of that session, the Working Group requested the Secretariat to prepare for the present session of the Working Group draft provisions on judicial cooperation and access and recognition, taking into account the views and suggestions expressed at that session.

6. The Working Group, which was composed of all States members of the Commission, held the present session in New York from 1 to 12 April 1996. The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Botswana, Bulgaria, Chile, China, Finland, France, Germany, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Thailand, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Benin, Burundi, Canada, Colombia, Croatia, Czech Republic, Estonia, Lebanon, Morocco, Myanmar, Namibia, Netherlands, Republic of Korea, South Africa, Swaziland, Sweden, Switzerland and Ukraine.

8. The session was also attended by observers from the following international organizations: Cairo Regional Centre for International Commercial Arbitration, European Insolvency Practitioners Association (EIPA), International Association of Insolvency Practitioners (INSOL), International Bar Association (IBA), International Chamber of Commerce (ICC), International Women’s Insolvency and Restructuring Confederation, and Union Internationale des Avocats.

9. The Working Group elected the following officers:

Chairman: Ms. Kathryn Sabo (Canada)
Rapporteur: Mr. Ricardo Sandoval (Chile)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.VWP.43); and a note by the Secretariat containing draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency (A/CN.9/WG.VWP.44), which served as the basis for the Working Group’s deliberations.

²United Nations publication, Sales No. E.94.V.14.
⁴The report on the Colloquium is found in document A/CN.9/398.
⁶The report of the Judicial Colloquium is found in document A/CN.9/413.
⁷The report of the preceding session of the Working Group is found in document A/CN.9/419.
11. The Working Group adopted the following provisional agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Cross-border insolvency.
4. Other business.
5. Adoption of the report.

I. DELIBERATIONS AND DECISIONS

12. The Working Group considered a set of draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency presented in the note prepared by the Secretariat (A/CN.9/WG.V/WP.44).

13. As the Working Group progressed with its consideration of document A/CN.9/WG.V/WP.44, it established an informal drafting group to revise the draft legislative provisions, reflecting the deliberations and decisions that had taken place. The deliberations and conclusions of the Working Group, including its consideration of various draft provisions, are set forth in chapter II below.

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

A. General remarks

14. Prior to a detailed consideration of the draft articles, the Working Group exchanged remarks of a general character, commencing with the question of the form of the instrument being prepared.

15. It was noted that the draft text before the Working Group was in the form of model legislative provisions. Such a form had been presented by the Secretariat as a working assumption, and would not preclude an eventual decision to transform the text into a draft convention. Considerations cited in favour of model legislation centred on the desire for flexibility in the text in view of differing approaches in national law and varied forms of cooperation and coordination in cross-border insolvencies. Also cited were the difficulties experienced in efforts to formulate and adopt multilateral conventions in this field.

16. At the same time, the Working Group was urged not to forsake the possibility of in the end adopting the text in the form of a draft convention. It was suggested that such a possibility was enhanced in the case of the text being prepared because it dealt essentially with procedural matters and contained provisions capable of being set forth in a convention. The Working Group agreed to return at a later stage to the question of the form of the instrument.

B. Consideration of draft provisions

Title

17. The Working Group commenced its reading of the draft by considering the title, which was denominated in terms of "model legislative provisions", rather than "model law". This, it was noted, was to foresee that the provisions might be incorporated into existing national insolvency statutes as a sort of "upgrade" to deal with cross-border insolvencies, rather than being enacted as a free-standing law.

Preamble

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

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

(a) fair and efficient administration of insolvencies that protects the interests of creditors from the enacting State, as well as the interests of foreign creditors;
(b) maximizing the value of the insolvent debtor's estate in the event of insolvency proceedings;
(c) facilitating the rescue of financially troubled though viable businesses, thereby protecting investment and preserving employment;
(d) encouraging and providing a predictable environment for trade and investment in the enacting State; and
(e) furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency,

Be it therefore enacted as follows."

19. Support was expressed for including a preamble. It was said that such a recital of the basic purposes of the text would be a useful tool for interpreting and applying the text.

20. It was suggested that subparagraph (a) should refer simply to the protection of the "interests of creditors", rather than referring separately to domestic and to foreign creditors. The concern was that a bifurcated reference might inadvertently suggest discrimination between those two categories of creditors.

21. Beyond that, the view was expressed that subparagraph (a), which referred only to protecting the interests of creditors, might be unduly narrowly drawn, as there might be a variety of other parties interested in the administration of a cross-border insolvency.

22. Suggestions for possible additions to the preamble included references to: "non-discrimination" on the basis of nationality of creditors; in subparagraph (b), the obtaining of information about the debtor's estate; and protection of assets as one of the objectives of the provisions.
23. Subsequently, the drafting group established by the Working Group submitted the following revised version of the preamble for consideration at a later session:

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

(a) Fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested parties;

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

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

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

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

Be it therefore enacted as follows."

Chapter I. General provisions

Article 1. Scope of application

24. The Working Group engaged in a discussion of the scope of application of the model legislative provisions based on the following draft article:

"This [Law] [Section] applies to insolvencies in which:

(a) a foreign proceeding has been commenced and recognition of that proceeding, and [enforcement of an order, or some other form of] assistance or relief, is sought on behalf of that proceeding in the enacting State;

(b) insolvency proceedings are taking place in the enacting State and the court seeks assistance on behalf of those proceedings from a foreign court or competent authority; or

(c) insolvency proceedings with respect to a debtor are taking place concurrently in the enacting State and in one or more other States."

25. The Working Group noted that draft article 1 was intended to bring within the scope of the text three types of cases with a cross-border character: cases in which a proceeding had been opened in a foreign State and assistance was sought in the enacting State; those in which a proceeding had been opened in the enacting State and assistance was sought from a foreign court or competent authority; and those in which concurrent proceedings were taking place in the enacting and in one or more other States.

26. The necessity of including a provision along the lines of subparagraph (b) was questioned. In response, it was pointed out that subparagraph (b) was merely intended to authorize the courts of the enacting State to seek assistance abroad with respect to insolvency proceedings in the enacting State, which was a question not adequately covered in some national laws. After deliberation, there was general agreement in the Working Group that reference to the situations mentioned in draft article 1 should be retained.

27. In addition, the Working Group noted that an additional case with overtones of internationality was alluded to in draft article 17, which referred to the presence of foreign creditors and to the principle of national treatment of creditors, including access of foreign creditors to opening of insolvency proceedings in the enacting State. It was suggested that that case also should be referred to in draft article 1.

28. With regard to the location of draft article 1, the suggestion was made that, from a structural point of view, it would be more appropriate to place it after the provision setting forth definitions. In response, it was stated that there was merit in stating the scope of application in general terms before describing it in more detail in the definitions.

29. It was observed that, while the main aim of the text was the recognition of foreign proceedings, "recognition" was mentioned only in subparagraph (a). It was therefore suggested that the principle of recognition of foreign proceedings should be stressed more explicitly in draft article 1.

30. The use interchangeably of terms such as "insolvency", "insolvencies" and "insolvency proceedings" was questioned. It was observed that such terms were not universally understood and might introduce uncertainty. It was suggested to refer instead to "situations in which assistance could be sought. Another suggestion was to include a definition of the term "insolvency proceeding" sufficiently broad to encompass all proceedings in respect of which assistance might be sought. The text could then refer to proceedings opened in the enacting State as "domestic", and to proceedings opened in any other State as "foreign". (Concerning the proposal to include a definition of "insolvency proceeding", see also paragraphs 46-47, below).

31. In response, it was stated that the main aim of the text was to establish a legal regime ensuring recognition of foreign proceedings. In addition, it was stated that, while a definition of "foreign proceeding" would be needed, the term referring to "domestic proceedings" would not need to be defined, since the text would rest in the national insolvency legislation. Moreover, it was pointed out that adding a definition of the term referring to "domestic proceedings" could risk inconsistency with national law or create the misimpression that the text aimed at substantive unification of insolvency cases.

32. With regard to the exact formulation of draft article 1, a number of suggestions were made. One suggestion was that the bracketed words in subparagraph (a) referring to the enforcement of an order were redundant,
as this was one form of “assistance or relief”. Another suggestion was that subparagraph (a) should be refined so as to refer, instead of to assistance “sought on behalf of” a proceeding, to assistance sought “with respect to” a proceeding, or to assistance sought “by a court or a foreign representative”. Yet another suggestion was that subparagraphs (a) and (b) should be aligned so as to refer to “assistance or relief” being sought by a court or a foreign representative. It was noted in response to that suggestion that an allusion to a court seeking “relief” might have to be considered further, as courts might more appropriately be considered to seek “assistance”.

33. After deliberation, the Working Group found the substance of draft article 1 to be generally acceptable and referred the suggestions made as to its exact formulation to the drafting group. Subsequently, the drafting group submitted the following revised version of article 1 for consideration by the Working Group at a later session:

“Article 1, Scope of application

This [Law] [Section] applies where:

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

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

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

Article 2. Definitions and rules of interpretation

34. The Working Group considered a number of definitions and rules of interpretation based on the following draft article:

“For the purposes of this Law,

(a) “Administrator” means a person or body appointed by a court [or by statutory authority] in the enacting State who is authorized to reorganize the debtor’s assets or affairs, or to liquidate the debtor’s assets, in the context or reorganization of liquidation proceedings initiated under the laws of the enacting State, including the implementation of any measures that may be ordered pursuant to this Law;

(b) […] “debtor” includes [an insolvent] legal [or natural] person who has the status of an insolvent in a foreign proceeding, [but not including debtors whose debts were [apparently] incurred [predominantly] for personal, family or household use rather than for commercial purposes];

(c) “Foreign proceeding” means a collective judicial or administrative proceeding [, whether voluntary or compulsory,] pursuant to an insolvency law [, or to another law relating to insolvency,] in a foreign country in which assets and affairs of the debtor are subject to control or supervision by a court, by an official authority or by a competent person under the supervision of a court or official authority, for the purpose of reorganization or liquidation;

(d) “Foreign representative” means a person or body appointed in a foreign proceeding, who is authorized by statute, court or other competent authority to reorganize the debtor’s assets or affairs, or to liquidate the debtor’s assets;

(e) “Opening of foreign proceedings” refers to the initiation of the proceedings, whether or not an order or judgement opening the proceedings is final;

(f) “Reorganization” refers to proceedings in which rights of creditors and the obligations of debtors are adjusted [, including by way of composition];

(g) “Rights in rem” refers to rights of disposal over assets to obtain satisfaction from the proceeds or income of the assets or to an exclusive right to have a claim met, including by way of liens, mortgages or assignments of claims by way of guarantee, [reservation of title arrangements], rights to the beneficial use of assets [and creditor rights to setoff of mutual claims].”

Subparagraph (a) (“Administrator”)

35. It was observed in the first place that this, and the other definitions in draft article 2, should be phrased as much as possible in functional terms rather than by utilizing terms which might have particular and diverging definitions in national laws. To that end, it was suggested that a term other than “administrator” might be used, such as “official person”. Another suggestion was that, in order for the definition of “administrator” to be sufficiently broad, reference should be made to insolvency proceedings in general, rather than to reorganization or liquidation proceedings. A suggestion along those lines was that the matter should be left to national law, for example, by leaving in subparagraph (a) a blank space for the enacting State to fill in the term or terms used in the enacting State.

36. It was suggested that the reference to “statutory” authority, which appeared within square brackets, should be deleted, since in many countries there was no need to refer to a statute for the authority of the administrator. The Working Group was urged, however, to add a reference to appointment by a “competent authority”.

37. Another suggestion was that subparagraph (a) should state that the administrator was appointed to “facilitate” reorganization and to “undertake” liquidation, rather than, directly by him or herself, to reorganize or to liquidate the debtor’s assets or affairs. This was because the administrator acted at the behest of the courts and on behalf of bodies of creditors. It was also suggested that a definition of the term “administrator” should focus on the common characteristics of the relevant proceedings in the context of which the administrator was appointed, namely: the collective nature of the proceedings; appointment by a court or other competent authority; and powers with respect to reorganization of the debtor’s assets or affairs or to liquidation of the debtor’s assets. In that
regard, it was suggested that the terms “reorganization” and “liquidation” should be defined in the text for the sake of clarity.

38. A consideration cited in several interventions was that the definition of the term “administrator” should parallel the definition of the term “foreign representative”, in order to avoid granting to foreign representatives more powers than those given to locally appointed administrators. In that connection, a note of caution was struck in order to ensure that recognition of a foreign representative would not preclude a court in the enacting State from recognizing more than one foreign representative.

39. Having considered the various drafting suggestions and attendant questions raised, the Working Group took the position that it would not be advisable or necessary to include in the text a definition of the term “administrator”. This was felt to be so in particular since the main purpose of the model provisions was recognition of foreign proceedings and it would then be sufficient to define the notion of “foreign representative”. Such an approach would avoid the risk of unnecessarily contradicting or superimposing new definitions on existing terms and notions of the “administrator” in national laws.

Subparagraph (b) (“debtor”)

40. There was general agreement that both legal and natural persons should be envisaged as debtors. The Working Group then considered the question of possible exclusions from the definition.

41. The first such exclusion concerned “consumer insolvencies”, an exclusion for which a text was presented in subparagraph (b). The formulation of the exclusion was questioned, as well as the very need to retain the exclusion. Factors cited in favour of deleting an exclusion of consumer insolvencies included: the relatively low economic significance of such insolvencies in the cross-border context; the lack of necessity of excluding that particular type of insolvency in a text merely establishing flexible mechanisms for cooperation; and that the matter of such an exclusion could be left more appropriately to national law. Were an exclusion of consumer insolvencies to be retained, it was proposed to phrase it along the lines of “debts incurred in the normal course of business”.

42. Another category of possible exclusions concerned insolvencies of credit, financial or insurance institutions. The Working Group noted that in various States insolvencies of such institutions were administered under special regulatory regimes that might not be fully susceptible to application of the text being prepared (e.g. draft article 9 referring to notification of creditors, application of which might be inappropriate in insolvencies of such institutions in which prompt and discrete action may be required to avoid massive withdrawals of deposits).

43. In response, it was pointed out that the enacting State would wish that insolvency proceedings in such cases, although conducted under a regulatory regime, would nevertheless be accorded recognition. It was pointed out that a possible approach in national law might be to treat the foreign insolvency proceedings involving a credit institution as an ordinary insolvency proceeding for recognition purposes if the branch or activity of the foreign credit institution in the enacting State did not fall under the national regulatory scheme.

44. With regard to exclusions of types of debtors from the scope of the model provisions, the Working Group hesitated to encourage broad resort to a “public policy” exception, in lieu of expressly referring in the text to specific exclusions. It was generally agreed that wide resort to “public policy” exceptions should be discouraged. Exclusions from the notion of “debtor” would best be left, it was agreed, to national law, including, it was noted, the important role in this context of the originating jurisdiction.

45. The prevailing view, however, was that subparagraph (b) was not necessary and should be deleted. It was generally felt that the determination of whether an insolvency proceeding could be recognized on the basis of the nature of the debtor should be left to national law or, to the extent necessary, perhaps dealt with in the definition of the term “foreign proceeding”.

Subparagraph (c) (“foreign proceeding”)

46. In the discussion at the current session the suggestion was made to define a general notion of “insolvency proceedings” without focusing on foreign proceedings. Reference would then be made, depending upon the context, either to “domestic” or to “foreign proceedings”. It was suggested that such an approach would establish a common ground or a “mirror image” among States as to proceedings covered by the model provisions. It was also said to have the advantage of making clear which types of proceedings under its own law the enacting State was subjecting to the model provisions. A further advantage of the “mirror image” approach was that it would limit possible conflicts and inconsistencies between relief awarded upon recognition of a foreign proceeding, and relief available under a local proceeding in the enacting State.

47. The prevailing view was that a definition of “insolvency proceedings” as such was not necessary. Since the main aim of the model provisions was the recognition of foreign proceedings, it was decided to focus on the definition of “foreign proceeding”.

48. As to the formulation of the definition of “foreign proceeding”, support was expressed for the basic elements of the definition, namely, insolvency in a broad sense covering liquidation and reorganization, a collective character involving representation of the mass of creditors, and official sanction.

49. A number of suggestions of a drafting nature were made, including that: the reference to “voluntary or compulsory” proceedings was superfluous since both those types of proceedings were implicit in the term “collective proceeding”, though retention of that reference was supported as providing greater clarity; the words “a law relating to insolvency” were sufficiently broad so as to en-
compass insolvency rules irrespective of the type of statute in which they might be contained and therefore should be the formulation retained; the term “debtor” should be replaced by a functional, neutral term; the term “competent authority” should replace the term “official authority”, or the term “court” could be defined to include various types of competent authorities, though the practicality of the latter approach was questioned; reference could be made to the debtor’s “estate” instead of to “assets and affairs” of the debtor, though it was pointed out that such a formulation might unnecessarily restrict the foreign representative from seeking to obtain information with regard to matters outside the “estate” of the debtor; and to add words along the lines of “unless the context otherwise indicates” in order to allow some flexibility in tailoring the meaning of “foreign proceeding” to fit particular circumstances.

50. After deliberation, the Working Group approved the substance of subparagraph (c) and referred the drafting suggestions to the drafting group.

Subparagraph (d) (“foreign representative”)  

51. The question was raised whether the definition was intended to encompass a “debtor in possession” appearing as the “foreign representative”. The view was expressed that encompassing such a notion of “foreign representative” might be problematic for some States. In response, it was recalled that at the previous session the Working Group had agreed to adopt an inclusive approach, thereby not excluding the debtor-in-possession scenario, which represented an important procedure for handling insolvencies in some States. It was also suggested that the matter would be less problematic than it might appear at first sight, since in a broad range of insolvency proceedings the debtor retained some measure of possession or control.

52. It was suggested to ensure that subparagraph (d) encompassed a foreign representative who had an “interim” appointment, rather than encompassing only those with a full appointment for the purposes of reorganization or liquidation. It was agreed that the definition was intended to encompass such “interim” office-holders in foreign collective proceedings.

53. Other refinements suggested included: to address more specifically the question of the powers of the foreign representative, namely, to control and supervise; to take into account that the constituency that the foreign representative represented might vary from case to case (e.g. the debtor; creditor bodies); to clarify the reference to statutory appointment authority by referring to the representative as one whose powers were possibly authorized by statute; and, in line with an earlier suggestion, to refer to the foreign representative as “facilitating” reorganization or “undertaking” litigation (see paragraph 37, above).

54. After deliberation, the Working Group approved the substance of subparagraph (d) and referred the drafting suggestions to the drafting group.

Subparagraph (e) (“opening of foreign proceedings”)  

55. The Working Group noted that the definition was intended to have broad scope, covering not only proceedings commenced compulsorily, but also those initiated voluntarily. It was said that in some cases this might include proceedings for which merely application had been made, and would in any case have to envisage provisional or preliminary relief.

56. The question was raised as to whether the text should be linked to at least some minimal preliminary action of a court in the commencement of the foreign proceedings. In response, it was stated that an early point of reference could on a practical level be crucial to preventing the rapid dissipation of assets against the interests of all creditors.

57. It was suggested that the definition might be made clearer as to its coverage. This clarification could touch on the notion of “initiation”, which was said to be uncertain; an alternative formulation, “whether or not the proceedings have been finalized”, for the second part of the definition; and use of a phrase along the lines of “when the order opening the proceedings becomes effective, whether final or not”.

58. Several interventions questioned the need for a definition of “opening of foreign proceedings”. It was suggested that determining a sufficient point of initiation for a proceeding would not engender significant difficulty in practice, and it would not be advisable to attempt a general rule in the face of diversity in national approaches. The Working Group agreed to return, after further review of the model provisions, to the question of the possible deletion of subparagraph (e), meanwhile placing the provision within square brackets.

Subparagraph (f) (“reorganization”)  

59. The Working Group recalled that, pursuant to the discussion at the previous session, the definition had been added in order to make it clear that the text encompassed proceedings settled by “composition” arrangements.

60. A number of modifications were proposed to the draft text, for example: the use of the notion of “adjustment” was questioned, and one of “settlement” of debts was proposed in its stead; the suggestion to refer, in addition to the elements already in the definition, to the negative criterion of absence of liquidation of assets; and the suggestion of emphasis on the aspect of the stay of creditor action involved in reorganizations.

61. Upon further scrutiny, the Working Group came to the view that it would not be necessary to include a definition along the lines proposed. An alternative solution suggested was to add greater clarity to the expression “reorganization” where it happened to be utilized, in particular in the definition of “foreign proceeding” (subparagraph (c)).
Subparagraph (g) ("rights in rem")

62. Various interventions alluded to the number and diverse treatment in national laws of notions of "rights in rem". The view was expressed that an attempt at a relatively simple, abbreviated general definition along the lines of the draft text was unlikely to be satisfactory or feasible. The view was also expressed that it would be appropriate to include a conflict of laws rule on the question of rights in rem. It was also pointed out that the question of rights in rem raised the question of indefeasible rights, whose applicability was strictly mandatory and fell outside the system of conflict rules.

63. As to the content of the draft definition, in response to the question put to the Working Group in the text, the inclusion of some of the elements, in particular the reference to setoff, was questioned as beyond the rubric of rights in rem.

64. Upon deliberation, the view was generally held that defining "rights in rem" was not necessary and would better be left to the national legislation. To the extent necessary, appropriate reference to rights in rem could be made in the text of the model provisions (e.g. exceptions to stay granted upon recognitions (draft article 7 (1)(a)(i)). In view of the above, the Working Group agreed to the deletion of subparagraph (g).

65. Subsequently, the drafting group submitted the following revised version of article 2 for consideration at a later session:

"Article 2. Definitions

'Foreign proceeding' means a collective judicial or administrative proceeding pursuant to a law relating to insolvency in a foreign State in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court or other competent authority, for the purpose of reorganization or liquidation. 'Foreign representative' means a person or body authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding."

Article 3. International obligations of the enacting State

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

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

67. The Working Group considered questions raised as to the need for article 3. Those questions were based on the widespread existence in laws at the national level of rules concerning the hierarchy of treaty and other national legislative enactments. However, despite a possible lack of final decision as to the exact placement of the provision, the Working Group decided to retain article 3 in substance. It was said to be useful because it would draw the attention of enacting States to the need for clarity on the relationship of treaty obligations to the model legislative provisions.

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

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

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

69. The Working Group found the substance of article 4 to be generally acceptable.

Article 5. Authorization for administrators to act extraterritorially

70. The draft article as considered by the Working Group read as follows:

"An administrator appointed [in insolvency proceedings] in the enacting State is authorized to act [as foreign representative of those proceedings] [to take such steps as are necessary extraterritorially for the purposes of reorganizing the debtor's assets or affairs, or to liquidate the debtor's asset] in accordance with the orders of the court."

71. Some questions were directed as to whether it was necessary or appropriate to include a provision along the lines of article 5. For example, it was suggested that, at least as currently formulated, the provision might be read as attempting to directly confer on locally appointed administrators the power to take action in foreign jurisdictions.

72. In response, the Working Group expressed its general understanding that article 5 was merely intended to give authority to locally appointed administrators to petition foreign courts for assistance in accordance with the law of the foreign court. The scope and exercise of power abroad would depend upon the foreign law and courts. Article 5, it was noted, was not intended to grant powers to the locally appointed administrator to take actions, including actions such as repatriation of assets, without authorization of the local court.

73. As to the utility of a provision along the lines of article 5, it was reported to the Working Group that such a provision would help to fill a gap found in some national laws, and would generally be in line with the aim of facilitating cooperation and coordination.
74. After deliberation, the Working Group was of the view that article 5 should be retained, and referred it to the drafting group for possible clarification of its intended scope and purpose. Subsequently, the drafting group submitted the following revised version of article 2 for consideration at a later session:

"Article 5. Authorization to act as a foreign representative
A [insert title of person or body who may be appointed to administer a liquidation or reorganization under the law of the enacting State] is authorized to seek foreign recognition of the proceeding in which he has been appointed and to exercise such powers as to the foreign assets or affairs of the debtor as the applicable foreign law may permit."

Chapter II. Recognition of foreign insolvency proceedings

75. The view was expressed that the provisions of articles 12 and 13, contained in chapter IV, could be relocated to precede chapter II. The rationale behind such a rearrangement would be to reflect more appropriately the typical order of events taking place with respect to an application for recognition of a foreign proceeding.

Article 6. Recognition of foreign insolvency proceedings

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

"(1) For the purposes of this Law, a foreign judgement opening insolvency proceedings shall be recognized [from the time that it becomes effective in the State of the opening of proceedings],

"Variant A
unless it is shown that there was no substantial connection between the foreign jurisdiction and the debtor.

"Variant B
if the judgement emanates from a competent court or authority. A court or authority shall be deemed competent if that court or authority has jurisdiction based on any of the following criteria:
(a) domicile or habitual residence of the debtor;
(b) seat or place of registered office;
(c) [principal place of business] [centre of debtor's main interests];
(d) location of assets.

"Variant C
if the foreign proceeding originates from a court or competent authority in a State [appearing on the following list: . . . ] [certified for purposes of recognition of insolvency by [name of appropriate entity or officer in enacting State].]

"(2) Notwithstanding paragraph (1), a court [may] [shall] refuse to recognize the opening of foreign insolvency proceedings [, to enforce a judgement emanating from such proceedings [, or to grant other forms of relief under this Law,] where the effects of such recognition, enforcement or relief would be manifestly contrary to public policy."

77. The Working Group decided to undertake its consideration of article 6 after completion of the discussion at the current stage of article 7 (see paragraphs 94-119, below). After having completed that discussion, it returned to article 6.

78. It was noted that the word "insolvency" would be deleted in the title of chapter II, as well as in the title of article 6, in line with the terminology used elsewhere in the text.

Paragraph (1)

79. The Working Group noted that paragraph (1) presented several options as to a rule to be followed by the courts of the enacting State in determining whether to accord recognition to a foreign proceeding. The Working Group paused to consider the necessity of including such a provision, in view of the fact that the model provisions were meant to open as wide a door to cooperation as would be appropriate, while at the same time not prejudicing the rights of local creditors under the insolvency laws of the enacting State. The Working Group affirmed the utility of article 6, which could play an important part in the provisions designed to secure an opportunity for foreign representatives to seek cooperation and assistance in the enacting State.

80. While some support was expressed for variant A, the predominant inclination in the Working Group was to follow an approach based on variant B. At the same time, it was acknowledged that selecting variant B would not preclude the possibility of offering, as an additional option for States, variant C. Inclusion of a variant C style provision by the enacting State would provide automaticity of recognition for foreign proceedings emanating from a jurisdiction in a prescribed list of States determined by the enacting State.

81. As to the content of a provision based on variant B, a number of suggestions were made so as to enable the courts of the enacting State to have a better and more predictable idea of how they should react to an application for recognition.

82. In the first place, and in view of the decision to distinguish in article 7 (relief available upon recognition) between foreign main and foreign non-main proceedings, the Working Group agreed that such a distinction would have to be reflected also in article 6. It was suggested to the Working Group that, aside from linking the rule on recognition in some way on the range of effects that would flow from recognition. Another suggestion was that possible additional factors might be added to the list set forth in variant B of paragraph (1).
83. It was also noted that consideration might be given to limiting paragraph (1), for the purposes of recognition of a foreign proceeding as a main proceeding, to one or the other of the factors listed. It was said that such a limitation would be necessary to avoid placing the courts in the enacting State in the position of dealing with multiple claims for recognition as a foreign main proceeding.

**Paragraph (2)**

84. There was broad agreement as to the advisability of providing for exceptions to the recognition rules that would take into account public policy considerations in the enacting State. However, the Working Group was receptive to a suggestion that the placement of paragraph (2) might inadvertently suggest that the public policy exception referred essentially to the recognition decision itself, rather than also to individual effects of recognition.

85. The Working Group affirmed that the provision on public policy should be applicable to both aspects, and directed the drafting group to reconsider the placement of the rule in paragraph (2).

86. Upon completion of the first round of consideration of article 6, the Working Group referred it to the drafting group with a view to taking into account the above deliberations. The drafting group subsequently submitted the following revised version of article 6 to the Working Group:

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

(a) as a foreign main proceeding if the court of the foreign proceeding has jurisdiction based on the:
   (i) domicile or habitual residence of the debtor;
   (ii) seat or place of registered office of the debtor; or
   (iii) [principal place of business] [centre of the debtor’s main interests];

or

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

[(c) If recognition is sought in respect of more than one foreign proceeding, the court [shall] [may] designate one such proceeding as the foreign main proceeding.]

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

87. It was widely felt that the revised version of article 6 represented an improvement in the direction of the observations made in the earlier round of discussion. The Working Group endorsed the distinction drawn between foreign main and foreign non-main proceedings. Beyond that, several further modifications and improvements were considered.

88. A concern that was emphasized was that the revised version of paragraph (1) raised the spectre of recognition of more than one foreign main proceeding. It was suggested that such a possibility would place courts in an untenable position and would detract from the acceptability of the model provisions. The attempt to equip the court to deal with such a case, by including in subparagraph (c) the authorization to select one of several competing foreign proceedings as the main proceeding, was not regarded as an adequate solution.

89. The Working Group acknowledged the concern about possibly giving rise to recognition of more than one foreign proceeding as “main”, and, upon further consideration, agreed that paragraph (1)(a) should be modified to refer to one factor as a competency test for recognition of a foreign main proceeding. It was agreed that that factor should be the “centre of the debtor’s main interests”.

90. Advantages cited in favour of the selection of that particular factor included that it would encompass as debtors both legal and natural persons, and that it would be in harmony with the approach and terminology utilized in the European Union Convention. The latter aspect would enable to draft model provisions to contribute to the development of a standardized and widely understood terminology, rather than inadvertently contributing to an undesirable diversification of terminology.

91. It was suggested, in order to add further specificity to the rule, to establish a rebuttable presumption that the registered seat of the debtor was the centre of its main interests.

92. The Working Group then considered whether subparagraph (c), which authorized the designation of one of several foreign proceedings as a foreign main proceeding, should be retained even though there would now only be one factor relevant to the identification of a foreign proceeding as main. It was suggested that retaining the provision would enable the court to deal with cases in which additional information might be received in connection with an application for recognition made subsequently to an earlier recognition of a foreign proceeding as main, and that would cause the court to retract the earlier recognition as one of a main proceeding. It was suggested that such flexibility would be helpful. However, though it did receive some support, there was wide hesitation with regard to retaining subparagraph (c), as it might create more uncertainty than it would possibly dispel.

93. The Working Group also chose not to include in the model provisions a chronologically based rule to the effect that the first foreign proceeding in time to apply for recognition, or that the first foreign proceeding to have been opened, would have priority to a designation as the “main” proceeding.
Article 7. Relief available upon recognition of foreign proceeding

94. The draft article as considered by the Working Group read as follows:

“(1) For the purposes of providing assistance to a foreign proceeding, recognition of a foreign proceeding by a competent court

(a) operates as a stay,

(i) against the commencement or continuation in the enacting State of judicial, administrative or private actions against the debtor or its assets, except

Option I
collective proceedings for liquidation or reorganization in the enacting State

Option II
[i, subject to paragraph (2),] proceedings for the enforcement of [secured creditor claims] [rights in rem], [seizures of assets that have already been obtained prior to recognition of the foreign proceeding],

Option III
proceedings for the purposes of police or regulatory enforcement,

and (ii) against the transfer of any interests in assets by the debtor, except transfers [made in the ordinary course of business] [or] [for the purposes of completion of open financial market transactions]

(b) authorizes the foreign representative to obtain a court order compelling testimony or the delivery of information in written or other form by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes [the court to issue an order permitting] the foreign representative to take custody and management of assets of the debtor, [subject to] [with the exception of assets encumbered by] rights in rem [and subject to exclusion of [personal][family] property exempt from insolvency administration under the laws of the enacting State];

(d) authorizes the foreign representative to intervene in collective proceedings for liquidation or reorganization in the enacting State;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief, including continuation of provisional measures granted pursuant to paragraph (2), as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened, to the extent that such relief is not prohibited by or inconsistent with the laws of [the enacting State] [i, including without limitation actions for voidness, voidability or unenforceability of legal acts detrimental to all creditors [that may be available under the law of the enacting State] [or under the law of the jurisdiction in which the foreign proceeding was opened]], [subject in all cases to:

(i) the procedural requirements of the court, and

(ii) the protection of [local] creditors against undue prejudice or inconvenience];

(f) authorizes the courts of the enacting State to cooperate with the foreign court that opened the foreign proceeding, in accordance with article 11.

“(2) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings has been decided by the court.

“(3) The judgement opening foreign proceedings emanating from a State [referred to in article 6(1) (variant C)] in which is located the centre of the debtor’s main interests [‘main proceedings’], produces the same effects as under the law of the State of the opening of the proceedings [i, except . . . ] [as long as no proceedings referred to in article 18(1) (variant B) (option I) are opened in the enacting State.]”

95. The Working Group noted that the text before it reflected the level of discussion and agreement tentatively achieved at the previous session with regard to the question of the “effects” that would flow from recognition.

96. Under the approach developed at the previous session, certain “minimum” effects would result more or less automatically from recognition. Those included in particular: a stay of individual creditor actions and of transfers by the debtor of interests in assets; management and custody of assets for the foreign representative; authorization of information gathering concerning the assets and affairs of the debtor; and the possibility for the foreign representative to seek from the court additional relief appropriate in the circumstances. Various exceptions, ranging from public policy grounds to exceptions of secured claims from the stay provisions, were included.

97. Differing views were exchanged as to the above tentative framework. One view was that such an approach would work to the disadvantage of creditors in the enacting State, by granting broader powers to the foreign representative to act in the enacting State on behalf of foreign creditors than the power that would be left to the local creditors. It was suggested that simply staying individual creditor actions could have the effect of preventing local creditors from establishing themselves as creditors, in particular as their claims might be in dispute. For these reasons, the Working Group was urged to limit the relief available upon recognition to the authorization to the foreign representative to petition the court for appropriate relief, along the lines of paragraph (1)(e).

98. In response to that view, it was emphasized that the intent of article 7 was not to accord advantages to any one particular category of creditors, in accordance with one of the basic principles of the draft text, equal treatment of creditors. The Working Group agreed that the stay should not be so broad as to disadvantage local creditors. Reference was also made to the advantages that
would accrue to all creditors, both foreign and local, by the enhancement of asset value and the prevention of dissipation of assets possibly provided by the stay.

99. It was also noted that, as understood at the previous session, the provisions were not intended to empower the foreign representative to act directly in the enacting State without the authorization and oversight of the local court. Neither was article 7 intended to provide for automatic repatriation of assets in the event of recognition. Rather, what was envisaged was the creation of a breathing space to permit the possibility of coordinated action to deal with a cross-border insolvency, including possibly steps by the foreign representative to preserve and manage assets.

100. It was further noted that, were the model provisions limited to giving the foreign representative the right to petition a court for relief, this would not represent significant progress beyond the currently prevailing situation. The right to petition a court was already available to the foreign representative in many legal systems and alone had not provided the generally desirable degree of predictability or speedy and efficient action needed for dealing with cross-border insolvency.

101. Various interventions suggested that the stronger effects of recognition referred to in article 7 should be reserved for cases in which the foreign proceeding was a "main" proceeding, i.e. one originating from the jurisdiction in which the debtor was, by way of one or another formulation, headquartered. Such an approach was justified on the grounds that an effect such as a stay of individual creditor actions or a freeze on the debtor's transfers of assets was tantamount to the opening of a local insolvency proceeding. Granting a similar degree of relief to a foreign proceeding in which the originating court had jurisdiction merely on the basis of presence of assets was said to be inappropriate as a general rule.

102. With the prevailing view for an approach along the lines of article 7 as described above, the Working Group considered adjustments that might be made to the text to better specify the intended content and scope of the relief envisaged, and to address the concerns raised in earlier interventions.

103. In particular, the Working Group agreed that relief in the nature of an automatic stay of individual creditor action and freezing of transfer of assets should be limited to cases in which the recognized foreign proceeding was a "main" proceeding. There also was broad agreement that the draft text should make it clearer that the stay was in fact limited to individual creditor actions and was, in particular if it were granted as an interim measure, of a provisional character, in the sense that it would lapse unless affirmed or prolonged by the court subsequently.

104. It was noted at the same time that the draft text did not disturb the right that local creditors might have under the law of the enacting State to proceed collectively against the debtor, since collective actions were exempt from the stay. Neither did the provision attempt to deal with questions of distribution of assets or priority of claims. It was also noted that under this approach certain other exemptions could be available as regards the stay, including public policy, secured claims and rights in rem as understood according to the law of the enacting State.

105. The Working Group also noted observations to the effect that the relief accorded upon recognition should not exceed the relief that would result from the commencement of insolvency proceedings in the enacting State, or the powers accruing to a locally appointed administrator. An additional point of reference, which it was said should also not be exceeded, was the extent of the relief available to the foreign representative in the originating jurisdiction. Suggestions for facilitating such an alignment included a formulation that recognition would have the same effects as the opening of a local proceeding. It was said that such an approach might help to limit the need to provide various exceptions.

Subparagraph (a)

106. Beyond the limitation of the stay in subparagraph (a) to foreign main proceedings, agreed by the Working Group as described above, several other modifications of the stay provisions were considered.

107. In order to make it clear that the draft provisions were not intended to have the effect of disadvantaging local creditors, it was suggested that the stay of individual creditor actions should be limited to actions of execution against assets. The Working Group agreed that such a limitation of the stay to actions of execution should be offered as an option. It was also suggested to refer specifically to the preservation of the right of local creditors to file their claims in foreign proceedings.

108. The Working Group also agreed that the reference in subparagraph (ii) to freezing of transfers by the debtor of interests in assets could be expanded to include a freezing of payments by the debtor. It was further agreed that exceptions to the freeze on transfer of assets (e.g. transfers in the "ordinary course of business", such as payment of wages) would be left to the local court. In order to give a reference to the court in determining that question, as well as other questions relating to the details of and exceptions to the stay under subparagraph (a), the Working Group agreed to include an option for enacting States. That approach would determine the scope and extent of the stay, under one option, in accordance with the law of the enacting State governing such stays. Another option would be to make that determination in accordance with the law of the originating jurisdiction. In such an approach, the treatment of rights in rem might fall within exceptions to the stay that might be available under whichever law was deemed to be applicable to the stay by the enacting State.

109. It was generally felt that an approach along the above lines would be a more effective way of instilling in the stay a sufficient degree of flexibility to allow those payments to continue to be made that would be necessary from the standpoint of the administration of the insolvency, while blocking other payments that might result only in the impoverishment of the estate of the debtor's assets.
110. An alternative approach for determining the scope of the stay, one based on the nature of the foreign proceeding (i.e., liquidation, reorganization and other possible categories), did not attract sufficient support. It was felt to be preferable not to impose on the court of the enacting State the task of attempting to classify foreign proceedings into categories that might not be universally applicable.

Subparagraphs (b), (c) and (e)
111. The Working Group noted that the relief available to the foreign representative pursuant to subparagraphs (b), (c) and (e), by contrast to the relief available pursuant to subparagraph (a), was generally of a somewhat less urgent nature than the stay, and was of a non-mandatory nature in the sense that it was dependent upon an order of the competent court in the enacting State.

112. With respect to subparagraph (c), the Working Group affirmed the requirement of a court order to entitle the foreign representative to take custody and management of assets. It was pointed out that that reference would make it clear that the foreign representative would not take custody and management of assets of the debtor upon mere recognition, and without an order of the court.

113. The Working Group noted that subparagraph (e) authorized the foreign representative to request the court of the enacting State to order other additional relief as might be appropriate in a given case. It was suggested that the reference to the procedural law of the enacting State and to the need to protect the local creditors against undue prejudice or inconvenience, which might also be considered as covered by a general public policy exception available to the court, should be an inherent limitation to all effects of recognition of a foreign proceeding pursuant to draft article 7. At the same time, it was observed that it might not be necessary to refer to those limitations in subparagraph (e) since they were implicit in the general reference to public order in draft article 6(2).

Subparagraphs (d) and (f)
114. Subparagraphs (d) and (f), it was noted, were enabling provisions respectively giving the foreign representative access to courts in the enacting State in case of a local insolvency proceeding, and empowering the courts of the enacting State to cooperate with the courts in the originating State of a recognized foreign proceeding.

115. The placement of subparagraph (d) was questioned, on the grounds that an intervention of a foreign representative in local collective proceedings could be made independently from a request for recognition and thus was a matter of access of the foreign representative to the courts of the enacting State. That matter could be dealt with more appropriately in chapter IV, or perhaps, according to another suggestion, in the provision on judicial cooperation. The placement of subparagraph (f) was similarly questioned.

Paragraph (2)
116. There was general support in the Working Group for a provision along the lines of paragraph (2) authorizing the courts of the enacting State to grant provisional measures upon the request of the foreign representative. It was noted that such measures could be crucial to preserve the assets of the debtor until the application for recognition had been decided by the competent court in the enacting State.

Paragraph (3)
117. It was noted that paragraph (3) provided for producing in the enacting State, in the case of recognition of a foreign main proceeding, the same effects as would the opening of an insolvency proceeding under the law of the originating State. Paragraph (3) was widely questioned, in particular since exporting directly the effects of the foreign proceeding would not be widely acceptable for the type of text being prepared. However, such an approach, it was suggested, might be included as an option for States willing to offer to a list of prescribed States direct application of the foreign insolvency law. An alternative paradigm was to determine the effects of recognition of the foreign proceeding in the enacting State according to the effects of an insolvency proceeding under the laws of the enacting State.

118. Subsequently, the following revised version of draft article 7 was placed before the Working Group by the drafting group:

"(1)(a) From the time of the filing of an application for recognition until recognition has been granted or refused, and where necessary to protect the assets of the debtor or the interests of creditors, the court may, upon the request of the foreign representative, grant any of the [types of] relief permitted under paragraph (2);

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

(c) Such relief may not extend beyond the date that recognition is granted or denied.

(2)(a) Upon recognition of a foreign main proceeding, the commencement or continuation of individual actions by creditors against [the debtor] [or the debtor's assets] and the transfer of any assets of the debtor are stayed. The stay is subject to any exceptions or limitations which would apply under Option I: any law of the enacting State which would apply to proceedings determined by the court to be comparable to the foreign main proceeding; Option II: the law of the foreign main proceeding [if the foreign main proceeding is taking place in one of the States listed on annex X];

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

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

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

(iii) compelling testimony or the delivery of information concerning the assets and liabilities of the debtor;"
(iv) permitting the foreign representative to preserve and manage the assets of the debtor;
(v) granting other relief which may be available under the laws of the State of the foreign proceeding or under the laws of the enacting State, including actions to reverse or render unenforceable legal acts detrimental to all creditors;
(c) The foreign representative shall give notice of recognition within ___ days to all known creditors that have an address in the enacting State;
(d) Any relief under this paragraph shall terminate, unless extended, within ___ days after recognition; or
(ii) if insolvency proceedings under the law of the enacting State have commenced and to the extent that the court in such proceedings orders the termination of such relief.
(3) The court may, upon request of the foreign representative in a foreign main proceeding made no earlier than ___ days after recognition, grant turnover of assets to the foreign representative for administration, realization or distribution in the foreign proceeding.
(4) In granting or denying relief under this article, the court must be satisfied that creditors collectively are protected against prejudice and will be given a fair opportunity to assert their claims against the debtor.
(5) The court may, at any time, upon request of a person or entity affected by relief granted or requested under this article, deny, modify or terminate such relief, including provisional measures, temporary or preliminary relief.

"Article 7 bis

Notwithstanding article 6, a court shall refuse to recognize a foreign proceeding or to grant relief under this Law where the effects of such recognition or relief would be manifestly contrary to public policy.”

119. The Working Group did not have sufficient time to consider the revised version of draft article 7. However, there was a preliminary airing of views. The inclusion of specific deadlines in article 7 was questioned. It was observed that such an approach might raise uncertainty and that, therefore, the use of more general language would be preferable. Another observation was that it might be made clearer which aspects of relief in article 7 were “automatic” upon application for recognition. The appropriateness of paragraphs (1)(a) and (2)(a), and of paragraph (3), was also questioned. A further suggestion was that the text should include an option for States automatic relief upon application for recognition of a foreign proceeding opened in a country on a prescribed list of countries established by the enacting State.

Article 8. Modification and termination of relief

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

“The relief granted pursuant to article 6(1) shall continue in place until modified or terminated by the compe-

tent court, [or until it lapses in accordance with the laws of [the enacting State]].”

121. The Working Group decided to defer consideration of whether article 8 would be needed, pending the possible revision of article 7 to include the substance of article 8.

Article 9. Notification of creditors

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

“[In addition to notification requirements under the laws of the enacting States,] the court may order the foreign representative petitioning for recognition of a foreign proceeding and for relief under article 7 to make such notification as it deems appropriate to creditors.”

123. The Working Group decided to defer consideration of whether article 9 would be needed, pending the possible revision of article 7 to deal with issues of notification of creditors.

Article 10. Discharge of obligations to debtor

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

“(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 6, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 9 is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding.”

125. Differing views were expressed as to whether it would be advisable to include a provision along the lines of draft article 10. In favour of deletion, it was stated that generally third parties should be discharged by paying the debtor, irrespective of whether they were aware of the foreign proceeding, and that that was an approach followed in many legal systems. Including draft article 10 was also questioned as it seemed to assume a system of automatic recognition and did not distinguish between recognition of foreign main and of foreign non-main proceedings.

126. In addition, it was observed that collection and discharge of debts involved a possibly complicated array of issues raising the possibility of conflicts with applicable law. Those issues included, for example, the question of the jurisdiction in which payment might be due, and possible setoff and netting, which were beyond the scope of
the text being prepared. It was suggested that, to the extent necessary, discharge of debts owed to the debtor could be addressed in the context of effects of recognition granted by courts of the enacting State.

127. A countervailing view was that a rule dealing with the discharge of the obligations to the debtor was useful, to the extent that it would protect, along with draft article 19, the interests of third parties affected by the recognition of foreign proceedings. In order to better achieve that goal, a number of suggestions were made, including: that third parties should not be expected to be aware of the opening of foreign secondary proceedings, but rather only of the recognition of main proceedings; that the rule should only apply to obligations “due in the enacting State”; and that paragraph (2) should be supplemented to deal with the question whether payment made to the debtor despite the fact that the payor was aware of the foreign proceedings discharged the payor. As regards the suggestion referred to above to deal with the question of discharge in draft article 7, it was observed that that article would not be the appropriate location since it dealt with relief available to the foreign representative.

128. After deliberation, the Working Group agreed to reserve its position on draft article 10 until it considered further the revised version of draft article 7 and other parts of the text.

Chapter III. Judicial cooperation

Article 11. Authorization of judicial cooperation

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

“(1) The courts of the enacting State and administrators appointed in the enacting State shall cooperate to the maximum extent possible with foreign courts or administrative authorities and foreign representatives of foreign proceedings recognized in accordance with article 5, [taking into account in all cases the procedural requirements of the court and the protection of [local] creditors against undue prejudice or inconvenience].

(2) Cooperation may be implemented by any appropriate means including:

(a) appointment of an administrator or representative to act at the direction of the court;

(b) communication [, by any means deemed appropriate by the court[,] of information, and coordination of the administration and supervision of the debtor’s assets and affairs, including by approval and implementation by the court of arrangements for the coordination of proceedings in the enacting State with foreign proceedings;

(c) […] the enacting State may wish to list additional forms or examples of cooperation]

(3) The courts of the enacting State may request foreign courts or relevant administrative authorities for assistance in any matter relating to insolvency [proceedings] in the enacting State.”

Paragraph (1)

130. It was noted that paragraph (1) was intended generally to establish the principle of judicial cooperation, while paragraph (2) was aimed at giving some guidance, in a non-exhaustive way, as to possible forms of judicial cooperation, and allowing the enacting State to list there additional forms or examples of cooperation.

131. There was general agreement in the Working Group that an enabling provision authorizing the courts or other relevant administrative authorities of the enacting State to extend cooperation to foreign courts in insolvency proceedings was a useful provision and should be retained.

132. It was suggested that the reference to “administrators” in paragraph (1) should be deleted since, even if administrators were called upon to cooperate, they would have to do so under the supervision of the competent court, which was a matter sufficiently covered in paragraph (2)(a). It was also suggested that the relevance of the reference to administrators was not universal, since there might be cases in which no administrator would be appointed. Another suggestion was that an independent reference to cooperation of administrators might inadvertently override the premise that cooperation between administrators should be under the supervision of the courts. It was said that an approach directly mandating cooperation between administrators might be too encompassing, possibly conflicting with rules of the enacting State, for example, in the case of requests for information, with rules concerning protection of privacy in data transfers.

133. The suggestion was also made that the provision should refer to administrators cooperating pursuant to court orders, though the concern was raised that such a formulation might inadvertently suggest that specific court authorization would be required for each cooperative act by an administrator, with the effect of stifling cooperative endeavours of administrators. It was pointed out that an appropriate degree of latitude and initiative of administrators were mainstays of cooperation in practical terms, and should be permitted within the broad confines of judicial supervision.

134. The Working Group, while affirming that cooperation envisaged between administrators would be under the overall supervision of the competent court, noted that cooperation of a court with a foreign representative or cooperation between an administrator in the enacting State and a foreign representative was often necessary to ensure prompt coordinated action in cross-border insolvency cases and should be covered in the text.

135. It was observed generally that various concerns among those that had been raised as to the scope and formulation of draft article 11 could be seen as addressed by the exhortation in the article to cooperate “to the maximum extent possible”.

136. Another observation was that the permissive verb “may” should replace the verb “shall”, since the latter might have the unintended effect of making cooperation mandatory, without regard to other relevant factors. That
suggestion was objected to on the ground that it was important to overcome the problem which existed in many countries, namely, the lack of authority of courts to cooperate with foreign courts or foreign representatives. That aim, it was said, could be better achieved by the use of the verb “shall”. In addition, it was pointed out that the combination of the verb “shall” with the words “to the maximum extent possible” provided a sufficient degree of flexibility.

137. Yet another suggestion, which was broadly supported, was that the words “recognized in accordance with article [6]” should be deleted or supplemented by words along the lines of “or whose recognition is sought”, since the current formulation might inadvertently result in conditioning any judicial cooperation upon recognition of a foreign proceeding in the enacting State. It was said that the preferable policy would be not to limit cooperation to the post-recognition phase.

138. Regarding the reference at the end of paragraph (1) to protection of “local” creditors, it was agreed that, should a reference to creditors be retained, it should not discriminate among creditors as to their residence. The view was expressed that the entire concluding proviso could be made a separate paragraph in article 11, which could usefully be broadened to refer also to the interested parties and to the policy aims of the model provisions.

Paragraph (2)

139. With regard to the list of forms of cooperation set forth in paragraph (2), it was suggested that further forms might need to be listed either in paragraph (2) or in a guide to enactment of the model legislative provisions. An example that was cited involved questions of trademarks and patent rights, though that particular example drew a response urging caution in going into detail in paragraph (2).

Paragraph (3)

140. It was noted that that particular provision was an outward-looking element in the model provisions, authorizing the courts of an enacting State to seek assistance from foreign courts. The question was raised whether it was appropriate to include this paragraph in the model provisions, which were substantially focused on the receptivity of the enacting State to requests for cooperation on behalf of foreign proceedings. A concern in this regard was that such a provision might be viewed as infringing on the terrain of other jurisdictions by suggesting that the courts of the enacting State were entitled to obtain such cooperation under the model provisions.

141. The prevailing view, however, was that a provision along the lines of paragraph (3) should be retained. It was recalled that evidence had been presented to the Commission at the Judicial Colloquium that courts in some countries felt that they had insufficient legislative authority to seek cooperation. Paragraph (3), it was noted, would help to fill such gaps in national legislation and neither was it intended to have, nor would it have, the effect of infringing on the prerogatives of foreign jurisdictions.

142. After deliberation, the Working Group referred article 11 for review by the drafting group, including the possible listing of additional examples of cooperation.

143. Subsequently, the drafting group presented the following revised version of draft article 11, as well as a modified title of chapter III, to be considered by the Working Group at a later session:

“Chapter III. Cooperation with foreign jurisdictions

Article 11. Authorization of cooperation

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

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

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

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

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

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

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

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

Chapter IV. Access for foreign representatives and creditors to courts

Article 12. Application for recognition of foreign proceeding

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

“A foreign representative may apply for recognition of a foreign proceeding and for provisional and other forms of relief directly in the court referred to in article 4.”

145. In response to a question as to the purpose of including the word “directly” in regard to the court access afforded to the foreign representative, the Working Group affirmed that the present formulation was intended to make it clear that the foreign representative was being given direct access to the court competent for deciding applications for recognition of foreign proceedings.

146. The underlying benefit of such direct access was to avoid the need to rely on cumbersome and time-consum-
ing letters rogatory or other forms of diplomatic or consular communication that might otherwise have to be used. Such traditional avenues, as had been reported to the Commission, were often inadequate for dealing with the urgent circumstances presented in cross-border insolvencies and for taking expedient action to preserve assets from dissipation.

147. Various suggestions were made aimed at expanding the content of article 12 so as to centralize in one place in the model provisions the different aspects of the access of the foreign representative to the courts of the enacting State. Those suggestions would congregate in article 12 the reference in the original text of article 7(1)(d) to the right of the foreign representative to intervene in collective proceedings in the enacting State, reference to access for the purpose of seeking recognition and reference to access for seeking provisional measures.

148. The Working Group agreed with a suggestion that the right to intervene in proceedings in the enacting State should be broadened to include not only collective proceedings but also individual creditor actions. It was noted that this would facilitate speedy action when necessary to preserve assets.

149. Regarding the foreign representative's right to intervene in local proceedings, the view was expressed that such a right should only be available upon recognition, and not before. A differing view was that the right to intervene should be broadened so as not to be conditioned on recognition. The Working Group acknowledged the possibility that on this point it might be necessary to include an option for enacting States, as some States might take a stricter view than others as to whether recognition should be a precondition to intervention by the foreign representative in various types of local proceedings.

150. The question was raised as to whether a reference in the revised version of article 12 to court access for the purposes of seeking provisional relief would be broadened to refer to any appropriate court in the enacting State, rather than only to the court competent for the recognition decision. It was noted in this regard that the court competent to issue a particular provisional measure (e.g. because of its territorial proximity to assets) might not be the court referred to in article 4 as competent to rule on the request for recognition. It was decided that the diverse possible solutions to this question at the national level might be taken account of by including in the reference to court access for provisional relief an option for enacting States phrased along the lines "[in any appropriate court of the enacting State]."

151. After deliberation, the Working Group referred article 12 to the drafting group in order to consider implementation of various suggestions that had been made. Subsequently, the drafting group submitted the following revised text of article 12 for review by the Working Group at a subsequent session:

"Article 12. Access of foreign representatives to courts

A foreign representative may

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

(b) directly apply for recognition of a foreign proceeding, request relief pursuant to article 7, and seek cooperation in accordance with article 11;

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

Article 13. Proof concerning foreign proceeding

152. The draft article as considered by the Working Group read as follows:

“(1) A petition for recognition of a foreign insolvency proceeding shall be submitted to the court accompanied by proof of the opening of the proceeding and of the appointment of the foreign representative. Such proof may be in the form of a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative, or, in the absence of such form of proof, in any other manner required by the court. No legalization or other similar formality is required.

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

(3) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction.]"

Paragraph (1)

153. The Working Group found draft article 13 to be generally acceptable. Beyond that general view, comments were exchanged as to several aspects of the formulation used. For example, it was suggested that the scope of the provision might be usefully broadened in order to encompass not only petitions for recognition of a foreign proceeding, as in its current formulation, but also other types of requests that the foreign representative might address to the courts of the enacting State, in particular, applications for provisional measures. In that connection, the view was expressed that a foreign representative should be required to seek authorization from the court before which it had filed a petition for recognition, before seeking relief from other courts in the enacting State. That suggestion would allow the "recognizing" court to act as a sort of "traffic policeman".

154. With regard to the requirement for a certified copy of "the decision" opening the foreign proceeding, it was suggested that the use of a more general expression along the lines of "document" or "certificate evidencing", might be preferable, in order to cover cases in which the foreign representative might be appointed, or the proceedings were commenced, without an actual decision or order of the court (e.g. by order of an administrative authority, or by right pursuant to statutory authority (e.g. a debtor-initiated voluntary proceeding)).

155. Doubt was expressed, however, as to whether the use of the term "document" was appropriate, since that term was indicative of the form but not of the content of an act by which an insolvency administrator would be
appointed. Hesitation was also expressed as to utilizing the term "order", which might in some jurisdictions have a technical meaning implicating a time-consuming procedure. In support of including a reference to "certificates" evidencing appointment of administrators, it was observed that in certain countries courts had broad discretion to issue such certificates, a practice that had proved to be useful.

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

157. In the discussion, the question was raised as to the meaning of the term "legalization". The Working Group affirmed that the negation of "legalization" requirements was meant to avoid time-consuming requirements involving notarial or consular procedures, which were not congruent with the required element of speedy treatment of applications by foreign representatives.

**Paragraph (2)**

158. A question was raised as to the meaning of the rule that a translation of the petition of the foreign representative "may be required". It was pointed out that the source of such a requirement was unclear, i.e. would it emanate from a court order, some other order, or from a statute. In response, it was suggested that the matter could be left to be determined by the court considering the foreign representative's petition for recognition pursuant to the law of the enacting State. It was also suggested that the reference to an "official" language might be usefully supplemented so as to cover situations in which there might be more than one official language. One possible way of doing this, it was said, was to refer to the "official language of the court".

**Paragraph (3)**

159. In view of the changes made to draft articles 6 and 7, the Working Group agreed that paragraph (3) was superfluous and should be deleted.

**Article 14. Limited appearance**

160. The draft article as considered by the Working Group read as follows:

"An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose, but a court granting relief to the foreign representative may condition any such relief on compliance by the foreign representative with the orders of the court."

161. The Working Group agreed that draft article 14 was a particularly useful provision for facilitating co-operation and access to recognition and should therefore be retained. It was noted that the provision was intended to be a "safe conduct" rule aimed at ensuring that the court in the enacting State would not assume jurisdiction over the entire debtor's estate on the sole ground of the application for recognition filed with the courts in the enacting State.

162. It was observed that the intent of draft article 14 might not be universally understood as currently formulated. It was observed that in some countries the provision might be read as attempting to preclude the courts in the enacting State from asserting jurisdiction on grounds other than the application for recognition, a result that would conflict with national procedural laws.

163. In view of the above, it was suggested that the matter might be usefully clarified in draft article 14 if words along the lines of "without prejudice to other grounds for jurisdiction" were to be included. A similar suggestion referred to use of words along the lines of "notwithstanding other grounds for jurisdiction".

164. It was suggested that the term "appearance", which was used as a technical term in some jurisdictions, might not be universally understood, and should therefore be replaced by a more general expression along the lines of: "participation in a recognition or similar proceedings does not subject the foreign representative to jurisdiction", or "coming to a court in the enacting State does not expose the foreign representative to jurisdiction for any purpose other than the application for recognition". In that connection, it was observed that the terms "petition", "application" and "appearance" were used interchangeably in the text, and it was suggested that instead one term might be defined and used throughout the text for consistency.

165. It was stated that the matter dealt with in the second part of draft article 14, namely, compliance with the orders of the court as a condition for relief sought by the foreign representative, was a different matter conceptually and should be dealt with in a separate paragraph of the draft article, or in the provision dealing with relief available to the foreign representative (article 7). While that suggestion met with some support, an objection was raised on the ground that the text in question made it clearer that the foreign representative was within the jurisdiction of the court for the purposes of the relief sought. Another suggestion was that the latter part of draft article 14 should be deleted altogether since it might appear to create uncertainty.

166. After deliberation, the Working Group decided to retain the substance of article 14. It also agreed that the matter of compliance of the foreign representative as a condition for relief could be dealt with in draft article 7, while other matters raised in the discussion could be further explained in the guide to enactment of the model provisions to be prepared, or perhaps addressed in a revision of article 14 to be prepared by the Secretariat for the next session.
Article 15. Misdirected applications

167. The draft article as considered by the Working Group read as follows:

“If a court to which an application for recognition has been made is not the competent court, [the application shall be transmitted forthwith to the competent court] [the court shall direct the foreign representative to the competent court].”

168. The view was expressed that a provision along the lines of draft article 15 might usefully complement draft article 4 specifying the competent court to consider applications for recognition of foreign proceedings, in order to avoid unnecessary delays that might jeopardize the ability of the foreign representative to preserve assets for the benefit of the mass of creditors.

169. However, the prevailing view was that the courts should not be burdened with the obligation to redirect applications that might be addressed to courts lacking jurisdiction to consider them and that courts would likely handle cases of misdirected applications in an appropriate manner under the circumstances. It was felt that the matter was adequately dealt with in draft article 4, and that it would be appropriate to delete draft article 15.

Article 16. Commencement of insolvency proceedings by foreign representative

170. The draft article as considered by the Working Group read as follows:

“A foreign representative is entitled to initiate an insolvency proceeding in the enacting State [if the conditions for opening such a proceeding under the laws of the enacting State are met].”

171. It was noted that draft article 16 was intended to supplement the remedies available to the foreign representative pursuant to draft article 12, by granting the foreign representative the right to request the opening of an insolvency proceeding in the enacting State.

172. The Working Group considered the question whether the mere opening of an insolvency proceeding in the originating State should entitle the foreign representative to seek the opening of a local proceeding in the enacting State, without the conditions set by the law of the enacting State for a local insolvency to be opened having necessarily to be met.

173. One view was that an approach based on the principle that the mere opening of an insolvency proceeding in one country should be a sufficient condition for the opening of an insolvency proceeding in another country would be in line with the broad aims of the model provisions to facilitate judicial cooperation in cross-border insolvency cases with a view to preserving the assets of the debtor’s estate and maximizing their value for the benefit of the mass of creditors.

174. In the same vein, it was suggested that the foreign representative should be entitled to request the opening of a local proceeding in the enacting State, even before being recognized in the enacting State as a representative of a foreign insolvency proceeding.

175. In that connection, it was observed that in practice foreign representatives seeking to obtain one type of relief would often submit alternative requests. For example, a foreign representative could seek recognition of a foreign proceeding in the enacting State and, in case recognition was not granted, request the opening of a local proceeding.

176. Another view was that draft article 16 was acceptable in its current formulation without further elaboration. In support of that view, it was pointed out that there was no need to accord the foreign representative any special status that would vest in the foreign representative powers additional to those granted to any creditor. In that light, the purpose of the article was to accord the foreign representative the right to petition for commencement of insolvency proceedings in the enacting State, and not to override the local requirements for such a proceeding to take place. The Working Group agreed with regard to this matter to leave the text along its current lines, including the words within square brackets referring to fulfillment of the local requirements. The Working Group also did not incorporate the view that the right accorded in article 16 should be linked to recognition of the foreign representative.

177. In the discussion, it was observed that the term “initiate” was not sufficiently clear and should be replaced by the term “request” in order to ensure that the thrust of draft article 16 was the right of the foreign representative to petition the opening of local proceedings, which was dependent upon a decision of the competent court or other authority of the enacting State. In addition, it was suggested that, while it might be implicit in the text that the proof requirements set forth in draft article 13 applied to provisional measures as well as requests for the opening of local proceedings, the matter might be usefully clarified in draft article 16.

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

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

“(1) Any creditor, whether or not [habitually] resident, domiciled or with a registered office in the enacting State [including foreign tax authorities and social security authorities], has the right to commence and file claims in insolvency proceedings in the enacting State, [to the same extent and in the same manner as other creditors of the same priority,] in accordance with the laws of the enacting State.

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

(3) The contents of the notification shall [conform to the requirements for such notifications under the laws of the enacting State] [include:
(a) an indication of the time limits and the place for filing of claims, and the sanctions that result from failure to comply with those requirements;
(b) an indication whether secured creditors need to file their secured claims; and
(c) any other information required to be included in notifications to creditors pursuant to the laws of the enacting State and the orders of the court.]"

Paragraph (1)

179. The Working Group noted that the intent of paragraph (1) was to establish a non-discrimination rule as regards treatment afforded in the enacting State to foreign creditors. The view was expressed that the present formulation might perhaps be replaced with a simple statement of that principle, without necessarily delving into the other aspects addressed in the provision.

180. A central question in the discussion was whether paragraph (1) should venture into the question of recognition of claims of foreign tax and social security authorities. Difficulties cited with respect to such an extension of the provision included the resistance that might be encountered in enacting States that would not wish to accord to foreign tax and other authorities status equal to that accorded to local tax and other fiscal authorities. It was suggested that venturing into this area would diminish acceptability of the model legislative provisions.

181. As regards the formulation "foreign tax authorities and social security authorities", it was observed that the use of such specific terms might inadvertently suggest a narrowing of the scope of non-discrimination among creditors, as there might be a host of other types of public authorities with the potential of presenting claims in a cross-border context, but which technically were not tax or social security authorities. It was proposed that a drafting solution to that problem might be to refer in a more general way to "public creditors", to "public claims" or "government claims", or to "claims covered by public law, such as foreign tax claims and social security claims".

182. While some support was expressed for recommending elimination of discrimination against claims of such public authorities, there was a general hesitation in the Working Group to address the matter by way of a general rule in the model provisions. It was noted that the matter might be dealt with to the extent of referring to "any creditor", thus avoiding in the text the preclusion of any particular type of creditor, but leaving it to the enacting State to determine, in accordance with its laws and traditions, which types of foreign creditors would be admitted. Some guidance, it was suggested, might be provided to enacting States in a guide to enactment.

183. An alternative approach aimed at clarifying the limited ambition of the text was expressly to exclude from the ambit of paragraph (1) public claims of the type referred to above, in particular foreign tax and social security claims. However, it was suggested that such an express exclusion might be too broad and unnecessarily handcuff a court that might in one or the other case wish to admit, perhaps on public policy grounds, a public claim deemed essential for the administration of an insolvency.

184. Hesitation was also widely felt with regard to paragraph (1) to the extent that it might be read as attempting to override traditional forms of discrimination found in some national legislation as to the recognition, or lack thereof, of privileges or priorities of foreign creditors. The view was expressed that an attempt to harmonize that aspect would be beyond the border of what would be feasible or desirable as an aim for an instrument in the form of model legislative provisions rather than a convention. In view of those concerns, the Working Group felt that this also was an area into which the text should not venture.

185. Observations were also made to the effect that the proviso at the end of paragraph (1) ("in accordance with the laws of the enacting State") created a degree of uncertainty with respect to the other aspects and principles embodied in paragraph (1). It was suggested that, in view in particular of the general discussion of paragraph (1) that had taken place, that proviso should be limited to referring clearly to the procedural aspects of commencing proceedings or filing claims.

186. Another question was whether the applicability or effect of paragraph (1) should depend on whether or not insolvency proceedings were taking place in the jurisdictions from which the foreign creditors emanated. More particularly, the question was raised as to the compatibility of granting recognition to a foreign proceeding, with at the same time still allowing creditors from that foreign jurisdiction individually to commence and file claims in insolvency proceedings in the enacting State.

187. The view was expressed that it was not advisable to refer to the "habitual" residence of creditors.

Paragraph (2)

188. Various interventions spoke in favour of somewhat limiting the notification requirement in paragraph (2), which required administrators appointed in the enacting State to notify known foreign creditors of the commencement of insolvency proceedings in the enacting State.

189. It was suggested that the better approach would be, rather than simply to require such notice in every case, to require notice to foreign creditors in cases in which notice would have to be given to local creditors. It was said that such an approach would be in line with the principle of non-discriminatory or "national" treatment of creditors, and would avoid imposing unnecessary notice requirements (e.g. when there were no assets in the estate). Under such an approach the applicability of a notice requirement for foreign creditors would be comparable to that regarding creditors in the enacting State.

Paragraph (3)

190. Paragraph (3) did not elicit specific comments or objections at the current session.
191. Upon completion of its deliberations on article 17, the Working Group requested the Secretariat to prepare a revised version of the article reflecting the discussion that had taken place.

Chapter V. Concurrent proceedings

Article 18. Concurrent proceedings

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

"Variant A

(1) Subject to article 5(1)(e), recognition of a foreign insolvency proceeding does not affect the commencement or continuation of insolvency proceedings under the laws of the enacting State.

Variant B

(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has its [main centre of interests] [domicile], the courts of the enacting State

Option I

shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or] [assets] in the enacting State [, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State.

Option II

[may] [shall] limit the scope of authority of an administrator appointed pursuant to proceedings initiated in the enacting State to the assets [and establishment] of the debtor in the territory of the enacting State.

(2) [Recognition of a foreign insolvency proceeding]

[A certified copy of a judgement opening a foreign insolvency proceeding] is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

(3) The administrator and the foreign representative shall cooperate in accordance with the orders of the court and shall promptly communicate to each other any information which might be relevant to the other proceeding, in particular all measures aimed at terminating a proceeding."

Paragraph (1)

193. The initial round of consideration by the Working Group suggested a wide preference for an approach based on variant B and its option I as regards a rule on the effect of recognition of a foreign proceeding on the jurisdiction to open insolvency proceedings in the enacting State. According to that combination, recognition of a foreign main proceeding would restrict the commencement of insolvency proceedings in the enacting State to those cases in which the debtor had an establishment in the enacting State. It was felt that such an approach represented a meaningful and not overly ambitious approach susceptible to acceptance by States.

194. The question was raised whether, within the basic approach favoured by the Working Group, there would be included a reference to recognition as triggering the effect of the rule, rather than the mere opening of foreign proceedings. The view was expressed that reference should not be made to a prerequisite of recognition of a foreign proceeding as a triggering event, but that approach was not favoured by the Working Group. It was felt that a system based on recognition would provide greater certainty and predictability.

195. The widely held view in the Working Group was that recognition of foreign main proceedings would not, under the model provisions, interrupt the continuation of existing proceedings. Mention was made, however, of the possibility of authorizing the court in such a case to terminate or suspend the proceeding. It was suggested that such a provision might be included in article 11 (judicial cooperation).

Paragraph (2)

196. Paragraph (2) was found to be acceptable in substance, subject to its being limited to cases of recognition of a foreign main proceeding.

Paragraph (3)

197. The Working Group found paragraph (3) to be generally acceptable. It asked the Secretariat to consider a suggestion that the provision be moved to article 11.

Article 19. Rate of payment of creditors

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

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

199. The Working Group generally agreed that an attempt should be made to include a provision along the lines of article 19. However, it was agreed that the draft provision needed to be developed further so as to make it clear that the intent was to avoid the situation in which creditors would be paid twice or out of proportion to the rate of payment given to other creditors of the same class.

III. FUTURE WORK

200. Upon completion of its deliberations at the present session, the Working Group requested the Secretariat to prepare a revised version of the draft model provisions for the next session, which, subject to confirmation by the Commission, was scheduled to take place at Vienna from 7 to 18 October 1996. The Working Group also requested the Secretariat to prepare for that session a first draft of a guide to enactment of the model provisions.
D. Working paper submitted to the Working Group on Insolvency Law at its nineteenth session: Draft legislative provisions on judicial cooperation and access and recognition in cases of cross-border insolvency

(A/CN.9/WG.V/WP.44) [Original: English]

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INTRODUCTION

1. At the present session, the Working Group on Insolvency Law continues its work, undertaken pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995), on the development of a legal instrument relating to cross-border insolvency.\(^1\)


2. The Commission's decision to undertake work on cross-border insolvency was taken in response to suggestions made to it by practitioners directly concerned with the problem, in particular at the UNCITRAL Congress, "Uniform Commercial Law in the 21st Century" (held in New York in conjunction with the twenty-fifth session, 18-22 May 1992).\(^2\) The Commission decided at its

\(^2\)The proceedings of the Congress are published in document A/CN.9/SER.D/1 (United Nations publication, Sales No. E.94.V.14).
on various issues including definitions of certain terms, rules on recognition of foreign proceedings, effects of recognition, modalities of court access for foreign insolvency representatives, and judicial cooperation in the context of concurrent proceedings. The present note is intended to serve as a basis for the resumption of the deliberations conducted at the previous session. The note presents a set of draft model legislative provisions based on the draft provisions considered by the Working Group at the previous session, revised and supplemented to reflect the discussions that took place. Furthermore, this note also sets forth draft provisions on certain points that the Working Group had noted at the last session might be considered for inclusion in the instrument, or that the Secretariat suggests for consideration.

**DRAFT UNCITRAL MODEL LEGISLATIVE PROVISIONS ON CROSS-BORDER INSOLVENCY**

**Notes to title**

1. The discussions at the previous session and at the two Colloquia indicated that there was, at least at this stage, an inclination in favour of model statutory provisions for the work being undertaken, in preference to the form of a convention. The Working Group might wish to proceed on that basis, with a working assumption that the provisions would take the form of a model law. Such an approach would not preclude a subsequent decision to convert the text into a draft convention.

2. As to the specific content of the title, the expression “model legislative provisions” is presented in lieu of “model law”, in view of the limited scope of the provisions within the broader field of issues covered in national legislation on insolvency and the possibility that the model provisions would be incorporated into existing legislation, rather than being enacted as a free-standing law. The model text contains only directly pertinent procedural provisions since each enacting State would have existing rules of procedure that would continue to be applicable.

**Preamble**

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

(a) fair and efficient administration of insolvencies that protects the interests of creditors from the enacting State, as well as the interests of foreign creditors;

(b) maximizing the value of the insolvent debtor’s estate in the event of insolvency proceedings;

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

3. The first UNCITRAL-INSOL Colloquium gave rise to the suggestion that work by the Commission should, at least at this stage, have the limited but useful goal of facilitating judicial cooperation, and court access for foreign insolvency administrators and recognition of foreign insolvency proceedings (hereinafter referred to as “judicial cooperation” and “access and recognition”). It was also suggested that an international meeting of judges take place specifically to elicit their views as to work by the Commission in this area. Those suggestions were received favourably by the Commission at its twenty-seventh session.5

4. Subsequently, the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency was held (Toronto, 22-23 March 1995). The purpose of the Judicial Colloquium was to obtain for the Commission, as it embarked on work on cross-border insolvency, the views of judges and of Government officials concerned with insolvency legislation, on the specific issue of judicial cooperation in cross-border insolvency cases and the related topics of access and recognition. The consensus view at the Judicial Colloquium was that it would be worthwhile for the Commission to provide a legislative framework, for example by way of model legislative provisions, for judicial cooperation, and to include in the text to be prepared provisions on access and recognition. In taking note of the views expressed at the Judicial Colloquium, the Commission noted that the Working Group would examine a range of matters raised at the Judicial Colloquium relating to the possible scope, approaches and effects of the legal text to be prepared.

5. The Working Group commenced that examination at its previous session (Vienna, 30 October-10 November 1995), which included consideration of draft provisions

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2 The report on the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency presented by the Secretariat to the Commission at its twenty-seventh session is set forth in document A/CN.9/398.

3 The report on the Judicial Colloquium presented by the Secretariat to the Commission at the twenty-eighth session is set forth in document A/CN.9/413.

4 The report of the Working Group session is set forth in document A/CN.9/419.
(d) encouraging and providing a predictable environment for trade and investment in the enacting State; and
(e) furthering cooperation between the courts and other competent authorities of States affected by cases of cross-border insolvency,
Be it therefore enacted as follows.

Notes
1. The purpose of the statement of objectives in the Preamble would be to state at an appropriate place the underlying purpose of the Law and to provide guidance in the interpretation and application of the model provisions. As such, the statement of objectives would not itself be intended to create substantive rights or obligations. As the legislative practice of States regarding inclusion of preambles differs, consideration might be given to recommending to States in which it is not the practice to include preambles that the statement of objectives might be incorporated in the body of the law. Such a recommendation is made in the Guide to Enactment of the UNCITRAL Model Law on Procurement of Goods, Construction and Services with respect to the preambular portion of the Model Law.

2. References in the Preamble and elsewhere in the text to “the enacting State” would, in enactment of the model provisions, be replaced by the name of the enacting State.

Chapter I. General provisions

Article 1. Scope of application

This [Law] [Section] applies to insolvencies in which:
(a) a foreign proceeding has been commenced and recognition of that proceeding, and [enforcement of an order, or some other form of] assistance or relief, is sought on behalf of that proceeding in the enacting State;
(b) insolvency proceedings are taking place in the enacting State and the court seeks assistance on behalf of those proceedings from a foreign court or competent authority; or
(c) insolvency proceedings with respect to a debtor are taking place concurrently in the enacting State and in one or more other States.

Notes
1. Chapter I is reserved for a number of provisions of a general nature, including scope of application, definitions, relationship of the draft articles, assuming they remain in the form of statute rather than convention, with treaty obligations of the enacting State, identification of the court or administrative authority competent for carrying out functions referred to in the instrument, and authorization for administrators appointed in the enacting State to act abroad. The Working Group may wish to consider whether the definition of “administrator” is superfluous.

2. The definition of the term “administrator” is included since the draft articles address situations and functions involving a person or entity appointed by a court of the enacting State to act in a capacity of supervision over the debtor’s assets or affairs, for example, in the context of a foreign proceeding. However, in a purely ancillary proceeding there would not necessarily be an administrator appointed and relief could be granted directly to the foreign representative. In the context of parallel or secondary proceedings, the national law of the enacting State would provide an applicable designation and definition of the person or body referred to herein as the “administrator”. In that light, the Working Group may wish to consider whether the definition of “administrator” is superfluous.

Article 2. Definitions and rules of interpretation

For the purposes of this Law,
(a) “Administrator” means a person or body appointed by a court [or by statutory authority] in the enacting State who is authorized to reorganize the debtor’s assets or affairs, or to liquidate the debtor’s assets, in the context of reorganization of liquidation proceedings initiated under the laws of the enacting State, including the implementation of any measures that may be ordered pursuant to this Law;

Notes
1. As is indicated in the title, article 2 might be used not only for defining various terms, but also for setting forth any rules of interpretation that the Working Group might consider appropriate for inclusion.

2. The Working Group may wish to consider whether the specific reference to “enforcement of an order, . . .” in square brackets could be deleted and considered covered by the broad reference to “assistance” that would be left following the deletion of the bracketed text.
3. Beyond the question of terminologically blending the reference to the “administrator” with the rest of the enacting State’s insolvency laws, the draft model provisions do refer to functions of the administrator in the cross-border context, in particular the empowerment of the courts to authorize the administrator to act extraterritorially as the representative of the court or proceeding before a foreign court or proceeding (article 5).

(b) For the purposes of this Law, “debtor” includes [an insolvent] legal [or natural] person who has the status of an insolvent in a foreign proceeding, [but not including debtors whose debts were [apparently] incurred [predominantly] for personal, family or household use rather than for commercial purposes];

Notes
1. The rule of interpretation of the term “debtor” is intended to take as its departure point the definition of “debtor” that is likely to exist already in the enacting State’s insolvency law. Placed within square brackets are various elements of the definition that the Working Group may wish to consider, as outlined below.

2. At the previous session, there was some discussion, though inconclusive at that stage, of whether the instrument should apply to insolvencies of natural persons. Germane to that discussion was the question whether coverage of natural persons would involve extension of the provisions to “consumer” insolvencies, or, in other words, insolvencies of “non-traders” (A/CN.9/419, para. 33). The words in square brackets at the conclusion of the definition are suggested as a possible formulation to exclude such cases, were the Working Group to opt for a “consumer” exclusion, while avoiding a blanket exclusion of insolvencies of natural persons. The formulation of the exclusion is based on article 2(a) of the United Nations Convention on Contracts for the International Sale of Goods. Consideration might be given to retaining the exclusion in the form of an option for enacting States. The word “apparently” is included so as to avoid referring to any particular requirement of proof at the outset of a request for recognition.

(c) “Foreign proceeding” means a collective judicial or administrative proceeding [, whether voluntary or compulsory,] pursuant to an insolvency law [, or to another law relating to insolvency,] in a foreign country in which assets and affairs of the debtor are subject to control or supervision by a court, by an official authority or by a competent person under the supervision of a court or official authority, for the purpose of reorganization or liquidation;

Notes
1. The definition is based on a text discussed at the previous session (A/CN.9/419, paras. 95-110). The text has been modified to reflect observations and suggestions made during that discussion.

(e) “Opening of foreign proceedings” refers to the initiation of the proceedings, whether or not an order or judgment opening the proceedings is final;

Notes
It was observed at the previous session that references in the text to judgments or orders opening an insolvency proceedings may, depending upon the nature of the process from which the proceeding originates, represent varying degrees of finality as regards the actual initiation of insolvency proceedings. In view of one of the main purposes of the draft provisions—to allow an early opportunity for cooperation and coordination mechanisms to be set in motion between jurisdictions involved in a cross-border insolvency—a flexible definition along the above lines may be considered. A definition along similar lines is contained in article 2(f) of the European Union Convention.

(f) “Reorganization” refers to proceedings in which rights of creditors and the obligations of debtors are adjusted [, including by way of composition];

Notes
The definition has been included in to make it clear that the various reorganization and rehabilitation proceedings covered include those referred to as “composition” (A/CN.9/419, para. 108).

(g) “Rights in rem” refers to rights of disposal over assets to obtain satisfaction from the proceeds or income of the assets or to an exclusive right to have a claim met, including by way of liens, mortgages, or assignments of claims by way of guarantee, [reservation of title arrangements], rights to the beneficial use of assets, [and creditor rights to setoff of mutual claims].

Notes
1. Reference is made in the draft articles to “rights in rem” in the context of exclusion of such rights from certain effects of recognition (article 6(1)(a)(Option II)). In view of the differing contexts and legal systems in which the expression might be applied, it may be helpful to include a definition such as the above. The suggested text attempts to capture the essential elements of the definition found in article 5(2) of the EU Convention, though in a somewhat abbreviated form.

2. Mention was made at the conclusion of the previous session of the question of reservation of title arrangements, which are mentioned here more as a marker for discussion than necessarily suggesting that this would be an appropriate or adequate treatment in the present context. It may be noted that article 7 of the European Union Convention provides that the opening of insolvency proceedings against the purchaser does not affect the seller’s reservation of title if the asset is situated in a contracting State outside of the State in which the proceedings were opened. That provision also states that a purchaser is not prevented from taking title, and the sale is not rescinded or terminated, by virtue of the opening of insolvency proceedings against the seller if, at the time of the opening of the proceedings, the object of the sale is situated in a contracting State other than the State in which the proceedings against the seller were opened. The Convention also contains a reference to protection of good faith acquisitions. A similar matter is the proposed inclusion
of the reference to creditor rights of setoff of mutual claims. It will further be recalled that the suggestion was made at the previous session to consider dealing with the question of seizures that have been obtained in assets (A/CN.9/419, para. 192).

Article 3. International obligations of the enacting State

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

Notes

On the assumption that the instrument being prepared would take the form of model statutory provisions, the purpose of article 3 is to deal with possible conflicts with treaty or other similar obligations of the enacting State on the international plane. A provision along those lines is found in article 1(1) of the UNCITRAL Model Law on International Commercial Arbitration, and in article 3 of the UNCITRAL Model Law on Procurement of Goods, Construction and Services.

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

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

Notes

1. As suggested at the previous session (A/CN.9/419, para. 69), a slot has been created for an explicit indication by the enacting State of the court or administrative authority competent to perform the functions set out in the model provisions. The content of this indication will of course differ from State to State, and within individual States more than one court or authority, or branch thereof, may be indicated depending upon a variety of factors, for example, allocation of jurisdiction in the enacting State, the specific type of proceeding, and whether insolvency proceedings with respect to a debtor would be under way in the enacting State. Henceforth in the present text reference will be made however simply to the "court". From the standpoint of a foreign representative, the obvious advantage of including a provision along the lines of article 4 is that it facilitates speedy action to protect debtor assets from dissipation or concealment.

2. To the extent that the draft model provisions contain, as one course in a "menu of options", automatic recognition without a court or administrative decision in the recognizing State, the scope of article 4 is reduced to cases not subject to automatic recognition. (See further discussion in comment 6 under article 6, and in comment 12 under article 7.)

Article 5. Authorization for administrators to act extraterritorially

An administrator appointed [in insolvency proceedings] in the enacting State is authorized to act [as foreign representative of those proceedings] [to take such steps as are necessary extraterritorially for the purposes of reorganizing the debtor's assets or affairs, or to liquidate the debtor's assets] in accordance with the orders of the court.

Notes

1. Although the model provisions focus on assistance to foreign proceedings, article 5 is aimed in the other direction, i.e. the empowerment of administrators appointed in the enacting State to act abroad, regardless of whether a foreign jurisdiction in which the administrator is acting has adopted the model provisions. Article 5 is intended to address what may be a deficiency in national laws of some countries, namely, the lack of authority for the locally-appointed administrator to act abroad. In addition to such a legislative grant of authority, the appointing court is empowered, pursuant to the proviso at the end of article 5 ("in accordance with the orders of the court"), and pursuant to article 11, to tailor the extraterritorial mandate of the administrator to fit the circumstances of the given case.

2. As to the formulation of article 5, the Working Group is presented with two variants to consider, the first referring simply to the administrator acting in the capacity of a foreign representative, and the second utilizing a more functional wording.

3. It may be noted that the laws of the enacting State would deal with the question of proper venue for insolvency proceedings conducted in that State. Beyond that, there may be room for the model provisions to suggest venue rules for cases "ancillary" to foreign proceedings. Such rules could provide that, for the purposes of staying a pending action pursuant to article 7(1)(a)(i), the proper venue would be the court before which the action is pending or where property in question is situated. Cases filed for other forms of relief ancillary to a foreign proceeding might have their proper venue in the court relevant to the location of the debtor’s principal place of business in the recognizing State, or to the location the debtor’s principal assets in that State.

Chapter II. Recognition of foreign insolvency proceedings

Article 6. Recognition of foreign insolvency proceedings

(1) For the purposes of this Law, a foreign judgment opening insolvency proceedings shall be recognized [from the time that it becomes effective in the State of the opening of proceedings],

Variant A

unless it is shown that there was no substantial connection between the foreign jurisdiction and the debtor.

Variant B

if the judgment emanates from a competent court or authority. A court or authority shall be deemed competent if that court or authority has jurisdiction based on any of the following criteria:

(a) domicile or habitual residence of the debtor;
(b) seat or place of registered office;
(c) [principal place of business] [centre of debtor's main interests];
(d) location of assets.
Variant C

if the foreign proceeding originates from a court or competent authority in a State [appearing on the following list: . . . ] [certified for purposes of recognition of insolvency by [name of appropriate entity or officer in enacting State].

(2) Notwithstanding paragraph (1), a court [may][shall] refuse to recognize the opening of foreign insolvency proceedings [, to enforce a judgment emanating from such proceedings [, or to grant other forms of relief under this Law,] where the effects of such recognition, enforcement or relief would be manifestly contrary to public policy.

Notes

1. Chapter II contains the rules of recognition of foreign insolvency proceedings, starting off in article 6 with the conditions for according recognition. The relief available upon recognition, referred to at the previous session as “effects of recognition”, is outlined in article 7. In considering the content of article 6, the Working Group may wish to consider whether such a separate provision is necessary, in view of the risk that it might invite litigation and delay, though it would be probably attractive to some States (A/CN.9/418, paras. 22-27). An alternative approach might be to rely on the predominantly procedural rules in article 13, subject to a general exemption phrased in terms of public policy or prejudice to national interests, coupled with a rebuttable presumption that the foreign proceeding was opened on the basis of a substantial connection with the debtor.

2. The provisions on recognition of foreign proceedings, coupled with those on access of foreign representatives to the courts of the enacting State and on judicial cooperation, provide the equivalent of relief available to a foreign representative in some jurisdictions through an “ancillary proceeding”. Such proceedings may be sought regardless of whether there is an ongoing insolvency proceeding in the recognizing jurisdiction. The Model International Insolvency Cooperation Act (MIICA) prepared by Committee J (Insolvency) of the International Bar Association (IBA) highlights the features of legislative provisions on “ancillary proceedings”. In addition, chapter II sets forth provisions which can be incorporated referring specifically to effects of recognition of a foreign proceeding that is a “main” proceeding (i.e., a proceeding emanating from the State in which the centre of the debtor’s main interests are located), as opposed to a foreign proceeding that is merely a “secondary” proceeding (i.e., a proceeding opened in a State in which the debtor has only assets or an establishment).

3. Article 6 presents possible approaches for consideration by the Working Group as to a rule on conditions for recognition of foreign proceedings. More than one of those approaches might be retained in a “menu of options” for enacting States, in view of differing approaches States may favour. (The discussion at the previous session of possible connecting factors related to competence of the foreign court, and other possible factors that might be considered decisive for according recognition, is reported in A/CN.9/419, paras. 22-45.)

4. Variants A and B both refer to the competence of the court opening the foreign insolvency proceeding as decisive in determining whether to accord recognition, though they differ in the manner in which competence would be assessed. Variant A reflects an approach mentioned in the discussion at the previous session, based on a rebuttable presumption of competence on the part of the foreign court. That approach is particularly receptive to recognition of foreign proceedings, leaving the objecting party to show that the foreign court lacks an adequate jurisdictional link to the debtor.

5. By contrast, variant B imposes on the court confronted with a petition for recognition of a foreign proceeding the task of assessing the competence of the foreign court. Within that variant, a number of alternative connecting factors are included, designed to broaden the possible bases on which jurisdiction of the foreign court may be found, while still involving the court in an examination of the competence of the foreign court. It may be recalled that at the previous session there was discussion of the disadvantages of utilizing only one or the other connecting factor as a basis for according recognition, an approach that might undesirably narrow the range of foreign proceedings subject to recognition in the enacting State (A/CN.9/419, paras. 24, 99-105, and 185-189).

6. Variant C represents the approach of automatically according recognition, and perhaps also various forms of assistance, to foreign proceedings emanating from prescribed countries. Such an approach may be based in particular on an assessment by the enacting State of the degree of similarity of legal systems and insolvency laws of States on the list to its own legal regime. The variant C approach might be combined with another approach as regards States not appearing on the list of prescribed States (see A/CN.9/WG.V/WP.42, para. 28), for example, variant C for States within a regional grouping to which the enacting State belongs, and variant A or B with respect to proceedings from other States. Variant C might be used as part of an automatic recognition scheme of the type in the European Union Convention, which does not entail necessarily a formal act of recognition. Other elements of such an automatic scheme provided in the present text include articles 7(3) and 18(1)(variant B)(option I).

7. General support was expressed at the previous session for inclusion of an exception to the recognition rule based on public policy grounds (A/CN.9/419, para. 40), a proposed formulation of which is set forth in paragraph (2). At the previous session, reference was made also to referring to possible public policy exceptions with respect to various specific effects of recognition. It is suggested in the present draft, in particular by the words in the second set of square brackets “[i, or to grant other forms of relief under this Law]” that treatment of public policy exceptions should be consolidated. This would avoid the need to have multiple references in article 7 and elsewhere in the text to various public policy exemptions that were raised in different contexts in the discussion at the previous session.

Article 7. Relief available upon recognition of foreign proceeding

(1) For the purposes of providing assistance to a foreign proceeding, recognition of a foreign proceeding by a competent court

(a) operates as a stay,

(i) against the commencement or continuation in the enacting State of judicial, administrative or private actions against the debtor or its assets, except

Option I

collective proceedings for liquidation or reorganization in the enacting State
Option II

[subject to paragraph (2),] proceedings for the enforcement of [secured creditor claims] [rights in rem], [seizures of assets that have already been obtained prior to recognition of the foreign proceeding],

Option III

proceedings for the purposes of police or regulatory enforcement,

and

(ii) against the transfer of any interests in assets by the debtor, except transfers [made in the ordinary course of business] [or] [for the purposes of completion of open financial market transactions]

(b) authorizes the foreign representative to obtain a court order compelling testimony or the delivery of information in written or other form by the debtor or others concerning the acts, conduct, assets and liabilities of the debtor;

(c) authorizes the court to issue an order permitting the foreign representative to take custody and management of assets of the debtor, [subject to][with the exception of assets encumbered by] rights in rem [and subject to exclusion of [personal][family] property exempt from insolvency administration under the laws of the enacting State];

(d) authorizes the foreign representative to intervene in collective proceedings for liquidation or reorganization in the enacting State;

(e) authorizes the foreign representative to ask the court to grant such other appropriate relief, including continuation of provisional measures granted pursuant to paragraph (2), as may be available to a liquidator under the law of the jurisdiction in which the foreign proceeding was opened, to the extent that such relief is not prohibited by or inconsistent with the laws of [the enacting State] [. including without limitation actions for voidness, voidability or unenforceability of legal acts detrimental to all creditors that may be available under the law of the enacting State [or under the law of the jurisdiction in which the foreign proceeding was opened], [subject in all cases to:

(i) the procedural requirements of the court, and

(ii) the protection of [local] creditors against undue prejudice or inconvenience];

(f) authorizes the courts of the enacting State to cooperate with the foreign court that opened the foreign proceeding, in accordance with article 11.

(2) Where it is appropriate to protect assets or the interests of creditors, provisional measures may be granted on the application of a foreign representative. Unless the court or authority otherwise orders, an order for provisional measures shall continue until the application for recognition of the foreign proceedings has been decided by the court.

(3) The judgment opening foreign proceedings emanating from a State [referred to in article 6(1)(variant C)] in which is located the centre of the debtor’s main interests [“main proceedings”], produces the same effects as under the law of the State of the opening of the proceedings[, except . . .] and as long as no proceedings referred to in article 18(1)(variant B)(option I) are opened in the enacting State.

Notes

1. At the previous session, the Working Group considered the “effects”, referred to herein as “relief”, that would be available upon recognition of a foreign proceeding (A/CN.9/419, paras 46-69, and 134-177). Draft article 7 reflects basically the approach and formulation developed by the Working Group at that stage of its deliberations (A/CN.9/419, para. 134), though modified to reflect comments made on the earlier version.

2. In its consideration of the effects of recognition, the Working Group may wish to focus in particular on the extent to, and the manner in which, the model provisions might distinguish between effects of recognition, on the one hand, of a foreign “main” proceeding, and, on the other hand, of a foreign “secondary” proceeding. It is conceivable that some States would enact provisions generally on cooperation and coordination with foreign courts and proceedings, without enacting general rules of how to classify proceedings taking place in different countries as “main” or “secondary”. Other States, however, would attach particular importance to such a distinction and may differentiate between effects of recognition based on such a distinction.

3. Presumably, the “menu of options” being prepared should attempt to cater to the varying tastes that States may have in the above regard. Accordingly, the words at the beginning of paragraph (1) (“For the purposes of providing assistance to a foreign proceeding”) indicate that the relief referred to in paragraph (1) encompasses, but would not necessarily be limited to, relief of an “ancillary” type designed to assist a foreign proceeding. For the enacting State that would wish to go further, and to enact rules on additional effects on its territory of the opening of a recognized foreign “main” proceeding, there is room to do so in paragraph (3), which is based on article 17(1) of the European Union Convention.

4. The Working Group may wish to consider further the question of whether a stay of collective actions should be automatic upon recognition of a foreign proceeding. At the previous session, the discussion led to an approach which exempted collective proceedings in the enacting State from automatic stay, though a stay of such proceedings could be requested from the court pursuant to paragraph (1)(e). One approach to this question, as suggested by the presentation of the exemption in an “option I”, would be simply to leave the text as is on this question. States that would not select option I would thereby enact an automatic stay that included collective proceedings. Another approach might be to stay collective proceedings if the foreign latter proceeding was the “main” proceeding in accordance with paragraph (3) of the present article.

5. Option II has been included in paragraph (1)(a)(i), providing for exclusion from the automatic stay under paragraph (1) of enforcement of claims of secured creditors, since some jurisdictions exempt enforcement of claims of secured creditors from coverage under insolvency proceedings (A/CN.9/419, para. 137). Reference is made in the draft formulation of option II to rights in rem, raising the question whether the exemption should be phrased in terms broader than “secured claims”. An alternative approach may be that
secured creditors would be affected by a foreign main proceeding to the extent provided for by the insolvency law of the enacting State.

6. Pursuant to a suggestion made at the previous session, reference has been made in paragraph (1)(a)(ii) to exemption from the stay of transfers made "in the ordinary course of business" (A/CN.9/419, para. 143). The Working Group may wish to consider whether such an exemption might be seen as running counter to the need for legal certainty, while still distinguishing the need to protect good faith acquirers. The reference to exemption of transfers for the purpose of completing open financial market transactions is another, separate question presented for consideration by the Working Group. Related to these questions may be the view that, at least in some of the contexts covered by the model provisions, the scope of the stay and its operation could be determined by the law of the foreign "main" proceeding.

7. Option III is included in order to facilitate consideration by the Working Group of whether a specific exception from the stay upon recognition should be provided for actions of a police or regulatory nature. The alternative presumably would be to consider such actions as covered by the omnibus public policy provision (article 6(2)).

8. A reference has been added in the chapeau of subparagraph (a) to the possibility that the stay in subparagraph (i) of individual creditor enforcement actions could be waived on public policy grounds. This suggestion encountered differing views and was left by the Working Group for further discussion (A/CN.9/419, paras. 139-143), though the exception does not appear here in view of the omnibus public policy provision (article 6(2)).

9. Express reference has been added to paragraph (1)(b) to the cloaking of the foreign representative with a court order for the purposes of compelling testimony and other forms of information about the debtor (A/CN.9/419, para. 145). A similar reference has been added to paragraph (1)(c), as it would seem imbalanced to require a court order authorizing the foreign representative to gather information, while not requiring an order for the taking of custody of assets. However, the Working Group may wish to consider further whether at least the reference to the gathering of information should be relieved from the requirement of a specific court order.

10. A reference has been added to paragraph (1)(e) to the possibility of obtaining, as part of the additional relief upon recognition, avoidance of preferential transfers. It may be recalled that, at the previous session, hesitation was expressed at delving into the question of avoidance of preferential transfers and the choice of law questions incident thereto. The Working Group may wish to discuss this matter further at an appropriate time (A/CN.9/419, paras. 59 and 151), in particular since this is an issue on which a choice of law rule might be considered desirable.

11. Consideration may be given by the Working Group to avoiding the repetition in subparagraph (e) of the reference to the court taking into account its applicable procedural law and the protection of local creditors. It may be viewed that consideration by the court of such factors is provided for generally by the provision on public policy or would be applicable in any case without additional mention in the present provision.

12. Paragraph (3) is included as part of what would be an optional set of provisions, in conjunction with article 18(1) (variant B)(option I), for States opting for a regime of automatic recognition of foreign proceedings distinguishing specifically the effects of recognition of proceedings emanating from the jurisdiction in which is located the centre of the debtor's main interests ("main proceedings"). Such an approach may be patterned on articles 3 and 17 of the European Union Convention, which allocate jurisdiction among States to open "main" proceedings on the basis of the location of the centre of the debtor's main interests, and base jurisdiction to open "secondary" proceedings on the presence in other States of assets of the debtor.

Article 8. Modification and termination of relief

The relief granted pursuant to article 6(1) shall continue in place until modified or terminated by the competent court, [or until it lapses in accordance with the laws of [the enacting State]].

Notes

At the conclusion of the previous session, the question was raised of a mechanism for modifying or terminating provisional relief (A/CN.9/419, para. 192). Earlier in the deliberations, a provision along the lines of the above article was tabled, with apparent reference to relief granted under article 6(1) ("non-provisional" or "minimum list" relief). The Working Group might wish to consider the suggestion regarding modification and termination of provisional relief further, taking into account, however, that to one extent or another such issues may be dealt with under existing national law and procedure.

Article 9. Notification of creditors

[In addition to notification requirements under the laws of the enacting States,] the court may order the foreign representative petitioning for recognition of a foreign proceeding and for relief under article 7 to make such notification as it deems appropriate to creditors.

Notes

1. This provision on notification is intended to be a flexible statement of the requirement that creditors receive notification of steps affecting them as a result of recognition, leaving the exact timing, content and addressees of notification to be determined by the local court in accordance with applicable law and procedures, thereby attempting to avoid the superimposition by the model provisions of notification procedures on those that would in any case be ordered by the court or be required by the applicable law. The provision also replaces the reference to notification that had appeared in the earlier draft of article 7, on granting of provisional relief.

2. The notion of the relationship of the present text to existing notification requirements under national law suggests that it may be useful to point out in a guide to enactment that the enacting State should consider amendment of its rules of procedure to the extent necessary to implement the model provisions. The Working Group may wish at some stage in its deliberations to consider what areas such companion changes in procedural law might generally address.

3. A separate matter is whether to include in the model provisions a rule requiring insolvency administrators appointed in insolvency proceedings commenced in the enacting State to notify creditors in other jurisdictions. Such a provision is found in article 17(2).

4. It will be recalled that at the previous session mention was made of the question of possible notification requirement linked to termination of the foreign proceedings (A/CN.9/419, para. 170). The Working Group might wish to consider that matter further.
Article 10. Discharge of obligations to debtor

(1) Where an obligation has been honoured in the enacting State for the benefit of a debtor who is subject to foreign proceedings recognized in accordance with article 6, when it should have been honoured for the benefit of the foreign representative pursuant to relief provided to the foreign representative upon recognition, the person honouring the obligation shall be deemed to have discharged the obligation if the person was unaware of the foreign proceeding.

(2) Where an obligation referred to in paragraph (1) is honoured before notification in accordance with article 9 is made, the person honouring the obligation is presumed, in the absence of proof to the contrary, to have been unaware of the foreign proceeding; where the obligation is honoured after such notification, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the foreign proceeding.

Notes

Draft article 10 is included pursuant to the suggestion that consideration be given to dealing with the question of discharge of debts owed to the debtor (A/CN.9/419, para. 192). The provision is patterned on the approach in article 24 of the European Union Convention. The Working Group may wish to consider whether anything more than what is said above should be included, bearing in mind the limited scope of the instrument being prepared.

Chapter III. Judicial cooperation

Article 11. Authorization of judicial cooperation

(1) The courts of the enacting State and administrators appointed in the enacting State shall cooperate to the maximum extent possible with foreign courts or administrative authorities and foreign representatives of foreign proceedings recognized in accordance with article 5, [taking into account in all cases the procedural requirements of the court and the protection of [local] creditors against undue prejudice or inconvenience].

(2) Cooperation may be implemented by any appropriate means including:

(a) appointment of an administrator or representative to act at the direction of the court;

(b) communication [by any means deemed appropriate by the court,] of information, and coordination of the administration and supervision of the debtor’s assets and affairs, including by approval and implementation by the court of arrangements for the coordination of proceedings in the enacting State with foreign proceedings;

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

(3) The courts of the enacting State may request foreign courts or relevant administrative authorities for assistance in any matter relating to insolvency [proceedings] in the enacting State.

Notes

1. Article 11 is intended to be a general enabling provision authorizing the courts or other relevant administrative authorities of the enacting State to extend cooperation to foreign courts in insolvency proceedings. It is intended to address what has been identified as one of the main obstacles to judicial cooperation in cross-border insolvencies, namely, the lack in many jurisdictions of legislative authority for judges to engage in cooperative activity (A/CN.9/398, para. 6; A/CN.9/413, para. 14; A/CN.9/419, para. 119).

2. At the previous session, discussion of a draft provision on judicial cooperation arose as part of consideration by the Working Group of the phenomenon of a plurality of insolvency proceedings (A/CN.9/419, paras. 75-76, and 118-124). In the present draft, the provision appears in a separate chapter, so as to indicate its applicability in a variety of contexts, as was the view at the previous session (A/CN.9/419, paras. 120-121). Those contexts include provision of assistance to a foreign proceeding by way of an “ancillary proceeding”, as well as cases of concurrent insolvency proceedings. The latter category includes the case of a foreign “primary” or “main” proceeding, with “secondary” proceedings taking place in the enacting State, and the case of a foreign jurisdiction and the enacting State both conducting proceedings considered by them to be primary. 3. The Working Group may wish to consider whether the reference to conformity with the procedural requirements of the court and protection of creditor needs to be mentioned in paragraph (1), as those elements might be considered either subsumed in the general public policy rule (article 6(2), in the case of protection of local creditors), or applied by the court in any case (regarding procedural requirements). A further question is whether the reference to protection of creditors should refer to protection only of local creditors.

4. Paragraph (2) is included to add an element of descriptiveness to the provision on judicial cooperation (A/CN.9/419, paras. 122-123), thereby providing more definitive guidance to courts as to the forms of cooperation envisaged. The Working Group may wish to consider whether to include additional forms of cooperation to be included in the indicative list (e.g. approval of ad hoc governance protocols), in addition to leaving open the possibility for enacting States to list additional forms of cooperation if that were felt helpful for judges.

Chapter IV. Access of foreign representatives and creditors to courts

Article 12. Application for recognition of foreign proceeding

A foreign representative may apply for recognition of a foreign proceeding and for provisional and other forms of relief directly in the court referred to in article 4.

Notes

1. Chapter IV deals with certain procedural aspects of obtaining recognition of a foreign proceeding, as well as with the more general proposition of giving access to foreign representatives and foreign creditors to the ordinary insolvency apparatus of the enacting State. The procedural aspects include, in addition to providing for direct access of the foreign representative to the competent court, questions of the requisite proof of the foreign proceeding (article 13) and the possibility of a “limited appearance” by the foreign representative (article 14).
2. Article 12 reflects the view of the Working Group that the foreign representative should be accorded direct access to the competent court or authority for the purposes of petitioning for recognition. Such an approach, as contrasted with requiring the petition to be routed through diplomatic or consular channels, serves the basic aim of preserving assets against dispersion and concealment where speedy and efficient procedures are essential.

Article 13. Proof concerning foreign proceeding
(1) A petition for recognition of a foreign insolvency proceeding shall be submitted to the court accompanied by proof of the opening of the proceeding and of the appointment of the foreign representative. Such proof may be in the form of a certified copy of the decision or decisions opening the foreign proceeding and appointing the foreign representative, or, in the absence of such form of proof, in any other manner required by the court. No legalization or other similar formality is required.

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

[(3) A foreign proceeding shall be presumed to have been properly opened in the foreign jurisdiction, unless it is proved that there was no substantial connection between the debtor and that jurisdiction.]

Notes
1. The above provision reflects the generally held views at the previous session as to the proof that may be required as to the appointment of the foreign representative and the opening of the foreign proceeding (A/CN.9/419, paras. 36-38, 113, and 178-184).

2. In the draft text considered at the previous session (A/CN.9/419, paras. 178 et seq.), it was decided to leave in square brackets for further consideration a reference to a presumption of the proper opening of the foreign proceeding from the standpoint of the competence of the foreign court. That presumption is now set forth as one of the options for enacting States for a competence-based test for recognizability of foreign proceedings (see article 6(1)(variant A)).

Article 14. Limited appearance
An appearance before a court in the enacting State by a foreign representative in connection with a petition or request pursuant to the provisions of this Law does not subject the foreign representative to the jurisdiction of the courts of the enacting State for any other purpose, but a court granting relief to the foreign representative may condition any such relief on compliance by the foreign representative with the orders of the court.

Notes
A provision along the above lines was suggested at the previous session for possible inclusion in the text (A/CN.9/419, para. 192). It may be regarded as one of the important foundations of granting access to a foreign representative, who is able to approach the courts for assistance without thereby exposing the representative and the insolvency estate under its control to the full jurisdiction of the court. Such a provision is found in MIICA, Section 5, and in national statutes dealing with cross-border cooperation.

Article 15. Misdirected applications
If a court to which an application for recognition has been made is not the competent court, [the application shall be transmitted forthwith to the competent court] [the court shall direct the foreign representative to the competent court].

Notes
The Working Group may wish to consider whether a provision along the above lines, based on article 6 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, would be useful.

Article 16. Commencement of insolvency proceedings by foreign representative
A foreign representative is entitled to initiate an insolvency proceeding in the enacting State [if the conditions for opening such a proceeding under the laws of the enacting State are met].

Notes
1. Article 16 establishes the right of the foreign representative to initiate insolvency proceedings in accordance with the applicable national law of the enacting State. Such a right may be an important adjunct to provisions on ancillary relief, in particular if the actual granting of a petition for ancillary proceedings and relief would rest in the discretion of the court. The route under article 16 may be made available irrespective of whether the foreign representative has sought or been granted recognition and relief under chapter II.

2. The Working Group may wish to consider whether the existence of the foreign proceeding would be sufficient to permit the opening of a domestic proceeding whether or not the conditions for opening a proceeding under the laws of the enacting State were met. (See in this regard the proposed rule in article 18(2) to the effect that recognition of a foreign proceeding constitutes proof that the debtor is insolvent for the purposes of initiating insolvency proceedings in the enacting State.)

Article 17. Access of foreign creditors to insolvency proceedings in the enacting State
(1) Any creditor, whether or not [habitually] resident, domiciled or with a registered office in the enacting State [including foreign tax authorities and social security authorities] has the right to commence and file claims in insolvency proceedings in the enacting State, [to the same extent and in the same manner as other creditors of the same priority] in accordance with the laws of the enacting State.

(2) As soon as insolvency proceedings are opened in the enacting State, the [court] [administrator] shall immediately cause notification of the opening of the proceedings to be made to known creditors not [habitually] resident, domiciled or with a registered office in the enacting State. The notification shall provide [a reasonable minimum time] within which such a creditor can file a claim.
(3) The contents of the notification shall conform to the requirements for such notifications under the laws of the enacting State [include:

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

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

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

Notes
1. The purpose of paragraph (1) of article 17 is to establish the right of foreign creditors both to commence and to participate in insolvency proceedings in the enacting State. The requirements of the national law would have to be fulfilled as regards initiation of proceedings and lodging of claims, as the thrust of the provision is to establish the principle of non-discrimination.

2. It was suggested at the conclusion of the previous session that consideration be given to the recognition of foreign Government claims, including revenue claims (AlCN.9/419, para. 192). Provision is made in the above text for recognition of such claims, with a view to soliciting consideration of the question by the Working Group.

3. Paragraph (2) establishes the obligation of notification to known foreign creditors upon the initiation of insolvency proceedings in the enacting State. Such a provision may be included as an additional way, beyond the basic provisions on access and recognition and judicial cooperation, of dealing with cases of cross-border insolvency, in particular those cases where internationality derives from the presence of creditors of the debtor outside of the debtor's home State. It might help to address what has been reported to be a problem, namely, that creditors often get information about the opening of an insolvency proceeding in another country late or not at all (AlCN.9/WG.V/WP.42, para. 102; AlCN.9/419, para. 84). Examples of such a provision are found in article 40 of the European Union Convention, and article 30 of the Istanbul Convention. Other aspects of the creditor information problem in the cross-border context include the language and form of notifications made to foreign creditors, which, if unfamiliar to a foreign creditor, would obscure the significance of the notification.

4. Two possible approaches are suggested in paragraph (3) as to the contents of the notification of foreign creditors, the first involving the extension of domestic type of notification requirements to the foreign notification. The second approach would involve a listing of some specific items to be included in the foreign notification, with a reference to inclusion of other items of information required in notifications in the domestic context. If it is decided to include the second approach, the Working Group may wish to consider whether to add any other items to the list (e.g. language in which claims are to be filed).

Chapter V. Concurrent proceedings

Article 18. Concurrent proceedings

Variant A

(1) Subject to article 5(1)(e), recognition of a foreign insolvency proceeding does not affect the commencement or continuation of insolvency proceedings under the laws of the enacting State.

Variant B

(1) Where an insolvency proceeding has been opened in a foreign jurisdiction in which the debtor has its [main centre of interests] [domicile], the courts of the enacting State.

Option I

shall have jurisdiction to open insolvency proceedings against the debtor only if the debtor has [an establishment] [or] [assets] in the enacting State [, and the effects of those proceedings shall be restricted to the [establishment] [or] [assets] of the debtor situated in the territory of the enacting State.

Option II

[may] [shall] limit the scope of authority of an administrator appointed pursuant to proceedings initiated in the enacting State to the assets [and establishment] of the debtor in the territory of the enacting State.

(2) [Recognition of a foreign insolvency proceeding] [A certified copy of a judgment opening a foreign insolvency proceeding] is, for the purposes of initiating proceedings in the enacting State referred to in paragraph (1) and in the absence of evidence to the contrary, proof that the debtor is insolvent.

(3) The administrator and the foreign representative shall cooperate in accordance with the orders of the court and shall promptly communicate to each other any information which might be relevant to the other proceeding, in particular all measures aimed at terminating a proceeding.

Notes
1. Chapter IV provides the enacting State with a number of provisions designed to deal with the phenomenon of more than one insolvency proceeding taking place with respect to a particular debtor, including the question of what effect recognition would have on the possibility of opening insolvency proceedings also in the recognizing State. As was noted at the previous session, it would not be the premise or the purpose of the model provisions to eliminate or reduce the phenomenon of concurrent or multiple insolvency proceedings. Neither is it intended to suggest that a State would have to establish a hierarchy of proceedings in the context of concurrent proceedings (AlCN.9/419, paras. 70-76). The model provisions might rather provide models for rules of coordination, with respect both to the question of allocation of jurisdiction among States, for those States that would wish to adopt such allocation rules, and with respect to cooperation and coordination between courts and administrators involved in concurrent insolvency proceedings in different jurisdictions.

2. At the previous session, the phenomenon of concurrent proceedings was discussed in particular from the vantage point of judicial cooperation in such cases (AlCN.9/419, paras. 76 and 118-124). Beyond that, it was suggested that some provisions be included concerning the jurisdictional interplay of concurrent proceedings. In the present draft text, the provisions authorizing and describing judicial cooperation, and those dealing with recognition, are presented in separate modules, and are not structurally a part of the pro-
visions on concurrent proceedings, though they would apply in such cases. This may help to make clear that the provisions on judicial cooperation do not depend for their applicability on there being concurrent insolvency proceedings as such. Such a structure may ease the enactment of the provisions on judicial cooperation and on recognition by any State that might not wish to enact the model provisions on concurrent proceedings.

3. The title “concurrent proceedings” is utilized rather than the term “secondary proceedings” so as to provide model rules of coordination in as generally applicable and understandable a way as possible, without linking them for all cases to a determination of which of the concurrent proceedings are “main” proceedings and which are so-called “secondary proceedings”, as such a distinction may not be universally made, at least not in the same manner. At the same time, options are included phrased in appropriate terms for jurisdictions that limit their own insolvency jurisdiction in cases of foreign proceedings accorded the status of “main” proceedings if, for example, those foreign proceedings are opened in the jurisdiction where is found the “centre of the main interests” or “domicile” of the debtor (see variant B in paragraph (1) of the present article).

4. As to the allocation of jurisdiction, it will be recalled that in the previous working paper (A/CN.9/WG.V/WP.42), and in the discussion at the previous session (A/CN.9/419, para. 70), the question was raised what effect recognition of a foreign proceeding might have on the jurisdiction to initiate insolvency proceedings in the recognizing State and how proceedings in the recognizing State might be linked to the foreign proceedings. One method of linking the proceedings under some regimes is to provide that the opening of insolvency proceedings in one State obviates the need in the recognizing State for the court to examine whether the debtor is insolvent for the purposes of opening an insolvency proceeding in the recognizing State (e.g. Istanbul Convention, article 16; European Union Convention, article 27). A provision along those lines is found in paragraph (2) of this article.

5. Another manner of linking concurrent proceedings is to provide the foreign representative with the right to commence insolvency proceedings in the recognizing State. That measure is provided in the current draft in article 16.

6. Variant A would give wide latitude to existing rights to initiate collective insolvency proceedings in the recognizing State, despite the recognition of a foreign proceeding. It reflects the assumption of concurrent jurisdiction. Notions closely linked to such an approach, which would also be reflected in statutory language, include the right of the foreign representative to initiate a local procedure. Such an approach would also be in line with leaving up to local law questions such as which of the concurrent proceedings are primary, and which secondary, and whether the local proceedings will have only territorial effect, will only be available if the debtor has an establishment in the recognizing country, and whether the mere presence of assets locally gives rise to insolvency jurisdiction.

7. Variant B is intended to present enacting States with options as regards a closer interrelationship as regards allocation of jurisdiction between concurrent jurisdictions. In that regard, four possible systems were presented to the Working Group at the previous session (A/CN.9/WG.V/WP.42, para. 87, as well as surrounding discussion). An attempt has been made in the present draft to focus on options as regards limitation of jurisdiction by the enacting State in the face of a foreign proceeding considered by it to be a main proceeding, and as to possible triggers for opening secondary proceedings. Those possible triggers include the presence of an establishment or of assets of the debtor in the enacting State (variant B, option I). A somewhat milder approach as regards limiting the jurisdiction of the courts of the enacting State is also presented for consideration, leaving up to the court’s discretion the possibility of restricting the scope of the administrator’s powers in the face of a foreign main proceeding (variant B, option II).

8. Beyond the possible links between concurrent proceedings, and jurisdictional restrictions in the enacting State possibly associated with a recognition regime, set forth in the draft article, some States may provide further degrees of linkages and restrictions between concurrent proceedings. Examples include in particular limitations on the rights of creditors in the recognizing State to initiate “secondary” proceedings when a foreign “main” proceeding is taking place, restrictions on access of local creditors to proceeds of secondary proceedings in such contexts, and rules on transfer to the main proceeding of assets remaining after payment of claims in the secondary proceeding. The Working Group may wish to consider whether any options with respect to such further provisions should be included, without surpassing the limited scope and purpose of the instrument being prepared.

9. As noted in comment 4 above, paragraph (2) establishes a link between the foreign proceedings and insolvency proceedings that might be concurrently available in the enacting State by establishing the rule that the opening of the foreign proceedings relieves the local court of having to examine de novo the question of whether the debtor is insolvent. The Working Group may wish to consider whether, at least as an option for enacting States, the scope of the rule in paragraph (2) on presumption of insolvency should be limited to cases in which the foreign proceeding is a “main” proceeding. Such an approach might be coupled with a prohibition against offering of proof to the contrary, subject to public policy.

Article 19. Rate of payment of creditors

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

Notes

1. As noted earlier (A/CN.9/WG.V/WP.42, para. 43; A/CN.9/419, para. 192), the Working Group may wish to include a rule along the above lines to the effect that a creditor that has received part payment in one proceeding may not receive a dividend for the same claim in another proceeding until other creditors of the same class have obtained an equal dividend. Referred to in some countries as the “hotch-pot” rule, the principle has been reflected in multilateral instruments as well (e.g. Istanbul Convention, article 5; European Union Convention, article 20(2)).

2. The Working Group may wish to consider whether the “cross-filing” of claims filed in concurrent proceedings should be mentioned as an alternative means to achieve equalization in the rate of payment of creditors, or whether such cross-filing could be mentioned separately, as a method of coordinating concurrent proceedings.
INTRODUCTION

1. At the present session, the Working Group on International Contract Practices commenced work on preparation of a uniform law on assignment in receivables financing, pursuant to a decision taken by the Commission at its twenty-eighth session (Vienna, 2-26 May 1995).1

2. The Commission’s decision to undertake work on assignment in receivables financing was taken in response to suggestions made to it in particular at the UNCITRAL Congress, “Uniform Commercial Law in the 21st Century” (held in New York in conjunction with the twenty-fifth session, 17-21 May 1992). A related suggestion made at the Congress was for the Commission to resume its work on security interests in general, which the Commission at its thirteenth

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session, in 1980, had decided to defer for a later stage.2

3. At its twenty-sixth session, in 1993, the Commission considered a note by the Secretariat concerning certain legal problems in the area of assignment of claims and of past and current work on assignment and related topics (A/CN.9/378/Add.3). The note described briefly some of the legal issues in assignment of claims that gave rise to problems in international trade. Those issues included differences among national laws concerning the validity of assignments of claims, differing requirements for a valid assignment of a claim to be effective towards the debtor and conflicts of priority between the assignee and another person asserting a right in the assigned claims. The note suggested that a study should be prepared on the possible scope of uniform rules on assignment of claims and on possible issues to be dealt with in the rules. After considering that note, the Commission requested the Secretariat to prepare, in consultation with the International Institute for the Unification of Private Law (UNIDROIT) and other international organizations, a study on the feasibility of unification work in the field of assignment of claims.3

4. At its twenty-seventh session, in 1994, the Commission had before it a report on legal aspects of receivables financing (A/CN.9/397). The report suggested that work might be both desirable and feasible, in particular if it were limited to assignment of international commercial receivables, i.e. claims for payment of sums of money that arose from international commercial transactions, including assignments by way of sale and by way of security, non-notification assignment, factoring and project finance. The report described a number of possible issues, such as no-assignment clauses, bulk assignments, form of assignment, effects of assignment between the assignor and the assignee, effects of assignment towards the debtor and towards third parties, as well as the related issue of priorities among claimants laying a claim on the assigned receivables. In addition, it referred to the possibility of international registration as a feasible solution to the problem of priorities. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law, EBRD, the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. After deliberation, the Commission decided to entrust the Working Group on International Contract Practices with the work of preparing a uniform law on assignment in receivables financing.

5. That more detailed report was presented to the Commission at its twenty-eighth session, in 1995 (A/CN.9/412). The report concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and the effects of such assignments on the debtor and other third parties. The Commission expressed its appreciation to the Secretariat for pursuing cooperation with UNIDROIT, the Hague Conference on Private International Law, EBRD, the International Bank for Reconstruction and Development (IBRD) and, in the United States of America, the National Conference of Commissioners on Uniform State Laws. After deliberation, the Commission decided to entrust the Working Group on International Contract Practices with the work of preparing a uniform law on assignment in receivables financing.

6. The Working Group, which was composed of all States members of the Commission, commenced its work at its twenty-fourth session, held at Vienna from 13 to 24 November 1995. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Austria, Chile, China, Ecuador, Finland, France, Germany, Hungary, Iran (Islamic Republic of), Italy, Japan, Mexico, Nigeria, Poland, Russian Federation, Saudi Arabia, Singapore, Slovakia, Spain, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America and Uruguay.

7. The session was attended by observers from the following States: Belarus, Bosnia and Herzegovina, Costa Rica, Croatia, Indonesia, Iraq, Paraguay, Philippines, Slovenia, Sweden, Switzerland, Syrian Arab Republic and Turkey.

8. The session was attended by observers from the following international organizations: EBRD, Hague Conference on Private International Law, UNIDROIT, Banking Federation of the European Union, Federacion Latinoamericana de Bancos (FELABAN) and International Credit Insurance Association (ICIA).

9. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)
Rapporteur: Mr. Masao Ikeda (Japan)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/4/WP.85) and a report of the Secretary-General on assignment in receivables financing (A/CN.9/412).

11. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Assignment in receivables financing.
4. Other business.
5. Adoption of the report.
I. DELIBERATIONS AND DECISIONS

12. The Working Group considered assignment in receivables financing on the basis of the report of the Secretary-General on assignment in receivables financing (A/CN.9/412), which contained preliminary drafts of uniform rules on certain of the issues dealt with in the Report ("the draft uniform rules").

13. The deliberations and conclusions of the Working Group, including its consideration of the draft uniform rules, are set forth below.

II. CONSIDERATION OF DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

A. General remarks

14. The Working Group began its deliberations with a general discussion of the commercial need for and the purpose of its incipient work in the area of receivables financing, and consideration of some of the possible guiding principles of that work.

15. It was noted that there had been an increased perception of a need for developing an acceptable international legal framework for receivables financing. The present legal environment, it was reported, was characterized by divergences among legal systems with the effect that cross-border assignments (in which the assignor, the assignee and the debtor were not in the same country) might be unenforceable against the debtor or might be challenged by creditors of the assignor. It was pointed out that the absence at the national level of modern legislation on assignment of receivables geared to the needs of international trade and the wide lack of treaty arrangements on the subject had come to constitute one of the most significant obstacles to receivables financing. This situation it was noted impacted in particular on commercial parties that had only limited access to potential sources of financing other than those based on receivables.

16. In terms of the broad aims and principles that could guide the work being undertaken, the Working Group was urged to strive for a legal text that would have the effect of increasing the availability of credit. It was said that the content and approach of that text should be guided by developments in current international commercial practice, rather than being based on particular national perspectives. It was observed that those aims would be furthered by facilitating "secondary financing" or "refinancing" of receivables, a type of transaction, also involving assignment, between the initial and a subsequent assignee that faced the same problem of possible ineffectiveness in a cross-border context.

17. An additional principle which was widely endorsed in the discussion was the desirability, in going beyond what had been accomplished internationally thus far in this field, of building on those accomplishments rather than attempting to supplant them.

18. In this regard, the attention of the Working Group was drawn in particular to the Factoring Convention. Attention was also drawn to the importance of having regard to the work currently being undertaken by UNIDROIT regarding security interests in mobile equipment, as well as to the work of IBRD, which was involved in several national law reform projects in the area of secured transactions, and EBRD, which had prepared a Model Law on Secured Transactions.

B. Scope of application

19. The Working Group engaged in a discussion of the scope of application of the draft uniform rules based on a draft article, which read as follows:

"Draft article 1. Scope of application

"(1) These rules apply to the assignment for [commercial] [financing] purposes of receivables between an assignor and one or more debtors whose places of business are in different States:

(a) when the States [are Contracting States] [have adopted the rules]; or

(b) when the rules of private international law lead to the application of the law of [a Contracting State] [this State].

"(2) For the purposes of this [Convention] [law]:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the [contract giving rise to the receivables] [assignment] and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the [conclusion of the contract] [assignment];

(b) if a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1)

Substantive scope of application: "commercial" vs. "financing" purposes

20. The Working Group exchanged views as to the question whether the assignments to be covered by the draft uniform rules should be limited by a reference to a "commercial" or to a "financing" purpose.

21. One view was that the draft uniform rules should focus on assignments effected for "financing" purposes, rather than referring to the broader notion of "commercial" purposes. It was suggested that such an approach was desirable to avoid overlapping with the Factoring Convention. It was stated that referring to assignments for "financing" purposes would reduce the potential for overlap, in view of the fact that the Factoring Convention covered assignments for financing purposes only if one
additional function among those enumerated in article 1(2)(b) of the Convention (i.e. maintenance of accounts relating to the receivables, collection of receivables or protection against default in payment by debtors) were performed by the assignee.

22. As to the question of defining the "financing" purposes of assignments, a number of suggestions were made. One suggestion was to set forth the characteristic elements of receivables financing transactions, while at the same time giving an indicative list of assignments that should be included. Another suggestion was to create a rebuttable presumption that all assignments were for financing purposes and, at the same time, to list certain types of assignments that should be excluded. Yet another suggestion was simply to refer to the financing contract, as was done in draft article 2(2), without further specifying the nature of that contract. It was stated that such a flexible formulation was essential to preserve party autonomy in the context of receivables financing, the usefulness of which, as indicated by its rapid development, lay to a great extent in the ability of the parties involved to vary the details of assignments in order to address their needs.

23. A number of suggestions were made as to how overlap between the draft uniform rules and the Factoring Convention could be avoided. One suggestion was to provide that the draft uniform rules did not deal with factoring transactions. That approach drew the objection that it was so broad as to preclude the text from dealing with certain types of factoring and of factoring-related issues that were not covered in the Factoring Convention, as well as precluding coverage of factoring for States not parties to the Factoring Convention. Another suggestion was that, if the text to be prepared would take the form of a convention, a provision could be included along the lines of article 21 of the Rome Convention on the Law Applicable to Contractual Obligations (Rome, 1980; "the Rome Convention"), to the effect that the convention would not prejudice the application of international conventions to which a Contracting State was, or might become, a party.

24. Another view was that application of the draft uniform rules should be predicated on assignments effected for "commercial" purposes. It was stated that such an approach would have the advantage of encompassing a broader variety of assignments. It was observed that under such an approach only assignments effected for personal, household or family purposes would be excluded from the scope of application of the draft uniform rules. In the discussion, the attention of the Working Group was drawn to the need to distinguish between assignments for consumer purposes, which would likely be excluded from coverage, and assignments for commercial purposes of consumer receivables. In that connection, a note of caution was struck as to the desirability of covering assignments of consumer receivables, even if they were concluded for commercial purposes, in view of the social policy issues that might potentially be involved.

25. Yet another view was that, in order to achieve uniformity and to avoid the difficulty of having to distinguish the notions of "commercial" and "financing" purposes, all assignments should be covered, or alternatively assignments effected for "commercial or financing" purposes. It was also suggested that the text of the draft uniform rules might omit any reference at all to the purpose of the assignment.

Internationality test

26. The Working Group agreed that the draft uniform rules should cover both international and domestic assignments of "international receivables", namely, receivables in which the assignor and the debtor had their places of business in different States. Beyond that, the view was expressed that paragraph (1) should be reformulated so as to cover, in addition to international or domestic assignments of international receivables, international assignments of domestic receivables, namely assignments in which the assignor and assignee had their places of business in different States, while the assignor and the debtor had their places of business in the same State. In support of such coverage, it was stated that the international assignment of domestic receivables effected in the context of refinancing and securitization transactions was an increasingly important practice that needed to be covered.

27. Several concerns were raised with regard to that suggestion. One concern was that, merely by virtue of the domestic creditor's decision to assign its receivables to a foreign assignee, the domestic debtor might find its legal position subjected to a different legal regime. That result was said to be particularly undesirable if the debtor was a consumer, which would raise the question of the possible impact of the draft uniform rules on consumer protection issues. It was further observed that the matter raised questions beyond merely those of consumer protection, but reached into questions of debtor's rights and protection generally. In response, it was pointed out that the main concern of the consumer as a debtor was the maintenance of its ability to discharge its obligation to a known creditor and to raise against the assignee, whether foreign or domestic, the same defences that were available to the debtor against the assignor. It was noted that debtor protection issues, including, to the extent it would be relevant, consumer protection, could be addressed in the context of draft article 4, dealing with no-assignment clauses, and draft articles 9 to 12, dealing with debtor protection issues.

28. Other considerations raised regarding applicability of the draft uniform rules to domestic receivables included the concern that uniformity and harmonization of law might not be served if assignment of some domestic receivables were covered by domestic law, while assignment of other domestic receivables would be covered by the draft uniform rules, depending on whether the domestic creditor decided to assign the receivables to a foreign rather than to a domestic creditor. Yet another concern involved the potential implications of an international assignment for the question of the currency in which a domestic receivable should be paid and possible exchange controls. It was noted that that problem would arise in any case in the international assignment of international receivables and could be dealt with, if the principle were adopted that the debtor's obligation to pay should not be changed as a result of assignment.
29. After discussion, the Working Group affirmed that both domestic and international assignments of international receivables should be covered. With regard to the suggestion that international assignments of domestic receivables should also be covered, it was agreed that a provision to that effect could be prepared, but kept within square brackets, pending further consideration once the draft articles dealing with debtor protection issues had been discussed.

Territorial scope of application

30. It was noted that draft article 1, which in its present formulation resulted in the application of the draft uniform rules to domestic and international assignments of international receivables, required that the assignor and the debtor have their places of business in different States and that those States adopt the draft uniform rules. It was observed that, if the suggestion to enlarge the substantive scope of application of the draft uniform rules to include international assignments of domestic receivables were accepted, namely assignments between parties (assignor and assignee) whose places of business were in different States, the question would arise whether it would be necessary to require that the assignee have its place of business in a State that had adopted the draft uniform rules. The view was expressed that that would not be necessary since, in a cross-border context, only the law of the State of the debtor and the assignor would be relevant to enforcement, in view of the fact that the assignee would seek to enforce the assignment in one of those States.

31. The view was expressed that application of the draft uniform rules by virtue of the private international law rules, referred to in paragraph (1)(b) of draft article 1, could introduce uncertainty, as private international law rules on assignment were subject to uncertainty. Accordingly, it was suggested to delete the paragraph or to retain it in brackets pending further consideration.

Paragraph (2)

32. As to the question of which place of business would be relevant in case a party had more than one place of business, some preference was expressed for the place which had the closest relationship with the assignment. The view was also expressed that the place which had the closest relationship with the original contract and its performance might be a more appropriate reference point. It was suggested, however, that the Working Group might wish to revisit the matter, after it had considered further the question of whether to cover international assignments of domestic receivables.

C. Definitions

33. The Working Group considered a number of definitions based on a draft article, which read as follows:

“Draft article 2. Definitions

“(1) ‘Receivable’ means any right of a creditor to receive or to claim the payment of a monetary sum, unless it is in the form of a bill of exchange or a promissory note.

“(2) ‘Assignment of receivables’ means the transfer, by way of sale, as security for performance of an obligation, or otherwise, from one party (‘assignor’) to another party who provides financing to the assignor (‘assignee’) of receivables arising from a contract (‘the original contract’) made between the assignor and a third party (‘the debtor’).

“(3) ‘Financing contract’ means the contract by which the assignee provides financing to the assignor.”

Paragraph (1) “Receivable”

34. The suggestion was made to replace the term “receivable” by the term “claim”, which might be more easily understood in various languages. However, it was generally felt to be preferable to retain the term “receivable” for consistency with the terminology of the Factoring Convention.

35. While the Working Group agreed that the right to payment was the essential element of the definition of “receivable”, several observations were made as to detailed aspects of the definition. One was that the words “right... to receive” might not capture the meaning of the term in an appropriate way. Another observation was that the reference to “a creditor” might inadvertently lead to the exclusion of some rights to payment that were intended to be covered, for example, royalties paid to the licensor of intellectual property. The suggestion was also made of a need to specify whether the reference to a “monetary sum” included foreign currency and commodities easily transferable into money, such as precious metals.

36. Differing views were expressed as to the types of receivables to be covered. One view was that all receivables in the form of negotiable instruments should be excluded, since their transfer was covered by other international texts. Another view was that, while emphasis could be given to non-documentary receivables, the application of the draft uniform rules to documentary receivables should not be excluded.

37. In support of such a broader approach, it was pointed out that negotiability was looked at in practice not from the point of view of the form of the instrument, but rather from the perspective of the protection of the transferee, which could be achieved in the context of the present work without necessarily excluding all negotiable instruments from the scope of application of the text to be prepared. In addition, it was observed that in practice there was a need for financing on the basis of receivables, irrespective of their form (contractual or unilateral, documentary or non-documentary), which should be accommodated. The example of “mortgage warehousing” transactions was given, in which notes incorporating lenders’ receivables arising from home loans and secured by mortgages were put together in pools and sold by lenders in capital markets for refinancing purposes. This enabled lenders to obtain lower interest rates in capital markets and to make a profit while offering lower home loan
interest rates. It was further explained that notes were kept in a central location where possession could be obtained by the buyers and that there was an increasing interest in replacing paper with electronic documents, the transfer of which was not regulated by any international legal text. A view was expressed, however, that in some countries arrangements such as "mortgage warehousing" were subject to regulation by special laws and should not be covered.

38. After discussion, the Working Group agreed that emphasis should be given not to the form in which the receivables might appear, but rather to the way in which they might be transferred, and that accordingly receivables transferred by way of assignment would be covered, while receivables to be excluded, including receivables transferred by way of endorsement, would be listed. The Working Group further agreed that contractual receivables should be covered, while the inclusion of non-contractual receivables (e.g. insurance, tort receivables) could be considered at a future session of the Working Group. It was suggested that the inclusion of further types of receivables, including receivables arising from leases or license agreements, could also be considered at a later stage.

Paragraph (2)/"Assignment of receivables"

39. As regards the scope of the notion of "assignment of receivables", there was general agreement that the definition should make it clear that the draft uniform rules were intended to apply to the entire range of assignment and related practices described in the document before the Working Group (A/CN.9/412, paras. 14-21), i.e. assignments by way of sale, of security, or in payment of a pre-existing debt. It was recalled that those practices included, apart from assignment proper, functional equivalents thereof, for example, depending on the national legislation applicable, legal techniques such as subrogation, pledge or novation. As a matter of drafting, it was widely felt that paragraph (2) was insufficiently reflective of the broad scope given to the notion of assignment, in that it relied on terminology typically used in the context of assignment by way of sale. It was agreed that paragraph (2) should be reworded using more neutral terminology, possibly to be combined with an express reference along the lines of "assignment by way of sale, by way of security or by any other method".

40. Triggered by the reference in the second part of paragraph (2) to "financing", the Working Group had occasion again to exchange views as to whether the applicability of the draft uniform rules should be linked to the purpose of the assignment. One view was that any reference to "financing" as the purpose of the assignment should be avoided since assignments of receivables existed outside the context of financing and such assignments should also be covered by the draft uniform rules. It was stated that, for example, in the context of insurance, the claims of an insured party against the party responsible for damages under tort law would typically be assigned to the insurer. Another view was that, should a reference to "financing" be included in the definition of "assignment of receivables", it should at least be accompanied by a definition spelling out the characteristic elements of "financing". With respect to a possible definition of "financing", objections were raised on the grounds that, in view of the fact that financing techniques were evolving rapidly, any such definition ran the risk of becoming rapidly obsolete, which might adversely affect the acceptability of the draft uniform rules. An alternative suggestion was to replace the reference to "financing" by a reference to assignment "against a monetary sum".

41. In favour of retaining the reference to "financing" in the definition of "assignment of receivables", the view was expressed that the focus of the draft uniform rules should be on the types of assignment that had financing as a common purpose. It was recalled that the mandate given to the Working Group by the Commission was to undertake the preparation of a uniform law regarding "assignment in receivables financing". A further view, which attracted considerable support, was that, although a general reference to the purpose of financing needed to be included in the draft uniform rules, it should not necessarily be made part of the definition of "assignment of receivables" under draft article 2. It was stated that, although the draft uniform rules should focus on financing transactions, nothing should prevent their being made applicable also to other types of assignments of receivables, irrespective of the purpose for which the assignment was concluded. While strong support was expressed in favour of deletion of the words "who provides financing to the assignor ("assignee") of receivables arising from a contract ("the original contract") made between the assignor and a third party ("the debtor")" at the end of paragraph (2), it was decided that the matter would need to be discussed further, after a decision had been taken regarding references to "financing" in draft article 1 and elsewhere in the draft uniform rules. As a matter of drafting, it was noted that, should the latter part of paragraph (2) be deleted as part of a deletion of the reference to "financing", the paragraph would still need to retain a definition of the terms "assignee" and "debtor".

42. With respect to the reference to "receivables arising from a contract" at the end of paragraph (2), the view was expressed that the definition should cover not only those receivables that arose from contracts but also other types, for example, receivables created by operation of law or by a decision rendered by a court of justice. It was generally felt, however, that such a broad notion of the receivables to be covered by the draft uniform rules might create conflicts with other legal regimes, possibly of a mandatory nature, which might be applicable to assignments of receivables generated by non-contractual mechanisms.

43. After discussion, the Working Group adopted the substance of the definition of "assignment of receivables", subject to further consideration of the reference to "financing", which it decided to place between square brackets.

Paragraph (3)/"Financing contract"

44. Differing views were expressed regarding the need for including a definition of "financing contract" in the
text of draft article 2. One view was that such a definition was useful since it established a clear distinction between the assignment itself and the underlying financing transaction. It was also stated that adopting a broad definition of “financing contract” made it less likely that it would be necessary to describe in detail the various types of financing transactions envisaged in the draft uniform rules. Doubts were expressed, however, as to whether a definition of “financing contract” was needed at all, particularly in view of the fact that the notion was used only in the context of draft article 7, dealing with the breach of the financing contract. It was also suggested that the current definition was too bare to be helpful. After discussion, the Working Group decided to place paragraph (3) between square brackets, pending a final decision as to how the concept of “financing” would be dealt with in the draft uniform rules.

D. Bulk assignment

45. The Working Group discussed bulk assignments based on a draft article, which read as follows:

"Draft article 3. Assignment of receivables

(1) An assignment of one or more receivables is effective if, when the assignment is effected or when the receivables come into existence, they can be identified as receivables to which the assignment relates.

(2) The assignment of future [or conditional] receivables operates to transfer the receivables directly to the assignee when they come into existence [or when the condition is fulfilled] without the need for a new assignment."

Paragraph (1)

General remarks

46. As a matter of drafting, it was generally felt that paragraph (1) currently dealt with too many distinct issues, which would be better addressed separately, either in several paragraphs of the same article or in separate articles. The following issues were identified as requiring separate treatment: recognition in-principle of bulk assignment and of assignment of single receivables; the notion of effectiveness of assignment as between assignor and assignee; the notion of effectiveness of assignment with respect to debtors and third parties; the criterion for effectiveness of assignment; the time when assignment was effected; recognition in-principle of assignment of future claims; the extent of the notion of future claim.

"An assignment of one or more receivables"

47. There was general agreement that an important aim of the draft uniform rules would be to overcome uncertainty under various national laws with regard to the validity of the assignment of more than one receivable, in particular assignments in which receivables were not specified individually, sometimes referred to as “bulk assignments”. At the same time, it was generally felt that the assignment of single receivables was an important practice, in particular in the context of refinancing transactions, which could benefit from the draft uniform rules.

"is effective if."

48. It was noted that, by relying on the unqualified concept of “effectiveness”, the draft provision was intended to establish the conditions for the actual transfer of the assigned receivables not only as between the assignor and the assignee but also vis-à-vis the debtor and other third parties. On that point, the draft uniform rules deviated significantly from the approach taken in article 5 of the Factoring Convention, which dealt with the validity of the relevant provision in the factoring contract and its effects as between the assignor and the assignee, without affecting the position of third parties.

49. The view was expressed that the approach taken in the draft provision was inappropriate since it unnecessarily mixed the question of defining “assignment of receivables” for the purposes of the draft uniform rules, a question dealing essentially with the scope of the draft uniform rules, with issues regarding the rights and obligations of third parties. It was stated that such issues were too complex to be dealt with by way of a bare reference to “effectiveness” in paragraph (1) and that they should be further discussed in the context of the draft provisions dealing with the debtor's duty to pay and with priorities among several creditors laying a claim on the assigned receivables. It was suggested that the draft provision should be reworded along the following lines: “An assignment may relate to one or more receivables if . . .”.

50. While some support was expressed in favour of that view and it was agreed that the matter would be considered further, the prevailing view at this stage was that it was appropriate for the draft uniform rules to attempt to provide certainty with respect to such important issues as effectiveness and validity of an assignment erga omnes. With respect to the possible deviation from the approach taken in the Factoring Convention, it was felt that the preparation of the draft uniform rules should be regarded as a welcome opportunity to build on the result already achieved by the Factoring Convention but also to go beyond that Convention, particularly regarding an issue such as effectiveness of the assignment vis-à-vis third parties, which could not be fully addressed in that Convention since it focused on the factoring contract and not on the transfer of receivables by way of assignment in general. As a matter of drafting, it was suggested that the reference to “effectiveness” in the draft provision might usefully be complemented by a reference to “validity”.

"when the assignment is effected"

51. It was generally felt that the draft uniform rules should provide for effectiveness of an assignment at as early a point of time as possible, so as to avoid retention of the receivables in the estate of the assignor in case of insolvency. However, it was generally felt that the draft provision might need to be redrafted with a view to clarifying the point in time as of which the assignment should be regarded as effective. It was pointed out in that regard that the draft provision, which was formulated along the lines of “the assignment is effective when the assignment is effected”, might appear to be somewhat circular.
“or when the receivables come into existence”

52. There was general agreement that the draft uniform rules should recognize, as a general principle, that future claims could validly be transferred by way of an assignment. While that principle might not currently be admitted under all domestic laws, or might be limited in some way (e.g. as in the case of a national law that recognized the validity of assignment of future receivables only if they arose within a specified period of time), it was noted that the assignment of future receivables was the essential basis of financing in the context of receivables financing transactions. However, although it was generally felt that a liberal approach to the assignment of future receivables was desirable from an economic point of view, the view was expressed that it should not be to the detriment of legal certainty, a result that could be avoided by setting out sufficient criteria as to the identification of future receivables.

53. Having settled on the desirability of adopting a liberal approach to the issue of assignment of future receivables, the Working Group proceeded with a discussion of the various types of assignment of “future receivables” that might be encompassed, noting that “future receivables” might vary considerably in nature and certainty. At one end of the spectrum were “fixed-term receivables”, described as involving situations where the existence of the future receivable, the date as of when payment could be sought and its amount were certain (e.g. claims arising from a sales contract already concluded). At the other end of the spectrum, lay purely “hypothetical receivables” (e.g. claims that might arise if a merchant was able to establish a business and to attract customers). Between those two extremes, a variety of situations were conceivable, where the existence of the claim, its amount and date of payment might vary from “future” to “conditional” and even to purely “hypothetical”. It was also suggested that, while the term “future receivables” would normally include “conditional” and “hypothetical” receivables, it should not include rights to payment arising from contracts existing at the time of assignment, whether or not the rights have been earned by performance.

54. Some doubts were expressed as to whether the draft uniform rules should recognize the entire range of “future receivables”. It was stated that recognition of bulk assignments combined with complete freedom of assignment of future receivables might allow a business entity to assign all its “future” and “hypothetical” claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries. However, it was stated that although such public policy considerations might be raised in the context of transactions involving consumers, they might be less relevant in the context of international business transactions. As an example of a text dealing with international business practice, it was noted that article 5 of the Factoring Convention recognized assignments of future receivables without distinguishing between various types of future receivables.

55. Noting that the issue would be discussed further at a future session, particularly with respect to “conditional” and “hypothetical” receivables, the Working Group decided that, pending such further discussion, no limitation would be brought to the draft uniform rules as to the general recognition of assignment of “future receivables”.

“they can be identified as receivables to which the assignment relates”

56. There was general agreement that identification of the receivables by linking them to the assignment to which they related should be the main criterion for determining the validity and effectiveness of their assignment.

Paragraph (2)

57. It was noted that paragraph (2) addressed three questions: the time at which future receivables would be transferred; whether future receivables would be acquired directly by the assignee or indirectly through the assignor, which was of particular importance were the assignor declared insolvent at the time the receivables would come into existence; and whether a new act of transfer was necessary when the receivables came into existence. It was further noted that paragraph (2) differed in two respects from article 5(b) of the Factoring Convention. One was the broader scope of the draft provision, in that the transfer under paragraph (2) was deemed effective not only as between the assignor and the assignee but also as against the debtor and other third parties. The other difference was the reference in the present draft to the direct acquisition of the future receivables by the assignee, namely, that the receivables were deemed to enter into the possession of the assignee without passing through the assignor.

58. In line with the intention to consider two variants of paragraph (1), one recognizing the validity of bulk assignments only as between the assignor and the assignee, and the other providing for the effectiveness of bulk assignments as against all parties, the Working Group agreed that a revised version of paragraph (2) should also include two variants along the same lines. However, a note of caution was struck to the effect that limiting the effects of assignment to the relationship between assignor and assignee might not be appropriate, since, in view of the fact that assignment was defined in draft article 1(2) as the transfer of property in the assigned receivables, assignment was bound to produce effects against all parties.

59. The view was expressed that it might not be appropriate to treat all future receivables in the same way, since they differed in the degree of certainty, a matter which was reflected in the varying amounts of credit made available on the basis of various types of future receivables. That aspect was reflected in the reference in the paragraph (2), within square brackets, to “conditional” receivables. The view was expressed that, in line with the distinction suggested above (see paragraph 53, above), paragraph (2) should cover “fixed” receivables only and not “conditional” or “possible” receivables.

60. After discussion, the Working Group agreed that, subject to further discussion, paragraph (2) should be revised so as to refer to “fixed”, “conditional” and “possible” receivables, though the latter two types would for the time being be left in square brackets.
E. No-assignment clauses

61. The Working Group based its discussion on a draft article, which read as follows:

“Draft article 4. No-assignment clauses

“(1) Subject to article 9, the assignment of receivables shall be effective notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment.

“(2) Subject to article 10(2), nothing in paragraph (1) of this article shall affect any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of the original contract.”

Paragraph (1)

62. There was broad acceptance of including a provision along the lines of paragraph (1), which provided for effectiveness of assignments in spite of no-assignment clauses in the original contract between the assignor and the debtor. However, differing views were exchanged as to the possibility that such a provision might not be accepted by a number of States as part of a draft convention without the option of a reservation. It was noted in this regard that a similar provision in the Factoring Convention provided for a reservation, with the effect that an assignment made in contravention of a no-assignment clause would be ineffective if the debtor were from a reserving State. That approach reflected the position that giving effect to no-assignment clauses in such contexts ran counter to established legislation in some States.

63. Proponents of the reservation approach referred to the importance of respecting the freedom of contract of the parties to agree on a no-assignment clause and preserving good faith in the implementation of agreed contract terms. Reference was made to the possible increase in inconvenience or difficulties to the debtor that could result from having to pay to foreign assignees, especially if the debtor were a consumer. Examples cited included increased postage costs, having to deal with notifications received in a foreign language, possible increased litigation costs, and the possibility of having to pay the receivables in an unanticipated and potentially unavailable currency. It was stated that the latter consideration in particular would affect debtors in developing countries where there may be a shortage of foreign exchange and for which therefore at least some notice needed to be built in. Reference was also made to the possibility that the above considerations could affect in particular consumer debtors. The view was also expressed that special consideration may have to be given to debtors that were State entities.

64. In support of avoiding a reservation clause, it was stressed that the interests of the debtor that underlay the discussion could be adequately dealt with in provisions on debtor protection. It was stated that a debtor-protection principle, which would alleviate the potential difficulties that had been raised, could be formulated along the lines that the debtor should be placed under no greater financial or other obligation by virtue of the assignment than the debtor would have been under if no assignment had been made.

65. Such an approach, it was stated, could encompass consumer protection concerns and would make it unnecessary to provide for a reservation, or to exclude consumer receivables, which risked limiting the extent to which the goal of facilitating receivables financing would be achieved. The Working Group was urged to bear in mind that, as a practical matter, the availability of consumer receivables for assignment constituted an important source for contemporary receivables financing and that imposing a requirement of individual notification and authorization would render assignments of consumer receivables impracticable. It was suggested that techniques could be found that would not encumber assignment of consumer receivables to a point of possible impracticability, for example, providing for payment to a specific account or post box.

Paragraph (2)

66. The Working Group noted that paragraph (2) was intended to ensure that the assignment effected in contravention of a no-assignment clause did not affect any rights that the debtor might have against the assignor for breach of the no-assignment clause. The question was raised whether the current formulation, which referred to an “assignment made in breach of the original contract” was appropriate, since it might be read as expressing a rule to the effect that such an assignment was indeed a breach of contract. It was pointed out that in fact the provision intended to leave to other applicable law the question of whether an assignment effected despite a no-assignment clause constituted a breach of contract and, were it to be considered such a breach, what the consequences of the breach would be. It was suggested that that point could be made clearer if paragraph (2) were to use more neutral language, avoiding reference to breach of contract.

67. It was suggested that another alternative, a more assertive approach, might be considered by the Working Group, one in effect invalidating no-assignment clauses. It was suggested that such an approach, found in some national laws, would be more effective in facilitating receivables financing since the possibility that a debtor would have a contractual claim against an assignor for violation of a no-assignment clause would create an undesirable degree of uncertainty in receivables financing. It was suggested that this potential jeopardy would be further heightened to the extent that there might be a ruling under applicable contract law that a violation of a no-assignment clause constituted a breach justifying termination of the contract between the assignor and the debtor.

68. Hesitation was expressed, however, as to the acceptability of including a rule invalidating no-assignment clauses. It was suggested that an assignment effected despite a no-assignment clause would in many legal systems fall within the broad category of breach of contract and that it would therefore be futile to attempt simply to invalidate no-assignment clauses. The view was expressed that the degree to which a less ambitious approach would harm the aims of the work was minimal, since the notion that contract termination was only justified in the face of
a “fundamental” breach of contract was widely accepted, and since the violation of a no-assignment clause was unlikely to be regarded as such a fundamental breach. It was further pointed out that the assignor in such a case would be liable to the debtor only to the extent of damages actually incurred and proven, thus diminishing the potential impediment to receivables financing that might result from leaving the matter to other applicable law.

F. Transfer of security rights

69. The Working Group engaged in a general discussion of the effect that should follow from the assignment of receivables with respect to the rights that might have been created for the purpose of securing payment of those receivables to the assignor. In its deliberation, the Working Group took into account the relevant provisions of other uniform law texts, such as article 7 of the Factoring Convention and article 18 of the EBRD Model Law on Secured Transactions.

70. It was noted, at the outset, that the legal issues of establishment and transfer of security rights involved a variety of requirements of administrative and regulatory nature under existing domestic laws and were therefore complex. It was generally agreed that the draft uniform rules should not attempt to deal with all the details of the substantive law of security rights. Similarly, matters such as the procedural steps to be taken to secure the valid transfer of any given security right should continue to be dealt with by relevant domestic law. The draft uniform rules should be limited to establishing a general principle as to whether the assignment of receivables had automatic effect on the corresponding security rights.

71. As to the substance of that general principle, it was suggested that a distinction should be drawn between “accessory” and “non-accessory” or “independent” security rights. “Accessory rights”, as existing under many national laws, were defined as security rights that could not exist or be transferred independently from the receivable, the payment of which they were intended to secure. Such “accessory rights” should thus be transferred automatically with the receivable to which they were linked. “Non-accessory” or “independent” security rights, such as independent bank guarantees, were defined as rights that might exist or be transferred independently, and should thus require a separate act of transfer. It was stated that relying on a distinction between “accessory” and “independent” security rights would avoid the difficulties that might result from any attempt to enumerate or describe the various types of security rights intended to be covered by the draft uniform rules. After discussion, it was agreed that the draft uniform rules should be drafted so as not to prevent the use of a distinction between “accessory” and “independent” security rights in those legal systems where that distinction was in use. It was widely felt, however, that embodying the suggested distinction in the draft uniform rules might not be helpful and that it might run counter to the general policy decision not to deal with all the details of the substantive law of security rights. It was noted that a distinction between “accessory” and “non-accessory” or “independent” security rights might not be acceptable to all legal systems. Moreover, even those national laws under which the distinction was recognized as meaningful, might vary considerably as to the definitions and contents of the “accessory” and “independent” categories of security rights.

72. The discussion focused on whether the transfer of a security right should automatically follow from the assignment of the secured receivable or whether it could only result from express agreement between the parties to the assignment. While it was generally agreed that the draft uniform rules should recognize party autonomy, it was pointed out that, from a practical point of view, addressing the issue of transfer of security rights merely by recognizing party autonomy on the matter of transfer of security rights might be seen as encouraging a formalistic approach that might prove to be excessively burdensome, depending on the nature of the assignment. For example, while a rule relying exclusively on party autonomy might be appropriate in the context of project financing, or other types of assignment involving an elaborate contractual framework, it might be less acceptable in the context of certain types of bulk assignments that were typically concluded without a specific contract being negotiated. It was also said that automatic transfer of security rights would be more in line with the general purpose of the draft uniform rules, which was to facilitate financing through assignment of receivables.

73. As to how party autonomy should be recognized by the draft uniform rules, it was agreed that the general principle should be drafted so as to avoid being misinterpreted as making other rules of domestic law, possibly of a mandatory nature, subject to contractual agreements between the parties. For example, the draft uniform rules should not displace domestic law regarding mortgages, or other types of “accessory” security rights, that would, in all circumstances, be regarded as transmitted automatically with the secured receivable.

74. After discussion, the Working Group decided that the uniform rules should embody the principle of automatic transmission of rights securing the assigned receivables, subject to contrary agreement between the parties to other rules of domestic law regarding the validity of such a transmission.

G. Form of assignment

75. The Working Group engaged in a discussion of the form of assignment, based on a draft article, which read as follows:

"Draft article 5. Form

"An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses."

76. Differing views and concerns were expressed regarding draft article 5. One concern was that the general principle of a form-free assignment expressed in the draft
article was not acceptable for those States whose legislation would require a contract for the assignment of receivables to be concluded in, or to be evidenced by, writing. It was noted that the draft article was modelled on article 11 of the United Nations Convention on Contracts for the International Sale of Goods ("the United Nations Sales Convention") and that article 96 of that Convention entitled those States to declare that article 11 did not apply where any party to the contract had its place of business in one of those States.

77. In response to that concern, it was stated that the purpose of the draft uniform rules was not to change the requirements and standards applicable to existing types of assignment contracts under domestic law but rather to create a new type of assignment. Thus, even in those countries where a writing was required for validity or for evidence purposes, the draft uniform rules should not be interpreted as an attempt to do away with general form requirements. The draft uniform rules were said to be merely intended to establish a limited exception to those requirements, in order to reflect modern international practice regarding assignment of receivables, which, in many instances, did not rely on written documents. For example, it was stated that it was essential that a provision along the lines of draft article 5 be included in the draft uniform rules to accommodate the use of electronic means of communication. Attention was drawn to the fact that the draft convention on international interests in mobile equipment, which was currently being prepared by UNIDROIT, was likely to require written form for any agreement creating such an interest. The purpose of such form would be to make clear that the parties intended to create an international, rather than a particular type of domestic, interest. In that regard, the view was expressed that account should be taken of the proposed rule in preparing the draft uniform rules, in particular since certain receivables that might be covered by the draft uniform rules, such as receivables arising from lease contracts, might also fall within the scope of the UNIDROIT draft convention.

78. Another concern was expressed with respect to the substance of the principle of a form-free assignment embodied in the draft article. It was stated that, while complete freedom regarding the form of an assignment was acceptable as between the assignor and the assignee, it might insufficiently protect the interests of third parties. For example, it was stated that recognizing the validity of a purely oral assignment might create opportunities for abuse or fraudulent collusion between the assignee and the assignor, particularly in situations where the assignor might become insolvent. It was suggested that an exception should be made to the general principle of a form-free assignment, to the effect that purely oral assignments could not be opposed to third parties. In response, it was stated that the interests of third parties should not be addressed by imposing restrictions as to the form of the assignment but by establishing an obligation to notify third parties of the assignment. It was suggested that the discussion should be resumed after the Working Group had completed its consideration of other draft provisions, such as draft article 9, which established the principle of a notification for purposes of debtor protection.

79. After discussion, the Working Group postponed its decision until it had completed its review of the draft uniform rules and its general discussion of the issues of third-party protection. The Secretariat was requested to prepare a revised draft article, including variants reflecting the above-mentioned views and concerns. It was pointed out that, should the draft uniform rules establish form requirements to apply in the context of relationships involving third parties, they should also clarify the effects of non-compliance with those form requirements. For example, the draft uniform rules could either make a purely oral assignment ineffective vis-à-vis third parties or, alternatively, leave such an assignment outside the scope of the draft uniform rules. It was agreed that those options should also be provided among the variants to be considered by the Working Group at a future session.

H. Warranties between assignor and assignee

80. The Working Group engaged in a discussion of warranties that might be undertaken by the assignor towards the assignee based on a draft article, which read as follows:

"Draft article 6. Warranties"

“(1) Unless otherwise agreed between the assignor and the assignee [in the contract of assignment], the assignor warrants to the assignee that the assigned receivables exist.

“(2) For the purposes of paragraph (1) of this article, the receivables shall be considered as existing if the assignor is the creditor, has a right to transfer the receivables and has no knowledge, at the time of assignment, of any fact that would deprive the receivables of value.

“(3) Unless otherwise explicitly agreed between the assignor and the assignee [in the contract of assignment], the assignor does not warrant towards the assignee that the debtor will pay.”

81. It was noted that, while the types of warranties given as to the receivables by the assignor towards the assignee were a matter of contract, it might be advisable to address the question of warranties in view of their importance for the allocation of risk between the assignor and the assignee for hidden defences of the debtor and in view of the potential impact that the breach of such warranties might have on the transfer of receivables.

Paragraph (1)

82. The Working Group felt that paragraph (1) reflected a sound principle that could facilitate receivables financing by recognizing party autonomy in the allocation of risk between the assignor and the assignee for unknown defences of the debtor and by properly allocating that risk in the absence of an agreement.

83. As to the exact formulation of paragraph (1), a number of concerns were expressed. One concern was that the assignor and the assignee should not be allowed to vary the content of the warranty as to the existence of the receivables, which flowed from the basic obligation
to act in good faith. The suggestion was made that at least the warranty should be varied only by way of an explicit agreement between the assignor and the assignee (see paragraph 88, below). Another concern was that the words "in the contract of assignment", which appeared within square brackets in paragraph (1), could prejudice the context or manner in which assignment might take place and should be deleted. Yet another concern was that the term "warrants" was not sufficiently clear. In that connection, it was noted that, while it was difficult to identify an equivalent term, in the United Nations Convention on International Bills of Exchange and International Promissory Notes, the term "represents" had been used in order to refer to the warranties given by the transferor of an instrument to the holder.

84. Yet another concern was that the word "assignee" might introduce an inappropriate restriction, to the extent that the assignor might be seen to give the warranty to the immediate assignee only and not to any subsequent assignee. It was pointed out that, as a result of the present formulation, the subsequent assignee might be able to turn only to the immediate and not to the initial assignor. It was stated that the initial assignor would presumably have to reimburse the subsequent assignee, but only pursuant to a series of subsequent actions and provided that the chain of assignors would not be interrupted by the insolvency of one of them. Yet another concern was that the words "that the assigned receivables exist" might be interpreted as not encompassing future receivables.

Paragraph (2)

85. Several observations were made as to the formulation of paragraph (2), regarding the content of the warranty that the assigned receivables existed. One observation was that the words "a right to transfer" introduced some uncertainty, since a right to transfer did not exist in case of a no-assignment clause, though an assignment in contravention of such a clause might be considered effective (see paragraphs 62-65, above). It was pointed out that those words were intended to address situations in which the assignor might not have the right to assign certain receivables, because it might have already assigned them or because of general reasons relating to lack of capacity or authorization. In response, it was suggested that the former problem was covered by the requirement that the assignor be the creditor, while problems of the latter type were beyond the scope of the present work of the Commission.

86. Another observation was that the reference to the assignor having no knowledge of any legal defects of the receivables placed on the assignee the risk of defences of the debtor that were unknown to the assignor, which could often occur in practice, in particular in cases where the assignor was the seller of goods manufactured by a third party. It was pointed out that that way of allocating the risk would result in the increase of the cost of credit and, in addition, was inappropriate, since the assignee was not a party to the original contract and could not do anything to reduce the risk.

87. Yet another observation was that the reference to deprivation of "value" could be understood as referring to economic value, which would place on the assignor the risk of a change in general economic conditions or in the economic position of the debtor. In order to address that concern, it was suggested that it should be clarified that the term "value" was intended to refer to hidden legal defences of the debtor.

Paragraph (3)

88. There was broad support in the Working Group for the principle expressed in paragraph (3) that the assignor did not warrant that the debtor would pay. It was noted that this reflected a rule known in most legal systems. It was also noted that, in view of the fact that the warranty in paragraph (3) involved a risk higher than that foreseen in paragraph (1), it could be varied only by way of an explicit agreement.

I. Breach of financing contract

89. The Working Group considered the effects of breach of the financing contract by the assignor on the basis of a draft article, which read as follows:

"Draft article 7. Assignor's breach of financing contract

"(1) When so agreed, and in any event if the assignor defaults on its obligation to pay in accordance with the financing contract, the assignee is entitled to notify the debtor pursuant to article 9 to pay the assignee.

"(2) In an assignment by way of sale, unless otherwise agreed by the assignor and the assignee, the assignee must account to the assignor and return any surplus, and the assignor is liable for any deficiency.

"(3) In an assignment by way of security, unless otherwise agreed by the assignor and the assignee, the assignee must account to the assignor and return any surplus, and the assignor is liable for any deficiency."

Paragraph (1)

90. The discussion suggested a general accord with the substantive rule of paragraph (1), to the effect that a breach of the financing contract would entitle the assignee to collect the proceeds of the receivables. It was also noted that the intent of the paragraph was to refer to a variety of financing situations, some of which might not be linked to a default by the assignor as the event triggering the assignee's rights with respect to the receivables, and to acknowledge the freedom of contract of the assignor and the assignee to define the effects of breach of the financing contract. Questions were raised, however, as to the extent to which the current formulation of the draft article expressed those basic principles on which the Working Group was in agreement and distinguished between different categories of cases intended to be covered.

91. Comments of such a drafting nature were directed in particular at the words at the beginning, "when so agreed". It was noted that as presently drafted those words might inadvertently suggest the need for a specific agreement beyond the contract of assignment in order to vest in the assignee the rights inherent in the assignment.
It was noted that the intent of those words was merely to refer flexibly to the freedom of contract of the parties to define the terms of the assignment, including the point of time when the right to collect the proceeds of the receivables would be triggered other than upon a default under the financing contract.

92. An example cited in this connection was the type of financing structures in which the debtor received notification of the assignment, but was instructed that payment should continue to be made to the assignor until subsequent notice directing otherwise. Another example was the case in which the lender (assignee) at the outset notified debtors and sought to collect on receivables, which had been assigned as security, though collection may involve payment to a post office box or account to which only the lender had access. Reference was also made to the existence of financing structures that did not require notification of the debtor, with payment continuing to be made to the assignor.

93. Views were also expressed to the effect that the expression referring to the entitlement of the assignee “to notify” the debtor to pay might create some uncertainty by perhaps being unnecessarily indirect. It was stated that the effect of breach of the financing contract would ordinarily be to entitle the assignee, as the new creditor of the receivables, to collect the proceeds of the receivables.

94. Other observations concerning the formulation of paragraph (1) were directed at the appropriateness of the reference to “default on its obligation”. The appropriateness of that expression was questioned for the context of sale of receivables, as a result of which the assignee presumably would be the owner of the receivables. The expression was also questioned because it used different wording than the corresponding expression in the United Nations Sales Convention, phrased in terms of “failure to perform”.

**Paragraphs (2) and (3)**

95. Several observations were also made as to the content and formulation of paragraphs (2) and (3), which dealt with the questions of surpluses and shortfalls between the amount paid by the assignee to the assignor in return for the assigned receivables and the amount paid to the assignee by the debtor. One observation was that the attempt to draw a clear distinction between assignment by way of sale (dealt with in paragraph (2)) and assignment by way of security (addressed in paragraph (3)) might be problematic. It was pointed out that, because of the variety of different forms of transfers of receivables and because of differences that existed among legal systems as to classifications of transfers, some transfers of receivables that might be denominated as transfers by way of security could in fact possess attributes of transfers by way of sale. The Working Group acknowledged that concern and expressed its understanding that there may be cases in which, in an assignment by way of security, the transfer of property in the assigned receivables could be involved.

96. Some doubt was also expressed in this context as to the rules set forth in paragraphs (2) and (3), as it was observed that the parties would not necessarily wish to be bound in a manner that might leave uncertain the net economic effect of collection of receivables merely because of the form or category into which a transfer might fall. It was suggested that such an approach might suggest a speculative or profit-making dimension in assignment of receivables that might not be congruent with the basic financing purpose of the transaction. It was pointed out in response, however, that the rules set forth in the two paragraphs, which were subject to party variation by contract, were merely intended to be default rules or starting points of reference aimed at eliminating the need to negotiate in all cases the allocation of risk referred to if the parties were not inclined to negotiate solutions other than those provided in the draft uniform rules.

97. As a drafting matter, the Working Group noted that certain terms used in paragraphs (2) and (3), in particular “surplus” and “deficiency” were undefined and might not be properly understood. It was also noted that the title of the article “breach of financing contract” might not fully correspond to its content, in particular since paragraph (2) did not involve a breach of the financing contract.

**J. Effects of assignment towards the debtor**

1. Debtor's duty to pay

98. The Working Group engaged in a discussion of the debtor's duty to pay based on a draft article, which read as follows:

“Draft article 9. Debtor's duty to pay

“(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

“(2) The debtor is under a duty to pay the assignee if the debtor has not received notification in writing of a prior assignment, of a judgement attaching the assigned receivables [or of the insolvency of the assignor] and:

(a) the debtor receives [an unconditional] notification in writing of the assignment by the assignor or by the assignee with the assignor’s authority; and

(b) the notification reasonably identifies the receivables assigned and the assignee to whom or for whose account the debtor is required to make payment.

“(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

“(4) ‘Notification in writing’ means a notification provided in a form that the information contained therein is accessible so as to be usable for subsequent reference, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

“(5) Irrespective of whether the assignment is in writing or not, a summary statement in writing about the assignment in accordance with paragraph (2) of this
article constitutes notification in writing under paragraph (4) of this article.

"(6) Payment by the debtor to the assignee shall discharge the debtor from liability if made in accordance with this article or other applicable law."

**Paragraph (1)**

99. Views were exchanged as to the question whether actual knowledge of the assignment by the debtor should have the same result as notification, namely to preclude the debtor from paying the assignor in order to be discharged.

100. One view was that "knowledge" of the assignment by the debtor should be an alternative way of triggering the debtor's obligation to pay the assignee. In support of that view, it was observed that the need to preserve acceptable standards of conduct in practice made it necessary to counterbalance, on the one hand, the need for certainty and, on the other hand, regard for ethical conduct by the parties. It was argued that it would run counter to good faith to allow the debtor to pay the assignor in cases in which the debtor actually knew of the assignment. Moreover, it was stated that paragraph (1), as presently formulated, appeared to positively allow the debtor to pay the assignor even if the debtor had actual knowledge of the assignment, possibly overriding domestic law good faith requirements.

101. Another view was that the duty of the debtor to pay the assignee should be triggered only by notification rather than, as was proposed, also by knowledge of the assignment in the absence of notification. It was stated that a notification approach was essential for the protection of the debtor, which was the main purpose of the draft article, in particular in order to ensure that there was no doubt as to whom the debtor should pay in order to be discharged. In that connection, the view was expressed that a related principle, which was of paramount importance for the protection of the debtor and should be explicitly stated in this draft article, was that the debtor should not be disadvantaged as a result of the assignment.

102. In addition, it was stated that a rule along the lines of paragraph (1) was a useful indication of what would be the proper behaviour of the debtor before notification and was in line with normal business practice. It was said that in practice parties normally intended the debtor to continue making payments to the assignor until notification was given. The example was given of securitization transactions in which it was customary for the debtor to have knowledge of the assignment but to continue making payments to the assignor and not to the assignee, which was a special corporation established for the sole purpose of issuing and selling securities without having a structure geared to receiving payments of the assigned receivables.

103. Moreover, it was stated that, while making business practice conform to good faith standards was an important goal, this should not be at the expense of certainty, which would be the case if knowledge of the assignment were to trigger the debtor's duty to pay the assignee. In that regard, it was noted that a number of questions would need to be addressed, including what constituted knowledge, who had to prove knowledge, what the content of knowledge would have to be and how knowledge of the assignment should be treated in case of several conflicting assignments.

104. After deliberation, the prevailing view was that "knowledge" of the assignment by the debtor should not be made a sufficient condition for the debtor to pay the assignee, while cases in which bad faith or fraud on the part of the debtor might be involved could be left to the applicable domestic law.

105. The Working Group then turned to the question of whether notification should be a condition for the effectiveness of assignment towards the debtor or merely a defence of the debtor in case the assignor challenged the payment made by the debtor to the assignee. It was noted that paragraph (1), read in conjunction with paragraph (1) of draft article 7, which provided that bulk assignments were effective upon their conclusion, gave the debtor, who knew of an assignment but had no notification of it, an option to pay the assignor or the assignee and be discharged.

106. The concern was expressed that allowing the debtor the choice of paying more than one person in order to be discharged could give rise to uncertainty. Another concern was that it might be inconsistent to provide that a bulk assignment was effective towards the debtor upon its conclusion and, at the same time, that the debtor may refuse to pay to the assignee before notification of the assignment.

107. In response to those concerns, it was stated that such an approach in effect would mean that the debtor before notification of the assignment could pay the assignor and be certain that it would be discharged; if the debtor chose to pay the assignee, and the assignor challenged that payment, the risk of proving the assignment would be on the debtor.

108. While the explanation given was considered to be to some extent satisfactory, the suggestion was made that, if that was the intention of paragraph (1), it should be explicitly stated that, while before notification the debtor was entitled to pay the assignor, it could also pay the assignee and be discharged. That suggestion was objected to on the ground that a clear discharge rule for the debtor in case of payment to the assignee before notification could have a negative impact on certain transactions, including securitization, in which the debtor was expected to continue making payments to the assignor. The view was expressed that it would be preferable to provide a clear rule for debtor discharge by payment to the assignor before notification, while leaving the question whether the debtor could be discharged by paying the assignee to other applicable law.

109. In the discussion, the suggestion was made that the Working Group may wish to consider the extent to which the assignee should be bound by modifications in the original contract entered into by the assignor and the
debtor after the assignment but before notification of the debtor.

110. After deliberation, the Working Group agreed that paragraph (1) as presently formulated was acceptable in principle.

**Paragraphs (2) and (3)**

**Chapeau**

“if the debtor has not received notification in writing of a prior assignment”

111. It was noted that pursuant to paragraph (2) the debtor was under a duty to pay the assignee in order to be discharged if it had received notification of the assignment to that assignee, without having received notification of a prior assignment. Doubts were expressed as to whether the chapeau of paragraph (2), as presently drafted, covered situations in which a multiplicity of notifications of several assignments were involved.

112. The view was expressed that, if paragraph (2) were intended to address situations in which one assignment was involved, it would be acceptable in principle. If, however, paragraph (2) were to cover cases in which several notifications of conflicting assignments were made by adopting the rule that the debtor should pay the first assignee to notify, some tentativeness should be attached to that formulation, since such a rule could pre-judge the answer to the question which of several conflicting assignees had priority.

113. Another view was that the question of multiple notifications was one involving the debtor’s protection and not the question of priority among several conflicting assignees, and should therefore be addressed in the context of paragraph (2). In that regard, it was stated that the principle that the debtor should be discharged by paying the first assignee to notify was a sound one and could be accepted, since it provided certainty as to whom the debtor should pay in case of multiple notifications. The question whether, as among multiple assignees themselves, the first assignee to notify the debtor, having received payment by the debtor, could retain that payment was a different one and could be dealt with in the context of the issue of priorities among several conflicting assignees.

114. While the Working Group found the substance of the chapeau of paragraph (2) to be acceptable, it agreed that the matter of multiple notifications should be revisited after the Working Group had an opportunity to consider draft article 14 (priorities) and draft article 15 (subsequent assignments).

“of a judgement attaching the assigned receivables or of the insolvency of the assignor”

115. General support was expressed in the Working Group in favour of exempting from the debtor’s duty to pay the assignee cases of attachment judgements and of insolvency of the assignor. The view was also widely shared that the chapeau should be expanded to cover other steps of the judicial, or non-judicial, process (e.g. attachment before judgement, other measures resulting from operation of law or from orders issued by a non-judicial body). With regard to insolvency of the assignor, reference was made to taking into account the work of the Commission on cross-border insolvency. The view was also expressed that insolvency of the assignor raised different issues from the issues arising in the context of attachment of receivables and should be looked at in more detail.

**Subparagraph (a)**

“[unconditional] notification”

116. It was noted that the term “unconditional”, which appeared within square brackets, was intended to protect the debtor from uncertainty by addressing situations in which the debtor might receive a notification which did not contain a clear payment request. The view was expressed that the term “unconditional” was unnecessary, since an “unconditional” notification would not meet the requirements of subparagraph (b), namely, reasonable identification of the receivables and of the person to whom the debtor should pay. In addition, it was pointed out that the term “unconditional” could introduce some uncertainty since it was not universally understood.

117. While the view was expressed that the term “unconditional” might not be absolutely clear, it was observed that there was a need in case of a multiplicity of notifications to minimize the confusion to the debtor by rendering ineffective those notifications that were “conditional” in the sense that they notified the debtor of an assignment without, however, including a clear request for payment. In order to address that concern, the suggestion was made that subparagraph (b) could be revised in order to make it clear that a notification should include an unequivocal designation of the person to whom the debtor should make payment. After discussion, the Working Group agreed that the term “unconditional” could be deleted, subject to the preceding suggested revision of subparagraph (b).

“writing”

118. There was general agreement in the Working Group that for reasons of certainty notification of assignment should be in writing. At the same time, the Working Group agreed that, in order to accommodate modern means of communications, a flexible definition of writing should be adopted along the lines of paragraph (4), which was based on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication.

“by the assignee with the assignor’s authority”

119. Views were exchanged as to whether the assignee should be able to notify the debtor on its own without being given authority by the assignor to do so. It was noted that paragraph (2), as presently drafted, provided that notification could be given by the assignor or by the assignee with the assignor’s authority. It was also noted that that approach, which was followed in article 8(1)(a) of the Factoring Convention, was intended to protect the debtor from the uncertainty as to whether the person notifying the debtor was the rightful creditor.
120. One view was that, in order to protect the debtor from uncertainty as to whom to pay, it was important to relate the notification to the contractual partner with whom the debtor was familiar, namely the assignor. As to the question of “authority” of the assignee to notify, it was stated that the interests of the assignee in this respect were adequately addressed in draft article 7 dealing with the breach of the financing contract, which provided that the assignee could notify the debtor “when agreed” or in case of failure of the assignor to perform the underlying receivables financing contract.

121. Another view was that subjecting the ability of the assignee to give notification to authorization by the assignor might create problems in case the assignor refused, or was unable, to give such authority to the assignee, since, for example, the assignor, subsequent to the assignment, might have been declared insolvent. In support of that view, it was pointed out that draft article 7 might not be sufficient in that the assignor and the assignee might have inadvertently failed to indicate in their agreement when the assignee may notify independently and in that, in case of sale of receivables, the assignee might have an interest in notifying irrespective of the assignor’s failure to perform the underlying finance contract. In addition, it was stated that paragraph (3) could address the need to protect the debtor from the uncertainty as to whether the assignor notifying was the rightful assignee, since the debtor, if in doubt, could request the assignor to provide adequate proof of the assignment.

122. The Working Group agreed that, in order to address the concerns that had been raised, paragraphs (2)(a) and (3) should be linked more closely. It was noted that the revised text should provide for a right of the assignee to notify the debtor independently and, at the same time, for a right of the debtor, if it wished, to request from the assignee, adequate proof of the assignment. However, the attention of the Working Group was drawn to the need to avoid placing on the debtor the burden of having to request additional proof or the risk of misjudging the facts and having to pay twice. In addition, a note of caution was struck that combining paragraphs (2)(a) and (3) might inadvertently lead to restricting the situations in which the debtor would have a right to request additional information only to situations involving independent notification by the assignee.

Subparagraph (b)

123. In line with the decision of the Working Group in its consideration of draft article 4 dealing with bulk assignments that future receivables could be assigned, provided that they could be identified as receivables to which the assignment related, it was agreed that the notification should not necessarily have to identify the receivables in completely exact terms. However, some concern was expressed as to whether the words “reasonably identified” properly conveyed that message, in particular in view of the fact that the term “reasonably” might not be universally understood. Although the suggestion was made that this term should be deleted or replaced by a clearer term, it was generally felt that it could be retained, so as to accommodate the case of future receivables, which could not be identified in exact terms, and for consistency in terminology with the Factoring Convention. As a drafting matter, it was suggested that the word “the assignee” should be replaced by a more general reference to “person”. Subject to the observation referred to in paragraph 117 above, the Working Group found the substance of subparagraph (b) acceptable.

124. Upon concluding its consideration of paragraphs (2) and (3), the Working Group considered an additional question, namely, whether notification of the debtor should relate only to receivables arising from contracts existing at or before the time of notification, a limitation found in article 8(1)(c) of the Factoring Convention.

125. The view was expressed that, if such a rule were adopted, notification relating to future receivables arising from contracts concluded after notification would not constitute part of the notification, and, as a result, the debtor would not be under a duty to pay the assignee in respect of such receivables. It was pointed out that such an approach would be particularly undesirable since it could result in curtailing a number of important receivables financing practices, and, for that reason, the Working Group chose not to incorporate such a limitation.

Paragraph (4)

126. It was recalled that paragraph (4) was modelled on articles 2(a) and 5 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication, which established the functional equivalent of “writing” in an electronic environment. The Working Group found paragraph (4) to be generally acceptable.

Paragraph (5)

127. With respect to the opening words of paragraph (5) (“Irrespective of whether the assignment is in writing or not”), it was noted that the draft provision had been formulated on the assumption that the draft uniform rules would not impose any form requirement on assignments. In view of the deliberations of the Working Group regarding the issue of form of assignment (see paragraphs 75-79, above), it was noted that paragraph (5) might need to be redrafted to reflect the variants to be prepared on that issue.

128. As regards the substantive rule contained in paragraph (5), there was general agreement that the main purpose of the paragraph was to avoid burdening parties with a duty to notify the entire contract of assignment. The minimum acceptable content of “notification in writing”, as stated in paragraph (2), was a written statement as to the existence of the assignment, which should clearly identify the assigned receivables and the person to whom the debtor should pay. As a matter of drafting, it was generally felt that the reference to the minimum conditions established in paragraph (2) should be made more explicit.

Paragraph (6)

129. Various views were expressed in favour of total or partial deletion of paragraph (6). Under one view, para-
graph (6) merely stated the obvious and, for that reason, should be deleted. Another view was that paragraph (6) should be deleted in line with a suggestion that had been made not to include in the draft uniform rules provisions on private international law issues (see paragraphs 185-187, below). Yet another view was that the reference to “other applicable law” at the end of paragraph (6) might lend itself to misinterpretation in that it might be confused with a reference to the rules of private international law. In line with that view, it was suggested that the words “or to other applicable law” should be deleted from paragraph (6).

130. It was widely felt, however, that a provision along the lines of paragraph (6) would be needed, since the discharging effect of payment should be recognized by the draft uniform rules. As to the exact way in which that issue should be addressed, it was noted that paragraph (1), which dealt with the option given to the debtor to pay the assignor, expressly mentioned that discharge would result from payment to the assignor. Paragraph (2) did not mention such a discharge in the case where payment was made to the assignee after the debtor had received notification of the assignment. It was suggested that a reference to that effect might be inserted in paragraph (2).

131. The view was expressed that, although the above-suggested references to discharge of the debtor in paragraphs (1) and (2) might be helpful, they might not sufficiently clarify the issue of discharge under the draft uniform rules. For example, in a situation where the debtor knew of the assignment although it had not received notification and chose to pay the assignee, a situation discussed in the context of paragraph (1), the question of discharge would remain unsettled. Furthermore, it was stated that a general reference to the possibility of obtaining discharge on legal grounds outside the draft uniform rules was essential to avoid creating the risk that the discharge mechanisms established by the draft uniform rules might be misinterpreted as being exclusive. It was noted that the words “Irrespective of any other ground on which payment by the debtor to the factor discharges the debtor from liability” had been included in article 8(2) of the Factoring Convention for that reason. A suggestion was made that wording along the same lines might be considered for insertion in the draft uniform rules. After discussion, the Working Group agreed that the revised text to be prepared should deal with the discharging effects of payment by the debtor to the assignee under the draft uniform rules, without excluding other grounds on which the debtor paying the assignee might be discharged.

2. Defences of the debtor and setoff

132. The Working Group considered the question of defences of the debtor, based on a draft article, which read as follows:

“Draft article 10. Defences of the debtor

“(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.

“(2) Notwithstanding paragraph (1), defences that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.

“(3) The debtor may assert against the assignee any right of setoff in respect of claims existing against the assignor in whose favour the receivable arose and available to the debtor at the time notification of assignment conforming to article 9 was given to the debtor.”

Paragraph (1)

133. Broad support was expressed in favour of paragraph (1), which reflected a principle considered essential for the debtor’s protection in the context of receivables financing, namely, the principle that the debtor’s legal position should not be negatively affected as a result of the assignment.

Paragraph (2)

134. Concerns similar to those raised in the context of the Working Group’s discussion of paragraph 2 of draft article 4 (no-assignment clauses) were raised with regard to paragraph (2) of this article (see paragraphs 66-68, above). In addition, the view was expressed that paragraph (2), as presently drafted, would not protect the assignee from defences raised by the debtor on the basis of tortious breach of contract. It was suggested that the debtor should have against the assignee defences based on tortious breach of the original contract by the assignor, if domestic law so provided. The view was expressed that that problem would be resolved if the text to be prepared were to include a provision invalidating no-assignment clauses, though the Working Group, it was recalled, had not generally rallied around the inclusion of such a provision at an earlier stage of the discussion (see paragraphs 67-68, above). The Working Group agreed that paragraph (2) should be revisited at a later stage in the light of a revised draft provision on no-assignment clauses.

Paragraph (3)

135. While paragraph (3) was found to be acceptable in principle, a number of questions were raised. One question was whether it was necessary to limit the right of setoff of the debtor against the assignee to those rights existing at the time of notification. In response, it was stated that this approach was necessary in order to protect the assignee from dealings between the assignor and the debtor of which the assignee had no knowledge. It was added that that result was particularly desirable from the standpoint of practices in which a multiplicity of lenders financed receivables arising from the same contract or in which one lender financed a multiplicity of contracts between certain parties. Another question was whether the debtor receiving notification should be obliged to make its defences known to the assignee. Yet another question went to the content of a right of setoff, a matter on which legal systems differed widely. In that connec-
tion, it was observed that setoff might be left to national law, in view of its complexity and the fact that it was clear in private international that the law applicable to setoff was the law governing the receivables to which the assignment related.

3. Waiver of defences

136. The Working Group considered the question of waiver by the debtor of its defences relating to the original contract between the assignor and the debtor on the basis of a draft article, which read as follows:

"Draft article 11. Waiver of defences

"A waiver by the debtor of the defences that the debtor could raise against the assignee under article 10 shall be valid [in respect of defences the availability of which the debtor knew or ought to have known at the time of waiver]."

137. The Working Group noted that waivers by debtors of defences relating to the original contract constituted an important potential source of greater certainty for creditors in the context of receivables financing. The Working Group then went on to consider several aspects of the above draft provision.

138. One matter considered was whether the provision should specify the point of time at which such a waiver would be made. The suggestion in this regard was to refer to waivers taking place at the time of the conclusion of the original contract between the debtor and the assignor. It was reported that that was typically the point of time at which a waiver was made by the debtor, and that such timing was instrumental in determining the credit terms that the assignee could make available to the assignor, which in turn could affect the credit terms offered to the debtor. It was noted, however, that there were cases in practice, not necessarily infrequent, in which a waiver would be made, or an earlier waiver modified, subsequent to the conclusion of the original contract between the debtor and the assignor. There was no reason, it was agreed, to preclude such practices.

139. A suggestion was made to include in the draft provision reference to the notion of "acceptance" of the assignment by the debtor. It was suggested that such a step, which might be introduced as an option rather than as a requirement, could be appropriate for the case of a single receivable, though it was unlikely to be feasible in the case of a bulk assignment involving a multiplicity of debtors. The rationale behind such an acceptance was to provide a technique for heightening for the assignee the degree of certainty surrounding an assignment of receivables, thereby increasing the utility of assignment of receivables as a financing tool.

140. It was reported that there were divergent views in practice as to the effect of such an acceptance. One was that the acceptance involved the effectiveness of the waiver itself, while another view was that the acceptance was merely an acknowledgment of the waiver. The concern was also expressed that including a reference to acceptance by the debtor could potentially compromise the utility of a provision recognizing the effectiveness of waivers of defences.

141. A similar concern was expressed with respect to the bracketed language at the end of the draft provision, limiting the waiver to defences that the debtor knew or ought to have known about at the time of the waiver. It was felt that such a reference would inject an undesirable degree of uncertainty and subjectivity and would perhaps place the assignee into the undesirable position of having to investigate the question of the knowledge possessed by the debtor, which would have an adverse impact on the cost of credit.

142. In the discussion, the question was raised whether a waiver of defences was "final" or, in other words, "irrevocable". In response, the Working Group expressed its understanding that, in order to have commercial utility and to provide legal certainty, a waiver should be deemed final or irrevocable. It was pointed out that such an understanding was necessitated by the fact that credit extended on the basis of an assignment of receivables often relied on a waiver of defences. The view was expressed that the attribute of irrevocability could usefully be clarified in the text.

143. From a drafting standpoint, a proposal was made to add a reference to the waiver as being "explicit". Another proposal was to refer to waivers as being "admissible", rather than using the word "valid", so as to avoid inadvertently giving the impression that the provision was intended to deal with the question of validity of a waiver of defences.

144. The attention of the Working Group was drawn to the fact that article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes exempted from the protection afforded to the protected holder instances such as those involving fraud and duress. It was suggested that the present text should not afford the assignee greater protection in such cases than that afforded to the protected holder by the above Convention. Support was expressed for such an understanding of the provision, which would exclude from the debtor’s waiver of defences those of the type related to fraud or duress. Reference was made in this connection to the understanding expressed above that the text was not intended to override other applicable law dealing with questions of validity of a waiver of defences.

4. Recovery of advances

145. The Working Group engaged in a discussion of recovery of advances paid by the debtor to the assignee on the basis of a draft article, which read as follows:

"Draft article 12. Recovery of advances

"Without prejudice to the debtor’s rights under article 10, non-performance or defective or late performance of the original contract by the assignor shall not by itself entitle the debtor to recover a sum paid by the
debtor to the assignee, provided that the debtor has a right to recover that sum from the assignor."

146. The Working Group lent its support to the approach embodied in the above provision, according to which the debtor should not be able to recover advances paid to the assignee prior to performance by the assignor of the original contract merely because of failure in performance by the assignor. It was noted that the draft provision did not include exceptions to the rule of the type included in the comparable provision of the Factoring Convention (article 10). Those exceptions included the case in which the assignee had not paid or loaned money to the assignor as required in the financing contract, and the case in which the assignee was aware of the assignor's failure in performance of the original contract. It was understood that exceptions of that type were peculiar to the specific case of factoring, in which it was typical for a guarantee of performance to be given by the factor, and that reflecting them in the general text being prepared would create obstacles to a variety of financing structures used in practice.

147. It was also noted that the general approach in the current text, which was acceptable to the Working Group, was that the debtor, after the assignment, would still be left with its remedies against the assignor, and that it was not necessary to add to those remedies a remedy against the assignee.

148. The Working Group then considered the proviso at the end of the draft provision, which preserved a remedy for the debtor to obtain from the assignee return of advances paid in the face of failure in contract performance by the assignor where no remedy would be available against the assignor. The Working Group felt that it would be preferable to affirm separately and positively a rule to the effect that the debtor was entitled to obtain from the assignor the amount of advances paid to the assignee.

K. Effects of assignment towards third parties

149. The Working Group engaged in a discussion of the effects of assignment on third parties, based on a draft article, which read as follows:

"Draft article 14. Priorities"

"(1) Variant A

The first assignee has priority over subsequent assignees, the assignor's creditors and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant B

The first assignee to notify the debtor in accordance with article 9 has priority over subsequent assignees, over earlier assignees who failed to notify or notified later, over the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant C

The first assignee to register a summary statement at a public register located in the place of business of the assignor, which reasonably identifies the assignor, the assignee and the assigned receivables, has priority over subsequent assignees and earlier assignees who failed to register or registered later, the assignor's creditors [and, subject to the applicable insolvency law, over the trustee in the insolvency of the assignor] with regard to the assigned receivables.

Variant D

The first assignee, or the first assignee to notify the assignment to the debtor, or the first to register a summary statement thereof in a public registry will have priority over subsequent assignees and the assignor's creditors, depending on the law of the State where the assignor has its place of business.

"(2) The rule of paragraph (1) does not apply in the following cases:

Paragraph (1)

General remarks

150. It was noted, at the outset, that assignment as a means of transferring property in receivables might have effects towards third parties, such as several conflicting assignees, the assignor's creditors and the trustee in the insolvency of the assignor. A conflict of priorities might arise in two main situations. One was the situation of a conflict between several assignees, due to multiple assignments of the same receivables because of fraud or an unconscionable act of the assignor. The other was the situation of a conflict between the assignee and the assignor's creditors, including the trustee in the insolvency of the assignor. While it was generally agreed that the possibility of receivables being fraudulently assigned to more than one assignee needed to be addressed in the draft uniform rules, the discussion focused on the situation where the assignor became insolvent, a situation raising particularly serious concerns in assignment practice.

151. The view was expressed that, when dealing with issues of priorities, whether by way of a registration mechanism or by relying on a system of notification, the draft uniform rules should seek to establish that the assignee would be accorded the status of a secured creditor for the purposes of the insolvency proceedings. While it was felt that such a result might be desirable for fostering financing through assignment of receivables, it was suggested that it might not be feasible. On the one hand, the disparities in the status of secured creditors under existing rules of domestic law and the existence of administrative law and public policy considerations would make it impossible for the draft uniform rules to refer merely to the status of secured creditors under domestic law. On the other hand, any attempt to create a uniform status of secured creditors in the draft uniform rules would be faced with the same administrative law and public policy considerations and might greatly jeopardize the acceptability of the draft uniform rules. After deliberation, it was
agreed that the status of an assignee in the context of insolvency proceedings might need to be further discussed at a future session, particularly in view of the work undertaken by the Working Group on Insolvency Law.

152. It was noted that legal systems differed as to whether the effects of assignment towards third parties arose from the assignment itself or depended upon an additional act, such as notification of the debtor or registration of the assignment, which was reflected in the variants presented. Variant A provided a simple rule, which, however, had the disadvantage that it afforded very little or no protection to third parties; variant B raised difficulties since third parties would need to identify the debtors in order to obtain information about possible assignments, which could involve considerable difficulty in particular in the context of receivables financing; variant C was based on an adequate publicity system, which allowed third parties a considerable degree of certainty and predictability as to whether they would be able to rely on receivables in deciding to extend credit while it raised the question of feasibility of establishing an international registration system; and variant D in effect provided a private international law rule based either on the place of business of the assignor or on the place of business of the debtor.

153. The Working Group engaged in a general exchange of views. It was generally agreed that an adequate publicity system was essential for an efficient legal framework for receivables financing. It was stated that uncertainty with regard to the issue of priorities would increase the risk of the assignee not being able to obtain payment, which in turn would have an impact on the cost of credit. As a result, the assignee would have to pass that cost to the assignor and the assignor to the debtor. It was also stated that an adequate publicity system was essential to ensure access of small and medium-sized businesses to international financial markets.

Variants A to D

154. As to what might constitute an adequate publicity system, the Working Group based its deliberations on the text of the variants. Some support was expressed in favour of variant A; it was stated that a rule giving priority to the first assignee (in actual time) had the advantage of simplicity. Should such an approach be followed, third parties would tend to be protected by the general knowledge that they possessed about receivables financing contracts in the relevant market. Some support was also expressed in favour of variant B. It was stated that various jurisdictions followed a “first to notify the debtor” rule. The view was expressed, however, that a drawback of such an approach was that it, in effect, utilized the debtor as a registry of notifications. While no support was expressed in favour of variant D, it was generally felt that it should not be deleted at this stage and that the merits of an approach based on private international law mechanisms might need to be reviewed at a later stage.

155. Support was expressed in favour of a registration mechanism, such as envisaged in variant C. It was stated that a rule based on registration would have the advantage of providing a system of notice to third parties, with the effect that the first assignee to register would have priority. The assignee would prevail over the assignor’s creditors if the registration was effected before attachment, and, subject to the applicable insolvency law, over the insolvency trustee if registration was effected before the opening or effect of the insolvency proceedings.

156. However, a number of concerns were expressed with respect to the adequacy of a registration system. One concern was that in some countries the concept of registration of assignments might not be acceptable. In response, it was stated that, while registration might be objected to on theoretical grounds, it would have to be considered in view of the potential it presented for increasing the amount of credit available based on receivables and the number of parties having access to such credit. Another concern was that the costs involved in a registration system might constitute an obstacle to its use by smaller businesses. In response, it was pointed out that the use of electronic technology in recent years had considerably reduced the costs of using registration systems. It was also pointed out that, under the current draft provision, only a summary statement had to be registered, thereby avoiding costs that might result, for example, from an obligation to register the details of each assignment. Yet another concern was that, in a number of practical situations, parties might not be willing to make use of a registration system. Such situations involved, for example, certain short-term transactions concluded for refinancing purposes, where the assignment was concluded for only a few hours or a few days. Another example was the situation where parties might not wish to register with a view to preserving the confidentiality of the assignment. With respect to the latter example, support was expressed for a suggestion that the draft uniform rules should limit the right to access the registered information to interested parties.

157. In view of the possibility that parties might choose not to use a register, it was felt that, should a registration mechanism be established by the draft uniform rules, a specific provision should clarify the status of assignments that had not been registered. In particular, the draft uniform rules would need to make it clear whether registration was a condition of validity of the assignment or merely a way of evidencing the assignment and of settling the issues of priorities. In that respect, support was expressed for a suggestion that the draft uniform rules, while providing the option of a registration should not make the validity of the assignment conditional upon registration. According to that suggestion, an assignee that registered a summary statement would have priority over an assignee that failed to register or registered later. As a default rule, in the absence of a registration, the first assignee would have priority.

158. With regard to the question whether a publicity system should be based on an international registry or whether it should rely on existing national registries, preference was expressed in favour of an international registry. It was noted that an international registry could facilitate both registration and access to registered information, while a system based on national registers linked
with an international communications system would not make registration easier, though it could facilitate access to registered information.

159. The view was expressed that the Working Group did not have sufficient information on the legal issues and the technical details (e.g. cost and manner of operation) involved in the establishment of a world registry. In that regard, it was noted that, while registration had been briefly dealt with in document A/CN.9/397 (paras. 43-51), the Secretariat was preparing a study on registration, which was relevant to the work of both the Working Groups on International Contract Practices and on Electronic Data Interchange. It was agreed that the discussion of registration issues would need to be resumed at a later stage, in view of the contents of that study. With regard to a world registry, a note of caution was struck that, while it could be acceptable if the instrument to be prepared were to cover assignments of international receivables, an attempt to cover international assignments of domestic receivables could create problems. It was also observed that the legal framework for a world registry would in all likelihood need to be established by way of a convention rather than a model law.

160. The Working Group was informed of work undertaken by UNIDROIT for the preparation of a draft convention on international interests in mobile equipment. It was observed that the draft convention would create a new international interest in mobile equipment, the effectiveness of which against third parties was intended to be based on international registration. It was also stated that a study group had been set up to consider issues related to that kind of registration. While coordination of work with UNIDROIT was said to be desirable, the view was widely shared that registration of interests in mobile equipment of the type envisaged in the UNIDROIT project presented different legal and practical issues from registration of assignments of receivables.

Paragraph (2)

161. It was noted that paragraph (2) was intended to allow for exclusion from a priority rule of certain special cases in which it might not be appropriate to afford preference to an assignee on the basis of some type of priority in time. The example was given of the seller who retained title to the goods sold until full payment of their price and who, at the same time, was the assignee of the future proceeds that might arise from the further sale of the goods by the buyer in the course of its business.

162. Differing views were expressed as to whether paragraph (2) should be retained. In support of retention of the paragraph, it was stated that the concept of priority was not useful in all cases and some exceptions would need to be listed (e.g. the conflict between a supplier of materials and a bank providing credit). As a drafting matter, it was suggested that, if paragraph (2) were retained, it should be made clear that the exclusions referred only to the rule in paragraph (1) and would not result in excluding in those cases the application of domestic law, even if the domestic law contained the same priority rule as in paragraph (1). In support of deletion of paragraph (2), it was stated that such a provision ran the risk of compromising the certainty of a priority rule in paragraph (1) to the extent that cases would be left to the applicable domestic law, which could differ widely from country to country. In addition, it was pointed out that an approach based on a list of exclusions from the priority rule in paragraph (1) would result in decreased predictability as to which assignee would be afforded priority, which would result in an increase in the cost of credit to the assignor and ultimately to the debtor. Moreover, such exclusions were said to be inappropriate since they might have a negative impact on practices in which credit might be extended to a seller in reliance on the receivables. It was suggested that, instead of listing excluded cases such as those in which a conflict of priority arose between a supplier of materials and a bank, a priority rule should be devised to provide that, for example, the supplier should inform the bank in order to enable it to avoid providing credit to the seller on the basis of the receivables assigned to the supplier.

164. Moreover, it was observed that a provision along the lines of paragraph (2) would raise the difficulty of having to classify claims in terms of special categories other than priorities (e.g. "privileges"), a task which should be left to the applicable domestic law. In the same vein, the suggestion was made that conflicts of priority between several assignees should be distinguished from conflicts between the assignee and the assignor's creditors, which could include Government revenue claims and employee wage claims. In that connection, it was noted that it should be made clear that the draft uniform rules were not intended to enter into the field of classification of claims or to cover revenue or wage claims.

L. Subsequent assignments

165. The Working Group engaged in a discussion of subsequent assignments, namely assignments by the initial or any subsequent assignee and several assignments of the same receivables by the assignor based on a draft article, which read as follows:

"Draft article 15. Subsequent assignments"

“(1) These rules apply to any assignment of the same receivables by the assignor to several assignees or by the first or any other assignee to subsequent assignees, provided that the [first] [such] assignment is governed by these rules.

“(2) In case of subsequent assignments by the assignor, the debtor is discharged from liability by payment to the first assignee to notify under article 9 and has against the assignee the defences provided for under article 10.

“(3) In case of subsequent assignments by the first or any subsequent assignee, the provisions of articles 9 to 12 apply as if the subsequent assignee were the first assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee.

“(4) Any subsequent assignment by the first assignee or by any subsequent assignee shall be effective not-
withstanding any agreement between the first assignor and the first assignee or between any of the subsequent assignees prohibiting or restricting such assignment.

“(5) Subject to the provisions of article 9, the invalidity of an intermediate assignment renders the final assignment invalid.”

Paragraph (1)

166. It was generally felt that paragraph (1) reflected the sound principle of perpetuatio juris, namely that a succession of assignments should be covered by the same rules. However, it was noted that paragraph (1) referred to different cases of subsequent assignments, including those made by the initial or any subsequent assignee for refinancing purposes (“successive assignments”), as well as those made by the assignor to several assignees because of fraud or an unconscionable act (“dual assignments”).

167. The view was widely shared that successive assignments should be the subject of paragraph (1), and that the question of dual assignments should be dealt with separately. In addition, the view was expressed that fraudulent or unconscionable assignments by the assignor to two or more assignees essentially raised an issue of priority or of validity since after the initial assignment the assignor had no longer the right to assign the receivables.

168. The question was raised whether assignments of distinct parts of a pool of receivables or of undivided interests in pools of receivables by the same assignor to several assignees should be covered (e.g. assignments in which the claim for the capital of a loan was assigned to one assignee while the claim for the interest was assigned to another). It was noted that the definition of “receivables” could be revised so as to include parts of receivables. However, in view of the highly specialized context of refinancing transactions in which such assignments took place, it was suggested that further consideration would have to be given as to whether the assignment of partial or undivided interests in receivables should be addressed in the draft uniform rules (see paragraphs 180-184, below).

Paragraph (2)

169. It was noted that paragraph (2) addressed the issue of the debtor’s protection in case of multiple notifications of dual assignments by several assignees. The Working Group found paragraph (2) to be acceptable in that the debtor could not be required to determine which of several assignees had priority and should have a simple and clear indication of whom to pay to discharge its obligation. As a matter of drafting, it was suggested that paragraph (2) should be aligned or consolidated with the revised paragraph (2) of draft article 9 on the debtor’s duty to pay, so as to avoid any overlap.

Paragraph (3)

170. It was noted that paragraph (3) dealt with the debtor’s protection in case of successive assignments by the initial or any subsequent assignee by adopting the principle that the debtor’s legal position should neither be worsened nor improved as a result of a subsequent assignment.
assigned could not be assigned validly a second time. It was recalled that, in that jurisdiction, factoring contracts routinely contained a clause whereby the factor undertook not to reassign the receivables; in order to avoid, in the context of international factoring, that the export factor would have to assign the receivables a second time to the import factor, the assignor assigned the receivables directly to the import factor in the State in which the debtor had its place of business.

176. After deliberation, the prevailing view was that paragraph (4), as presently formulated, was acceptable. It was pointed out that there was no reason to follow a reservation approach since, while upholding no-assignment clauses contained in the original contract between the assignor and the debtor was considered in some countries as a matter of public policy, this was not the case for no-assignment clauses agreed upon in the context of refinancing transactions, in which subsequent assignments were normal practice. In addition, it was stated that it was not necessary to introduce a provision along the lines of article 12 of the Factoring Convention, since assignments under the draft uniform rules differed from the factoring contract, which was a contract based on the close relationship between the assignor and the factor, and in the context of which subsequent assignments were normally not effected for refinancing purposes.

177. The view was expressed that paragraph (4) should include a rule on the consequences of the breach of no-assignment clauses along the lines of paragraph (2) of draft article 4, which would mean in effect that a possible liability of an assignee assigning the receivables further, despite the fact that it had agreed with its immediately preceding assignor not to do so, would not be affected by the rule in paragraph (4).

178. After deliberation, the Working Group found the substance of paragraph (4) to be acceptable along its present lines.

Paragraph (5)

179. The Working Group agreed with the principle reflected in paragraph (5) that invalidity of an intermediate assignment rendered the following assignments invalid. As a matter of drafting, it was suggested that the opening words of paragraph (5) might be revised so as to avoid giving the impression that notification of the debtor cured the invalidity of a subsequent assignment. The suggestion was also made that paragraph (5) should be revised so as to reflect the idea that the invalidity of an intermediate assignment could invalidate all following assignments and not only the "final" assignment, as presently formulated.

M. Assignments of partial or undivided interests in receivables

180. In the discussion of draft article 15 dealing with subsequent assignments, the question arose whether assignments of distinct parts of receivables or of undivided interests in pools of receivables should be covered by the draft uniform rules (see paragraph 168, above).

181. At the outset, it was observed that such assignments often formed part of highly complex financing transactions and raised a number of difficult issues that needed to be examined carefully in order not to upset existing practices, which varied widely. One example given referred to loan participations, in which undivided interests, usually in large loans, were sold to different financing institutions for the purpose of spreading the risk involved. Another example cited was securitization, which also involved the assignment of undivided interests in receivables, although for a different purpose, namely, to decrease the cost of credit by converting the receivables into securities and making them available to the investment market.

182. It was widely felt that the above types of assignments merited further consideration with a view to determining whether or how they should be addressed in the draft uniform rules.

183. As to the particular questions that may need to be considered, a number of suggestions were made, including: the definition of "parts" of receivables, or the minimum units, that could be assigned; the debtor's protection, in particular the question whether the debtor's consent was necessary for such an assignment to be effective and whether the debtor should be able to discharge its debt by depositing the amount owed in a bank account or by mailing it to a post box office; the assignee's protection from creditors of the assignor; the possible exclusion of receivables in the form of negotiable instruments; and the extent to which it would suffice, in order to cover such assignments, to revise the definition of "receivable" so as to include partial or undivided interests in receivables, coupled with the application to such cases of the draft uniform rules being prepared.

184. Further questions were raised with regard to transactions such as loan participations and securitization, including whether both types of transactions could be addressed by the same rules and whether a criterion could be found to distinguish the undivided investment interest in a loan participation, that could be covered, from investment securities that were subject to a different regulatory regime and would presumably not be covered.

N. Private international law issues

1. General remarks

185. A question was raised as to whether the Working Group had the mandate to discuss issues of private international law in the context of the preparation of the draft uniform rules. In response, it was recalled that the Commission, at its twenty-eighth session, had taken the decision to assign the report prepared by the Secretariat and the draft uniform rules contained therein to the Working Group with a view to preparing a uniform law on assignment in receivables financing. As to the private international law aspects of assignment, it had been agreed at that session that the difficulty in addressing them should not result in their exclusion from future work of the Commission on the topic, but should rather lead to closer
cooperation with the Hague Conference on Private International Law, for example, by the holding of joint meetings of experts on issues of common interest related to assignment of receivables.  

186. Views were exchanged as to whether it was appropriate to consider inclusion of provisions on issues of private international law in the body of the draft uniform rules. It was stated that, under an approach taken in some countries, it might be regarded as inappropriate for a text of substantive law to include rules on private international law issues governing its own applicability. It was stated in response that provisions on conflicts of laws had been included in previous UNCITRAL texts, without negatively affecting their applicability.

187. Another preliminary question was whether it was appropriate to discuss private international law issues in the context of the preparation of the draft uniform rules before agreement had been reached as to the substantive rules. It was generally agreed that, at this stage, the Working Group could only have a very tentative discussion on the basis of the draft provisions embodied in the draft uniform rules with respect to private international law, namely draft article 8 (law applicable to the relationship between assignor and assignee), draft article 13 (law applicable to the relationship between assignor and debtor) and variant D of paragraph (1) of draft article 14 (priorities). It was felt, however, that, although private international law issues would need to be further discussed as the work on the substantive provisions of the draft uniform rules would progress, a preliminary exchange of views on those issues might be useful at this stage.

2. Law applicable to the relationship between assignor and assignee

188. The Working Group engaged in a discussion of possible rules on the law applicable to the relationship between assignor and assignee, based on a draft article, which read as follows:

"Draft article 8. Law applicable to the relationship between assignor and assignee

"(1) [With the exception of matters which are expressly settled in these rules,] the rights and obligations of the assignor and the assignee [among the question of the point of time at which the assignee becomes the rightful creditor of the receivables,] are governed by the law the choice of which is:

(a) Stipulated in the assignment; or
(b) Agreed elsewhere by the assignor and the assignee.

"(2)(a) In the absence of a choice by the parties, the rights and obligations of the assignor and the assignee[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables], and with the exception of matters which are expressly settled in these rules, are governed by the law of the State in which the assignor has its place of business.

(b) For the purposes of subparagraph (a), in case the assignor has more than one place of business, the place of business is that which has the closest relationship to the assignment, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the assignment."

Paragraph (1)

"[With the exception of matters which are expressly settled in these rules,]"

189. The view was expressed that the opening words of paragraph (1) created the impression that the draft uniform rules established a distinction between the general application of domestic law, which would be determined by a private international law rule, and certain provisions of the draft uniform rules, which would apply in abstracto with no regard to domestic law. It was stated that the draft uniform rules would either be in the form of a model law, in which case they would be enacted as domestic law and carry out their international effects through a private international law rule, or as a convention, which would determine its own scope of application. In response, it was stated that, while the opening words of paragraph (1) might need to be redrafted to avoid misinterpretation, they were intended mainly as a reference to draft articles 6 (warranties) and 7 (breach of the financing contract), which were the only provisions in the draft uniform rules dealing with issues related to the contract of assignment. As a matter of drafting, it was suggested that the opening words of paragraph (1) might be replaced by a reference to draft articles 6 and 7. In that context, it was also recalled that support had been expressed for the deletion of paragraph (1)(b) of draft article 1 so as to reduce uncertainty inherent in reliance on the rules of private international law regarding assignment.

190. A concern was expressed about a possible side-effect of the reference to "matters expressly settled in these rules". It was stated that relying on private international law to solve all matters not expressly settled in the draft uniform rules might detract from the main goal of the draft uniform rules, which was to provide uniform substantive solutions to the issues raised by receivables financing. While certain questions would undoubtedly have to be left to domestic law, with the inherent uncertainty and diversity as to the solutions to be provided, other questions, though not expressly settled by the draft uniform rules, might be settled better by reference to the principles on which the draft uniform rules were based or to trade custom or to other source of uniform law. A suggestion was made that the word "expressly" should be deleted. With reference to the principles on which the draft uniform rules were based, another suggestion was that a provision on interpretation along the lines of article 7 of the United Nations Sales Convention might be included. The view was expressed, however, that such a
provision could only operate in the context of an international convention. Other examples included texts of international origin that allowed jurisdictions to apply general principles, trade custom, "lex mercatoria" or other standards developed internationally.

"the rights and obligations of the assignor and the assignee"

191. The view was expressed that the reference to "rights and obligations" of the parties to the assignment might overly restrict the scope of the draft provision. For example, it was stated that the time of transfer of the assigned receivables, while not falling strictly under the category of "rights and obligations" of the parties, was intended to be subject to the law applicable to that relationship. A suggestion was that the matter might be addressed by appropriate explanations in a commentary on the draft uniform rules, that might be possibly prepared at a later stage, with a view to broadening the scope of the notion of "rights and obligations" for the purposes of the draft uniform rules. Another suggestion was to replace the reference to the notion of "rights and obligations of the assignor and the assignee" by a reference to "the assignment". That suggestion was objected to on the grounds that such a reference would open too widely the scope of the draft provision, in that it would also cover the effects of the assignment in the context of the relationship between the assignee and the debtor, which were currently covered by draft article 13. After discussion, it was agreed that the provision would need to be redrafted to make it clear that it covered the relationship between the assignor and the assignee, including such issues as validity of the assignment and transfer of the assigned receivables as between the assignor and the assignee.

192. Another concern was that the reference simply to the "rights and obligations" of the parties left it unclear whether the rights and obligations to be taken into consideration were only those stemming from the assignment contract or also those originating from the underlying financing transaction. The view was expressed that this might not be an appropriate distinction since it might be regarded that the rights and obligations of the assignor and the assignee were not separable but themselves arose from the underlying financing transaction. However, it was observed that assignment clauses created distinct rights and obligations of the parties (e.g. warranties), apart from the rights and obligations stemming from the underlying transaction. After discussion, it was generally agreed that it should be made clear that the scope of the draft provision was limited to the relationship between the assignor and the assignee arising from the assignment.

"[, including the question of the point of time at which the assignee becomes the rightful creditor of the receivables,]"

193. There was general agreement that matters regarding time and validity of the transfer of the assigned receivable should not be affected by agreement between the parties. It was also agreed that the provision might need to indicate more clearly that it was not intended to over-ride any provision of insolvency law.

"are governed by the law the choice of which is:
(a) Stipulated in the assignment; or
(b) Agreed elsewhere by the assignor and the assignee."

194. As to the substance of the private international law rule, there was general agreement on the need to recognize party autonomy. As a matter of drafting, the view was expressed that the reference to "the law the choice of which is agreed elsewhere" might need to be redrafted to indicate more clearly that it intended to cover any law chosen by the parties outside the contract of assignment itself. The provision should not be misinterpreted as interfering with any procedural law that might apply, in the context of certain domestic laws, as to where or when such a contract might be concluded by the parties. As a drafting suggestion, it was stated that subparagraphs (a) and (b) should be merged to read along the following lines: "stipulated in, or for the purposes of, the assignment".

Paragraph (2)

195. Various views were expressed as to the private international law rule that should apply in the absence of a choice by the parties. One view was that a rule based on the contract of assignment being governed by the law of the place of business of the assignor had the advantage of simplicity and predictability. However, such a rule was objected to on the grounds that it was inappropriate to provide for a fixed rule to apply to the wide variety of practical situations, in the various types of financing transactions to be covered by the draft uniform rules. For example, while the law of the place of business of the assignor might be appropriate in the context of a sale of receivables, the law of the place of business of the assignee might be preferable in case of a loan, where the characteristic performance would be performed by the assignee. In the discussion, the suggestion was made that paragraph (2) should apply also in cases in which the parties' choice of law was invalid.

196. Another view was that a rule based on the notion of "closest relationship" was preferable, along the lines adopted in the Rome Convention. Inherently more flexible, such an approach could result in the application of the law of the assignor's place of business (e.g. in an assignment by way of sale), or the law of the assignee's place of business (e.g. in recourse factoring in which the factor might perform bookkeeping and collection functions). That approach was objected to on the grounds that such a rule would have the disadvantage of reduced predictability. While support was expressed in favour of introducing a degree of flexibility in the choice-of-law rule, to reflect the variety of the situations encountered in practice, it was generally felt that the issue needed to be considered further at a future session of the Working Group.

3. Law applicable to the relationship between assignee and debtor

197. The Working Group then turned to a discussion of a possible rule on the law applicable to the relationship
between assignee and debtor based on a draft article, which read as follows:

"Draft article 13. Law applicable to the relationship between the assignee and the debtor

"With the exception of matters which are expressly settled in these rules, any matter arising between the assignee and the debtor shall be governed by the law [governing the receivable to which the assignment relates.] [of the State where the debtor has its place of business. In case the debtor has more than one place of business, the place of business is that which has the closest relationship to the transfer of receivables, having regard to the circumstances known to or contemplated by the assignor and the assignee at any time before or at the conclusion of the contract."

198. It was noted that the above draft provision presented a choice for consideration by the Working Group between two possibilities, the law governing the receivable to which the assignment related (the law of the original contract) and the law where the debtor had its place of business. The tendency of the Working Group, at least at the present stage of its deliberations, was to favour the former approach, namely a rule referring to the law of the original contract. Views expressed in support of such an approach included that it would be more in line with the general approach of the draft uniform rules as they had been considered thus far and that it would provide greater protection to the debtor. The latter advantage was linked to the fact that the debtor would have chosen or at least acquiesced in the choice of the law governing the original contract. It was also suggested that a presumed advantage of the second approach, greater predictability due to being based on the place of business of the debtor, might be less than would appear since the debtor’s place of business might not be known at the time of assignment or the debtor might relocate to another jurisdiction after the conclusion of the assignment. At the same time, the view was expressed that it would be premature at this stage to make a final decision as to which of the two approaches to follow.

199. As to the scope of the provision, the questions raised included whether the reference to “any matter arising between the assignee and the debtor” might be undesirably broad. A related matter was whether the question of the assignability of a receivable would be categorized as an issue between the debtor and the assignee, or one that perhaps might be considered as an issue of validity to be dealt with under the draft provision dealing with the law applicable to the assignor-assignee relationship. Observations made in regard to that question included that it did not relate to the question of admissibility of no-assignment clauses, and that in some countries the question of assignability may be dealt with as a question of the validity of the original contract. A further question raised was whether consideration should be given to including a reference to the contractual freedom for the parties to vary the rule set forth in the draft provision.

200. By way of a drafting suggestion, it was noted that the provision being considered at present, as well as paragraph (2)(b) of the draft article 8 (law applicable to the relationship between assignor and assignee), both identified the decisive place of business in the event that the party concerned in each of those provisions had more than one place of business. It was suggested that those provisions might be consolidated in a single place in the text, perhaps in a provision containing general definitions.

201. Prior to closing for the present stage its discussion of applicable law questions, the Working Group recalled that variant D of paragraph (1) of draft article 14 on priorities contained a reference to the law of the State of the place of business of either of the assignor or of the debtor, the two constituting a choice presented to the Working Group within that variant. While some doubt was expressed as to the utility of variant D, it was agreed to retain it for the time being for possible further consideration at a later stage.

III. FUTURE WORK

202. Having concluded the above deliberations on various possible issues and draft provisions to be included in draft uniform rules on assignment in receivables financing, the Working Group noted a number of comments concerning the work accomplished at the current session and concerning the next steps to be taken. It was observed that the session had provided a productive exchange of views, including on various approaches and formulations that might be reflected in the draft uniform rules with a view to facilitating the development of global financial markets. A number of suggestions were made of issues for particular attention during the upcoming deliberations of the Working Group. Those included: the question of the international assignment of domestic receivables, with a particular view to providing adequate assurance of the protection of the debtor in such contexts (e.g. regarding new risks for the debtor; currency implications); the extent to which emphasis could be placed on finding solutions by way of substantive law, rather than through private international law rules; examination of the feasibility of relying on a registry approach; coverage of “conditional” and “possible” receivables; and compatibility of the draft uniform rules with national laws.

203. In connection with the above issues, reference was made to the relevance and utility of information, in particular regarding the experiences and needs of practitioners and other interested circles, that might be brought to the attention of the Working Group by the Secretariat, as well as by the members of the Working Group themselves as a result of consultations.

204. The Working Group requested the Secretariat to prepare a revised version of the draft uniform rules that had been considered at the present session, taking into account its deliberations and decisions. It was noted that the next session of the Working Group to be devoted to the subject of assignment in receivables financing was scheduled for 8-19 July 1996, those dates being subject to confirmation by the Commission at its twenty-ninth session.
V. POSSIBLE FUTURE WORK

Build-Operate-Transfer projects: note by the Secretariat
(A/CN.9/424) [Original: English]

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INTRODUCTION

1. At its twenty-seventh session in 1994, the Commission, after consideration of a note prepared by the Secretariat (A/CN.9/399), emphasized the relevance of build-operate-transfer projects (BOT) and requested the Secretariat to prepare a note on possible future work on the subject of BOT projects. The Commission discussed the requested note (A/CN.9/414) at its twenty-eighth session in 1995.\(^1\)

2. Wide support was voiced in the Commission for taking up work in the area of BOT. It was pointed out that the BOT project-financing mechanism had raised a considerable amount of interest in many States and that work by the Commission in that area would help such States in tackling the problems that had been identified. It was noted, however, that, since the work to be undertaken by the Commission would be partly influenced by the final content of the Guidelines to be prepared by the United Nations Industrial Development Organization (UNIDO), and taking into account that the practice regarding BOT was still developing, it would be useful to provide the Secretariat with the opportunity to study further the issues proposed for future work. It was also noted that the Commission’s work would be partly influenced by the final content of the Guidelines to be prepared by the United Nations Industrial Development Organization (UNIDO), and taking into account that the practice regarding BOT was still developing, it would be useful to provide the Secretariat with the opportunity to study further the issues proposed for future work. The Commission requested the Secretariat to prepare a report on the issues proposed for future work with a view to facilitating discussion of the matter at the Commission’s twenty-ninth session in 1996.

3. The present report is submitted pursuant to the above-mentioned request.

I. THE BUILD-OPERATE-TRANSFER CONCEPT

4. BOT is essentially a form of project financing whereby a Government awards to a group of investors (hereafter referred to as “project consortium”) a concession for the development, operation, management and commercial exploitation of a particular project. The project consortium, or a company established by the project consortium (hereafter referred to as “concessionaire”), in turn, undertakes to develop the project and operate the concession in accordance with the agreement between the Government and the concessionaire (hereafter referred to as “project agreement”). While the generic term used for this type of project is “build-operate-transfer” (BOT), the following expressions may also be used to describe this form of project financing: “build-own-operate” (BOO), “build-own-operate-transfer” (BOOT), “build-own-lease-transfer” (BOLT) and “build-rent-transfer” (BRT). Despite the varying denomination, all these different arrangements consist of project financing schemes by which a Government grants a concession to private entities undertaking to finance, carry out and manage a particular project. Similar arrangements are sometimes also used between a private licensor and a project developer.

5. Unlike the traditional project financing structure in which the owner (the Government) assumes responsibility for obtaining financing and guaranteeing its repayment, in BOT it is the project consortium that assumes such responsibilities. The loans are made against the project’s anticipated proceeds. This provides many benefits to the host Government. Since direct funds from the public budget are not required, the project will have little impact on public debt. Private sector financing also generally allows for the transfer of the financial, industrial and other risks to the private sector. Furthermore, since the project is built and, during the concession period, operated by the project consortium, the host Government benefits from private sector expertise in operating and managing such projects.

6. Contracts for the construction of infrastructure or other works traditionally provide that the owner takes over the facility upon completion of construction in accordance with the construction contract. The financing is arranged by the owner who pays the contractors either by drawing money from a loan or with its own resources. In such contracts, the contractor’s basic duty is to build and to equip the contracted facility, while the economic

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viability and profitability of the project are the concern of the owner. In a BOT project, however, the project consortium undertakes to complete a construction and to operate the facility for a certain period of time with a view to recouping its costs and gaining profit. Thus, the project consortium has a clear interest in the feasibility and design of the facility. The project consortium also has an interest in ensuring that the legal and commercial conditions for construction and profitable operation of the facility are in place and will remain basically unchanged throughout the period of the concession.

7. Chief among the factors that have led to the interest in BOT projects is the potential for mobilizing private sector resources for infrastructure development without the need for raising public debt. This element of the BOT concept is particularly attractive at a time of worldwide increase in privatization of various utilities and services previously reserved for the public sector, and decreasing availability of public sector funds for infrastructure development. Other advantages include increased private sector involvement in the management of public infrastructure, higher potential for direct foreign investment, and access to technologies and skills not available locally. Also, BOT facilities may serve as a parameter for measuring the performance of similar projects run by the public sector.

8. There are, however, several features of BOT projects that have resulted in difficulties in their conclusion. A BOT project normally involves many contractually interrelated parties. Besides the host Government and the project consortium, other parties usually include lenders, construction companies, equipment suppliers, independent capital investors and the purchasers or end users of the project’s product. Often, the project consortium will itself consist of construction companies, engineering equipment suppliers and other private investors and the project operator. Investors can include institutional investors and multilateral development agencies. In addition to that, complicated financing arrangements are necessary, not only because of the large number of parties involved, but also because, with no sovereign guarantees provided, the project consortium and the lenders have to find the means to cover the attendant risks including by way of insurance and various forms of guarantees. The contractual arrangements and risk allocation schemes in BOT can therefore be quite complex and require lengthy negotiations.

9. The support of the host Government is regarded as an essential factor for the successful realization of a BOT project. The host Government not only has to authorize the project but also will be the ultimate owner of the facility. The Government has to oversee the implementation of the concession and may, sometimes, share some of the debt or participate in the investment. In order to ensure long term private sector participation, the Government has to ensure a legal climate that is conducive to long term private investment. This will range from the establishment of a legal framework for private investments to putting in place the necessary administrative machinery for the timely, fair and objective issuance of any required approvals or licences.

10. As the potential for BOT is more widely understood, interest in the use of the BOT concept of project finance is likely to increase, not only for large infrastructure projects, such as power generation plants and transport (toll roads, bridges and railways), but also for small and medium-sized projects, such as water treatment plants, hotels or medical facilities.

II. WORK OF OTHER ORGANIZATIONS ON BOT

A. United Nations Industrial Development Organization

11. UNIDO has recently prepared a document entitled “Guidelines for the Development, Negotiation and Contracting of Build-Operate-Transfer (BOT) Projects” (hereafter referred to as “UNIDO Guidelines”). The final English text was in printing at the time of the preparation of this note. French and Spanish versions will follow later.

12. The three opening chapters of the UNIDO Guidelines provide a general introduction to BOT projects. Chapter 1 (“Introduction to the BOT concept”) outlines the structure, characteristics and parties of a BOT project and also the financing techniques and legal instruments involved; it also contains a summary of the main potential advantages to the host Government of using the BOT approach for infrastructure development. Chapter 2 (“Phases of a BOT project”) briefly describes the phases of a BOT project from the initial identification and definition of the project, Government preparation for tendering, sponsor’s preparation and submission of a tender, selection of the best tender, project development, construction phase, operation of the project until the transfer of the project to the host Government. The basic economic considerations in BOT projects are set out in chapter 3 (“Economic framework for BOT schemes”). Such considerations include the role of infrastructure in promoting a country’s economic development, the potential benefits of the involvement of the private sector in infrastructure projects and the economic benefits and costs of BOT projects.

13. The next three chapters focus on the responsibilities of the Government for the success of a BOT project. Chapter 4 (“The Government’s role in providing for successful BOT projects”) deals, inter alia, with matters such as the importance of a credible legal, regulatory and administrative framework to expedite the implementation of BOT projects, the role of various forms of governmental incentives and the requirement of an orderly and transparent BOT procurement procedure. Having set out the general responsibilities of the Government, the UNIDO Guidelines go on to examine, in chapter 5 (“Transfer of technology and capability building through BOT projects”), how the host Government should seek to derive benefits from BOT projects for the transfer of technology from the project consortium into the local economy. It also provides examples of contract clauses seeking to ensure the use of domestic goods and services and the protection of improvements and innovations.
made during the concession period. Chapter 6 ("Procurement issues and selection of sponsors") deals in more detail with the objectives of procurement procedures in selecting the developers of a BOT project and presents a brief overview of the legal and regulatory framework thereafter. It also describes competitive tendering proceedings and presents a summary flow chart of tender proceedings.

14. Three chapters are dedicated to financial and economic aspects of BOT projects. The methods for assessing the financial and economic viability of a BOT project are analysed in chapter 7 ("Financial and economic appraisal of BOT projects"). This is followed, in chapter 8 ("Risk Identification and Management"), by a discussion of the main risks to which BOT projects are exposed. That chapter distinguishes between general risks associated with the political and legal environment of the host country and risks specific to the project. Lastly, chapter 9 ("Financial structuring of BOT projects") explains how funds are mobilized for BOT projects, describes the types and sources of capital available in terms of the level of risk that each type of capital undertakes, and outlines financial structuring techniques.

15. Contractual matters are discussed in more detail in the following four chapters. Chapter 10 ("The contract package") provides a brief description of major contractual arrangements involved in a BOT project, including consultancy agreements, preliminary consortium agreement, project consortium agreement, project or concession agreement, agreement of the Government to purchase the products of the BOT facility ("off-take" agreement), construction agreement, equipment supply contracts, operation and maintenance contract, insurance contracts, financing contracts. Of these interrelated contracts, the project or concession agreement, the construction agreement and the operation and maintenance contract are also discussed separately in the three subsequent chapters. Chapter 11 ("The project agreement") identifies the essential elements to be regulated in a project agreement, an agreement between the project consortium and the Government for the development and operation of the project. Chapter 12 ("The construction agreement") discusses how the construction agreement in a BOT project usually takes the form of a turnkey contract and briefly considers three main methods of establishing the price to be paid to the contractor: lump-sum or fixed price, price based on reimbursable cost plus fees, and price based on unit prices. In addition, the chapter briefly mentions some key contractual issues, such as keeping to the planned time schedule, assuring quality and proper functioning of the BOT facility, pricing and payment, subcontracting, availability of spare parts, claims by the contractor for additional payment and securing payment obligations. Chapter 13 ("Operation and maintenance contract") lists and briefly describes major issues that may have to be addressed in a contract between the project consortium and the company that will oversee the day-to-day operation and maintenance of the BOT facility.

16. The ultimate steps of a BOT project, namely, those concerning the transfer of the project facility to the host Government at the end of the concession period, are discussed in chapter 14 ("Transfer of ownership"). In particular, chapter 14 considers matters such as possible extension of the concession period, terms and costs of the transfer and warranties upon transfer. The draft UNIDO Guidelines are concluded with a summary, in chapter 15 ("Some criteria for a successful application of the BOT concept"), of the basic factors that characterize successful BOT projects in developing countries.

B. Economic Commission for Europe

17. Under the auspices of the Economic Commission for Europe and its Working Party on International Contract Practices in Industry of the Committee on Development of Trade ("the Working Party"), the Forum on Attracting Private Investment to Large-Scale Infrastructure Projects in Central and Eastern Europe and the CIS was held at Geneva on 13 November 1995. The agenda of the Forum included legal and financial issues relating to private sector participation in public sector infrastructure project financing, such as what laws are required for creating reliable project finance contracts and whether a BOT law, for instance, is required (the complete agenda of the Forum is contained in the information bulletin TRADE/ WP.5/53 of 21 July 1995). The participants in that Forum adopted a resolution (TRADE/R.633, annex) recommending, inter alia, that:

"12. an expert group of private- and public-sector representatives be established and charged with developing guidelines on new project financing and construction budget techniques, including BOT, for the countries of central and eastern Europe and the CIS, under the aegis of the [Working Party] (WP. 5);

"13. these guidelines be publicized through seminars and through their publication by the United Nations Economic Commission for Europe, following their submission and ratification by the UN/ECE legal experts, as constituted in the [Working Party] (WP.5)".

18. The Working Party accepted the recommendation by the Forum for the establishment of the expert group and decided that its work should be carried out in full cooperation with the European Bank for Reconstruction and Development, which had actively participated at the Forum and had supported this initiative (see TRADE/R.633, para. 10).

C. World Bank

19. The World Bank has supported the development of individual BOT projects in a number of countries. While the World Bank may provide assistance to Bank members seeking to establish a legal and regulatory framework favouring foreign investment via BOT projects, the World Bank is not involved in an overall effort to elaborate model legislation or guidelines on BOT legislation.
20. The European Bank for Reconstruction and Development (EBRD) is providing financial support to BOT projects in a number of different sectors (e.g. telecommunications, power generation, pipelines, roads, airports and air navigation systems, ports and industrial terminals, water treatment and sewerage, waste management). EBRD also plays an advisory role regarding such projects, including as to some aspects of the legislative framework.

21. On 30 August 1995, the International Federation of Consulting Engineers (FIDIC), a non-governmental organization with headquarters at Lausanne, Switzerland, held a workshop entitled "Privatization: New opportunities for consulting engineers". For the purposes of that workshop, the word "privatization" was understood to embrace a range of new methods of project implementation, including BOT projects. After discussion, the participants in that workshop agreed that FIDIC should draw up applicable conditions of contract for new methods of project financing.

III. THE ROLE OF AN ADEQUATE LEGAL FRAMEWORK

A. Promoting the confidence of foreign investors

22. The BOT concept has so far mainly been used in the implementation of large infrastructure projects, which require substantial investment from private sources. Most of the funds used to implement such projects are generally obtained by borrowing from commercial banks and other financial institutions. However, the repayment of borrowed funds and the return on the investment take place over an extended period. The lenders to the project and the investors will therefore look for a clear sign by the host Government of its intention to encourage long-term private investments and that such investments will be protected from expropriation or nationalization without fair compensation.

23. One of the means by which the host Governments can express such intention is by providing a sound legal framework that encourages private investment and protects the recovery of the return on the investment. Most of this will be in the form of legislation that governs investments and other general commercial matters and which is not necessarily geared towards BOT projects specifically. The existence of such legislation makes it easier to negotiate specific projects. This is so because, in the absence of such legislation, the contract documents will have to cover various issues and guarantees that would otherwise be covered by legislation, thus adding complexity to the negotiations.

B. Areas of legislation relevant to BOT projects

24. The legislation that, to one degree or another, is relevant to BOT projects falls into two categories. The first category includes legislation primarily geared towards promotion of foreign private investment. The terms of such legislation that will be of particular interest to sponsors of BOT projects and to their lenders will include provisions on private ownership of land and other assets, repatriation of profits, foreign exchange convertibility and public procurement. The second category includes the general commercial legislation of the host country, in particular, on incorporation of commercial enterprises, assignment of trade receivables and other securities arrangements, public procurement as well as an adequate framework governing commercial contracts and dispute settlement procedures.

25. In some of the areas of law just mentioned, there are harmonized legal texts, including texts related to the work of the Commission, which States would be advised to consider for adoption. Those texts include the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Law on International Commercial Arbitration, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

26. Beyond the need for such general legislation, there is often a need to provide more specific legislation for the implementation of certain aspects of BOT projects. Such legislation not only provides clear signals to potential investors of the interest of the Government in carrying out BOT projects but also facilitates private sector participation in public sector projects. For example, in most States, public infrastructure has traditionally been financed and run, to a large degree, by public sector institutions usually operating as monopolies. In most such instances, there might be a need for providing a legislative basis for private sector participation and, in particular, the right to charge the public for the use of the facility to be built or for its product. Some of the other topics that may usefully be dealt with in such BOT legislation are outlined below in paragraphs 31-84.

C. Existing approaches to BOT-related legislation

27. Legislative approaches differ among those States that have enacted legislation for BOT projects. Some States have adopted legislation aimed at regulating the implementation of BOT projects generally. In some cases, such legislation sets out general parameters within which Government agencies can negotiate BOT contracts. This has the advantage of providing flexibility to negotiate the contracts in a way that suits the particular circumstances of each project. Typical provisions of such legislation include, for example: the authorization to grant concessions to the private sector for BOT projects, an indication of
concession can be granted, such as power production and
distribution, water treatment systems, transportation fa-
cilities, telecommunications and minerals’ exploitation.
Some laws state that a concession may be granted where
the State has a monopoly established by law. There are
also provisions restricting concessions for reasons of na-
tional security.

2. Statements of policy

32. Some laws include hortatory provisions expressing
principles to be borne in mind when governmental agen-
cies plan and enter into BOT arrangements. Such provi-
sions may be limited to general statements of policy (e.g.
to the effect that governmental organs are encouraged to
open markets and industries to private and foreign invest-
ment) or may be complemented by factors to be taken
into account in a decision whether to grant a concession
(e.g. showing that savings will be achieved by granting a
concession to a private entity, or the effect a BOT project
will have on the transfer of technology or the quality of
services).

3. Competent governmental body

33. A number of laws establish a new governmental
body authorized to enter into a project agreement,
whereas other laws delegate that authority to already
existing public bodies. According to some laws, a conces-
sion requires consent of a higher body such as parliament,
council of ministers or a supervisory authority.

34. In addition to requiring authorization for a conces-
sion, national laws often require licences for activities
carried out in the context of a BOT arrangement, such as
the use of public land for specific purposes or installation
of some equipment. The authority to issue such licences
may lie with different bodies at different levels of Gov-
ernment. The following are examples of provisions de-
dsigned to facilitate and expedite obtaining such licences:
provisions requiring the listing of all necessary licences
in the concession instrument; provisions directing a speci-
fied body to monitor the issuance of approvals and to
help the concessionaire in dealing with the bodies com-
petent to issue licences; provisions that channel, for the
purposes of concessions, the issuance of licences through
one body; and provisions on deadlines for acting on a
request for a license.

4. Planning and coordination

35. In view of the role BOT transactions may play in the
national or regional economy, laws provide various
means of planning and coordinating such transactions,
such as setting up a master-plan for projects that could be
the subject of a concession; empowering one organ to
authorize BOT arrangements; obligating that organ to
consult with specified other bodies before giving the
authorization; making a concession dependent on consent
of a local government, if the concession concerns an
activity carried out by a body of that local government;
imposing a duty to notify specified public bodies about a proposal for a BOT project and to publish such details of proposed projects that are of interest to the public or potential investors; obligating public bodies to coordinate the measures they take in case of unforeseen changes in a BOT project.

36. Furthermore, for the cases of several independent but technically related BOT arrangements (e.g. in the area of telecommunications services), there may be a need for coordination among the concessionaires or prospective concessionaires with a view to ensuring compatibility of technical solutions used. Such coordination is sometimes promoted by requiring that the project agreements contain appropriate provisions on coordination or by providing for proposals to be made to concessionaires.

5. Publicity and confidentiality

37. Laws seek to balance the interest of the Government or the public in having access to certain information concerning BOT projects against the concessionaire’s interest in keeping information confidential. It is provided, for example, that the fact that the concession has been granted and specified clauses in the project agreement must be published in a publication or must be accessible to the public. Sometimes the persons that have access to the documents are defined more restrictively, e.g. by reference to the kind of interest they have in the project. In some countries, special registries for concessions are kept and the validity of the contract is made dependent on the registration. On the other hand, some laws guarantee confidentiality of the information that the concessionaire is not required to publicize, for example, by providing that Government officials who have access to information relating to the concession are obligated to maintain such information confidential.

B. Award of the concession

1. Prerequisites and conditions

38. Because of the high investment costs and the need to ensure financial viability of the concessionaire, some laws require that the capital of the company operating the concession (equity capital) is to be not less than a certain percentage of the whole investment. Some laws provide that the project consortium shall be solely responsible for obtaining the required financial means, or limit any public investment to a certain percentage of the whole investment.

39. Many laws contain eligibility criteria and other requirements concerning the shareholders in the concessionaire. Such provisions, for example, expressly allow foreigners to hold shares in the concessionaire; restrict foreign ownership to a certain percentage and reserve the rest for domestic investors; prohibit the participation of persons who are related to the Government (e.g. experts engaged by the Government, public officials, elected representatives and their relatives); oblige the shareholders to disclose their affiliations with companies carrying out the same activity as the concessionaire; confer special preferences to shareholders such as municipalities of the host country regarding, for example, voting rights or rights in new emissions of shares; establish the responsibility of the shareholders for the preparation of the final account of the project, which is to be presented to the Government upon expiration of the concession period or termination of the concession.

2. Preferences to domestic entities

40. Several provisions could be identified which give preference to domestic entities in the context of granting a concession. This is either done within the process of selecting the concessionaire or by obliging the already selected concessionaire to give preferences to domestic third parties. Some laws establish the special obligation of the procuring body to inform all potentially interested domestic entities about a specific project and about the invitation to submit tenders. In addition, when equally advantageous tenders are submitted, the tender of the domestic entity might prevail. Furthermore, laws might include provisions giving preference margins to those tenderers who undertake to employ domestic labour, contractors or products.

41. Another way to ensure preference for domestic entities is to oblige the concessionaire to make use of domestic products. The same approach can be found regarding the employment of domestic labour: some laws state that in specific phases of the project the concessionaire has to employ domestic personnel. As to the question of what is considered to be a domestic entity, the laws differ: some refer to the ownership, some to the legal status.

3. Selection of the concessionaire

42. A common feature of the laws analysed are provisions on the selection of the concessionaire. A number of laws give the Government considerable freedom in choosing the method of selection, including direct negotiations with one or several prospective concessionaires. Other methods dealt with are similar to those that are described in the UNCITRAL Model Law on Procurement of Goods, Construction and Services as tendering, restricted tendering, two-stage tendering, request for proposals.

43. Under some national laws, it is in principle obligatory to use public tendering. Exceptionally, the use of direct negotiations instead of public tendering is authorized, for example, when a previous public tender was not successful, when the project is to be financed completely from private sources, or in case of unsolicited proposals for BOT arrangements.

44. Laws typically include a list of topics to be mentioned in the invitation to submit tenders and to be considered in evaluating the tenders. These include, for example, the structure of the price to be charged by the
concessionaire, possibility of increases of that price, government subsidies to be granted or expected to be granted to the concessionaire, the degree of exclusivity to be enjoyed by the concessionaire in operating the project, duration of the concession period, termination of the concession, transfer by the concessionaire of the project to the Government after the end of the concession period.

45. In case of unsolicited proposals, some laws allow direct negotiations with the prospective concessionaire, while others require that, if the Government is willing to grant a concession of the kind proposed, public tendering should be carried out on the basis of technical solutions of the unsolicited proposal. In such public tendering, some laws allow a margin of preference (e.g. 10 per cent) to the tenderer that had submitted the unsolicited proposal. The purpose of the margin of preference is to compensate that tenderer for the costs of preparing the unsolicited proposal and to provide an incentive for submitting such new proposals.

46. In many cases the company that will operate the concession has not yet been established at the time of the selection of the project consortium that will finance the project. Therefore, some laws deal with the obligation of the consortium to found that company (concessionaire) within a specified period after the selection of the consortium. Failure to establish the company within the time period typically leaves the Government free to grant the concession to another entity.

47. It appears that, except as noted below, the policies underlying the provisions in national laws on the selection of the concessionaire are broadly the same as those on which the UNCITRAL Model Law on Procurement of Goods, Construction and Services is based. A specific consideration characterizing the process of selecting the concessionaire is the particularly high cost of preparing the technical, commercial and financial elements of a BOT project, which is the reason for a margin of preference given to the prospective concessionaire who has submitted an unsolicited proposal. Another specific consideration may apply when several BOT projects are to be tendered. In such cases, if the Government has an interest in fostering competition in those areas, it may wish to grant the concessions to more than one project consortium, even if the evaluation of other elements of their proposals would suggest granting the concession to one concessionaire.

4. Selection of subcontractors

48. The following types of provisions on the selection of the concessionaire’s subcontractors may be found in laws: an obligation to specify in the tender the percentage of the total value of work that will be subcontracted; an obligation to identify the subcontractors before being granted the concession; a minimum percentage of the value of the project that must be subcontracted to companies that are not affiliated to the project consortium; an obligation to use competitive methods, including tendering proceedings, for selecting subcontractors. Some laws contain provisions that favour subcontracting to companies from the country where the project is to be implemented (e.g. particular measures to notify potential domestic subcontractors or participation of domestic subcontractors as an evaluation criterion for selecting the concessionaire).

49. An international financing agency provides in its guidelines on BOT related procurement that, if the concessionaire has been selected by a suitable competitive method, the concessionaire is free to select subcontractors, whereas if a competitive method has not been used for the selection of the concessionaire, such methods must be used for the selection of subcontractors.

5. The project agreement

50. The range of issues to be covered in the project agreement between the Government and the concessionaire may sometimes be provided by law. Thus, some national laws require that the project agreement define the activities that are the subject of the concession. Some laws require that the project agreement contain provisions on financial matters, such as the type and amount of financial guarantees given to the Government for the performance of the project agreement, the concessionaire’s right to the benefits obtained from the activity that is the subject of the concession, the concessionaire’s obligation to pay any concession fee to the Government, the criteria or method for determining and adjusting the price to be charged by the concessionaire. National laws may also mandate that the project agreement provide for some degree of supervision by the State.

51. Some national laws may further define the rights and obligations of the parties by requiring that the project agreement provide for matters such as quality standards and performance control, compensation to the concessionaire for additions or improvements to the facility, the concessionaire’s liability for failure to meet its obligations under the project agreement, including penalties or liquidated damages in case of breach of contract, consequences of a delay in the completion of the project, revision and amendment of the project agreement, early termination and settlement of disputes.

52. National laws also prescribe that the project agreement stipulate the preference, if any, given by the concessionaire to the employment of domestic labour and domestic suppliers, training of employees or any requirement related to the protection of the environment, areas protected by law, national security and public order.

C. Rights and obligations of the concessionaire

1. Nature of the concession

53. Several laws include provisions defining the legal regime of the concession and the nature of the conces-
sylvania’s rights. For instance, some laws provide that the concession concerns a public service, that it is exercised on behalf of the State, or that the right conceded has to be exercised in conformity with the public interest. Furthermore, national laws generally provide that the State retains the ownership of all public assets involved in the concession, while the concessionaire is only granted the right to use and possess those assets.

2. Obligations

54. Many laws include provisions defining the obligations of the concessionaire that arise out of the project agreement. These refer basically to the duty to implement the project and provide the relevant service in an adequate and diligent manner according to the provisions of the project agreement. National laws may also impose more specific obligations upon the concessionaire, such as the obligation to purchase some type of insurance, to provide guarantees for the completion of different project phases (e.g. by a performance bond), to use and transfer new technology in the implementation of the project, to take good care of any public property.

3. Ancillary revenue sources

55. The concessionaire, in addition to pursuing the core of the concession, might be able and willing to pursue other activities in order to generate additional income. For example, in connection with a concession to build and operate a toll road, the concessionaire may be given permission for land development alongside the road so as to supply fuel, provide car servicing, sell publicity space, or run motels, restaurants or shops. Such ancillary activities may enhance and diversify the sources of income of the concessionaire enterprise and thus offset the concessionaire’s risk that the revenue from the basic concession activity would not be sufficient to provide a reasonable rate of profit. Profitable ancillary activities may also serve as an alternative for governmental guarantees.

56. In some national laws it is expressly provided that the concessionaire is allowed to pursue only the activities of the concession and those functionally connected with the core activity. Other laws mention the possibility of authorizing the concessionaire to provide ancillary services. In that connection, it is provided that the Government, in evaluating the tenders by prospective project consortia, will also take into account the number and magnitude of the ancillary services that tenderers expect to be allowed to provide. Some laws mention that the concessionaire may or may not be given a degree of exclusivity with respect to providing ancillary services. For cases where the concessionaire is engaged in ancillary activities, provisions also exist to the effect that the concessionaire must not, directly or indirectly, by way of contract or through the use of technical specifications, compel the purchasers of its core goods or services to purchase from the concessionaire also ancillary equipment or maintenance services.

4. Assignment, subconcession, encumbrances

57. National laws provide divergent answers to the possibility of assignment, whether partial or total, of the concessionaire’s rights. While some laws authorize such assignment, normally subject to prior governmental approval, others prohibit any form of assignment. Different solutions can also be found among those laws allowing assignment. Some national laws only permit complete assignment of the concession, including all the rights pertaining to it, while the laws of other States authorize partial assignment of some rights.

58. Similarly, national laws are not unanimous as to whether the concessionaire may award subconcessions. Some laws require prior governmental approval for any subconcession, while others expressly reject such possibility.

59. Some laws authorize the concessionaire to offer the assets and premises that are the object of the concession as collateral for the concessionaire’s obligations. In such cases, some laws require, however, that those assets and premises continue to be used for the purposes of the concession.

D. Governmental obligations and undertakings

1. Financial incentives and guarantees

60. Notwithstanding the fact that one of the main purposes of BOT projects is for Governments to avoid having to mobilize public money for a project, there are many BOT projects where the Government provides some sort of financial support to the project. Incentives offered by the Government include subsidies, no-interest loans, exemption from stamp duties and other fees, exemption from, or preferential rates for, import duties on equipment used in the project, or even some type of insurance coverage by the State. In some cases, the Government is, to a limited degree, providing guarantees. The Government may guarantee, for example, the right of the project consortium to convert the currency earned through the BOT project into another currency (usually a freely convertible one) or the availability of sufficient foreign currency for such conversion. The Government may also guarantee the right to transfer proceeds from the project to a foreign country, the right to sell a certain amount of goods or services resulting from the BOT project to a governmental agency (so as to ensure a minimum flow of income to the concessionaire), or the availability of short term financial loans or guarantees for such loans in case of cash-flow difficulties which arise form extraordinary and unforeseen circumstances. The Government may further guarantee the repayment of a part of loans given to the project consortium, or guarantee that the price of goods or services supplied to the Government by the concessionaire (or the price charged to customers subject to price control of the Government) will be sufficient to cover the costs and provide a reasonable rate of return.

61. Some other laws do not specify the type of guarantee that the Government is authorized to provide. Laws of
this group may limit themselves to mentioning that governmental guarantees may be given, or that guarantees, if granted, should be spelled out in the project agreement, or that, in evaluating offers from prospective concessionaires, the Government will take into account the governmental guarantees requested. Finally, some laws, apparently motivated by the consideration that BOT projects should not engage public money, exclude such incentives altogether, or limit them to a certain percentage of the whole investment or of the equity capital of the company operating the concession.

2. Assurances

62. In addition to possible financial guarantees, laws often include provisions for other kinds of assurances by the Government. Laws provide, for example, that the Government will treat preferentially the concessionaire in respect of rights to use land, roads and other supporting public facilities; that the Government will use reasonable endeavours to build the infrastructure necessary for a satisfactory operation of the BOT facility (e.g. road links, terminals); or that the project agreement may stipulate that certain conditions will be maintained and that, should such conditions change, the concessionaire is entitled to compensation, readjustment of its remuneration or even termination of the project agreement. Furthermore, there are provisions similar to those typically found in investment protection treaties, including guarantees to respect private property and to ensure that any redemption of the concession will only be done by the decision of a specific body of the Government and against fair compensation.

3. Taxation

63. Some legislation makes provision for a preferential tax treatment of BOT projects, either by a straightforward provision or by providing that, subject to approval by a specified body, such treatment may be available. The types of tax benefits vary from country to country and from project to project, and may include any of the following: a preferential revenue tax, possibly staggered over different stages of the project (e.g. the preference, highest during a period after the first profit making year, may diminish with the years); a preferential tax rate for expatriated profits, if such a special tax exists; preferential turnover tax on goods or services produced at the BOT facility; exemption from custom duties, or that certain conditions will be maintained and that, should such conditions change, the concessionaire is entitled to compensation, readjustment of its remuneration or even termination of the project agreement. Furthermore, there are provisions similar to those typically found in investment protection treaties, including guarantees to respect private property and to ensure that any redemption of the concession will only be done by the decision of a specific body of the Government and against fair compensation.

E. Operation of the concession

1. Price setting and price increases

64. In view of the fact that the concessionaire often operates a facility that enjoys a degree of monopoly, many laws address, directly or indirectly, the question of the prices to be charged by the concessionaire. Some laws do not address themselves the price adjustment policy but leave this issue to the project agreement. Other laws, however, establish some control system for the prices charged by the concessionaire. This is done either by price setting by the Government or a regulatory body, or by the concessionaire subject to prior approval by the Government. Lastly, in laws dealing with specific projects or a narrowly defined area of concessions, the concessionaire may sometimes be given the freedom to charge the rate it thinks is reasonable.

65. Governmental control over price setting and price increases is subject to different rules. Some laws limit themselves to stating only that the prices must be just, reasonable or fair. Some laws state additional criteria, which might be, for example, that the prices must not exceed the amounts needed to recover the investment, cover the costs and leave a reasonable profit; that prices may be adjusted so as to reestablish the initial economic and financial balance of the contract; that the prices are to be linked to a price index; that sets of standardized quality control criteria (such as those prepared by the International Standard Organization) have to be used for measuring the quality of performance. There are also laws that mention social interests as a criterion. In addition, some laws provide the possibility to decrease prices if the concessionaire's profits are higher than a prior set rate of return on investment. Some laws restrict the frequency of price increases (e.g. once a year).

66. Some laws provide for the concessionaire's obligation to publish the prices and any changes, and for its obligation to adhere to the published prices. In addition, some laws require equal treatment of customers as regards the prices (as well as regards other contract conditions). In some cases, different treatment of specified categories of customers is allowed. When the concessionaire supplies different types of goods or services, there are also provisions dealing with the possibility of "internal subsidizing" in the sense that one price may be reduced, provided another one is appropriately increased. One law provides that if the Government determines a price that is below the level stipulated in the contract (which might occur, for example, because of social concerns) the State will pay the difference. One law provides for conciliation and specifies the composition of the conciliation panel and the conciliation procedures, in order to facilitate agreement on the price between the Government and the concessionaire.

2. Monitoring of project implementation

67. While national laws often give the Government some level of control and monitoring over the concession, the particular control and monitoring mechanisms may differ considerably from case to case. Some laws simply require that the project agreement stipulate some type of control by the Government. Other laws include provisions establishing a general monitoring right for the Government and even identifying various specific rights, such as the right to have access to all documents and records, to enter the property of the concessionaire, or to obtain periodic reports from the concessionaire. In some cases, the Government is given the right, under differing condi-
tions and circumstances, to temporarily assume the control and operation of the project. Some national laws further provide that the Government shall hold a "golden share" in the concessionaire company which gives the Government the right to veto corporate decisions, such as changes of capital or transfer of shares. Moreover, some laws provide for the establishment of a separate agency or the office of a special inspector.

68. Furthermore, some laws give the Government the authority to require changes in the project, in case the original plan is deemed to be insufficient or if the public interest so requires. In such cases, some laws provide for compensation for the concessionaire's added costs, while other laws refer this matter to the project agreement or give the concessionaire the right to withdraw from the contract.

F. Relations with customers

69. A number of national laws contain specific provisions dealing with customer issues. The following are examples of provisions in national laws that protect customers of the concessionaire: the obligation to conclude a contract with all interested parties, the duty not to discriminate any user group, the obligation to publish the general conditions and prices used by the concessionaire, provisions requiring submission of the general conditions to a competent body for approval, the obligation to issue receipts if so requested by the customer, the obligation to have in place an internal review procedure in case of complaints by customers, the right of the customers to direct complaints concerning the concessionaire's activities to a public body, and, as provided in some laws, the obligation of that body to investigate the complaint and take a decision.

G. Relations with competitors

70. Some laws provide that, as a condition for granting a concession, the concessionaire must enter into agreements, the features of which are specified in the concession, with competitors providing the same or similar services or goods as the concessionaire. Such agreements may concern the use of the same technical standards, or, for example in the area of telecommunications, the obligation to share communications infrastructure.

H. Performance by the concessionaire

1. Breach of the agreement

71. A number of laws limit themselves to requiring that the project agreement deal with the breach of the agreement by the concessionaire and the consequences of the breach (in particular payment of penalties or liquidated damages, termination of the agreement, the right to demand payment under the guarantees given to the Government).

72. Other laws, in addition to requiring that the agreement deal with these matters, distinguish between a breach committed during the construction period and a breach during the operation of the project, give examples of the two kinds of breach and provide for different consequences according to the case.

73. Other laws deal with the breach in the context of termination of the project agreement and provide examples of breach that may result in termination (e.g. failure to accumulate the finance to construct the facility, to prepare the technical documentation required to commence the construction works, to observe the technical regulations in carrying out the construction, to complete the investment process in time, to maintain the facility in accordance with the agreed standards, to provide agreed information to the Government, to meet the minimum standards of the services as required by the agreement, or charging of higher prices than permitted under the agreement). Some laws provide that the project agreement may be terminated only in cases of a grave breach of the agreement.

74. Some laws oblige the concessionaire to indemnify the Government for any claims against the Government raised as a result of the activities of the concessionaire.

2. Impediment

75. There is wide divergence in national laws dealing with circumstances that impede the performance by the concessionaire under the project agreement. Some laws provide for the termination of the project agreement in case the concessionaire is rendered unable to perform due to an unforeseeable change of circumstances beyond the concessionaire's control. Other laws provide for an extension of the concession period, so as to give the concessionaire the opportunity to adjust to the new circumstances. In that event, some laws contemplate some form of financial assistance by the State, while other laws exclude any form of assistance not originally provided for in the project agreement. Another group of national laws authorizes a revision of the project agreement so as to reflect the change in circumstances.

I. Termination of concession

1. Common grounds for termination

76. Various grounds can be found in national laws for the termination of the concession. Commonly, national laws provide for one or more of the following grounds: mutual consent, expiry of the concession period, death, dissolution or bankruptcy of the concessionaire, repurchase of the concession by the Government, expropriation or other form of seizure by the Government, change of governmental plans and priority, in case of public interest, national defence or security, major breach of the agreement by either party.

77. Some laws provide for the consequences of termination, depending on the reason therefor. In case of insol-
vency, for instance, some laws provide the possibility of a so-called "step-in" right in favour of interested third parties (normally creditors of the concessionaire), which may include a right to claim the transfer of the concession.

2. Extension

78. The extension of the concession beyond the expiry of its term is a possibility which is not equally accepted in national laws. Some laws authorize an extension only if expressly permitted in the project agreement and under specific circumstances. Other national laws generally authorize the Government to grant an extension of the concession, provided that the concessionaire is not in breach of any of its main obligations. Some national laws impose a limit on the maximum period of extension, or provide for only one extension without public tendering. Some national laws, however, give the concessionaire a right to an extension of the concession under the same terms, or provide for an automatic renewal of the concession, if neither party gives notice of termination.

3. Transfer of the facility to the Government

79. A common feature of the laws examined is to provide for a transfer of the complete project to the Government, free of charge and liabilities, upon expiry of the concession period. In addition, some national laws provide for a transfer before the expiry of the concession period by means of repurchase by the Government and payment of reasonable compensation to the concessionaire.

80. Various solutions are found, however, as to the procedure for such transfer. While some national laws provide that the transfer takes place automatically at the end of the concession period, other national laws require the execution of some form of act of transfer by the concessionaire. National laws also differ regarding what assets are to be transferred. Some laws distinguish between assets which were originally attached to the concession, and which have to be returned to the Government, and assets which were acquired during the concession period and meant for its operation, which the concessionaire may retain or regarding which the concessionaire may claim compensation.

81. Some national laws give the Government an option to require, instead of the transfer, the complete removal of the project facilities at the concessionaire’s expense, in the event the Government at the end of the concession decides that it is not in the national interest to keep the project facility.

J. Miscellaneous provisions

1. Governing law

82. Many of the laws analysed include provisions on the law governing the project agreement. Some laws provide for the applicability of the law of the State that is granting the concession. Some of those laws specify that a concession is a private law agreement, to which the law of contract applies, while others provide that a concession is a matter of public law and that administrative law applies.

83. Other laws expressly allow the choice of a national law other than the law of the State granting the concession; some of those laws indicate issues to which the law of the State granting the concession will apply, notwithstanding an agreement on the applicable law (e.g. the transfer of technology, accounting, statistics, labour relations, foreign exchange controls, export and import regulations, residency of persons and travel regulations). There is also a law providing that, in addition to using a national law for certain issues, recourse may be had to the relevant principles of international law and, if the parties in dispute so agree, to the principles of equity.

2. Settlement of disputes

84. Some laws state that the project agreement is to contain a dispute settlement clause without specifying anything further about the content of the clause. Other laws provide that any disputes will be settled by the competent courts of the State granting the concession. Yet other laws expressly allow submitting a dispute to arbitration; according to one law, arbitration may be agreed upon as long as this has been stipulated in the invitation to tender; another law provides that any arbitration is to take place in the State that has granted the concession. There are also laws that provide that conciliation should be attempted before resorting to the procedure for a binding settlement of the dispute.

V. CONCLUSION

85. BOT transactions can play a major role in the economic policy of a State. In the experience of a good number of States, it was necessary, in order to attract investors for BOT projects, to adopt legislation on such transactions. A brief survey of such legislation is contained above in chapter IV.

86. Solutions included in national laws show different approaches, as well as different levels of detail and sophistication. While some States have enacted general legislation on BOT projects, others have adopted specific legislation on various industrial sectors, such as power generation, development of maritime terminals or water treatment. In some cases, laws were adopted for individual BOT projects.

87. National laws also provide different solutions to apparently similar or identical issues and those solutions are likely to have an impact on the country’s ability to attract foreign investment through BOT projects. These differences may result from differences in underlying policies; those policies, and how they are expressed in legislative form, may also be influenced by whether the law applies
to BOT transactions in general or whether it is limited to BOT projects in a specific industrial sector. To a certain extent, however, varying national solutions may also occur because drafters of the laws did not have access to the experience and solutions in other States, and did not have model solutions available, in particular solutions that are internationally harmonized.

88. As noted above in paragraphs 11-21, the organizations that have done work in the area of BOT transactions are not working to provide comprehensive guidance to national legislators regarding BOT projects.

89. The Commission may wish to conclude that it would be useful for States to have legislative guidance in preparing or modernizing their legislation relating to BOT projects, and that the Commission should prepare such guidance.

90. As to the form of such guidance, the Commission may wish to consider that any preparatory work should aim at providing a guide for legislators by describing legislative objectives, considering possible solutions for achieving those objectives and discussing their advantages and disadvantages. In the light of the progress of the work, the Commission might wish to determine whether it would be feasible and desirable to prepare model legislation.

91. Should the Commission decide to undertake work in the area of BOT, it may wish to request the Secretariat to review, with the assistance of an expert group and in cooperation with other international organizations having the expertise in BOT arrangements, possible issues on which legislative guidance may be useful and prepare first draft chapters of a guide for consideration by the Commission. As to the scope of the work, the Commission may wish to consider that, at least initially, the work should be geared to BOT projects in general. It could then be decided during the preparatory work whether it would be useful to add special considerations or model provisions relating to specific industrial sectors.

92. As for any work on contractual aspects of BOT, the Commission may wish to request the Secretariat to continue monitoring the work of other organizations, such as the Economic Commission for Europe and the International Federation of Consulting Engineers (FIDIC). In the light of their work, the Commission might at the appropriate time consider forms of cooperation with these organizations (e.g. review of their draft and recommendations thereon by a Working Group with a view to later endorsement by the Commission). The Commission may also decide to prepare itself a legal guide on selected types of contract clauses in project agreements between Governments and concessionaires that give rise to particular difficulties.
VI. STATUS OF UNCITRAL TEXTS

Status of Conventions: note by the Secretariat
(A/CN.9/428) [Original: English]

1. At its thirteenth session (1980) the Commission decided that it would consider, at each of its sessions, the status of conventions that were the outcome of work carried out by it.1

2. The present note sets forth the status of the conventions and model laws emanating from the work of the Commission. It also shows the status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), adopted prior to the establishment of the Commission, because the Convention is closely related to the work of the Commission in the area of international commercial arbitration.

3. The note indicates the changes since 2 May 1995, when the most recent report in this series (A/CN.9/416) was issued. The names of States in the annexed list that have adhered to a convention or enacted legislation based on a model law since the preparation of the last report are printed in bold letters.

4. The following texts are covered in the note:


   (New York, 1974)*

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<th>State*</th>
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Signatures only: 7; ratifications, accessions and successions: 20

"The Convention was concluded in authentic Chinese, English, French, Russian and Spanish texts. On 11 August 1992, the Secretary-General, in accordance with a request of the United Nations Commission on International Trade Law, circulated a proposal for the adoption of an authentic Arabic text of the Convention. No objections having been raised, the Arabic text was deemed adopted on 9 November 1992 with the same status as that of the other authentic texts referred to in the Convention.

"The Convention had been signed by the former German Democratic Republic on 14 June 1974, ratified by it on 31 August 1989 and entered into force on 1 March 1990.

"The Convention was signed by the former Czechoslovakia on 29 August 1975 and an instrument of ratification was deposited on 26 May 1977, with the Convention entering into force for the former Czechoslovakia on 1 August 1988. On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession with effect from 1 January 1993, the date of succession of States.

"The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

Declarations and reservations

"Upon signature Norway declared, and confirmed upon ratification, that in accordance with article 34 the Convention would not govern contracts of sale where the seller and the buyer both had their relevant places of business within the territories of the Nordic States (i.e. Denmark, Finland, Iceland, Norway and Sweden).


In accordance with articles XI and XIV of the Protocol, the Contracting States to the Protocol are considered to be Contracting Parties to the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol in relation to one another and Contracting Parties to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

"The Protocol was acceded to by the former German Democratic Republic on 31 August 1989 and entered into force on 1 March 1990.
The Protocol was acceded to by the former Czechoslovakia on 5 March 1990, with effect from 10 October 1990. On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.

**Declarations and reservations**

Upon accession, Czechoslovakia and the United States of America declared that, pursuant to article XII, they did not consider themselves bound by article I.


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Signatures only: 20; ratifications and accessions: 25

The Convention was signed by the former Czechoslovakia on 6 March 1979. On 28 May 1993, the Slovak Republic and on 2 June 1993, the Czech Republic deposited their instruments of succession to the signature and the instrument of ratification on 23 June 1995. The Czech Republic, upon ratification, withdrew the declaration, referred to in footnote 1, that had been made by the former Czechoslovakia.
Declarations and reservations

Upon signing the Convention the former Czechoslovakia declared in accordance with article 26 the formula for converting the amounts of liability referred to in paragraph 2 of that article into the Czechoslovak currency and the amount of the limits of liability to be applied in the territory of Czechoslovakia as expressed in the Czechoslovak currency.


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Signatures only: 2; ratifications, accessions, approval, acceptance and successions: 45

*The Convention was signed by the former Czechoslovakia on 1 September 1981 and an instrument of ratification was deposited on 5 March 1990, with the Convention entering into force for the former Czechoslovakia on 1 April 1991.7 On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession, with effect from 1 January 1993, the date of succession of States.
The Convention was signed by the former German Democratic Republic on 13 August 1981, ratified on 23 February 1989 and entered into force on 1 March 1990.

The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

Declarations and reservations

1 Upon adherence to the Convention the Governments of Argentina, Belarus, Chile, Estonia, Hungary, Lithuania, Russian Federation and Ukraine declared, in accordance with articles 12 and 96 of the Convention, that any provision of article 11, article 29 or part II of the Convention that 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, would not apply where any party had his place of business in their respective States.

2 Upon accession the Government of Canada declared that, in accordance with article 93 of the Convention, the Convention will extend to Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island and the Northwest Territories. Upon accession the Government of Canada declared that, in accordance with article 95 of the Convention, with respect to British Columbia, it will not be bound by article 1(1)(b) of the Convention. In a notification received on 31 July 1992, the Government of Canada withdrew that declaration. In a declaration received on 9 April 1992 the Government of Canada extended the application of the Convention to Quebec and Saskatchewan. In a notification received on 29 June 1992, Canada extended the application of the Convention to Yukon.

3 Upon approving the Convention the Government of China declared that it did not consider itself bound by subparagraph (b) of paragraph 1 of article 1 and article 11 as well as the provisions in the Convention relating to the content of article 11.

4 Upon ratifying the Convention, the Governments of Denmark, Finland, Norway and Sweden declared, in accordance with article 92(1), that they would not be bound by part II of the Convention (Formation of the Contract). Upon ratifying the Convention, the Governments of Denmark, Finland, Norway and Sweden declared, pursuant to article 94(1) and 94(2), that the Convention would not apply to contracts of sale where the parties have their places of business in Denmark, Finland, Iceland, Norway or Sweden.

5 Upon ratifying the Convention, the Government of Germany declared that it would not apply article 1(1)(b) in respect of any State that had made a declaration that that State would not apply article 1(1)(b).

6 Upon ratifying the Convention, the Government of Hungary declared that it considered the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance to be subject to the provisions of article 90 of the Convention.

7 Upon ratifying the Convention, the Governments of Czechoslovakia, Singapore and of the United States of America declared that they would not be bound by subparagraph (1)(b) of article 1.

8 Upon accession to the Convention, the Government of New Zealand declared that this accession shall not extend to the Cook Islands, Niue or Tokelau.


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Signatures only: 3; ratifications and accessions: 2; ratifications and accessions necessary to bring the Convention into force: 10

¹The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

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Signatures only: 5, ratifications: 1; ratifications and accessions necessary to bring the Convention into force: 5


Legislation based on the Model Law on International Commercial Arbitration has been enacted in Australia, Bahrain, Bermuda, Bulgaria, Canada (by the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Egypt, Finland, Guatemala, Hong Kong, Hungary, India, Kenya, Malta, Mexico, Nigeria, Peru, Russian Federation, Scotland, Singapore, Sri Lanka, Tunisia, Ukraine and, within the United States of America, California, Connecticut, Oregon and Texas.


Legislation based on the Model Law on Procurement of Goods, Construction and Services on International Commercial Arbitration has been enacted in Albania and Poland.


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*Signature only: 15, ratifications: 1; ratifications and accessions necessary to bring the Convention into force: 15.
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Egypt                        | 10 June 1958       | 9 March 1959   |
El Salvador                   |                    |                |
Finland                      | 29 December 1958   | 30 August 1993 |
France                       | 25 November 1958   | 19 January 1962|
Georgia                      |                    | 26 June 1959   |
Germany                      | 10 June 1958       | 2 June 1994    |
Ghana                        |                    | 30 June 1961   |
Greece                       |                    | 9 April 1968   |
Guatemala                    |                    | 16 July 1962   |
Guinea                       |                    | 21 March 1984  |
Haiti                        |                    | 23 January 1991|
Holy See                     |                    | 5 December 1983|
Hungary                      |                    | 14 May 1975    |
India                        | 10 June 1958       | 5 March 1962   |
Indonesia                    |                    | 13 July 1960   |
Ireland                      |                    | 7 October 1981 |
Israel                       |                    | 12 May 1981    |
Italy                        |                    | 5 January 1959 |
Japan                        |                    | 31 January 1969|
Jordan                       | 10 June 1958       | 20 June 1961   |
Kazakhstan                   |                    | 15 November 1979|
Kenya                        |                    | 20 November 1995|
Kuwait                       |                    | 10 February 1989|
Latvia                       |                    | 28 April 1978  |
Lesotho                      |                    | 14 April 1992  |
Lithuania                    |                    | 13 June 1989   |
Luxembourg                   | 11 November 1958   | 15 March 1995  |
Madagascar                   |                    | 9 September 1983|
Malaysia                     |                    | 16 July 1962   |
Mali                         |                    | 5 November 1985 |
Mauritius                    |                    | 8 September 1994|
Mexico                       |                    | 19 June 1996   |
Monaco                       | 31 December 1958   | 14 April 1971  |
Mongolia                     |                    | 2 June 1982    |
Morocco                      |                    | 24 October 1994|
Netherlands                  | 10 June 1958       | 12 February 1959|
New Zealand                  |                    | 24 April 1964  |
Niger                        |                    | 6 January 1983 |
Nigeria                      |                    | 14 October 1964|
Norway                       |                    | 17 March 1970  |
Pakistan                     | 30 December 1958   | 14 March 1961  |
Panama                       |                    | 10 October 1984 |
Peru                         |                    | 7 July 1988    |
Philippines                  | 10 June 1958       | 6 July 1967    |
Poland                       | 10 June 1958       | 3 October 1961 |
Portugal                     |                    | 18 October 1994|
Republic of Korea            |                    | 8 February 1973|
Romania                      |                    | 13 September 1961|
Russian Federation           | 29 December 1958   | 24 August 1960 |
San Marino                   |                    | 17 May 1979    |
Saudi Arabia                 |                    | 19 April 1994  |
Senegal                      |                    | 17 October 1994|
Singapore                   |                    | 21 August 1986 |
Slovakia                     |                    | 28 May 1993*   |
Slovenia                     |                    | 25 June 1991*  |
South Africa                 |                    | 3 May 1976     |
Spain                        |                    | 12 May 1977    |
Sri Lanka                    | 30 December 1958   | 10 October 1984 |
Sweden                       | 23 December 1958   | 9 April 1962   |
Switzerland                  | 29 December 1958   | 28 January 1972|
Syrian Arab Republic        |                    | 1 March 1965   |
Thailand                     |                    | 9 March 1959   |
The former Yugoslav Republic |                    | 21 December 1959|
of Macedonia                 |                    | 10 March 1994* |
Trinidad and Tobago         |                    | 14 February 1966|
Tunisia                      |                    | 17 July 1967   |
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Signatures only: 2; ratifications, accessions and successions: 109

- The Convention was signed by the former Czechoslovakia on 3 October 1958 and an instrument of ratification was deposited on 10 July 1959.\(^1\)\(^3\) On 28 May 1993 Slovakia, and on 30 September 1993 the Czech Republic, deposited instruments of succession.
- The Convention was acceded to by the former German Democratic Republic on 20 February 1975 with reservations 1, 2 and 3.
- The Russian Federation continues, as from 24 December 1991, the membership of the former Union of Soviet Socialist Republics (USSR) in the United Nations and maintains, as from that date, full responsibility for all the rights and obligations of the USSR under the Charter of the United Nations and multilateral treaties deposited with the Secretary-General.

**Declarations and reservations**

(Excludes territorial declarations and certain other reservations and declarations of a political nature)

1. State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

2. State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law.

3. With regard to awards made in the territory of non-contracting States, State will apply the Convention only to the extent to which these States grant reciprocal treatment.

4. The Government of Canada has declared that Canada will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

5. State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.

6. State will apply the Convention only to those arbitral awards which were adopted after the coming of the Convention into effect.

7. The present Convention should be construed in accordance with the principles and rules of the National Constitution in force or with those resulting from reforms mandated by the Constitution.

8. On 23 April 1993, the Government of Switzerland notified the Secretary-General its decision to withdraw the declaration it had made upon ratification.

9. Interpretation of the Convention before the Vietnamese Courts or competent Authorities should be made in accordance with the Constitution and the law of Viet Nam.
VII. TRAINING AND ASSISTANCE

Training and technical assistance: note by the Secretariat
(A/CN.9/427) [Original: English]

CONTENTS

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INTRODUCTION

1. Pursuant to the decision taken at the twentieth session of the Commission (1987), training and assistance activities count among the high priorities of UNCITRAL. The training and technical assistance programme carried out by the Secretariat under the mandate given by the Commission, particularly in developing countries and in countries whose economic systems are in transition, encompasses two main lines of activity: (a) information activities aimed at promoting the knowledge of international commercial law conventions, model laws and other legal texts; and (b) assisting Member States in their efforts towards commercial law reform and towards the adoption of UNCITRAL texts.

2. This note sets out activities of the Secretariat subsequent to the twenty-eighth session of the Commission (2-26 May 1995) and discusses possible future training and technical assistance activities, in the light of the trends in the demand for such services from the Secretariat.


I. TRENDS IN TRAINING AND TECHNICAL ASSISTANCE

3. There is a continuing and significant increase in the importance being attributed by Governments, by domestic and international business communities and by multilateral and bilateral aid agencies to improvement of the legal framework for international trade and investment. UNCITRAL has an important function to play in this process because it has produced and promotes use of legal instruments in a number of key areas of commercial law which represent internationally agreed standards and solutions acceptable to different legal systems. Those instruments include:


(b) In the area of dispute resolution, the UNCITRAL Arbitration Rules, the UNCITRAL Conciliation Rules and the Model Law on International Commercial Arbitration;

(c) In the area of procurement, the UNCITRAL Model Law on Procurement of Goods, Construction and Services;
(d) In the area of banking and payments, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, the UNCITRAL Model Law on International Credit Transfers and the United Nations Convention on International Bills of Exchange and International Promissory Notes;


4. The upsurge in commercial law reform represents a significant and crucial opportunity for UNCITRAL to significantly further the objectives of substantial coordination, systematization and acceleration of the process of harmonization and unification of international trade law, as envisaged by General Assembly resolution 2205 (XXI) of 17 December 1966.

II. TECHNICAL ASSISTANCE TO STATES IN PREPARATION AND IMPLEMENTATION OF LEGISLATION

5. Technical assistance is provided to States preparing legislation based on UNCITRAL legal texts, particularly in areas such as international commercial arbitration, procurement and international credit transfers. Such assistance is provided in various forms, including review of preparatory drafts of legislation from the viewpoint of UNCITRAL legal texts, technical consultancy services and assistance in the preparation of legislation based on UNCITRAL legal texts, preparation of regulations implementing such legislation (e.g. procurement regulations), comments on reports of law reform commissions, as well as briefings for legislators, judges, arbitrators, procurement officials and other users of UNCITRAL legal texts embodied in national legislation. Another form of technical assistance provided by the Secretariat consists in advising on the establishment of institutional arrangements for international commercial arbitration, including training seminars for arbitrators, judges and practitioners in this area.

6. With a view to maximizing the benefit that recipient countries derive from UNCITRAL technical assistance, the Secretariat has taken steps towards increasing cooperation and coordination with development assistance agencies. Cooperation and coordination among entities providing legal technical assistance has the desirable effect of ensuring that, when United Nations system entities, or outside entities, are involved in providing legal technical assistance, the legal texts formulated by the Commission and recommended by the General Assembly to be considered are in fact so considered and used.

7. From the standpoint of recipient States, UNCITRAL technical assistance is beneficial in view of the Secretariat’s accumulated experience in the preparation of the UNCITRAL legal texts and in providing technical assistance to Governments in the preparation of legislation. It also helps establish legal systems that not only are internally consistent, but also utilize internationally developed trade law conventions, model laws, and other legal texts. The resulting legal harmonization maximizes the ability of business parties from different States to successfully plan and implement commercial transactions.

III. UNCITRAL 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 (e.g. Uniform Customs and Practice for Documentary Credits and INCOTERMS (International Chamber of Commerce); Factoring Convention (International Institute for the Unification of Private Law (UNIDROIT)). Typically, all briefing missions, as well as one-day seminars, are carried out by only one member of the Secretariat.

9. Since the previous session, the Secretariat organized seminars in a number of States. Lectures at UNCITRAL seminars are generally given by one or two members of the Secretariat, by experts from the host countries and occasionally by external consultants. After the seminars, the UNCITRAL Secretariat remains in close contact with seminar participants in order to provide the host countries with the maximum possible support during the process relating to the adoption and use of UNCITRAL legal texts.

10. The following seminars and briefing missions were financed with resources from the Trust Fund for UNCITRAL Symposia:

(a) Minsk, Belarus (29-30 May 1995), held in cooperation with the International Court of Arbitration at the Belarusian Chamber of Commerce and Industry, and attended by approximately 50 participants;

(b) Tehran, Islamic Republic of Iran (9-12 September 1995), held in cooperation with the Ministry of Foreign Affairs, and attended by approximately 150 participants;

(c) Almaty, Kazakhstan (22-26 August 1995), briefing mission held in cooperation with the Ministry of Foreign Affairs;

(d) Bogota, Colombia (10 November 1995), briefing mission held in cooperation with the Ministry of Justice;

(e) Asuncion, Paraguay (22-24 November 1995), held in cooperation with the Ministry of Foreign Affairs, and attended by approximately 70 participants;

(f) Santiago, Chile (27-29 November 1995), held in cooperation with the University of Chile, and attended by approximately 40 participants;

(g) Conakry, Guinea (15-19 January 1996), held in cooperation with the Ministry of Foreign Affairs and attended by approximately 150 participants;
11. The following seminars and briefing missions were financed by the institution organizing the event or by another organization:

(a) Abu Dhabi, United Arab Emirates (27 June 1995), held in cooperation with the United Nations Development Programme, the Federation of United Arab Emirates Chambers of Commerce and Industry and the Abu Dhabi Chamber of Commerce, and attended by approximately 50 participants;

(b) Libreville, Gabon (22-25 January 1996), held in cooperation with the Ministry of Industry and Foreign Trade, and attended by approximately 30 participants;

(c) Ljubljana, Slovenia (31 January 1996), held in cooperation with the GEA College, and attended by approximately 50 participants;

(d) Athens (18-19 October 1995), held in cooperation with the Athens Chamber of Commerce, and attended by approximately 250 participants;

(e) Auckland and Wellington, New Zealand (5 and 14 July 1995), held in cooperation with the Office of the Attorney-General, and attended by approximately 40 participants at Auckland and 70 at Wellington;

(f) Dubai, United Arab Emirates (4 July 1995), held in cooperation with UNDP and the Municipality of Dubai, and attended by approximately 50 participants;

(g) Montreal, Canada (30-31 August 1995), held in cooperation with the GEA College, and attended by approximately 50 participants.

IV. OTHER SEMINARS, CONFERENCES, COURSES AND WORKSHOPS

12. Members of the UNCITRAL secretariat have participated as speakers in various seminars, conferences and courses where UNCITRAL legal texts were presented for examination and discussion, or for the purposes of coordination of activities. The participation of members of the secretariat in the seminars, conferences and courses listed below was financed by the institution organizing the events or by another organization:

- Central European University post-graduate Programme on International Commercial Law (Budapest, 21 April 1995);
- Development Lawyers’ Course sponsored by the International Development Law Institute (IDLI) (Rome, 2-4 May 1995);
- Training Workshop on Interbank Relations and Foreign Bank Agreements sponsored by the International Development Law Institute (IDLI) (Vilnius, Lithuania, 31 May-1 June 1995);
- International Entry Course on Arbitration and Special Fellowship Course sponsored by the Chartered Institute of Arbitrators (Cairo, 12-17 June 1995);
- International Arbitration Workshop sponsored by the Institute of Transnational Arbitration (Dallas, Texas, 21-23 June 1995);
- International Entry Course on Arbitration sponsored by the Chartered Institute of Arbitrators (Bermuda, 26-28 June 1995);
- Post Fellowship Arbitration Practice Weekend sponsored by the Chartered Institute of Arbitrators (Kent, United Kingdom of Great Britain and Northern Ireland, 1-2 July 1995);
- Conference on Trade Law Harmonization in the Pacific Rim Countries sponsored by the Pacific Economic Cooperation Council (PECC) (Auckland and Wellington, 5-7 July 1995);
- International Trade Law Post-Graduate Course (Equipment Procurement Management in the Public Sector) sponsored by the International Training Centre of the International Labour Organization (ILO) and the University Institute of European Studies (Turin, Italy, 18-19 July 1995);
- Annual Conference of the New Zealand Institute of Arbitrators (Christchurch) 21-23 July 1995);
- International Trade Law Post-Graduate Course sponsored by the International Training Centre of the International Labour Organization (ILO) and the University Institute of European Studies (Turin, Italy, 3 August 1995);
- “Doing Business Securely on the Information Highway” Conference sponsored by the EDI World Institute (Montreal, Canada, 30-31 August 1995);
- Procurement Conference sponsored by the Cairo Regional Centre for International Commercial Arbitration (Cairo, 9-10 September 1995);
- International Fellowship Course sponsored by the Chartered Institute of Arbitrators (Paris, 15-17 September 1995);
- International Chamber of Commerce (ICC) Seminar on Demand Guarantees, Standby Credits and Performance Bonds (London, 3 October 1995);
- “Emerging Financial Markets and Secured Transactions” Conference sponsored by the European Bank for Reconstruction and Development (EBRD) (London, 5-6 October 1995);
- U.S. Working Group on Standby Practices sponsored by the Institute of International Banking Law and Practice (New York, 12-13 October 1995);
- Conference on “Recent Developments in Trade Law” sponsored by the French/Arab Chamber of Commerce (Sousse, Tunisia, 12-15 October 1995);
- “Worldwide Electronic Commerce” Conference sponsored by the American Bar Association (Bethesda, Maryland, 18-20 October 1995);
- International Council for Commercial Arbitration (ICCA) Meeting-Planning Future Conferences (Paris, 20 October 1995);
- International Association of Insolvency Practitioners (INSOL) Regional Conference (Hong Kong, 1-5 November 1995);
- XXXII Inter-American Bar Association (IABA) Conference (Quito, 12-17 November 1995);
Arbitration Seminar sponsored by the German Institute for Arbitration (Berlin, 14-15 November 1995);

Arbitration Conference of the Iberoamerican Association of Chambers of Commerce (AICO) (Asunción, 20-21 November 1995);

Arbitration Diploma Course sponsored by the Chartered Institute of Arbitrators (London, 27-28 November 1995);

U.S. Working Group on Standby Practices sponsored by the Institute of International Banking Law and Practice (Miami, Florida, 30 November-3 December 1995);

International Entry and Special Fellowship Course on Arbitration sponsored by the Chartered Institute of Arbitrators (Harare and Bulawayo, Zimbabwe, 16-23 December 1995);

U.S. Working Group on Standby Practices sponsored by the Institute of International Banking Law and Practice (New York, 29-31 January 1996);

Arbitration Conference sponsored by the Swiss Arbitration Association (Zurich, Switzerland, 1-2 February 1996);

Insolvency Lawyers' Annual Conference (Stratford-on-Avon, United Kingdom of Great Britain and Northern Ireland, 8-10 March 1996);

Seminar "International Interests in Mobile Equipment: UNIDROIT Draft Convention" and "Assignment in Receivables Financing" sponsored by the Department of Trade and Industry, Business Law Unit (London, 12 March 1996);

Annual Survey Conference on Letter-of-Credit Law sponsored by the Institute of International Banking Law and Practice (New York, 14 March 1996);

U.S. Study Group on Standby Practices sponsored by the Institute of International Banking Law and Practice (New York, 18-19 March 1996);

Tilburg Lectures: The Unification of International Commercial Law through EC Directives and International Conventions organized by Tilburg University, Schooordijk Institut (Tilburg, Netherlands, 2-4 April 1996).

13. The participation of members of the UNCITRAL Secretariat as speakers in the conferences listed below was financed with resources from the Trust Fund for UNCITRAL and from the United Nations regular travel budget:

"Dispute Resolution in Emerging Economies of Asia" Conference sponsored by the Inter-Pacific Bar Association and the Viet Nam International Arbitration Centre (Ho Chi Minh City, Viet Nam, 14-16 January 1996);


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 received 11 interns, originating from Belgium, Brazil, Denmark, Egypt, Germany, India, Italy, Poland and Spain. Interns are assigned tasks such as basic or advanced research, collection and systematization of information and materials, or helping prepare 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 a Government agency, or they meet their expenses from their own means. The Commission may wish, in this connection, to invite Member States, universities and other organizations, in addition to those that already do so, to consider sponsoring the participation of young lawyers in the United Nations internship programme for work with UNCITRAL.

15. In addition, the Secretariat occasionally accommodates requests by scholars and legal practitioners who wish to conduct research in the Branch and in the UNCITRAL Law Library for a limited period of time.

VI. FUTURE ACTIVITIES

16. For the remainder of 1996, seminars and legal-assistance briefing missions are being planned in Africa, Asia, the Caribbean, eastern Europe and Latin America. Since the costs of training and technical assistance activities is not covered by the regular budget, the ability of the Secretariat to implement these plans is contingent upon the receipt of sufficient funds in the form of contributions to the Trust Fund for UNCITRAL Symposia.

17. As it has done in recent years, the Secretariat has agreed to co-sponsor the next three-month International Trade Law Post-Graduate Course to be organized by the University Institute of European Studies and the International Training Centre of the International Labour Organization at Turin. Typically, approximately half of the participants are drawn from Italy, with many of the remainder being from developing countries. This year's contribution from the UNCITRAL Secretariat will focus on issues of harmonization of laws on international trade law from the perspective of UNCITRAL, including past and current work.

VII. FINANCING PROGRAMME IMPLEMENTATION

18. The Secretariat continues in its efforts to devise a more extensive training and technical assistance programme, to meet the considerably greater demand from States for training and assistance, and in response to the call of the Commission at the twentieth session (1987) for an increased emphasis both on training and assistance and on the promotion of the legal texts prepared by the Commission. However, as no funds for the travel expenses of lecturers or participants are provided for in the regular
budget, expenses for UNCITRAL training and technical assistance activities (except for those that are funded by funding agencies such as the World Bank) have to be met by voluntary contributions to the Trust Fund for UNCITRAL Symposia.

19. Given the importance of extra-budgetary funding for the implementation of the training and technical assistance component of the UNCITRAL work programme, the Commission may again wish to appeal to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL Symposia, particularly in the form of multi-year contributions, so as to facilitate planning and enable the Secretariat to meet the increasing demands in developing countries and newly independent States for training and assistance. The Secretariat can be contacted for information on how to make contributions to UNCITRAL Trust Funds.

20. In the relevant period, contributions from Cambodia, France, the Philippines and Switzerland were made for the seminar programme. The Commission may wish to express its appreciation to those States and organizations that have contributed to the Commission's programme of training and assistance by providing funds or staff or by hosting seminars.

21. It is noted that, in its previous session, the Commission decided to request that the Trust Fund for UNCITRAL Symposia be placed on the agenda of the pledging conference taking place within the framework of the General Assembly session, on the understanding that that would not have any effect on the obligation of a State to pay its assessed contribution to the Organization. However, since the General Assembly did not have the opportunity to consider that matter during its last session, the Commission may wish to reiterate its decision and request that the Sixth Committee recommend to the General Assembly the adoption of a resolution including the Trust Fund for UNCITRAL Symposia and the Trust Fund for Granting Travel Assistance to Developing States Members of UNCITRAL on the agenda of the United Nations Pledging Conference for Development Activities.

Part Three

ANNEXES
I. UNICTRAL MODEL LAW ON ELECTRONIC COMMERCE

PART ONE. ELECTRONIC COMMERCE IN GENERAL

Chapter I. General provisions

Article 1. Sphere of application*

This Law** applies to any kind of information in the form of a data message used in the context*** of commercial**** activities.

Article 2. Definitions

For the purposes of this Law:

(a) “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;

(b) “Electronic data interchange (EDI)” means the electronic transfer from computer to computer of information using an agreed standard to structure the information;

(c) “Originator” of a data message means a person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message;

(d) “Addressee” of a data message means a person who is intended by the originator to receive the data message, but does not include a person acting as an intermediary with respect to that data message;

(e) “Intermediary”, with respect to a particular data message, means a person who, on behalf of another person, sends, receives or stores that data message or provides other services with respect to that data message;

(f) “Information system” means a system for generating, sending, receiving, storing or otherwise processing data messages.

*The Commission suggests the following text for States that might wish to limit the applicability of this Law to international data messages: “This Law applies to a data message as defined in paragraph (1) of article 2 where the data message relates to international commerce.”

**This Law 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 to any kind of information in the form of a data message, 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. 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 4. Variation by agreement

(1) As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.

(2) Paragraph (1) does not affect any right that may exist to modify by agreement any rule of law referred to in chapter II.

Chapter II. Application of legal requirements to data messages

Article 5. Legal recognition of data messages

Information shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

Article 6. Writing

(1) Where the law requires information to be in writing, 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: [...].

Article 7. Signature

(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: [...].
Article 8. Original

(1) Where the law requires information to be presented or retained in its original form, that requirement is met if:

   (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and
   
   (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for the information not being presented or retained in its original form.

(3) For the purposes of subparagraph (a) of paragraph (1):

   (a) the criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change which arises in the normal course of communication, storage and display; and
   
   (b) the standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances.

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

Article 9. Admissibility and evidential weight of data messages

(1) In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:

   (a) on the sole ground that it is a data message; or

   (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.

(2) Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified, and to any other relevant factor.

Article 10. Retention of data messages

(1) Where the law requires that certain documents, records or information be retained, that requirement is met by retaining data messages, provided that the following conditions are satisfied:

   (a) the information contained therein is accessible so as to be usable for subsequent reference; and

   (b) the data message is retained in the format in which it was generated, sent or received, or in a format which can be demonstrated to represent accurately the information generated, sent or received; and

   (c) such information, if any, is retained as enables the identification of the origin and destination of a data message and the date and time when it was sent or received.

(2) An obligation to retain documents, records or information in accordance with paragraph (1) does not extend to any information the sole purpose of which is to enable the message to be sent or received.

(3) A person may satisfy the requirement referred to in paragraph (1) by using the services of any other person, provided that the conditions set forth in subparagraphs (a), (b) and (c) of paragraph (1) are met.

Chapter III. Communication of data messages

Article 11. Formation and validity of contracts

(1) In the context of contract formation, unless otherwise agreed by the parties, an offer and the acceptance of an offer may be expressed by means of data messages. Where a data message is used in the formation of a contract, that contract shall not be denied validity or enforceability on the sole ground that a data message was used for that purpose.

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

Article 12. Recognition by parties of data messages

(1) As between the originator and the addressee of a data message, a declaration of will or other statement shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message.

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

Article 13. Attribution of data messages

(1) A data message is that of the originator if it was sent by the originator itself.

(2) As between the originator and the addressee, a data message is deemed to be that of the originator if it was sent:

   (a) by a person who had the authority to act on behalf of the originator in respect of that data message; or

   (b) by an information system programmed by or on behalf of the originator to operate automatically.

(3) As between the originator and the addressee, an addressee is entitled to regard a data message as being that of the originator, and to act on that assumption, if:

   (a) in order to ascertain whether the data message was that of the originator, the addressee properly applied a procedure previously agreed to by the originator for that purpose; or

   (b) the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to gain access to a method used by the originator to identify data messages as its own.

(4) Paragraph (3) does not apply:

   (a) as of the time when the addressee has both received notice from the originator that the data message is not that of the originator, and had reasonable time to act accordingly; or

   (b) in a case within paragraph (3)(b), at any time when the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was not that of the originator.

(5) Where a data message is that of the originator or is deemed to be that of the originator, and had reasonable time to act accordingly; or

(6) The addressee is entitled to regard each data message received as a separate data message and to act on that assumption, except to the extent that it duplicates another data message and the addressee knew or should have known, had it exercised reasonable care or used any agreed procedure, that the data message was a duplicate.
Article 14. Acknowledgement of receipt

(1) Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged.

(2) Where the originator has not agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, an acknowledgement may be given by:

(a) any communication by the addressee, automated or otherwise, or
(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received.

(3) Where the originator has stated that the data message is conditional on receipt of the acknowledgement, the data message is treated as though it has never been sent, until the acknowledgement is received.

(4) Where the originator has not stated that the data message is conditional on receipt of the acknowledgement, and the acknowledgement has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed, within a reasonable time the originator:

(a) may give notice to the addressee stating that no acknowledgement has been received and specifying a reasonable time by which the acknowledgement must be received; and
(b) if the acknowledgement is not received within the time specified in subparagraph (a), may, upon notice to the addressee, treat the data message as though it had never been sent, or exercise any other rights it may have.

(5) Where the originator receives the addressee’s acknowledgement of receipt, it is presumed that the related data message was received by the addressee. That presumption does not imply that the data message corresponds to the message received.

(6) Where the received acknowledgement states that the related data message met technical requirements, either agreed upon or set forth in applicable standards, it is presumed that those requirements have been met.

(7) Except in so far as it relates to the sending or receipt of the data message, this article is not intended to deal with the legal consequences that may flow either from that data message or from the acknowledgement of its receipt.

Article 15. Time and place of dispatch and receipt of data messages

(1) Unless otherwise agreed between the originator and the addressee, the 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 data message on behalf of the originator.

(2) Unless otherwise agreed between the originator and the addressee, the time of receipt of a data message is determined as follows:

(a) if the addressee has designated an information system for the purpose of receiving data messages, receipt occurs:

(i) at the time when the data message enters the designated information system; or
(ii) if the data message is sent to an information system of the addressee that is not the designated information system, at the time when the data message is retrieved by the addressee;

(b) if the addressee has not designated an information system, receipt occurs when the data message enters an information system of the addressee;

(3) Paragraph (2) applies notwithstanding that the place where the information system is located may be different from the place where the data message is deemed to be received under paragraph (4).

(4) Unless otherwise agreed between the originator and the addressee, a data message is deemed to be dispatched at the place where the originator has its place of business, and is deemed to be received at the place where the addressee has its place of business. For the purposes of this paragraph:

(a) if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction or, where there is no underlying transaction, the principal place of business;

(b) if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence.

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

PART TWO. ELECTRONIC COMMERCE IN SPECIFIC AREAS

Chapter 1. Carriage of goods

Article 16. Actions related to contracts of carriage of goods

Without derogating from the provisions of part I of this Law, this chapter applies to any action in connection with, or in pursuance of, a contract of carriage of goods, including but not limited to:

(a) (i) furnishing the marks, number, quantity or weight of goods;

(ii) stating or declaring the nature or value of goods;

(iii) issuing a receipt for goods;

(iv) confirming that goods have been loaded;

(b) (i) notifying a person of terms and conditions of the contract;

(ii) giving instructions to a carrier;

(c) (i) claiming delivery of goods;

(ii) authorizing release of goods;

(iii) giving notice of loss of, or damage to, goods;

(d) giving any other notice or statement in connection with the performance of the contract;

(e) undertaking to deliver goods to a named person or a person authorized to claim delivery;

(f) granting, acquiring, renouncing, surrendering, transferring or negotiating rights in goods;

(g) acquiring or transferring rights and obligations under the contract.

Article 17. Transport documents

(1) Subject to paragraph (3), where the law requires that any action referred to in article 16 be carried out in writing or by using a paper document, that requirement is met if the action is carried out by using one or more data messages.

(2) Paragraph (1) applies whether the requirement therein is in the form of an obligation or whether the law simply provides consequences for failing either to carry out the action in writing or to use a paper document.

(3) If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is met if the right or obligation is conveyed by using one or more data messages, provided that a reliable method is used to render such data message or messages unique.
(4) For the purposes of paragraph (3), the standard of reliability required shall be assessed in the light of the purpose for which the right or obligation was conveyed and in the light of all the circumstances, including any relevant agreement.

(5) Where one or more data messages are used to effect any action in subparagraphs (f) and (g) of article 16, no paper document used to effect any such action is valid unless the use of data messages has been terminated and replaced by the use of paper documents. A paper document issued in these circumstances shall contain a statement of such termination.

The replacement of data messages by paper documents shall not affect the rights or obligations of the parties involved.

(6) If a rule of law is compulsorily applicable to a contract of carriage of goods which is in, or is evidenced by, a paper document, that rule shall not be inapplicable to such a contract of carriage of goods which is evidenced by one or more data messages by reason of the fact that the contract is evidenced by such data message or messages instead of by a paper document.

(7) The provisions of this article do not apply to the following: [...]
II. UNCITRAL NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

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PREFACE

The United Nations Commission on International Trade Law (UNCITRAL) finalized the Notes at its twenty-ninth session (New York, 28 May-14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993, considered in 1994 a draft entitled “Draft Guidelines for Preparatory Conferences in Arbitral Proceedings”. That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994. On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared “draft Notes on Organizing Arbitral Proceedings”. The Commission considered the draft Notes in 1995, and a revised draft in 1996, when the Notes were finalized.

INTRODUCTION

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Laws governing the arbitral procedure and arbitration rules that parties may agree upon typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.* This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

Multi-party arbitration

6. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 86-88 (item 18).

Process of making decisions on organizing arbitral proceedings

7. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

* A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers proper, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

8. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls or other electronic means. Meetings may be held at the venue of arbitration or at some other appropriate location.

9. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as “preliminary meeting”, “pre-hearing conference”, “preparatory conference”, “pre-hearing review”, or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

10. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

11. Given that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, it is not attempted in the Notes to describe in detail different arbitral practices or express a preference for any of them.

12. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order not to create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e. before it is clear that a decision is needed.

13. When the Notes are used, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules, by other provisions agreed to by the parties and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

LIST OF MATTERS FOR POSSIBLE CONSIDERATION IN ORGANIZING ARBITRAL PROCEEDINGS

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ANNOTATIONS

1. Set of arbitration rules

If the parties have not agreed on a set of arbitration rules, would they wish to do so

14. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it may be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

15. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

16. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine how the case will be conducted.

2. Language of proceedings

17. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

18. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.

(b) Possible need for interpretation of oral presentations

19. If interpretation will be necessary during oral hearings, it is advisable to consider whether the interpretation will be simultaneous or consecutive and whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

20. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.
22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. Administrative services that may be needed for the arbitral tribunal to carry out its functions

24. Various administrative services (e.g. hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the arbitration is administered by an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

25. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

26. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

27. To the extent the tasks of the secretary are purely organizational (e.g. obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g. collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto. However, it is typically recognized that it is important to ensure that the secretary does not perform any decision-making function of the arbitral tribunal.

5. Deposits in respect of costs

(a) Amount to be deposited

28. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

29. When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

30. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g. because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.
32. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g. pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g. because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole (e.g. in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

33. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

34. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters (e.g. dates for hearings), more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

8. Telefax and other electronic means of sending documents

(a) Telefax

35. Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a telefacsimile of a document, special arrangements may be considered, such as that a particular piece of written evidence should be mailed or otherwise physically delivered, or that certain telefax messages should be confirmed by mailing or otherwise delivering documents whose facsimile were transmitted by electronic means. When a document should not be sent by telefax, it may, however, be appropriate, in order to avoid an unnecessarily rigid procedure, for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided that the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g. electronic mail and magnetic or optical disk)

36. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g. as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the attitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time limit for submitting a document, which act constitutes submission.

37. When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g. electronic mail or computer disks) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into a readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g. the names of the originator and recipient, computer program, titles of the electronic files and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identification of persons who can be contacted if a problem occurs.

9. Arrangements for the exchange of written submissions

38. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, rebuttal or rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

39. It is advisable that the arbitral tribunal set time limits for written submissions. In enforcing the time limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

40. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submissions be made after the hearings.
43. In considering the parties' allegations and arguments, the useful for it or for the parties to prepare, for analytical purposes the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g. method of submission, copies, numbering, references)

42. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- Whether the submissions will be made as paper documents or by electronic means, or both (see paragraphs 35-37);
- The number of copies in which each document is to be submitted;
- A system for numbering documents and items of evidence, and a method for marking them, including by tabs;
- The form of references to documents (e.g. by the heading and the number assigned to the document or its date);
- Paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- When translations are to be submitted as paper documents, whether the translations are to be contained in the same volume as the original texts or included in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

43. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages, it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute. However, possible disadvantages of preparing such a list include delay, adverse effect on the flexibility of the proceedings, or unnecessary disagreements about whether the arbitral tribunal has decided all issues submitted to it or whether the award contains decisions on matters beyond the scope of the submission to arbitration. The terms of reference required under some arbitration rules, or in agreements of parties, may serve the same purpose as the above-described list of points at issue.

(b) In which order should the points at issue be decided

44. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g. a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

45. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier decisions are referred to by expressions such as “partial”, “interlocutory” or “interim” awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of a party.

(c) Is there a need to define more precisely the relief or remedy sought

46. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

47. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Given the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

48. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

49. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.
produce documentary evidence it intends to proceed.  

51. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate?

52. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document; (b) a copy of a dispatched communication (e.g. letter, telex, telefax or other electronic message) is accepted without further proof as having been received by the addressee; and (c) a copy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence?

53. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of “working” documents. A convenient arrangement of documents in the set may be according to chronological order or subject matter. It is useful to keep a table of contents of the documents, for example, by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples?

54. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g. public accountant or consulting engineer). The report may present the information in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

55. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted?

56. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary?

57. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places, other arrangements to provide the opportunity for all parties to be present, and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

58. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

59. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses’ statements

60. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; and (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party’s allegations.

61. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness’s statement containing testimony itself. It should be
noted, however, that such practice, which implies interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see paragraph 67). Notwithstanding these reservations, signed witness’s testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

62. If a signed witness’s statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

63. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal’s view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

64. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

65. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending on what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) The order in which the witnesses will be called

66. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

67. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In those legal systems such contacts are usually not permitted once the witness’s oral testimony has begun. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

68. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g., certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. Experts and expert witnesses

69. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

70. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the par-
ties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

71. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time schedule. While the discretion to appoint an expert normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. It might also be useful to determine details about how the expert will receive from the parties any relevant information or have access to any relevant documents, goods or other property, so as to enable the expert to prepare the report. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

72. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

73. If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see paragraphs 60-62).

17. Hearings

(a) Decision whether to hold hearings

74. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

75. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings. The arbitral tribunal may wish to consult the parties on this matter.

(b) Whether one period of hearings should be held or separate periods of hearings

76. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

77. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

78. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements; (b) questioning its witnesses; and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

79. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

80. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the respondent present their opening statements, arguments, witnesses and other evidence; and whether the respondent or the
claimant has the last word. In view of such differences, or when no arbitration rules apply, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

81. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties’ preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

82. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one method is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

83. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

84. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

85. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

18. Multi-party arbitration

86. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. The Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in multi-party as well as in two-party proceedings.

87. The areas of possibly increased complexity in multi-party arbitration are, for example, the flow of communications among the parties and the arbitral tribunal (see paragraphs 33, 34 and 38-41); if points at issue are to be decided at different points in time, the order of deciding them (paragraphs 44-45); the manner in which the parties will participate in hearing witnesses (paragraph 63); the appointment of experts and the participation of the parties in considering their reports (paragraphs 70-72); the scheduling of hearings (paragraph 76); the order in which the parties will present their arguments and evidence at hearings (paragraph 80).

88. The Notes, which are limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not cover the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions in multi-party arbitration as compared to two-party arbitration.

19. Possible requirements concerning filing or delivering the award

89. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g. to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, for example, invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

90. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.
III. SUMMARY RECORDS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW FOR MEETINGS DEVOTED TO THE PREPARATION OF DRAFT UNCITRAL MODEL LAW ON ELECTRONIC DATA INTERCHANGE AND RELATED MEANS OF COMMUNICATION AND THE DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Summary record of the 583rd Meeting

Tuesday, 28 May 1996, at 10.30 a.m.

[A/CN.9/SR.583]

Temporary Chairman: Mr. CORELL (Under-Secretary-General, The Legal Counsel)

Chairman: Mrs. PIAGGI de VANOSSEI (Argentina)

The meeting was called to order at 11 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN said that the decision to move the International Trade Law Branch from New York to Vienna in 1979 had demonstrated a lack of managerial understanding. While an expert group had conducted an efficiency review and had suggested that the Branch should be moved back to Headquarters, the cost benefit of relocation was not likely to generate any savings in the short term. After discussing the matter with the Under-Secretary-General for Administration and Management, he had come to the conclusion that a move was currently not realistic and that the mistake made in 1979 would be difficult to correct.

2. Since its establishment in 1966, the United Nations Commission on International Trade Law (UNCITRAL) had distinguished itself by a remarkable record of achievements that clearly justified its place not only as the core legal body of the United Nations concerned with international trade law but also as the leading body in the codification and harmonization of international trade law in general. The extensive work that the Commission and its secretariat put into the preparation of legal texts was complemented by the training and technical assistance programme carried out by the secretariat. That programme, which benefited developing countries and countries with economies in transition, included information activities aimed at promoting knowledge of international commercial law conventions, model laws and other legal texts, as well as technical assistance to Member States in their efforts to reform their commercial law and adopt UNCITRAL texts.

3. Governments, national and international business communities and multilateral and bilateral assistance agencies were attaching increasing importance to improving the legal framework for international trade and investment. In that regard, it was crucial to ensure adequate coordination with multilateral and bilateral agencies providing assistance in commercial law reform in order to avoid situations in which such assistance led to the adoption of national laws that did not represent internationally agreed standards, including conventions and model laws adopted by the Commission.

4. The UNCITRAL secretariat was committed to achieving greater coordination with multilateral funding agencies, such as those within the United Nations system. Member States should work closely with the Commission’s secretariat in order to ensure that the conventions and model laws formulated by UNCITRAL were given due regard in that process. He invited all donors to contribute to the technical assistance activities of the secretariat by making voluntary contributions to the Trust Fund for UNCITRAL Symposia.

5. The United Nations had begun its fifty-first year of existence under the shadow of an unprecedented financial crisis caused by the non-payment of assessed contributions. The General Assembly’s decision to adopt a zero-growth budget would have an impact on all major and subsidiary organs, and he anticipated a reduction in the capacity to service meetings, which included limitations on the availability of documents and translation services. He was, however, confident that the UNCITRAL secretariat would nevertheless be able to maintain in the years to come the high quality of the services that it provided to the Commission.

6. Drawing attention to the main topics to be discussed at the current session, he said that the first draft of the draft Notes on Organizing Arbitral Proceedings had been considered at a number of conferences on arbitration, including the International Arbitration Congress, which had been organized by the International Council for Commercial Arbitration and held at Vienna in November 1994. At its twenty-eighth session, the Commission had adopted a number of specific decisions regarding the draft Notes. Those decisions had been incorporated into the draft, and he hoped they would enable the Commission to finalize the text at its current session.

7. In 1995, the Commission had adopted articles 1 and 3-11 of the draft Model Law on Legal Aspects of Electronic Data
Intercontinental commerce (EDI) and related means of communication. At its current session, the Commission had to complete its review and adoption of draft articles 2 and 12-14. The Commission was also expected to consider and adopt a guide to enactment to assist national legislators in their implementation of the Model Law. Even in its draft form, the text of the Model Law was being used as a basis for model communication agreements between users of electronic means of communication. The draft was also being taken into account by States revising their national legislation to adapt it to the needs of electronic commerce.

8. The Commission would also have the opportunity to review and adopt provisions prepared by the Working Group on Electronic Data Interchange for addition to the Model Law in order to deal with the replacement of traditional transport documents, such as maritime bills of lading, by electronic data messages.

9. In addition to the draft texts before it, the Commission would also consider reports concerning possible forms of work on build-operate-transfer (BOT) projects and the progress achieved by the working groups assigned to receivables financing and cross-border insolvency, as well as training and technical assistance.

ELECTION OF OFFICERS

10. Mr. ABASCAL (Mexico) nominated Mrs. Piaggi de Vanossi (Argentina) for the office of Chairman.

11. Mr. GRIFFITH (Australia) seconded the nomination.

12. Mrs. Piaggi de Vanossi (Argentina) was elected Chairman by acclamation.

13. Mrs. Piaggi de Vanossi (Argentina) took the Chair.

ADOPTION OF THE AGENDA

14. The agenda was adopted.

15. Mr. HERRMANN (Secretary of the Commission) drew attention to General Assembly resolution 50/206 A, which dealt with the more efficient utilization of conference-serving resources.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (A/ CN.9/423)

16. Mr. SEKOLEC (International Trade Law Branch), introducing the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423), said that the Notes reflected a discussion of the draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/ CN.9/423), said that the Notes had been highlighted: first, the text should not impinge on the beneficial flexibility of arbitral proceedings; second, the establishment of any requirements beyond existing laws, rules or practices must be avoided; third, disregarding the Notes in arbitral proceedings should not lead to the conclusion that procedural principles had been violated; and fourth, unlike other legal texts, the Notes should not aim at harmonizing procedures but rather serve as a management and planning tool for practitioners.

17. In addition to the UNCITRAL debates, the Guidelines had been discussed in a number of other international forums, including the XIIth International Arbitration Congress, held at Vienna in November 1994 by the International Council for Commercial Arbitration. The Notes retained the basic structure of the Guidelines but included specific revisions suggested by both the Commission and other international forums.

18. Mr. HOLTZMANN (United States of America) expressed appreciation to the Secretariat for successfully incorporating the suggestions made at the Commission's previous session into the revised draft Notes.

19. Mr. GRIFFITH (Australia), Mr. ABASCAL (Mexico), Mr. GOH (Singapore), Mr. LEBEDEV (Russian Federation) and Mr. HUNTER (United Kingdom of Great Britain and Northern Ireland) proposed that, since the draft Notes had been so carefully prepared, they might be considered section by section rather than paragraph by paragraph.

20. Mr. ZHANG Yuqing (China) and Mr. CHOUKRI (Observer for Morocco) said they would prefer a paragraph-by-paragraph discussion.

21. Mr. TELL (France), Mr. RAO (India) and Mrs. FERNANDEZ de GURMENDI (Argentina) expressed their preference for a section-by-section approach, provided that there would be an opportunity to comment on all provisions of the draft Notes.

22. The CHAIRMAN said that the Commission would consider the Notes section by section but would examine specific paragraphs when necessary.

Paragraph 1

23. Paragraph 1 was adopted.

Paragraphs 2 and 3

24. Mr. ZHANG Yuqing (China) noted that the draft Notes dealt with norms of arbitral proceedings rather than practical laws and were non-binding. The fact that they could be disregarded -- and that all the time and effort invested in them would be for naught -- was particularly regrettable during a period of financial constraint. Perhaps the draft Notes should become a supplement to the UNCITRAL Arbitration Rules.

25. Mr. ABASCAL (Mexico), Mr. LEBEDEV (Russian Federation), Mr. HUNTER (United Kingdom), Mr. RAO (India), and Mrs. FERNANDEZ de GURMENDI (Argentina) expressed the hope that publication of the draft Notes would not be deferred, so that the international community could begin to make use of them.

26. Mr. LEBEDEV (Russian Federation) stressed the non-binding nature of the recommendations contained in the draft Notes, and said that their usefulness lay in illustrating the practical issues that could arise in the context of international commercial arbitration, and in providing general guidelines for both arbitrators and the parties participating in arbitral proceedings. He found the Chinese proposal to impart some binding nature to the Notes to be interesting but not easily implementable, because arbitral approaches differed from country to country and even among individual arbitrators.

27. Mr. RAO (India) said that although the Notes were intrinsically non-binding in nature, their utility lay in the way in which they could be applied by arbitrators on a case-by-case basis.
28. Mr. FERRARI (Italy) said that paragraph 2 of the draft Notes, established their non-binding nature and paragraph 3 stated that they were not suitable to be used as arbitration rules. His delegation therefore suggested that the guidelines in the draft should be referred to not as "rules" but as "suggestions".

29. Mr. CHOUKRI (Observer for Morocco) said that, in view of the non-binding nature of the Notes as specified in paragraph 2, the question arose as to whether courts or arbitrators were bound to accept the guidelines contained therein if the parties concerned had previously agreed to be bound by them.

30. Mr. SEKOLEC (International Trade Law Branch), said that even if the parties agreed on the applicability of the Notes, such an agreement did not establish any obligation binding upon an arbitral tribunal.

31. Mr. ABASCAL (Mexico) suggested that the character of the Notes could be made clearer if paragraph 3, which specified that the Notes were not suitable for use as arbitration rules, were to precede paragraph 2.

32. Mr. ZHANG Yuqing (China) said that given the non-binding nature of the Notes, the question arose as to whether they had any independent status at all. The Notes might more accurately be referred to as "suggestions" or "advice".

33. The CHAIRMAN said that she took it that a consensus existed concerning the need to complete the draft Notes at the current session, but not concerning the suggestion of the Chinese delegation regarding a change in the title of the document.

34. Paragraphs 2 and 3 were adopted.

Paragraphs 4 and 5

35. Mr. HUNTER (United Kingdom) said that the words "arbitration rules" in the first sentence of paragraph 4 could appear to refer only to institutional rules or published sets of rules, such as the UNCITRAL Arbitration Rules, whereas the paragraph was really intended to encompass any rules agreed upon by the parties to arbitration proceedings. He proposed that those words should be replaced by the phrase "rules governing the proceedings (whether institutional or otherwise)".

36. Mr. TELL (France) said that the reference to "the law" in the first sentence of paragraph 4 should be clarified, since the rules chosen by the parties to arbitration proceedings were subject only to the mandatory rules of procedural law. He proposed that the beginning of the sentence should be amended to read, "Subject to the mandatory provisions of any laws governing the arbitral procedure".

37. Mr. HOLTZMANN (United States of America) proposed that the beginning of paragraph 4 should be changed to read, "Subject to the provisions of the law governing the arbitral procedure from which the parties cannot derogate", so that it would be consistent with the wording of article 1, paragraph 2, of the UNCITRAL Arbitration Rules. He also proposed that the phrase "including fundamental requirements of procedural justice" should be deleted, since it was unnecessary and could cause problems by giving rise to a number of different interpretations. He supported the proposal of the United Kingdom representative, but suggested that the word "arbitration" should be inserted before the word "rules".

38. Mr. ABASCAL (Mexico) said he agreed that the words "including fundamental requirements of procedural justice" should be deleted. However, he was concerned that the French proposal could mislead users of the Notes by implying that non-mandatory provisions were never applied to arbitral procedure.

39. Mr. HERRMANN (Secretary of the Commission) suggested that the first part of the first sentence of paragraph 4, preceding the words "typically allow", should be replaced by the words "Laws governing the arbitral procedure and arbitration rules that the parties may agree upon", since the paragraph was intended only to emphasize the flexibility allowed in the conduct of arbitral proceedings, not the legal provisions governing such proceedings.

40. Mr. LEBEDEV (Russian Federation) and Mr. ABASCAL (Mexico) said they supported the Secretary's suggestion.

41. Mr. CHOUKRI (Observer for Morocco) said that he supported the United States proposal to delete the reference to "fundamental requirements of procedural justice", and suggested that those words should be replaced by the phrase "including the requirements that are most appropriate to the subject of the dispute".

42. Mr. HOLTZMANN (United States of America), supported by Mr. HUNTER (United Kingdom), said that he welcomed the Secretary's proposal and withdrew his own previous proposal.

43. The CHAIRMAN said that, if she heard no objection, she would take it that the Commission adopted the Secretary's suggestion.

44. Paragraphs 4 and 5 as amended, were adopted.

The meeting rose at 1 p.m.
Summary record of the 584th Meeting

Tuesday, 28 May 1996, at 3 p.m.

[A/CN.9/SR.584]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 3.20 p.m.

INTERNATIONAL COMMERCIAL ARBITRATION:
DRAFT NOTES ON ORGANIZING ARBITRAL
PROCEEDINGS (continued) (A/CN.9/423)

Paragraphs 6 and 7
1. Mr. HOLTZMANN (United States of America) said that the Commission needed to decide between variant 1 (paragraph 6) and variant 2 (paragraph 7). His delegation felt that variant 2 was preferable because in most cases the Notes would be used in two-party arbitration and there would be no need to spend time reading about the difference between two-party arbitration and multi-party arbitration. Variant 2 clearly directed the minority involved in multi-party cases to the section of the Notes that dealt with its special concerns and made it clear to the majority that it need not consider the somewhat complex concepts of variant 1.

2. Mr. HUNTER (United Kingdom), supported by Mr. TELL (France) and Mr. FERRARI (Italy), said that variant 2 was preferable; variant 1 was too detailed to be included in the introductory section.

3. Mr. GRIFFITH (Australia) and Mr. ABASCAL (Mexico) said that they also favoured variant 2.

Paragraph 6 was deleted.

Paragraph 7 was adopted.

Paragraphs 8-10
6. Mr. HOLTZMANN (United States of America) suggested that in paragraph 9, the words “or other electronic means” should be added after the words “telefax or conference telephone calls” so as to conform with paragraphs 37 and 38 and to recognize that in the modern world there were other electronic means than those mentioned in the paragraph.

7. Mr. HUNTER (United Kingdom) said that he supported that proposal.

8. Mr. CHOUKRI (Observer for Morocco) said that the Arabic version of paragraph 9 referred to a single meeting, rather than “one or more meetings”, and must be brought in line with the other language versions.

9. Paragraphs 8-10, as amended, were adopted.

Paragraphs 11-14
10. Mr. HOLTZMANN (United States of America) said that in paragraph 14, it would be useful to add the words “by other provisions agreed to by the parties” after the words “arbitration rules”, since the parties might have side agreements, or provisions in their contracts, relating to the conduct of the arbitration, which would limit the discretion of the arbitral tribunal.

11. Mr. GRIFFITH (Australia) and Mr. FERRARI (Italy) said that they supported that proposal.

12. Paragraphs 11-14, as amended, were adopted.

Paragraphs 15-17
13. Mr. CHOUKRI (Observer for Morocco) said his delegation felt that the reference in paragraph 15 to securing the agreement of the arbitral institution should be deleted since it was up to the parties to choose the arbitration rules, and they would not necessarily be the rules of the arbitral institution.

14. Mr. SEKOLEC (International Trade Law Branch) said that that point had been considered at some length at the previous session. The reference was to the agreement of the arbitral institution concerning the performance of the functions of that institution, and not to the permission of the institution to use its rules. The wording was recorded in paragraph 332 of the Commission’s report on the work of its twenty-eighth session.1

15. Mr. HUNTER (United Kingdom) said that the problem could be solved by changing the word “would” to “may”; that would cover other eventualities as well as the point made by the observer for Morocco.

16. Mr. TELL (France) said that as in the case of paragraph 4, paragraph 17 needed to be amended to reflect the fact that in some legal systems, there was no requirement that international arbitration should be subject to national law.

17. Mr. SEKOLEC (International Trade Law Branch) suggested the wording “... on the basis of provisions of law that may govern the arbitral procedure ...”. That would cover all cases, including cases where there was no national law governing the arbitral procedure, while not confusing the issue in cases where such a law did exist.

18. Mr. TELL (France) and Mr. HUNTER (United Kingdom) said that they could accept that wording.

19. Paragraphs 15-17, as amended, were adopted.

Paragraphs 18-21
20. Mr. FERRARI (Italy), referring to paragraph 19, said that the examples of documents which might not need to be translated or might have to be translated only in part should be deleted so as not to discourage arbitrators from having translations made. The sentence would then read “In the interest of economy, some documents might not need to be translated, or may have to be translated only in part.”

21. Mr. HOLTZMANN (United States of America) said that paragraph 20 should make a distinction between simultaneous and consecutive interpretation, since the choice of method had implications in terms of cost and time: consecutive interpretation was cheaper, but it doubled the length of a hearing. The

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question needed to be considered at an early stage because it had an impact on scheduling and on deposits for costs.

22. Mr. ABASCAL (Mexico), referring to paragraph 19, said that conflicts might arise in cases where one of the parties submitted documents in a language other than the language of the proceedings. In such cases, the arbitrators might request the party concerned to provide a translation; the other party might not be satisfied with the translation, and might wish to submit an alternative version. He therefore suggested that the paragraph should include a sentence to the effect that the parties should consider the possibility of conflicts between translations provided by the parties or between translation methods proposed by them. The final wording could be left to the secretariat.

23. With regard to paragraph 20 his delegation supported the United States proposal.

24. Mr. TELL (France), referring to paragraph 19, suggested that in the French version, the word "législation" in the third sentence should be replaced by "règles de droit".

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran), referring to paragraph 19, said that his delegation supported the Italian proposal. As to the concern expressed by the representative of Mexico, conflicts might be avoided if the text referred to "official translations", as that term implied that the translations would be made by licensed individuals.

26. Mr. GRIFFITH (Australia) said that his delegation had no objection to amending the last sentence of paragraph 19 to read "Some documents may not need to be translated or may have to be translated only in part."

27. Mr. CHOUKRI (Observer for Morocco) said that his delegation did not support deletion of the examples in paragraph 19; it did, however, favour deletion of the words "or commentaries in the final brackets", as "commentaries" was a very broad term.

28. Mr. FERRARI (Italy) said that the comments by the representative of Mexico related not only to conflicts involving translation and interpretation, but to broader issues, such as that of expert opinions presented by the parties.

29. The CHAIRMAN suggested that the Commission should revert to the Mexican proposal at a later time. She took it that the Commission wished to delete the bracketed portions of paragraph 19, as proposed by the representative of Italy.

30. It was so decided.

31. Paragraphs 18, 20 and 21 were adopted.

32. Mr. GRIFFITH (Australia), referring to paragraph 23, suggested that the term "support services" should be changed to "administrative services".

33. Mr. HOLTZMANN (United States of America) said that his delegation could not accept the Australian proposal, as administrative services in the context of arbitration typically referred to the services provided by an arbitral institution, while support services included the availability of local counsel, secretarial services and a variety of other services that did not fall within the purview of an arbitral institution.

34. Mr. GRIFFITH (Australia) withdrew his delegation's proposal.

35. Mr. ABASCAL (Mexico) said that the second sentence of paragraph 25, which began with the phrase "When the parties have submitted the case to an arbitral institution, ...", should be amended, as parties did not submit a case to an arbitral institution, but to arbitral proceedings supervised by an institution.

36. Mr. HOLTZMANN (United States of America) said that his delegation welcomed the comments by the representative of Mexico. The sentence could perhaps be amended to read "When an arbitral institution is involved in a case ...".

37. Mr. CHOUKRI (Observer for Morocco) suggested that, in view of the financial implications of engaging a secretary, paragraph 26 might stipulate that the parties should engage a secretary to provide administrative services for the tribunal.

38. Mr. HUNTER (United Kingdom), said that the wording of the last two sentences of paragraph 28 provided too much encouragement to those who felt that the functions of an arbitrator could be delegated to the secretary of the tribunal. The general view in the international community was that an arbitral tribunal could not delegate its essential decision-making function. He therefore suggested that the following sentence should be added at the end of the paragraph: "However, it is typically recognized that it is important to ensure that the secretary does not usurp the decision-making functions of the arbitral tribunal."

39. Mr. HOLTZMANN (United States of America) supported by Mr. ABASCAL (Mexico), welcomed the United Kingdom proposal.

40. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation did not see the need for the proposed amendment as the secretary's functions would be carried out under the supervision of the arbitral tribunal, and the secretary would thus be unable to usurp the tribunal's functions.

41. Mr. GRIFFITH (Australia) proposed deleting the last two sentences of paragraph 28 and inserting a short sentence emphasizing that the secretary should never usurp the decision-making functions of the arbitral tribunal.

42. Mr. TELL (France) endorsed the proposal of the United Kingdom.

43. Mr. HERRMANN (Secretary of the Commission) said that since the secretary carried out tasks under the direction of the arbitral tribunal, as indicated in paragraph 27, paragraph 28 should specify that, while some tasks might be delegated to the secretary, they should never include any decision-making functions. He suggested that a more neutral term should be used to replace the verb "usurp", such as "perform" or "carry out".

44. The CHAIRMAN said that if she heard no further comments she would take it that the Commission agreed to let the secretariat provide appropriate wording for paragraph 28.

45. It was so decided.

46. Paragraphs 25-28, as amended, were adopted.

47. Mr. LEBEDEV, referring to paragraph 30, which dealt with the management of deposits, proposed that the words "taking into account the nature of such deposits" should be inserted at the end of the second sentence to cover situations such as deposits which were exempt from taxation.
48. The CHAIRMAN said that if she heard no further comments she would take it that the Commission wished to adopt paragraphs 29-31 as originally drafted.

49. Paragraphs 29-31 were adopted.

Paragraphs 32 and 33

50. Mr. CHOUKRI (Observer for Morocco), referring to paragraph 33, which dealt with confidentiality, proposed that the references to the identity of arbitrators and to the content of the award should be deleted. The identity of arbitrators was generally public information and the content of awards was an aspect of jurisdiction; accordingly, the parties should not be encouraged to keep such matters confidential.

51. Mr. GRIFFITH (Australia) said that the first sentence in paragraph 32 could be incorrectly construed to mean that confidentiality was an essential aspect of arbitration which, in fact, it was not in all jurisdictions. The draft Notes should state in broader terms that the issue of confidentiality could be dealt with expressly by the parties or covered in the applicable arbitral rules, but that in the absence of a specific arbitral rule, parties should not assume that the obligation of confidentiality was implied. Parties should consider the issue before the arbitration began and make specific provisions for confidentiality if they so desired.

52. Mr. HUNTER (United Kingdom) agreed that the draft Notes should encourage parties to consider the need for an agreement on confidentiality.

53. Mr. HOLTZMANN (United States of America) agreed that the parties should be advised that confidentiality was not necessarily assured and that they had to make specific agreements. He proposed that a small drafting group should review the issue of confidentiality and that discussion of the matter should be deferred.

54. Mr. HERRMANN (Secretary of the Commission) said it would be helpful if the Commission provided further guidance on the matter of confidentiality, which continued to be an important topic of discussion in arbitration circles. For the purposes at hand, however, it would be sufficient to indicate that in the absence of express rules for confidentiality, parties should not assume the existence of an implied confidentiality recognized by courts in all jurisdictions. If parties wished to include an agreement on confidentiality, they could proceed in accordance with the guidelines in paragraph 33.

55. The CHAIRMAN said that the secretariat would provide a final draft of paragraph 33.

56. Paragraphs 32 and 33 were adopted.

Paragraphs 34 and 35

57. Paragraphs 34 and 35 were adopted.

Paragraphs 36-38

58. Mr. FERRARI (Italy) said that his delegation objected to the negative implications in paragraph 36 regarding the use of telefax. He suggested that the paragraph should be deleted or redrafted.

59. Mr. HOLTZMANN (United States of America), agreeing with the representative of Italy, proposed to delete the word “while” in the first sentence of paragraph 36 so that it would read “The use of telefax in arbitration proceedings offers many advantages over traditional means of communication.” The next sentence might then begin with the words “It is, neverthe-

less, advisable ...” and continue as drafted. He further proposed that the phrase “in light of those considerations” should be deleted from the next sentence so that it began “It might be decided that ...” and continue with no further changes. In that way, the paragraph would endorse the use of telefax but would also mention the necessary precautions to be taken with regard to equipment.

60. Mr. ABASCAL (Mexico) supported the United States proposal and suggested that the reference in the first sentence to “the advisability of considering whether the equipment used offered satisfactory security” should be deleted in order to avoid any confusion.

61. Mr. GRIFFITH (Australia) said that the paragraph should be as short as possible to avoid confusion and ensure that it encouraged rather than discouraged the use of telefax. He proposed that the secretariat should provide the precise wording of paragraph 36.

62. Mr. TELL (France) supported the proposal of Italy and the deletion of the second part of the first sentence as well as the second sentence.

63. Referring to paragraph 38, he said that the phrase “to avoid technical difficulties” was misleading, since no suggestions for avoiding such difficulties were provided in the paragraph.

64. Mr. ABASCAL (Mexico) said that, if paragraph 36 was retained, his delegation would prefer the wording proposed by the delegation of the United States of America for the first sentence; it reflected a more positive attitude to the use of telefax.

65. Mr. HUNTER (United Kingdom) said that since the use of telefax gave rise to specific problems, paragraph 36 should not be deleted. His delegation favoured the wording proposed by the representative of the United States of America. He agreed with the representative of Mexico that the second sentence should be deleted, and suggested that the third sentence could be left to the secretariat to redraft as appropriate.

66. Mr. FERRARI (Italy) agreed that the first sentence of paragraph 36 should be reworded in a more positive way.

67. Mr. TELL (France) supported the remarks by the representatives of Mexico and Italy and added that if the second sentence was retained, it would be inappropriate to warn against the use of telefax for certain types of documents.

68. The CHAIRMAN said that paragraph 36 would be re-drafted accordingly, and that the revised English text would be made available at the following meeting.

69. Paragraphs 36-38, as amended, were adopted.

Paragraphs 39-42

70. Paragraphs 39-42 were adopted.

Paragraph 43

71. Mr. HOLTZMANN (United States of America) proposed that the following subparagraph should be added at the end of the paragraph: “ - the method by which submissions will be made, e.g. whether on paper or by electronic means, or both (see also paragraphs 36-38).”

72. Mr. GRIFFITH (Australia) suggested that it was already implicit in the guidelines that submissions could be made by
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electronic means. Moreover, the wording of the new subparagraph did not sit well with the rest of the paragraph.

73. Mr. FERRARI (Italy) supported the proposal of the United States of America.

74. Mr. HOLTZMANN (United States of America) said that the increasing availability and use of electronic means should be recognized in the text. Any necessary redrafting of the paragraph should be left to the secretariat.

75. The CHAIRMAN said that the paragraph would be redrafted accordingly.

76. Paragraph 43, as amended, was adopted.

The meeting rose at 6 p.m.

Summary record of the 585th Meeting

Wednesday, 29 May 1996, at 10 a.m.

[ACN.9/SR.585]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 10.15 a.m.

INTERNATIONAL COMMERCIAL ARBITRATION:
DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

Paragraphs 44-47

1. Mr. HOLTZMANN (United States of America) suggested that a new sentence should be added at the end of paragraph 44, reading "The terms of reference required under some arbitral rules or agreements of the parties may serve this same purpose."

2. Mr. TELL (France) said that the practice of preparing lists of points at issue, referred to in paragraph 44 was falling out of favour with practitioners. He suggested that the words "risk of a subsequent ultra petita or infra petita objection to the award" should be added to the disadvantages cited in the text.

3. Mr. ABASCAL (Mexico) expressed his support for both the United States proposal and the French proposal.

4. Mr. TELL (France) suggested that in the French text of paragraph 47, the word "recours" should be replaced by "action".

5. Mr. SANDOVAL LÓPEZ (Chile) said that a similar problem existed in the Spanish text, where the words "reparación" and "remedio" should be replaced by "acción".

6. Mr. ABASCAL (Mexico), supported by the CHAIRMAN, said that since the word "acción" had a specific technical meaning in several Latin American countries, it might be inappropriate to use it in paragraph 47.

7. Mr. SANDOVAL LÓPEZ (Chile) said there was nevertheless a need to make it clear that what was being sought was not always a relief or remedy, but rather some action on the part of the tribunal.

8. Mr. HERRMANN (Secretary of the Commission), supported by Mr. ABASCAL (Mexico) and Mr. TELL (France), suggested the adoption of the wording used in other Commission documents, where the phrase "relief or remedy sought" had been translated into French as "l'objet de la demande" and into Spanish as "el objeto de la demanda".

9. Mr. LEBEDEV (Russian Federation) observed that paragraph 47 appeared to concern only the claims of the claimant, and not those of the defendant, and that the secretariat should clarify the draft by avoiding the use of the words "their claims".

10. Mr. HOLTZMANN (United States of America) suggested that, for reasons of clarity and accepted usage, the word "defendant" at the end of paragraph 46 should be replaced by "a party".

11. Paragraphs 44-47, as amended, were adopted.

Paragraph 48

12. Mr. GRIFFITH (Australia) suggested that paragraph 48 should indicate more clearly the need for the consent of all parties to the disclosure to the arbitrator of any information relating to the possibility and status of settlement negotiations.

13. Mr. HERRMANN (Secretary of the Commission) said that the purpose of the Notes was not to lay down rules for the parties to arbitration proceedings, but rather to serve as an annotated checklist for the arbitrators. He therefore preferred to preserve the minimalist character of the paragraph as currently drafted.

14. Mr. ABASCAL (Mexico) expressed doubts about the appropriateness of the Australian proposal. Some negotiation agreements might require both parties to provide information to the arbitrators, while others might stipulate confidentiality. The complexity of the problem was beyond the scope of the current paragraph.

15. Mr. HUNTER (United Kingdom) said that in view of the complexity of the issues involved, his delegation also preferred the minimalist approach of the current text.

16. Paragraph 48 was adopted.

Paragraphs 49-55

17. Mr. SANDOVAL LÓPEZ (Chile) suggested that part of paragraph 50 should be moved to paragraph 52, so that the first part of the latter paragraph would read "The arbitral tribunal may wish to establish time limits for the production of docu-
ments. In that case, evidence submitted late will as a rule not be accepted."

18. The CHAIRMAN said she took it that the Commission preferred the current text of paragraphs 49 and 50.

19. Mr. HOLTZMANN (United States of America) suggested that, for consistency with other provisions, the words "or electronic message" should be added after the word "telefax" in paragraph 53(b).

20. Mr. TELL (France) said that while his delegation had no objection to the United States proposal, it found the second part of paragraph 53 to be questionable and too formalistic. As currently drafted, the paragraph appeared to encourage parties to challenge the introduction of documentary evidence.

21. The CHAIRMAN said she took it that the Commission preferred to retain the current wording of paragraph 53, with the addition suggested by the United States representative.

22. Mr. HOLTZMANN (United States of America) suggested that the last sentence of paragraph 54 should be revised to include a reference to a document-numbering system.

23. Mr. HERRMANN (Secretary of the Commission) said that specific reference to a document-numbering system had already been made in paragraph 43, and asked whether a joint set of documents would require a separate numbering system distinct from those already used by the parties to the proceeding.

24. Mr. HOLTZMANN (United States of America) said that perhaps paragraph 43 could be broadened to include a more direct reference to a document-numbering system.

25. Mr. LEBEDEV (Russian Federation) suggested that, in paragraph 43, "a system for numbering items of evidence" should be amended to read "a system for numbering items of evidence and other documents".

26. The CHAIRMAN said she took it that the Commission accepted the amendment suggested by the representative of the Russian Federation.

27. Mr. HUNTER (United Kingdom) said that, the word "findings" in the second sentence of paragraph 55 implied that a decision had been taken. His delegation therefore considered that "findings" should be replaced by a more neutral word, such as "material".

28. The CHAIRMAN said that, if the members of the Commission agreed, the word "findings" in the English text would be replaced by the word "information".

29. Paragraphs 49-55, as amended, were adopted.

Paragraphs 56-59

30. Mr. HOLTZMANN (United States of America), supported by Mr. HUNTER (United Kingdom), proposed that, in paragraph 58, the words "arrangements so that all parties have the opportunity to be present" should be inserted after the words "matters such as timing."

31. Mr. MADRID (Spain) said that the current wording of paragraph 58 already implied that measures would be taken to ensure that the arbitrators and one party would be given an opportunity to be present at an on-site inspection.

32. Mr. HUNTER (United Kingdom) said that it was not necessary to imply that the arbitral tribunal had an obligation to make arrangements. The word "arrangements" should therefore be avoided. Perhaps the words "giving the parties an opportunity to be present" would be sufficient.

33. Mr. HERRMANN (Secretary of the Commission) said that, in paragraph 58, the reference to timing and meeting places should take into account the arrangements to which the United States representative was referring. Perhaps the paragraph could be amended to include the words "with a view to ensuring that all parties have an opportunity to be present".

34. Mr. HOLTZMANN (United States of America) said that his delegation could accept the Secretary's suggestion.

35. Paragraphs 56-59, as amended, were adopted.

The meeting was suspended at 11.15 a.m. and resumed at 11.55 a.m.

Paragraphs 60-69

36. Mr. HOLTZMANN (United States of America), supported by Mr. GRIFFITH (Australia) and Mr. HUNTER (United Kingdom), proposed that the following sentence should be inserted after the first sentence of paragraph 68: "In those legal systems, it is usual that such contacts are not permitted once the oral testimony of the witness has begun."

37. The CHAIRMAN asked whether the proposed amendment was necessary, considering that the first sentence of paragraph 68 specified that the interviews in question took place "prior to" the hearing.

38. Mr. CHOUKRI (Observer for Morocco) proposed, in keeping with the United States proposal, that the sentence "In some legal systems, the parties are permitted to hold meetings with witnesses prior to their appearance at the hearing" should be added at the end of paragraph 68.

39. The CHAIRMAN said that the Moroccan proposal simply reiterated what was said at the beginning of paragraph 68.

40. Mr. CHOUKRI (Observer for Morocco) said that that paragraph did not cover situations where the parties were permitted to interview witnesses after the hearing had begun but before the witnesses had given their testimony.

41. Mr. HUNTER (United Kingdom) suggested that the Moroccan proposal might be intended to cover situations where witnesses gave evidence before the hearing in the form of a deposition, which was admitted into the record of the proceedings and taken into account by the tribunal in reaching its conclusion. That situation might be too specific for inclusion in the Notes; on the other hand, the Notes should not imply anything negative about that practice.

42. The CHAIRMAN said that the situation was already covered in paragraph 66, and that referring to it again could cause confusion.

43. Mr. HOLTZMANN (United States of America) said that the words "prior to" in the first sentence of paragraph 68 did not convey his idea as explicitly as he would have liked. He suggested that, to replace his previous proposal, the secretariat of the Commission should draft a sentence specifically cautioning the parties that, in systems where witnesses could be interviewed before the hearing, such contacts were usually forbidden once oral testimony had begun.

44. The CHAIRMAN said that the secretariat would take note of the United States proposal.
45. Paragraphs 60-69, as amended, were adopted.

Paragraphs 70-74

46. Mr. FERRARI (Italy) said that the question of conflicts between different expert opinions which had been raised at the previous meeting, should be dealt with in the section currently under consideration.

47. Mr. LEBEDEV (Russian Federation) said experience had shown that experts were often unable to perform their functions without additional materials from one of the parties, and that many arbitration rules therefore stipulated that the parties must provide experts with the materials they needed to form an opinion. He proposed that the sentence "It may be useful to provide that the parties should supply the expert with the materials he requires to prepare his expert conclusion" should be inserted after the second sentence of paragraph 72.

48. Mr. HERRMANN (Secretary of the Commission) said that, with respect to the proposal by the Russian Federation, the Notes should not specify whether the request for additional materials should come directly from the expert or should be made through the tribunal, since the relevant provisions of the UNCITRAL Arbitration Rules differed from those of the UNCITRAL Model Law on International Commercial Arbitration. He asked the representative of Italy to clarify his proposal, since the Notes could not cover all situations where expert opinions contradicted one another, because the solutions to such contradictions depended on the circumstances in each case and were part of the decision-making process, which was not addressed in the Notes.

49. The CHAIRMAN said she agreed that the choice between different expert opinions was a matter for the judge to decide in each case. In any event, the last sentence of paragraph 72 dealt adequately with the evaluation of experts' reports.

50. Mr. FERRARI (Italy) said that sentence did not sufficiently address the issue because it appeared in the section on the terms of reference of experts appointed by the arbitral tribunal, and not in the section on expert opinions presented by a party.

51. The CHAIRMAN said that the differences of opinion referred to could involve either category of experts. In the absence of specific proposals, she would take it that the Commission approved paragraphs 70-74 as amended.

52. Mr. FERRARI (Italy) asked whether the issue he had raised would be addressed.

53. The CHAIRMAN noted that thus far no proposal had been made in that connection, not even by the Mexican delegation, which had raised the issue at the previous meeting.

54. Mr. ABASCAL (Mexico) explained that the problem he had raised concerned conflicts between translations, not conflicts between expert opinions.

55. Mr. FERRARI (Italy) pointed out that the question raised by the Mexican delegation had been postponed precisely because his delegation had suggested dealing with conflicts between translations and conflicts between expert opinions at the same time.

56. The CHAIRMAN, said that she would take it that the Commission found the paragraphs under consideration sufficiently clear, since no specific amendments had been proposed, apart from the addition to paragraph 72 proposed by the Russian Federation. With regard to the latter proposal, she observed that it might be useful to require the parties to supply the expert with the material necessary for the discharge of his functions.

57. Mr. LEBEDEV (Russian Federation) said he agreed with the Secretary of the Commission that the wording of the addition proposed by his delegation should be extremely general and should do nothing more than clarify certain issues that arose in practice.

58. Paragraphs 70-74, as amended, were adopted.

Paragraphs 75-86

59. Mr. HOLTZMANN (United States of America) suggested moving the last sentence of paragraph 89 to the end of paragraph 87. He also suggested that the last part of the sentence should be amended to read "can be used in multi-party as well as two-party proceedings", which shifted the emphasis.

60. Paragraphs 75-86, as amended, were adopted.

Paragraphs 87-89

61. Mr. HOLTZMANN (United States of America) suggested moving the last sentence of paragraph 89 to the end of paragraph 87. He also suggested that the last part of the sentence should be amended to read "can be used in multi-party as well as two-party proceedings", which shifted the emphasis.

62. Mr. TELL (France) said that the word "pluripartite" in paragraph 89 of the French text should be changed to "bilatérale" in order to be consistent with paragraph 87.

63. Mr. LEBEDEV (Russian Federation) said that a number of inaccuracies in the Russian text should be corrected.

64. Mr. HERRMANN (Secretary of the Commission) invited all delegations to make suggestions in the other official languages as well.

Paragraphs 32 and 36

65. Mr. SEKOLEC (International Trade Law Branch) read out the following amended version of paragraph 32:

"It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the arbitration. Moreover, parties that have agreed on arbitration rules that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize a commitment to confidentiality as an implied term of the agreement. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality."

66. He also read out the following amended version of paragraph 36:

"Telefax, which offers many advantages over traditional means of communication, is widely used in arbitral proceedings. Nevertheless, should it be thought that, because of the characteristics of the equipment used, it would be preferable not to rely only on a facsimile of a document, special arrangements may be considered, such as that a particular
INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (continued) (A/CN.9/423)

1. Mr. HERRMANN (Secretary of the Commission) suggested that, pursuant to the discussion at previous meetings, the Commission might wish to make a number of drafting changes to the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423). He therefore proposed to read out the changes as formulated by the secretariat.

2. Paragraph 19 would read: “Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. Bearing in mind the needs of the proceedings and economy, it may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings.” The title of section 10 would read: “Practical details concerning written submissions and evidence”. However, if the Commission preferred to retain paragraph 43 in its current form, the last subparagraph, which dealt with translations, should be deleted, since that issue had been sufficiently covered in paragraph 19.

5. Mr. GRIFFITH (Australia) suggested that the heading of section 10 should be shortened to “Practical details concerning written submissions and evidence”. In addition, paragraph 43 contained too much detail, and could be replaced by the sentence “Directions should be given as to the form and format of any translations of documents or evidence.” However, if the Commission preferred to retain paragraph 43 in its current form, the last subparagraph, which dealt with translations, should be deleted, since that issue had been sufficiently covered in paragraph 19.

6. Mr. CHOUKRI (Observer for Morocco) supported the proposal of the representative of Australia regarding the heading of section 10.

7. Mr. HOLTZMANN (United States of America) recalled that an effort had been made to ensure that all section headings were sufficiently explicit, so that the list of matters following paragraph 19 could stand alone. His delegation therefore opposed changing the heading of section 10. Also, his delegation did not support the changes to paragraph 43 proposed by the representative of Australia; they would result in the deletion of some very useful information.

8. Mr. GRIFFITH (Australia) said that his delegation accepted the arguments put forward by the representative of the United States of America.

9. Mr. LEBEDEV (Russian Federation), supported by Mr. FERRARI (Italy) and Mr. TELL (France), said that the new language produced by the secretariat should be retained in its current form.

10. Mr. HERRMANN (Secretary of the Commission) suggested that the Commission might wish to rename the document “UNCITRAL Notes on Organizing Arbitral Proceedings”.

11. The CHAIRMAN said she would take it that the Commission wished to adopt the document as amended.

12. It was so decided.
13. Mr. LEBEDEV (Russian Federation) said that the Commission had completed a very important document which would prove most useful in the field of international commercial arbitration. He requested the secretariat to explain how it would be disseminated, particularly in business circles.

14. Mr. HERRMANN (Secretary of the Commission) said that the secretariat did not have any definite plans for publication because in the current financial situation there was no certainty as to what resources would be available. However, the secretariat would make every effort to disseminate the text as widely as possible and to determine which distribution channels should be used. As soon as the document was finalized internally it would be put on the home page, which was another way of making it widely available. If possible, the Notes would be issued in the form of a booklet, possibly with the list of issues as a separate insert. There might be some advantage in having the booklet printed in Vienna. It would be helpful if, in its formal decision adopting the Notes, the Commission requested the Secretary-General to ensure the widest possible dissemination of the Notes; that decision would then be included in the Commission’s report.

**The meeting was suspended at 4 p.m. and resumed at 4.30 p.m.**

**ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK** (A/50/17; A/CN.9/421 and 426)

15. Mr. SORIEUL (International Trade Law Branch), introducing the draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426), recalled that, at its previous session, the Commission had adopted article 1 and articles 3-11, although some questions remained with regard to article 11. The title of the draft Guide had not been finalized, and that reflected uncertainties about the exact sphere of application of the Model Law.

16. In article 2, one of the questions to be resolved, which actually determined the sphere of application of the Model Law, was the definition of the term “data message”. The Commission would have to determine whether that notion included not only automatic exchanges of data from computer to computer but also electronic mail, telegrams, telex and fax. There had been a detailed discussion at the previous session as to the types of fax uses the concept of a “data message” should cover. The Working Group had agreed that automated fax uses should be covered but had not been very specific about fax uses in general. Another question that arose was whether the concept covered writing.

17. There had been agreement on much of article 1, but it remained to be determined whether the sphere of application should cover domestic and international uses of modern means of communication or should be limited to the commercial area. The footnote to article 1 was based on the broad definition of the term “commercial” contained in the UNCITRAL Model Law on International Commercial Arbitration. Although the Model Law was limited to the commercial field, there were elements which made it possible to extract general rules applicable to all uses of modern means of communication in the commercial field and also in civil law and possibly administrative law.

18. Chapter II contained central provisions of the Model Law and sought to determine the functional equivalent of concepts such as “writing”, “signature” and “original”, as well as the legal validity of data messages. Those provisions would re-place binding provisions which already existed in national laws concerning the form of certain legal transactions. Articles 5-7 were concentric articles, moving from simpler to more complex, and from less binding to more binding. Article 5 was not concerned with the authenticity of the content of a writing or with identification of its author but aimed to define a functional equivalent of a piece of paper. In article 6, one found rules on the functional equivalent of a signature; the functional equivalent of a signed writing was therefore a writing or electronic message that met the conditions of articles 5 and 6. Article 7 laid down more autonomous rules on the presentation of the content of the document between the time of its creation and the time it acquired legal force. Articles 8 and 9 were also binding in nature.

19. Chapter III contained provisions which were not binding and were of the type often found in contracts establishing the links between EDI users and communications agents. Article 10, a general provision, established the principle of party autonomy. Article 11 was concerned with the conditions in which the author of a data message could be legally bound by the content of a document emanating from a computer. The Commission had not been able to reach consensus on paragraph 6, which therefore remained in square brackets. It might be preferable for the Commission to start with articles 12-14 at the current session and then revert to the question of the sphere of application, raised in article 2.

20. Before taking up article 2, the Commission might wish to consider the text of draft article “x”, annexed to the report of the Working Group on Electronic Data Interchange on the work of its thirtieth session (A/CN.9/421). Draft article “x”, the text of which had been drawn up in collaboration with the Comité Maritime International (CMI), would create the functional equivalent of bills of lading in maritime transport. The text would be added to the draft Model Law as article 15.

21. Article “x” would apply to maritime transport documents, not only negotiable documents but also non-negotiable sea waybills, so that it would be possible to extend its application to all types of transport documents. The objective of the article was to settle all questions regarding the negotiability and transferability of rights. Article “x” was therefore a specific provision of transport law.

22. The Working Group proposed that draft article “x” should be placed in a separate part – Part II – of the Model Law, so that a division would be made in the text between general and specific provisions. The question then arose as to whether other specific provisions were needed; if so, the Commission could instruct the Working Group to propose provisions in respect of other negotiable documents. However, the Commission would then have to take a position on when the Model Law should be completed. If the text was to be completed at the current session, the Commission would have to decide about possible future additions to the Model Law.

23. The draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange and Related Means of Communication (A/CN.9/426), served as an explanatory note to the Model Law and constituted a possible source of law. Once the Commission had completed its review and adoption of the Model Law, it was the intention of the secretariat to finalize the Guide, taking into account the deliberations and decisions of the Commission. It was to be hoped that the Guide would be adopted at the same time as the Model Law so that both texts could be published concurrently. Accordingly, the Commission should provide the secretariat with any modifications to be incorporated into the final version of the Guide.
24. The question of future work on the topic of EDI was covered in chapter IV of the Working Group’s report (A/CN.9/421). The Working Group, with the help of CMI, had identified questions which went far beyond the uses of EDI and electronic communications to issues of maritime law. Article “x” was concerned with the functional equivalent of bills of lading but made no mention of other issues that could affect the rights and obligations of parties to various types of maritime transport contracts. The view had been expressed that the Commission should take up issues of maritime law and formulate more general rules on the rights and obligations of the parties concerned.

25. The Working Group had considered other possible topics for future work in the field of EDI. It had felt that the question of possible standards for digital signatures should not be taken up by the Commission because it was a technical rather than a legal matter. On issues of registries, if there was to be a system of certification and authentication of electronic communications, one of the technical solutions was to ensure uniformity of rights transferred and integrity of information transmitted through a certification authority which would have the status of a third party in relation to the parties concerned. The simplest method was to have a registry which would receive information and register the transfer of rights and would be able to provide information on the holders of registered rights. That issue needed to be considered in more detail in collaboration with the International Institute for the Uniformization of Private Law (UNIDROIT), which was working on the question of the registration of certain types of mobile equipment.

26. With regard to the question of incorporation by reference, the Working Group had agreed on three conditions to be met when establishing legal norms for the incorporation of reference clauses in data messages. If time permitted, it was recommended that the Commission should discuss, at its current session, the possibility of including in the Model Law a general reference to incorporation by reference.

27. Other areas in which it was recommended that the Commission should conduct future work included a set of rules, or a code of conduct, covering the rights and obligations of information service providers, and a review of existing international conventions. The Working Party on Facilitation of International Trade Procedures of the Economic Commission for Europe (WPA) was currently reviewing all international conventions applicable to international trade in order to identify those provisions that hindered the use of EDI. The Working Group had encouraged further collaboration between the Commission and WPA in that area.

28. Mr. HOLTZMANN (United States of America) said that if the Commission expected to have sufficient time to consider future work as well as major issues in the Guide, then it ought to consider only previously unresolved matters and not seek to reopen the discussion of any other issues on which it had already taken action. Secondly, with regard to the Guide, the secretariat was correct to seek guidance from the Commission on major issues. However, his delegation understood that the Commission would not have sufficient time to do so with great particularity and assumed that it would authorize the secretariat to finalize the Guide in accordance with the Commission’s deliberations.

29. Mr. SORIEUL (International Trade Law Branch) said that the final version of articles 1 and 3-11 of the draft Model Law had been adopted by the Commission the previous year, at which time it had indicated that priority at its twenty-ninth session should be given to concluding work on the draft Model Law and Guide. In order to achieve that goal, the Commission should consider first and foremost articles 2, 12-14 and article “x,” raising as few questions as possible regarding previously discussed matters. However, in order to ensure that the final version of the Model Law and Guide were harmonious, some adjustments of the text, both in wording and in substance, might be necessary.

30. Mr. ABASCAL (Mexico) agreed with the representatives of the United States of America and the secretariat but warned that the rule to refrain from raising previously settled issues should not be interpreted too strictly. It was quite possible that decisions regarding article “x” would affect other provisions that had been adopted earlier, and it was vital that no discrepancies should arise that would be detrimental to the quality of the Model Law.

Article 12

31. Mr. PHUA (Singapore) said that current EDI technology allowed for two forms of acknowledgement of receipt: acknowledgement that was automatically generated without the intervention of the addressee and acknowledgement that required the intervention of the addressee. Article 12 as currently drafted was not entirely clear as to which form of acknowledgement of receipt was contemplated.

32. Mr. SORIEUL (International Trade Law Branch) said that the text of article 12 as currently drafted did not distinguish between the technical forms of acknowledgement of receipt.

33. Mr. CHOUKRI (Observer for Morocco) said that the reference in paragraph 4 to a “reasonable time” was too vague. Either it should be deleted or the Commission should specify the exact amount of time referred to, for example, “within a week” or “within a month’s time”.

34. Mr. ABASCAL (Mexico), referring to the question raised by the representative of Singapore, said that an automatically generated acknowledgement of receipt might not correspond to the acknowledgement requested by the originator.

35. Mr. MADRID (Spain) said it should be borne in mind that an acknowledgement of receipt was also a data message. The text of paragraph 2 not only raised that issue, as noted by the representative of Mexico, but also resolved it by providing that unless the acknowledgement conformed strictly to the originator’s requirements, it could not be deemed valid.

36. Mr. BURMAN (United States of America) endorsed the Mexican representative’s comments with regard to article 12, paragraph 2. It might be appropriate to amend the paragraph to read “Where the originator has not requested that the acknowledgement contain particular information, ....”.

37. Mr. ABASCAL (Mexico) agreed with the representative of Spain that there might be undesirable consequences for the addressee if the acknowledgement of receipt was not in a particular form. An addressee whose equipment automatically generated an acknowledgement of receipt might believe that he had complied with the originator’s request for acknowledgement and take action on that basis, whereas the acknowledgement might be deemed to be invalid. While the United States proposal was of interest, it did not address the issue raised by the representative of Singapore, since the intention behind paragraph 2 was not to require that the acknowledgement should contain particular information, but that it should be in a particular form.

38. The concept implied by article 12, paragraph 2, was similar to that embodied in the United Nations Convention on
Contracts for the International Sale of Goods, whereby specific conduct on the part of the party receiving a contract offer could be construed as constituting acceptance of the offer. The paragraph was also intended to give the addressee the widest possible choice of means of acknowledging receipt of a data message – for instance, by telephone, facsimile, and so on. The problem could best be solved by amending the paragraph to state that, where the originator had requested that the acknowledgement should be in a particular form, if the addressee’s equipment automatically generated a response, that should be deemed to constitute acknowledgment of receipt.

39. Mr. ALLEN (United Kingdom) agreed with the representative of Spain that if the originator was not satisfied with an automatic form of acknowledgement, then the solution was to stipulate a particular kind of acknowledgement. He also concurred with the Mexican representative’s view that the paragraph should not refer to a particular kind of information.

40. The CHAIRMAN said her understanding of article 12, paragraph 2, was that, where the originator had requested that the acknowledgement should be in a particular form, only an acknowledgement which was in the form requested could be deemed to be valid.

41. Mr. PHUA (Singapore) said that the United States and United Kingdom proposals did not address the concern which he had raised. If the addressee’s equipment automatically generated an acknowledgement, then paragraph 2 would not be relevant. Paragraph 4 would, however, be relevant, because the originator would then have to rely on the amount of time that had elapsed in order to know whether or not the data message had been received. He proposed that the following sentence should be inserted at the end of paragraph 1: “This article does not apply where an acknowledgement of receipt is generated automatically, without intervention by the addressee.”

42. Mr. MADRID (Spain) suggested that the concerns expressed by the representatives of Mexico, the United States of America and the United Kingdom could be met by amending article 12, paragraph 2, to read “Where the originator has not requested that the acknowledgement contain a particular kind of information or be sent by a particular means…”. It should be borne in mind that article 12 applied only where no prior agreement existed between the parties. Accordingly, it was up to the originator to decide whether or not to request an acknowledgement of receipt. If an acknowledgement of receipt was requested, then the originator was entitled to stipulate that it should be in a particular form, in order to preserve the validity of the original data message. For that reason, his delegation could not accept the proposal just made by the representative of Singapore, which would preclude the application of paragraph 2.

43. Mr. CHANDLER (United States of America) endorsed the comments by the representative of Spain and suggested that, if the Commission had reached a consensus on amending paragraph 2 along the lines proposed, the matter could be referred to the drafting group. His delegation also concurred with the Spanish delegation’s view that amending paragraph 1 as suggested by the representative of Singapore could constitute a major step backward in the light of current developments in electronic commerce. There was a growing number of ad hoc contractual practices in which pre-set arrangements triggered inventory dispatch and other contractual actions. In view of those developments, his delegation had recently introduced a draft text which referred to the concept of an electronic agent and was, in part, intended to cover arrangements of that type.

44. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that, as a practical matter, his organization could not support the Singaporean proposal, since the recipient could, if he so wished, deactivate the acknowledgement feature on his computer.

45. Mr. BISCHOFF (Observer for Switzerland) recalled that the intention underlying article 12 had been to confirm the automatic receipt of a data message. Such confirmation was always linked to a particular form; he therefore believed that the applicability of the draft article should be limited to a particular form of acknowledgement.

46. Mr. SCHNEIDER (Germany) said that the representative of Singapore had raised a substantive issue, not merely a drafting problem. Draft article 12 had to be read in conjunction with draft article 14, which dealt with the circumstances under which a data message was deemed to have been received. A situation might arise in which an automatic acknowledgement was generated even though a data message had not been received, a problem which paragraph 2 of article 12 did not address.

47. Mr. ALLEN (United Kingdom) said that the situation referred to by the previous speaker was part of a wider issue, involving cases where an acknowledgement of receipt was given, but not by the addressee. That issue could be addressed in paragraph 5 of article 12, by stipulating that that paragraph applied where the originator received an addressee’s acknowledgement of receipt. The question then arose as to whether the acknowledgement had actually been given by the addressee; however, in his delegation’s view, that question was dealt with adequately in article 11.

48. Mr. PHUA (Singapore) thanked the representative of Germany for having summarized his delegation’s concerns so succinctly. While his delegation did not wish to inhibit the use of automatic acknowledgement of receipt, it believed that the wording of article 12 was too broad and did not specify whether the provision referred to acknowledgement of receipt by the addressee or by the system. Nevertheless, his delegation could accept the solution proposed by the representative of the United Kingdom.

The meeting rose at 6 p.m.
Summary record of the 587th meeting

Thursday, 30 May 1996, at 10 a.m.

[A/CN.9/SR.587]

Chairman: Mrs. PIAGGI de VANOSSE (Argentina)

The meeting was called to order at 10.10 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17, A/CN.9/426)

Article 12 (continued)

1. Mr. SANDOVAL LÓPEZ (Chile) proposed some drafting changes in article 12 which he believed would solve the problems referred to by the German representative at the previous meeting. Paragraph 2 of the article should read: "Where the originator has not requested that the acknowledgement be in a particular form, it shall be understood that any communication from the addressee, including in electronic form, should be sufficient to indicate to the originator that the data message has been received ...." Paragraph 5 could begin: "Where the originator receives an acknowledgement of receipt of a data message, whether by communication or conduct of the addressee, including in electronic form, it is presumed that the addressee has received that message ...."

2. Mr. SORIEUL (International Trade Law Branch) replied to a number of questions raised at the previous meeting. Concerning a situation where a message was acknowledged but had not been received, he drew the Commission's attention to article 12, paragraph 5, and to the Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426). In fact, there was a clear analogy with the regular mail where a letter was sent by "return receipt requested" and was acknowledged, but not received by the addressee.

3. The specific form of an acknowledgement of receipt, dealt with in paragraph 2, was also a matter of interpreting legal norms by analogy with the regular mail. If the acknowledgement was not in the particular form specified by the originator, it would be considered not to have been received and nothing more. The lacuna in paragraph 2 could also be expanded to cover cases in which the originator requested that the acknowledgement be given by a particular method ...

4. The representative of Singapore had asked about distinguishing between an acknowledgement of receipt in electronic form, which might be automatically generated by the addressee's equipment, and other forms which would require the addressee to take action. In fact, the Working Group had not misunderstood the differences between the various categories of electronic acknowledgements, ranging from devices which responded automatically to those which required human intervention. In order to avoid complications, article 12 deliberately did not go into detail but rather focused on the function of an acknowledgement, while providing some general principles. Before taking action, the Commission should seriously weigh the benefits of breaking up article 12 into a number of more specific provisions.

5. Mr. CHANDLER (United States of America) said article 12 did not have to contain details on various forms of acknowledgement because the parties would of necessity have reached a prior understanding if they used sophisticated acknowledgements such as retransmitting the message back to the originator for verification. If such an understanding existed between the parties, there was no need for intervention.

6. The word "form" was potentially misleading because it had several uses. It could be understood to mean a bureaucratic form or a generalized form in structured electronic data interchange. It would be regrettable if the use of the term resulted in the rejection of an acknowledgement. Perhaps another term, such as "kind" or "method", should be used.

7. Mr. ALLEN (United Kingdom) said the beginning of article 12, paragraph 2, should read: "Where the originator has not requested that the acknowledgement be given by a particular method ...

8. Mr. BISCHOFF (Observer for Switzerland) said he would prefer to retain the word "form" and add "method" and/or "particular type". He proposed inserting the words "be of a particular type or" before "be in a particular form".

9. Mr. ABASCAL (Mexico) noted that the word "form" appeared in many articles of the Model Law. If it were deleted in one place, the Working Group would be forced to review its use in other articles for the sake of consistency.

10. Mr. ALLEN (United Kingdom) agreed with the observer for Switzerland that "form" should be retained. The English version would then read: "Where the originator has not requested that the acknowledgement be in a particular form or be given by a particular method ...

11. Mr. MADRID (Spain) agreed with the Mexican representative that "form" should not be deleted. Unless delegations felt strongly that the specific forms of acknowledgement should be differentiated, it would be preferable not to engage in an exercise that involved reviewing the language of all the articles.

12. Mr. SCHNEIDER (Germany) supported the remarks made by the Observer for Switzerland and the representative of Spain. The term "form" should be retained, although he was not averse to adding "procedure" or "method".

13. Mr. CHOUKRI (Observer for Morocco), citing various articles of the Model Law, stressed that the term "form" was the most suitable.

14. Mr. ABASCAL (Mexico) said that the problem stemmed from the fact that the concept of "acknowledgement of receipt" was not defined. "Acknowledgement of receipt" should mean that the message was received and nothing more. The lacuna in article 12 could be rectified by adding a paragraph indicating that an acknowledgement of receipt in electronic form fulfilled all the requirements of paragraphs 2, 3 and 4.
15. Mr. SANDOVAL LÓPEZ (Chile) agreed with the Mexican representative that there was a lacuna in article 12, paragraph 2, because an acknowledgement in electronic form was not specifically mentioned.

16. Mr. SORIEUL (International Trade Law Branch) stressed that “acknowledgement” simply meant that the message had been received. As specified in the Guide to Enactment of the Model Law, it gave no indication of the addressee’s position on the content of the message. He failed to see how article 12, paragraph 2, was insufficient or in any way opposed to an acknowledgement in electronic form. The paragraph was intended to describe the function, not limit the form, of an acknowledgement; it even recognized the addressee’s conduct as a tacit form of acknowledgement (the classic example being when an originator placed an order for goods and the addressee shipped the goods without acknowledging receipt of the order). If the Commission wished, it might specify in the Guide that acknowledgement could be manual or electronic; however, even that seemed redundant.

17. Ms. BOSS (United States of America) said that the original intent of article 12 was to validate acknowledgments of receipt generated by computers. While her delegation would prefer to retain article 12 as it stood, the fact that some delegations had raised questions about the interpretation of the article indicated that the intent of the article had not been expressed clearly. The amendment suggested by the representative of Mexico might help to clarify that functional acknowledgments could be issued spontaneously by computers and still satisfy the requirements of article 12. Unfortunately, that proposal might exclude other types of acknowledgement, such as instances where an acknowledgement of receipt was issued on behalf of an addressee by its third-party provider or by an intermediary.

18. Mr. ZHANG Yuqing (China) said that his delegation supported the Mexican proposal. According to article 12, paragraph 2, if the originator requested that the addressee should use a particular form of acknowledgement, only that form could be regarded as the acknowledgement of receipt. In cases where there was no particular request, any communication or conduct could constitute acknowledgement of receipt. The particular form requested by the originator should be taken as the standard; otherwise, any kind of communication or conduct could be regarded as acknowledgement of receipt. Perhaps a few more sentences could be added to paragraph 2 in order to clarify the concept of “particular form”.

19. Mr. ABASCAL (Mexico) said that the secretariat’s suggestion that the problem of defining “acknowledgement of receipt” could be solved by referring to another document was not appropriate. The definition must be provided in the Model Law itself.

20. The problem in article 12, paragraph 2, was that, if the originator sent a message requesting a particular form of acknowledgement, and the addressee had a system that issued acknowledgments of receipt automatically, it was quite probable that the addressee would assume that there had been automatic acknowledgement of receipt and would not pay any attention to the written message. That might lead to a situation in which it would be deemed that there had been inappropriate conduct on the part of the addressee because he did not comply with the originator’s request.

21. The United States representative had made the point that, if the Commission dealt with automatic acknowledgments of receipt, it might be excluding other types of acknowledgement. Perhaps the Commission could come up with much more general wording that would cover the overall situation. In order to avoid referring to automatic acknowledgement of receipt in a given system, the Commission might consider such wording as “the addressee uses a method for acknowledgement of receipt in which he can place reasonable trust without observing any particular conduct”. That would provide security for all parties in the transaction and would promote the use of electronic data interchange.

22. Mr. ALLEN (United Kingdom) said that, in order for the presumption contained in article 12, paragraph 5, to apply, it should be sufficient if the acknowledgement of receipt was an acknowledgement of the addressee, whether such acknowledgement was generated automatically or generated by the addressee personally or by a person acting on the addressee’s behalf. The acknowledgement would not be sufficient if it was generated by a third person who was not acting on behalf of the addressee. The beginning of the first sentence of article 12, paragraph 5, should be amended to read “Where the originator receives an acknowledgement of receipt of the addressee,”.

23. Article 11, paragraph 2, did not contemplate the possibility of an automatic message, and he suggested that the following words should be added to the end of that paragraph: “or by a system operated by or on behalf of the originator”. That would make it clear that any automatically triggered message that was communicated by a system by or on behalf of the originator would be attributed to that originator. In article 12, paragraph 5, an automatically triggered acknowledgement of receipt would then fall within that wording because paragraph 5 would have been amended to make it clear that it only concerned an acknowledgement of receipt of the addressee.

24. Mr. SORIEUL (International Trade Law Branch) said that, while the United Kingdom proposal might improve the text of article 12, it would not solve the problem under consideration. In its current form, article 12, paragraph 2, must be interpreted a contrario: in other words, if the originator of the message requested that acknowledgement of receipt should be provided in a particular form and that form was not respected, it would follow that the conditions required in article 12, paragraph 4, had not been fulfilled and acknowledgement of receipt had not been received. The Commission was now being told that, if the addressee had a system that issued acknowledgments of receipt automatically, the automatic acknowledgement of receipt must be accepted as valid in the Model Law even if the form of the acknowledgement of receipt was not the one requested by the originator. Perhaps article 12, paragraph 2, could be amended to indicate that any automatically issued acknowledgement of receipt was automatically valid even if the originator had not requested that particular form of acknowledgement.

25. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that it was his understanding that article 12, paragraph 2, did not deal with any questions that were unrelated to the originator’s request. His delegation was satisfied with the text as it stood. Perhaps additional paragraphs could be added to article 12 in order to deal with the questions raised by a number of delegations.

26. Mr. ABASCAL (Mexico) said that the explanations and suggestions by the secretariat were very reasonable. According to the current drafting of article 12, paragraph 2, the originator determined the procedure for acknowledgement of receipt. His delegation was proposing that the originator should not determine the form or method for acknowledgement of receipt. Rather than referring to automatic acknowledgement of receipt, the Commission should use language that made it clear that the addressee should be able to use a reasonably trustworthy method of acknowledgement of receipt. That would protect the use of electronic data interchange systems.
27. While the United Kingdom proposal contained some useful elements, article 11, paragraph 2, was not applicable to the question under discussion.

28. Mr. CHOUKRI (Observer for Morocco) said that his delegation preferred to retain the text of article 12, paragraph 2, as it stood.

The meeting was suspended at 11.25 a.m. and resumed at 12.05 p.m.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission needed to decide how it wished to deal with acknowledgements of receipt that were automatically generated. On the one hand, allowing the originator to determine the form of acknowledgements of receipt was undesirable, but on the other, the possibility that the originator would need to receive acknowledgement in a particular form could not be ignored either. As currently provided for under article 12, control of the procedure for acknowledgement of receipt lay largely with the originator.

30. Mr. MADRID (Spain), supported by Mr. SANDOVAL LÓPEZ (Chile), raised the possibility of a more balanced solution that would not give the determining power to either the originator or the addressee. Article 12, paragraph 2, could be amended to read “Where the originator has requested that the acknowledgement be in a particular form, the request for an acknowledgement shall be deemed satisfied if the requirements established by the originator have been met. However, if the addressee has an automatic system for acknowledgement of receipt, the request for an acknowledgement may be deemed satisfied when the acknowledgement is sent to the originator.”

31. Mr. ALLEN (United Kingdom) agreed with the Spanish representative that a more balanced approach was needed, and proposed that the following sentence should be added to the beginning of paragraph 2: “Where the originator has requested that acknowledgement be given in a particular form, or by a particular method, an acknowledgement is only sufficient for the purposes of paragraphs 3 and 4 if given in that form or by that method, provided that the form or method requested is not unreasonable in the circumstances.”

32. Mr. CHANDLER (United States of America) said that while article 12 had originally been intended as a default rule, its current formulation left to the originator the exclusive ability to determine the particular form to be taken by the acknowledgement of a message; perhaps the addition of a formulation such as “When the parties have not otherwise agreed on a particular form” would be more useful. The phrasing suggested by the United Kingdom still appeared to leave undue control in the hands of the originator.

33. Mr. FERRARI (Italy) agreed with the United States representative in calling for a reference to whatever agreement existed between originator and addressee regarding the form or manner of acknowledgement, rather than allowing the originator exclusively to determine the form of that acknowledgement. He also requested the deletion from the United Kingdom proposal of the wording concerning unreasonable requests.

34. Mr. ABASCAL (Mexico) said that the United Kingdom proposal was reasonable; he also supported the United States proposal to make explicit the fact that article 12 was a default rule. The two proposals could be combined by stating clearly that when the parties had not agreed on a method for acknowledging receipt, and when the originator had requested a particular method, then the request for acknowledgement should be satisfied in accordance with the originator’s request if that request were reasonable under the circumstances.

35. Mr. SCHNEIDER (Germany) said that the meaning of the new text as proposed by the United Kingdom was very different from that of the old text. While it was necessary to fulfil an explicit request by the originator for acknowledgement in a particular form, a separate and distinct question arose as to the feasibility of making an acknowledgement in the form of a data message when no particular form had been requested.

36. A question also arose as to the nature of the presumption in article 12, paragraph 5: i.e. whether an acknowledged message had simply been received, or if it had been received exactly as sent. He therefore proposed that some form of wording such as “Presumption does not extend to the content of the message” should be added at the end of the paragraph.

37. Mr. PHUA (Singapore) said he supported the United Kingdom proposal and agreed with the German delegation that the presumption established in paragraph 5 was unclear. To solve that problem, he proposed that paragraph 5 should contain a statement similar to the eighth sentence of paragraph 98 of the Guide, to the effect that article 12 was not intended to deal with the legal consequences that might flow from sending an acknowledgement of receipt, apart from establishing receipt of the data message.

38. Mr. GRIFFITH (Australia) said that the United Kingdom proposal would substantially alter paragraph 2 so that it no longer dealt with cases where the originator of a data message did not request a particular form of acknowledgement, but with the opposite situation. It would also create uncertainty for the addressee, who would have to determine what was or was not “unreasonable in the circumstances”; under paragraphs 3 and 4, any errors in that regard would nullify the legal effect of the acknowledgement. The Commission should not make such substantial changes to the text, since they only introduced new uncertainties.

39. Mr. SORIEUL (International Trade Law Branch) said that it was his understanding that the United Kingdom proposal was intended only as an addition to the current text, not as a replacement.

40. Mr. GRIFFITH (Australia) said he agreed with the representative of Germany that the Commission should assume that the current text was being retained unless delegations expressed clear and unanimous views to the contrary.

41. Mr. BURMAN (United States of America) said he shared the view expressed by the representative of Australia. He would prefer to retain the current text of paragraph 2, but with the wording proposed by his delegation. If delegations wished to consider additional provisions, such as the addition proposed by the United Kingdom, it could establish a small working group to study them and report back to the Commission; he suggested that the delegation of Singapore should organize that group.

42. Mr. ANDERSEN (Observer for Denmark) said he agreed with the United States delegation that a drafting group should be set up.

43. Mr. PHUA (Singapore) said his delegation accepted the United States proposal that it should head the working group.

44. Mr. ABASCAL (Mexico) said he wished to clarify that the proposal concerned a working group and not a drafting group, and that its role would be to find a compromise solution to the issues raised.
45. Mr. SORIEUL (International Trade Law Branch) said the working group would require a precise and narrowly defined mandate. He wondered whether that mandate would include the consideration of the United Kingdom proposal, the issue of automatic acknowledgements and the United States proposal to delete the references in paragraph 2 to the originator of a data message as the party that determined the form of the acknowledgement of receipt. That last proposal would affect the whole connection, he agreed with the representative of Singapore that the sentence from paragraph 98 of the Guide would provide a useful clarification.

46. Mr. ABASCAL (Mexico) said a working group could be useful for expediting the Commission's work and for finding compromise solutions that would enable the Commission to take a better-informed decision. The working group should take into account the points raised by the representatives of Spain and the United Kingdom, to the effect that neither the originator nor the addressee should be given all the power to determine the form of an acknowledgement, and should draft the resulting provision in positive terms, in contrast to the current text of paragraph 2, which was easily misinterpreted. The Commission should identify other problems with article 12 for submission to the working group.

47. Mr. LEBEDEV (Russian Federation) said he agreed that the current text of article 12 should be considered a "default" text that should be retained to the extent possible. The working group should prepare a written text comprising proposed alternatives to the current text; it should not simply present its conclusions orally. To save time, the text could be circulated in only one language.

The meeting rose at 1 p.m.

Summary record of the 588th meeting
Thursday, 30 May 1996, at 3 p.m.

[A/CN.9/SR.588]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)
The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 12 (continued)

1. Mr. PHUA (Singapore) said that a new version of article 12 of the draft Model Law had been produced immediately before the meeting by an informal working group in response to the comments made at the previous meeting. If the proposed changes were adopted, paragraph 1 of that article would then read: "Paragraphs (2) to (4) of this article apply where, on or before sending a data message, or by means of that data message, the originator has requested or has agreed with the addressee that receipt of the data message be acknowledged." Paragraph 2 would read:

"Where the originator has not requested or agreed with the addressee that the acknowledgement be given in a particular form or by a particular method, the request for an acknowledgement may be satisfied by (a) any communication by the addressee, automated or otherwise, or (b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."

2. Paragraphs 3 and 4 would remain unchanged. Paragraph 5 would read: "Where the originator receives the addressee's acknowledgement of receipt, it is presumed that the related data message was received by the addressee. This presumption does not imply that the data message sent corresponds to the message received."

3. Paragraph 6 would read: "Where the received acknowledgement states that the related data message met technical requirements either agreed upon or set forth in applicable standards, such as those verifying the integrity of its contents, it is presumed that those requirements have been met."

4. Paragraph 7 would read: "Apart from establishing receipt of the data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt."

5. Mr. GRIFFITH (Australia) said that the second sentence of paragraph 5 was unnecessary, and somewhat inconsistent with the terms of article 11, paragraph 4.

6. Mr. SORIEUL (International Trade Law Branch) noted that the new paragraph 2 attempted to deal both with situations in which the originator of the message had requested acknowledgement of receipt and with situations where the parties had agreed that such acknowledgements should be provided as a matter of course. He wondered whether it was logical or feasible to provide for both types of situation in a single formula; the new wording did not seem to take into account the considerable difference between a situation where the addressee failed to acknowledge receipt in the manner requested by the originator, and one where the parties had agreed in advance that such acknowledgement should be provided in a particular manner.

7. Mr. FERRARI (Italy) said that in cases where the acknowledgement of receipt was not given in the form requested by the originator, it would be considered that no acknowledgement of receipt had been given.

8. Ms. BOSS (United States of America), responding to the remarks by the representative of the secretariat, said that the result should be the same whether acknowledgement was re-
quested in a particular form or whether there was an agreement that it should be in a particular form. Taken in context, the new wording did make sense.

9. Mr. ZHANG Yuqing (China) said that his delegation had some difficulties with the attempt to cover the two different situations in a single paragraph. The practical application of the law would be facilitated if the text could be made more clear, preferably with concrete examples.

10. Mr. ABASCAL (Mexico) said that where an agreement between the parties existed it would apply, and the attempt to cover that situation in article 12 was an unnecessary source of confusion. Also, the new draft still gave the originator the right to determine unilaterally the form in which acknowledgement of receipt was to be given. If that solution was adopted, he hoped that the reasons for it would be expressed clearly so that in the future, those who had to apply the law would be able to understand them.

11. Mr. CHOUKRI (Observer for Morocco) agreed with the representative of the secretariat that the draft should not have attempted to provide for the two different situations in a single paragraph. Article 12 should provide only for the situation where acknowledgement was requested in a particular form.

12. Mr. ANDERSEN (Observer for Denmark) said that where no prior agreement existed, it was logical that the originator of the message, who would usually be the party making an offer, should be empowered to determine whatever conditions he wished. Where a prior agreement existed, the form of the acknowledgement would in any case be determined by that agreement.

13. In order to avoid spending too much time on further discussions of the wording of article 12, it would be useful to determine which version of the text was preferred by the majority of the members of the Commission and to proceed on that basis.

14. Mr. FERRARI (Italy) said it should not necessarily be assumed that the originator of the message would be the offeror. If the party accepting an agreement was the originator of the message and requested the addressee to acknowledge receipt in a particular manner, that would amount to an attempt to modify the acceptance, which was not possible.

15. Ms. BOSS (United States of America) said that paragraph 7 was intended to solve that problem, by making it clear that article 12 did not deal with legal consequences such as offer and acceptance.

16. Mr. FERRARI (Italy) said that under the contract law of many countries, the acceptance could not contain a request for modification of the terms of the agreement, however minor.

17. Mr. MADRID (Spain) said that it was an unnecessary repetition, and a potential source of confusion, for article 12 to refer to the agreement between the parties; the latter was dealt with comprehensively in article 10, which was applicable to chapter III as a whole.

18. As to the substantive question at issue, a clear distinction must be made between the content of the message, which was a matter of contract law, and the requirements for acknowledgement of its receipt, which was only a technical matter, and in respect of which the Commission should try to find some middle ground in order to avoid giving all power to the originator.

19. Mr. PHUA (Singapore) said that the representative of Spain had clearly identified the problem faced by the Commission, namely that there was a distinction between acknowledgement of receipt and the legal concept of acceptance. That was the reason for the inclusion of paragraph 7 in the new draft. The determination of the legal consequences that might flow from the acknowledgement of receipt would have to be left either to whatever agreement had been reached between the parties as to the consequences of certain forms of acknowledgement or to the domestic laws of the country concerned, in which case paragraph 7 left the courts free to arrive at whatever conclusion they wished on the basis of the facts.

20. Mr. ABASCAL (Mexico) said that the reasons put forward for giving the originator the power to request an acknowledgement of receipt were still insufficient. In formulating trade law, it was necessary to observe what happened in practice and regulate that activity, and the law should be based on what was reasonable and customary, rather than on unusual cases. Paragraph 7 left matters in a vacuum, and did not meet the concerns expressed by the observer for Denmark and the representative of Italy.

21. Ms. BOSS (United States of America) said that there was no difference between the two versions of article 12 as far as the question of the empowerment of the originator to make unilateral requests was concerned. Only the new version attempted to make a distinction between the mere receipt of a message and the legal consequences that might flow from that message or the acknowledgement of its receipt. The role of agreements between the parties was not addressed in the old version but was taken up in the new version, which made it clear that the default rule in paragraph 2 did not apply where there had been an agreement to the contrary, and that in that regard the agreement was the same as a request. She urged the Commission to decide which version of article 12 it wished to work on so that it could take up the issue raised by the representative of Mexico.

22. Mr. ALLEN (United Kingdom) said that the new paragraph 2 dealt not with a case where there had been an agreement, but with a case where there had been no agreement; there was no reason in principle to treat such a case differently from a case in which the originator had not requested a particular form of acknowledgement. It was true that the implication of paragraph 2 was that where the originator had requested a particular form or a particular method of acknowledgement and that request was not complied with, the requirements of article 12 were not met. However, that was also true of the old paragraph 2, so that no change had been made.

23. His delegation would be content to consider the additional paragraph it had proposed at the previous meeting in order to address the concerns raised by the representative of Mexico and others.

24. Mr. GRIFFITH (Australia) said it seemed that the balance of opinion viewed the new draft as an improvement. The Commission should therefore take a decision on it.

25. His delegation did not feel that the inclusion of the second sentence of paragraph 5 was justified, since it was a derogation from the first sentence of that paragraph. There was no point in making a presumption, and immediately derogating from it.

26. Mr. FERRARI (Italy) said it was obvious that acknowledgement of receipt did not amount to acceptance. The prob-
lem was that if the originator unilaterally asked for an acknowledgment of receipt, there could be inconsistencies with contract law in many countries, since such a request could change or modify the acceptance.

27. Mr. SORIEUL (International Trade Law Branch) said that, on the question of the extent to which requesting acknowledgment of receipt might constitute a violation of contract law or a modification of an offer, the situation was much the same in paper-based communications. The problem lay in determining whether the form of the acknowledgement of receipt established by the originator of the message was binding in all cases on the recipient or whether an acknowledgement of receipt in another form was valid, whether there should be a general rule of invalidity and, if so, what the exceptions to such a rule should be.

28. Mr. FERRARI (Italy) said that he had referred only to the originator as acceptor because when the originator was the offeror, he was the master of the offer and could determine the form of the acknowledgement of receipt. There was a difference between asking the offeror to act by acknowledging receipt and sending registered mail with acknowledgement of receipt. In many cases, contract law had a mirror-image requirement; that meant that not even the slightest change could be made, and asking for an acknowledgement of receipt would constitute a change.

29. Mr. SCHNEIDER (Germany) said that both the problem and its solutions were clear; the Commission must make a decision. His delegation was in favour of the new version of article 12. It was true that the second sentence of paragraph 5 deviated from article 11, paragraph 5, but the problem lay in the fact that the Commission had not completed its consideration of article 11 and was therefore dealing with a specific problem before solving a general problem. The second sentence of paragraph 5 provided clarification, and his delegation was in favour of retaining it.

30. The CHAIRMAN suggested that, as there seemed to be a tendency to prefer the new version of article 12, the Commission should therefore work on that version.

31. Ms. BOSS (United States of America) said there seemed to be disagreement on whether the originator should have the power to ask that acknowledgement be made in a particular form. Article 12 did not address the issue; it merely provided that in the absence of a request, certain rules applied. It could be argued that if there was such a request, the traditional contract rules came into play. The current wording of article 12 might therefore be the best solution in that it did not attempt to reconcile irreconcilable differences.

32. Mr. AL HERZ (Observer for Kuwait) asked whether there was a standing drafting committee of the Commission. If not, his delegation proposed that such a committee should be set up.

33. Mr. SORIEUL (International Trade Law Branch) said that the function of drafting committees was to align the different language versions of a text; such committees usually met when a draft was near completion. The Commission was still discussing the substance of article 12, and an informal working group could go much further than a drafting committee would be authorized to go. There was no standing committee for the drafting of texts.

34. Mr. ABASCAL (Mexico) said that since there was no agreement on the course to follow, the Commission should take up the text put forward by the representative of the United Kingdom, which was a compromise between the two positions. If it was not possible to reach a compromise on the basis of that text, the only solution would be to eliminate paragraph 2 altogether.

35. Mr. ZHANG Yuqing (China) said that the Commission had spent too much time on article 12, paragraph 2, and at that rate would not be able to complete its work. His delegation hoped that the draft put forward by the representative of the United Kingdom could be accepted. The Commission must solve the problem of paragraph 2 first and then take up the other paragraphs.

The meeting was suspended at 4.35 p.m. and resumed at 5.10 p.m.

36. The CHAIRMAN said that there appeared to be a clear preference for the new draft of article 12 and suggested the deletion of the words "requested or" in the first line of paragraph 2.

37. Mr. KOIDE (Japan), referring to article 12, paragraph 3, said that the phrase "the data message has no legal effect" was inappropriate, as it might lead to the misconception that receipt of acknowledgement in itself had some legal effect. That phrase should therefore be replaced by the similar wording used in paragraph 4(b): "treat the data message as though it had never been transmitted".

38. Mr. FERRARI (Italy) said that his delegation supported the amendments suggested by the Chairman, as they were consistent with the contract law of all countries.

39. Mr. ABASCAL (Mexico) also agreed with the Chairman's suggestion.

40. Mr. BORMAN (United States of America) said that the Chairman's proposed change was an effective resolution and that the amendment suggested by the representative of Japan was useful in bringing the two provisions into conformity.

41. Mr. PHUA (Singapore) supported the proposed amendment to new article 12, paragraph 2.

42. Mr. CHOUKRI (Observer for Morocco) said that article 12 was not a fundamental article since it related solely to acknowledgement of receipt. Since the other cases were covered by other paragraphs, he saw no need to delete the words "requested or" in new paragraph 2. Furthermore, acknowledgement of receipt had nothing to do with offers and their acceptance, which was already covered by article 13. If there was an acknowledgement of receipt, such acknowledgement had no impact on the place or date of the contract already specified in article 14. Indeed, it was the originator who had the right to ask for acknowledgement of receipt and to specify the form it should take.

43. Mr. TELARANTA (Finland) said he agreed with the statements made by the representatives of Denmark and Germany.

44. The CHAIRMAN suggested that the amendments proposed by the representative of Japan concerning paragraph 3 should be adopted. She then asked why the phrase "such as those verifying the integrity of its contents" had been placed in square brackets in paragraph 6.
45. Mr. PHUA (Singapore) explained that the working group had included the bracketed phrase to clarify the term “applicable standards”.

46. Mr. ABASCAL (Mexico) endorsed the suggestion made by the representative of Japan with respect to article 12, paragraph 3, and drew attention to the end of that paragraph, which read “until the acknowledgement is received”. As far as he was aware, no decision had been taken as to whether it was the rule governing the acknowledgement of receipt or the rule governing the dispatch of acknowledgement of receipt that was the correct one. The end of paragraph 3 could very well read “until the acknowledgement is dispatched”. If the originator was unilaterally setting conditions, it was logical to assume that the addressee would be released if he dispatched the acknowledgement in his delegation’s opinion, the rule governing dispatch was more logical than the rule governing receipt.

47. Mr. ALLEN (United Kingdom) said that his delegation could not agree to the proposal made by the representative of Japan. The situation reflected in paragraph 4(b), where the key words were “upon notice to the addressee”, was very different from that in paragraph 3, which made the originator’s message conditional on receipt of an acknowledgement. In the latter case, the absence of an acknowledgement should automatically render the data message null and void. It should not be necessary for the originator to give notice to the effect that the data message was to be treated as though it had never been transmitted because he had already made his message conditional on receipt of an acknowledgement. It would make a nonsense of the provision to insert in paragraph 3 the words which appeared in paragraph 4(b).

48. Some delegations would not accept the Chairman’s amendment if the Commission decided on a further decision which would enable the originator to request an acknowledgement in a particular form and to insist that that form should be complied with. He therefore proposed the insertion of an additional paragraph after paragraph 3 which would read “Where the originator has stated that the data message is conditional on receipt of an acknowledgement given in a particular form or by a particular method, the data message has no legal effect until an acknowledgement given in that form or by that method is received”.

49. Mr. FERRARI (Italy) said that if article 12, paragraph 2, was amended as suggested by the Chairman to read “where the originator has not agreed with the addressee”, article 12, paragraph 3, should be changed since its current wording appeared to give the originator the power to request an acknowledgement of receipt. It could be amended to read “Where it is stated that the data message is conditional on receipt of that acknowledgement, ...”. The intention behind the Japanese proposal could be accommodated with the wording “the data message the reception of which has not been acknowledged is treated as though it had never been transmitted”.

50. He agreed with the representative of Mexico that it had not yet been decided whether the acknowledgement was effected upon receipt or upon dispatch. There were other uniform law conventions drafted by UNCITRAL which were based on dispatch.

51. The United Kingdom proposal could be considered, since the spirit underlying it was similar to that underlying his delegation’s proposal concerning article 12, paragraph 3.

52. Ms. BOSS (United States of America) said that her delegation endorsed the deletion of the words “requested or” in paragraph 2 and the idea of reconciling the provisions of paragraph 3 with those of paragraph 4. While the exact way in which those recommendations should be implemented had not yet been specified, it was apparent that consensus had been reached on those two points.

53. With regard to the Mexican representative’s concerns relating to paragraph 3, most existing trading partner agreements used a receipt rule rather than a dispatch rule for determining legal effectiveness, and an attempt had been made to adopt that solution in the Model Law. The Mexican proposal would create inconsistencies within paragraph 3, which referred specifically to conditionality based on receipt and not on dispatch or acknowledgement. Her delegation favoured retaining the word “receipt” in paragraph 3 and did not support the proposal of the United Kingdom, which it believed to be inconsistent with the existing text of paragraphs 2 and 3.

54. Mr. LEBEDEV (Russian Federation) questioned the need to retain in the first paragraph a reference to the agreement between the originator of the message and the addressee.

55. Mr. ABASCAL (Mexico) thanked the representative of the United States of America for her explanation regarding paragraph 3 and said that he could now endorse paragraph 3 as drafted. The additional paragraph proposed by the United Kingdom would reopen the discussion which the deletion of the words “requested or” from paragraph 2 had sought to eliminate, namely, that the Model Law should not deal with the cases where an originator had required that acknowledgement should be given in a particular form. The assumption in paragraph 1 did not refer to acknowledgement in any particular form and there was therefore no need to modify paragraph 2.

56. Mr. ALLEN (United Kingdom) explained that his delegation’s proposal was not meant to supersede existing paragraph 3, but to follow it, either at the end of it or as an additional paragraph. If the originator was entitled to make his message conditional on receipt of an acknowledgement, then it should also be possible for the originator to make the message conditional on receipt of an acknowledgement in a particular form.

57. Mr. FERRARI (Italy) said that article 12, paragraph 3, whether amended as proposed by the representative of Japan or retained as drafted, was inconsistent with paragraph 7 of the same article, since paragraph 7 excluded the legal consequences of the acknowledgement of receipt.

58. Mr. MADRID (Spain) wondered whether, if the Commission decided to adopt the Chairman’s proposal and delete the words “requested or” at the beginning of paragraph 2, it would also be necessary to delete the reference to “request” at the end of paragraph 2. He favoured a receipt rule rather than a dispatch rule.

59. Mr. BURMAN (United States of America) supported the modification proposed by the representative of Spain and said he was encouraged to see that delegations had found a basis for compromise with regard to the final drafting of article 12.

60. The CHAIRMAN confirmed that the Commission had reached agreement with regard to article 12, paragraphs 1 and 2, and proposed that a small drafting group should address the apparent discrepancy between paragraph 3 and paragraph 7.

The meeting rose at 6 p.m.
ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/406, 407, 409 and Add.1-4, 421 and 426)

Article 12 (continued)

1. The CHAIRMAN said the only remaining problem with the informal working group's new text for article 12 of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication, which had been read out at the beginning of the previous meeting, was the conflict between paragraphs 3 and 7.

2. Mr. FERRARI (Italy) proposed that the words "and subject to paragraph 3" should be inserted in the first sentence of paragraph 7 after the phrase "Apart from establishing receipt of the data message", so as to reconcile the content of paragraph 3 and 7 with the reference to "legal effect" in paragraph 3.

3. Mr. TELL (France) said his delegation still wanted to delete the words "has requested or" from paragraph 1 and the words "requested or" from paragraph 2, as it had proposed at the previous meeting. He wondered whether paragraph 3 was necessary, since, if a data message was "conditional", it obviously had no legal effect until the relevant condition was met; the same could be said of paragraph 4. The proposed amendments seemed to call the whole structure and purpose of article 12 into question; in his view, the article was merely intended to set minimum standards for electronic data interchange. However, he did not object to the new version of the article, which provided for a more balanced relation between the parties and did not prejudice the legal consequences deriving from the receipt of a data message.

4. Ms. BOSS (United States of America) and Mr. KOIDE (Japan) said they supported the Italian proposal.

5. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said the Italian amendment should also refer to paragraph 4, because treating the data message as though it had never been transmitted was one of the legal consequences referred to in paragraph 7.

6. Ms. BOSS (United States of America) said paragraph 4 was not referred to in paragraph 7 because it concerned the establishment of the time of receipt, which was covered by the beginning of paragraph 7 as currently drafted. The key difference between paragraphs 3 and 4 was that the former went beyond the question of receipt to deal with the question of the effectiveness of the underlying message. Therefore, the amendment to paragraph 7 should refer only to paragraph 3.

7. Mr. FERRARI (Italy) said he supported the position of the United States.

8. Mr. ALLEN (United Kingdom), Mr. ANDERSEN (Observer for Denmark), Ms. REMSU (Observer for Canada) and Mr. SCHNEIDER (Germany) said they agreed with the observer for the International Association of Ports and Harbors that the reference to paragraph 4 should be included.

9. The CHAIRMAN asked whether the Commission wished to delete the words in square brackets in the new version of paragraph 6.

10. Mr. PHUA (Singapore) said that if the term "applicable standards" in paragraph 6 did not require the clarification provided by the words in square brackets he had no objection to deleting those words.

11. Mr. MADRID (Spain) proposed that, since the words in square brackets were of an explanatory nature, they should be moved to the Guide to Enactment of the UNCITRAL Model Law (A/CN.9/426).

12. Mr. ABASCAL (Mexico) said that, in the final version of paragraph 3 in Spanish, the word "conditional" should be translated as "condicionado" and not "supeditado", as in the current translation.

13. Mr. FERRARI (Italy) suggested that the phrase he had proposed earlier for insertion in paragraph 7 should be changed to read, "and unless otherwise provided in this text", to cover both paragraph 3 and paragraph 4.

14. Mr. HOWLAND (United Kingdom) and Mr. ABASCAL (Mexico) said they supported the compromise solution proposed by the representative of Italy.

15. Mr. HERRMANN (Secretary of the Commission) said that if Italy's new proposal was adopted, paragraph 7 would state, essentially, that article 12 did not deal with the legal effects of a data message unless it dealt with them. To avoid such an awkward construction, it would be preferable to adopt the original amendment that referred specifically to paragraphs 3 and 4.

16. Ms. REMSU (Observer for Canada) and Mr. PHUA (Singapore) said they supported the inclusion of the phrase "and subject to paragraphs 3 and 4" in paragraph 7.

17. Mr. ZHANG Yuqing (China) said he shared the Secretary's views on the proposed amendment. However, he felt that the paragraph did not add anything of substance to article 12. If the other delegations agreed that paragraph 7 was superfluous, it should be deleted; otherwise, he supported the proposal to refer to both paragraph 3 and paragraph 4 in the amendment.

18. Mr. MADRID (Spain) said he supported the Chinese proposal to delete paragraph 7, since it only reflected the general principle that nothing in the Model Law was intended to impinge on applicable law. It might be more appropriate to include that paragraph in the Guide. If the other delegations wished to retain the paragraph in the Model Law, he supported the proposal to include a reference to paragraphs 3 and 4.

19. Ms. BOSS (United States of America) said that, although the viewpoint of China and Spain was understandable, paragraph 7 should be retained because it indicated that article 12 did not deal with offer and acceptance rules. However, the amendment referring to paragraphs 3 and 4 was unnecessary.
20. Mr. TELL (France) said he did not see the need for paragraph 7, but had no strong objections to retaining it. He agreed with the United States delegation that the proposed amendment was unnecessary, and felt that it could cause problems of interpretation.

21. Mr. FERRARI (Italy) said that, because paragraphs 3 and 4(b) dealt with the issue of whether or not a data message had legal effects, they must be mentioned in paragraph 7.

22. Mr. CHOUKRI (Observer for Morocco) said he agreed with the Chinese and Spanish delegations that paragraph 7 was superfluous and should be either deleted or moved to the Guide.

23. Mr. SANDOVAL LÓPEZ (Chile) referred to the amendment to article 12; he had proposed the day before and expressed support for the draft of article 12 prepared by the informal working group. As paragraph 7 fulfilled no function, it should be eliminated from the Model Law; a reference to it could be included in the Guide to Enactment of the Model Law (A/CN.9/426).

24. Mr. ABASCAL (Mexico) said paragraph 7, while not essential, would be a useful tool in interpreting the text. It did indeed raise a legal issue, namely, whether or not the message had been received and, thus, whether or not the conditions had been fulfilled. That was different from the legal effects referred to in paragraphs 3 and 4 of the article. The problem seemed to be one of drafting.

25. Mr. SORIEUL (International Trade Law Branch) said the question could not be resolved by a drafting group. He recalled that the first draft of the Model Law had included a provision analogous to paragraph 7, which had later been transferred to the Guide. Ultimately, the Commission must decide whether it would be more appropriate to declare an absence of legal consequences in the Model Law or in the Guide.

26. Mr. TELL (France) said that, despite his earlier remarks, in the interest of compromise his delegation would consider retaining paragraph 7 and adding the phrase "and subject to paragraphs 3 and 4" after "data message".

27. Mr. HOWLAND (United Kingdom) said that in a spirit of compromise, his delegation too, would agree to retain paragraph 7. The Italian proposal and the proposal to include a reference to paragraphs 3 and 4 were equally problematic. Perhaps a viable compromise would be the United States suggestion to place the emphasis on the phrase "apart from establishing receipt of the data message".

28. In fact, the article did not deal with the establishment of receipt of data messages; it merely described two situations where data messages might be viewed as not having been transmitted. It might therefore be more accurate to say at the beginning of paragraph 7, "Apart from the question of whether or not the data message may be treated as having been transmitted, ...". That echoed the language of paragraph 4(b). However, it was not consistent with paragraph 3, which stated that the data message had no legal effect until the acknowledgement was received. If the amendment proposed by the representative of Japan at the previous meeting was adopted and paragraph 3 was changed to read: "the data message shall be treated as never having been transmitted ...", paragraph 7 would be consistent with both paragraph 3 and paragraph 4(b). If, however, the current wording of paragraph 3 was used, the beginning of paragraph 7 would have to be amended to read: "Apart from the question of whether the data message may be treated as having legal effect in certain circumstances ...". It would be neater to change paragraph 4(b) and deal with the question of whether the message had been transmitted in paragraph 7.

29. Mr. FERRARI (Italy) said that, subject to the amendment proposed at the previous meeting by the Japanese representative, his delegation supported the proposal just made by the United Kingdom representative, which took into account the suggestions made by the Secretary of the Commission.

30. Mr. CHANDLER (United States of America) said that the United Kingdom proposal to use the words "legal effect" in paragraph 7 seemed unduly complicated. The phrase "treated as though it had never been transmitted ...", however, was helpful, since it established a factual effect which avoided direct legal consequences, not unlike the principle of statutory time limits in contract law. It only remained to deal with the question in the Guide to Enactment in order to ensure that there was no misunderstanding.

31. Mr. PHUA (Singapore) agreed with the United States representative. Without paragraph 7, there would be confusion about the legal consequences of article 12. As the domestic legislation in some countries prohibited statutory interpretation on the basis of a guide, paragraph 7 should be included in article 12 of the Model Law, as it had been in earlier drafts.

32. Mr. HERRMANN (Secretary of the Commission) pointed out that there would be more room to explain paragraph 7 in the Guide than in the Model Law. Another solution might be to refer to transmission rather than receipt in paragraph 7, as the United Kingdom proposal suggested. The other United Kingdom proposal, namely to use the term "legal effect" in the first part of paragraph 7, would simply reintroduce the problem.

33. Mr. BURMAN (United States of America) said that, as long as some delegations, such as that of Singapore, felt strongly about including paragraph 7, it should be retained. The changes in that paragraph proposed by the United Kingdom would improve article 12 as a whole because they would limit the extent to which legal consequences could flow from it. He requested clarification concerning the Japanese proposal made at the previous meeting to reconcile paragraph 3, which referred to legal effects, and paragraph 4(b), which discussed treating the message as if it had never been transmitted.

34. Mr. SORIEUL (International Trade Law Branch) confirmed that the Japanese proposal had been adopted and that paragraph 3 would be made consistent with the wording of paragraph 4(b).

35. Mr. ANDERSEN (Observer for Denmark) expressed support for the remarks made by the representative of Singapore. The Commission would probably be prepared to accept a compromise solution if it could be worked out by delegations which had strong feelings about paragraphs 3 and 4.

36. Mr. ZHANG Yuqing (China) expressed a preference for the secretariat's drafting of article 12. The term "legal consequences" was extremely vague and had no place in the article, which dealt exclusively with procedural matters. Paragraph 7 was superfluous, for other paragraphs of the article and indeed every article of the draft Model Law could conceivably have legal consequences. It was not for the Commission to analyse those consequences exhaustively, as States would tailor the Model Law to their own needs.

The meeting was suspended at 11.45 a.m. and resumed at 12.20 p.m.
37. Mr. ALLEN (United Kingdom), supported by Mr. ANDERSEN (Observer for Denmark) and Mr. BURMAN (United States of America) proposed that paragraph 7 should be amended to read: “Except in so far as it relates to the transmission or receipt of a data message, this article is not intended to deal with the legal consequences that may flow from either that data message or the acknowledgement of its receipt.”

38. Mr. SORIEUL (International Trade Law Branch), responding to an inquiry from Mr. LEBEDEV (Russian Federation), read out the text of article 12, paragraph 3, as amended: “Where the originator has stated that the data message is conditional on receipt of that acknowledgement, the data message is treated as though it had never been transmitted until the acknowledgement is received.”

39. Mr. MADRID (Spain) recalled that paragraph 7 had been drafted in order to clarify the reference to “legal effect” in paragraph 3; since that reference had been eliminated in the latest formulation of paragraph 3, and since indirect reference to legal effect continued to exist in other paragraphs, it appeared that paragraph 7 had become superfluous.

40. Mr. CHOUKRI (Observer for Morocco) said that paragraph 7 was clearly superfluous and could be deleted, but if the Commission wished to preserve it, he proposed a clearer reformulation, as follows: “This article has no legal effect other than the legal consequences regarding the transmission or receipt of a data message.”

41. Mr. LEBEDEV (Russian Federation) asked for an indication of the Commission’s position on the need for paragraph 7.

42. Mr. GRIFFITH (Australia) said his delegation doubted the need for such an indication, as it was clear that Commission members either agreed that paragraph 7 was superfluous, or else felt that it improved the text.

43. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said he agreed with the previous speakers who had expressed the view that paragraph 7 was superfluous. Deletion of that paragraph would bring the formulation of article 12 one step closer to the secretariat’s original draft of the article, which dealt more clearly and efficiently with the questions at issue.

44. The CHAIRMAN invited members of the Commission to take an indicative vote as to whether paragraph 7 should be retained.

45. Mr. ABASCAL (Mexico) said that an indicative vote simply indicated the views of the majority, and did not reflect a consensus. The preceding debate had revolved around the need perceived by several delegations for some clarification of the legal effects of article 12, in order to avoid possible misinterpretation of the Model Law. The trend in the Commission toward deleting paragraph 7 appeared to reflect drafting exigencies and not substantive ones, and he proposed instead that the United Kingdom’s formulation of paragraph 7 should be accepted, subject to final drafting to be carried out by the drafting group.

46. An indicative vote was taken by a show of hands.

47. The CHAIRMAN said that according to the indicative vote, a substantial majority of the Commission appeared to favour retaining paragraph 7 as formulated by the United Kingdom.

48. Article 12, as amended, was adopted.

49. Mr. ZHANG Yuqing (China) said that the Commission had traditionally adopted articles by consensus, and the adoption of an article by a vote appeared to be unprecedented. The indicative vote had been intended only to provide an indication of the views of delegations on various issues, and not to take decisions on the adoption of articles. He inquired as to whether the vote just taken had been in conformity with the Commission’s rules of procedure.

50. Mr. HERRMANN (Secretary of the Commission) said that the Chairman had clearly called for an indicative vote, which did not constitute a formal vote. Indicative voting had been used occasionally in the Commission as a means of saving time in debate once the arguments for and against a given proposal had already been made clear. Such voting remained indicative in the sense that no decision was directly taken thereby. In the vote just taken, the silence of those opposing the retention of the paragraph had been assumed to indicate their willingness to accept the results, as was a necessary component of the consensus principle. In view of the result of that indicative vote, the matter had been assumed to have been concluded.

51. Mr. BURMAN (United States of America) expressed his delegation’s support for the Secretary’s comments. Indicative votes were a valid part of the Commission’s procedures in that they allowed the Chairman to determine if a prevailing view existed on a matter of debate, thereby allowing the Commission’s work to move forward.

52. Mr. ABASCAL (Mexico) said that notwithstanding the Secretary’s explanation, the indicative vote procedure remained dangerous. If delegations had fundamental reasons for their positions in matters of debate, it was important to attempt to reach consensus on those matters, and not to impose decisions by a vote. A decision could be taken after the reasons for delegations’ positions had been made clear, but a single delegation could have such fundamental objections to a position that consensus was impossible.

53. Mr. RAO (India) said he agreed with the representative of Mexico. He questioned whether the issue had been urgent enough to require a vote of any kind. If not, it could have been left undecided until other outstanding agenda items had been dealt with. His delegation did not wish to encourage the practice of resorting to any form of voting in the case of model laws or draft notes. It was important to maintain a clear distinction between indicative voting and consensus in the Commission’s procedures.

The meeting rose at 1 p.m.
Summary record of the 590th meeting

Friday, 31 May 1996, at 3 p.m.

[A/50/17; A/CN.9/421 and 426]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 3.05 p.m.


Article 13

1. Mr. SORIEUL (International Trade Law Branch) introduced article 13 of the Draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication. Article 13 dealt with the formation and validity of contracts and reaffirmed the principle set forth in article 4, which stipulated that a contract could not be denied validity or enforceability on the sole ground that a data message was used in its formation. Article 13, paragraph 2, provided for possible exceptions to the provisions contained in paragraph 1.

2. Mr. ABASCAL (Mexico) proposed to delete the phrase “unless otherwise agreed by the parties” in the first sentence of article 13, paragraph 1, to avoid confusion with article 10, which already contained a reference to contractual freedom.

3. Mr. SANDOVAL LÓPEZ (Chile) suggested that in the Spanish version of paragraph 1 the word “formación” should be replaced by the word “perfeccionamiento” and that “existencia” and “validización” should be used rather than “exigibilidad” because they were more faithful translations of the English.

4. Mr. BURMAN (United States of America) endorsed the current draft of article 13 as amended by the representative of Mexico.

5. Mr. CHOUKRI (Observer for Morocco) agreed that the content of article 13 was extremely important, but opposed its current wording. He proposed that the first paragraph should be broken up into two paragraphs; the first would correspond to the existing first sentence of paragraph 1 and the second would read “Contracts made by means of the use of data messages would have the same enforceability as contracts originating in writing. Article 10 did not deal sufficiently with such exceptions.

6. Mr. MADRID (Spain) endorsed the current wording of article 13 with the deletion proposed by the representative of Mexico and the changes to the Spanish version proposed by the representative of Chile. His delegation believed that the essence of article 13 resided in the second paragraph rather than in the first, which reaffirmed the ideas expressed in article 4 and article 10. Paragraph 2 of article 13 enabled States to make specific exclusions in the area of contracting.

7. Mr. TELL (France) endorsed the current wording of article 13, as amended by the representative of Mexico.

8. Mr. ABASCAL (Mexico) disagreed with the changes proposed by the representative of Chile, as he believed the term “perfeccionamiento” in Spanish referred to the “execution” rather than “formation” of a contract and would change the meaning of the Spanish text.

9. Mr. ALLEN (United Kingdom) favoured retaining the current draft of article 13, including the phrase “unless otherwise agreed by the parties”, which was essential to cover the case of master agreements which might stipulate that subsequent agreements could only be concluded by an offer and acceptance in writing. Article 10 did not deal sufficiently with such exceptions.

10. Mr. MASUD (Observer for Pakistan) stressed that the provisions of article 12, paragraph 3, were relevant to the idea expressed in article 13. He therefore proposed that article 13, paragraph 1, should be made subject to the provisions of article 12, paragraph 3.

11. Mr. FERRARI (Italy) favoured the use of the Spanish term “formación”, which was consistent with other official texts published by UNCITRAL.

12. In response to the view expressed by the representative of Pakistan, he emphasized that article 13 in no way related to the process of offer and acceptance, but rather to the form an offer or acceptance might take, and was meant specifically to inform a legislator that a contract would be deemed valid even when either the offer or the acceptance was in the form of a data message. He therefore favoured retaining article 13 as drafted and could agree to either the deletion or retention of the phrase “unless otherwise agreed by the parties”. Nonetheless he wished to point out that article 10 did indeed cover master agreements, since such agreements did contain an agreement between the parties regarding the communication of data messages.

13. Mr. SORIEUL (International Trade Law Branch) agreed with the representative of Italy that it was necessary to adopt terminology that was consistent with the terminology used in previous documents. It was the work of the drafting group to deal with the various language versions of the text at hand.

14. The CHAIRMAN said that if she heard no further comments she would take it that the majority of delegations favoured adopting article 13 as originally drafted.

15. Mr. ABASCAL (Mexico), supported by Mr. CHOUKRI (Observer for Morocco), Mr. ANDERSEN (Observer for Denmark) and Ms. REMSU (Observer for Canada), said that his delegation had recommended the deletion of the phrase “unless otherwise agreed by the parties”, and he believed that, with the exception of the United Kingdom, most delegations supported that proposal.

16. Mr. ADENSAMER (Austria) said that his delegation favoured retaining article 13 as originally drafted, including the phrase “as otherwise agreed by the parties”, which was consistent with the idea expressed in article 10 and also highlighted the principle of party autonomy. Moreover, retention of the phrase would in no way harm the purity or clarity of the text.

17. Mr. FERRARI (Italy) said that while his delegation favoured retaining article 13 as drafted, it could also agree with the deletion proposed by the representative of Mexico. In that
regard, he stressed that the principle of the party autonomy was sufficiently covered elsewhere in the Model Law and was in fact a general principle underlying the Model Law.

18. Mr. ALLEN (United Kingdom), supported by Mr. ZHANG Yuqing (China), said that the words “unless otherwise agreed by the parties” should be retained; their retention would do no harm, even though several delegations felt that their deletion would do considerable harm. Article 10 did not cover the case at hand; article 13 was expressed in general terms and applied to any contract, whether or not the parties were communicating by means of data messages.

19. Mr. SANDOVAL LÓPEZ (Chile) agreed with the representative of Mexico that the phrase should be deleted.

20. Mr. ABASCAL (Mexico) said that article 10 applied to situations where the parties were communicating by means of data messages. To retain the phrase under discussion would lead to a narrow interpretation of article 13, whereas the Commission had intended its applicability to be very broad. He drew attention to the comments of his Government on article 13 contained in document A/CN.9/409/Add.1.

21. Mr. SORIEUL (International Trade Law Branch) suggested that those who favoured the deletion of the phrase should explain their position clearly.

22. Mr. BURMAN (United States of America) pointed out that similar phrases were present in article 14. However, while his delegation had initially supported the deletion of the phrase from article 13, he did not see what harm would be done by retaining it.

23. Mr. ABASCAL (Mexico) said that there was a danger that the text might be interpreted in such a way as to make the applicability of article 10 excessively narrow.

24. The CHAIRMAN suggested that that issue could be made clear in the Guide to Enactment.

25. Mr. ABASCAL (Mexico) said that that would be acceptable.

26. Mr. ALLEN (United Kingdom) said that article 10 clearly would apply to the formation of contracts, but only if the parties were communicating by means of data messages. The Commission should adopt a policy of caution and retain the language as it stood.

27. Mr. ZHANG Yuqing (China) said that retention of the words “unless otherwise agreed by the parties” was desirable, since it would give the parties more room for manoeuvre in the formation of contracts.

28. Mr. MADRID (Spain) said that it would be preferable to delete the phrase in the interests of a suitably broad interpretation of article 10, which was not intended to apply only to agreements concluded by electronic means.

29. Mr. ANDERSEN (Observer for Denmark) said that since a number of delegations felt strongly about it, the phrase should be retained.

30. Mr. BISCHOFF (Observer for Switzerland) pointed out that both articles 10 and 13 came under the heading of chapter III; article 10 would therefore apply to articles 11, 12, 13 and 14. In deciding whether the phrase should be deleted, the Commission should bear in mind the impact of such a decision on article 14.

31. The CHAIRMAN suggested that the Commission could agree to retain the phrase, provided that the intended interpretation was clearly stated in the Guide to Enactment.

32. Mr. ABASCAL (Mexico) said that his delegation would submit to the generally held view.

33. Mr. CHOUKRI (Observer for Morocco) supported the remarks of the observer for Switzerland and said that his delegation still supported deletion of the phrase.

34. Mr. LEBEDEV (Russian Federation) said that in the interest of compromise, the phrase should be retained; however, the Commission’s report should reflect the widely held view that the phrase was unnecessary. Such a stipulation would be useful when the Model Law was enacted in individual countries.

35. Mr. SORIEUL (International Trade Law Branch) said that the views expressed during the current discussion would be reflected in the Commission’s report to the General Assembly and in the Guide to Enactment.

36. Ms. REMSU (Observer for Canada), speaking also on behalf of the Australian delegation, said that it had not been demonstrated that any harm would be done by retaining the phrase. In the interest of compromise, the wording of article 13 should be adopted without any change.

37. Mr. BURMAN (United States of America) said that it would be necessary to return to the matter when the final language of article 10 was discussed. His delegation’s interpretation of the relationship between articles 10 and 13 was completely different from that of the delegation of the United Kingdom. It had been the clear intent of the Commission that articles 10-14 should cover the autonomy of the parties to contract separately as between themselves, and that fact should be reflected in the Commission’s report.

38. Mr. ABASCAL (Mexico) reiterated his earlier comment concerning the excessively narrow interpretation of article 13; that article should not be restricted solely to the formation of contracts.

39. Mr. ANDERSEN (Observer for Denmark) agreed with the point made by the representative of Mexico. However, article 4 already contained wording which should meet that requirement.

40. Mr. BURMAN (United States of America) said that it would be useful to broaden the applicability of article 13 as suggested by the representative of Mexico. He wondered whether the latter could draft appropriate wording to enable the Commission to consider the issue at a later time.

The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.

41. Mr. ABASCAL (Mexico), referring to the point made by the observer for Denmark, said that article 4 recognized the validity of data messages as such; however, article 13 had been included because in practice there were systems which could issue manifestations of will – offers and acceptances – because they had been programmed to do so, without any human intervention. Some delegations had felt that the act of programming a computer was a manifestation of will, others that it was an implied responsibility. His Government had proposed an expansion of the principle of article 13 to other acts which involved negotiable manifestations of will. He therefore proposed the addition of a new paragraph 2 to article 13, with the
existing paragraph 2 becoming paragraph 3. The new paragraph 2 would read: “Where a data message is used in a transaction, that transaction shall not be denied validity or enforceability on the sole ground that that data message was used.

42. Mr. FERRARI (Italy) said that his delegation supported that proposal. However, the word “transaction” suggested two parties; it might be better to use the word “communication”, to cover such situations as notification regarding non-conformity of goods, which was a unilateral act.

43. Mr. CHANDLER (United States of America) said that his delegation also found the Mexican proposal very useful. In order to meet the concern expressed by the representative of Italy, the words “or other commercial communication” could be inserted after “transaction”, so as to cover unilateral statements with commercial and contractual implications.

44. Mr. TELL (France) said that his delegation also supported the Mexican proposal. However, it had difficulty with the word “operation” (“transaction”), which had no legal meaning in French law. The Commission also needed to determine whether it was necessary to change the title of article 13 if its scope was to be expanded.

45. Mr. SORIEUL (International Trade Law Branch) said that for some years there had been problems with the translation into other languages of the word “transaction”, but it might be a good idea to conform with past usage. Since the Mexican proposal referred to the validation of manifestations of will by electronic means, a solution might be to use the words “manifestation of will”, thereby avoiding problems of terminology.

46. Mr. FERRARI (Italy) said that his delegation strongly supported the suggestion by the representative of the United States of America but would prefer not to use the word “commercial” since article 1, which defined the sphere of application, expressly referred to commercial activities.

47. There would be a problem in using the words “manifestation of will” because in a number of countries notification of non-conformity, for example, was not considered to be a declaration of will, but a declaration of science. The wording suggested by the representative of the United States of America might be the best, since it would cover both types of declaration.

48. Mr. UCHIDA (Japan) said that his delegation was opposed to the inclusion of the new paragraph 2. The term “transaction” covered unilateral legal act; however, as a matter of policy, his delegation did not feel that unilateral legal acts should be included within the scope of article 13. It could be a surprise to the other party if, for example, a cancellation could be made by way of a data message without prior agreement.

49. Mr. ALLEN (United Kingdom) said that his delegation would not oppose the inclusion of a paragraph along the lines suggested by the representative of Spain. It felt that the word “communication” was better than “transaction”, especially if it was more acceptable in jurisdictions in which the word “transaction” had no clear legal meaning, and would prefer “communication” to “manifestation of will”, although if there was general support for the latter formulation his delegation would not oppose it.

50. The proposed new paragraph was more akin to article 4 than to the provisions in chapter III. Like article 4, the new provision was entirely general: it applied to unilateral communications, not just cases in which parties were communicating by means of data messages on both sides. It would therefore make more sense for it to be included as a separate provision after article 4, because the intention was to ensure that the requirements for writing and other formalities did not have a restrictive effect which would prevent validity being given to expressions of will by means of data messages. If the new paragraph was included in chapter II, it would be necessary to ensure that article 13, paragraph 2, applied to it.

51. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported the Mexican proposal. However, the word “transaction” had an economic rather than a legal sense, and his delegation would prefer “manifestation of will”.

52. Mr. ABASCAL (Mexico) said that his delegation’s original proposal, reproduced in document A/CN.9/409/Add.1, used the term “manifestation of will”, but it seemed that some delegations found that wording too broad. As to the difficulties associated with the use of the word “transaction”, because international trade law instruments needed to be uniformly adopted, it was sometimes necessary to move away from traditions and precise meanings of terminology in individual legal systems. His delegation would have no difficulty with the suggestion put forward by the representative of the United States of America.

53. Mr. ZHANG Yuqing (China) said that the word “transaction” referred to the sale of goods, from the making of offers to payment, while article 13 referred only to “contract formation”, although that could include transport, insurance and banking enterprises, and other parties, which would complicate the Commission’s work. The terms “communication” and “manifestation of will” could have many different meanings. Article 1 referred to “any kind of information”, which included all those meanings. The use of the word “transaction” would then extend the scope too much. His delegation therefore suggested that the Commission should return to the secretariat’s version of article 13, rather than spending more time on the word “transaction”.

54. Mr. CHOUKRI (Observer for Morocco) said that his delegation felt that the first version of article 13 was clearer than the new version. Article 13 referred to “contract formation”, and a transaction was only one part of that process. “Enforceability” and “validity” referred to contracts; in manifestations of will, there must be no error and no coercion. The word “transaction” had a commercial, not a legal meaning, and was very broad; article 13 was concerned with the validity and enforceability of contracts, not transactions.

55. Mr. TELL (France) said that it was necessary to determine what was meant, in the legal sense, by “commercial communication”, which could, for example, mean either advertising or an offer, in which case paragraph 1 applied. Article 4 referred to “information” in general. To some extent, the hypothesis of a commercial communication was already covered by that article. The word “transaction” generally meant a contract, or an offer, which was covered by article 13, paragraph 1. It might be better to use the words “manifestation of will” or “legal acts”, which would include contracts.

56. Mr. MADRID (Spain) said that the Commission must decide whether there was any advantage in including the new paragraph. It had been felt that in some situations, article 4 was not sufficient to cover the possibility of using data messages for information. The new paragraph must embody the idea of manifestation of will, but should not overlap with paragraph 1 (offer and acceptance of an offer). Since the word “transaction” posed problems, his delegation preferred “manifestation of will”; “legal acts” could be too technical in some legal systems, and too imprecise in others.

57. Mr. FERRARI (Italy) said that article 13, paragraph 1, covered both offer and acceptance and was therefore applicable
to all contracts. He suggested embracing the spirit behind the Mexican proposal and inserting the word "communication", as suggested by the United States delegation. The terms "legal act" and "declaration of will" should not be used for similar reasons. He proposed that the new paragraph 2 should read "Any communication shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message." That would bring it into line with the wording used in article 4.

58. Mr. UCHIDA (Japan) said that if the new paragraph 2 was adopted, a party to a contract could cancel the contract without any prior agreement, to the surprise of the other party.

59. Mr. FERRARI (Italy) said that the only new point that the proposed new paragraph would add to contract law had to do with whether the data message could be used. No one could be surprised by receiving a notification of cancellation because the right to void or cancel a contract was either permissible under the applicable law or it was not.

60. Mr. ABASCAL (Mexico), referring to the concern raised by the representative of Japan, said that a contract could indeed be considered to be terminated in the spirit of the proposal. If the Model Law did not contain a clear stipulation that a contract could not be changed or ended except in writing, a contract could be considered terminated by means of an electronic message or an EDI message and yet there could still be doubt as to whether the notification was a manifestation of appropriate will. The proposal was intended to make clear that such manifestation of will existed. He was not opposed to the use of "manifestation of will", which were the very words used by the Government of Mexico in its original observations. He had changed the term at the suggestion of a number of delegations who had felt it might be too broad.

61. Mr. ZHANG Yuqing (China), referring to the suggestion of the representative of Italy to replace the word "transaction" by the word "communication", said that the meaning of the latter term in Chinese could be very confusing. In fact, it had no legal meaning in his language. As his delegation saw it, letters, telephone calls and facsimile messages were all forms of communication, which was a tool for transmitting information. If the word was understood to mean information, then a separate provision would be required.

62. Mr. LEBEDEV (Russian Federation) said that the serious problem raised by the representative of Mexico appeared to be covered by article 4 of the Model Law. If that was not the case, and the proposal by the representative of Mexico to use the term "communication" or "statement" was accepted, a separate paragraph in article 13 would not be necessary. The words "the same rules apply to communication or statements of the parties" could be added to that article, bearing in mind that such communications or statements might be made by data message, a mode of transmittal that did not, in fact, affect their legal validity or enforceability. That would be the best way to solve the problem in paragraph 1, although, as noted by the representative of France, the title of article 13 would have to be changed.

63. Expressions such as "statement" and "communication" on the one hand and "information" as used in article 4 on the other hand, reflected concepts which were basically identical. Over and above the difficulty of interpreting the concept of "communication" in itself, there was the additional problem of distinguishing between "information" as defined in article 4 and "communication" as the term would be used in article 13. Furthermore, it was very clear that terms such as "communication" and "statement" in article 13 would have to be subject to the rules set out in articles 5, 6 and 7 of the Model Law. If the proposal of the representative of Mexico was to use the term "communication" rather than the term "manifestation of will", then there would be no need to supplement the existing text; the problem was settled in article 4 by the word "information", which seemed to have a fairly broad meaning in order to encompass very different situations.

64. Mr. SORIEUL (International Trade Law Branch) said that the problems being encountered at the current meeting were no doubt linked to the redundancy between the provisions of article 4 and article 13. Once an exception had been made for contracts, it was logical that a proposal to expand the recognition of the validity beyond the scope of contracts to a set of acts by which a party might be led to produce legal effects by electronic communication should be put forward. Additional effort would be required to define the precise context of the concept that was intended to enjoy the same treatment as contracts, for if the Commission intended to use vague non-legal concepts such as "operation", "transaction" and "communication", then specific definitions of those concepts as used in the Model Law would have to be formulated. The authors of the proposal and the delegations supporting it should draw up a list of three or four legal concepts which the Commission wished to have recognized in the context of article 13. If the Commission decided that it would be useful to include such a provision, the link between the new paragraph and paragraph 1 could then be determined.

65. Mr. FERRARI (Italy) said that his delegation had suggested the use of the word "communication" precisely because the term did not have specific legal meaning - it was neutral and sufficiently vague, in keeping with the international character of the Model Law, and prevented the introduction of new concepts which would only create more confusion. A similar approach had been used in other uniform UNCITRAL texts, such as the United Nations Convention on Contracts for the International Sale of Goods. Indeed, all the arguments adduced by the representative of China tended to justify the use of the word "communication".

66. Mr. ABASCAL (Mexico) said that it was indeed quite difficult to explain and justify the difference between article 4 and article 13. However, his delegation was actively seeking to resolve that problem. He agreed with the representative of Italy as to the use of legal terms. Concerning documents on uniform law, the use of legal terminology, which had very specific connotations in domestic systems, might have results that were opposite to the ends sought in formulating uniform law. He suggested that the word "statement" should be used instead of "transaction" or "communication".

67. Mr. CHANDLER (United States of America) said that the term "manifestation of will" appeared to enjoy a consensus and that, since it suited the purpose for which it had been proposed, the Commission should concentrate on it.

68. Mr. ZHANG Yuqing (China) said that article 13, paragraph 1, on formation and validity of contracts, would suffice. The Mexican proposal would extend its scope to include implementation and all other related issues. However, extending the scope of the article without a comprehensive debate beforehand might be hasty. If his memory served him right, communication dealt with form, namely, the will of one party expressed through writing to the other party. However, article 13 dealt not only with form but also with types of contracts expressed through the transmission of a data message. The article's function would be totally different from that of article 27. While he was not against expanding the scope of the article, he agreed with the representative of the secretariat on the need to limit such expansion.

The meeting rose at 6.05 p.m.
SUMMARY RECORD OF THE 591st MEETING  
Monday, 3 June 1996, at 10 a.m.  
[A/CN.9/SR.591]  
Chairman: Mrs. PIAGGI de VANROSSI (Argentina)  
The meeting was called to order at 10.15 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/409/ADD.1; A/CN.9/426)

Article 13 (continued)
1. Mr. FERRARI (Italy) said his delegation strongly opposed the use of the words “manifestation of will” in the wording proposed by Mexico for paragraph 1 of article 13.

2. The CHAIRMAN said that while the Commission appeared to have accepted the wording proposed by Mexico, the final version of the text and heading of the article would be formulated by the drafting group.

3. Mr. ABASCAL (Mexico) drew attention to the difference between article 13 and article 4, which stated that “information shall not be denied legal effectiveness, validity or enforceability solely on the grounds that it is in the form of a data message”.

4. Mr. MASUD (Observer for Pakistan) said article 13 had been intended to deal with the entire process of contract formation. As currently formulated, however, the article covered only the making and acceptance of an offer, and not with the equally essential matter of the entry into effect of that offer or of its acceptance. Since article 14, paragraph 2(a), stipulated that “receipt occurs at the time when the data message enters the designated information system”, problems could arise if the addressee did not immediately become aware of the message’s arrival in that system. The article should therefore be given further careful consideration.

5. Mr. ZHANG Yuqing (China) agreed that article 13 required further consideration, because the proposed changes in its wording would appear to imply or require expanding its scope beyond contract formation; his delegation was firmly opposed to such an expansion.

6. Mr. SORIEUL (International Trade Law Branch) said the Commission had already concluded its discussion of article 13, but perhaps a new article could be formulated to deal with the handling of manifestations of will or other statements conveyed by means of data messages.

7. Mr. BURMAN (United States of America) said such terms as “manifestations of will and other statements” could be clarified by explicitly relating them to more specific terms, such as “performance”. The article’s scope would thereby be extended beyond contract formation, but not to an excessive degree.

8. Mr. CHOUKRI (Observer for Morocco) said a manifestation of will was only binding upon the party manifesting or expressing that will. He therefore suggested a clarification of article 13, paragraph 1, that would allow offers and acceptances to be expressed by means of data messages in the context of manifestations of will.

9. Mr. LEBEDEV (Russian Federation) pointed out that articles 4 and 13 of the draft Model Law were similar in content and wording.

10. Mr. SORIEUL (International Trade Law Branch) recalled that questions had been raised at the Commission’s twenty-eighth session with regard to the applicability of article 11 to telegram, telecopy and telex messages, as well as the criteria for ascertaining the authenticity of a data message in the context of telegrams or telexes. The Commission had decided to reconsider the inclusion of article 11, subparagraph 3(a)(ii), in view of the possible legal consequences it entailed; moreover, no decision had been taken on article 11, paragraph 6. The Commission had also agreed to delete the previous draft paragraph 8.

11. Mr. SCHNEIDER (Germany) said article 11 constituted the core of the Model Law; any changes to it required careful consideration of its underlying principles, as well as of its consequences. Article 11, subparagraph 3(a)(ii), as currently formulated, could endanger international commerce by placing too heavy a burden on the addressee of a potentially falsified message, and should therefore be deleted.

12. Mr. BURMAN (United States of America) said that, although his delegation had previously favoured retaining the original language of that subparagraph, it had consulted many experts in the commercial and data-exchange fields and had changed its position to that just expressed by the representative of Germany. Retaining that subparagraph would not work in the marketplace, and could jeopardize the use of the Model Law. His delegation therefore joined Germany in urging that it be deleted.

13. Mr. ABASCAL (Mexico) said his delegation, too, agreed with the proposal to delete subparagraph 3(a)(ii), which had similarities with the Model Law on International Credit Transfers, in that a message could be attributed to the originator only on the basis of some previously agreed procedure for authentication. When article 11 had been drafted, it had seemed to apply to open electronic data interchange; the provision regarding “reasonable circumstances” should allow for authentication without prior agreement, but if it would cause problems it would be preferable to delete it.

14. Mr. FERRARI (Italy) said his delegation also favoured deletion of subparagraph 3(a)(ii), but consideration must then be given to the fact that ways of ascertaining whether a message was that of the originator would, consequently, be very limited.

15. Mr. ANDERSEN (Observer for Denmark) suggested that, in subparagraph 3(a)(ii), “or” could be replaced by “and”, to make it clear that prior agreement as such was not the entire basis for relying on the data message.

16. Mr. MADRID (Spain) said his delegation shared the concerns expressed by previous speakers and supported the proposed deletion of subparagraph 3(a)(ii) to ensure greater certainty in commercial transactions. Article 11, paragraph 2, was ambiguous. Some delegations saw a necessity for prior agreement among the parties; Denmark had just pointed out the need
to place a further restriction on attribution. His delegation nevertheless believed that article 11, paragraph 1, was sufficiently broad to allow anyone with an inter-computer communications system to conclude a contract with a third-party service provider and take as authentic messages received from that third party. Contracting parties could also agree on a third-party service provider, but it should be made clear whether that possibility would be covered in the article or should be discussed in greater depth in the Guide to Enactment of the Model Law. Some uncertainty also remained regarding the extent to which prior agreement was needed. Assurances and security should be provided, but restrictions should not be imposed.

17. Mr. GOH (Singapore) said he supported the deletion of subparagraph 3(a)(ii), but did not agree with the suggestion of the observer for Denmark which, in his view, would lead to greater uncertainty.

18. Mr. TELARANTA (Finland) said he supported the suggestion of Denmark.

19. Ms. REMSU (Observer for Canada) said both the proposal of Germany and the suggestion of Denmark would confirm the interchange to the relationship between the originator and the addressee. Her delegation preferred the proposal to delete paragraph 3(a)(ii).

20. Mr. MASUD (Observer for Pakistan) said once an agreed procedure had been followed, further authentication was not necessary because of the autonomy of the parties. Therefore, his delegation opposed the suggestion of Denmark.

21. Mr. ABASCAL (Mexico) said there seemed to be general agreement that subparagraph 3(a)(ii) should be deleted. The Danish suggestion would make the text of article 11 parallel to the text of the Model Law on International Credit Transfers, which required prior agreement on an authentication procedure. That Model Law identified authentication as a procedure established by agreement between the parties to determine whether a message actually was issued by the person indicated as the sender. It also expressly stated that no procedure could be agreed upon that was not "reasonable in the circumstances". The Danish suggestion varied somewhat, however. Article 11, as part of chapter III, would be subject to "variation by agreement" (article 10). In his opinion, the system in the Model Law on International Credit Transfers was more secure, since article 11 of the draft under consideration was quite restrictive for the originator. In the Model Law on International Credit Transfers, the agreement was arrived at between the originator and the addressee, but that was not the case in article 11.

22. Mr. SCHNEIDER (Germany) said it should be left to the parties to decide on procedures; therefore, he did not support the Danish suggestion. The purpose of article 11 was to determine which party bore the risk when sending a data message. It was never really clear how the term "reasonable" would be interpreted, and therefore, the use of that term added an element of uncertainty.

23. Mr. BURMAN (United States of America) said his delegation associated itself with the comments of Spain, Singapore and Pakistan regarding the Danish suggestion. The default rules provided for the allocation of risk and it was not appropriate to subject the mechanism to further judgement. The point raised by Spain was well taken, and should be incorporated in the draft. Agreements regarding procedures leading to a more open system of interchange should be a priority for the future work of the Commission.

24. The CHAIRMAN said there appeared to be a consensus that article 11, paragraph 3(a)(ii), should be deleted and that the Danish suggestion should not be adopted. The point raised by Spain should also be incorporated in the draft.

25. Mr. ANDERSEN (Observer for Denmark) said it had not been his intention to place restrictions on the way in which procedures were agreed upon, but he could accept the Commission's view regarding his proposal.

26. Mr. CHOUKRI (Observer for Morocco) said his delegation did not share the misgivings expressed concerning paragraph 3(a)(ii), which provided a mechanism based on efficiency, speed and confidence. It concerned commercial transactions between two parties known to each other, and, if an error was made, civil law provided penalties and a way to end the contract.

27. Mr. BISCHOFF (Observer for Switzerland) noted that article 11 referred to a reasonable procedure, rather than a reasonable method, as in the Model Law on International Credit Transfers.

28. Mr. BAUM (Observer for the International Chamber of Commerce) said he was concerned that the deletion of subparagraph 3(a)(ii) would have a negative impact on the broader goal of fostering open trading, for example on the Internet, when no prior agreement existed between the parties. Some delegations had seen the deleted subparagraph as fostering such trade. The underlying problem appeared to be that of ensuring that the communication was sufficiently secure. Terms such as "reasonably secure" or "properly secure" might meet that concern.

29. Mr. TELL (France) said the Model Law under discussion would apply to such means of communication as telecopy, telex, electronic mail and the Internet. He wondered whether article 11 had any legal meaning stricte sensu in the case of a telecopy, where the originator could be determined. Perhaps the Guide should contain some discussion regarding the contractual relationship between the parties in such cases.

The meeting was suspended at 11.35 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said the words "as its own" at the end of subparagraph 3(b) were ambiguous and should be replaced with the phrase "to impersonate the originator".

31. The CHAIRMAN said the Commission did not appear to support that proposal.

32. Mr. CHANDLER (United States of America) pointed out that the reference to paragraph 3(a)(ii) in paragraph 4(b) would have to be deleted, and asked whether paragraph 6, which was in square brackets, would be retained.

33. Mr. HOWLAND (United Kingdom), supported by Mr. SCHNEIDER (Germany), proposed that the square brackets should be deleted and that paragraph 6 should be adopted as currently drafted.

34. It was so decided.

35. Mr. BURMAN (United States of America) said paragraph 2 should be redrafted so that it covered actions taken by third-party service providers. He proposed that the phrase "communicated by a person" should be replaced with "communicated by or on behalf of a person".

36. Mr. SORIEUL (International Trade Law Branch) said the resulting repetition of the phrase "on behalf of" could be con-
fusing. The drafting group would decide how to incorporate the United States proposal into paragraph 2.

37. Mr. ALLEN (United Kingdom) proposed that the phrase "or by an information system operated by or on behalf of the originator" should be added at the end of paragraph 2 so that the provision would cover automatic messages.

38. The CHAIRMAN said the secretariat took note of the proposal, but that the drafting group would determine the final wording of the paragraph.

39. Mr. LLOYD (Australia) said the word "transmit" in paragraph 5 should be changed to "communicate", which was the term used in the rest of article 11.

40. Article 11, as amended, was adopted.

Article 14

41. Mr. FERRARI (Italy) said there was a conflict between paragraphs 1 and 2 of article 14, since the definition of the time of dispatch was identical with that of the time of receipt.

42. Mr. SORIEUL (International Trade Law Branch) said the Italian representative’s observation was correct, but he saw no conflict between those paragraphs. When two parties communicated directly, the dispatch and the receipt of a data message were virtually simultaneous. Thus, a data message was considered to have been dispatched when it could no longer be changed by the originator, i.e. when it entered an information system to which the originator did not have access.

43. Mr. ABASCAL (Mexico) said the Working Group had concluded that the only time when a data message could be objectively deemed to have been sent was when it had entered a system other than that of the originator, whether the system belonged to the addressee or to an intermediary.

44. Mr. ZHANG Yuqing (China) said that, in the first sentence of paragraph 4, the order of the two phrases following the comma should be reversed so that the place of dispatch was mentioned before the place of receipt. That would be more logical, since a data message had to be dispatched before it could be received, and the word “dispatch” appeared before “receipt” in the title of article 14.

45. Mr. HOWLAND (United Kingdom) said the text of article 14 represented a compromise reached in the Working Group and it would be preferable not to reopen the debate on the substance of the article. However, he wished to propose two minor drafting changes. In paragraph 3, the words "deemed to be" should be inserted before the word "received" to reflect the wording of paragraph 4. In subparagraph 4(b), the words following the comma should be replaced by "the place of its habitual residence is to be regarded as its place of business".

46. Mr. SORIEUL (International Trade Law Branch) said that, although the wording of paragraph 4(b) was not very precise, it was taken directly from article 10 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention) and should not be changed for less than compelling reasons.

47. Mr. MADRID (Spain) said he was concerned about the exceptions to the applicability of paragraph 4 which were provided for in paragraph 5. Under paragraph 4, the parties to a contract could agree to change the place where the contract was deemed to have been concluded for procedural and jurisdictional purposes, irrespective of any objective or pre-existing criterion. That could interfere with public procedural and jurisdictional regulations because, in the event of litigation related to the contract, the parties could decide to change jurisdictions in order to avoid certain courts.

48. Mr. FERRARI (Italy) said his delegation wished to draw attention to certain consequences of comparison between dispatch and receipt of messages. Countries where a contract was concluded on the basis of the theory of expedition or mailbox rule were currently governed by the rules of reception. For example, article 16 of the Vienna Sales Convention stipulated that an offer could not be revoked once acceptance of it had been dispatched.

49. Mr. SORIEUL (International Trade Law Branch) referring to the comparison with the mailbox rule, said it was simply a matter of considering that the mailbox in such cases would be a system belonging to a third party who owned the network. The originator was deemed to have entrusted his message to the owner of the network through which he sent his message. More rarely, in cases where the parties possessed a system that enabled them to communicate directly, the time when the message was sent out and the time it was received directly coincided. The Working Group had decided that in such instances the instantaneous nature of the transaction would rule out extending the period during which a contract could be withdrawn or modified.

50. Mr. FERRARI (Italy) said in order for a contract to be concluded under the mailbox rule, it was not necessary for the relevant message to reach its destination. In the rule currently under discussion, the message actually had to reach its destination.

51. Mr. SORIEUL (International Trade Law Branch) said when a third party was used to carry a message between an originator and a recipient, it was assumed that the system worked and that the mailbox was open. In the current instance, the message was deemed to have been sent out once it had left the originator’s control; strictly speaking, it was immaterial whether or not the message actually reached the addressee. The same criterion, that of a message actually entering the system, also applied to messages sent directly from one party to another without intermediaries. A genuine difficulty did arise, however, in cases where an addressee deliberately chose to switch off his system, thus precipitating a conflict between the mailbox rule and the rule currently under discussion.

52. Mr. CHANDLER (United States of America) said the mailbox rule, which applied to the regular mail, was not adequate to deal with the commercial realities of electronic communication. Dispatch by the originator did not necessarily mean that the message had been transmitted into the overall system. Many systems batched messages and did not send them out until a certain number had accumulated. A more reliable criterion was receipt by the addressee’s system, a criterion which the United States was beginning to adopt. The informal working group had therefore made the proper decision.

53. Mr. MASUD (Observer for Pakistan) said that, in article 14, paragraph 2(a), a distinction must be made between the ordinary transmission of data messages through electronic means and actual knowledge of the addressee as the essence of the transaction. In many cases, legal consequences could flow from the latter and not merely from the transmission of data into an information system. He therefore proposed amending the article by adding, after “designated information system”, the words “except when actual knowledge of the addressee is an essence of the transaction”. The word “but” would then have to be deleted.
54. Mr. CHOUKRI (Observer for Morocco) suggested deleting paragraph 5 on administrative, criminal or data protection law, as it was totally unrelated to paragraph 4.

55. Mr. HOWLAND (United Kingdom) said he agreed with the United States representative that article 14 was a tailor-made adaptation of the rule of receipt, which was well suited to modern electronic communication. He shared the concerns of the Pakistani representative but felt they were already addressed in paragraph 2 and also by the content of article 10.

56. Mr. TELL (France) said he was pleased that, as his delegation had requested, article 14, paragraph 4, would not attempt to impose any rules concerning conflict of laws.

57. Mr. UCHIDA (Japan), referring to paragraph 1, asked when a data message would be considered to occur in a situation where the originator entered the message into his own system and it was later accessed and retrieved by the addressee's information system.

58. Mr. SORIEUL (International Trade Law Branch) said the timing would be determined in the agreement between the parties. Probably, the message would occur when the addressee searched for it in the originator's system.

59. Mr. ABASCAL (Mexico) said it was more likely that the message would occur when the addressee actually retrieved it, for it would then be in a system other than the originator's.

60. Mr. BURMAN (United States of America) said he agreed with the United Kingdom representative that article 14 was well balanced and that the concerns of the Pakistani delegation might already be addressed in the Model Law. He also supported the Spanish and Moroccan statements concerning paragraph 5, which his delegation had never found to be necessary.

61. Mr. LEBEDEV (Russian Federation) said the experts in his country had felt that paragraph 1 meant that a message was dispatched when it left the originator's information system, which was contrary to the conclusion of the Working Group. However, the Guide to Enactment (A/CN.9/426) seemed to indicate in paragraph 107, that dispatch and receipt were virtually simultaneous except where an information system had not been specifically designated by the addressee.

62. Mr. DONG Yi (China) inquired why paragraph 4, on place of receipt, was limited to computerized transmission. He noted that, in document A/CN.9/406, paragraph 49, the Working Group expressed concern that the provision might not cover telexes and telegrams. He wondered, however, whether it was applicable to telecopies, particularly when sent through a mobile phone and, in such a case, how the place of receipt of the data message was determined.

63. Mr. ABASCAL (Mexico) drew attention to situations where the originator, using a third-party provider service, dispatched a message which could not be forwarded to its destination. In such a case, the originator had complied with the dispatch rule but his responsibility regarding retransmission of the data message had yet to be determined. The Pakistani proposal was covered by the rule of information, not the rule of receipt. Under contract law, the message occurred when the addressee became aware of its content.

64. Mr. SORIEUL (International Trade Law Branch) said he could offer only a partial response to the Chinese delegation. Paragraph 4, as worded, did not apply to telexes and telegrams. The extent to which it covered telecopies was unclear, for telecopiers could be transmitted electronically but also by other means. It was for the Commission to decide whether the paragraph covered telecopies.

The meeting rose at 1.05 p.m.

Summary record of the 592nd meeting
Held at Headquarters, New York, Monday, 3 June 1996, at 3 p.m.
[A/CN.9/SR.592]

Chairman: Mrs. PIAGGI de VANOSSE (Argentina)
The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 14 (continued)
1. Mr. MADRID (Spain) said that there was a lack of consistency between the third sentence of paragraph 113 of the proposed draft Guide to Enactment and article 14, paragraph 4, of the Draft Model Law. Under paragraph 4, the parties could, at their discretion, avoid the application of a given jurisdiction. In his country, there was a general rule that such procedural issues were established by law on the basis of objective facts, one such fact being the actual place where a contract was entered into or, as in the current case, the place where a data message was received or sent. While paragraph 4 established some presumptions regarding the place where the message was sent or received, the place of receipt was impossible to verify because the information was computerized. For procedural purposes then, it seemed reasonable, in public law, that a provision should also be made to prevent the parties from establishing, at their discretion, tax havens where they could habitually send and receive data messages without maintaining either a commercial or residential place of business there. Such a practice would run counter to the laws of virtually any country.

2. He therefore proposed the deletion from article 14, paragraph 4, of the words "unless otherwise agreed between the originator and the addressee of a computerized transmission of a data message", and the insertion in paragraph 5 of the word "procedural", between the words "administrative" and "criminal". To ensure that that paragraph was consistent with the
others, he would support the general proposal of the Mexican delegation. Throughout the article, any reference to discretion between the originator and the addressee should be deleted.

3. Mr. BURMAN (United States of America) said that he could not agree with the proposal of the representative of Spain. It was critical to retain for commercial parties the ability to negotiate as between themselves a rule by which they would determine when their contractual actions would be deemed to have taken place, particularly since it was very difficult to apply normal conflict and contractual rules to events taking place through computerized messages which passed over many countries and might come from quite remote stations. Paragraph 4 was a default rule that sought to provide a standard only when the parties had not otherwise agreed. While his delegation would not object to having the drafting group consider the possibility of removing the phrase “unless otherwise agreed” from paragraph 4, such action should be consistent with article 10, paragraph 1. Should the effect of a drafting change be to remove the discretion of the parties to make such an agreement between themselves, then the change would constitute an unacceptable step backwards. The Commission did not need to – nor should it attempt to – rework the rules for public law purposes. For the same reason, addition of the word “procedural” would be a most unfortunate step. His delegation had already accepted, with great difficulty, the word “administrative” because of its excessive reach in the context of commercial law rules or commercial transactions.

4. Mr. TELL (France) said that paragraph 4 did not provide for rules on the conflict of laws or for a rule of jurisdiction, so he did not see how the representative of Spain could infer that it provided for a rule allocating competence to a specific jurisdiction. In principle, where contracts were concerned, the applicable law was the law chosen by the parties. He was not in favour of adding the word “procedural” to paragraph 5 since conflict rules and jurisdiction rules differed from country to country.

5. Mr. MADRID (Spain) said he was not proposing that the abilities of the parties to come to an agreement should be eliminated or curtailed; that situation was covered by article 10. If other delegations had any objection to deleting the beginning of article 14, paragraph 4, he would not object to its retention. However, if exceptions were made for the broader issue of administrative norms, then exceptions should also be made for the narrower issue of procedural law. Parties could not by themselves determine anything which might run counter to administrative norms, yet the paragraph as currently drafted seemed to allow them to sidestep procedural norms which were part of public law.

6. Mr. SANDOVAL LÓPEZ (Chile) endorsed the statement by the representative of Spain.

7. Mr. BURMAN (United States of America) said it was highly unlikely that a party’s choice of place for commercial and contractual purposes would cause a court to consider itself bound by that choice with regard to jurisdiction. The Commission was inviting a great deal of disregard of the model law by providing a long list of very broad exclusions in paragraph 5. For the United States, the word “procedural” covered a broad range of activities and events, but no United States judicial authorities had felt that it in any way implicated choice of jurisdiction. He hoped that the Commission would not begin to add to the already excessive list of exceptional terms in paragraph 5.

8. Mr. ALLEN (United Kingdom) said that if the representative of Spain was concerned principally about tax evasion, then paragraph 5 could state that paragraph 4 was subject to the provisions of administrative criminal data-protection or tax law instead of the present wording. Then it would be left to national law to decide, for example, whether for the purposes of tax law it would be possible to contract out of paragraph 4.

9. Mr. CHOUKRI (Observer for Morocco) said that he supported the United States proposal to delete paragraph 5 because that paragraph created more problems than it solved.

10. Mr. MADRID (Spain) said he would prefer that paragraph 5 should be deleted since, in any case, article 1 provided that States could specify those areas of law in which they did not wish the Model Law to be applicable.

11. Mr. SCHNEIDER (Germany) said that, having realized that the concept of administrative law did not necessarily include tax law, his delegation endorsed the retention of paragraph 5 together with a proviso that would make it clear that the rule applied also to tax law.

12. Mr. TELL (France) said that he did not agree with the deletion of paragraph 5. As a compromise, the words “criminal or tax or data protection” could be added after the word “administrative”.

13. Mr. ANDERSEN (Observer for Denmark) suggested that, instead of discussing the particular areas of law which should be included or excluded, the Commission should consider using language similar to that of article 5, paragraph 2, and article 6, paragraph 2.

14. Mr. UCHIDA (Japan) and Mr. ZHANG Yuqing (China) supported the United States proposal to delete paragraph 5.

15. Mr. LLOYD (Australia) said that he had understood the United States delegation as advocating the retention of article 14, paragraph 5, as it stood without the need for any further amendments, a position which his delegation endorsed. The word “administrative” was broad enough, and any lack of clarity could be taken care of in the Guide to Enactment.

16. Mr. BISCHOFF (Observer for Switzerland) supported the retention of paragraphs 4 and 5 in their current formulation.

17. Ms. BAZAROVA (Russian Federation), referring to paragraph 5, said that since administrative law was confined to a very narrow area of law in her country, specific mention should be made of tax law as well. She also wished to know what was meant by the term “data-protection law”.

18. The CHAIRMAN suggested that the Commission should take up the Danish proposal and include a paragraph in article 15, paragraph 5, along the lines of article 5, paragraph 2, and article 6, paragraph 2.

19. Ms. REMSU (Observer for Canada), Mr. SCHNEIDER (Germany) and Ms. BAZAROVA (Russian Federation) supported the Chairman’s suggestion.

20. Mr. MADRID (Spain) said that he, too, supported the proposal. However, the Spanish text of article 5, paragraph 2, article 6, paragraph 2, and article 13, paragraph 2, must be standardized, as in the English version.

21. Ms. BAZAROVA (Russian Federation) said that there was an inconsistency between paragraphs 3 and 4 of article 14. Paragraph 3 used the broad term “information system” while paragraph 4 referred to “computerized transmission” of a data message; the word “computerized” should be deleted.

22. Mr. ANDERSEN (Observer for Denmark) supported that proposal.
23. Mr. ALLEN (United Kingdom) said that the word "computerized" had been inserted in paragraph 4 because it had been felt that the difficulty which the paragraph sought to solve would occur only in computerized transmissions.

24. Mr. CHANDLER (United States of America) said that his delegation supported the Russian proposal; although the original reason for including the more restrictive terminology was valid, the distinction that was made could raise questions in the mind of the reader. The Commission must ensure the ease of application of the Model Law.

25. Mr. TELL (France) said that if the word “computerized” was deleted, paragraph 4 would be meaningless. An explanation of the paragraph was provided in the Guide to Enactment.

26. Mr. ANDERSEN (Observer for Denmark) said he supported the Russian proposal because of the problems which arose with the definition of a “data message”. The distinction made in paragraph 4 was very difficult to maintain, and it would be better to avoid referring to particular types of technology.

27. Mr. DONG Yi (China) said that his delegation supported the Russian proposal. In article 2, the definition of “data message” covered, but was not limited to, electronic data interchange, electronic mail, telegram, telex and telecopy; if the reference in article 14, paragraph 4, was limited to “computerized transmission”, loopholes would remain.

28. Mr. CHANDLER (United States of America) said that in the past the Commission had been careful to use the word “computerized” because of uncertainties as to the time of dispatch of faxes. However, the words “information system” took care of that problem. While distinction between telex, fax and electronic mail was sometimes blurred, they were all part of an information system, and proper control could be maintained.

29. Mr. LLOYD (Australia) said that the words “of a computerized transmission of a data message” should be deleted from paragraph 4.

30. Mr. CHANDLER (United States of America) supported that proposal.

31. Mr. LLOYD (Australia) said that article 14, paragraph 1, left open the possibility that there might be no dispatch date if an originator of a message had an agent send that message. He proposed that the words “or of the person who sends the data message on behalf of the originator” should be added.

32. Ms. REMSU (Canada), Mr. ALLEN (United Kingdom) and Mr. CHANDLER (United States of America) said that they supported the Australian proposal.

33. Mr. ANDERSEN (Observer for Denmark) said that his delegation also supported the proposal; although the term “originator” was defined in article 2, subparagraph (c), it was worth clarifying the meaning of article 14, paragraph 1.

34. Article 14, as orally amended, was adopted.

The meeting was suspended at 4.30 p.m. and resumed at 4.35 p.m.

Article 2

35. Mr. SORIEUL (International Trade Law Branch), introducing article 2, recalled that there were two issues to be resolved concerning subparagraph (a): firstly, whether it was appropriate to include telecopy as part of the definition of a data message; and secondly, whether a clear definition or an alternative term could be found for the word “analogous” in the second line of the English text.

36. Mr. ANDERSEN (Observer for Denmark) said that “analogous” could be a source of confusion because of its similarity to the term “analog”.

37. Mr. MADRID (Spain) said that subparagraph (a) should perhaps be redrafted so that paper-based information would be clearly excluded; otherwise, there could be some confusion as to its scope. It was important to ensure that the Model Law did not affect well-established national practices in respect of rules concerning paper-based documentary evidence; the inclusion of the words “telegram, telex or telecopy” was likely to cause difficulties in that respect.

38. Mr. ANDERSEN (Observer for Denmark) suggested that the word “digital” should be added before the word “information” in the first line. It should be borne in mind that telegrams, telexes and telecopies, in digital form, could be processed by computers, and in such cases should fall within the scope of the Model Law.

39. Mr. CHANDLER (United States of America) noted that in the future, information would be transmitted in digital, analog or optical form. It would be unwise to limit the scope of the Model Law to digital information.

40. Mr. BAUM (Observer for the International Chamber of Commerce) agreed with the preceding speaker, adding that great restraint should be exercised in attempting to reinvent definitions. He, too, felt that the word “analogous” could cause confusion and suggested that it should be replaced by the word “similar”.

41. Mr. PHUA (Singapore) said that his delegation did not support the proposal to add the word “digital” before the word “information”, since it would preclude the application of the Model Law to analog information. Also, he agreed with the representative of Spain regarding the disadvantages of including more conventional means such as mail, telegram, telex or telecopy in the definition of “data message”. That definition should be restricted to EDI, and the title of the Model Law should be reworded accordingly.

42. Mr. HOWLAND (United Kingdom) said that information generated, stored or communicated in analog form should not be excluded. He proposed that the words “in digital or analog form” should be added after the word “communicated”, and that the word “analogous” should be deleted.

43. Mr. MADRID (Spain) said that to do so would preclude other forms of information which might be used in the future. To leave the Model Law open to future developments in information technology, the subparagraph should simply state: “(a) ‘Data message’ means information generated, stored or communicated by electronic or similar means including, but not limited to, electronic data interchange (EDI).” That wording might still cover electronic mail, but it would avoid interfering with established national practices in respect of documentary evidence in the form of telegram, telex or telecopy.

44. Mr. ANDERSEN (Observer for Denmark) said it was not possible to have a Model Law that covered every present and future aspect of communications. He therefore proposed retaining the definition of data message as drafted, using the word “similar” to replace “analogous”. The various views of the Commission regarding the definition of the term “data mes-
been drafted taking into account existing technology, but that covered. Definitions in the Model Law should be drafted in a way that allowed for some degree of interpretation, particularly by judges.

45. Mr. SORIEUL (International Trade Law Branch) said that EDI, as defined in article 2, subparagraph (b), referred to a narrow technique of transferring information between computers and did not cover all uses of electronic data, such as electronic mail. In future, communications would include EDI as well as other, less restrictive technologies, such as electronic mail and the Internet. Thus, it was of greater importance at present to lay down rules that applied to those technologies and not only to the relatively sophisticated EDI form of exchanges. If the current definition of EDI did not include electronic mail, the Model Law would be useless in the future.

46. Mr. CHANDLER (United States of America) agreed that an overly restrictive definition of EDI would destroy any usefulness of the Model Law. A definition of the term “data message” should include electronic mail, which was used to forward EDI messages, as well as such methods as “FDI”, the fax transmission of information that was subsequently transferred into an EDI system. While EDI was central to the transfer of information, all the EDI-related communications attachments should also be covered under the Model Law if it was to be useful in the future.

47. Ms. GUREYEVA (Russian Federation) proposed replacing the phrase “electronic, optical or analogous means” in subparagraph (a), with the term “automated means” to broaden the definition of the term “data message”.

48. Mr. ALLEN (United Kingdom) shared the views of previous speakers who favoured a broad and flexible definition of the term “data message”. However, the definition should not be so nebulous that the term became incomprehensible. He proposed replacing the phrase “electronic, optical or analogous means” with “an information system”, rather than “automated means”, since EDI was not completely automated and involved human agency. In subparagraph (f), which defined the term “information system”, the words “a system” should be replaced by the expression “information technology”.

49. Mr. MASUD (Observer for Pakistan) said that the term “data message” emphasized both the information and the means of communication and thus the question of how the data message was generated or stored was not relevant. He suggested that the terms “generated” and “stored” should be deleted from the definition in subparagraph (a).

50. Mr. MADRID (Spain), endorsing the comments of previous speakers, suggested that the Model Law should include a definition of “electronic mail” in article 2 in order to make the Model Law as broad, yet complete as possible. If the Model Law was too narrow, it would become useless; however, if incorrectly drafted or ambiguous, it would open itself to misuse.

51. Mr. SANDOVAL LÓPEZ (Chile) favoured retaining the definition of “data message” in article 2, subparagraph (a), as originally drafted, since that definition was not limited to EDI alone.

52. Mr. PHUA (Singapore) supported the United Kingdom proposal to replace the phrase “electronic, optical or analogous means” with “an information system” in subparagraph (a) and to amend subparagraph (f) to read “information system means information technology”. He agreed that the final words of subparagraph (f), “in a data message”, should be deleted to avoid circular reasoning. The United Kingdom proposal provided a definition for “data message” that would facilitate the use of technology without undoing all of the legal forms that dealt with traditional methods of communication.

53. Mr. LLOYD (Australia) rejected both the United Kingdom proposal, and the term “automated means” because neither took into account non-physical materials. He supported the proposal of the observer for Denmark and the suggestion to include a definition of “electronic mail” in article 2. He opposed the deletion of the words “generated” or “stored”.

54. Mr. TELL (France) supported the suggestion by the observer for Denmark to retain the text as drafted, but favoured “analogous” as the more appropriate term.

55. Mr. SCHNEIDER (Germany) endorsed the Danish suggestion to retain the definition of “data message” as originally drafted in subparagraph (a) and rejected the United Kingdom proposal, which resulted in circular reasoning.

The meeting rose at 6 p.m.
2. Ms. REMSU (Observer for Canada) said she supported the views expressed by the representatives of the United States, Australia and Germany and the observer for Denmark. Her delegation, too, felt that the wording of subparagraph (a) should remain unchanged. The word “analogous” should be replaced by “similar” and an explanation could be included in the draft Guide to Enactment of the Model Law (A/CN.9/426). As the Australian representative had pointed out, the words “generated and stored” should also be retained, in order to ensure that the article covered information that had been recorded and stored but not necessarily communicated.

3. Mr. BAUM (Observer for the International Chamber of Commerce) said he strongly supported both the remarks made by the secretariat at the previous meeting concerning the definitions and the appeal just issued by the United States representative. Members of the Commission should respect the intricate legal and technical work done by their predecessors and should not introduce radical changes.

4. Mr. MADRID (Spain) said he agreed with the United States representative on the need to finalize the draft speedily. Subparagraph (a) should make it clear that it covered only telegrams, telexes and telecopies transmitted by electronic means, that would avoid a paradoxical situation in which the Model Law applied when they were sent by other means. The Spanish version of the text contained the word “similar” and he had no objection to the term being used in English.

5. Mr. SORIEUL (International Trade Law Branch) said the issue was not one of drafting but rather of content and the scope of the Model Law. The Commission must identify common elements of electronic and optical systems in order to determine whether “similar” or “analogous” was more appropriate.

6. Mr. DONG Yi (China) said the word “analogous” could mean either “similar” or “analogous” in the sense of digital. Therefore, the word “similar” should be used for the sake of clarity.

7. Mr. ALLEN (United Kingdom) said he strongly supported the remarks made by the representative of the secretariat. If no common points were found between optical and electronic means of transmission, the use of “similar” or “analogous” could be taken as including paper and other means, which would be disastrous. It might be preferable in that case to rely on a specific list which was as open to future developments as possible. He stressed that “digital analog”, which had been widely supported at the previous meeting, referred to form and “electronic and optical” referred to means of transmission. The most effective wording would be “digital analog or light form”, which left room for the inclusion of light technology in the future. Otherwise, the only solution was to delete “or analogous means” and simply say “by electronic and optical means”. Indeed, the Working Group had never been completely satisfied with the use of “analogous” because the problem was one of logic, not merely drafting.

8. Ms. REMSU (Observer for Canada) said that if “similar” were eliminated, the result would be an unnecessarily restrictive list. One common feature of both electronic and optical means was that they were paperless. The term “paperless” might therefore be very apt, particularly since the Commission had already used it to describe the data message as a paperless exchange of information and a paperless recording.

9. Mr. LLOYD (Australia) noted that the formulations “electronic, optical” and “analogous” or “similar” were remarkably close to the wording of an article of the Australian Constitution on telegraphs and telephones which had never been misinterpreted in 96 years. He disagreed with the United Kingdom representative and the secretariat. Both article 2 and the entire draft Model Law were eminently clear. The use of “paperless” could be problematical, as telecopies and telexes were transmitted on paper.

10. Mr. ANDERSEN (Observer for Denmark) praised the Canadian suggestion, although his delegation still believed that the wording of subparagraph (a) should be left unchanged. Expressing support for the statement made by the United States representative, he suggested that proposals concerning issues should not be permitted to be discussed during Commission meetings unless they had been submitted beforehand in writing.

11. Mr. MADRID (Spain) said the word “electronic” should be retained. He expressed strong support for the Canadian suggestion to add the word “paperless” and also agreed with the remarks made by the Australian representative.

12. Mr. PHUA (Singapore) said that, in line with the remarks made by the United States representative, the carefully elaborated draft Model Law should not be changed. He agreed with the United Kingdom representative that the definition of “data message” had always been controversial in the Working Group and that its definition in the Model Law might have to be interpreted at a later stage. He also agreed with the secretariat’s views on the use of “similar”; for it was not clear what kind of technology embraced electronic, optical and analog digital means. If the draft Guide to Enactment could be expanded to specify that the data message was paperless, his delegation could accept the definition as it stood.

13. Mr. SCHNEIDER (Germany) said he agreed with the representative of Singapore. The word “similar” was not clear at all. With regard to the proposed use of the word “paperless” he noted that smoke signals and foghorns were paperless but not necessarily electronic or optical. At the very least, definitions should include examples in order to help the reader. The text of subparagraph (a) should be left unchanged and the Guide to Enactment should be used for explanations.

14. Mr. CHOUKRI (Observer for Morocco) said subparagraph (a) could be left unchanged. The Arabic term for “analogous” presented no ambiguities. However, the reference to optical means of communication should be deleted from the text and included in the explanatory notes in the Guide to Enactment.

15. Mr. TELL (France) associated himself with the previous speakers who had favoured retaining the current text of subparagraph (a).

16. Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration) said he, too, supported the retention of the subparagraph in its current form.

17. Mr. SORIEUL (International Trade Law Branch) said subparagraph (a) would be retained in its current form, and the explanation to be added to the Guide would concern the “paperless” aspect common to the various means of data interchange mentioned in the text.

18. The CHAIRMAN said there appeared to be a consensus that subparagraph (a) should be retained in its current form.

19. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) had been drafted to resemble as closely as possible the definition of electronic data interchange (EDI) used by the Economic Commission for Europe, in that it referred specifically to communication between computers and
the structured nature of the data being communicated. However, the question arose whether the manual transmission of electronic data as for example via diskette, fell within the definition of EDI.

20. Ms. BOSS (United States of America) said that such manual transfers of data could be included in the definition of EDI by changing the phrase "from computer to computer of" in subparagraph (b) to "of computer-based".

21. Mr. MASUD (Observer for Pakistan) suggested that the definition should include optical as well as electronic means of transferring information.

22. Mr. DONG Yi (China), supported by Mr. TELL (France), Mr. BAUM (Observer for the International Chamber of Commerce) and Mr. UCHIDA (Japan), said the Model Law's definition of EDI was consistent with those used by other international bodies such as the Economic and Social Council, and should be retained as currently formulated.

23. Mr. HOWLAND (United Kingdom) said he associated himself with previous speakers supporting the retention of subparagraph (b) as currently formulated. While structured electronic information could be transferred by physical means for subsequent processing by computer, the definition in subparagraph (a) was broad enough to cover such transfers whether or not they fell within the strict definition of EDI.

24. Mr. SORIEUL (International Trade Law Branch) said the text of subparagraph (b) would be retained in its current form; the Guide would be amended to indicate that the definition of EDI included the manual exchange of electronic data on diskettes, provided the data was structured in a format agreed upon by the parties.

25. The CHAIRMAN said there appeared to be a consensus that subparagraph (b) should be retained in its current form.

26. Mr. HOWLAND (United Kingdom), supported by Mr. ABOUL-ENEIN (Observer for the Cairo Regional Centre for International Commercial Arbitration), said that as currently formulated, the term "originator" in subparagraph (c) appeared to include both the sender of a data message and a recipient who stored it. He proposed that the words "prior to being" should be added to the text before "stored"; the words following "or communicated" would be deleted.

27. Mr. LLOYD (Australia), supported by Mr. BAUM (Observer for the International Chamber of Commerce), supported the United Kingdom proposal, with the further amendment that the words "stored or" should be removed entirely.

28. Mr. UCHIDA (Japan), supported by Mr. SCHNEIDER (Germany), Ms. BOSS (United States of America), Mr. FARIDI ARAGHI (Islamic Republic of Iran) and Mr. ANDERSEN (Observer for Denmark), said subparagraph (c) should be retained as currently formulated, except that the words "purports to have been" should be replaced by "has been". The corresponding note in the Guide would refer to the conditions of attribution contained in article 11 of the Model Law.

29. Ms. BOSS (United States of America) said the debate on article 2 had prompted her delegation to re-examine article 6, where the term "originator" appeared to be ambiguous; the problem could be solved by replacing "originator" by "signer" throughout article 6. Such a change would permit the deletion of the words "stored or" in article 2, subparagraph (c).

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

30. Mr. LLOYD (Australia) said it was essential to retain the words "purports to" in subparagraph (c) for the purposes of article 6 and article 11, paragraph 3(b). In both of those articles there was a reliance on appearances rather than actuality. With respect to article 11 in particular, where a message was sent by an impersonator the proposed deletion would make the impersonator, in effect, the originator. It was thus important to define the originator as the person on whose behalf a data message purported to have been generated.

31. Mr. ALLEN (United Kingdom) agreed that it was essential to retain "purports to" in subparagraph (c) for the purposes of articles 6 and 11.

32. Mr. ANDERSEN (Observer for Denmark) said that in view of the amendments to article 11 proposed earlier in the session, subparagraph (c) would still be clear with the deletion proposed by the delegation of Japan.

33. Mr. PHUA (Singapore) said he agreed with the representatives of Australia and the United Kingdom that the words "purports to" should be retained in subparagraph (c). If an impersonator obtained the digital signature of an originator and a data message was then verified by an addressee using an agreed method, the impersonator would, as noted by the representative of Australia, in fact become the originator.

34. Mr. MADRID (Spain) said the word "presuntamente", which would convey the idea expressed in the English text by the word "purported", did not appear in the Spanish text, but his delegation would prefer to retain the current Spanish wording. The point at issue might be resolved by including in the Guide comments making it clear that the originator was to be defined in terms of a message having first been generated, then stored or communicated. That would avoid the possibility of a recipient who stored a message being categorized as an originator.

35. The CHAIRMAN said there appeared to be a consensus that subparagraph (c) should be retained in its current form, with a clarification in the Guide.

36. Mr. HOWLAND (United Kingdom) said there was no point in including in the Guide a clarification embodying a suggestion made by his delegation if that suggestion were not to be reflected in the article. While he would prefer to see an unambiguous statement in the text of the definition, if the rationale for the change was not accepted there was no point in including a contradictory statement in the Guide.

37. Mr. SORIEUL (International Trade Law Branch) said it might be useful to discuss the United Kingdom proposal further. It would certainly be inappropriate to resolve the difficulty in the text by a formulation in the Guide that effectively contradicted the text.

38. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said further consideration should be given to the proposals made by the United Kingdom, Japan and the United States.

39. Mr. PHUA (Singapore) said the Working Group had concluded that the word "stored" should be retained so as not to give the impression that the Model Law was concerned only with the generation and communication of data messages.

40. Mr. SORIEUL (International Trade Law Branch) said the concern had been to ensure that the Model Law covered both situations where data messages were transmitted and situations where they were archived but not transmitted. The concept was not necessarily linked to that of the originator of the data message, and other solutions might be possible. It would clearly be strange if a person who merely stored a message were subsumed
under the definition of originator. In any event the text before the Commission represented the Working Group's solution.

41. Ms. REMSU (Observer for Canada) said she agreed that the concern was to ensure that the Model Law accommodated records that were not communicated as well as those that were. Deletion of the word "stored" would raise the question whether data messages not transmitted were in fact covered. The United Kingdom proposal rightly placed the emphasis on the generation of the data message, which was the main activity of the originator. The Commission might wish to pursue that proposal further.

42. Mr. HOWLAND (United Kingdom) pointed out that his delegation had not proposed that the word "stored" should be deleted, since storage was an important aspect of the activities being referred to. The problem was that the definition, as currently drafted, included recipients who stored the messages they received; his delegation's proposal was intended to correct that error.

43. Mr. LLOYD (Australia) said the United Kingdom proposal would make subparagraph (c) consistent with the rest of the text. The words "the originator" in articles 11 to 14 implied that each data message had only one originator. However, subparagraph (c) currently implied that a data message could have multiple originators, since a message could be generated, stored and communicated by different people. The advantage of the United Kingdom proposal was that it defined the originator as the person who generated the message.

44. Mr. CHOUKRI (Observer for Morocco) said he disagreed with the United States proposal to replace "originator" by "signer" in article 6, because the Model Law did not define the term "signer". That could lead to confusion; for example, article 2, subparagraph (c) specified that the definition of "originator" excluded intermediaries, but it was not clear whether a "signer" could be an intermediary. He also disagreed with the proposal to delete the word "stored" from subparagraph (c), because the Model Law itself referred to situations where originators stored messages; for example, article 12 dealt with the interval between the sending of a message and the acknowledgement of receipt, during which the originator presumably stored the message.

45. Ms. BOSS (United States of America) said she understood the concern of the observer for Morocco about the use of a new term, and agreed to leave article 6 unchanged for the time being. With respect to article 2, subparagraph (c), she was willing to retain the word "stored" as long as emphasis was placed on the idea of communication, which was the subject of chapter III of the Model Law. The problem with the United Kingdom proposal was that it focused on the generation of a data message and made communication seem irrelevant, whereas all of the articles in chapter III concerned the sending and receiving of data messages.

46. Mr. TELL (France) said he shared the United States delegation's views on the United Kingdom proposal; the latter appeared to dissociate the generation of a data message from its storage or communication, thereby implying that a message could have more than one originator. He wondered whether the current text already addressed the concern expressed by the observer for Canada about ensuring that the Model Law covered the storage of data messages.

47. Mr. MASUD (Observer for Pakistan) said he agreed with the United States delegation that the United Kingdom proposal failed to emphasize the idea of communication. Moreover, he did not agree that the words following "communicated" in subparagraph (c) should be deleted, since that change was unrelated to the rest of the United Kingdom proposal, and it was important to specify that an intermediary could not be considered an originator.

48. Mr. SORIEUL (International Trade Law Branch) said the Commission had identified a flaw in the text of subparagraph (c) which the Working Group had been unable to correct. He suggested that since no consensus had been reached, the Commission should adopt the subparagraph as currently drafted and decide how that flaw should be dealt with in the Guide.

49. Mr. MADRID (Spain) said that if the generator and the originator of a data message were considered to be one and the same, the problem noted by the United States was only theoretical. If it was assumed that the communicator of a message was either the generator — in which case no problem arose — or a third party who sent the message on behalf of the generator, so that the originator was not the sender but the person on whose behalf the message was sent, then the United Kingdom proposal was an acceptable solution that deviated only slightly from the current text.

50. Ms. BOSS (United States of America) suggested that the United Kingdom proposal should be amended so that subparagraph (c) would end with the words "and communicated prior to storage". That would solve the problem posed by the reference to storage, while still ensuring that the Model Law covered stored data messages; it also preserved the idea that communication was a key component of the definition of an originator. Because no formulation could cover all possible situations, the Guide should give specific examples of how the definition of "originator" applied in each case.

51. Mr. PHUA (Singapore) said he supported the United States proposal.

52. Mr. ALLEN (United Kingdom) said the United States proposal only covered cases where data messages were both generated and communicated, and failed to address the concern of the observer for Canada about messages that were generated and stored, but not communicated. Conversely, it also failed to cover cases where messages were communicated but not stored. The real issue to be decided was whether the originator of a message that was communicated was the generator or the communicator, in cases where the two were not one and the same.

53. The CHAIRMAN suggested that the word "and" in the United States proposal should be changed to "or".

54. Mr. ALLEN (United Kingdom) said the subparagraph would still imply that messages were always stored after being communicated. However, the word "or" would be preferable to "and".

55. Ms. BOSS (United States of America) said the difficulty would be eliminated if the wording was changed to "prior to any storage". She agreed with the United Kingdom on the substantive point at issue, and felt that chapter III of the Model Law, which dealt with communication, assumed that the communicator, and not the generator, was the originator of a data message. Another possible solution was to exclude the idea of generation from the definition of "originator", since it was unnecessary for the purposes of chapter III.

ELECTION OF OFFICERS (continued)

56. Mr. BURMAN (United States of America) nominated Mr. Illescas (Spain) for the office of Rapporteur.

57. Mr. Illescas (Spain) was elected Rapporteur by acclamation.

The meeting rose at 1.05 p.m.
Summary record of the 594th meeting

Held at Headquarters, New York,
Tuesday, 4 June 1996, at 3 p.m.

[A/CN.9/SR.594]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 3.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 2

1. The CHAIRMAN suggested that the Commission should resume consideration of the proposal to replace the words "generated, stored or communicated" in subparagraph (c) by "communicated or generated prior to storage, if any".

2. Mr. SCHNEIDER (Germany) said that it was necessary to distinguish between three different situations: where a message had been generated, but had not been communicated; where a message had been communicated, but had not been generated; and where a message had been generated and communicated. His delegation felt that the phrase should read "generated and communicated", since otherwise there would be problems. A person who communicated a message could be an agent or employee, in which case he could not be considered the originator. A situation where information had been generated but not communicated was also a situation in which there was no originator.

3. Ms. BOSS (United States of America) said that whether the Commission opted for the words "communicated or generated" or the words "communicated and generated", there would be instances in which the fit was less than perfect. The question of whether a person who communicated a message was the originator could only be answered by determining the purpose for which that information was needed. For the purposes of chapter III, it was appropriate to say that the person who communicated a message was indeed the originator, although in matters of admissibility, it might not be the correct conclusion. Article 2 gave a general definition of "originator" which took on meaning depending on the context. The Guide to Enactment could be very useful in showing how that definition could be used in the context of the rules in chapter II and chapter III. Her delegation felt that if there was a majority in favour of using the connective "or", that would be quite satisfactory.

4. Mr. ALLEN (United Kingdom) said that the case of an agent acting on behalf of an originator was sufficiently covered by the words "or on whose behalf".

5. It was important for the definition of the term "originator" to cover cases in which a draft had been prepared but not actually communicated. It was not necessary to distinguish between drafts and finished documents because each document created was a data message which might or might not be communicated. However, in each case there was an originator: if the document was not communicated, the originator was the person who generated it; if the document was communicated, the originator was the person who communicated it, even if he was not the same person who originally generated it.

6. Mr. VARIO (Slovakia) said that the originator should be defined as the author of a draft message, who was protected by copyright rules. He agreed that the word "or" should be replaced by "and".

7. Mr. SORIEUL (International Trade Law Branch) said it seemed as though the Commission was near consensus on the substance of the text. He suggested that the text should be sent to the drafting group for clarification of the exact formulation.

8. Mr. SANDOVAL LÓPEZ (Chile) said that his delegation supported that suggestion.

9. Mr. SCHNEIDER (Germany) said that the Commission was considering matters of policy and could not redefine them as drafting matters. His delegation could agree on the substance of the text if an explanation was added in the Guide to Enactment along the lines suggested by the representative of the United States of America.

10. The CHAIRMAN said that subparagraph (c) would be referred to the drafting group.

11. Mr. HOWLAND (United Kingdom) said that it was important to make it clear in subparagraph (d) that the addressee was the ultimate intended recipient.

12. Mr. CHOUKRI (Observer for Morocco) said that the definition of the term "addressee" was not sufficiently clear. If someone received a message, it might be from an intermediary, not the originator. It must be specified that the message was received from the addressee.

13. Ms. BOSS (United States of America) said it was important to retain the word "but" to make it absolutely clear that intermediaries were not considered to be addressees. Her delegation agreed that it was important to consider who the intended addressee, rather than the actual recipient, was. The Commission should retain the original text.

14. Article 2, subparagraph (d), was adopted.

15. Mr. HOWLAND (United Kingdom) said that the word "intermediary" was not used anywhere in the text except in the definitions in article 2, subparagraphs (c) and (d), where it appeared for the purpose of being excluded. Subparagraph (e) as currently drafted defined any agent as an intermediary, and under subparagraphs (c) and (d) they would be excluded from the coverage of the Model Law.

16. Mr. LLOYD (Australia) agreed with the representative of the United Kingdom. The current definition was too broad, and took into account agents who should not be referred to as "intermediaries".

17. Mr. TELARANTA (Finland) expressed support for the position of the United States of America.

18. Ms. BOSS (United States of America) said that the presence of a definition of "intermediary", and its exclusion from the definitions of "originator" and "addressee", were essential
in order to ensure that the Model Law would not bind those who were merely providing services with respect to a particular message. The definition currently contained in subparagraph (e) might be very broad, extending to persons who were not intermediaries in the technical sense, but it was successful in that it did not exclude from the Model Law any persons who should be covered by it. Her delegation therefore felt that it should be retained.

19. Mr. UCHIDA (Japan) agreed with the representative of the United Kingdom that the current definition was too broad.

20. Mr. PHUA (Singapore) supported the United States position. Those who felt that the current definition was too broad should produce a new draft, rather than simply proposing the deletion of the word “intermediary”.

21. Mr. FARIDI ARAGHI (Islamic Republic of Iran) favoured retention of the current wording.

22. Mr. MADRID (Spain) said that the definition of “intermediary” should remain unchanged, but that it would be useful to specify in the Guide to Enactment that the word was not being used in the technical sense in which it was generally used in the field of electronic communications.

23. Mr. CHOUKRI (Observer for Morocco) agreed that the definition should remain unchanged.

24. Mr. MASUD (Observer for Pakistan) supported the point made by the representative of the United Kingdom. The current definition of “intermediary” was very broad, and would extend to types of agents which should not be included, such as employees of the originator or of the addressee.

25. Mr. BAUM (Observer for the International Chamber of Commerce) expressed support for the United States position. Considerable efforts to find improved definitions for “intermediary” or alternative terms, such as “third-party service provider”, had proved unsuccessful; there was no simple solution, and he urged the Commission to retain the current text.

26. Ms. GUREYEVA (Russian Federation) supported the position of the United States of America.

27. Mr. HOWLAND (United Kingdom), supported by Mr. LLOYD (Australia) and Mr. ANDERSEN (Observer for Denmark), proposed that the current definition of “intermediary” should be replaced with the phrase “a person who, as part of his business, provides to another person services of receiving, transmitting or storing data messages”.

28. Mr. SANDOVAL LÓPEZ (Chile) said that the definition should remain unchanged.

29. Mr. MADRID (Spain) strongly supported the representative of Chile. It was inappropriate to propose a drafting change, since it had not been agreed that the existing text should not be retained. Moreover, the relatively narrow definition proposed by the United Kingdom would leave a gap in the law; certain persons, such as employees of originators or of addressees, would fall outside the definitions of “originator”, “addressee”, and “intermediary”.

30. The CHAIRMAN said that there was clearly no consensus in favour of changing the text of subparagraph (e). Accordingly, she invited the Commission to turn its attention to subparagraph (f).

31. Mr. UCHIDA (Japan) proposed that, in the second line of subparagraph (f), the words “information in” should be deleted in order to make the wording consistent with the definition of “data message” in subparagraph (a).

32. Mr. HOWLAND (United Kingdom) proposed that the subparagraph should be amended to read “‘Information system’ means technology for generating, transmitting, receiving, storing or otherwise processing a data message.”

33. Ms. BOSS (United States of America) suggested that the proposal to use the word “technology”, rather than “a system”, could be left to the drafting group, which would determine whether the change had any implications for the rest of the text. Otherwise, the proposals made by the representatives of Japan and the United Kingdom were acceptable.

The meeting was suspended at 4.30 p.m. and resumed at 5.05 p.m.

34. Mr. MADRID (Spain) endorsed the amendments proposed by the representatives of Japan and the United Kingdom to subparagraph (f), which would now read “‘Information system’ means a system for generating, transmitting, receiving, storing or otherwise processing data messages.” However, he continued to have reservations regarding the repetition of the word “system” in the definition; he hoped that the drafting group would come up with a better alternative.

35. Mr. LLOYD (Australia) supported the amendments proposed by Japan and the United Kingdom but opposed the use of “technology” to replace “system” in the definition. The term “technology” implied the capacity to do something, whereas a “system” suggested something tangible in operation.

36. Mr. ZHANG Yuqing (China) agreed with the representative of Australia that “technology” referred to know-how rather than to equipment. It was more accurate to say that messages were entered into an “information system” than into a “technology”. He endorsed the amendments proposed by the United Kingdom and Japan.

37. Mr. CHANDLER (United States of America), supported by Ms. REMSU (Observer for Canada), endorsed the view of the representative of Australia and other speakers who believed that the term “technology” should not be used in the definition of an “information system” in subparagraph (f). “Technological system” or “technological infrastructure” might be possible solutions; however, the drafting group would ultimately be responsible either for finding a formula that all agreed to or for deciding to retain the existing language.

38. Mr. TELL (France) said he believed it would be wrong to repeat the word “system” in the definition in subparagraph (f) and hoped the drafting group would come up with a better solution.

39. The CHAIRMAN said that the consensus was to adopt the Japanese proposal to delete the words “information in” and to add the words “or otherwise processing data messages” at the end of subparagraph (f), as proposed by the representative of the United Kingdom. Furthermore, most delegations agreed that the term “technology” would not be an appropriate replacement for “system”.

40. Article 2, as amended, was adopted.

Article “x”

41. Mr. SORIEUL (International Trade Law Branch) introduced draft article “x”, on contracts of carriage involving data messages, which was contained in the annex to document A/
Mr. HOWLAND (United Kingdom) endorsed the views in the Model Law.

Mr. MAZZONI (Italy) supported the statements of the United States of America and the United Kingdom. If the article was adopted, the Model Law would provide assurances that the use of electronic documents would be recognized and permitted.

Mr. CHANDLER (United States of America) said that draft article "x" represented an interesting proposal in support of electronic bills of lading and provided rules that could be adapted to various types of bills of lading or contracts of carriage. If the article was adopted, the Model Law would provide detailed guidance on the use of electronic messages to create bills of lading, they could not provide a legal basis for such bills since the rules were voluntary. When a country required a bill of lading to be on paper and bear certain seals, the Model Law rules could not bypass that requirement, even if the parties agreed to it. All such rules needed legal underpinnings, which the Model Law would provide. His delegation strongly supported adoption of article "x" and believed it should be renamed article "A" and placed at the beginning of a section on particular use rules. He proposed that the Model Law should be divided into two sections, one in which general use rules would appear as articles with letters, and a second section on particular use rules, which would appear as articles with letters, the first of which would be article "A", i.e. the existing article "x".

Mr. HOWLAND (United Kingdom) endorsed the views of the representative of the United States of America and said that his delegation strongly supported the adoption of article "x" and agreed to it being renamed article A. The article in question did much to remove legal impediments in the field of transport contracts by means of electronic communication and was a useful facilitating measure.

Mr. MAZZONI (Italy) supported the statements of the United States of America and the United Kingdom.

Mr. PHUA (Singapore), noting that the concepts contained in article "x" mirrored many of those contained in the Model Law, asked how article "x" extended the concepts found in the Model Law.

Mr. TELL (France) said that the provisions set out in paragraph 1(f) of article "x" were the most important since they made that article applicable under negotiable terms. It was therefore respect for legal security which would guide the subsequent position of his delegation. He could not endorse the text unless it unambiguously set forth the applicability to that article of the minimum guarantees contained in articles 6 and 7 of the Model Law.

In general terms, the proposed text should also provide security guarantees that were comparable to the written ones regarding the authenticity of the title. In that regard, he proposed the addition of a paragraph to article "x" which would read "The provisions of articles 6 and 7 are applicable to the present article or to article 'x'."

Mr. MADRID (Spain) said that the concerns raised by the representatives of France and Singapore highlighted the need for the Commission to clarify both the substance and form of article "x". The existence of article "x" should not lead to the erroneous conclusion that the Model Law would not be applicable to that area without that article. It was not necessary to state that article 6 or article 7 was applicable: the Model Law was general in nature and was applied in a general way. Article "x" was a clarification put forward by the Commission. For the purposes of uniformity, the Commission was promoting the opportunity for a uniform application of the Model Law in the specific area of the contract of carriage of goods. His delegation, supported article "x", but agreed with the representative of Singapore on the need for further clarification. Such explanations could be included in the Guide in order to avoid misinterpretations.

Concerning the format of the article, while other model laws might have a tradition of using lettered articles, his delegation was not familiar with that practice. The Working Group should find some other formula, or else the secretariat's formula of a general Part I and a specific Part II could be used. In the Working Group, some delegations had been reluctant to consider the question of annexes because they felt that annexes had a subordinate ranking. In his country, the provisions of an annex had the same binding force as provisions appearing in the body of a document.

Mr. Won Kyong KIM (Observer for the Republic of Korea) said that in the absence of a specific decision on the position of article "x", no proper deliberations could be held about its contents.

Mr. CHANDLER (United States of America) said that the concern of the representative of France could easily be accommodated by inserting the words "subject to the general provisions" at the beginning of article "x", paragraph (1). That would ensure that articles 6, 7 and any others applied to article "x" as a whole. With regard to the Singaporean delegation's concern about duplication of wording, such duplication had occurred in a number of paragraphs because of a particular need in transport documents to explain things fully, thus minimizing the chances of overlooking certain details. He understood, however, that notwithstanding the duplications, the general provisions always applied.

Mr. MASUD (Observer for Pakistan) said that, except for a very general provision that would facilitate the use of EDI wherever it was permitted by individual legal regimes, the Commission would be going beyond its mandate to include things that were intended to override the various legal regimes involved in the carriage of goods.

Mr. ZHANG Yuqing (China) agreed with the observer for the Republic of Korea concerning the importance of the position of article "x". The Commission was intending to adopt a model law involving general provisions on EDI which called into question the Model Law's scope of application. Of the articles already discussed, only article 13 was similar to article "x"; otherwise, the entire Model Law dealt with procedural issues. The basic provisions should be applied to specific commercial activities. Article "x", however, dealt with the specific application of the Model Law to contracts of carriage.

Since his delegation had every confidence in the future development of EDI, it wondered whether a complete model law thereon could be drafted at present. Various annexes could be attached to the Model Law, such as an annex on the formation of contracts and another on carriage of goods. It could be noted that the Commission had the obligation, in accordance
with the development of international trade, to formulate additional annexes. That would make the provisions of the first part complete, and the use of annexes would have the advantage of being open-ended so that adjustments could be made for future developments. The provisions of the annexes should have the same force as the provisions of the Model Law itself.

56. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that his organization supported the Model Law generally and also article “x”. However, he shared some of the Chinese delegation’s concerns about potential problems in connection with the implementation of either the Model Law or article “x”. Article “x” was merely an example of how the Model Law’s provisions could be implemented in respect of a specific set of documents, namely transport documents. Redundant drafting was very prudent, since it protected against fraud and the like and gave assurances to the business community that both the Model Law and its annex would be implemented in a businesslike manner. For those reasons, he supported both the general provisions of the Model Law and article “x”. In order to satisfy some of the qualms expressed by some delegations regarding the placement of article “x” within the Model Law, the drafting group might consider including a disclaimer to the effect that nothing contained in article “x” could be deemed to alter, amend, repeal or detract from the general provisions of the Model Law.

The meeting rose at 6.05 p.m.

Summary record of the 595th meeting
Held at Headquarters, New York, Wednesday, 5 June 1996, at 10 a.m.
[A/CN.9/595]
Chairman: Mrs. PIAGGI de VANOSSE (Argentina)
The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421)

Article “x” (continued)

1. Mr. SORIEUL (International Trade Law Branch) recalled that the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication had been designed in modular form, with the first module comprising general rules and the other modules setting forth more specific rules to remove obstacles to the use of EDI in specific areas of trade law. Thus far, the only module containing specific rules was the so-called article “x”, which appeared in the annex to the latest report of the Working Group on Electronic Data Interchange (EDI) (A/CN.9/421). Paragraph 60 of that report set forth the Working Group’s proposal to divide the Model Law into part I (general rules) and part II (specific rules, including article “x”). That proposal had the virtue of maintaining structural coherence and facilitating the addition of further industry-specific provisions in the future.

2. Mr. SANDOVAL LÓPEZ (Chile) said he fully supported the Working Group’s proposal. Article “x” should not be included in an annex to the Model Law because annexes were usually considered to be of secondary importance; consequently, a Government might adopt the main body of the Model Law but not the annex.

3. Mr. CHANDLER (United States of America) said he agreed that article “x” should form part of the main body of the Model Law. He was concerned about the statement made by Pakistan the previous day, to the effect that it could not support the rules in article “x” because they overrode the provisions of various international conventions. The Working Group had taken care not to override any such provisions; article “x” was intended only to fill a vacuum in the laws governing contracts of carriage.

4. Mr. LLOYD (Australia) and Mr. HOWLAND (United Kingdom) said they supported the Working Group’s proposal on the placement of article “x”.

5. Mr. MASUD (Observer for Pakistan) said paragraphs 2 and 5 of article “x” overrode certain rules of law by changing the way in which they were applied. Moreover, in cases where States parties to conventions requiring that certain information should be presented in writing had enacted domestic legislation to give effect to those provisions, the rules in the Model Law would create complications by requiring those States to change such legislation.

6. Mr. SORIEUL (International Trade Law Branch) said the Model Law, by definition, could not override or conflict with international conventions or national legislation because it was only a proposal to States. Moreover, instruments such as The Hague Rules could not have foreseen the technological developments which had led to the use of EDI; as noted by the United States, the Model Law was intended to fill that vacuum in existing law. Essentially, the Model Law provided new rules on how to interpret, in the light of EDI, the provisions of conventions and national legislation that required information to be presented in writing.

7. Mr. CHOUKRI (Observer for Morocco) said article “x” was within the purview of the Model Law, since it concerned some of the commercial activities mentioned in article 1 thereof, and should therefore be included in the main body of the Law. However, article “x” was too long; its five paragraphs should be considered five separate articles.

8. Mr. ZHANG Yuqing (China) said his delegation had proposed placing article “x” in an annex to the Model Law so that it would not appear to limit the scope of that Law, which encompassed all international electronic transactions. With the further development of EDI, more annexes could be added. However, he did not object to the secretariat’s proposal. In any...
the Model Law would then be equally applicable to it.

12. Mr. FARIDI ARAIGHI (Islamic Republic of Iran) said no further additions should be made to the general rules; article "x" should be placed in an annex to the Model Law.

13. Mr. GILL (India), supported by Mr. KOIDE (Japan) and Mr. SCHNEIDER (Germany), said that as article "x" appeared to perform the same function as the "rules" sections of other model laws, it should be included in the Model Law as part II.

14. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said adoption of article "x" in the form of an annex, as proposed by Morocco and China, appeared to conflict with the provisions of article 1 of the Model Law concerning universality of application of that Law.

15. The CHAIRMAN said there appeared to be a consensus that article "x" should be included in the draft Model Law as part II, rather than as an annex, in order to avoid raising doubts about its legal value or relevance to the rest of the Model Law.

16. Mr. TALICE (Uruguay) said the structure of article "x" when incorporated into the Model Law, should be consistent with that of the rest of the Law. Dividing chapter II into two sections, the first dealing with contracts of carriage and the second with other topics as necessary, would allow for the possibility of including articles on other subjects.

17. Mr. SANDOVAL LÓPEZ (Chile) said he supported the proposal of the Spanish delegation, bearing in mind that the second part of the Model Law would have to refer to specific provisions. The Uruguayan proposal would have the effect of creating certain functions not paralleled in other articles.

18. Mr. CHANDLER (United States of America) said his delegation supported the Spanish delegation's proposal, and was prepared to accept the advice of the secretariat with regard to the specific form in which article "x" was to be incorporated in the Model Law.

19. Mr. SORIEUL (International Trade Law Branch) said that while paragraph 1 of article "x" could perhaps be treated as a separate article, doing so with each of the other paragraphs of the article would result in creating a section whose form was inconsistent with the rest of the Model Law. He therefore recommended that the drafting group should be instructed to study the incorporation of article "x" in two segments, with the first comprising the current paragraph 1 outlining the scope of application, and the second comprising the rest of the article.

20. Mr. CHANDLER (United States of America), supported by Mr. HOWLAND (United Kingdom) and Mr. CHOUKRI (Observer for Morocco), suggested adding the words "or statement" after "notice" in paragraph 1, subparagraph (d), and deleting the words "irrevocably or not" in subparagraph (e).

21. The CHAIRMAN said there appeared to be a consensus in favour of the United States proposal regarding sub-paragraphs (d) and (e).

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. HOWLAND (United Kingdom) noted the word "requires" at the beginning of article "x", paragraph 2, could be taken to mean either an obligation or a condition for being valid and enforceable. As the Working Group had realized, the phrase "or provides for certain consequences if it is not ..." could be interpreted to mean the opposite of what was intended. He therefore proposed that that phrase should be deleted and the following sentence added at the end of the paragraph: "This paragraph applies whether the requirement imposes an obligation or whether it is a condition of the validity, effectiveness or enforceability of the action."

23. Mr. ANDERSEN (Observer for Denmark) expressed his concern that article "x" should be consistent with the text of the entire Model Law. The phrase which the United Kingdom representative had proposed for deletion appeared in article 5 and elsewhere. Thus, it might be appropriate to add the sentence just proposed to article 5 as well. He requested clarification from the secretariat.

24. Mr. SORIEUL (International Trade Law Branch) said article "x" had been drafted taking into account other provisions of the Model Law. Upon closer consideration, the Working Group had realized that the phrase "or provides for certain consequences if it is not ...", taken from article 5 was not really sufficient. If consequences ensued when an action was not in writing, it was not logical to say that the rule of law was satisfied by using a data message. In fact, the Commission agreed on the principle that a data message could replace something in writing in all cases but must now verify whether the phrase "or provides for certain consequences if it is not" was effective in article "x". If it determined that an alternative, such as the United Kingdom proposal, was necessary, the rest of the Model Law would have to be reviewed for consistency.

25. Mr. CHANDLER (United States of America) said he agreed that paragraph 2 - and probably a number of general provisions of the Model Law contained huge flaws in logic. It made no sense to say that a rule of law was "satisfied" at best a condition or requirement was satisfied. He agreed with the United Kingdom representative that the phrase "or provides for certain consequences if it is not ..." should be deleted. However, the sentence which the United Kingdom proposed should be added at the end of the paragraph might not solve the problem. It would be much simpler to amend the paragraph by deleting the word "requires" after "Where a rule of law" and replacing it by the words "either by requirement or by consequences, makes it a condition that any action ...". At the end of the paragraph, "rule" would be replaced by "condition".

26. Mr. LLOYD (Australia) said he agreed that there was a problem with the drafting of paragraph 2 and perhaps with articles 5, 6 and 7 of the Model Law as well. He had a slight preference for the United Kingdom proposal over the proposal just made by the United States. If the Commission could agree on a solution in principle, the wording could be left to the drafting group.
27. Mr. HOWLAND (United Kingdom) acknowledged that the amendment he had proposed might necessitate parallel changes in other provisions of the Model Law. If changes had to be made in a number of places, perhaps economy of language could be achieved by adding a paragraph to the definitions in article 2.

28. Mr. ANDERSEN (Observer for Denmark) said he was satisfied by the secretariat’s explanation. Perhaps it was not necessary to state explicitly conditions and the consequences, as the United States had proposed, since they could be easily inferred from the fundamental principles of the application of law. The United Kingdom proposal was very much in line with the tenor of the Model Law and could be incorporated into paragraph 3 follow on from that of paragraph 4.

29. Mr. MADRID (Spain) said he agreed that more appropriate language was necessary in paragraph 2. As long as the Commission agreed on the substantive issue, either of the two proposals was acceptable. The wording of the paragraph could be left to the drafting group.

30. Ms. EKEMEZIE (Nigeria) said she agreed that paragraph 2 was flawed and should be referred to the drafting group.

31. Ms. REMSU (Observer for Canada) said she, too, recognized that there was a flaw in logic in paragraph 2, which could be dealt with by the drafting group. The United States proposal was preferable to the United Kingdom proposal.

32. The CHAIRMAN confirmed that paragraph 2 would be submitted to the drafting group for clarification.

33. Mr. HOWLAND (United Kingdom) said the aim of paragraph 3 of article “x” was to avoid any danger of duplication in the transfer of rights and obligations by two different means, so that in a series of transactions relying on data messages where a subsequent party made use of a paper document there must be a demonstrable assurance that the prior method of data message transmission was cancelled. In fact, paragraph 4 of the article provided the essential guarantee of singularity, so that his delegation would prefer to see the substance of existing paragraph 3 follow on from that of paragraph 4.

34. Mr. CHANDLER (United States of America) said his delegation would not object to moving paragraph 3, which, he proposed, should be amended by the insertion of a new second sentence, reading: “Any paper document issued shall contain a statement of such termination.”

35. Mr. HOWLAND (United Kingdom) supported that amendment.

36. Mr. LLOYD (Australia) said his delegation had no objection to the United States amendment. There were, however, two difficulties with paragraph 3. The reference to “such actions” in the first sentence was illogical, since the actions had already been effected by data message, and the sentence must really mean actions of the type referred to in paragraph 1, subparagraphs (f) and (g), and not the actual actions already effected by data message. Similarly, the use of the word “substitution” in the second sentence really meant that following termination, paper must be used; there was no question of substitution of what had already been done. The current wording gave an unintended impression.

37. Mr. MADRID (Spain) said his delegation supported moving existing paragraph 3. As currently worded, that paragraph only partially addressed any doubts that might arise for third parties in connection with the use of paper documents as to whether there had previously been a data message. The United States proposal would provide added certainty. He would welcome clarification, however, as to whether that amendment would mean that in every case a statement would be required indicating that there was no parallel data message, or if the procedure it outlined, would be employed only where electronic means had previously been used, in which case in the absence of any statement the situation would not be clear to third parties, since the statement could simply have been omitted.

38. Mr. CHANDLER (United States of America) said such doubts existed in many areas. There was, for example, no way to guarantee that a carrier issued only one bill of lading; even if a bill of lading indicated that no electronic data interchange method was involved, that might not be the case. Such an instance would, of course, constitute fraud, which would give rise to liability. All that the Commission could do was to provide that where parties had a choice of opting out of the electronic system they would be warned that there might have been a previous electronic transaction. There was no universal way to address the problem, and the Commission should take care not to restrict the system unnecessarily, but should merely ensure that where electronic use was terminated, subsequent documentation indicated that fact.

39. The CHAIRMAN suggested that interested delegations might wish to formulate a revised draft of the paragraph.

40. Mr. HOWLAND (United Kingdom) said that, on the assumption that paragraph 4 would refer to the necessity of reliable assurance, his delegation proposed that paragraph 3 could be reformulated to provide that an assurance should not be sufficient for the purpose of paragraph 4 unless it included reliable assurance that if the right or obligation had been conveyed by a person by means of a paper document it could not also be conveyed by the same person by means of a data message subsequently or concurrently, and unless the method used to give such assurance was specified to the person to whom the right or obligation was to be conveyed. Such a formulation would reflect the essence of paragraph 3 and the concern that a recipient must be given clear notice where data messaging had been cancelled.

41. Mr. TELL (France) said the United Kingdom proposal still left unresolved the question of when any change from one means to the other was to take place. The Commission might consider whether a party should be prohibited from making a change from electronic means to the use of paper documents. He inquired what the rationale was for the emphasis in the United Kingdom proposal on one means or the other.

42. Mr. HOWLAND (United Kingdom) said the fundamental security being sought was a guarantee of singularity, so that rights and obligations could be transferred to one person only and not to a multiplicity either initially or subsequently, which would constitute fraud. Accordingly, electronic messaging must be used in such a way as to prevent duplication. In particular, where a party required a paper document in a series of transactions that had begun with a data message there must be an assurance that there was no duplication and that data messages would not continue to be used as well. The Working Group had felt that the need for security was so important that it should be set out in a paragraph of its own, since commercial operators using electronic data messages and paper needed a clear assurance that no duplication was possible regarding the transfer of rights and obligations.

43. The CHAIRMAN said there appeared to be no objection to moving paragraph 3 to follow paragraph 4.

The meeting rose at 1.05 p.m.
Summary record of the 596th meeting

Held at Headquarters, New York, Wednesday, 5 June 1996, at 3 p.m.

[A/ CN.9/ SR./596]

Chairman: Mrs. PIAGGI de VANNOSSI (Argentina)

The meeting was called to order at 3.20 p.m.

ELECTION OF OFFICERS (continued)

1. The CHAIRMAN invited the Commission to elect three Vice-Chairmen.

2. Mr. GOH (Singapore) nominated Mr. Piyavaj Niyom-Rerks (Thailand).

3. Mr. AUSTEN (Poland) nominated Mr. Varso (Slovakia).

4. Mr. Piyavaj Niyom-Rerks (Thailand) and Mr. Varso (Slovakia) were elected Vice-Chairmen by acclamation.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

(A/50/17; A/CN.9/421 and 426)

Article “x” (continued)

5. The CHAIRMAN invited the Commission to resume its consideration of draft article “x”, contained in the annex to document A/CN.9/421.

6. Mr. MADRID (Spain) said that the wording of paragraph 4 did not seem to provide for situations in which a right was to be acquired by a group of persons pro indiviso.

7. Mr. LLOYD (Australia) suggested that the drafting group should consider whether the words “that rule is satisfied” in the third line of paragraph 4 should be replaced by the phrase “that requirement is met”, and whether in paragraph 2, the word “condition” should be avoided because of its very specific meaning in the contract law of several countries.

8. Mr. MASUD (Observer for Pakistan) suggested that the words “is to be granted to” should be deleted from the first line of paragraph 4 and that the words “the requirement of” should be added before the words “that rule”.

9. Mr. MAZZONI (Italy) proposed that, after the words “one or more data message”, the remainder of paragraph 4 should be amended to read “provided that the method used to effect such conveyance is reliable enough as to designate as beneficiary of such conveyance the intended person only and no other person”.

10. Mr. DONG Yi (China) wondered whether the use of the words “by any means which includes the use of one or more data message” meant that the paragraph was intended to be applicable to means other than data messages.

11. Mr. SORIEUL (International Trade Law Branch) recalled that article “x” was intended to be applied only to contracts involving data messages; perhaps the drafting of paragraph 4 could be made more clear in that respect.

12. Mr. CHANDLER (United States of America) agreed that it was a drafting problem. The beginning of the paragraph should refer to “any right or obligation pursuant to a contract of carriage of goods”.

13. Mr. MADRID (Spain) said that the wording proposed by the representative of Italy was a significant improvement; however, the question of reliability should be borne in mind with respect to the identification of the right of obligation to be acquired, as well as the addressee. As to the expression “by any means” in the third line, it should be made clear whether the reference was to legal or technical means.

14. Mr. HOWLAND (United Kingdom) said that it should be specified that the rights and obligations referred to were those listed in paragraphs 1(f) and 1(g). As to the issue of reliability raised by the representative of Spain, the Commission might feel that it was adequately addressed in paragraph 5.

15. Mr. MADRID (Spain) said that it would be wrong to restrict the application of paragraph 4 to the rights and obligations listed in paragraphs 1(f) and 1(g), since paragraph 4 was designed to apply to the entire article.

16. Mr. SORIEUL (International Trade Law Branch) agreed with the representative of Spain that the scope of the article should be clarified. However, as he understood it, the United Kingdom proposal had been intended not to restrict that scope, but to avoid the danger of an excessively broad interpretation.

17. Mr. MAZZONI (Italy) suggested that paragraph 5 should begin with a broader formulation, such as “For the purposes of paragraph 3”, since the rule might come into play even if nobody raised a question, and guidance needed to be provided.

18. Mr. LLOYD (Australia) supported the proposal by the representative of Italy. The reference should be to paragraph 4.

19. Mr. HOWLAND (United Kingdom) and Mr. CHANDLER (United States of America) said that they, too, supported the proposal.

20. Paragraph 5, as amended, was adopted.

21. Mr. CHANDLER (United States of America) said that excess verbiage should be cut from paragraph 6. The word “rendered” should be deleted.

22. Mr. HOWLAND (United Kingdom) said he could agree to that deletion but would prefer to leave the rest of the paragraph unchanged.

23. Mr. MADRID (Spain) said that the paragraph could be simplified even further and must not imply any discrimination between paper documents and data messages.

24. Mr. CHANDLER (United States of America) said that problems arose because the definition of a bill of lading varied
from country to country. In some cases a country might not consider an electronic data message to be a bill of lading. Paragraphs 2 and 6 therefore dealt with entirely different concepts.

25. Mr. HOWLAND (United Kingdom) said that the issue had been considered by the Working Group in considerable depth, and it had been decided that the best approach was a minimalist, permissive approach, which was embodied in paragraph 6. The paragraph left open the possibility of being selective according to the customs, practices and rules applicable in different countries. Therefore, for the very reasons put forward by the United States representative, his delegation would prefer to keep paragraph 6 unchanged.

26. Mr. RENGER (Germany) said that the drastic changes sought by the United States representative went further than the Working Group had been able to go. He would prefer to retain the current wording of paragraph 6, with the possible deletion of the word "rendered".

27. Mr. LLOYD (Australia) said that in paragraph 6 as currently drafted there was insufficient connection between paper contracts and data message contracts. A formulation was needed which would connect the two types of contracts.

28. Mr. TELL (France) said that the existing text should be retained as a compromise solution reached in the Working Group.

The meeting was suspended at 4.35 p.m. and resumed at 5.15 p.m.

29. Ms. REMSU (Observer for Canada) agreed to the deletion of the word "rendered" in paragraph 6. The Australian delegation's concern about linking the contract of carriage in the first line with the rest of the paragraph could be accommodated by the insertion of the word "such" before the words "a contract of carriage" in the second and third lines.

30. Mr. ILLESCAS (Spain) said that he favoured the wording "the rules shall be applicable" because it was more explicit. The current wording of paragraph 6 was ambiguous. His delegation was concerned about ensuring that rules of national origin which were compulsory when the carriage, bill of lading and the contract were on paper should be equally compulsory when the contract, carriage and bill of lading were sent by data message.

31. Mr. RENGER (Germany) disagreed with the change suggested by the representative of Spain. In his view, the current wording of paragraph 6 accommodated all the reservations raised by delegations, and the compromise reached by the Working Group should not be called into question.

32. Mr. HOWLAND (United Kingdom) said that, except for the deletion of the word "rendered", his delegation was satisfied with the current wording of the text. However, the addition of the words "of a certain kind" after the words "a paper document" in the second line of paragraph 6 might help some of the other delegations to accept the text.

33. Mr. LLOYD (Australia) suggested the insertion of the word "such" after the words "inapplicable to" in the second line of paragraph 6, without which the clause ran the risk of applying laws which were inappropriate to a contract.

34. Mr. HOWLAND (United Kingdom), supported by Mr. ADENSAMER (Austria), Mr. MAZZONI (Italy) and Mr. MADRID (Spain), endorsed the suggestion of the Australian delegation.

35. Paragraph 6, as amended, was adopted.

36. Paragraph 7 was adopted.

Title of the draft Model Law

37. Mr. HOWLAND (United Kingdom) noted that some delegations felt that the title of the Model Law was too long. Accordingly, he suggested the deletion of the words "legal aspects of".

38. Ms. BOSS (United States of America) said her delegation had concluded from its discussions with parties that would ultimately be dealing with the provisions of the Model Law that they did not understand that the Model Law was relevant to individuals engaging in forms of electronic commerce other than EDI, and that the title was too long. The term "electronic commerce", however, had been receiving increasing acceptance in the international community, and might be used in the title. To retain a long title which hinged on what was now only a minor part of the technological revolution would do a disservice to what would otherwise be quite an influential product.

39. Mr. CHOUKRI (Observer for Morocco) suggested that the title should read "Draft Model Law on EDI".

40. Mr. PHUA (Singapore) said that, since the Model Law dealt with commercial transactions conducted through electronic means, he endorsed the proposal to amend the title to "Draft Model Law on Electronic Commerce", in keeping with the suggestion by the representative of the United States of America.

41. Mr. LLOYD (Australia) endorsed that proposal and agreed that the term "electronic commerce" was becoming more and more widely used by people in the industry.

42. Mr. TELL (France) agreed that a shorter, more explicit title was needed for the draft Model Law and endorsed the United States proposal.

43. Mr. RENGER (Germany) agreed that the title of the Model Law should be shorter, but believed that the term "electronic commerce" would limit its scope of application since the Model Law did not apply solely to commercial transactions. His delegation would prefer a title such as "Model Law on EDI".

44. Mr. MAZZONI (Italy) favoured the title "Model Law on Electronic Commercial Transactions", which was clearer and translated easily into his language.

45. Mr. SANDOVAL LÓPEZ (Chile) endorsed the United States proposal.

46. Mr. ZHANG Yuqing (China) endorsed the title "Model Law on Electronic Commerce", adding that if that title was adopted, a definition of "electronic commerce" should be included in the text of the Model Law.

47. With regard to article "x", he favoured placing it in an annex to the Model Law. Furthermore, he hoped that the final draft of the Model Law would make clear that the scope of application was broad and included new technologies.

48. Mr. ANDERSEN (Observer for Denmark) endorsed the United States proposal. There was every indication that the term "electronic commerce" would be even more widely used in future years, a situation which made it more attractive in terms of marketing the Model Law.
49. Mr. Won-Kyong KIM (Observer for the Republic of Korea) endorsed the proposal of the United States of America. In reply to the representative of China, who had expressed concern that the Model Law contained no definition of the term "electronic commerce", he recalled that article 1 stated that the Model Law applied to data messages "used in the context of commercial activities". By using the term "electronic commerce" in the title of the Model Law, the Commission would play a leading role in defining terminology in the field of electronic data interchange.

50. Mr. MASUD (Observer for Pakistan) suggested that, since the Model Law dealt primarily with commercial transactions by means of electronic, optical and other related means, the title might be changed to "Model Law on Commerce through Electronic and Related Means", which had a broader scope than "electronic commerce".

51. Mr. MADRID (Spain) strongly supported the proposal of the representative of the United States of America.

52. Ms. REMSU (Canada) agreed that the shorter title "Model Law on Electronic Commerce" was more appropriate, especially since the term "electronic commerce" was gaining rapid acceptance, even in government circles. She therefore endorsed the proposal of the United States of America.

53. Mr. UCHIDA (Japan) sought clarification as to whether the term "electronic commerce" included telegram, telex and telecopy, the means of transmission covered under the Model Law.

54. Mr. ALLEN (United Kingdom) said that while he agreed a shorter title which contained the word "electronic" was needed for the Model Law, the term "electronic commerce" could be misleading because it implied that the Model Law was about the underlying commercial transaction, rather than the procedures governing communication. The Model Law contained provisions on the admissibility and retention of data messages and dealt with requirements of national legislation, regardless of whether the communication related to commercial activities. As a compromise, he proposed the title "Model Law on Electronic Communication", which emphasized that the Model Law dealt with the procedures for governing communications.

55. Mr. CHANDLER (United States of America) said that using the term "electronic communication" would be inappropriate and would cause confusion with international telecommunications. For that reason, his delegation opposed the United Kingdom proposal. In reply to the representative of Japan, he said that the term "electronic commerce" included EDI, electronic mail and all areas of electronic transmission including telex, telegram and fax. He agreed with the observer for the Republic of Korea that the Commission was breaking new ground with the Model Law and that it should therefore not hesitate to establish new terms where warranted. The term "electronic commerce" was being used in an increasing number of areas precisely because it was less restrictive than the term "EDI".

56. Mr. CHOUKRI (Observer for Morocco) said that he was opposed to the title "Model Law on Electronic Commerce" because his delegation believed it would lead to confusion. He proposed the longer but clearer title "Draft Model Law on Commercial Transactions in the Electronic Field".

57. The CHAIRMAN said that there seemed to be a consensus that the Commission should adopt the title "Draft Model Law on Electronic Commerce" proposed by the representative of the United States of America.

58. The title of the draft Model Law, as amended, was adopted.

The meeting rose at 6.05 p.m.

Summary record of the 597th meeting

Held at Headquarters, New York,
Thursday, 6 June 1996, at 10 a.m.
[A/CN.9/SR.597]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)

Article 1

1. Mr. SORIEUL (International Trade Law Branch) said the drafting group would need to review the draft Model Law to ensure consistency. A number of substantive issues also remained. With respect to article 1, at the previous session the drafting group had concluded that the second of the two formulations in square brackets appearing in the third footnote to the article was preferable. If the Commission approved that view, a list could then be prepared indicating the kind of message that would be excluded from the scope of the Model Law. That approach would conform to article 5, paragraph 2, article 6, paragraph 2, and article 7, paragraph 3, of the Model Law, where a list of exclusions would also be required.

2. Ms. BOSS (United States of America) said her delegation would support adoption of the second alternative listed in the third footnote, since that had been the consensus in the drafting group.

3. Mr. ALLEN (United Kingdom) said the first alternative, specifying all the situations to be covered by the Model Law, would in practice present serious difficulties, and might well make the Model Law more restrictive than intended; his delegation therefore supported adoption of the second alternative.

4. Mr. MADRID (Spain) agreed that the second formulation was preferable—particularly since the intent was to allow States to extend the applicability of the Law—and would accord better with later articles. Use of the first alternative would in fact, be likely to restrict the scope of the Model Law.
Mr. MAZZONI (Italy) and Ms. REMSU (Observer for Canada) supported adoption of the second formulation.

The CHAIRMAN said there appeared to be a consensus in favour of the second formulation in the third footnote to article I.

Mr. SORIEUL (International Trade Law Branch) said the second issue left pending by the drafting group was whether there was a need to include a rule of interpretation concerning the intent of the parties. The question arose, for example, as to whether contracts concluded in writing prior to the entry into force of the Model Law would be affected by its provisions, and whether the functional equivalent of "writing" provided for under the Model Law would prevail or whether the original contract would subsist.

Mr. ABASCAL (Mexico) said the phrase "rule of law" was used in connection with the Model Law to cover laws enacted under the various legal systems in question. However, the UNCITRAL Model Law on International Commercial Arbitration embodied a different approach, in that it allowed parties to instruct arbitrators which rules of law were applicable for the settlement of a dispute. In that context, "rules of law" had been taken to include precepts not emanating from national legislation, such as the UNIDROIT rules governing international contracts. In view of the different approaches, the Commission should seek other language so as to avoid erroneous interpretations.

Ms. BOSS (United States of America) said the question as to whether a rule of interpretation was needed to determine the meaning of an agreement entered into prior to the adoption of the Model Law affected only a small number of cases. Furthermore, the Model Law, in chapter III, allowed variation by agreement in many cases. The real issue was to determine the will or intent of the parties as expressed in the agreement. In the United States the answer to that question would depend on the agreement as a whole, on statutory interpretation and on the circumstances. Where, for example, an agreement required a notice in writing, but that requirement merely mimicked a statutory writing requirement, thus bringing the statutory requirement into the agreement, since it had been the intent of the parties, the situation was different, and a functional equivalent under the Model Law would be valid. As noted earlier, the aim of the Model Law was to facilitate electronic data exchanges in commercial transactions, but not to impose them.

Mr. ALLEN (United Kingdom) agreed that there should be no rule of interpretation along the lines suggested. Parties could always extend the meaning of the word "writing", and if they had a requirement for writing the chances were that they meant writing in the traditional sense.

Mr. ABASCAL (Mexico) agreed there was no need for a special rule of interpretation. Perhaps a section on interpretation should be in the Guide, as that concern was not dealt with in the Model Law itself (A/50/17, para. 236).

Ms. BOSS (United States of America) noted there was an emerging consensus in the Commission that no specific provision on interpretation was necessary. She agreed with the suggestion that the issue should be covered in the Guide. It might not be judicious to state categorically in the Guide that the rules were mandatory. The Commission had yet to consider article 10, paragraph 2, whose wording had been specifically agreed upon, whereby the provisions of chapter II could be varied if permitted by domestic law.

Mr. ANDERSEN (Observer for Denmark) supported the proposal to discuss interpretation in the Guide. He wondered whether it would be appropriate to include the third footnote to article I in the Guide as well.

Mr. SORIEUL (International Trade Law Branch), replying to the Mexican representative, said that, although the Working Group had reopened the debate on article 10, paragraph 2, when it considered article "x", for purposes of the Commission, that debate was closed. The term "rule of law" was used differently in article 28 of the UNCITRAL Model Law on International Commercial Arbitration and in the draft Model Law on EDI. In the latter Model Law, the term covered, *inter alia*, mandatory rules, laws and decrees and case law but not contractual law, including the Uniform Customs and Practice of the International Chamber of Commerce.

Mr. ABASCAL (Mexico) said although the debates held the year before were not to be reopened, the Commission's report did not actually contain final decisions. The Working Group had never informed the Commission of the problem of interpretation in two different contexts and no discussion had been held. In the UNCITRAL Arbitration Model Law "rule of law" meant the selection of laws from a specific legal system, whereas in the Model Law on EDI, it did not. The easiest solution would be to find another term.

20. Mr. SORIEUL (International Trade Law Branch) asked the Mexican representative if he was proposing that the words “where the rule of law ...” in article 5, paragraph 1, should be replaced by “where law ...”.

21. Mr. ABASCAL (Mexico) said he felt “rule of law” should not be used but was not necessarily proposing a specific replacement text.

22. Mr. LLOYD (Australia) said his delegation was pleased that the prevailing view was that no special provision was needed on contractual agreements made prior to the adoption of the Model Law. A transitional clause allowing countries to adapt the Model Law to their own legal systems might be more useful than an explanation in the Guide. He acknowledged that the term “rule of law” had a broader application but would not comment at the current stage on the Mexican representative’s remarks.

23. Mr. CHANDLER (United States of America) expressed shock at the restrictive interpretation of the term “rule of law” contained in the Commission’s report. The consequences provided for in the Model Law flowed from the law but also very definitely from customs and practice. Indeed, the Commission’s work would not be very valuable if customs and practice were not taken into account, particularly in the field of electronic data interchange. Article “x”, paragraph 2, should be redrafted accordingly.

24. Mr. MAZZONNI (Italy) agreed that international trade law was much broader than “rules of law” and embraced customs and practice as well. Consistency in the Model Law was also of paramount importance.

25. Mr. SORIEUL (International Trade Law Branch) reiterated that the Commission had to decide on a question of terminology or form, and one of substance, namely whether to include customs and practice within the scope of articles 5, 6 and 7.

26. Mr. ALLEN (United Kingdom) said there were three ways in which customs and practice were relevant to law: (a) when they were incorporated into a contract, either expressly or implicitly, including by common law; (b) when rules were developed through customs and practice and then became rules of law by incorporation; and (c) when customs and practice were referred to in interpreting how a statutory rule of law was to be applied. Customs and practice did not have to be specifically mentioned in any of those cases. Chapter II was concerned, not with the contractual relationship of the parties, but solely with rules of statutory law and case law. Even where a statute was developed through customs and practice so that they effectively became a rule of law, chapter II would automatically apply. The Commission should not interfere with the application of rules derived from customs and practice. The term “rule of law” should be clarified in the Model Law—perhaps in the definition portion—as not everyone would read the lengthy draft Guide.

27. Mr. MADRID (Spain) agreed wholeheartedly with the representative of the secretariat that two different questions must be resolved, one of form and the other of substance. Concerning the question of form, it would be important to ensure that whatever term was used did not have different meanings within the draft Model Law and that if it were replaced, the new term was truly appropriate in every context. Concerning the question of substance, Commission members should indicate whether they preferred a broad or narrow interpretation of the term “rule of law”. The Commission should explain its choice in the draft Guide, bearing in mind that its interpretation might be much narrower than it was in many countries which incorporated customs and practice into their definition of rule of law.

28. Ms. BAZAROVA (Russian Federation) suggested that if the words “rule of law” were removed from article 5, paragraph 1, the paragraph could be revised to indicate that if an agreement called for information to be presented in writing, that presentation in writing could be replaced by the same information in the form of a data message.

29. Mr. TELL (France) said the Commission had excluded contractual stipulations and trade usages or practice from the scope of application of articles 5, 6 and 7 of the Model Law. The reference to “rule of law” could not be easily transposed to the context of electronic data interchange. His delegation opposed the inclusion of international commercial practices or rules of the International Chamber of Commerce in the scope of “rule of law”.

30. Mr. MAZZONI (Italy) said in international trade law, the term “rule of law” had acquired a meaning which encompassed rules other than those included in decrees of national legislation or acts of parliament. The emphasis on the international origin of the Model Law in article 3 of the draft had been intended to forestall the tendency to interpret expressions on the basis of national legal concepts. Unless the term was to be interpreted in a broad sense in the context of the Model Law, it would therefore have to be replaced because of the technical meaning it had already acquired.

31. Mr. ABASCAL (Mexico) associated himself with the position of the Italian delegation that the term “rule of law” should be interpreted broadly in the Model Law. For example, the provisions of the International Institute for the Unification of Private Law (UNIDROIT) were not customs and practice, but rules of law existing in the international community that were part of international trade law. The matter should not be left for explanation in the Guide; if the term were to be interpreted in the narrow sense, then it should be changed and an appropriate explanation of the change included in the Commission’s report.

32. Ms. BOSS (United States of America) said the apparent disagreement over interpretation of the term “rule of law” stemmed from differences in legal systems and their approaches to dispute resolution. Her delegation agreed with that of France, in that customs and practice, insofar as they were recognized, were part of the rule of law. That was not to say that customs and practice should necessarily be seen as partial sources of law, but the inability of positive statutory law to cover all situations meant that customs and practice developed over time had to be applied as well.

33. Her delegation had been troubled by the Guide’s narrow and restrictive interpretation of the term “rule of law”, and suggested either reformulating article 5, paragraph 1, to make that term unnecessary, as suggested by the Russian Federation, or replacing “rule of law” by “where law requires”. Whatever terminology was used should be broad enough to allow the Model Law to be used in the interpretation of customs and practice as they were recognized and applied to the transactions at hand.

34. Mr. SANDOVAL LÓPEZ (Chile) agreed with those delegations which were in favour of strictly interpreting the term “rule of law” as meaning rules originating in legislatures or other law-making bodies. Any replacement of the term should follow that interpretation.
35. Mr. ALLEN (United Kingdom), supported by Mr. GOH (Singapore), said the Commission needed to decide on a neutral term that covered but did not exceed case law, statutory rules, and customs and practice in so far as those formed part of the law. He suggested modifying the United States formulation of “where law requires” to read “where the law requires” as a way to include all three categories.

36. Mr. MASUD (Observer for Pakistan) suggested adding the words “or customs and practice recognized as rules of law” after “rule of law”.

37. Mr. LLOYD (Australia) said some customs and practices were not rules of law, but were simply chosen by the parties; inclusion of such customs and practices would constitute an inappropriate modification of the meaning of chapter II of the Model Law. He therefore supported the United Kingdom formulation “where the law requires”.

38. Mr. MAZZONI (Italy) said under Roman law, while “rule of law” could include rules which were non-parliamentary in origin, the term “the law” was more restrictive in scope than was perhaps intended in the current case by members of the Commission. If a majority of the Commission wished to adopt the term “the law”, however, the Guide should make clear that the expression included case law and customs having the force of law.

39. Mr. ABASCAL (Mexico) agreed with the position of the Italian delegation. The formulation suggested by the United Kingdom raised the possibility that a broad interpretation of the term “the law” would be inconsistent with article 28, paragraphs 2 and 4, of the UNCITRAL Model Law on International Commercial Arbitration, where a clear distinction had been drawn between “the law” and the usages of the trade applicable to the transaction at hand.

40. Mr. MADRID (Spain) said he agreed with the Mexican delegation that changing “rule of law” to “the law” would not solve the problem of inconsistency between different model laws, since the latter term also had a narrower meaning in the UNCITRAL Arbitration Model Law than in the Model Law under discussion. Thus, it made no difference which term was used, as long as the Guide explained that the term referred to any generally recognized rule that overrode the will of the parties concerned.

41. Ms. BOSS (United States of America) said terminological inconsistencies, even among the products of a single body, were virtually inevitable. The phrase “rule of law” was more likely to be interpreted in a technical sense, whereas “the law” lent itself to a wider variety of interpretations. She recognized the conflicts pointed out by the representative of Mexico, but they did not seem to represent an insurmountable difficulty. More troubling was Italy’s observation that “the law” could be interpreted too narrowly under certain legal traditions. She suggested two alternatives: retaining “rule of law” and defining that term in article 2 of the text, or replacing it with the broader term “the law” and elucidating its meaning in the Guide.

42. Mr. SORIEUL (International Trade Law Branch) said he favoured the term “the law”, which covered the whole system of applicable law, including legislation, case law and recognized practice. The Guide should explain that the term encompassed those three categories of rules. He saw no inconsistency with article 28 of the UNCITRAL Arbitration Model Law, since the latter dealt with the choice among different types of applicable law.

43. Mr. CHOUKRI (Observer for Morocco) said he was satisfied with the term “rule of law”, since any law consisted of various types of rules.

44. Mr. MADRID (Spain) said that, with respect to the second alternative proposed by the United States delegation, users of the Model Law would not necessarily consult the Guide for clarification of the term “the law”. It would be preferable to retain “rule of law”, which clearly had a more specific meaning, and to give a brief definition of the term in article 2.

45. Mr. MAZZONI (Italy) said either proposal was acceptable, but he also preferred the first alternative.

46. Mr. TELL (France) said he supported the secretariat’s proposal because the term “law” was broad enough to encompass all of the areas to be covered by the Model Law. It was inadvisable to define the term in the Model Law itself because that would only lead to more disagreement and difficulty, in view of the variety of legal systems in the States members of the Commission.

47. Mr. ALLEN (United Kingdom) said the two possibilities mentioned by the United States representative were not mutually exclusive and a compromise solution could be to use the term “the law” and define it in article 2.

48. Ms. BOSS (United States of America) said she agreed with the French delegation that the Commission was unlikely to find a definition that would be acceptable to all of its members; for that reason, any explanation of the term used should appear in the Guide and not in the Model Law itself. She would prefer to use the term “the law” and to define it in the Guide.

49. The CHAIRMAN said there appeared to be a consensus in favour of the proposal just made by the United States representative.

The meeting rose at 1 p.m.
Summary record of the 598th meeting

Held at Headquarters, New York,
Thursday, 6 June 1996, at 3 p.m.

[A/CN.9/SR.598]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 3.30 p.m.

ELECTION OF OFFICERS (continued)

1. Ms. EKEMEZIE (Nigeria) nominated Mr. S. Thuita Mwangi (Kenya) for the office of Vice-Chairman.

2. Mr. S. Thuita Mwangi (Kenya) was elected Vice-Chairman by acclamation.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421)

Draft article “x” (continued)

3. Mr. CHANDLER (United States of America) introduced the revised version of paragraph 3, which read: "Where one or more data messages have been used to effect any of the actions in paragraph 1(f) or (g) of this article, and a paper document is subsequently to be used to effect any such action, no such paper document is effective for the purpose of law mentioned in paragraph 4 of this article, unless, as between the person subject to the obligation to deliver and the holder of a right acquired by means of a data message, the use of data messages for this purpose has ceased to be valid, and unless the paper document contains a statement that data messages may no longer validly be used for such purposes in place of the paper document. Any such replacement of a data message by a paper document shall not have the effect of modifying any existing right or obligation."

4. He introduced the revised version of article 4, which read: "Under a contract of carriage, if a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, the requirement of that law is satisfied if the right or obligation is conveyed by any means which includes the use of one or more data messages, provided a method is used to give reliable assurance that the right or obligation becomes vested in the intended person and in no other person."

5. Mr. HOWLAND (United Kingdom) commended the United States delegation for its work on paragraph 3 of article “x” and for achieving a considerable degree of harmony. While the draft of paragraph 3 was not exceedingly long, he suggested, for purposes of clarity, that the text should be broken up by inserting a colon after the word “unless”, a small (a) before the words “as between” and a small (b) before the words “the paper document contains”. The last sentence should appear as a new paragraph.

6. Mr. ALLEN (United Kingdom) favoured retaining the expression “rule of law”, as opposed to “law”, in paragraph 3, since the sentence referred to paragraph 4, which used the term “rule of law”.

7. Mr. TELL (France) said that it would be extremely difficult for members of the Commission to consider the revised versions of paragraphs 3 and 4 without a copy of the text in English and the other official languages.

8. Mr. RENGER (Germany), supporting the representative of France, said that his delegation could not consider or endorse the revised versions of paragraphs 3 or 4 if it did not have before it the text in printed form, which under normal procedures, should have been distributed as a working paper.

9. Mr. SORIEUL (International Trade Law Branch), confirming the views of the representatives of France and Germany, said that it was not possible for the Commission to consider the paragraphs in question without a copy of the text in all official languages. Accordingly, he proposed that the Commission should wait for the other language translations to be issued before continuing consideration of paragraphs 3 and 4 of article “x”.

10. Mr. CHANDLER (United States of America) said that he understood the concerns of the Commission regarding the need for a printed text of paragraph 3. However, he proposed that the Commission should discuss paragraph 4, which had undergone only slight changes.

11. Mr. MADRID (Spain) requested that copies of the text should be made available to all delegations at least in the English version.

12. Mr. DONG Yi (China) agreed with previous speakers that the amendments to paragraphs 3 and 4 were considerable and that all delegations should be in possession of a printed text before considering those amendments, if not in translation, then at least in English.

13. Mr. HOWLAND (United Kingdom) said paragraph 4 had only been slightly revised to incorporate amendments that had been discussed and agreed upon at an earlier meeting.

14. The CHAIRMAN suggested that if all delegations agreed, the Commission should consider paragraph 4 since the changes to it were minor and the original text of that paragraph appeared in the annex to document A/CN.9/421.

15. Mr. LLOYD (Australia) asked why the words "under a contract of carriage" had been added to the beginning of paragraph 4.

16. Mr. CHANDLER (United States of America) said that the words "under a contract of carriage" had been added at the beginning of paragraph 4 in response to the concern expressed by a number of delegations, including China, that the paragraph might, if taken out of context, be interpreted too broadly. However, the additional phrase could be considered redundant in the light of paragraph 1, and his delegation would not object if the Commission preferred to delete it.

17. Mr. LLOYD (Australia) said that his delegation had no objection to the proposed amendments. However, it would be necessary to use the words "the requirement of that law" rather than "the requirement of that rule" in the third line of the paragraph.
18. Mr. MAZZONI (Italy) said that, according to Italian law, under a bill of lading, rights could be transferred either by endorsement and physical delivery of the paper or "by consent" which did not involve delivery of the document. Consequently, there might be some ambiguity as to which of those methods was to be replaced by the use of a data message.

19. He noted also that there was some circular logic in the proposed wording, which seemed to say that the right became vested when conveyance was effected, and vice versa.

20. Mr. ABASCAL (Mexico), supported by Mr. MADRID (Spain), said that the words which had been added at the beginning of the paragraph should be deleted; the paragraph might be needed for transactions other than contracts of carriage.

21. Mr. CHANDLER (United States of America), replying to the representative of Italy, said that in international commerce, only the physical delivery of the paper document was acceptable. One of the major advantages of using electronic transfer was that, being instantaneous, it avoided delays caused by the time required for that delivery. A system of transfer "by consent" was a bad practice; it could not and should not continue once an EDI system was introduced.

22. Mr. HOWLAND (United Kingdom) said that paragraph 4 was intended solely to remove a legal impediment to the use of electronic means instead of paper documents, where such an impediment existed.

The meeting was suspended at 4.35 p.m. and resumed at 5.20 p.m.

23. Mr. MAZZONI (Italy) suggested the following wording for paragraph 4: "Provided that the method used to effect such conveyance is reliable enough as to designate as sole addressee (beneficiary) of such data message the intended person only and no other person." He suggested that the text should be taken up by the drafting group.

24. Mr. HOWLAND (United Kingdom) proposed the following wording: "Provided a method is used to give a reliable assurance that no other data message has been or may be used by the transferor for the purpose of transferring such right or obligation to more than one person at any given time."

25. Mr. SORIEUL (International Trade Law Branch) said that the drafting group was a technical group and could not be asked to settle matters of substance. Time was running out; priority must be given to adopting the Model Law. Interested delegations were encouraged to meet in an ad hoc working group, and if the resulting text was fairly close to the current article 4, it could be taken up at once. Otherwise, the proposals would have to be typed out and translated before they could be considered by the Commission.

26. Mr. LLOYD (Australia) said that the United Kingdom proposal did not solve the problem posed by the fact that methods could not give assurances - only people could. The Italian proposal avoided the problem, but was a little vague. He would prefer to use wording such as "a reliable method is used to ensure".

27. Mr. CHANDLER (United States of America) said that the Commission seemed to be looking for a degree of certainty that could never be achieved. The deeper it went into the details of transference, the more it would intrude upon system rules. Both the Italian proposal and the United Kingdom proposal went too far. It might be better to retain the existing text, with minor drafting changes. The more the Commission tried to add to the provision, the more unwieldy it would become.

28. Mr. MADRID (Spain) said that the Model Law already used the term "method", for example in article 6, paragraph 1(b), which also referred to the concept of reliability. The question of reliability had been taken up in the Working Group and by the Commission itself, and the consensus seemed to be that the Commission should not lay down requirements for data messages and electronic communications that were more stringent than those applied to paper-based communications, from which fraud and discrepancies could not be completely eliminated. While the Commission had to establish a method which inspired confidence, it could not expect to prevent fraud in all cases.

29. He agreed that consensus seemed to have been reached on the paragraph and that only minor drafting changes were needed; there was therefore no need to raise matters of substance that went beyond the consensus that had been achieved.

30. Mr. FALVEY (Observer for the International Association of Ports and Harbors) said that his organization supported the United States proposal but wished to suggest that in addition the Guide to Enactment should refer to the guarantee of singularity as the purpose of paragraph 4. In that way, the Commission would close the circle.

31. Mr. SANDOVAL LÓPEZ (Chile) and Mr. MASUD (Observer for Pakistan) said that they supported the United States proposal.

32. Mr. ZHANG Yuqing (China) said that the existing draft should be retained. The submission of new proposals only prolonged the debate, and his delegation did not feel that any of the new proposals improved on the existing text.

33. His delegation had some difficulties with the phrase "by any means which includes the use of one or more data messages" and would prefer to delete it. If a country stipulated that a paper document had to be used to convey a right or obligation, there was only one means; if the Commission was trying to expand the scope of the means of conveying rights and obligations to include data messages, then there would be two means, so that the rule would be satisfied if the right or obligation was conveyed by one or more data messages. The existing wording gave the impression that the Commission was trying to expand the application of domestic law.

34. Mr. ABASCAL (Mexico) said that it could be difficult to establish very strict requirements in paragraph 4. The Commission seemed to be seeking a degree of assurance that did not exist even in paper documents. The technology for providing such a level of assurance did not exist, so that if the Commission established such a requirement, it would effectively be prohibiting the transfer of rights through data messages. He suggested that instead of the words "reliable assurance", the Commission should use terms regularly used in international trade contracts, such as "a reasonable method in the circumstances". That would accommodate the rules of the Comité maritime international, since adopting those rules would be reasonable in the circumstances.

35. The CHAIRMAN asked whether the Commission could agree to retain the original text, or whether it preferred the United States proposal.

36. Ms. GUREYEV (Russian Federation) said that her delegation supported the United States proposal, but also supported the Chinese proposal.

37. Mr. MAZZONI (Italy) said that there was no divergence of opinion about the purpose of paragraph 4. If the majority of delegations favoured retaining the last phrase of the paragraph, his delegation would have to place its opposition on record.

38. The CHAIRMAN said that the Commission would have to continue its consideration of paragraph 4 at the next meeting.
Summary record of the 599th meeting

Held at Headquarters, New York,
Friday, 7 June 1996, at 10 a.m.

[ACN.9/SR.599]
Chairman: Mrs. PIAGGI de VANOSSI (Argentina)
The meeting was called to order at 10.25 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

Article 6
1. Ms. BOSS (United States of America) proposed the following amendment to cover situations where one person prepared a document and another person signed it: in the first sentence of paragraph 1, "of a person" should be inserted after "signature" and in subparagraph (a) "the originating" should be replaced by "that person". The words "of the data message" would have to be deleted from subparagraph (a).

2. Mr. MASUD (Observer for Pakistan) supported the United States proposal and suggested that, for the sake of consistency with other articles, the phrase "the requirement of" should be inserted before "that rule" in the first sentence.

3. Mr. SORIEUL (International Trade Law Branch) agreed that certain changes would have to be made for the sake of consistency. For example, "a rule of law" in the first sentence of paragraph 1 would have to be changed to "the law". In line with the United States proposal, "between the originator" in subparagraph (b) should be amended to read "between the person whose signature is required ...".

4. Mr. CHOUKR (Observer for Morocco) maintained that it was not necessary to add "of a person" in the first sentence of paragraph 1, as a signature was always provided by a physical or legal person. However, in subparagraph (a), "the originating" should be changed to "the person who will sign" in order to indicate that that person approved of the message.

5. Article 6, as amended, was adopted.

Article 10
6. Mr. SORIEUL (International Trade Law Branch), referring to paragraph 274 of the Commission's report,4 said the Commission must decide on the placement of article 10 now that it contained two paragraphs, one on the provisions of chapter III and one on the mandatory provisions of chapter II. As it spanned two chapters, it would be logical to include it under chapter I on general provisions.

7. Ms. BOSS (United States of America) said the secretariat's proposal made a great deal of sense. Since there were very few provisions referring to chapter II in the more specific chapter III, the most appropriate place for the article was under the general provisions of chapter I.

8. Mr. MADRID (Spain) and Mr. ABASCAL (Mexico) agreed with the remarks made by the representative of the secretariat and the United States representative.

9. Mr. PHUA (Singapore) cautioned that the words "this chapter" in article 10, paragraph 1, would have to be changed if the article was moved to another chapter.

10. Mr. ZHANG Yuqing (China) said the problem raised by the representative of Singapore was difficult to solve. If "this chapter" were amended to read "this Model Law", it could mean that all 14 articles of the Model Law could be changed by agreement. If the article was moved to chapter I with an indication that chapter III could be varied by agreement, then there was no justification for moving it.

11. Mr. SORIEUL (International Trade Law Branch) explained that when there had been only one paragraph in the article, referring to chapter III, it had seemed logical to say "this chapter". However, it might make more sense to place the two-paragraph article referring to two different chapters in the general provisions portion of the Model Law. As indicated by the representative of Singapore, a drafting change would be necessary.

12. Mr. MADRID (Spain) suggested that the words "this chapter" should be replaced either by "Part I" or by reference to specific article numbers. That would avoid confusion if Part II of the Model Law were to be divided into chapters at a future date.

Article "x"
13. Mr. CHANDLER (United States of America) proposed the following amended text of article "x", paragraph 4: "If a right is to be granted to, or an obligation is to be acquired by, one person and no other person, and if the law requires that, in order to effect this, the right or obligation must be conveyed to that person by the transfer, or use of, a paper document, that requirement is satisfied if the right or obligation is conveyed by the use of one or more data messages, provided a method is used to give reasonable assurance that the use of such data messages is unique." The concept of uniqueness could be explained in the draft Guide to Enactment of the Model Law (A/ CN.9/426).

14. Mr. LLOYD (Australia) said it would be more logical for the final element of the United States proposal to be amended to read "reasonable assurance that such data messages are unique".

15. Mr. MAZZONI (Italy) said replacing the words "and if a rule of law requires that" by "and if the law requires that" raised the problem of which law was being referred to, since any one of a number of laws might come to mind, such as legislation relating to title and ownership or laws on carriage. A specific reference would thus be preferable. It would also be better to include in the paragraph the concept of agreement between the sender and recipient of a data message on the use of that method rather than paper, since the sender should not be given the power to impose the use of data messages for legal purposes. Lastly, the reference to "unique" at the end of the United States proposal was welcome, and should be reflected in the Guide.

16. Mr. CHANDLER (United States of America) said his delegation could accept the amendment proposed by the representative of Australia. The first Italian proposal, however,
might raise the problem of conflicts between laws, given the great variance between legal systems, some of which had very detailed provisions in that area and some of which had virtually none. Equally, the view that parties needed to agree on the use of data messages would interfere with current practice with regard, for example, to letters of credit and bills of lading. Nevertheless, it should be possible to use a paper document since parties in some States were simply not equipped for electronic data interchange, while parties that were so equipped might still find that the use of paper was necessary, if, for example, there were problems with the system. Insistence on agreement between the parties would, however, simply create impediments and impose conditions that did not currently exist.

17. Mr. MAZZONI (Italy) said using the phrase “the law” without further elaboration was not a solution if it was not clear what was meant. Regarding agreement between the parties, the proposed rules would allow a sender to use either electronic means or paper, which gave that party too much power.

18. Mr. ABASCAL (Mexico) said his delegation supported the United States proposal, as amended by the representative of Australia. He agreed with the United States representative that the imposition of a requirement of agreement between parties before use could be made if electronic means of transferring rights would frustrate the objectives of article “x”, since the use of electronic means did not, in reality, constitute an imposition by the originator, but, rather, implementation of the way in which rights were transferred through an electronic system.

19. Ms. BOSS (United States of America) said that where sender and recipient were set up to transfer rights through electronic messaging it could be argued that there was already implicit agreement to send and receive messages. The question of whether a transferee could be required to take data messages if not equipped to do so or if there was a need for paper was a separate issue, relating to the right of the transferee to demand replacement paper. In fact under paragraph 3 transferees would have a unilateral ability to terminate data messages and substitute paper for such messages.

20. Mr. MAZZONI (Italy) said if the rule applied to a unified system embracing both parties then clearly the question of consent did not arise, since there was consent by virtue of adhering to the system. But the rule was not worded in such a way as to make it apparent that it applied to such systems. It could, in fact, apply to someone who had an electronic capability but did not wish rights to be transferred by electronic means, and the rule would also allow a switch from paper to electronic messages even if the recipient did not want that, an issue which was not addressed under paragraph 3, which, rather, dealt with that situation. In effect the proposal would embody an involuntary rule concerning the switch from paper to electronic means, even though that was not the purpose of the rule. Unless the rule were amended to indicate that it referred to a closed system, within which the question of consent did not arise, the issue still needed to be addressed.

21. Mr. LLOYD (Australia) said the paragraph did not confer upon the transferee a right to transfer by electronic means, but merely a legal equivalence between data messages and paper. In actuality a recipient could simply say that paper was required and a transferee would then need to make appropriate arrangements.

The meeting was suspended at 11.30 a.m. and resumed at noon.

22. Mr. MADRID (Spain) said he supported the changes to article “x”, paragraph 4, proposed by the United States and Australia. That paragraph did not impose any obligations; like the rest of the Model Law, it was intended only to facilitate the use of electronic means of communication.

23. Mr. CHANDLER (United States of America) suggested that the Guide should clarify that the paragraph was not intended to make the use of electronic data interchange (EDI) mandatory.

24. Ms. REMSU (Observer for Canada) said she agreed with the delegations of the United States, Australia and Spain that there was no need to refer to the agreement of the parties, since the transfer of rights to goods was subject to agreement whether or not it involved EDI.

25. Paragraph 4, as amended, was adopted.

Draft Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication (A/CN.9/426)

26. Mr. SORIEUL (International Trade Law Branch) introduced document A/CN.9/426, the annex to which contained the draft Guide to Enactment of the UNCITRAL Model Law. That text reflected the suggestions and decisions of the Working Group at its twenty-ninth session, as well as those of the Commission at its twenty-eighth session. In addition, the points raised at the Commission’s current session would be incorporated into the final version of the Guide. He suggested that the Commission should discuss only the substantive points that should be reflected in the Guide; any terminological or other drafting changes should be submitted to the secretariat in writing. Although the Guide would not be finalized by the end of the current session, the Commission could adopt it because any changes in its content would be reflected in the report, which would be available by the end of the session.

27. Ms. BOSS (United States of America) said the Guide would have to reflect the Commission’s earlier decision to change the words “electronic data interchange” in the Model Law’s title to “electronic commerce”. Accordingly, terms such as “EDI users” and “EDI practice” would also have to be changed. She was concerned about the use of the term “minimum requirements” in several places in the Guide because it seemed to invite legislatures to adopt further requirements, which was not the Commission’s intent. The descriptions of “basic standards” in the sections on the concepts of “writing”, “signature” and “original” were clearer, and the same technique should be used in all references to minimum requirements.

28. Mr. MADRID (Spain) asked whether the secretariat could provide delegations with a draft Guide showing the paragraphs in the order in which they appeared in the amended version of the Model Law. The Commission could then adopt the substance of the Guide, though not the actual wording, when it adopted its report. The changes in the name of the Model Law, noted by the United States, was also a change of perspective, which must be reflected in the Guide. The same was true of the decision to change “a rule of law” to “the law”, which would require more extensive revision than a simple substitution of one term for another.

29. Mr. SORIEUL (International Trade Law Branch) said the Commission had two alternatives: to adopt the Guide without seeing the final document, in which case the Guide would be published along with the Model Law within a few months, or to wait until the next session to adopt the Guide. The disadvantage of the second alternative was that it could lessen the usefulness of publishing the Model Law in the current year, since the Commission had agreed that the Model Law must be read in conjunction with the Guide in order to be interpreted correctly.
30. Ms. BOSS (United States of America), supported by Mr. CHOUKRI (Observer for Morocco), said it would be dangerous to delay the finalization of the Guide until 1997 while publishing the finalized Model Law in 1996. Her delegation had full confidence in the secretariat’s ability to incorporate comments from delegations in a final product, and called upon the Commission to approve the Guide, on the understanding that it would be revised to accommodate the changes made in the Model Law during the Commission’s current session, the Commission’s discussion of those changes, the comments made during the Commission’s discussion of the Model Law and the written comments on the draft Guide submitted to the secretariat by delegations.

31. Mr. ABASCAL (Mexico), supported by Mr. SANDOVAL LOPEZ (Chile), agreed that the adoption of the Guide should not be delayed. As had been done in the case of the draft Notes on Organizing Arbitral Proceedings, the secretariat should be given a mandate to implement the comments made during the Commission’s debate on the Guide and provide a finalized document with the prior approval of the Commission.

32. Mr. LLOYD (Australia) said paragraph 78 of the Guide should be included under article 5, where the phrase “a rule of law” first occurred, and should be worded so as to refer to each of the subsequent occurrences of that phrase. Moreover, the third sentence of paragraph 84 appeared to contradict the sentence immediately preceding it. He also suggested the possibility of issuing a draft Guide pending publication of the finalized Guide.

33. Mr. STURLESE (France) said publishing the Guide and the Model Law separately would be regrettable; the Model Law needed to be read in the context of the clarifications contained in the Guide. A flexible approach, as suggested by the secretariat, would be to adopt the existing draft of the Guide and then mandate the secretariat to incorporate any substantive changes in it.

34. Mr. FARIDI ARAGHI (Islamic Republic of Iran) requested clarification as to whether the Guide would be published in two parts, in parallel with the two parts of the Model Law.

35. Mr. SORIEUL (International Trade Law Branch) said comments on the substance of article “x” would have to be integrated in the Guide once that article had been adopted; the Guide should also reflect the discussion on the significance of the Model Law’s division into two parts. He suggested that a date should be added to the heading of the Guide, so that new material could be added in the future without requiring a change of title.

36. Mr. GOH (Singapore), supported by Mr. NIYOM-RERKS (Thailand), expressed doubts regarding the appropriateness of adopting the Guide without having considered the final version. The Model Law would be adopted at the Commission’s current session, but the Guide could be adopted at the following session if necessary.

37. Mr. MASUD (Observer for Pakistan) said he joined previous speakers in expressing confidence in the secretariat’s ability to prepare a final version of the Guide in the light of the current discussions. Moreover, in order to clarify the voluntary nature of the use of electronic commerce envisaged under the Model Law, he suggested that in paragraph 55 of the Guide the words “without in any way imposing it” should be added before the colon at the end of item (1) in the list of basic principles underlying the Model Law.

38. Mr. ZHANG Yuqing (China) said he completely agreed with the representative of Singapore in that there appeared to be no need to publish the Model Law and the Guide at the same time. The Model Law, if adopted at the current session, could be published first, but the many changes made in the Model Law during the current session would have an impact on the Guide. There appeared to be no precedent for allowing the secretariat essentially to rewrite the entire Guide on the Commission’s behalf and then publish it without having the Commission examine the final version and amend it if necessary.

39. Mr. BURMAN (United States of America), supported by Mr. ABASCAL (Mexico) and Ms. REMSU (Observer for Canada), said the comments contained in the Guide reflected the provisions agreed to in the Commission’s debates. There were precedents for allowing the secretariat to compile a finalized version of such commentaries with the Commission’s prior approval, most recently in the case of the draft Notes on Organizing Arbitral Proceedings. Timely publication of the Guide and Model Law was important, in view of the desire of many countries to refer to the Model Law in formulating their own national legislation in the area of electronic data interchange.

The meeting rose at 1.05 p.m.

Summary record of the 600th meeting

Held at Headquarters, New York, Friday, 7 June 1996, at 3 p.m.

[A/CN.9/SR.600]

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

The meeting was called to order at 3.20 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421; A/CN.9/XXIX/CRP.3)

1. Mr. BURMAN (United States of America) said that the occasion of the 600th meeting of UNCITRAL was a source of pride to all delegations since the Commission had contributed substantially to the harmonization of legal procedures between nations with different legal systems and from different parts of the world. It was widely recognized that over the years UNCITRAL had achieved its objectives while remaining non-politicized, technically focused and productive.

2. Mr. RENGER (Germany) said it was essential at the current session that the Commission should not only adopt the draft Model Law on Legal Aspects of Electronic Data Inter-
Changes would necessarily have to be made in the draft Guide as a result of the changes made to the text of the Model Law. In that connection, he urged delegations to submit any outstanding comments to the secretariat so that they could be incorporated into the Guide for publication.

3. Mr. VARSO (Slovakia) noted that while there was a consensus on the need to issue the Model Law and the Guide at the same time, there was no consensus concerning the adoption of the Guide by the Commission. A compromise whereby the Model Law would be published on behalf of the Commission while the Guide was prepared by the secretariat and issued with the authorization of the Commission, might accommodate the concerns of the Singaporean and other like-minded delegations.

4. Ms. ALLEN (United Kingdom) said her delegation endorsed the view that the Model Law and the Guide should both be adopted at the current session of the Commission. She had great faith in the secretariat’s ability to come up with a satisfactory Guide.

5. Mr. GOH (Singapore) said that in view of the desire of many delegations to have the Model Law and Guide published at the same time and as early as possible, his delegation would have no objection to the compromise procedure suggested by the representative of Slovakia.

6. Mr. ZHANG Yuqing (China) said that while his delegation was not opposed to the compromise solution suggested by the representative of Slovakia, it still felt that since the Guide in its entirety had not been discussed by the Commission, it was not appropriate to publish it in the name of the Commission.

7. Mr. SORIEUL (International Trade Law Branch) said it was obvious that, if a single document contained both the Model Law as adopted by the Commission and a guide published by the Commission secretariat and authorized by the Commission, it would be difficult for most readers to distinguish between the authority of the Model Law and that of the Guide. Further difficulties would arise should the Commission be unable to publish the Guide in the same document as the Model Law. He would have to consult the rules governing United Nations publications, for the issue was certainly a complex one.

8. Mr. BURMAN (United States of America) suggested deferring final action on the Guide until the secretariat had had an opportunity to review the matter in the light of the applicable United Nations procedure. He hoped that those delegations which were not wholly in agreement with the substantial majority that favoured authorizing the secretariat to publish the Guide might also be given some time to reconsider their positions. However, any solution that permitted the Guide to be published separately from the Model Law because of the different legal status of the two documents would be unacceptable.

9. Mr. ABASCAL (Mexico) agreed with the statement made by the representative of the United States of America.

10. The CHAIRMAN said that action on publication of the Guide would be deferred. She then invited the Commission to consider further revisions to the provisions of the Model Law.

Article "x"

11. Ms. BOSS (United States of America) introduced her delegation’s proposed amendments to paragraph 3 of article "x" as amended by the United Kingdom (A/CN.9/XXIX/CRP.3). Paragraph 3 was intended to deal with situations where transfers of rights had been accomplished in the past by data messages and a decision had been made to convert to paper. Paragraph 3(a) was intended to protect the holder of a right acquired by means of a data message against involuntarily losing that right by the issuance of a paper document while paragraph 3(b) gave full warning to further transferees of that paper document that although data messages had been used in the past, they could no longer be used. The last sentence was based on the original version of article "x", paragraph 3.

12. Ms. REMSU (Observer for Canada), noting that the Model Law sought to open the door to the use of electronic technology, said that paragraph 3(b) meant that once paper was adopted instead of electronic technology, parties who took interest in goods subsequent to the conversion from electronic technology to paper were barred from using such technology even though it might be EDI-capable. Indeed, paragraph 3(b) seemed not only to contradict the overall purpose of the Model Law by not facilitating the use of technology but also to let the State, rather than the parties shape the practice.

13. Mr. LLOYD (Australia) said that his delegation had some reservations about paragraph 3(b) and would prefer to delete it. If the goal of the provision was to stop reversion from paper documents to electronic messages, it would not work; requiring that a statement should be made in a document was not the same as prohibiting such a reversion. Furthermore, if a mistake was made in a bill of lading and an electronic message was replaced by a paper document but, either mistakenly or inadvertently, the statement required in paragraph 3(b) was not included, that bill of lading would be considered invalid and the effect would be to penalize a bona fide recipient of a paper bill of lading, who would have to seek recourse under domestic law. The penalty should be targeted towards the issuer of the paper bill of lading.

14. Ms. BOSS (United States of America), replying to the observer for Canada, said that paragraph 3(b) was not intended to disempower the parties from surrendering a paper document at a later stage and issuing data messages instead. Her delegation’s amendments were intended to make it clear that so long as a paper document was outstanding, data messages could not be used. To that end, the words “in place of the paper document” could be changed to “while such paper document is outstanding”. That would constitute a warning to the issuer of the paper document and any subsequent holders that if there was a reversion to data messages, the two could not exist simultaneously, and that the paper document must be surrendered; that was consistent with maritime practice.

15. Mr. BURMAN (United States of America) said he could not agree with the points made by the representative of Australia. It was very important to keep the provisions of the Model Law consistent with existing maritime practice, and paragraph 3(b) had been crafted after lengthy deliberations. The most that could be done in bill-of-lading practice was to rely on the statements in the documentation; it was not possible to reassess the rights and obligations that derived from them. It had to be assumed that the parties were aware of the documentation they received. The possibility of the existence of duplicate bills of lading was faced by every issuer and every person who honoured a bill of lading; if there was a discrepancy, nothing in article "x" prevented action being taken against the issuer.

16. Mr. MASUD (Observer for Pakistan) said that the use of the word “effect” in the first line of paragraph 3 meant that the right or obligation had already been transferred. That being so, it was not clear how that right or obligation could subsequently be affected by a paper document, or how any contradiction between the two actions would be resolved. The last sentence of the paragraph also highlighted that contradiction.
17. Paragraph 3(b) referred only to the carrier and the consignee, but made no mention of the shipper and gave no indication of how disputes between the shipper and the carrier would be resolved. The use of the word “acquired” in paragraph 3(a) was inconsistent with paragraph 4, in which the word “granted” had been used; it would be better to use the verb “acquire” in both cases.

18. Mr. FALVEY (Observer for the International Association of Ports and Harbors), referring to the concerns expressed by the observer for Canada, said that article “x” dealt with actions in pursuance of a contract for the carriage of goods. It was therefore unlikely that it would apply to a transaction subsequent to the completion of such a contract, since the key action for completion of such contract was the delivery of the goods to the persons entitled to receive them. Paragraph 3(a) was designed to provide protection both to the person subject to the obligation to deliver and to the holder of a right acquired by means of a data message indicating that the goods would be delivered to the person who was entitled to receive them. It was not possible to have both a data message and a paper bill of lading being presented as the basis for delivery. The carrier would therefore rely on the data message unless it had been agreed between the holder of a right acquired by means of a data message and the carrier that data messages were no longer valid for the purpose of the delivery of goods. Even after the presentation of a properly substituted paper bill of lading, a data message could be used to direct a carrier to deliver to a different location than that specified in the bill of lading.

19. Mr. PHUA (Singapore) said that it was made clear in paragraph 43 of the report of the Working Group (A/CN.9/421) that the draft article was based on the Rules for Electronic Bills of Lading of the Comité maritime international (CMI), known as the CMI Rules, and on the BOLERO project. He asked the secretariat to update the Commission on pilot projects carried out under the CMI Rules and the BOLERO project.

20. Mr. ILLESCAS (Spain) said that his delegation endorsed the point made by the observer for the International Association of Ports and Harbors. If a consignee claimed goods on the basis of a paper document and another consignee in the same port claimed the same goods on the basis of a data message, enormous problems would arise. His delegation therefore urged caution, particularly since some national laws required the use of paper-based bills of lading.

21. He suggested that in paragraph 3(a), the word “previously” should be added before the words “ceased to be valid”; otherwise there would be a period during which goods were documented both by a data message and by a paper bill of lading, and that situation must be avoided. He also suggested that the words “derived from the data message” should be added at the end of the last sentence of paragraph 3 so as to avoid raising the question of rights and obligations derived from documents or data messages other than the transport document itself.

22. Lastly, in the Guide to Enactment, Governments should be advised to bear in mind the possibility of converting paper-based documents to electronic messages.

23. Mr. BURMAN (United States of America) said that the fact that neither the CMI Rules nor the BOLERO project had yet achieved widespread application, reflected uncertainty in the absence of model laws which provided a level of predictability and commercial protection in the use of electronic messages. Both sets of rules were premised on existing maritime practice, and the Commission would be unwise to depart from them. Paragraphs 3 and 4 aimed to facilitate the adoption of electronic bill-of-lading practice.

24. Ms. BOSS (United States of America) said her delegation agreed that it should be made clear in the Guide to Enactment that article “x” dealt only with certain aspects of bill-of-lading practice and that there were other areas which needed to be considered at the same time. The first requirement to be met in making an effective conversion from paper to electronic documents was the cancellation or surrender of outstanding bills of lading, and that was part of maritime practice: a new bill of lading was not issued until the prior bill was returned.

25. As to the Spanish proposal regarding paragraph 3(a), her delegation would prefer to include an explanation in the Guide to Enactment. In any case the situation was covered: if the use of data messages ceased to be valid, and a new data message was subsequently used, it would be invalid under paragraph 3(b). There was no need to make provision for the period after the issuance of the paper document. Moreover, the statement in paragraph 3(b) was being made by the issuer, and was therefore binding on him.

26. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said that if there were situations in actual practice in which paper documents were converted to data messages, they should be covered in the Model Law. The impact on national legislation would not be the same if such situations were merely referred to in the Guide to Enactment.

27. The words “rule of law” in paragraph 3 should be changed to “law”, as already agreed and in line with paragraph 4.

The meeting was suspended at 4.35 p.m. and resumed at 5.20 p.m.
33. Mr. MADRID (Spain) and Mr. PHUA (Singapore) agreed that the Guide would be more readily understandable by legislators if it began with a brief executive summary stating clearly and concisely the purpose of the Model Law and the content of the Guide.

34. Ms. GUREYeva (Russian Federation), referring to the remarks of the representative of the United States of America regarding paragraphs 28 and 29, wondered why emphasis was placed on the technical aspects of the Model Law. She also wondered what provisions would be made so that in the future the text of the Model Law as a whole could be changed as appropriate.

35. Mr. BURMAN (United States of America) said that the Commission could undertake a re-examination of the text at any time in order to bring it up to date.

36. Mr. SORIEUL (International Trade Law Branch) agreed with the suggestion that the "History and background" section should be placed in an annex to the Guide. He agreed that periodic reviews of the Model Law would be desirable because of the particular nature of the subject matter and the rapid technical changes that could be expected; for that same reason it would also be useful for the current text to be described as the "1996 version" of the Model Law.

37. Mr. PHUA (Singapore), referring to paragraph 39 of the Guide, said that the wording of the second sentence should be clarified, since it might be thought to extend the coverage of the Model Law to paper-based documents.

38. The CHAIRMAN said that the appropriate drafting changes would be made.

*The meeting rose at 6 p.m.*

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**Summary record of the 601st meeting**

**Held at Headquarters, New York,**

**Monday, 10 June 1996, at 10 a.m.**

[A/CN.9/SR.601]

*Chairman: Mrs. PIAGGI de VANOSI (Argentina)*

The meeting was called to order at 10.15 a.m.

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**ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)**

*Article “x” (continued)*

1. Mr. CHANDLER (United States of America) said that in proposing its two formulations of paragraph 3 of draft article “x” (A/CN.9/XXIX/CRP.3), his delegation had simply wished to caution users against allowing data messages to coexist with paper bills of lading. As the formulations of the paragraph proposed by other delegations appeared to entail unintended consequences for users, he suggested that the second United States formulation should be used; however, a new sentence reading "Any paper documents issued shall contain a statement of such determination." should be inserted between the existing first and second sentences.

2. Mr. LLOYD (Australia), Mr. ILLESCAS (Spain), Mr. RENGER (Germany) and Mr. SANDOVAL LÓPEZ (Chile) supported the proposal.

3. Ms. BAZAROVA (Russian Federation) requested clarification as to whether such a statement of determination applied only to the specific paper document it appeared in, or to all subsequent documents in a given transaction.

4. Mr. CHANDLER (United States of America) said in order to avoid duplication of documents, carriers and issuers of bills of lading would understand that such a statement would apply to all subsequent documents issued in the course of the transaction.

5. Mr. MASUD (Observer for Pakistan) suggested that for greater clarity, the new additional sentence just proposed by the United States representative should be replaced by the phrase “and the said document contains a statement of such determination”.

6. Mr. CHOUKRI (Observer for Morocco) said that as proposed, the rule appeared to be concerned solely with the contract of carriage, and suggested that it should be made more general in scope.

7. Mr. LLOYD (Australia) said the wording suggested by the delegation of Pakistan would make the inclusion of such a statement a prerequisite for the validity of a paper document, and proposed instead that the phrase “in these circumstances” should be inserted after “Any paper documents issued” in the new additional sentence proposed by the United States representative.

8. The CHAIRMAN said there appeared to be a consensus on accepting the second formulation of paragraph 3 proposed by the United States, with final polishing to be performed by the drafting group.

9. *Article “x”, as amended, was adopted.*

**Possible future work**

10. Mr. BURMAN (United States of America) suggested that the Commission should first take up his delegation’s general proposal regarding the international transport of goods. There was a need for progress in the harmonization of transport law, and the Commission should address the topic in a context broad enough to include all its aspects. Before the establishment of a working group on the topic, however, adequate time should be allowed to permit countries and groups involved in the international commercial transport of goods to submit to the secretariat their views on what would constitute a core of common ground. The secretariat would then be able to provide the Commission with the information needed to evaluate the possibility of achieving greater harmonization. The Commission’s close cooperation with all relevant governmental and non-governmental bodies was essential in that effort, as was the involvement of the trade, i.e. the shippers, carriers, insur-
ers, terminal operators and others actually carrying on the international transport of goods.

11. Mr. CHANDLER (United States of America) said the lack of uniformity in the laws, customs and practices applicable to bills of lading in different countries could lead to misunderstandings and conflicts. Existing liability rules on the carriage of goods, such as the Hague-Visby Rules and the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules), were inadequate because they allowed procedures concerning bills of lading to be determined by national laws. Moreover, current developments with respect to such rules were disjointed, and not all of them were positive. Thus, there was a need to harmonize the entire set of laws and practices concerning the carriage of goods. Since all of the Commission's working groups were currently occupied with other matters, his delegation was suggesting a "bottom-up" approach whereby interested parties would be invited to submit their ideas. Once that process had been completed, in one to three years, the secretariat could tie those proposals together and a working group on the subject could be established.

12. Mr. FALVEY (International Association of Ports and Harbors) said he fully supported the United States proposal. One important issue in that regard was multimodal transport, which, though technologically efficient, was hindered by the different liability regimes applicable to the different means of transport involved. It was important to harmonize and simplify those regimes to facilitate multimodal transport.

13. Mr. ABASCAL (Mexico) said the Working Group's deliberations on draft article "x" had demonstrated the urgency of dealing with issues concerning the transport of goods. He supported the proposal put forward by the United States.

14. Mr. MASUD (Observer for Pakistan) said existing instruments, such as the Hamburg Rules and the United Nations Convention on International Multimodal Transport of Goods, should serve as the starting-point for the Commission's harmonization efforts. For example, the Hamburg Rules, on the carriage of goods by sea, were consistent with the conventions on other means of transport, and helped to harmonize the different legal regimes for the transport of goods by various means. Instead of spending two years gathering opinions on the subject, the secretariat should begin its work immediately.

15. Mr. STURLESE (France) said that, although international rules on the transport of goods undoubtedly needed to be harmonized, modernized and simplified, a new international instrument would not necessarily achieve that goal. It might be preferable to encourage the many countries which had not yet ratified or implemented existing conventions to do so without delay. If the secretariat wished to take up the United States proposal, he would not object, but felt that it was premature to establish a working group on that topic.

16. Mr. VAN DER ZIEL (Observer for the Comité maritime international) said he endorsed the United States proposal because there were many gaps in existing international instruments on the subject. As the United States delegation had pointed out, current conventions did not adequately deal with bills of lading themselves or the rights of the parties under bills of lading. The spread of electronic data interchange (EDI) in international trade and transport made it imperative to consider issues such as how to define the functions of bills of lading. Over the years, bills of lading had acquired new functions, all of which must be harmonized to ensure the success of EDI in the field of trade and transport.

17. Mr. RENGER (Germany) said he shared the French delegation's doubts about the utility of a new instrument to harmonize international transport law. The problem of the electronic transfer of rights was by no means limited to bills of lading or to transport law, and the discussions on article "x" had shown that it was premature to embark on further work before the facts and needs in that area were better understood. There were already many different liability regimes stemming from the application of various earlier attempts to harmonize laws and practices, so that conflicts between international conventions had become more problematic than conflicts between national laws. UNCITRAL must be careful not to add to the confusion.

18. Mr. ILLESCAS (Spain) said the lack of harmony in international law on the transport of goods stemmed from three types of situations: those where the various solutions established in international conventions conflicted with one another because no single formula was universally accepted; those where the relevant international instruments had never entered into force, as in the case of the United Nations Convention on International Multimodal Transport of Goods; and those where no attempt had ever been made to harmonize the relevant laws, as in the case of the rights of third parties and the use of data messages in the international transport of goods. Those three situations should not be dealt with as though they belonged to the same category. With respect to the instruments already in force, UNCITRAL must be careful not to contradict itself by elaborating a new set of rules just after the entry into force of the Hamburg Rules. The issues in the second category might be worth exploring, and those in the third category could be addressed immediately. However, the United States proposal did not distinguish among the three situations, whose essential differences must be taken into account.

19. Ms. CRAGGS (United Kingdom) said she agreed with the French and German delegations that there was no need to begin the task of harmonization immediately. She was not aware of any major difficulties with the operation of the Hague-Visby Rules, which were the most widely applied regime in that area. Rather than begin work on a new instrument, the Commission should encourage more countries to adopt the Hague-Visby Rules. The United Kingdom did not support the Hamburg Rules and would not ratify them unless a majority of its trading partners did so.

20. Mr. BURMAN (United States of America) said he agreed that there was no immediate need to establish a working group. However, the Commission could begin the process of inviting comments and proposals. If it then determined that there was sufficient potential for progress, the secretariat could prepare a study and a draft instrument. The United States proposal was based on extensive discussions with groups involved in the carriage of goods by sea. Merely emphasizing existing conventions was tantamount to admitting that no progress could be made, since it was clear that some of those conventions were unlikely to be widely ratified and would never cover a significant proportion of the goods transported worldwide. Moreover, it was important to involve commercial sectors in determining the possible bases for future work. His delegation's proposal would enable the Commission to examine in depth, at little cost, a field in which very little harmony had been achieved thus far.

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

21. Mr. ABASCAL (Mexico) said his delegation could support the United States proposal on the understanding that the secretariat was simply authorized to initiate a study or to prepare a questionnaire requesting information from States or other interested parties. It should be made quite clear, however, that the Commission was not seeking to amend the Hamburg Rules, since that would have the effect of discouraging States from joining that regime.
22. Mr. CHANDLER (United States of America) said the aim of the exercise would be to see whether any consensus emerged; it would not work to the detriment of the Hamburg Rules. If in fact the approach was premature, that would become apparent. The work would not be done by the secretariat but would comprise submissions by interested parties. The reality was that in addition to there being several regimes, those regimes were being modified by States individually, adding to the confusion.

23. Ms. SABO (Observer for Canada) said the Commission should take account of the limited resources available to the secretariat, and of the fact that there were other topics worthy of consideration, such as rules on digital signatures. The Commission should also acknowledge the impact of the United States proposal on resources, and should be careful not to discourage States from becoming parties to existing instruments. Nevertheless her delegation could accept the United States proposal if those concerns could be accommodated.

24. Mr. VAN DER ZIEL (Observer for the Comité maritime international) said what was needed was not work on liability, which was covered by existing conventions, but, rather, work on the gaps existing in all of the current instruments. There was, for example, no harmonization in the area of the rights and obligations of shippers regarding whether a shipper retained any rights where those rights were transferred to a subsequent holder. A second area of concern was that of consignees and their possible obligations. There were recent signs of further fragmentation with regard to the situation of consignees, making harmonization imperative. The Commission must, of course, allow commercial practice to evolve, but should not trail very far behind.

25. Ms. GUREYEVA (Russian Federation) welcomed the United States proposal, but noted the importance of prioritizing the future work of the Commission. In the first instance it would be preferable to conduct a study of current practice in various countries, and perhaps, as suggested by the representative of Mexico, a questionnaire could be sent to elicit relevant information. She also agreed with the observer for Canada that there were other issues requiring the Commission's attention.

26. Mr. LLOYD (Australia) said he supported the observer for Canada. While he had no objection to the United States proposal, there were other priorities, such as performance rules and digital signatures. There were already inconsistencies in the latter area and the Commission should combat the lack of harmonization. If the secretariat had adequate resources it could follow up on the United States proposal, but as a lower priority.

27. Ms. CRAGGS (United Kingdom) agreed with the Canadian and Australian delegations that the study proposed by the United States should be postponed until more pressing matters had been considered. The Commission should also be given a clear indication from the industry that such a study was necessary. The exercise would comprise a wide spectrum of activities and a large number of issues which would probably require the establishment of a number of working groups and the investment of a great deal of time by the secretariat. Furthermore, no resources were currently available.

28. Mr. BURMAN (United States of America) said that, while he shared the concerns expressed by the United Kingdom representative, the industry had made it abundantly clear that the study should not be delayed. Perhaps, as the Australian and Canadian delegations had suggested, the work should be undertaken but given low priority. At least that would initiate a flow of proposals and send a clear message to the industry that there was a forum willing to consider the topic at an appropriate time. He also believed that no work would be involved in the immediate term, as it would take the industry some time to collect its thoughts.

29. Ms. CRAGGS (United Kingdom) said she was not aware of any pressure from the industry to begin such a study. There was, however, no harm in soliciting suggestions on which areas to address. She wondered what "low priority" meant in practice. If proposals were solicited, the secretariat must be prepared to work on them; it was not clear how much time and effort that would involve.

30. Ms. SABO (Observer for Canada) inquired whether the secretariat could provide an estimate of the time and work that would be required.

31. Mr. HERRMANN (Secretary of the Commission) said that "low priority" meant that harmonization would be considered after the conclusion of all items for which there were currently working groups, future work on Build-Operate-Transfer projects (BOT) and other items which might be considered more urgent by the Commission. The study might involve more work at the very beginning, as a questionnaire might have to be circulated. He assumed, however, that, if that were the case, the Commission could benefit from the experience of the Comité maritime international which had sent a questionnaire on harmonization to international maritime law associations. It was hard to predict how much work would be required later on; that depended very much on the number and type of proposals submitted and on whether clarification had to be sought on the replies to the questionnaire.

32. He also wished to remind the Commission that the secretariat was operating on a very tight budget because of the financial crisis, and that its staff of five Professionals was not likely to change while there was a freeze on recruitment. The secretariat could send letters inviting proposals and give the Commission a progress report in approximately two years. The Commission might also limit its task by focusing on a few areas on which a consensus might be achieved rather than on the entire spectrum of activities.

33. Mr. LLOYD (Australia) suggested that, as a compromise, the report of the Commission could indicate that, at its next session, a decision would be taken as to whether resources were available to undertake a study on harmonization. That would reflect the importance which the Commission attached to the study without requiring it to begin any work in the current year.

34. Ms. SABO (Observer for Canada) noted that, in the project to develop a legal instrument relating to cross-border insolvency, the secretariat had collaborated with the International Association of Insolvency Practitioners, which had carried out most of the preparatory work of collecting information and identifying core areas. Perhaps the secretariat could lighten its workload by entering into a similar arrangement with an outside organization.

35. Mr. BURMAN (United States of America) supported the Canadian suggestion but said that the Australian proposal to mention the study in the Commission's report might not send a strong enough signal that the Commission was willing to serve as a forum for the study. It would be regrettable to miss an opportunity.

36. Ms. CRAGGS (United Kingdom) said the Canadian suggestion was acceptable on the clear understanding that any suggestion received by the Commission would be acted on in a timely fashion.

The meeting rose at 1.05 p.m.
Summary record of the 602nd meeting

Held at Headquarters, New York,
Monday, 10 June 1996, at 3 p.m.

[A/CN.9/SR.602]

Chairman: Mrs. PIAGGI de VANOSSEI (Argentina)

The meeting was called to order at 3.15 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued) (A/50/17; A/CN.9/421 and 426)

1. The CHAIRMAN said that if she heard no objection, she would take it that the Commission agreed to entrust the publication of the Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication to the secretariat, which would be authorized to make changes as suggested by the Commission. In that way, it would be possible to publish the Guide together with the Model Law.

2. It was so decided.

Possible future work (continued)

3. The CHAIRMAN said there was a consensus that the Commission should continue to accept and consider proposals for future work, but that such proposals would not be considered to be a high priority.

4. Mr. SANDOVAL LÓPEZ (Chile) said that the Commission should not consider any new topics in the area of maritime transport for which numerous conventions already existed. His country had joined the international effort at harmonization by adopting uniform legislation such as the Hamburg Rules. If it was decided, some delegations had proposed, that the Commission would consider outside bodies’ concerns relating to new aspects of maritime law, his delegation strongly believed that the topic of liability in maritime transport should be excluded, since it was already covered by the Hamburg Rules and The Hague regime. By establishing another regime in the area of liability, the Commission would be undermining current efforts at harmonization.

5. Mr. BURMAN (United States of America) introduced his delegation’s proposal regarding future work on electronic commerce. From a review of the work done by the Working Group on Electronic Data Interchange (EDI) and discussions with commercial sector groups and government agencies in a number of countries, two major topics of concern had emerged: digital signatures and electronic commerce contract and performance. His delegation recommended that the secretariat should be authorized to produce a preliminary study on each topic, to be considered by the Working Group in 1997. The Working Group would then make recommendations which would be considered by the Commission at its thirtieth session in order to determine the course of future work.

6. International rules on digital signatures could be the key to further progress in electronic commerce. In recent months, many countries had begun to develop laws regarding digital signatures to provide standards by which a remote party could sign a document through computer means and have some reasonable commercial assurance of the signature’s acceptability. The Commission had the unique opportunity to set international legal norms to guide the growth of electronic commerce. It would be far more difficult to unravel embedded differences between national laws in the future.

7. Moreover, in the case of electronic and computer-based communications and transactions, many legal issues were no longer covered under contract or copyright law. For example, where data messages and the sale of products which consisted of electronic data were concerned, it was no longer clear what was meant by the terms “performance” or “delivery” when those products were taken off the Internet. There again, the Commission could take the lead in providing the legal infrastructure for trade and commerce.

8. Lastly, his delegation wished to propose a third topic for future work which was based on a recommendation of the Working Party on Facilitation of International Trade Procedures (WP.4) of the Economic Commission for Europe, which had identified impediments to electronic commerce arising from “writings” and other such requirements. WP.4 had invited the Commission to assess the feasibility of undertaking corrective work in that area. The Commission could consider whether it could take any appropriate action after the preparation of a secretariat study.

9. Ms. BOSS (United States of America) said that the two main topics for future work proposed by her delegation had two essential characteristics which it believed should guide the Commission’s future work in the field of EDI. Both topics dealt with areas where uniformity in law was crucial to the development of commerce and both were directly related to the Model Law. A number of jurisdictions, nationally and internationally, were beginning to consider the adoption of legislation that would determine the circumstances under which digital signatures would be recognized in commercial practice and had, in some instances, initiated systems for certifying the authenticity of those signatures. It was vital that the applicable rules should be uniform lest they become a barrier to international and national trade.

10. In the draft Model Law, the Commission had considered the extent to which data messages would comply with writing and signature requirements. Thus, the area of digital signatures was integrally related to the Model Law. While the Model Law had basic rules regarding the authenticity of messages and contract formation, those rules did not fully address the type of transactions that were currently being undertaken in an electronic environment. There existed a body of laws that governed the sale of goods, but there was no body of law anywhere, that dealt with such transactions as the licensing or purchase of software or with contracts granting access to information or data in an electronic environment.

11. The Commission still had to determine what the final work product in that area would be, what specific topics would be treated under either of the proposals and how the various issues would be handled. That was why her delegation had requested the secretariat to conduct a preliminary study of each topic which could then be discussed by the Working Group before being submitted to the Commission.
12. Mr. STURLESE (France) said that before making a decision on future work, the Commission should decide if it wanted to continue working on EDI or on build-operate-transfer (BOT) projects, since it did not have the resources to work on both topics simultaneously. If the Commission decided to continue working on EDI, his delegation did not consider digital signatures to be a topic of fundamental concern at present. The Commission should continue the work it had begun on the possible preparation of a code of conduct for third-party service providers which provided the interface between users in an electronic environment.

13. Mr. HERRMANN (Secretary of the Commission) said that the Working Group on Electronic Data Interchange was reserved for EDI matters, subject to the Commission’s decision and possible changes. As far as BOT was concerned, a substantive discussion could be held thereon at the next session of the Commission.

14. Mr. SORIEUL (International Trade Law Branch) said that the Commission should give very clear instructions to the secretariat concerning the scope of the studies it wished to have carried out because they involved fields in which there was very little literature available. The secretariat would have to rely heavily on the assistance of delegations. The Working Group should not have to waste time on lengthy debates on the exact scope of its mandate.

15. Mr. BURMAN (United States of America) said that his delegation had done its best to confine its proposals to practical topics and to modify them where necessary. It assumed that any important topic that was selected for consideration would of necessity involve third-party service providers, which were constantly growing in number and variety. His delegation had come to a similar conclusion on the subject of electronic registries, which was likely to become an increasingly common topic of discussion. Indeed, it now appeared more practical to take up both electronic registries and third-party service providers in the context of individual topics such as digital signatures and electronic contract and performance rules rather than as generic topics in themselves.

16. Mr. Won-Kyong KIM (Observer for the Republic of Korea) said that the Commission should continue its consideration of electronic commerce so that the Model Law could become a useful tool for the international community. With regard to the specific topics to be given priority, he found the United States proposal acceptable.

17. Mr. RENGER (Germany) said that because of the growing importance of electronic interaction in all fields, including international trade, the problem of digital signatures went far beyond commerce. It was related to a host of laws, including international civil law and administrative law as well. Indeed, he was not sure whether UNCITRAL was the appropriate body to discuss and find an internationally acceptable solution to the problem of digital signatures. His delegation did not believe that a role could be found for digital signatures which applied to international trade law treaties. One of the problems of the electronics field was the rapidity of its development. Delegations to UNCITRAL, which represented national Governments, should think about the overall welfare of their countries and not focus solely on the interests of the electronics industry, which was profit-driven.

18. Ms. SABO (Observer for Canada) said that while she agreed with the representative of France on the need to consider all priorities, she disagreed with him as far as EDI priorities were concerned. She supported the United States proposal to undertake work in the areas of digital signatures and contract performance rules in electronic commerce. However, she was concerned that the Commission would be asking the secretariat to undertake too much.

19. Mr. ABASCAL (Mexico) said that he would prefer the Commission to continue working on EDI and to take advantage of the momentum already generated by the Working Group to develop the Model Law further. He suggested that the Working Group should be mandated to begin formulating a new set of rules or principles after examining and approving some of the topics submitted to it by the secretariat.

20. Ms. CRAGGS (United Kingdom) said that in her view, digital signature standards and the knowing with certainty the identity of the party one was dealing with were the absolute bedrock of electronic commerce. Very closely linked to that was the issue of performance rules. For that reason, her delegation supported the United States proposal that the Working Group should give top priority to work first on digital signatures followed closely by contract and performance rules.

21. Mr. ILLESCAS (Spain) said it was significant that once the Commission completed its current work on EDI it planned to change the title of the Model Law so that it referred to electronic commerce. The thorough understanding of that field acquired by the Commission and the Working Group on EDI over the previous five years should be exploited to the fullest. To the extent that resources allowed, a working group that dealt with those topics should continue to exist.

22. A good starting point for the work of the Working Group was digital signature; the expression of the will to negotiate with proper security and proper assurances that the data message corresponded to a will to negotiate. Equally important were third-party interventions in the passage of the electronic message, the rules relating to performance in the context of electronically concluded contracts and the question of inclusion by reference. Indeed, the latter aspect was a serious problem in trade transacted on paper; when such business became electronic the problem became even more acute. The issue of electronic registries also needed to be tackled.

The meeting was suspended at 4.40 p.m. and resumed at 5.15 p.m.

23. Mr. SORIEUL (International Trade Law Branch) said that the secretariat had some concerns about the proposed study on rules on digital signatures. Article 6 of the Model Law had deliberately been drafted in very general terms in order to accommodate the possibility of technological change. Very few legislations in the world had detailed rules on digital signatures. The Commission would therefore need to decide which field it wanted the secretariat to study and would need to provide the essential documentation, since few legal publications were available in the field.

24. Mr. CHANDLER (United States of America) said that four states in the United States of America had passed laws on digital signatures, and approximately 14 others were considering the adoption of such laws. Relevant materials could be furnished to the secretariat. Issues were emerging which had legal implications and, with the proliferation of digital signature devices, the need for regulation would become apparent.

25. Mr. ABASCAL (Mexico) said that the name of the Working Group on Electronic Data Interchange should be changed in line with the new title of the Model Law.

26. Mr. FARIDI ARAGHI (Islamic Republic of Iran) said that there might not be enough material to warrant a study on
the rules on digital signatures. His delegation would prefer to concentrate on incorporation by reference and third-party information and service providers.

27. Mr. STURLESE (France) said that everyone agreed it was important for the work on electronic commerce to continue. However, he had reservations about having the Working Group study the rules on digital signatures because the mandate was not very specific; moreover working groups were expensive, both for the United Nations and for Governments. Unless the Working Group had a clear and precise objective, it would waste time deciding what it should be discussing. In fact, the Working Group itself, in paragraphs 110 and III of its report (A/CN.9/421), had expressed doubts as to whether it would be realistic to focus exclusively on digital signatures.

28. Ms. BOSS (United States of America) said that it was difficult to specify a precise mandate for the Working Group and at the same time give it enough discretion to determine what needed to be done. Clearly, it would be inappropriate for the Working Group to formulate any technical requirements or to dictate the use of any specific technologies; the scope of the topic must be broad enough to encompass emerging technologies. Some specific legal issues that might be considered by the Working Group were the legal basis supporting the certification processes of certifying authorities; rules and guidelines associated with digital signatures; allocations of risk; responsibilities of users in cases of fraud or error; and the role and liability of third-party service providers.

29. The CHAIRMAN said she took it that the Commission accepted the proposal that the secretariat should prepare a study on the rules on digital signatures and a study on electronic commerce contract and performance rules.

30. It was so decided.

The discussion covered in the summary record ended at 5.40 p.m.

Summary record of the 603rd meeting

This summary record was not done upon the request of the committee.

Summary record of the 604th meeting

Held at Headquarters, New York, Tuesday, 11 June 1996, at 3 p.m.

[ A/CN.9/SR.604 ]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 3.20 p.m.

1. The CHAIRMAN invited the Commission to resume its consideration of the draft UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication and drew attention to the revisions proposed by the drafting group, which were contained in documents A/CN.9/XXIX/CRP.2 and Add.1-5.

2. Ms. CRAGGS (United Kingdom) said that the EDI experts who had represented the United Kingdom at previous meetings on the subject were no longer present; consequently, her delegation would need time to consult with its national authorities before it could agree to any further drafting changes.

3. Mr. BURMAN (United States of America) said that the Commission should continue to work together in a spirit of collaboration, in keeping with its usual practice.

4. Ms. SABO (Observer for Canada), supported by Mr. ZHANG Yuqing (China), Mr. ABASCAL (Mexico) and Mr. CHOUKRI (Observer for Morocco), said that her delegation had some doubts regarding the new title proposed for Part I of the Model Law, “Electronic commerce in general”.

5. Mr. SORIEUL (International Trade Law Branch) said that it would be preferable to adopt the proposed title, which was intended to indicate clearly the scope of application of Part I.

6. Mr. ZHANG Yuqing (China) said that his delegation continued to have reservations concerning the title of Part I.

7. Mr. RENGER (Germany), supported by Mr. MADRID (Spain), said that the footnote to the title of chapter I should apply to the Model Law as a whole and should therefore be moved.

8. The CHAIRMAN suggested that the footnote should be placed after the words “This Law” at the beginning of article 1.

9. It was so decided.

10. Article 1, as amended, was adopted.

11. Ms. BOSS (United States of America) proposed that the word “communicated” in article 2, subparagraph (a), should be changed to “sent or received”, as had been done throughout the text of the Model Law. She also questioned whether there had been a consensus in the Commission to change the term “analogous” in the same subparagraph to “similar”.

12. Mr. SORIEUL (International Trade Law Branch) agreed that in order to harmonize the text of the Model Law, the word...
“communicated” in article 2, subparagraph (a), should be changed to “sent or received”. Following a somewhat confused debate, the Commission had decided to retain the word “analogous”.

13. Mr. BURMAN (United States of America), supported by Mr. ABASCAL (Mexico), said he favoured the term “similar”, since it paralleled the term used in the Spanish text. Moreover, the term “analogous” might be confused with the word “analog”, which had a specific meaning in electronic commerce.

14. Mr. LLOYD (Australia) supported the proposal to change “communicated” to “sent or received” and said he believed the consensus of the Commission had been to replace the word “analogous” with “similar”.

15. The CHAIRMAN said that the consensus of the Commission was to replace “communicated” with “sent or received” and to use “similar” instead of “analogous” in subparagraph (a).

16. Mr. Moon-Chul CHANG (Republic of Korea) proposed that the definition of EDI in article 2, subparagraph (b), should be changed to define the term “electronic commerce”, in keeping with the new title of the Model Law.

17. Mr. SORIEUL (International Trade Law Branch) said that the term “electronic commerce” was not equivalent to the term “electronic data interchange”, which was a distinct technical term that could not be defined other than as defined in subparagraph (b). It was open to question, however, whether there was a need to include a definition of the term “EDI” in the Model Law, the title of which had been changed to “Model Law on Electronic Commerce”.

18. Mr. ABASCAL (Mexico) said that there had been some discussion in the drafting group as to whether a definition of EDI should be retained in subparagraph (b). He favoured deleting the definition, since there was no provision in the Model Law which referred to the concept of EDI.

19. The CHAIRMAN said that there had not been sufficient support for the proposed deletion of the definition of EDI from article 2, subparagraph (b), which would be retained as drafted.

20. Article 2, as amended, was adopted.

21. Article 3 was adopted.

Article 10 (A/CN.9/XXIX/CRP.2/Add.4 and Add.5)

22. Mr. SORIEUL (International Trade Law Branch) said that article 10, entitled “Variation by agreement”, should be moved to follow immediately after article 3. The text of paragraph 1 would be amended to read:

“1. As between parties involved in generating, sending, receiving, storing or otherwise processing data messages, and except as otherwise provided, the provisions of chapter III may be varied by agreement.”

The article would be renumbered appropriately.

23. Article 10, as amended, was adopted.

The meeting was suspended at 4.30 p.m. and resumed at 5 p.m.

Article 4 (A/CN.9/XXIX/CRP.2/Add.3)

24. Article 4 was adopted.
Summary record of the 605th meeting

Held at Headquarters, New York,
Wednesday, 12 June 1996, at 10 a.m.

[A/CN.9/SR.605]

Chairman: Mrs. PIAGGI de VANOSI (Argentina)

The meeting was called to order at 10.20 a.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW; POSSIBLE FUTURE WORK (continued)
(A/CN.9/XXIX/CRP.2/Add.11, A/CN.9/XXIX/CRP.2/Add.4
and Add.5)

1. The CHAIRMAN said the drafting group had submitted its report and the Commission should be in a position to adopt the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication.

2. Ms. CRAGGS (United Kingdom) said that, while her delegation was anxious to adopt the draft Model Law, it still had some concerns with regard to the drafting of article 17, paragraphs 3 and 5.

3. With regard to article 17, paragraph 5, it was completely unclear what was meant by “termination” of a data message, who would effect such a termination, whether the message was terminated in practice or simply in legal effect, and whether such termination must be permanent. In order to answer some of those questions, the following sentence could be added at the end of the paragraph: “Nothing in this paragraph shall affect any right to resume the use of a data message for the purpose of conveying a right or obligation, provided that any paper document previously used for this purpose has first been rendered invalid.”

4. With regard to article 17, paragraph 3, which referred to data messages as being “unique”, all such messages were necessarily unique even if they duplicated an earlier message. Each data message was sent at a different time, and if sent to the same person, was obviously unique even though it might be transferring the same right or obligation. Similarly, if a series of data messages were used, transferring or purporting to transfer the same right to a series of different persons, each of those transfers was necessarily unique because the beneficiaries were different. All but the first transfer would be fraudulent, however, if the paragraph was interpreted as referring to a data message or transfer of a unique kind. No national law could or should implement the paragraph as currently drafted. Each data message was sent at a different time, and if sent to a different person, was obviously unique even though it might be transferring the same right or obligation. Similarly, if a series of data messages were used, transferring or purporting to transfer the same right to a series of different persons, each of those transfers was necessarily unique because the beneficiaries were different. All but the first transfer would be fraudulent, however, if the paragraph was interpreted as referring to a data message or transfer of a unique kind. No national law could or should implement the paragraph as currently drafted. The final clause of the paragraph could be replaced by the following: “provided that a reliable method is used to secure that data messages purporting to convey any right or obligation of a person may not be used by or on behalf of that person inconsistently with other data messages by which the right or obligation was conveyed by or on behalf of that person.”

5. It would be preferable for article 17 to be considered further by the drafting group, but her delegation was prepared to accept the text of the Model Law as it stood, although with serious reservations.

6. Mr. BURMAN (United States of America) said that, at the current advanced stage of consideration, extensive restructuring was adopted.
of the text should be avoided. The term “unique” was widely employed in electronic commerce and conveyed the appropriate concept to individuals engaged in that field. It would also be inadvisable to spell out in any greater detail the implications of “termination”, as referred to in article 17, paragraph 5.

7. Mr. CHOUKRI (Observer for Morocco) said his delegation found the United Kingdom proposals valid. With regard to the use of the term “unique” the final clause of article 17, paragraph 3, could be redrafted to read: “provided that a reliable instrument is used to make the data message the unique instrument adopted.”

8. Mr. SANDOVAL LÓPEZ (Chile) said his delegation shared the view of the United States. Delegations had been afforded many opportunities to express their views, and the drafting should not be reopened.

9. Mr. LLOYD (Australia) noted that the paragraphs in question represented a compromise text. The questions raised by the United Kingdom with regard to termination would be worked out in practice over time. The concept of “uniqueness” was indeed vague, and the new drafting proposed by the United Kingdom, which had added some clarity, could be included in the Guide.

10. Mr. PHUA (Singapore) and Ms. SABO (Observer for Canada) supported the suggestion of the representative of Australia.

11. Ms. CRAIGGS (United Kingdom) said that, having expressed its concerns and made its position clear, her delegation was willing to proceed to the adoption of the Model Law, and would welcome the opportunity to have its concerns regarding the term “unique” included in the Guide.

12. The CHAIRMAN said she would take it that the Commission wished to adopt the draft decision contained in document A/CN.9/XXIX/CRP.1/Add.11.

13. It was so decided.

The discussion covered in the summary record ended at 11.15 a.m.

Summary record of the 606th meeting

Held at Headquarters, New York, Friday, 14 June 1996, at 10 a.m.

[A/CN.9/SR.606]

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

The meeting was called to order at 10.45 a.m.


2. Mr. ILLESCAS (Spain), Rapporteur, introducing the draft report, said that in general the report accurately reflected the discussions conducted during the Commission’s twenty-ninth session, and he recommended it for adoption.

Document A/CN.9/XXIX/CRP.1

3. Mr. SEKOLEC (International Trade Law Branch) said that Albania, Kyrgyzstan, Pakistan, South Africa and the Syrian Arab Republic should be added to the list of attending observer States in paragraph 6 and that the Organization of American States should be added to the list of attending intergovernmental organizations in paragraph 7(b).

4. Document A/CN.9/XXIX/CRP.1, as orally revised, was adopted.

Document A/CN.9/XXIX/CRP.1/Add.1

5. Mr. HOLTZMANN (United States of America) suggested that a number of amendments should be made to document A/CN.9/XXIX/CRP.1/Add.1: first, the phrase “or was a ground for refusing enforcement of an award” should be added after the word “violated” in paragraph 3; second, the phrase “took a stand as to whether it necessarily had to be a national law that governed the arbitral procedure or that the Notes” should be deleted from paragraph 5; third, the phrase “or other provisions” should be added after “arbitration rules” in paragraph 21; and fourth, the third sentence in the quotation in paragraph 21 should be revised to read “Moreover, parties that have agreed on arbitration rules that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality.”

6. Document A/CN.9/XXIX/CRP.1/Add.1, as amended, was adopted.

Documents A/CN.9/XXIX/CRP.1/Add.2 to Add.6

7. Documents A/CN.9/XXIX/CRP.1/Add.2 to Add.6 were adopted.

Document A/CN.9/XXIX/CRP.1/Add.7

8. Mr. LLOYD (Australia) suggested that the phrase “which the Commission considered to be good practice and which is provided for in the rules of the Comité maritime international (CMI)”, should be added after the word “interchange” in paragraph 17.

9. Mr. RENGER (Germany) said that the introduction of the topic of draft article “x” in paragraph 1 should include a specific reference to the report of the Working Group contained in document A/CN.9/421.
10. Mr. SORIEUL (International Trade Law Branch) said that the secretariat intended to add such a reference to paragraph 1 when it prepared the final version of the report.

11. Document A/CN.9/XXIX/CRP.1/Add.7, as amended, was adopted.

Documents A/CN.9/XXIX/CRP.1/Add.8 and Add.9
12. Documents A/CN.9/XXIX/CRP.1/Add.8 and Add.9 were adopted.

Document A/CN.9/XXIX/CRP.1/Add.10
13. Mr. PHUA (Singapore) proposed that, in paragraph 3(f), the phrase “and possibly elsewhere” should be added after the phrase “to revise paragraph 39”, and that the phrase “and not to create uncertainty by altering traditional laws on paper-based communication” should be added to the end of the paragraph.

14. Mr. SORIEUL (International Trade Law Branch) said that the proposal by the representative of Singapore appeared to conflict with the original intent of the Model Law, which was to bring about changes in traditional laws on paper-based communications.

15. Mr. PHUA (Singapore) said that while his delegation agreed that the Model Law was intended to aid in modernizing laws on communication, it did not believe that the Commission intended to create uncertainty in traditional laws on paper-based communication.

16. Mr. BURMAN (United States of America) suggested that both the comment by the representative of Singapore and the secretariat’s reply should be reflected in the report.

17. Mr. SORIEUL (International Trade Law Branch) suggested that the report should indicate that, without prejudice to the changes necessarily introduced by virtue of the Model Law, the Law was not intended to alter the traditional use of paper-based documents or the legal regimes traditionally applicable to such documents. A similar indication would have to be included in the Guide to Enactment of the Model Law.

18. Mr. PHUA (Singapore) said that he supported that suggestion.


Document A/CN.9/XXIX/CRP.1/Add.11
20. Document A/CN.9/XXIX/CRP.1/Add.11 was adopted.

Document A/CN.9/XXIX/CRP.1/Add.12
21. Mr. LLOYD (Australia), supported by Mr. BURMAN (United States of America), proposed that, in the last sentence of paragraph 11, the words “as the liability of” should be replaced with “concerning” and the words “work on certification authorities” should be replaced with “each new area of work addressed by the Working Group on Electronic Commerce”. Those amendments would reflect the United States delegation’s earlier proposal that issues involving service providers should be dealt with separately under each of the topics considered by the Working Group.

22. Mr. BURMAN (United States of America) proposed that, in paragraph 2, the sentence “In addition, it was suggested that obtaining the views of the commercial sectors involved would be very important” should be inserted after the first sentence. He also proposed that the last sentence of paragraph 4 should be followed by a new sentence which would read “Contrary views were expressed that, in fact, disharmony had prevailed, and would continue without some new effort at unification.” In the first sentence of paragraph 6, he proposed that the words “currently active” should be inserted before the word “agenda” so that the sentence would not imply that no action would be taken on the issues in question.

23. Mr. RENGER (Germany) said that the proposed addition to paragraph 4 would affect the drafting of paragraph 5 and would cause an imbalance in that part of the report by placing too little emphasis on the reservations expressed by delegations.

24. Mr. BURMAN (United States of America) said that he withdrew his proposal to amend paragraph 4.

25. Mr. HERRMANN (Secretary of the Commission) said that the term “currently active agenda” had no definition in the context of UNCITRAL. Paragraph 6 as a whole accurately reflected the decision not to undertake, at the current stage, harmonization work in the area of the international carriage of goods by sea.

26. Mr. BURMAN (United States of America) said that another way of amending paragraph 6 would be to delete the first sentence and to replace the words “Nevertheless, it” in the second sentence with “The Commission”.

27. Mr. LLOYD (Australia), supported by Mr. STURLESE (France), said that the first sentence of paragraph 6 was important because it specified that no definite decision had been taken to begin work on the issue; without it, the rest of the paragraph was too positive. He proposed that the word “current” should be inserted before the word “agenda” in the first sentence.

28. Ms. SABO (Observer for Canada) said that she, too, was in favour of retaining the first sentence of paragraph 6. She proposed that the words “for immediate priority” should be added after the word “agenda” to address the concern of the United States of America.

29. Mr. RENGER (Germany) and Ms. CRAGGS (United Kingdom) said that they preferred to leave paragraph 6 unchanged, since it accurately reflected the outcome of the Commission’s deliberations on the issue.

30. Mr. BURMAN (United States of America) said that the first sentence conveyed the incorrect impression that the Commission had rejected the idea of doing any work at all on the subject, whereas it had in fact agreed to ask the secretariat to do some preliminary information-gathering.

31. Mr. RENGER (Germany) said that most delegations had rejected the proposal in question and the issue had not been included on the Commission’s agenda. The first sentence was therefore correct.

32. Mr. BURMAN (United States of America) said that if the Commission had rejected the proposal outright, it would not have instructed the secretariat to gather information. The report should not imply that the Commission had not authorized any action on the subject.
33. Mr. CHOUKRI (Observer for Morocco), supported by Mr. LLOYD (Australia), proposed that the words “at present” should be added to the first sentence after the word “agenda” to show that the Commission had left open the possibility of including the issue on its agenda in the future.

34. Document A/CN.9/XXIX/CRP.1/Add.12, as amended, was adopted.

35. Mr. SORIEUL (International Trade Law Branch) said that, in article 17, paragraph 6, the word “such” should be inserted after the words “inapplicable to”, as agreed previously by the Commission.

36. Document A/CN.9/XXIX/CRP.1/Add.13, as orally revised, was adopted.

37. Documents A/CN.9/XXIX/CRP.1/Add.14 to Add.21 were adopted.

CLOSURE OF THE SESSION

38. After an exchange of courtesies, the CHAIRMAN declared the twenty-ninth session closed.

The meeting rose at noon.
IV. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF UNCITRAL: NOTE BY THE SECRETARIAT (A/CN.9/442)

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I. General

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A note on the first annual Willem C. Vis International Arbitration Moot, held at Vienna, 18-20 March 1994.


Chapter 2, entitled: Estructura institucional del derecho del comercio internacional, introduces the Commission and its work, p. 66-67.

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janvier 1996. Recueil Dalloz Strey: jurisprudence, notes

Title from table of contents.

A note on a court decision rendered by the Court of Cas-
sation of France.

See also note on the same decision entitled: Wesentlicher
Vertragsbruch durch Lieferung gezuckerten Weins: zu
Cour de Cassation, Ire chambre civile, 23.1.1996/P.
Schlechtriem. Accompanied by excerpts of decision in
French, p. 126, no. 13. IPRAx: Praxis des internationalen
Privat- und Verfahrensrechts (Bielefeld) 17:2:132, März-
April 1997.

and E. N. Kapnopoulou. E Súmbas tis Viannis perf
dieitnoús pólloes empreumátou kai ñ prospáthete schetikè
nomologia. Ellēnikē epitheærēsē eurṓpakaou dikaiou (Thes-

In Greek.

Translation of title: Vienna Convention on Contracts for the
International Sale of Goods and recent relevant case law.
Parallel title of journal: Revue hellénique de droit euro-
péen.
III. International commercial arbitration and conciliation


In Arabic.


Reproduces full text of the award with minor editorial changes, p. 11.

Arbitration moot teaches ADR [Alternative Dispute Resolution] skills to students. Dispute resolution times: ADR news from the American Arbitration Association (New York, N.Y.) 6, spring 1996.

A note on the first annual Willem C. Vis International Arbitration Moot, held at Vienna, 18-20 March 1994.


Subtitle (II): L'application de normes substantielles non nationales: l'application de conventions internationales = The application of non-national substantive norms: the application of international conventions, p. 526-530.


Thesis (doctoral) – University of Köln (Germany), 1994. Includes bibliography, table of cases and subject index.


Le Centre libanais de l'arbitrage adopte le reglement d'arbitrage de la CNUDCI. Bulletin ASA: Association suisse de l'arbitrage (Bâle) 14:4:609-610, 1996.


Includes bibliography and subject index.


Parallel title of journal: *International business law journal*.


Paper dealing with the work of UNCITRAL: Implementing legislation: the International Bar Association/UNCITRAL Project/G. Herrmann, 135-144.


Brief announcements regarding recently enacted arbitration regulations as well as draft legislation that is about to be enacted. Announcements refer to published or future national reports in the companion publication to the *Yearbook, the International Handbook on Commercial Arbitration* (loose-leaf release, 22 of September 1996). - p. 367.


Title from cover.

This paper is published for comment and criticism and does not represent the final views of the Committee. — Cover note.

Includes annexes A-E with source materials.


Accompanied by a four-page leaflet with only the black letter items of the Notes. Description based on English ed.

Published in all official languages of the United Nations.


In four instalments:


IV. International transport


Parallel title of journal: International trade law and practice.


V. International payments


In 11 instalments:
Part I, Introducción. In three instalments: I-III in 10(2A), 17(6A), 24(9A) of abril.
Part II, Ley Modelo de la CNUDMI sobre Transferencias Internacionales de Crédito. In eight instalments:
IV-VIII in 2(7A), 8(3A), 15(3A), 22(2A), 29(2A) of mayo;
IX-X in 5(3A), 19(2A) of junio;
XI in 3(2A) of julio.


Chapter 3 deals with the work of UNCITRAL: Neure Entwicklungen des internationalen Zahlungsverkehrs, p. 75-85.

At foot of title page: Ein Informationsservice der Spar­kassen-Finanzgruppe für den Aussenhandel.


Includes various bibliographies, tables of legislation and cases, as well as subject index.


Thesis (doctoral) – University of Freiburg (Breisgau), Germany (1995).

Includes bibliography, table of cases and subject index.


VI. Electronic data interchange


In 25 instalments:
Part I, Introducción. In three instalments:
I-III in 10(2A), 17(6A), 24(9A) of abril.
Part II, Ley Modelo de la CNUDMI sobre Transferencias Internacionales de Crédito. In eight instalments:
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IX-X in 5(3A), 19(2A) of junio;
XI in 3(2A) of julio.

Part III, Ley Modelo de la CNUDMI sobre el Comercio Electrónico. In 14 instalments:
XII-XIV in 10(5A), 17(13A), 24(2A), 31(2A) de julio;
XVI-XIX in 7(2A), 14(5A), 21(2A), 28(3A) de agosto;
XX-XXIII in 4(9A), 11(3A), 18(2A), 25(5A) de septiembre;
XXIV-XXV in 24(6A), 31(16A) de octubre.

Running title of newspaper: Financiero, análisis.

Photocopy.


Parallel title of journal: Computer & telecoms law review.


Parallel title of journal: Computer & telecoms law review.


Includes bibliography, annexes and subject index.


VII. Independent guarantees and stand-by letters of credit


Loose-leaf.

Contributions dealing with the work of UNCITRAL: The reception of URDG 458 and of the UNCITRAL Convention in the Arab Middle East/B. G. Affaki. – The URDG 458 and the UNCITRAL Convention and their impact within national jurisdictions – English law/Ch. Debattista.


Photocopy of galley proof.


Slovenian title of the Convention: Konvencija Združenih narodov o neodvisnih garancijah in stand-by akreditivih.


A reprint of the text of the Convention, it also contains an explanatory note by the UNCITRAL secretariat. The note is for information purposes only and is not an official commentary.

Reprints in the other official languages of the United Nations are in preparation.

**VIII. Procurement**


Parallel title of journal: *Revue de droit uniforme: Institut international pour l'unification du droit privé.*


Text is reproduced in English and French on facing pages.

**IX. International countertrade**


**X. Cross-border insolvency**


**XI. Privately financed infrastructure projects**


Article is based on a note by the Secretariat on build-operate-transfer projects (A/CN.9/414) of 3 March 1995.
### ANNEX

**Short and full titles of UNCITRAL legal texts**

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## V. CHECK-LIST OF UNCITRAL DOCUMENTS

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1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
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4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
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6. Documents submitted to the Working Groups:
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