United Nations

Report of the United Nations Commission on International Trade Law

on the work of its twenty-ninth session

28 May-14 June 1996

General Assembly

Official Records · Fifty-first Session
Supplement No. 17 (A/51/17)

Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session

28 May-14 June 1996

General Assembly
Official Records · Fifty-first Session
Supplement No. 17 (A/51/17)

United Nations · New York, 1996

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.

ISSN 0251-9127

[Original: English]

[14 August 1996]

CONTENTS

Chapter		Paragraphs	Page
	INTRODUCTION	1 - 2	1
I.	ORGANIZATION OF THE SESSION	3 - 10	2
	A. Opening of the session	3	2
	B. Membership and attendance	4 - 7	2
	C. Election of officers	8	3
	D. Agenda	9	3
	E. Adoption of the report	10	4
II.	INTERNATIONAL COMMERCIAL ARBITRATION	11 - 54	5
	A. Introduction	11	5
	B. Discussion of the draft Notes on Organizing Arbitral Proceedings	12 - 51	5
	1. Text as a whole	12 - 14	5
	2. Introductory part (paras. 1-14)	15 - 19	6
	3. List of matters for possible consideration in organizing arbitral proceedings	20	6
	4. Annotations (paras. 15-91)	21 - 51	6
	C. Adoption of the UNCITRAL Notes on Organizing Arbitral Proceedings	52 - 54	11
III.	DRAFT UNCITRAL MODEL LAW ON LEGAL ASPECTS OF ELECTRONIC DATA INTERCHANGE (EDI) AND RELATED MEANS OF COMMUNICATION	55 - 224	12
	A. Introduction	55 - 62	12
	1. Draft Model Law	55 - 57	12
	2. Additional provisions concerning transport documents	58 - 59	12
	3. Draft Guide to Enactment of the Model Law	60 - 62	13
	B. Consideration of draft articles	63 - 172	13

CONTENTS (continued)

Chapter			Paragraphs	Page
		Article 12. Acknowledgement of receipt	63 - 88	13
		Article 13. Formation and validity of contracts .	89 - 99	20
		Article 14. Time and place of dispatch and receipt of data messages	100 - 115	22
		Article 2. Definitions	116 - 138	26
		Specific rules concerning transport documents	139 - 172	31
	C.	Other issues to be considered with respect to the draft Model Law	173 - 194	40
		1. Title of the draft Model Law	174 - 177	40
		2. Footnote **** to article 1	178 - 179	41
		3. Paragraphs (1) of articles 5, 6 and 7	180 - 181	41
		4. Notion of "originator" in paragraph (1) of article 6	182	42
		5. Rule of interpretation of contracts	183 - 184	42
		6. Notion of "rule of law" in articles 5, 6, 7 and 9	185 - 187	43
		7. Location of article 10	188	43
		8. Article 11	189 - 194	43
	D.	Report of the drafting group	195 - 204	44
	E.	Draft Guide to Enactment of the Model Law	205 - 208	47
	F.	Adoption of the Model Law and recommendation	209	48
	G.	Future work	210 - 224	49
		1. Future work on issues of transport law	210 - 215	49
		2. Future work with respect to electronic commerce	216 - 224	51
IV.		BUILD-OPERATE-TRANSFER PROJECTS	225 - 230	53
V.		ASSIGNMENT IN RECEIVABLES FINANCING	231 - 234	55
VI.		CROSS-BORDER INSOLVENCY	235 - 237	56
VII.		LEGISLATIVE IMPLEMENTATION OF THE 1958 NEW YORK CONVENTION	238 - 243	57

CONTENTS (continued)

Chapter		Paragraphs	Page
VIII.	CASE-LAW ON UNCITRAL TEXTS (CLOUT)	244 - 247	58
IX.	TRAINING AND TECHNICAL ASSISTANCE	248 - 254	59
X.	STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS	255 - 257	61
XI.	GENERAL ASSEMBLY RESOLUTIONS ON THE WORK OF THE COMMISSION	258 - 264	63
XII.	OTHER BUSINESS	265 - 275	65
	A. Reduction of documentation requirements	265	65
	B. Principles of interpretation	266	65
	C. UNCITRAL Yearbook	267	65
	D. Cooperation with the Organization of American States	268	65
	E. Bibliography	269 - 270	66
	F. Willem C. Vis International Commercial Arbitration Moot	271 - 272	66
	G. Six hundredth meeting of the Commission	273	66
	H. Date and place of the thirtieth session of the Commission	274	66
	I. Sessions of working groups	275	66

Annexes

I.	UNCITRAL Model Law on Electronic Commerce	70
II.	List of documents before the Commission at its twenty-ninth session	78

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twenty-ninth session, held in New York from 28 May to 14 June 1996.

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/

Algeria (2001), Argentina (1998), Australia (2001), Austria (1998), Botswana (2001), Brazil (2001), Bulgaria (2001), Cameroon (2001), Chile (1998), China (2001), Ecuador (1998), Egypt (2001), Finland (2001), France (2001), Germany (2001), Hungary (1998), India (1998), Iran (Islamic Republic of) (1998), Italy (1998), Japan (2001), Kenya (1998), Mexico (2001), Nigeria (2001), Poland (1998), Russian Federation (2001), Saudi Arabia (1998), Singapore (2001), Slovakia (1998), Spain (1998), Sudan (1998), Thailand (1998), Uganda (1998), United Kingdom of Great Britain and Northern Ireland (2001), United Republic of Tanzania (1998), United States of America (1998) and Uruguay (1998).

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, Kazakstan, 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 organs

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)

Interamerican Bar Association (IABA)

International Association of Ports and Harbors (IAPH)

International Chamber of Commerce (ICC)

Tribunal Internacional de Conciliación y de Arbitraje del Mercosur (TICAMER)

Union internationale des avocats (UIA)

C. Election of officers 2/

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.

4. International commercial arbitration: draft Notes on Organizing Arbitral Proceedings.

5. Electronic data interchange: draft Model Law; possible future work.

6. Build-operate-transfer (BOT) projects.

7. Receivables financing: assignment of receivables.

8. Cross-border insolvency.

9. Monitoring implementation of the 1958 New York Convention.

10. Case-law on UNCITRAL texts (CLOUT).

11. Training and assistance.

12. Status and promotion of UNCITRAL legal texts.

13. General Assembly resolutions on the work of the Commission.

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.

II. INTERNATIONAL COMMERCIAL ARBITRATION

A. Introduction

11. The Commission, after an initial discussion of the project at its twenty-sixth session (1993), 3/ considered at its twenty-seventh session (1994) a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (A/CN.9/396/Add.1). 4/ 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 para. 53 below). 5/ 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). 6/ 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 paras. 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 (paras. 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 (paras. 15-91)

Set of arbitration rules (item 1, paras. 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, paras. 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, paras. 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, paras. 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, paras. 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, paras. 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.

Routeing of written communications among the parties and the arbitrators (item 7, paras. 34 and 35)

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

Telefax and other electronic means of sending information (item 8, paras. 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 unjustifiedly 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 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."

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

36. The substance of paragraphs 39 to 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, para. 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, paras. 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, paras. 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, para. 48)

41. The substance of paragraph 48 was approved.

Documentary evidence (item 13, paras. 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, paras. 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, paras. 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, paras. 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, paras. 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, paras. 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, paras. 90-91)

51. The substance of paragraphs 90 to 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 XIIth 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), 7/ 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, 387, 390 and 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, 60 and 62. The Working Group also 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, 8/ 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. 9/ 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, paras. 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, paras. 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 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 acknowledgements 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 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. 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 paras. 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 established 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 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 paras. 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 para. 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 of the parties. 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 telecopy" 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 telecopy 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 telecopy") 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 para. 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. After discussion, the Commission referred subparagraph (c) to the drafting group for implementation of those policy decisions in the text, which was otherwise found to be generally acceptable. It was also agreed that the Guide to Enactment should reflect the above discussion.

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;

"(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: [...]"

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 para. 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 address such concerns, 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 to 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:
>
> "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. Paragraphs (1) of articles 5, 6 and 7

180. A concern was expressed with respect to the way in which the opening words of paragraphs (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 expressly 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". 13/

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 unjustifiedly 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 understood 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.

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.

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 paras. 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:

> "(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."

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 para. (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

205. The Commission engaged in a discussion of the draft Guide to Enactment of the Model Law prepared by the Secretariat (A/CN.9/426).

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 paras. 95-99 above), and with transport documents (see paras. 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 paras. 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 paras. 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, 17/ 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 18/ 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

1. 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/CN.9/421, 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 seaway bills, 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. 19/ 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 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

231. The Commission, having discussed legal issues in the area of assignment of claims at its twenty-sixth and twenty-seventh sessions (1993 and 1994), 20/ entrusted, at its twenty-eighth session in 1995, the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing. 21/

232. The Working Group commenced its work at its twenty-fourth session (Vienna, 13-24 November 1995) by considering a number of preliminary draft uniform rules presented to it in the report submitted by the Secretariat (A/CN.9/412).

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 Secretariat 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.

VII. LEGISLATIVE IMPLEMENTATION OF THE 1958 NEW YORK CONVENTION

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 the 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 to the United Nations Convention on Contracts for the International Sale of Goods and the UNCITRAL Model Law on International Commercial Arbitration had been published (A/CN.9/SER.C/ABSTRACTS/7 and 8).

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:

(a) Convention on the Limitation Period in the International Sale of Goods (New York, 1974). New actions: ratification by Poland and adherence, by virtue of accession to the Protocol amending the Limitation Period Convention, by Slovenia; number of States parties: 20;

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

(c) United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). New actions: ratification by the Czech Republic; accession by Gambia and Georgia; number of States parties: 25;

(d) United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). New action: ratification by Poland; number of States parties: 45;

(e) United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988). The Convention had two States parties. It required eight more adherences for entry into force;

(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;

(h) UNCITRAL Model Law on Procurement of Goods, Construction and Services, 1994. Jurisdictions that had enacted legislation based on the Model Law: Albania and Poland;

(i) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). New actions: accession by Kazakstan, Uzbekistan and Viet Nam; total number of States parties: 108.

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 secretariat, should continue to maintain close cooperation with the other international organs and organizations, including regional organizations, active in the field of international 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 international trade law, such as assistance in the preparation of national legislation based on legal texts of the Commission, and that, in paragraph 7, the Assembly 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 appropriate, 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 support the training and technical assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

262. It was also appreciated that the Assembly appealed, 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 resolution 48/32 of 9 December 1993. The Commission further noted with appreciation the decision of the General Assembly, 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 paragraph 10, by the General Assembly to the Secretary-General 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 importance of bringing into effect the conventions emanating 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 requests 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 consolidated reports on related topics. While recognizing the need for achieving further savings in the field of documentation, 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 international trade. A suggestion was made that, when similar provisions were to be drafted for new conventions, consideration 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 International 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 volumes 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:

(a) The Working Group on International Contract Practices would hold its twenty-fifth session from 8 to 19 July 1996 in New York, and its twenty-sixth session from 11 to 22 November 1996 at Vienna;

(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.

Notes

1/ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 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 1998, 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.

2/ The 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)).

3/ Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 291-296.

4/ Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 111-195.

5/ The proceedings of the Congress are published in Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7, Kluwer Law International, The Hague, 1996.

6/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 314-373.

7/ Ibid., Forty-seventh Session, Supplement No. 17 (A/47/17), paras. 140-148.

8/ Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), para. 307.

9/ Ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), para. 201.

10/ Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), para. 309.

11/ Ibid., para. 212.

12/ Ibid., para. 211.

13/ Ibid., para. 236.

14/ See the report of the Commission on the work of its eighteenth session, Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), paras. 232 and 233 (Yearbook of the United Nations Commission on International Trade Law, vol. XVI: 1985, part one); see also the summary records of the 326th meeting of that session, para. 34, and the summary records of the 327th meeting, para. 38 (Yearbook of the United Nations Commission on International Trade Law, vol. XVI: 1985, part three).

15/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), para. 274.

16/ Ibid., paras. 282 and 283.

17/ The following table indicates new article numbers assigned to the provisions of the UNCITRAL Model Law on Electronic Commerce upon adoption by the Commission and the articles as they were presented in the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication before the Commission.

Number of article in Model Law	Number of draft article before the Commission	Number of article in Model Law	Number of draft article before the Commission
1	1	11	13
2	2	12	new 13 bis
3	3	13	11
4	10	14 (1) to (4)	12 (1) to (4)
5	4	14 (5) and (6)	12 (5)
6 (1) and (2)	5 (1)	14 (7)	new
6 (3)	5 (2)	15	14
7 (1) and (2)	6 (1)	16	X (1)
7 (3)	6 (2)	17 (1) and (2)	X (2)
8 (1) and (2)	7 (1)	17 (3)	X (4)
8 (3)	7 (2)	17 (4)	X (5)
8 (4)	7 (3)	17 (5)	X (3)
9	8	17 (6)	X (6)
10	9	17 (7)	X (7)

18/ Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17), chap. VI, sect. B.

19/ Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 394-400.

20/ Ibid., Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301 and ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214.

21/ Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

22/ Ibid., paras. 382-393.

23/ The report of the eighteenth session of the Working Group is found in document A/CN.9/419 and Corr.1.

24/ The report of the nineteenth session of the Working Group is found in document A/CN.9/422.

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

26/ Ibid., para. 422.

ANNEX I

[Original: Arabic, Chinese, English, French, Russian, Spanish]

UNCITRAL 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;

---

* 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.

(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.

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 by a data message if the information contained therein is accessible so as to be usable for subsequent reference.

(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 in writing.

(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 by a data message 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, or the addressee is entitled to act on that assumption, then, as between the originator and the addressee, the addressee is entitled to regard the data message as received as being what the originator intended to send, and to act on that assumption. The addressee is not so entitled when it knew or should have known, had it exercised reasonable care or used any agreed procedure, that the transmission resulted in any error in the data message as received.

(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 I. 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: [...].

ANNEX II

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

A. General series

A/CN.9/418	Provisional agenda, annotations thereto and scheduling of meetings of the twenty-ninth session
A/CN.9/419 and Corr.1 (English only)	Report of the Working Group on Insolvency Law on the work of its eighteenth session
A/CN.9/420	Report of the Working Group on International Contract Practices on the work of its twenty-fourth session
A/CN.9/421	Report of the Working Group on Electronic Data Interchange (EDI) on the work of its thirtieth session
A/CN.9/422	Report of the Working Group on Insolvency Law on the work of its nineteenth session
A/CN.9/423	International commercial arbitration: draft Notes on Organizing Arbitral Proceedings
A/CN.9/424	Possible future work: Build-Operate-Transfer projects
A/CN.9/425	International commercial arbitration: Monitoring the legislative implementation of the 1958 New York Convention: progress report
A/CN.9/426	Electronic data interchange: Guide to Enactment of the UNCITRAL Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication
A/CN.9/427	Training and Technical Assistance
A/CN.9/428	Status of Conventions
A/CN.9/429	Bibliography of recent writings related to the work of UNCITRAL

B. Restricted series

A/CN.9/XXIX/CRP.1 and Add.1-21	Draft report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session

A/CN.9/XXIX/CRP.2 and Add.1-5	Report of the Drafting Group
A/CN.9/XXIX/CRP.3	Proposed amendments to paragraph (3) of draft article x

C. Information series

A/CN.9/XXIX/INF.1	List of participants