

## 2. REPORT ON THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AT ITS FORTY-SECOND SESSION

### I. INTRODUCTION

1. The General Assembly of the United Nations, in the year 1966, by its Resolution 2205 (XXI) established the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL' or 'Commission') as the primary organ of the United Nations system to harmonize and develop progressive rules in the area of international trade law. A substantial part of the Commission's work is carried out in meetings of the Working Groups, while the Commission meets annually to review and adopt recommendations towards guiding the progress of work on the various topics on its agenda. The Commission is also mandated to submit an annual report to the General Assembly, as to the tasks accomplished at its sessions.<sup>1</sup>

2. The forty-second session of the UNCITRAL was held in New York from 29 June to 17 July 2009. The Commission had on its agenda, *inter alia*, the following topics for consideration:

- (i) Finalization and Adoption of UNCITRAL Notes on Cooperation, Communication and Coordination in Cross-border Insolvency Proceedings,
- (ii) Draft UNCITRAL Model Law on Public Procurement,
- (iii) Arbitration and Conciliation,
- (iv) Insolvency Law, and
- (v) Security Interests

3. This brief report is primarily focused on examining the UNCITRAL's deliberations at its forty-second session on the above topics. Some of the notable achievements of this session, *inter alia*, were the finalization and adoption of UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation and consideration of the Revised Model Law on Public Procurement of Goods.<sup>2</sup>

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<sup>1</sup> Membership of UNCITRAL: The Commission is composed of 60 Member States elected by the United Nations General Assembly. Membership is structured so as to be representative of the world's geographic regions and its principal economic and legal systems. Members of the Commission are elected for terms of six-year and the terms of half members expiring every three years. Current members are: Algeria, Armenia, Australia, Austria, **Bahrain**, Belarus, Benin, Bolivia, Bulgaria, **Cameroon**, Canada, Chile, **People's Republic of China**, Colombia, Czech Republic, Ecuador, **Arab Republic of Egypt**, El Salvador, Fiji, France, Gabon, Germany, Greece, Guatemala, Honduras, **India**, **Islamic Republic of Iran**, Israel, Italy, **Japan**, **Kenya**, Latvia, **Lebanon**, Madagascar, **Malaysia**, Malta, Mexico, **Mongolia**, Morocco, Namibia, **Nigeria**, Norway, **Pakistan**, Paraguay, Poland, **Republic of Korea**, Russian Federation, **Senegal**, Serbia, **Singapore**, **South Africa**, Spain, **Sri Lanka**, Switzerland, **Thailand**, **Uganda**, United Kingdom, United States of America, Venezuela and Zimbabwe.

<sup>2</sup> UN Press Release, UNIS/L/130, 17 July 2009.

## II. FINALIZATION AND ADOPTION OF UNCITRAL NOTES ON COOPERATION, COMMUNICATION AND COORDINATION IN CROSS-BORDER INSOLVENCY PROCEEDINGS

### A. Background

4. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that the initial work to compile practical experience with respect to negotiating and using cross-border insolvency agreements should be facilitated informally through consultation with judges and insolvency practitioners and that a preliminary progress report on that work should be presented to the Commission for further consideration at its fortieth session, in 2007. The Commission also recalled that, during the first part of its fortieth session, in 2007, the Commission had considered that preliminary report<sup>3</sup> and had expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency protocols; the Commission had reaffirmed that work should continue to be developed informally by the Secretariat in consultation with judges, practitioners and other experts.

5. The Commission also recalled that, at its forty-first session, in 2008, it had before it a note by the Secretariat reporting on further progress with respect to that work.<sup>4</sup> At that session, the Commission had noted that further consultations had been held with judges and insolvency practitioners and a compilation of practical experience, organized around the outline of contents annexed to the previous report to the Commission,<sup>5</sup> had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the Commission's forty-first session.

6. It was recalled that, at its forty-first session, the Commission had expressed its satisfaction with respect to the progress made on the work of compiling practical experience and had decided that the compilation should be presented as a working paper to Working Group on Insolvency Law ('hereinafter Working Group') at its thirty-fifth session<sup>6</sup> for an initial discussion. The Working Group could then decide to continue discussing the compilation at its thirty-sixth session<sup>7</sup> and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in finding solutions for the international treatment of enterprise groups in insolvency.

7. It was noted that the Working Group considered the draft notes on cooperation, communication and coordination in cross-border insolvency proceedings<sup>8</sup> at its thirty-fifth session, when it agreed that the notes should be circulated to Governments for comment prior to its thirty-sixth session.<sup>9</sup> That version of the draft notes was circulated in November 2008.

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<sup>3</sup> A/CN.9/629.

<sup>4</sup> A/CN.9/654.

<sup>5</sup> A/CN.9/629.

<sup>6</sup> Vienna, 17-21 November 2008.

<sup>7</sup> New York, 18-22 May 2009.

<sup>8</sup> A/CN.9/WG.V/WP.83.

<sup>9</sup> A/CN.9/666, para. 22.

8. The draft notes were revised on the basis of the decisions made by the Working Group at its thirty-fifth session, the comments received from Governments and additional cross-border insolvency agreements that were entered into after the preparation of the first draft.

## **B. Consideration at the Forty-Second Session (2009) of the Commission**

9. At its current session, the Commission had before it the revised version of the draft notes,<sup>10</sup> the comments of States on the draft notes<sup>11</sup> and the report of the thirty-sixth session of the Working Group at which the draft notes were further considered.<sup>12</sup> The Commission heard an oral presentation on the draft notes and noted that some minor updating was required to take account of important cross-border insolvency agreements entered into since the consideration by the Working Group at its thirty-sixth session.

10. The Commission expressed its appreciation for the draft notes and emphasized their usefulness for practitioners and judges, as well as creditors and other stakeholders in insolvency proceedings, particularly in the context of the current financial crisis. In that regard, the notes were viewed as very timely, having application in a number of large, complex cases and being the first document dealing with cross-border insolvency agreements to be prepared by an international organization. The Commission also expressed its appreciation for the incorporation of the suggestions made by Governments following circulation of the draft notes<sup>13</sup> and agreed that the document should be entitled “Practice Guide on Cross-Border Insolvency Cooperation”.

11. With respect to the term “court” as used in the draft Practice Guide and as defined in paragraph 13 (f) of A/CN.9/WG.V/WP.86, it was clarified that, consistent with the terminology of the UNCITRAL Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, it included judicial and other authorities, including administrative authorities, competent to control or supervise insolvency proceedings. To avoid any confusion with regard to the use of that term, the Commission agreed to delete the second sentence of paragraph 8 of A/CN.9/WG.V/WP.86.

12. With respect to paragraph 17 of part III A, the Commission agreed to modify the first sentence, so that it would read as follows: “Where parties desire court approval of an agreement, certain jurisdictions may require the court to find appropriate statutory authorization for such approval, as it may not be covered by the court’s ‘general equitable or inherent powers’.”

13. The Commission agreed to modify the second sentence of paragraph 18 of part III A, so that it would read as follows: “As noted above with respect to insolvency representatives, one issue to take into consideration is that since judges must act on the basis of legal authority, acting outside that authority could make them personally liable.” The Commission also agreed that, in order to align the third and fourth sentences with the revised second sentence and paragraph 17, the words “formally approve” should replace the words “enter into” in the third sentence and that the words after “familiarity with cross-border agreements” in the fourth sentence should be deleted.

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<sup>10</sup> A/CN.9/WG.V/WP.86.

<sup>11</sup> A/CN.9/WG.V/WP.86/Add.1-3.

<sup>12</sup> A/CN.9/671, paras. 12-15.

<sup>13</sup> A/CN.9/WG.V/WP.83.

It further agreed to remove the references to common and civil law in paragraphs 17 and 18 and replace them with a more generic reference, such as “some” or “certain” jurisdictions.

14. To address the concern that the term “cross-border agreement” was too general, the Commission agreed that those agreements should be referred to as “cross-border insolvency agreements” and, as a short form, as “insolvency agreements” or “agreements”.

### **III. DRAFT UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT**

#### **A. Background**

15. It may be recalled that the Commission, at its thirty-sixth and thirty-seventh sessions, in 2003 and 2004, respectively, considered a possible updating of the UNCITRAL Model Law on Procurement of Goods, Construction and Services and its Guide to enactment on the basis of the notes by the Secretariat.<sup>14</sup> At its thirty-seventh session (2004), the Commission agreed that the Model Law would benefit from being updated to reflect new practices, in particular those resulting from the use of electronic communications in public procurement, and the experience gained in the use of the Model Law as a basis for law reform. It decided to entrust the drafting of proposals for the revision of the Model Law to its Working Group on Procurement (hereinafter ‘Working Group’). The Working Group was given a flexible mandate to identify the issues to be addressed in its considerations. At its thirty-eighth session, in 2005, the Commission reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices in the Model Law.

16. At its thirty-eighth and thirty-ninth sessions, in 2005 and 2006, respectively, the Commission took note of the reports of the sixth, seventh, eighth and ninth sessions of the Working Group.<sup>15</sup>

17. At its fortieth session, the Commission had before it the reports of the tenth and eleventh sessions of the Working Group.<sup>16</sup> The Commission was informed that, at its tenth and eleventh sessions, the Working Group continued its work on the elaboration of proposals for the revision of the Model Law and in this regard, it had considered the following topics: (i) the use of electronic means of communication in the procurement process; (ii) aspects of the publication of procurement-related information, including revisions to article 5 of the Model Law and the publication of forthcoming procurement opportunities; (iii) the procurement technique known as the electronic reverse auction; (iv) abnormally low tenders; and (v) the method of contracting known as the framework agreement. Further, the Commission recalled that, at its thirty-ninth session, it had recommended that the Working Group, in updating the Model Law and the Guide, should take into account the specific question of conflicts of interest to the list of topics to be considered in the revision of the Model Law and the Guide.

18. At the forty-first session (2008), the Commission took note of the reports of the twelfth and thirteenth sessions of the Working Group.<sup>17</sup> At its twelfth session, the Working

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<sup>14</sup> A/CN.9/539 and Add.1, and A/CN.9/553.

<sup>15</sup> A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595.

<sup>16</sup> Vienna, 25-29 September 2006, A/CN.9/615 and New York, 21-25 May 2007, A/CN.9/623.

<sup>17</sup> Vienna, 3-7 September 2007, A/CN.9/640 and New York, 7-11 April 2008, A/CN.9/648.

Group adopted the timeline for its deliberations, later modified at its thirteenth session, and agreed to bring an updated timeline to the attention of the Commission on a regular basis. At its thirteenth session, the Working Group held an in-depth consideration of the issue of framework agreements on the basis of drafting materials contained in notes by the Secretariat<sup>18</sup> and agreed to combine the two approaches proposed in those documents, so that the Model Law, where appropriate, would address common features applicable to all types of framework agreement together, in order to avoid, *inter alia*, unnecessary repetition, while addressing distinct features applicable to each type of framework agreement separately.

19. At the session, the Working Group also discussed the issue of suppliers' lists, the consideration of which was based on a summary of the prior deliberations of the Working Group on the subject and decided that the topic would not be addressed in the Model Law, for reasons that would be set out in the Guide to Enactment.

20. The Commission commended the Working Group and the Secretariat for the progress made in its work and reaffirmed its support for the review being undertaken and for the inclusion of novel procurement practices and techniques in the Model Law. The Working Group was invited to proceed expeditiously with the completion of the project, with a view to permitting the finalization and adoption of the revised Model Law, together with its Guide to Enactment, within a reasonable time.

#### **B. Report on the progress made by Working Group on Procurement (2009)**

21. The Commission noted that the focus of the early sessions of the Working Group was primarily on the following key subjects, for which the Working Group was recommending entirely new provisions or substantial amendments: (a) the use of electronic communications in public procurement; (b) electronic reverse auctions; (c) abnormally low submissions; and (d) framework agreements. It was reported that the principles for most of those provisions had been agreed upon, but that some drafting issues remained outstanding.

22. It was noted that later sessions had focused on procurement of services, alternative procurement methods, simplification and standardization of the 1994 Model Procurement Law and conflicts of interest, and that new provisions and substantial amendments on those subjects were being considered.

23. The Commission heard a report on the progress achieved in separate areas of work. As regards the general aspects of electronic procurement, it was noted that provisions of the revised model law would allow for the use of electronic communications in the procurement process, in a new article 8, which would address form and means of communications together and would replace article 9 of the 1994 Model Procurement Law.

24. The proposed article 8 would: (a) provide for functional equivalence between paper and non-paper based communications; (b) contain safeguards addressing confidentiality, traceability and integrity; (c) prevent any form or means of

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<sup>18</sup> A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56.

communications from being used to restrict access to procurement; and (d) ensure transparency and predictability by requiring any specific requirements as to the form and means of communications to be specified by the procuring entity at the beginning of the procurement proceedings.

25. As regards electronic reverse auctions, it was explained that the term referred to an online, real-time auction, during which bidders submitted successively improved bids. Recognizing their potential benefits (price savings), the Working Group was recommending provisions for them, but not for auctions in a non-electronic form because of the risks of collusion in the latter. Provisions on electronic reverse auctions would set out: (a) conditions for the use of electronic reverse auctions; and (b) procedural rules for two types of such auctions: those used as a phase in other procurement methods and those used as a stand-alone procurement method. The revised model law would provide for the type of auction where the best bid according to the award criteria was identified automatically at the end of the auction process. This type of electronic reverse auctions, which did not allow post-auction evaluation, required (a) an automatic re-evaluation of bids as they were revised during the auction and (b) disclosure to all bidders at all times during the auction of sufficient information to allow them to determine whether their bid was the winning one. It was noted that the important issue considered by the Working Group in the context of electronic reverse auctions was the extent to which non-price factors could feature in such auctions. The Working Group noted concerns that such factors could complicate the process, and lead to less transparency.

26. With regard to framework agreements, it was explained that the term described two-stage procurements in which a framework agreement between suppliers and the procuring entity was made at the first stage and procurement contracts were issued in the form of orders at the second stage. It was noted that framework agreements were not addressed in the 1994 Model Procurement Law, partly because they were used infrequently at that time. In the light of their increasing use and advantages (mainly reductions in administrative and transactional costs and times and assuring the security of supply), the Working Group provided for them in the draft revised text. Three types were addressed. The first type was a “closed” framework agreement, i.e. one concluded with one or more suppliers in which the specification and all terms and conditions of the procurement were set out in the framework and there was no further opening of competition between the suppliers at the second stage. The second type was also a “closed” framework agreement but it differed in that it would always have more than one supplier as a party, not all terms would be finalized and set out in the framework agreement, and a further competition would take place at the second stage to award a procurement contract. The third type was an “open” framework agreement, i.e. one concluded with more than one supplier to which further suppliers could subsequently become parties. The second stage of “open” framework agreements would be competitive in the same way as the second type of “closed” framework agreements.

27. As regards suppliers’ lists, the Working Group had acknowledged that such lists existed and were in use, and that such use in practice should be subject to minimum standards. At its thirteenth session, the Working Group concluded that the topic would not be addressed in the revised model law because the flexible provisions on framework agreements would be sufficient and would avoid some of the risks of lists. The reasons for that conclusion would be set out in the guide to enactment, which would also

address concerns related to the use of lists, such as lack of transparency and restrictions on market access, which might arise even where controls such as permanently open and simple registration procedures had been put in place, and even where lists were intended to be optional.

28. As regards abnormally low submissions, which might entail a performance risk, the Working Group had decided that the risk could arise in any procurement procedure (though it had initially considered that the risk arose in the context of electronic reverse auctions). It therefore recommended provisions in the revised model law to require the procuring entity to investigate a potentially abnormally low submission. Only after such an investigation, and where the procuring entity concluded that the submission was abnormally low and a performance risk existed, could the procuring entity reject the submission. The limitation on this ability was noted to be important for ensuring fair and equal treatment of suppliers.

29. The Working Group had reconsidered the provisions addressing the procurement of services, alternative procurement methods and their impact on simplification and standardization of the 1994 Model Procurement Law. The preliminary decision of the Working Group was to retain all options for the procurement of services, with enhanced guidance for their use. In the course of consideration, it became apparent however that services procedures contained in different articles of the 1994 Model Procurement Law were substantially the same and that only one services selection procedure – the selection procedure with consecutive negotiations – was distinct. In the light of such a significant overlap, the Working Group had reconsidered whether all methods should be retained. The review of all procurement methods therefore became one main element of simplification and standardization of the 1994 Model Procurement Law.

30. Some delegations had formulated a proposal for a negotiated procurement method to be used for any type of procurement, to be called “Request for proposals with competitive dialogue”, the results of which were presented to the Commission as a new procurement method. The Commission noted that the main issues in that method included: providing sufficient flexibility in the method (considered to facilitate achieving best value for money) while building in procedures to avoid the risk that the discretion conferred would be abused; ensuring sufficient transparency without removing all flexibility; and specifying ways for the procuring entity to control the number of suppliers with which it would negotiate (for example, through pre-selection, an assessment of responsiveness or exclusion of solutions). The Commission also heard about the importance of establishing the aspects of the procurement that could be negotiated during the dialogue phase.

31. The Commission noted that other methods from the 1994 Model Procurement Law (including competitive negotiations, two-stage tendering, and perhaps consecutive negotiations) might be retained in specific circumstances (such as competitive negotiations in the case of urgent procurement) and that the need for such methods would be assessed based on the extent to which they differed and the extent to which they addressed circumstances that were distinct from that proposed in the new procurement method.

Other aspects of the Working Group’s work in simplifying and standardizing the 1994 Model Procurement Law were described. First, as not all procurement in the defence and

national security arena was considered to be sensitive or confidential, the blanket exemption of those sectors from the scope of the 1994 Model Procurement Law had been revisited. The aim was to bring national defence and national security sectors, where appropriate, into the general ambit of the revised model law, to promote a harmonized legal procurement regime across various sectors in enacting States. However, appropriate modifications, for example to transparency obligations, would be required and were proposed in the draft revised text, drawing on provisions of the 1994 Model Procurement Law, to accommodate sensitive or confidential types of procurement.

32. The Commission heard that the general provisions in chapter I had been expanded in the draft revised model law contained in the addenda<sup>19</sup> to include rules that under the 1994 Model Procurement Law were applicable only to tendering proceedings, but that were, in fact, of general application. The Commission noted that those rules addressed the choice of procurement method and open or direct solicitation, the description of procurement (specifications and other terms), evaluation criteria, tender securities, prequalification proceedings, confidentiality and the acceptance of tender and entry into force of procurement contract. Other topics, such as requests for expression of interest and general rules on clarifications and modifications of solicitation documents might also be included in chapter I.

33. As regards the evaluation and comparison of tenders, the Working Group had formulated a single set of requirements as regards evaluation criteria that would replace several inconsistent, incomplete provisions in the 1994 Model Procurement Law. The essence of the provisions was that such criteria should: be relevant to the subject matter of the procurement; to the extent practicable, be objective and quantifiable; and be disclosed (together with their relative weights, thresholds, and any margins of preference, and with information on the manner in which the criteria, margins, relative weights and thresholds would be applied) at the outset of the procurement. The aim, it was observed, was to enable submissions to be evaluated objectively and compared on a common basis.

34. The Working Group had reviewed the manner in which the use of procurement to promote industrial, social and environmental policies (notably to protect the domestic economy) was addressed in the 1994 Model Procurement Law. The Commission, it was noted, would consider the issue, including the matter of whether socio-economic factors should be treated as evaluation criteria with all the transparency and objectivity rules then applicable to them and/or as qualification criteria (as was the practice in some jurisdictions with set-asides programmes), with reference to the relevant documents before it at the current session.

35. As regards remedies in procurement, the Working Group had decided to strengthen the provisions to ensure that they were consistent with the United Nations Convention against Corruption, providing for a mandatory system of independent review and deleting the exemptions from review contained in the 1994 Model Procurement Law. The Working Group had also recommended the introduction of a standstill period between the identification of the successful submission and entry into force of a procurement contract in order to ensure an effective review procedure. The extent of relief that may be granted in administrative proceedings, it was noted, had not yet been finalized.

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<sup>19</sup> A/CN.9/WG.I/WP.69.

36. As regards other issues identified for consideration in the review of the 1994 Model Procurement Law, it was reported that:

(a) Although the question of community participation in procurement fell outside the scope of the 1994 Model Procurement Law as it related primarily to the planning and implementation phases, given the growing importance of local community participation and the possible need for enabling legislation, the Working Group had ensured that the revised model law would not pose obstacles to such participation in project-related procurement and that further guidance in the guide would be given;

(b) It was recalled that the 1994 Model Procurement Law permitted procuring entities to call for the legalization of documents from all suppliers, which could be time consuming and expensive for suppliers. In addition to the deterrent effect, all or part of the increased overheads for suppliers might be passed on to procuring entities. Hence, the Working Group recommended an amendment to the provisions contained in the 1994 Model Procurement Law to allow the procuring entity to require the legalization of documentation only from a successful supplier;

(c) Noting that the Convention against Corruption required procurement systems to address conflicts and declarations of interest and that the 1994 Model Procurement Law did not address them, the draft revised model law had been expanded to make appropriate provision.

37. The Commission endorsed the suggestion made as regards the establishment of a committee of the whole to consider the draft revised model law at the current session. It also decided that the committee in its work should address the issues of defence sector procurement and consider socio-economic factors in public procurement. It heard statements about the importance of the guidance provided by UNCITRAL, in particular the guidance on how to protect domestic interests and treat sensitive procurement without undermining the objectives of the 1994 Model Procurement Law.

### **C. Future Work on Model Law on Public Procurement**

38. The understanding in the Committee of the Whole<sup>20</sup> was that the Secretariat should be requested to prepare new draft provisions of the revised model law to reflect deliberations at the current session. The idea of holding inter-session informal consultations was supported. The importance of ensuring inclusiveness and as wide a geographical representation of participants as possible in such consultations was highlighted. The Secretariat was requested to make all efforts within available resources to provide the relevant documents in the six official languages of the United Nations.

39. The Commission adopted the report of the Committee of the Whole as recommended. It also took note of the reports of Working Group on the work of its

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<sup>20</sup> See the Report of the Committee of the Whole on its Consideration of the Revised Model Law in *Report of the United Nations Commission on International Trade Law, Forty-Second Session (29 June-17 July 2009)*, A/64/17. pp.13-51.

fourteenth to sixteenth sessions<sup>21</sup> and requested the Working Group to continue its work on the review of the 1994 Model Procurement Law.

40. The importance of completing the revised model law as soon as reasonably possible was highlighted. It was emphasized that the revised model law would have considerable impact on ongoing procurement law reforms at the local and regional levels. Guidance from UNCITRAL in the procurement field was in particular sought on such issues as electronic reverse auctions, framework agreements, e-procurement in general, competitive dialogue and procurement in the defence sector. The importance of UNCITRAL outreach activities was also underscored and the UNCITRAL secretariat was encouraged to increase its promotional efforts for a more widespread use of its uniform law standards in procurement and other areas.

#### **IV. ARBITRATION AND CONCILIATION**

##### **A. Background**

41. The Commission, it may be recalled that, at its thirty-second session (1999), had a note entitled “Possible future work in the area of international commercial arbitration,” which discussed the desirability and feasibility of further development of the law of international commercial arbitration. The Commission had entrusted this task to its Working Group on Arbitration and Conciliation (hereinafter ‘Working Group’) and had decided that the priority items for the Working Group should be requirement of written form of the arbitration agreement, enforcement of interim measures of protection and possible enforcement of an award that had been set-aside in the State of origin. The Working Group on Arbitration and Conciliation commenced its work at its thirty-third session in March 2000.

42. At its thirty-seventh session, in 2004, the Commission noted that the Working Group had continued its discussions on a draft text for a revision of article 17 of the 1985 UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) on the power of an arbitral tribunal to grant interim measures of protection, and on a draft provision on the recognition and enforcement of interim measures of protection issued by an arbitral tribunal (for insertion as a new article of the Model Law, tentatively numbered 17 *bis*), including on how to deal with *ex parte* interim measures in the Model Law. The Commission also noted that the Working Group II had yet to complete its work in relation to draft article 17 *ter* dealing with interim measures issued by State courts in support of arbitration and in relation to the “writing requirement” contained in article 7 (2) of the Model Law and article II (2) of the New York Convention.

43. At its thirty-eighth session, in 2005, the Commission noted that the Working Group had continued its discussion on a draft text for a revision of article 17 of the Model Law on International Commercial Arbitration on the power of an arbitral tribunal to grant interim measures, on draft provisions on the recognition and enforcement of interim measures issued by an arbitral tribunal and on interim measures issued by State courts in support of arbitration. The Commission noted that the Working Group had yet to complete its work in relation to the “writing requirement” contained in article 7 (2) of the Model Law and article II (2) of the Convention on the Recognition and Enforcement of Foreign

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<sup>21</sup> A/CN.9/664, A/CN.9/668 and A/CN.9/672.

Arbitral Awards, 1958 (the “New York Convention”). As expected, the Working Group completed its work in respect of those issues and the Secretariat was requested to circulate the draft legislative provisions on interim measures and the form of arbitration agreement, and the draft declaration, to Governments for their comments, with a view to consideration and adoption of the draft legislative provisions and declaration by the Commission at its thirty-ninth session.

44. At its thirty-ninth session, in 2006, the Commission had agreed that Working Group on Arbitration and Conciliation should undertake a revision of the UNCITRAL Arbitration Rules. The Commission noted that, as one of the early instruments developed by UNCITRAL in the field of arbitration, the UNCITRAL Arbitration Rules were widely recognized as a very successful text, having been adopted by many arbitration centres and used in many different instances. In recognition of the success and status of the UNCITRAL Arbitration Rules, the Commission was generally of the view that any revision of the Rules should not alter the structure of the text, its spirit or its drafting style, and should respect the flexibility of the text rather than make it more complex. It was suggested that the Working Group should undertake to define carefully the list of topics that might need to be addressed in a revised version of the UNCITRAL Arbitration Rules.

45. At its fortieth session, the Commission had before it the reports of the forty-fifth and forty-sixth sessions of the Working Group.<sup>22</sup> The Commission also had before it a note by the Secretariat transmitting the report of the Secretary-General of the Permanent Court of Arbitration.<sup>23</sup> The Commission noted that a broad support had been expressed in the Working Group for a generic approach that sought to identify common denominators that applied to all types of arbitration irrespective of the subject matter of the dispute, in preference to dealing with specific situations. However, the Commission noted that the extent to which the revised UNCITRAL Arbitration Rules should take account of investor-State dispute settlement or administered arbitration remained to be considered by the Working Group by the future sessions. With respect to the future work in the field of settlement of commercial disputes, the Commission recalled that, at its thirty-ninth session, it had agreed that the issue of arbitrability was a topic to consider and on the issue of online dispute resolution, it was agreed that the Working Group should maintain the topic on its agenda but, at least in an initial phase, should consider the implications of electronic communications in the context of the revision of the UNCITRAL Arbitration Rules.

46. At the forty-first session, the Commission had before it the reports of the forty-seventh and forty-eighth sessions of the Working Group.<sup>24</sup> The Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules and the Secretariat for the quality of the documentation prepared for the Working Group.

47. The Commission noted that the Working Group had discussed at its forty-eighth session the extent to which the revised UNCITRAL Arbitration Rules should include more detailed provisions concerning investor-State dispute settlement or administered arbitration. Further, the Commission noted that the Working Group had decided to proceed

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<sup>22</sup> Vienna, 11-15 September 2006-A/CN.9/614 and New York, 5-9 February 2007-A/CN.9/619.

<sup>23</sup> A/CN.9/634.

<sup>24</sup> Vienna, 10-14 September 2007-A/CN.9/641 and New York, 4-8 February 2008-A/CN.9/646.

with its work on the revision of the UNCITRAL Arbitration Rules in their generic form and to seek guidance from the Commission on whether, after completion of its current work on the Rules, the Working Group should consider in further depth the specificity of treaty-based arbitration and, if so, which form that work should take. After discussion, the Commission agreed that it would not be desirable to include specific provisions on treaty-based arbitration in the UNCITRAL Arbitration Rules themselves and that any work on investor-State disputes that the Working Group might have to undertake in the future should not delay the completion of the revision of the UNCITRAL Arbitration Rules in their generic form. As to timing, the Commission agreed that the topic of transparency in treaty based investor-State arbitration was worthy of future consideration and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules.

## **B. Consideration at the Forty-Second Session (2009) of the Commission**

48. At its current session, the Commission had before it the reports of the forty-ninth and fiftieth sessions of the Working Group.<sup>25</sup> The Commission commended the Working Group for the progress made regarding the revision of the UNCITRAL Arbitration Rules and the Secretariat for the quality of the documentation prepared for the Working Group.

49. The Commission noted that the Working Group had discussed at its forty-ninth session a proposal aimed at expanding the role of the Secretary-General of the Permanent Court of Arbitration at The Hague under the UNCITRAL Arbitration Rules. The 1976 version of the Rules included a mechanism whereby the Secretary-General of the Permanent Court of Arbitration should, if so requested by a party, designate an appointing authority to provide certain services in support of arbitral proceedings. The appointing authority would appoint members of an arbitral tribunal under articles 6 and 7 of the Rules and might also be called upon, under article 12 of the Rules, to decide on challenges to arbitrators. Under articles 39 and 41 of the Rules, the appointing authority might also assist the parties in fixing the arbitrators' fees and the arbitral tribunal in fixing the deposit for costs. The Secretary-General of the Permanent Court of Arbitration, despite the Court being neither a United Nations body, nor a body created to deal with commercial, non-governmental disputes, agreed to act as the designating authority under the Rules and thus to play a role that was clearly more limited than, and qualitatively different from, that of an appointing authority. A proposal was made in the Working Group to replace the existing mechanism by a provision to the effect that where parties were unable to agree on an appointing authority, the Secretary-General of the Permanent Court of Arbitration should act directly as the appointing authority subject to the parties' right to request the him or her to designate another appointing authority, and to the discretion of the Court's Secretary-General to designate another appointing authority, if it considered it appropriate. The Commission noted that that proposal had initially been made at the forty-sixth session of the Working Group,<sup>26</sup> where it had been considered a major and unnecessary departure from the existing UNCITRAL Arbitration Rules and where it had been decided that the mechanism on the designating and appointing authorities as designed under the 1976 version of the Rules should be preserved.<sup>27</sup>

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<sup>25</sup> Vienna, 15-19 September 2008 and New York, 9-13 February 2009 - A/CN.9/665 and A/CN.9/669 respectively.

<sup>26</sup> A/CN.9/619, paras. 71-74.

<sup>27</sup> A/CN.9/619, para. 74, and A/CN.9/665, para. 49.

50. The Commission further noted that, at the forty-ninth session of the Working Group, diverging views had been expressed as to whether that question should be debated again in the Working Group and the view had been expressed that, whether or not consensus could be reached in the Working Group regarding a possible default rule, the matter was of a political nature and could only be settled by the Commission. At its current session, the Commission had before it a note on the designating and appointing authorities under the UNCITRAL Arbitration Rules.<sup>28</sup>

51. After discussion, the Commission agreed that the existing mechanism on designating and appointing authorities, as designed under the 1976 version of the Rules, should not be changed. It was recalled that the mechanism regarding designating and appointing authorities under the 1976 version of the Rules was not considered to be a problematic area by the Working Group, when defining matters for revision at its forty-fifth session. That mechanism was generally not reported as having created delays for the parties or difficulties in the functioning of the Rules. It was further said that since the provision on designating and appointing authorities under the 1976 version of the Rules did not cause any significant burden and offered benefits, there was no need to alter the structure of the Rules in that respect. In the context of that discussion, the Commission recognized the expertise and the sense of accountability of the Permanent Court of Arbitration, as well as the quality of the services it rendered under the UNCITRAL Arbitration Rules.

52. The two-stage process defined under the 1976 version of the Rules was said to offer flexibility (by allowing the designation of a wide range of appointing authorities to suit the needs of particular cases) that a default appointing authority would preclude. It was observed that the Rules could easily be adapted for use in a wide variety of circumstances covering a broad range of disputes and that one measure of the UNCITRAL Arbitration Rules' success in achieving broad applicability and in their ability to meet the needs of parties in a wide range of legal cultures and types of disputes had been the significant number of independent arbitral institutions that had declared themselves willing to administer (and that, in fact, administered) arbitrations under the UNCITRAL Arbitration Rules, in addition to proceedings under their own rules. It was also said that the proposal to expand the role of the Permanent Court of Arbitration under the Rules, if adopted, would constitute not a mere technical adjustment, but a change in the nature of the Rules and would run contrary to the guiding principles set by the Commission, that any revision of the Rules should not alter the structure of the text, its spirit or its drafting style and should respect the flexibility of the text rather than make it more complex.

53. It was further said that the Permanent Court of Arbitration had been established by the Convention for the Pacific Settlement of International Disputes to deal with disputes involving States and not to handle disputes arising in the context of commercial relations among private parties, which were said to be the primary focus of the UNCITRAL Arbitration Rules. Expanding the role of the Permanent Court of Arbitration, it was said, would appear as favouring the Court over other arbitral organizations, despite the Court having little experience in the area of private commercial disputes, as compared with other arbitration organizations that had jurisdiction over

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<sup>28</sup> A/CN.9/677.

such cases.

54. The Commission was of the view that the establishment of any central administrative authority under the Rules would create a need for providing (in the Rules or in an accompanying document) guidance on the conditions under which such a central authority would perform its functions. The Commission agreed that the work on the revision of the Rules should not be delayed by additional work that would need to be done in that respect if the proposal to expand the role of the PCA were to be pursued.

55. In light of those policy principles, it was emphasized that the UNCITRAL Arbitration Rules should not contain a default rule, to the effect that one institution would be singled out as the default appointing authority and would be identified in the Rules as a provider of direct assistance to the parties.

56. With respect to future work in the field of settlement of commercial disputes, the Commission recalled that the issue of arbitrability and online dispute resolution should be maintained by the Working Group on its agenda, as decided by the Commission at its thirty-ninth session.

## **V. INSOLVENCY LAW**

### **A. Background**

57. The Commission recalled that, at its thirty-ninth session, in 2006, it had agreed that: (a) the topic of the treatment of corporate groups in insolvency was sufficiently developed for referral to Working Group of Insolvency Law (hereinafter ‘Working Group’) for consideration in 2006 and that the Working Group should be given the flexibility to make appropriate recommendations to the Commission regarding the scope of its future work and the form it should take, depending upon the substance of the proposed solutions to the problems that the Working Group would identify under that topic; and (b) post-commencement finance should initially be considered as a component of work to be undertaken on insolvency of corporate groups, with the Working Group being given sufficient flexibility to consider any proposals for work on additional aspects of the topic.

58. During the fortieth session, the Commission reaffirmed that the mandate of the Working Group was to consider the treatment of corporate groups in insolvency, with post-commencement finance to be included as a component of that work. The Commission took note of the agreement of the Working Group, at its thirty-first session, that the Insolvency Guide and the UNCITRAL Model Law on Cross-Border Insolvency provided a sound basis for the unification of insolvency law and that the current work on corporate groups was intended to complement those texts, not to replace them.<sup>29</sup> The Commission also took note of the suggestion made at that session of the Working Group that a possible method of work would be to consider the provisions contained in those existing texts that might be relevant in the context of corporate groups and identify those issues that required additional discussion and the preparation of additional recommendations. The Commission further took note that other issues, although relevant to corporate groups, could be treated in the same manner as in the Insolvency Guide and the UNCITRAL Model Law on Cross-

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<sup>29</sup> A/CN.9/618.

## Border Insolvency.

59. With respect to the facilitation of cooperation and coordination in cross-border insolvency proceedings, the Commission had before it a note by the Secretariat on facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings. The Commission emphasized the practical importance of facilitating cross-border cooperation in insolvency cases. It expressed its satisfaction with respect to the progress made on the work of compiling practical experience with negotiating and using cross-border insolvency protocols based on the draft outline of contents in document.

60. At the forty-first session, the Commission had before it a progress report made on the work of compiling practical experience with negotiating and using cross border insolvency agreements. It decided that the compilation should be presented as a working paper to Working Group at its thirty-fifth session for an initial discussion. The Working Group could then decide to continue discussing the compilation at its thirty-sixth session in April and May of 2009 and make its recommendations to the forty-second session of the Commission, in 2009, bearing in mind that coordination and cooperation based on cross-border insolvency agreements were likely to be of considerable importance in searching for solutions in the international treatment of enterprise groups in insolvency.

### **B. Consideration at the Forty-Second Session (2009) of the Commission**

61. At its current session, the Commission expressed its appreciation for the substantial progress made by the Working Group in considering the treatment of enterprise groups in insolvency as reflected in the reports on its thirty-fifth and thirty-sixth sessions<sup>30</sup> and commended the Secretariat for the working papers and reports prepared for those sessions.

62. The Commission noted that the Working Group had adopted in substance a number of recommendations with respect to the domestic treatment of enterprise groups and had reached agreement on its approach to the international treatment of such groups as reflected in the set of 15 recommendations discussed at its thirty-sixth session, a number of which had been adopted in substance. The Commission took note of the close connection between the work on the international treatment of enterprise groups and both the UNCITRAL Model Insolvency Law and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation and emphasized the need to ensure consistency with those two texts.

63. The Commission also noted that the Working Group had agreed that the text resulting from the work on enterprise groups should form part III of the UNCITRAL Legislative Guide on Insolvency Law and adopt the same format, i.e. recommendations and commentary. To that end, the commentary to accompany both the domestic and international recommendations would be prepared for consideration by the Working Group at its thirty-seventh session, in 2009, and, if necessary, at its thirty-eighth session, in 2010.

64. The Commission also expressed its appreciation for the cooperation between

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<sup>30</sup> Vienna, 17-21 November 2008, New York, 18-22 May 2009 - A/CN.9/666 and A/CN.9/671, respectively.

working groups with respect to the treatment of intellectual property in insolvency and noted that the questions raised by Working Group on Security Interests had been considered and answered by Working Group on Insolvency Law at its thirty-sixth session<sup>31</sup> and noted that that information had been incorporated in the work of Working Group on Security Interests.

### **C. Future Work on Insolvency Law**

65. The question of possible future work that Working Group might undertake on completion of the current topic on enterprise groups was raised. The Commission noted several tentative proposals, including: (a) developing a model law based on the recommendations of the UNCITRAL Legislative Guide on Insolvency Law; (b) undertaking a study of the different financial instruments currently being used and how they were treated in insolvency; and (c) in light of the current financial crisis, considering the insolvency of banks and other financial institutions. It was agreed that those and other possible topics should continue to be discussed and elaborated upon in order to establish their feasibility, with a view to possible consideration of the issue of future work at the Commission's forty-third session, in 2010.

## **VI SECURITY INTERESTS**

### **A. Background**

66. The Commission recalled that, during the first part of its fortieth session,<sup>32</sup> it had decided to entrust Working Group on Security Interests (hereinafter 'Working Group') with the preparation of an annex to the draft Guide on Secured Transactions specific to security rights in intellectual property. At that session, the Commission had emphasized the need to complete that work within a reasonable period of time.

67. The Commission also recalled that, at its resumed fortieth session,<sup>33</sup> it had finalized and adopted the UNCITRAL Legislative Guide on Secured Transactions (the Legislative Guide) on the understanding that the annex to the Legislative Guide would be prepared as soon as possible thereafter so as to ensure that comprehensive and consistent guidance would be provided to States in a timely manner.

### **B. Consideration at the Forty-Second Session (2009) of the Commission**

68. At its current session, the Commission had before it the reports of Working Group on the work of its fourteenth and fifteenth sessions.<sup>34</sup> The Commission noted with satisfaction that the Working Group had completed the reading of two versions of the annex to the Legislative Guide<sup>35</sup> and made significant progress.<sup>36</sup>

69. The Commission also noted with appreciation that Working Group on

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<sup>31</sup> A/CN.9/671, para. 127.

<sup>32</sup> Vienna, 25 June-12 July 2007.

<sup>33</sup> Vienna, 10-14 December 2007.

<sup>34</sup> Vienna, 20-24 October 2008 and New York, 27 April-1 May 2009 - A/CN.9/667 and A/CN.9/670, respectively.

<sup>35</sup> A/CN.9/WG.VI/WP.35 and Add.1 and A/CN.9/WG.VI/WP.37 and Add.1-4.

<sup>36</sup> A/CN.9/667, para. 15, and A/CN.9/670, para. 16.

Insolvency Law, at its thirty-sixth session, had discussed, on the basis of documents,<sup>37</sup> certain insolvency-related issues referred to it by Working Group, and approved the text referred to it by Working Group<sup>38</sup> for inclusion in the annex to the Legislative Guide.<sup>39</sup>

70. In addition, the Commission noted that, at its fourteenth session, the Working Group discussed its future work and agreed that it should be able to complete its work on the draft supplement in time to have it submitted to the Commission for final approval and adoption at its forty-third session, in 2010. Moreover, the Commission noted that, at its fourteenth and fifteenth sessions, the Working Group had engaged in a preliminary discussion of its future work programme.<sup>40</sup>

71. In that connection, it was noted that, at the fifteenth session of the Working Group, the following topics were suggested for inclusion in the future work programme of the Working Group: a text on security rights in securities not covered by the draft convention on substantive rules regarding intermediated securities, being prepared by the International Institute for the Unification of Private Law (UNIDROIT); a legislative guide on registration of security rights; a contractual guide on secured financing agreements; a contractual guide on intellectual property licensing; a model law on secured transactions, incorporating the recommendations of the Legislative Guide; and a text on franchising.<sup>41</sup>

72. With respect to the annex to the Legislative Guide (referred to subsequently as a supplement), the Commission expressed its appreciation to the Working Group and the Secretariat for the progress achieved thus far and emphasized the importance of that supplement. It was stated that economic development involved innovation which was in turn connected with intellectual property assets. It was also pointed out that the main assets of many small or medium-sized businesses were intellectual property assets. Thus, it was observed that it was important for economic development to facilitate secured transactions in which the encumbered asset was an intellectual property asset.

73. After discussion, the Commission, noting the interest of the international intellectual property community, requested the Working Group to expedite its work so as to finalize the supplement to the Legislative Guide in one or two sessions and submit it to the Commission for finalization and adoption at its forty-third session, in 2010, so that the Supplement to the Guide may be offered to States for adoption as soon as possible. The Commission agreed that, if two sessions were not sufficient for the preparation of a generally acceptable and balanced text, the Working Group should be given the time necessary to achieve that result, even if that meant that the supplement to the Legislative Guide would be ready for submission to the Commission at its forty-fourth session in 2011.

74. As to the topics to be included in that future work programme, various views were expressed. With respect to security rights in securities not covered by the draft convention on substantive rules regarding intermediate securities, the Commission noted that, at its fortieth session in 2007, it had decided that future work should be undertaken with a view

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<sup>37</sup> A/CN.9/WG.VI/WP.37/Add.4 and A/CN.9/WG.V/WP.87.

<sup>38</sup> A/CN.9/WG.VI/WP.37/Add.4, paragraphs 22-40

<sup>39</sup> A/CN.9/671, paras. 125-127.

<sup>40</sup> A/CN.9/667, paras. 141-143, and A/CN.9/670, paras. 123-126.

<sup>41</sup> A/CN.9/670, para. 124.

to preparing a supplement to the Guide on certain types of securities, taking into account work by other organizations, in particular UNIDROIT. In that connection, it was generally agreed that no decision could be made before UNIDROIT had finalized its work on the draft convention, which it would presumably do in the fall of 2009. With respect to a legislative guide on registration of security rights in general security rights registries, it was stated that such work could usefully supplement the work achieved by the Commission on the Guide. With respect to a contractual guide on intellectual property licensing, it was stated that such work, if any, should be undertaken in close cooperation with the World Intellectual Property Organization (WIPO).

75. In addition, it was agreed that the Secretariat could hold an international colloquium early in 2010 with broad participation of experts from Governments, international organizations and the private sector. Moreover, the Commission left it to the Secretariat to organize an expert group meeting, if necessary, to obtain expert advice for the preparation of a paper discussing the various work topics and making suggestions. It was generally agreed that on the basis of that paper the Commission would be in a better position to consider and make a decision on the future work programme of Working Group at its forty-third session, in 2010.

76. In response to a question, it was noted that, should the Working Group complete its work at its sixteenth session in the fall of 2009, it was noted that, in discussing its possible future work programme in the area of security interests at a future session, the Commission could be assisted by the detailed suggestions of Working Group and a paper to be prepared by the Secretariat after a colloquium and an expert group meeting, if necessary.

77. At the conclusion of its deliberations on security interests, the Commission recalled the mandate given to the Secretariat for the publication of the commentary to the United Nations Convention on the Assignment of Receivables in International Trade. In that connection, it was suggested that the Secretariat could hold an expert group meeting with the participation of experts who were involved in the preparation of the Convention. The Commission also recalled its mandate for the publication of a text discussing the interrelationship of various texts on security interests prepared by the Commission, UNIDROIT and the Hague Conference on Private International Law.

## **VII. POSSIBLE FUTURE WORK IN ELECTRONIC COMMERCE**

### **A. Background**

78. The Commission recalled that the Working Group on Electronic Commerce (hereinafter 'Working Group'), after it had completed its work on the draft Convention on the Use of Electronic Communications in International Contracts, in 2004, requested the Secretariat to continue monitoring various issues related to electronic commerce, including issues related to cross-border recognition of electronic signatures, and to publish the results of its research with a view to making recommendations to the Commission as to whether future work in those areas would be possible.<sup>42</sup>

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<sup>42</sup> A/CN.9/571, para. 12.

79. At its thirty-eighth session, in 2005, the Commission requested the Secretariat to prepare a more detailed study, to the form and nature of a comprehensive reference document discussing the various elements required to establish a favourable legal framework for electronic commerce, which the Commission might in the future consider preparing with a view to assisting legislators and policymakers around the world. At its thirty-ninth session (2006), the Commission had considered a note which was prepared by the Secretariat which identified the following areas as possible components of a comprehensive reference document: (a) authentication and cross-border recognition of electronic signatures; (b) liability and standards of conduct for information-services providers; (c) electronic invoicing and legal issues related to supply chains in electronic commerce; (d) transfer of rights in tangible goods and other rights through electronic communications; (e) unfair competition and deceptive trade practices in electronic commerce; and (f) privacy and data protection in electronic commerce. The note also identified other issues which, although in a more summary fashion, could be included in such a document: (a) protection of intellectual property rights; (b) unsolicited electronic communications (spam); and (c) cyber crime.

80. The Commission further agreed that its final decision on that matter might be facilitated if it could review a sample portion of the comprehensive reference document on a discrete topic. The Commission therefore requested the Secretariat to prepare a document dealing specifically with issues related to authentication and cross-border recognition of electronic signatures, for review at its fortieth session, in 2007.

81. At the fortieth session, the Commission considered the sample chapter that had been prepared by the Secretariat.<sup>43</sup> The Commission reviewed the structure, level of detail, nature of discussion and type of advice provided in the sample chapter. The Commission regarded the chapter as very informative and useful. It was suggested that it would be desirable for the Secretariat to prepare other chapters following the same model, to deal with other issues that the Commission might wish to select from among those proposed earlier, in particular the transfer of rights in tangible goods and other rights through electronic communications.

82. At the forty-first session, the Commission had before it a note by the Secretariat setting out policy considerations and legal issues in the implementation and operation of single windows and submitting proposals for possible future work in cooperation with other international organizations. The note also summarized the proposal by World Customs Organization (WCO) for joint work.

83. The Commission was informed that single windows could enhance the availability and handling of information, expedite and simplify information flows between traders and Governments and result in a greater harmonization and sharing of the relevant data across governmental systems, bringing meaningful gains to all parties involved in cross-border trade. The Commission noted that the use of single windows could result in improved efficiency and effectiveness of official controls and could reduce costs for both Governments and traders as a result of better use of resources. At the same time, the Commission also noted that the implementation and operation of single windows gave rise to a number of legal issues including, for example, the legislative authority to operate single windows; identification, authentication and authorization to exchange documents

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<sup>43</sup> A/CN.9/630 and Add.1-5.

and messages through single windows; data protection; liability of operators of single windows; and legal validity of documents exchanged in electronic form.

84. The Commission also heard a proposal for the Commission to undertake a project to identify the basic issues and define the fundamental principles that must be addressed to develop workable international legal systems for electronic transferable records and to assist States in developing domestic systems that affect international commerce. Such work, it was proposed, would likely focus to some extent on the use of electronic registries, but should recognize that specific solutions would vary based on sector and application requirements. The proposed project would include a clear set of high-level principles that could be incorporated into any international system for transferable records. It was suggested that additional guidance could be provided to assist States, international organizations and industries to assess the legal risks and the options available to them and to help them through the process of crafting approaches to transferability best suited to their needs and the needs of global commerce. If appropriate, following that phase, consideration could then be given to the possible need for and feasibility of elaborating additional instruments that could promote commerce and trade by boosting the effectiveness of electronic records.

#### **B. Consideration at the Forty-Second Session (2009) of the Commission**

85. At the current session, the Commission had before it a note by the Secretariat<sup>44</sup> providing an update on the work relating to policy considerations and legal issues in the implementation and operation of single window facilities. In particular, the note reported on the activities of the WCO-UNCITRAL Joint Legal Task Force on Coordinated Border Management incorporating the International Single Window (the Joint Legal Task Force) as well as on other regional initiatives in this field. Moreover, the note referred to a proposal for the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers, in particular in developing countries, when dealing with issues relating to electronic commerce.

86. The Commission had received further proposals for future work on electronic commerce from States. One proposal suggested the preparation of legal standards on the electronic transferability of rights to goods in transit as well as on electronic documents for bills of lading, letters of credit, insurance and other trade in and transportation of goods.<sup>45</sup> A related proposal called for the preparation of uniform rules governing electronic transfer or negotiation of rights or documents with a view to fostering the migration of cross-border operations of this kind to the electronic environment; the suggested approach focused on the role of electronic registries and trusted third parties in these processes. A third proposal suggested preparing a study on possible future work on the subject of online dispute resolution in cross-border electronic commerce transactions.<sup>46</sup>

87. The Commission heard a statement from a representative of WCO on the work of the Joint Legal Task Force. The Commission also heard a statement from the Inter-Parliamentary Assembly of the Eurasian Economic Community on the structure of

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<sup>44</sup> A/CN.9/678.

<sup>45</sup> A/CN.9/681 and Add.1.

<sup>46</sup> A/CN.9/681/Add.2.

that body and its activities relating to electronic commerce legislation and single window facilities.

88. The Commission stressed the importance of the work of the Joint Legal Task Force, and, more generally, of the legal aspects of single window facilities for trade facilitation. The desirability of focusing that work on practical outcomes, including by involving implementing bodies such as WCO, was also noted. After discussion, the Commission requested the Secretariat to remain engaged in the Joint Legal Task Force, to report periodically on its achievements and to convene a Working Group session should the progress of work warrant it.

89. The Commission agreed on the importance of the proposals relating to future work in the fields of electronic transferable records and of online dispute resolution to promote electronic commerce, for the reasons expressed in the proposals submitted to the Commission. With respect to electronic transferable records, it was recalled that, as already noted at the Commission's forty-first session, limited elements of commonality in the different records and rights transferred would not support immediate work at the working group level. Thus, it was indicated that further information was needed in order to fully assess the scope and mandate of possible future work on those issues by the Working Group.

90. With respect to the proposal on online dispute resolution, it was suggested that further studies should identify the different groups interested by possible future standards, including consumers. It was noted in this respect that the variety of rules on consumer protection made it particularly difficult to achieve harmonization in this field. Divergent views were expressed on the desirability of a discussion of the issue of enforcement of awards rendered in online arbitral proceedings. It was explained that practical difficulties arose from the fact that the disputes settled by such awards generally involved small monetary amounts, especially in consumer-related disputes, and from the costs of cross-border enforcement under existing instruments.

91. The Commission requested the Secretariat to prepare studies on the basis of the proposals in documents<sup>47</sup> with a view to reconsidering the matter at a future session. It further requested the Secretariat to hold colloquiums on the same issues, resources permitting.

92. The Commission was aware of the importance of providing adequate assistance to developing countries in addressing the digital divide, and of promoting the adoption of modern electronic commerce legislation. However, the Commission did not consider it had sufficient information to support the proposal to initiate the compilation of a comprehensive reference document aimed at facilitating the task of legislators and policymakers. In this respect, it was noted that, while a significant amount of information had already been made available to the public, including through the UNCITRAL website, the studies already requested by the Commission to the Secretariat fully engaged its capacity in the near future. It was therefore suggested that the proposal could be reconsidered at a later stage, subject to availability of resources and to clarification of the specific issues to be covered in such compilation.

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<sup>47</sup> A/CN.9/681; Add.1 and 2 and A/CN.9/682.

## VIII. POSSIBLE FUTURE WORK IN THE AREA OF COMMERCIAL FRAUD

### A. Background

93. The Commission considered this subject at its thirty-fifth to thirty-eighth sessions, in 2002 to 2005. At its thirty-seventh session, in 2004, with a view towards education, training and prevention, the Commission had agreed that the preparation of lists of common features present in typical fraudulent schemes could be useful as education material for participants in international trade and other potential targets of perpetrators of fraud to the extent that such lists would help potential targets protect themselves and avoid becoming victims of fraudulent schemes.

94. At its thirty-eighth session, the Commission's attention was drawn to Resolution 2004/26 adopted by the Economic and Social Council (ECOSOC) on 21 July 2004, pursuant to which the United Nations Office on Drugs and Crime (UNODC) had convened an intergovernmental expert group to prepare a study on fraud and the criminal misuse and falsification of identity, and develop on the basis of such a study relevant practices, guidelines or other materials, taking into account in particular the relevant work of UNCITRAL.

95. At its thirty-ninth session, the Commission heard a progress on work by the Secretariat on materials listing common features present in typical fraudulent schemes. At that session, the Commission took note of the suggested format for the materials and the additional information such as explanations regarding how to effectively perform due diligence.<sup>48</sup> The Commission agreed with statements made at the session to the effect that commercial fraud deterred legitimate trade and undermined confidence in established contract practices and instruments and that the UNCITRAL transactional and private law perspective and expertise were necessary for a full understanding of the problem of measures to fight it. The Commission concluded that its Secretariat should continue its work in conjunction with experts and other interest organizations with respect to identifying common features of fraudulent schemes, with a view to presenting interim or final materials for the consideration of the Commission at a future session and continue its cooperation with UNODC in its study on fraud, the criminal misuse and falsification and identity and related crimes.

96. At the fortieth session, the Commission was informed that the Secretariat had, as requested, continued its work in conjunction with experts and other interested organizations with respect to identifying common features of fraudulent schemes in order to prepare materials of an educational nature for the purpose of preventing the success of fraudulent schemes. The results of that work were reflected in a note by the Secretariat entitled "Indicators of commercial fraud".<sup>49</sup> The presentation of each of the indicators was similar: first, the potential indicator of fraud was identified; this was followed by a more detailed description of the indicators; and, lastly, instances and examples of the particular indicator were given, as found in a commercial fraud in a variety of contexts. Finally, since it was not possible to identify discrete indicators with absolutely clear demarcations

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<sup>48</sup> A/CN.9/600. para. 16.

<sup>49</sup> A/CN.9/624 and Add.1 and 2.

between them, it was explained that many of the indicators could or should overlap, and cross references to other related indicators were included, where relevant.

97. However, the Commission was also informed that, as noted in the introduction to the materials, each of the indicators taken alone or in combination was not intended to indicate definitively the presence of commercial fraud; rather, the presence of a single warning sign was intended to send a signal that commercial fraud was a possibility, while the presence of several of the indicators was intended to heighten that concern.

98. At its forty-first session, the Commission had before it the comments of States and Organizations on the indicators of commercial fraud submitted to the Secretariat<sup>50</sup> and the text of the indicators that had been circulated. Following its consideration of the comments of Governments and international organizations, the Commission reiterated its support for the preparation and dissemination of the indicators of commercial fraud, which were said to represent an extremely useful approach to a difficult problem. The indicators, it was said, would be an important and credible addition to the arsenal of weapons available in the battle against fraudulent practices, which were so detrimental to the commercial world.

99. The Commission considered how best to proceed with respect to completing the work on the indicators of commercial fraud. Given the technical nature of the comments received and bearing in mind that such treatment should keep separate any criminal law aspects of commercial fraud, the Secretariat was requested to make such adjustments and additions as were advisable to improve the materials and then to publish the materials as a Secretariat informational note for educational purposes and fraud prevention. The Commission was of the view that the materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials.

## **B. Consideration at the Forty-Second Session (2009) of the Commission**

100. At the current session of the Commission, the Secretariat reported that several examples of fraudulent schemes that had come to light since the beginning of the global economic crisis were being added to the indicators, which were being updated and prepared for publication and dissemination. The Commission expressed its approval and its continued support for the publication and dissemination of indicators of commercial fraud.

101. The Secretariat further reported that it had participated in all meetings of UNODC core group of experts on identity-related crime, which had been created to examine issues of economic fraud and identity fraud. Three meetings of the core group of experts had been held, in November 2007, June 2008 and January 2009, the results of which had been considered by the Commission on Crime Prevention and Criminal Justice at its eighteenth session,<sup>51</sup> under the agenda item entitled “Economic fraud and identity-related crime”.

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<sup>50</sup> A/CN.9/659 and Add.1 and 2.

<sup>51</sup> 18 April 2008 and 16-24 April 2009.

102. The Commission was informed that at its eighteenth session, the Commission on Crime Prevention and Criminal Justice had considered a number of texts on the issue of economic fraud, including: the reports of the first three meetings of the core group of experts<sup>52</sup>; a report of the Secretary-General on international cooperation in the prevention, investigation, prosecution and punishment of economic fraud and identity-related crime<sup>53</sup>; a note by the Secretariat, section II of which was on economic fraud and identity-related crime<sup>54</sup>; a conference room paper on essential elements of criminal laws to address identity-related crime<sup>55</sup>; a conference room paper on legal approaches to criminalize identity theft<sup>56</sup>; and a discussion paper on identity-related crime victim issues.<sup>57</sup>

103. The Commission was advised that two themes raised by the Commission on Crime Prevention and Criminal Justice at its eighteenth session might be of particular interest to UNCITRAL. The first theme was the prevention of economic crime and identity-related crime, and cooperation in that regard with the private sector. The second theme was international cooperation in the prevention of economic fraud and identity-related crime, particularly in terms of raising awareness of the problem and providing technical assistance. The following conclusions reached by the Commission on Crime Prevention and Criminal Justice after the thematic discussions on economic crime and identity-related crime were reported to UNCITRAL as being of possible interest:

- (a) It was generally agreed that, in view of the increasing transnational nature of economic fraud and identity-related crime, it was indispensable to strengthen international cooperation mechanisms;
- (b) Emphasis was placed on giving special consideration to the protection of victims of economic fraud and identity-related crime, particularly in terms of awareness-raising and educational programmes, among other issues;
- (c) The education of potential victims of fraud and identity-related crime, as well as the dissemination of information to them, were said to be critical elements of crime prevention strategies;
- (d) It was acknowledged that cooperation between the public and private sectors was essential in order to develop an accurate and complete picture of the problems posed by economic fraud and identity-related crime and in order to adopt and implement both preventive and reactive measures against such crime.

104. The Commission took note that certain of the actions requested of UNODC by the Commission on Crime Prevention and Criminal Justice in its draft resolution would allow ample scope for integrating the work of UNCITRAL on the indicators of commercial fraud as an important tool for prevention and education and as a possible component of any broader efforts by UNODC in that regard. In response to a question regarding the possibility of future work for UNCITRAL in that area, for example, the development of a code of conduct, the Commission was advised that, following the approval of the draft resolution by the Economic and Social Council, the Secretariat

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<sup>52</sup> E/CN.15/2009/CRP.10, E/CN.15/2009/CRP.11 and E/CN.15/2009/CRP.12.

<sup>53</sup> E/CN.15/2009/2 and Corr.1.

<sup>54</sup> E/CN.15/2009/15.

<sup>55</sup> E/CN.15/2009/CRP.9.

<sup>56</sup> E/CN.15/2009/CRP.13.

<sup>57</sup> E/CN.15/2009/CRP.14.

would consult with the UNODC secretariat regarding the possibilities for future work and collaboration, and would report on that issue to UNCITRAL at a future session of the Commission.

105. The Commission expressed its gratitude to the Secretariat for its work in the area of commercial fraud and expressed the desire that the Secretariat would continue its efforts at cooperation and collaboration with the UNODC secretariat in its work on economic fraud and identity-related crime, including by reporting to the Commission on developments at its future sessions.

106. One delegation proposed that the Commission's work in the area of commercial fraud should be extended to the area of financial fraud, in the light of the current situation and recent events in the financial market that had cross-border and international implications. It was proposed that, in the future, work on financial fraud could focus on developing further indicators of financial fraud and on identifying preventive measures. In addition, it was proposed that such work could also involve a study of measures for efficiently solving the consequences of financial fraud, with a view to preserving the integrity of the global financial market. The creation of an institutional arbitration organ was mentioned as one such possible measure. The Commission took note of those proposals.

#### **IX. FORTY-THIRD SESSION OF THE COMMISSION**

107. The forty-third session of the Commission will be held in New York from 21 June to 9 July 2010.

#### **X. GENERAL COMMENTS OF THE AALCO**

108. The Commission at its forty-second session was able to finalize and adopt the Practice Guide on the Cross-border Insolvency Cooperation. The adoption of the Practice Guide was a key and timely achievement of the current session. It provides the necessary information for insolvency practitioners and judges on practical aspects of cooperation and communication in cross-border insolvency cases. The information is based upon a description of collected experience and practice, focusing on the use and negotiation of cross-border agreements. It also provides an analysis of more than 39 agreements, ranging from written agreements approved by courts to oral agreement between parties to the proceedings that have been entered into over the last decade or so.

109. It is also welcoming that all other Working Groups established by the Commission have made considerable progress in the forty-second session. AALCO hopes that the Member States would continue to support and actively participate in the work of the UNCITRAL and its Working Groups. Further, AALCO also urges the Member States to implement the instruments adopted by the UNCITRAL, in order to promote uniformity and consistency in the international trading system.