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ASIAN-AFRICAN LEGAL CONSULTATIVE ORGANIZATION

REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

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REPORT ON THE WORK OF UNCITRAL AND OTHER INTERNATIONAL ORGANIZATIONS IN THE FIELD OF INTERNATIONAL TRADE LAW

I. INTRODUCTION

1. AALCO Secretariat has been in the practice of preparing report to the Annual Session of the Organization, which will be focusing on the work of the United Nations Commission on International Trade Law (UNCITRAL), and other International Organizations in the field of international trade law. With the onset of the globalization process and the establishment of the World Trade Organization (WTO), the task of legislating new rules and harmonizing the existing laws relating to international trade has gained momentum.

2. Against this backdrop, this report prepared by the AALCO Secretariat is intended to provide an overview of the work of UNCITRAL and other International Organizations engaged in the field of international trade law. The Organizations covered in the report are:

(A) UNCITRAL (United Nations Commission on International Trade Law)

(B) UNCTAD (United Nations Conference on Trade and Development)

(C) UNIDROIT (International Institute for the Unification of Private Law)

(D) HCCH (Hague Conference on Private International Law)

II. REPORT ON THE WORK OF UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) AT ITS FORTY-FIRST SESSION IN THE YEAR 2008

A. Introduction

3. 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.[1]

4. The forty-first session of the UNCITRAL was held in New York from 16 June to 3 July 2008. The Commission had on its agenda, *inter alia*, the following topics for consideration:

(i) Finalization and Adoption of a Draft UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

(ii) Arbitration and Conciliation

(iii) Public Procurement, and

(iv) Insolvency Law

5. This brief report is primarily focused on examining the UNCITRAL's deliberations at its forty-first session on the above topics. The main achievement of this session, *inter alia*, was the finalization and approval of a draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.[2]

[1] 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, Croatia, 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, Sri Lanka**, Spain, Switzerland, **Thailand, Uganda**, United Kingdom, United States of America, Venezuela and Zimbabwe. (The countries specified in bold letters are Member States of AALCO).

[2] UN Press Release, UNIS/L/121, 7 July 2008.

B. Finalization and Adoption of the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea

1. Background

6. The Commission, at its twenty-ninth session (1996), had considered a proposal to include in its work programme a review of current practices and laws in the area of international carriage of goods by sea, with a view to establishing uniform rules where no such rules existed and achieving greater uniformity in laws. Since then the work has been carried out by the UNCITRAL Secretariat with the cooperation of other international organizations representing various industries. The Commission at its thirty-fourth session (2001), decided to entrust the preparation of draft instrument on transport law to the Working Group on Transport Law (hereinafter 'Working Group'). As to the mandate of the work, the Commission decided that considerations should cover initially port-to-port transport operations (including liability issues). However, the Working Group was given free hand to study the desirability and feasibility of dealing with door-to-door transport operations, or certain aspects of those operations. At its thirty-fifth session (2002), the Commission approved the working assumption that the draft Convention on transport law should cover door-to-door operations.

7. At its thirty-sixth (2003) to thirty-ninth (2006) sessions, the Commission noted the complexities involved in the preparation of the draft Convention on the Carriage of Goods wholly or partly by Sea and authorized the Working Group, on an exceptional basis, to hold its sessions on the basis of two-week periods.

8. At the eighteenth and nineteenth sessions, the Working Group[3] informed to the Commission that, it had continued and largely completed its second reading of the draft Convention, and had made significant progress with regard to a number of difficult issues, including those regarding transport documents and electronic transport records, shipper's liability of delay, time of suit, limitation of the carrier's liability, the relationship of the draft Convention with other Conventions, general average, jurisdiction and arbitration. Also considered by the Working Group was the issue of right of suit pursuant to the draft Convention and it was decided that, while an attempt to offer uniform solutions for rights of suit was a laudatory goal, the chapter should be deleted from the draft Convention in the light of its complexity and of the Working Group's goal for completion of the text. The Commission was also informed that the Secretariat had facilitated consultations between experts from Transport Law Working Group and Arbitration and Conciliation Working Group and that a common understanding had been reached that accommodated the needs and general approach of both working groups regarding the provisions on arbitration in the draft Convention.

9. The Commission was further informed that the Working Group, at its nineteenth session, had commenced its third reading of the draft Convention and that significant progress had been made in that regard. The third reading of a number of chapters of the draft Convention had been completed, including of related definitions, regarding the

[3] Vienna, 6-17 November 2007, A/CN.9/616 and New York, 16-27 April 2007, A/CN.9/621, respectively.

scope of application, electronic transport records, the period of responsibility of the carrier, the obligations of the carrier, the liability of the carrier, additional provisions relating to particular stages of carriage, the validity of contractual terms, liability for delay in the delivery of goods, the relationship of the draft Convention with other conventions and the obligations of the shipper. The Commission was further informed that the third reading had also largely been completed of the chapter regarding transport documents and electronic transport records.

10. The Convention text was drafted based on the original text provided by Comite Maritime Internationale (CMI), a non-governmental international organization, to replace the Hague, Hague-Visby and Hamburg Rules which were considered to be outdated, never gained widespread adherence and were never uniformly adopted by major trading countries.

2. Consideration of Draft Articles at the Forty-First Session (2008) of the Commission

11. The draft Convention contains eighteen chapters and ninety-eight draft articles. At the forty-first session, the Commission considered the draft articles in the order,[4] except where the interrelationship between certain draft articles required their consideration in a different order. The Commission agreed that the draft definitions should be considered in conjunction with the substantive provisions to which they related.

12. The following are some of the draft articles, *inter alia,* which were discussed at length and approved by the Commission and adopted by the UN General Assembly at its sixty-third session on 11 December 2008.[5]

Chapter 1. General Provisions

Draft article 3: Form requirements; and draft article 1, paragraph 17 ("electronic communication")

13. The Commission agreed that the cross references contained in draft article 3 were incomplete and that reference should also be made to draft articles 24, paragraph 4; 69, paragraph 2; and 77, paragraph 4, as those provisions also contemplated communications that needed to be made in writing.

14. The question was asked whether the definition of electronic communication contained in draft article 1, paragraph 17, required that the communication should also identify its originator. In response to that question, it was observed that the definition of electronic communication used in the draft Convention followed the definition of the same term in the United Nations Convention on the Use of Electronic Communications in International Contracts. The capability of identifying the originator, it was said, was a function of electronic signature methods, which was dealt with in draft article 40, and not

[4] Annex to the document A/CN.9/645.
[5] A/RES/63/120 dated 11 December 2008.

a necessary element of the electronic communication itself. The Commission agreed that the draft definition adequately reflected that understanding.

Chapter 2. Scope of Application

Draft Article 5: General scope of application; and draft article 1, paragraphs 1 ("contract of carriage"), 5 ("carrier") and 8 ("shipper")

15. The view was expressed that the notion of "contract of carriage" in the draft convention was wider than under previous conventions, such as the Protocol to amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924, as amended by the Protocol of 23 February 1968 (the "Hague-Visby Rules") and the United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules"), because the Convention would also apply to carriage of goods done only partly by sea. However, it was pointed out that there was no requirement in the draft Convention for the goods actually to be carried by sea, which meant that, in theory, as long as the contract of carriage provided that the goods would be carried by sea, the Convention would apply even if the goods were not actually so carried. As the contract could identify a port of loading and a port of discharge in different States, the Convention would apply, even if the goods had not actually been loaded or discharged at those named ports. Alternatively, if the contract of carriage failed to mention any of the places or ports listed in draft article 5, subparagraphs 1 (a)-(d), it would be possible to infer that the Convention would not apply, even though the goods might, in fact, have been carried by sea in a manner that would have complied with the Convention requirements. The draft Convention, it was proposed, should be amended so as to place the emphasis on the actual carriage rather than on the contractual provisions.

16. Another proposal was to open the possibility for limiting the scope of the draft Convention only to contracts for carriage by sea so as not to cover contracts for carriage by sea and other modes of transport. The concern was expressed that the draft Convention established special rules applying to one particular type of multimodal transport contract, namely multimodal transport contracts that provided for carriage by sea. That, it was said, would lead to a fragmentation of the laws on multimodal transport contracts. Moreover, the draft convention was said to be generally unsuitable for application to contracts for multimodal transport.

17. The Commission took note of those concerns, but was not in favour of amending the provisions that dealt with the scope of application of the Convention. It was observed that the basic assumption of the Working Group had been that the key for determining the scope of application of the draft instrument was the contract of carriage, not the actual carriage of the goods. It was also observed that the Working Group had spent a significant amount of time in considering the scope of the draft Convention and its suitability for contracts of carriage that included other modes of transportation in addition to carriage by sea. The Commission approved the substance of draft article 5 and the definitions contained in draft article 1, paragraphs 1, 5 and 8, and referred them to the drafting group.

Draft article 12: **Period of responsibility of the carrier**

18. Concerns were expressed in the Commission regarding the possible effect of paragraph 3 of draft article 12, which stated that the provision was void to the extent that it provided that the time of receipt of the goods was subsequent to the beginning of their initial loading under the contract of carriage, or that the time of delivery of the goods was prior to the completion of their final unloading under the contract of carriage. In particular, the view was expressed that paragraph 3 could thus be taken to mean that a provision would be valid, provided an exemption of the carrier from liability for loss or damage that occurred prior to the loading of the goods on the means of transport, or following their having been unloaded, despite the fact that at such time the carrier or its servants had custody of the goods. In order to avoid that result, a text was suggested to replace paragraph 3.

19. Some support was expressed for that proposal and for adjusting the text. However, support was also expressed for an alternative interpretation of paragraph 3, such that the carrier should be responsible for the goods for the period set out in the contract of carriage, which could be limited to "tackle-to-tackle" carriage. However, there was general agreement in the Commission that nothing in the draft Convention prevented the applicable law from containing a mandatory regime that applied in respect of the period prior to the start of the carrier's period of responsibility or following its end.

20. There was an agreement in the Commission that the different views that had been expressed on the possible interpretation of paragraph 3 illustrated that there could be some ambiguity in the text. However, the Commission was of the view that it might be possible to clarify the text so as to ensure a more uniform interpretation. The Commission agreed that revised text to resolve the apparent ambiguity in paragraph 3 should be considered, and that it would delay its approval of draft article 12 until such efforts had been pursued.

Draft article 13: **Transport beyond the scope of the contract of carriage**

21. It was observed that, in the light of the diverging views in the Commission on this draft article, two options seemed possible. The first was to simply delete the draft article 13, but to ensure that the *travaux préparatoires w*ere clear in indicating that its deletion did not intend to indicate that the long-established commercial practice was no longer allowed. The second option was that the Commission could attempt to redraft the draft article 13 in order to retain its purpose but to address the concerns that had been raised in regard to its current text. It was further observed that any attempt to redraft the text should make it clear that the provision was operative only at the express request of the shipper, and that it might be possible to redraft the text in order to clarify the carrier's obligation in respect of the shipper in such cases.

Draft article 14: **Specific obligations**

22. Concerns were expressed in the Commission with respect to the title of the draft provision. It was observed that the term "specific obligations" did not seem appropriate, particularly as translated in to some of the language versions, as the provision itself set out very standard obligations of the carrier. It was suggested that the title of the provision should be "general obligations" or possibly "obligations in respect of the goods". While the view was also expressed that the existing title of the provision was appropriate, there was some support for changing the title along the lines suggested.

23. A proposal was made to include in paragraph 1 of the requirement that the carrier carefully receive and mark the goods. Support was expressed for a proposal to delete paragraph 2 of draft article 14, which regulated FIOS (free in and out, stowed) clauses.

24. A suggestion was made that paragraph 2 could be limited to non-liner transportation as, in liner trade; the carrier typically performed the listed obligations itself in respect of the containers. It was noted that draft article 83, subparagraph (b), could cover those cases where the shipper itself undertook the handling of the goods in liner transportation. However, it was observed that in some situations, as for example with respect to irregular or non-containerized goods such as large machinery, special equipment or particular products, FIOS clauses were employed in the liner trade as well. Accordingly, the suggestion was not taken up.

Draft article 16: **Goods that may become a danger**

25. A proposal was made to limit the carrier's rights under draft article 16 by providing that the carrier could take any measures contemplated in the draft article only if it was not aware of the dangerous nature of the goods. The carrier, it was further suggested, should also be required to explain the reasons for taking any of those measures and to show that the actual or potential danger posed by the goods could not have been averted by less drastic measures than the ones actually taken.

26. There was not sufficient support for those proposals. On the one hand, it was felt that requiring the carrier to justify the reasons for any measures taken under the draft article was unnecessary, as the carrier would be required to do so in court in case the measures were challenged by the cargo interests. On the other hand, it was pointed out that draft articles 16 and 17 were important to confirm the carrier's authority to take whatever measures were reasonable, or even necessary, under the circumstances to prevent danger to persons, property or the environment. The carrier did not enjoy unlimited and uncontrolled discretion under draft article 16, which merely made it clear that measures reasonably taken by the carrier to avoid danger posed by the goods did not constitute a breach of the carrier's obligations to care for the goods received for carriage. However, the carrier's release of liability under draft article 18, subparagraph 3 (o), was not an absolute one as, in any event, the measures taken by the carrier under draft articles 16 and 17 were subject to the standard of reasonableness stated in those provisions and otherwise inherent to the carrier's duty of care for the cargo under the draft Convention.

It was also said that limiting the carrier's rights under the draft article to situations where the carrier could prove that it was not aware of the dangerous nature of the goods would be tantamount to shifting the risk of carrying dangerous goods from the shipper to the carrier, a result which should not be condoned in the draft Convention.

Chapter 5. Liability of the carrier for loss, damage or delay

Draft article 18: Basis of liability

27. The Commission heard strong objections to the decision not to amend the draft article, in particular its paragraph 3. The maintenance of that paragraph, it was stated, would have a number of negative consequences, such as higher insurance premiums, resulting in higher prices of goods and consequently reduced quality of life for the final consumers, which would particularly be felt by the populations of least developed countries, landlocked developing countries and Small Island developing States. That outcome, it was further stated, would be contrary to a number of fundamental policy goals and principles of the United Nations, as formally adopted by the General Assembly. The Commission was reminded, for instance, of the Millennium Development Goals expressed in General Assembly resolution 60/1 of 16 September 2005, which adopted the 2005 World Summit Outcome. The Commission was urged not to ignore its role in that process and to bear in mind the negative impact that its decision regarding draft article 18 would have for a number of developing and least developed countries. The concern was expressed that by retaining in the text provisions those unduly favoured carriers to the detriment of shippers, the Commission might diminish the acceptability of the draft Convention in entire regions of the world.

28. While reiterating its sympathy for those who were not entirely satisfied with the draft article, the Commission decided to approve the substance of draft article 18 and to refer it to the drafting group. In doing so, the Commission requested the drafting group to align the reference to containers in subparagraph 5 (a) (iii) with a similar reference in draft article 15, subparagraph (c), deleting the brackets around the relevant phrase.

Draft article 20: Liability of maritime performing parties; and draft article 1, paragraphs 6 ("performing party") and 7 ("maritime performing party")

29. It was noted that the draft article 20 made the maritime performing party subject to the same liabilities imposed on the carrier. According to the definition in draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. The combined effect of those provisions was said to be inappropriate, as seaworthy packing could also be performed inland. Furthermore, cargo companies located in seaports were more and more frequently performing services that did not fall under the obligations of the carrier. There might be doubts as to whether a road or rail carrier that brought goods into the port area would qualify as a maritime performing party for its entire journey or whether it would be a mere performing party until it reached the port area and would become a maritime performing party upon entering the port area. As it was in practice

difficult to establish the boundaries of port areas, the practical application of those provisions would be problematic. In view of those problems, it was suggested that the draft Convention should allow for declarations whereby Contracting States could limit the scope of the Convention to carriage by sea only.

30. In response, it was noted that in accordance with the draft article 1, paragraph 7, an inland carrier would be regarded as a maritime performing party only if it performed or undertook to perform its services exclusively within a port area. That qualification was consistent with a policy decision taken by the Working Group that road carriers should generally not be equated with maritime performing parties.

31. Therefore, a road carrier that brought goods from outside the port area into the port area would not be regarded as a maritime performing party, as the road carrier had not performed its obligations exclusively in the port area. Furthermore, it was noted that it had become common for local authorities to define the extent of their port areas, which would in most cases provide a clear basis for the application of the draft article. The Working Group, it was further noted, did not consider that there was any practical need for providing a uniform definition of "port area".

***Draft article 22*: Delay**

32. The view was expressed that the draft article was unsatisfactory, as it did not limit the amount recoverable for delay in delivery, leaving the issue entirely to freedom of contract. Another criticism was that it was unclear whether under the draft article damage caused by the delay would also be recoverable in case of implied delivery deadlines or periods. It was proposed, therefore, that the draft article should be deleted and that the matter of liability for delay should be left for applicable national law.

33. In response, it was noted that, as currently worded, the draft article did not require an express agreement on a delivery time or period, neither did it allow the carrier to exclude its liability for delay.

***Draft article 23:* Calculation of compensation**

34. There was no support for a proposal to mention a determination of value of the goods by the competent courts in cases where there were no similar goods. It was felt that courts generally would assess the compensation according to the local rules and that the draft Convention should not venture into offering concrete rules for exceptional situations.

***Draft article 34:* Assumption of shipper's rights and obligations by the documentary shipper; and draft article 1, paragraph 9 ("documentary shipper")**

35. A concern was expressed that the draft article 34 was too broad in subjecting the documentary shipper to all of the obligations of the shipper. That view was not taken up by the Commission. In response to a question whether the documentary shipper and the

shipper could be found to be jointly and severally liable, the view was expressed that there was not intended to be joint and several liability as between the two.

Draft article 38: Contract particulars

36. There was a strong support for the view that, in its present formulation, the draft article was incomplete in that it related only to the goods and the carrier, but did not mention, in particular, other essential aspects, such as delivery and means of transport.

37. Another proposal for adding new elements to the list in the draft article argued for the inclusion of the places of receipt and delivery, as those elements were necessary in order to determine the geographic scope of application of the Convention in accordance with its article 5. In the absence of those elements, the parties might not know whether the Convention applied to the contract of carriage.

Chapter 9. Delivery of the goods

General comment

38. A concern was expressed with respect to chapter 9 as a whole. In general, the aim of the legal regime in chapter 9 to provide legal solutions to a number of thorny questions was applauded. However, it was thought that certain difficult questions remained, such as: when did the consignee have an obligation to accept delivery; what was the carrier's remedy if the consignee was in breach of that obligation; and what steps were necessary on the part of the carrier to ensure that the goods were delivered to the proper person.

39. It was suggested that the chapter created more problems than it solved and that adoption of the chapter could negatively affect ratification of the Convention.

Draft article 45: Obligation to accept delivery

40. Concerns in line with the general comment expressed in respect of chapter 9 were also raised with respect to draft article 45. While there was some support for that approach, the focus of concern in respect of the draft provision was the phrase "the consignee that exercises its rights". It was suggested that that phrase was too vague in terms of setting an appropriate trigger for the assumption of obligations under the Convention. It was suggested that that uncertainty could be remedied by deleting the phrase at issue and substituting for it: "the consignee that demands delivery of the goods". There was support in the Commission for that view. After discussion, the Commission decided to adopt the amendment suggested above. With that amendment, the Commission approved the substance of draft article 45 and referred it to the drafting group.

***Draft article 49*: Delivery when a negotiable transport document or negotiable electronic transport record is issued**

41. It was generally acknowledged that the problems faced by carriers when cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, represented real and practical problems for carriers. However, concerns were expressed in the Commission regarding whether the text of draft article 49 was the most appropriate way to solve those problems. In particular, the view was expressed that draft article 49 undermined the function of a negotiable transport document as a document of title by allowing carriers to seek alternative delivery instructions from the shipper or the documentary shipper and thus removing the requirement to deliver on the presentation of a bill of lading. Further concern was expressed that subparagraph (d) would increase the risk of fraud and have a negative impact on banks and others that relied on the security offered by negotiable transport documents. One delegation emphasized that discussions with banks had indicated that draft article 49 would result in banks having additional risks to manage.

42. It was also suggested that the indemnity in subparagraph (f) could be problematic for cargo insurers, for example, in a CIF (cost, insurance and freight) shipment, where insurance was arranged by the seller and the policy was assigned to the buyer when the risk of shipment transferred. It was suggested that if the seller unwittingly provided an indemnity to the carrier by providing alternative delivery instructions, this could have an impact on any recovery action that an insurer might have had against the carrier. That, it was said, would result in the loss of one avenue of redress for cargo claimants seeking recovery for misdelivery.

43. As a response to some of the criticism expressed, various examples were given of how the new system envisioned under draft article 49 would reduce the current widespread possibility of fraud. For example, current practices subject to fraud were said to involve the issuance of multiple originals of the bill of lading, forgery of bills of lading and the continued circulation and sale of bills of lading even following delivery. The regime established by draft article 49 was aimed at reducing or eliminating many of those abuses. Further, it was emphasized that that regime set up a system aimed at removing risk for bankers by restoring the integrity of the bill of lading system, and that discussions with banks and commodities traders had indicated that, while they might be forced to adjust some of their practices, they considered the new regime to present less risk for them. In addition, it was noted that the current system of obtaining letters of indemnity, possibly coupled with bank guarantees, was both a costly and a slow procedure for consignees.

44. There were some suggestions for adjustments to the proposed new text of draft article 49. It was suggested that as the provision would be most relevant in the commodities trade, which primarily incorporated into the transport document by reference the terms and conditions in the charter party, the phrase “indicates either expressly or through incorporation by reference to the charter party” should be included

in the chapeau of paragraph 2 rather than the word “states”. There was some support for that suggestion.

Draft article 50: Goods remaining undelivered

45. The view was expressed that the remedies set out in draft article 50 were only available to a carrier facing undelivered goods after it had attempted to deliver the goods in keeping with the procedure set out in draft article 49. However, there was support in the Commission for the alternative view that the use of the disjunctive “or” in listing the various bases on which goods would be deemed to have remained undelivered clearly indicated that an entitlement or an obligation to refuse delivery under draft article 49 constituted only one of several reasons for which goods could be deemed to have remained undelivered. A proposal was made to make that latter intention clear through the addition of a phrase along the lines of “without regard to the provisions of articles 47, 48 or 49” after the phrase “the carrier may exercise the rights under paragraph 2 of this article” in paragraph 3, but such an addition was not found to be necessary.

46. It was noted that in some jurisdictions, the applicable law required local authorities to destroy the goods rather than allowing the carrier itself to destroy them. In order to accommodate those jurisdictions, a proposal was made to insert into subparagraph 2 (b) a requirement along the lines of that for the sale of goods pursuant to subparagraph 2 (c) that the destruction of the goods be carried out in accordance with the law or regulations of the place where the goods were located at the time. There was support for that proposal and for the principle that the carrier should abide by the local laws and regulations, provided that those requirements were not so broadly interpreted as to unduly restrict the carrier’s ability to destroy the goods when that was necessary.

47. Some drafting suggestions were made to improve the provision. It was observed that depending on the outcome of the discussions relating to draft article 49, a consequential change might be required to add the word “holder” to subparagraph 1 (b). It was also suggested that the logic of draft article 50 might be improved by deleting subparagraph 1 (b) as being repetitious of other subparagraphs or that the order of subparagraphs (b) and (c) of paragraph 2 should be changed, since destruction was the more drastic remedy of the two. The Commission took note of those suggestions.

Chapter 10. Rights of the controlling party

Draft article 52: Exercise and extent of right of control

48. A question was raised regarding how a controlling party could exercise its right of control with respect to the matters set out in paragraph 1 when such details were not set out in the contract of carriage. Several examples were given in response, such as the situation where the controlling party was a seller who discovered that the buyer was bankrupt and the seller wanted to deliver the goods to another buyer, or the simple situation where a seller requested a change of temperature of the container on the ship. It was emphasized that there were safeguards written into the draft Convention to protect

against potential abuses. The Commission approved the substance of draft article 52 and referred it to the drafting group.

Draft article 53: **Identity of the controlling party and transfer of the right of control**

49. A correction was proposed to the text of draft article 53, paragraph 1. It was observed that when paragraph 2 of draft article 53 had been inserted in a previous version of the draft Convention, the consequential changes that ought to have been made to paragraph 1 had been overlooked. To remedy that situation, it was proposed that the chapeau of paragraph 1 be deleted and replaced with the words: "Except in the cases referred to in paragraphs 2, 3 and 4 of this article." Further, it was observed that the reference in subparagraph 3 (c) should be corrected to read "article 1, subparagraph 10 (a) (i)" rather than "article 1, subparagraph 11 (a)(i)." The Commission agreed with those corrections.

Chapter 11. Transfer of rights

General Comment

50. There was some support for the view that, as a whole, the draft chapter was not sufficiently developed to achieve either certainty or harmonization of national law. It was also suggested that the draft chapter contained vague language and that further clarification and modification to the draft chapter was required if it was to be of benefit to future shippers, consignees and carriers.

51. It was suggested that the draft articles 59 and 60 should be revised in such a way that the transfer of liabilities under the contract of carriage would coincide with the transfer of the rights under the underlying contract. The Commission took note of those views but was generally favourable to retaining the draft chapter.

Draft article 60: **Liability of holder**

52. Concerns were expressed that under paragraph 2 of the draft article a holder might face the risk that even a trivial exercise of a right under the contract of carriage might trigger an assumption of liability. In practice, negotiable transport documents might be consigned to a bank without prior notice or agreement. The effect of article 60, paragraph 2, would therefore be to increase the risks on banks or other holders. That was said to be a matter of particular concern for banks in some jurisdictions, where serious reservations had been expressed to paragraph 2 of the draft article.

53. The Commission took note of those concerns, but was generally in favour of maintaining paragraph 2 as currently worded.

54. It was noted that the ambit of the two provisions was different, and that paragraph 3 of the draft article was in fact broader than the draft article 45. Draft article 45 was concerned with the consignee, which typically exercised rights by demanding delivery of the goods. Draft article 60, however, was concerned with the holder of the transport

document, that is, the controlling party under draft article 53, paragraphs 2 to 4. Limiting the operation of paragraph 3 to cases where the holder had not claimed delivery of the goods would be tantamount to releasing a holder that exercised the right of control from any liability or obligation under the draft Convention. Given the extent of rights given to the controlling party by draft article 52, that result would not be acceptable. The only change that had become necessary in view of the Commission's decision in respect of draft article 45 was to delete the cross reference in paragraph 3.

55. Having considered the different views on the draft article, the Commission agreed to approve it and to refer it to the drafting group, with the request to delete the reference to draft article 45 in paragraph 3.

Chapter 12. Limits of liability

Draft article 61: Limits of liability

56. The Commission was reminded of the prolonged debate that had taken place in the Working Group concerning the monetary limits for the carrier's liability under the draft Convention. The Commission was reminded, in particular, that the liability limits set forth in the draft article were the result of extensive negotiations concluded at the twenty-first session of the Working Group with the support of a large number of delegations and were part of a larger compromise package that included various other aspects of the draft Convention in addition to the draft article[6]. Not all delegations that had participated in the deliberations of the Working Group were entirely satisfied with those limitation levels and the large number of supporters of the final compromise included both delegations that had pleaded for higher limits and delegations that had argued for limits lower than those finally arrived at.

57. The Commission heard expressions of concern that the proposed levels for the limitation of the carrier's liability were too high and that there was no commercial need for such high limits, which were said to be unreasonable and unrealistic. There was some support for those concerns, in particular given that a number of delegations felt that the level of limitation of the Hague-Visby Rules was adequate for commercial purposes. It was said that it would have been possible for some delegations to make an effort to persuade their industry and authorities of the desirability of accepting liability limits as high as those set forth in the Hamburg Rules, as an indication of their willingness to achieve consensus. It was also said, however, that the levels now provided for in the draft article were so high as to be unacceptable and they might become an impediment for ratification of the Convention by some countries, which included large trading economies.

58. The Commission heard a proposal, which received some support, for attempting to broaden the consensus around the draft article by narrowing down the nature of claims to which the liability limits would apply in exchange for flexibility in respect of some matters on which differences of opinion had remained, including the applicability of the

[6] See A/CN.9/645, para. 197.

draft Convention to carriage other than sea carriage and the liability limits. The scope of the draft article, it was proposed, should be limited to "loss resulting from loss or damage to the goods, as well as loss resulting from misdelivery of the goods". It was said that such an amendment would help improve the balance between shipper and carrier interests, in view of the fact that the liability of the shipper was unlimited.

Draft article 62: **Limits of liability for loss caused by delay**

59. In response to a question, it was pointed out that the liability limit set forth in the draft article applied only to economic or consequential loss resulting from delay and not physical loss of or damage to goods, which was subject to the limit set forth in draft article 61.

Draft article 66: **Action for indemnity**

60. Although a concern was expressed as to whether it should be possible for a person held liable to institute an action for indemnity after the expiration of the period of time for suit, that concern was not supported, and the Commission approved the substance of draft article 66 and referred it to the drafting group.

Chapter 14. Jurisdiction

General comment

61. The Commission was reminded that the Working Group had agreed that chapter 14 on jurisdiction should be subject to an "opt-in" declaration system, as set out in draft article 76, such that the chapter would apply only to Contracting States that had made a declaration to that effect. It was observed that as the chapter on jurisdiction did not contain a provision equivalent to draft article 77, paragraph 5, which provided that certain arbitration clauses or agreements that were inconsistent with the arbitration chapter would be held void, it was desirable that there be clarity regarding the interpretation of the "opt-in" mechanism. To that end, it was observed that the operation of the "opt-in" mechanism meant that a Contracting State that did not make such a declaration was free to regulate jurisdiction under the law applicable in that State. There was support in the Commission for that interpretation of draft article 76. In addition, it was observed that chapter 14 as a whole had been the subject of protracted discussions and represented a carefully balanced compromise, for which support was maintained.

Draft article 75: **Recognition and enforcement**

62. It was observed that following the decision of the Working Group to proceed with a full "opt-in" approach as opposed to a "partial opt-in" approach to the chapter on jurisdiction, certain consequential changes to the draft Convention had been made. However, it was observed that draft article 75, subparagraph 2 (b), which had been inserted into the text to accommodate the "partial opt-in" approach, had not been deleted when that approach was not approved by the Working Group. A proposal was made to

delete draft article 75, subparagraph 2 (b), in order to correct the text. The Commission agreed with that proposal.

Chapter 15. Arbitration

General comment

63. The Commission was reminded that the Working Group had agreed that, like chapter 14 on jurisdiction, chapter 15 on arbitration should be subject to an "opt-in" declaration system, as set out in draft article 80, such that the chapter would only apply to Contracting States that had made a declaration to that effect.

Draft article 77: Arbitration agreements

64. It was observed that there might be inconsistencies in the terminology used in the draft Convention in terms of describing the party instituting a claim, which was described variously as "the person asserting a claim against the carrier" (draft art. 77, para. 2), the "claimant" (draft arts. 18 and 50, para. 5), and the "plaintiff" (draft arts. 68 and 70). There was support in the Commission for the suggestion that such terms be reviewed and standardized, to the extent advisable. In particular, it was noted that in chapters 14 and 15 the term "person asserting a claim against the carrier" should be used rather than the term "plaintiff" or "claimant", in order to exclude cases where a carrier had instituted a claim against a cargo owner.

Draft article 78: Arbitration agreement in non-liner transportation

65. It was observed that draft article 78, paragraph 2, was unclear in that it referred to the "arbitration agreement" in the chapeau, in subparagraph 2 (a) and elsewhere throughout chapter 15, but it referred to the "arbitration clause" in subparagraph 2 (b). It was also noted that some lack of clarity could result from different interpretations given to the terms "arbitration agreement" and "arbitration clause" in different jurisdictions. In response, it was noted that UNCITRAL instruments attempted to maintain consistent usage of terminology, such that "arbitration agreement" referred to the agreement of the parties to arbitrate, whether prior to a dispute or thereafter, in accordance with a provision in a contract or a separate agreement, whereas the "arbitration clause" referred to a specific contractual provision that contained the arbitration agreement.

Draft article 79: Agreement to arbitrate after the dispute has arisen

66. A question was raised regarding how draft article 79 would be applied to a Contracting State that had opted in to the application of chapter 15 on arbitration, but had opted out of the application of chapter 14 on jurisdiction. In response, it was observed that the likely interpretation would be that the reference to chapter 14 would simply have no meaning, but that its inclusion in the text would not cause any harm. However, it was also observed that it would be unlikely that a Contracting State would opt into chapter 15 but opt out of chapter 14, as the two chapters were intended to be complementary so that,

while the arbitration provisions did not change the existing arbitration regime, they would nonetheless prevent circumvention of the jurisdiction provisions through resorting to arbitration.

Chapter 16. Validity of contractual terms

Draft article 81: General provisions

67. It was observed that the liability of the shipper for breach of its obligations under the draft Convention was not subject to a monetary ceiling, unlike the carrier's liability, which was limited to the amounts set forth in draft articles 61 and

68. In order to achieve a greater balance of rights and obligations between carriers and shippers, it was suggested that draft article 81 should at least allow the parties to the contract of carriage to agree on a limit to the liability of the shipper, which was currently not possible.

Draft article 82: Special rules for volume contracts

69. Concern was expressed with respect to the provision concerning volume contracts in draft article 82. One delegation reiterated its consistent and strong opposition to the inclusion of draft article 82 in its current from. In particular, it was suggested that the text, as currently drafted, allowed too broad an exemption from the mandatory regime established in the draft Convention. Since it was felt that a large number of contracts for the carriage of goods could fall into the definition of a volume contract, the concern was expressed that derogation from the obligations of the draft Convention would be widespread and could negatively affect smaller shippers. Further, it was thought that such a result would undermine the main goal of the draft Convention, which was to harmonize the law relating to the international carriage of goods. It was suggested that possible remedies to reduce the breadth of the provision could be to restrict the definition of "volume contract" and to further protect weaker parties to the contract of carriage by requiring that the requirement in draft article 82, subparagraph 2 (b) that the volume contract be individually negotiated or that it prominently specify the sections of the contract containing any derogations should be amended to be conjunctive rather disjunctive. There was some support in the Commission for that position. There was also a proposal to allow States to make a reservation with respect to draft article 82.

70. Concern along the same lines was expressed with respect to the effect that the provision concerning volume contracts in draft article 82 could have on small liner carriers. In that respect, it was suggested that such carriers would not have sufficient bargaining power vis-à-vis large shippers and that such carriers would find themselves in the situation of having to accept very disadvantageous terms in cases where volume contracts allowed derogation from the mandatory provisions of the draft Convention.

Chapter 17. Matters not governed by this Convention

Draft article 84: International conventions governing the carriage of goods by other modes of transport

71. It was pointed out that draft article 84 preserved only the application of international conventions that governed unimodal carriage of goods on land, on inland waterways or by air that were already in force at the time that the Convention entered into force. That solution was said to be too narrow. Instead, the draft Convention should expressly give way both to future amendments to existing conventions as well as to new conventions on the carriage of goods on land, on inland waterways and by air. It was noted, in that connection, that an additional protocol to the Convention on the Contract for the Carriage of Goods by Road (the "CMR") dealing with consignment notes in electronic form had recently been adopted under the auspices of the Economic Commission for Europe and that such amendments were common in the area of international transport. The Convention concerning International Carriage by Rail and Appendix B to that Convention containing the Uniform Rules concerning the Contract for International Carriage of Goods by Rail (the "CIM-COTIF"), for instance, had an amendment procedure as a result of which the 1980 Convention ("COTIF") had been replaced with the 1999 version. Furthermore, the draft Convention should also preserve the application of any future convention on multimodal transport contracts. It was said that the provisions of the draft Convention had been mainly designed with a view to sea carriage and it was therefore advisable to leave room for further development of the law with respect to other modes of carriage.

Draft article 85: Global limitation of liability

72. In response to a query as to the need for draft article 85, it was noted that the draft article aimed at solving situations where the carrier under the draft Convention was at the same time the ship owner under the Convention on Limitation of Liability for Maritime Claims, 1976 (the "LLMC"), which subjected the combined amount of individual claims against the owner to a global liability limit. Thus, for example, in cases of a major accident where the entire cargo of a ship was lost, cargo claimants might have the right to submit individual claims up to a certain amount, but their claim might be reduced if the combined value of all claims exceeded the global limitation of liability under the other applicable convention. Global limitation of liability such as provided by the Convention on Limitation of Liability for Maritime Claims (the "LLMC") or domestic law was an important element with a view to providing predictability in international sea carriage and should not be affected by the draft Convention.

C. Arbitration and Conciliation

1. Background

73. 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.

74. 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.

75. 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 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.

76. 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.

77. At its fortieth session, the Commission had before it the reports of the forty-fifth and forty-sixth sessions of the Working Group.[7] The Commission also had before it a note by the Secretariat transmitting the report of the Secretary-General of the Permanent Court of Arbitration.[8] 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.

2. Consideration at the Forty-First Session (2008) of the Commission

78. At the forty-first session, the Commission had before it the reports of the forty-seventh and forty-eighth sessions of the Working Group.[9] 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.

79. 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 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

[7] Vienna, 11-15 September 2006-A/CN.9/614 and New York, 5-9 February 2007-A/CN.9/619.
[8] A/CN.9/634.
[9] Vienna, 10-14 September 2007-A/CN.9/641 and New York, 4-8 February 2008-A/CN.9/646.

completion of the current revision of the UNCITRAL Arbitration Rules. As to the scope of such future work, the Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution.

80. With a view to facilitating consideration of the issues of transparency in treaty-based arbitration by the Working Group at a future session, the Commission requested the Secretariat, if resources permitting, to undertake preliminary research and compile information regarding current practices. The Commission urged member States to contribute broad information to the Secretariat regarding their practices with respect to transparency in investor-State arbitration. It was emphasized that, when composing delegations to the Working Group sessions that would be devoted to that project, member States and observers should seek to achieve the highest level of expertise in treaty law and treaty-based investor-State arbitration.

81. The Commission expressed the hope that the Working Group would complete its work on the revision of the UNCITRAL Arbitration Rules in their generic form, so that the final review and adoption of the revised Rules would take place at the forty-second session of the Commission, in 2009.

82. 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.

D. Public Procurement

1. Background

83. 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.[10] 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.

[10] A/CN.9/539 and Add.1, and A/CN.9/553.

84. 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.[11]

85. At its fortieth session, the Commission had before it the reports of the tenth and eleventh sessions of the Working Group[12]. 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.

86. The Commission commended the Working Group 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.

2. Consideration at the Forty-First Session (2008) of the Commission

87. At the forty-first session, the Commission took note of the reports of the twelfth and thirteenth sessions of the Working Group.[13] At its twelfth session, the Working 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[14] 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.

88. 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.

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[11] A/CN.9/568, A/CN.9/575, A/CN.9/590 and A/CN.9/595.
[12] Vienna, 25-29 September 2006, A/CN.9/615 and New York, 21-25 May 2007, A/CN.9/623.
[13] Vienna, 3-7 September 2007, A/CN.9/640 and New York, 7-11 April 2008, A/CN.9/648.
[14] A/CN.9/WG.I/WP.52 and Add.1 and A/CN.9/WG.I/WP.56.

89. 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.

E. Insolvency Law

1. Background

90. 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.

91. 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.[15] 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-Border Insolvency.

92. 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

[15] A/CN.9/618.

negotiating and using cross-border insolvency protocols based on the draft outline of contents in document.

2. Consideration at the Forty-First Session (2008) of the Commission

93. At the forty-first session, the Commission had before it a note by the Secretariat reporting on further progress with respect to that work. The Commission 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, had been prepared by the Secretariat. Because of timing and translation constraints, that compilation could not be submitted to the present session of the Commission.

94. The Commission expressed its satisfaction with respect to the progress 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[16] for an initial discussion. 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. The Commission decided to plan the work at its forty-second session, in 2009, to allow it to devote, if necessary, time to discussing recommendations of the Working Group.

F. Possible Future Work in Electronic Commerce

1. Background

95. 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.[17]

96. 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

[16] Vienna, 17-21 November 2008.
[17] A/CN.9/571, para. 12.

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.

97. 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.

98. At the fortieth session, the Commission considered the sample chapter that had been prepared by the Secretariat.[18] 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.

2. Consideration at the Forty-First Session (2008) of the Commission

99. 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.

100. 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 and messages through single windows; data protection; liability of

[18] A/CN.9/630 and Add.1-5.

operators of single windows; and legal validity of documents exchanged in electronic form.

101. 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.

102. The Commission agreed that it would be worthwhile to study the legal aspects involved in implementing a cross-border single window facility with a view to formulating a comprehensive international reference document to which legislators, Government policymakers, single window operators and other stakeholders could refer for advice on legal aspects of creating and managing a single window designed to handle cross-border transactions. The Commission's involvement in such a project in cooperation with WCO and other organizations would have several benefits, including: (a) better coordination of work between the Commission, WCO and United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT); (b) being able to influence the content of a trade-facilitation text that may contain significant legislative aspects; and (c) promoting the use of UNCITRAL standards in the countries using the future reference document.

103. The Commission requested the Secretariat, at an initial stage, to engage actively, in cooperation with WCO and with the involvement of experts, in respect of the single window project and to report to the Commission on the progress of that work at its next session. The Commission agreed to authorize holding a Working Group session in the spring of 2009, after full consultation with States, should this be warranted by the progress of work done in cooperation with WCO.

G. Possible Future Work in the Area of Commercial Fraud

1. Background

104. 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.

105. 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.

106. 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.[19] 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.

107. 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"[20]. 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 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.

108. 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

[19] A/CN.9/600. para. 16.
[20] A/CN.9/624 and Add.1 and 2.

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.

2. Consideration at the Forty-First Session (2008) of the Commission

109. 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[21] 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.

110. 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. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner was appropriate, including tailoring them to meet the needs of various audiences or industries.

111. In terms of additional future work in the area of commercial fraud, one possible topic that was suggested was the creation of recommendations regarding fraud prevention. The Commission agreed that the publication of the indicators on commercial fraud and their incorporation into technical assistance work were very useful steps to be taken in the fight against such fraudulent schemes, leaving open the question of future work in the area to be considered by the Secretariat, which could make appropriate recommendations to the Commission.

H. Forty-Second Session of the Commission

112. The forty-second session of the Commission will be held in Vienna from 29 June to 17 July 2009.

[21] A/CN.9/659 and Add.1 and 2.

III. REPORT ON THE WORK OF THE UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD)

113. The Secretariat report would deal with two major developments at the UNCTAD. Firstly, the Twelfth Ministerial Session of the UNCTAD (UNCTAD-XII) held in Accra, Ghana from 20 - 25 April 2008[22]; and secondly, the Fifty-Fifth Annual Session of the Trade and Development Board held in Geneva from 15 - 26 September 2008.

A. Twelfth Ministerial Session of the United Nations Conference on Trade and Development (UNCTAD-XII) (20-25 April 2008, Accra, Ghana)

114. The UNCTAD conducts its sessions[23] every four years and so far they have conducted eleven Sessions. The UNCTAD-XII was held at Accra, Ghana, from 20 - 25 April 2008.[24] The pre-Conference events were held from 18 - 20 April 2008 which included meetings of the World Investment Forum, the World Association of Investment Promotion Agencies (WAIPA) and the United Nations Chief Executives Board Inter-Agency Cluster on Trade and Productive Capacity. During the course of the Conference, a series of round tables were held on topics related to the sub-themes of the Conference. In addition, ministerial meetings of the Group of 77 and China, the Least Developed Countries and the Landlocked Developing Countries, and two meetings of the Civil Society Forum, were held in conjunction with the Conference and transmitted declarations to the Conference. At its closing plenary meeting, the Conference adopted the Accra Declaration and the Accra Accord.

115. The Accra Accord and its accompanying political declaration foresee the shared commitment of the developing and developed world "to work towards making globalization a powerful means to achieve poverty eradication". The Accra Accord and declaration were adopted by consensus by 193 member states of UNCTAD that reflected the views of the UNCTAD's developing and developed countries. The conference addressed pressing economic, trade and development issues as well as set forth four-year work programme of the UNCTAD. The conclusions highlighted the challenges that many

[22] See TD/442 on the Report of the United Nations Conference on Trade and Development on its twelfth session, held in Accra, Ghana, from 20 to 25 April 2008 (hereafter referred to as the Report).

[23] These sessions are conducted in conformity with United Nations General Assembly (UNGA) resolutions 1995 (XIX) of 30 December 1964 and 60/184 of 22 December 2005. The highest decision-making body of UNCTAD is the quadrennial conference, at which member States make assessments of current trade and development issues, discuss policy options and formulate global policy responses. The conference also sets the Organization's mandate and work priorities. The conference is a subsidiary organ of the United Nations General Assembly. The conferences serve an important political function: they allow intergovernmental consensus building regarding the state of the world economy and development policies, and they play a key role in identifying the role of the United Nations and UNCTAD in addressing economic development problems.

[24] The theme and sub-themes of the Conference were approved by the Trade and Development Board at its forty-first executive session, held from 18 - 20 April 2007, and the provisional agenda for the Conference was approved by the Board at its fifty-fourth session, held from 1 - 11 October 2007. At its Fifty-Fourth Annual Session, the Trade and Development Board established the open-ended Preparatory Committee for UNCTAD-XII.

developing countries have to face when they strive to integrate successfully into the international economic and financial system and set out a detailed agenda for progress in economic and social development spanning areas ranging from commodities, trade and debt to investment and new technologies.

116. The Sub-themes at the UNCTAD-XII were to address the opportunities and challenges of globalization for development:

(a) Enhancing coherence at all levels for sustainable economic development and poverty reduction in global policymaking, including the contribution of regional approaches;
(b) Key trade and development issues and the new realities in the geography of the world economy;
(c) Enhancing the enabling environment at all levels to strengthen productive capacity, trade and investment: mobilizing resources and harnessing knowledge for development; and
(d) Strengthening UNCTAD: enhancing its development role, impact and institutional effectiveness.

117. The Session underlined that the UNCTAD needs to strengthen its work on commodities, in the light of the ongoing financial crisis, including agriculture. The main goals were to promote policies that bolster agricultural sectors in developing countries which would include increased aid, investment and technology transfers. It could also highlight market distortions and back policies that lead to higher incomes for small producers. The developing countries have attained strong economic growth rates due to global trade and investment flows, however, one must be vigilant when such advances have been benefiting only few and it is accompanied by new difficulties like the current crises in food prices and financial markets, as well as growing income inequalities.

118. UNCTAD XII underscored the importance of diversifying economies away from dependence on one or two commodities, building the capacity to produce a wide range of goods, ensuring access to basic services and strengthening legal and regulatory frameworks and institutions. The Accord also said that the policies should be tailored to the needs of individual countries, while at the same time respecting international law, stating that “there is no one precise model for improved, growth-enhancing governance and institutions”.

119. At the same time, the conference stressed the immense potential created by growing trade and investment links within the developing world, spurred by the emergence of dynamic developing economies, such as China, India and Brazil. It called for such ties to be encouraged and reinforced, particularly through regional integration and the reduction of barriers to such South-South trade. These include practical matters, such as export finance and transport infrastructure, which traditionally have been geared much more towards North-South trade. At a time of economic slowdown in developed countries, UNCTAD XII signalled the increasingly prominent role that developing countries can play in fostering global economic stability.

120. The Ministerial Declaration of the **Group of 77 and China** during UNCTAD XII observed that the current global institutional architecture for global economic governance required fundamental reforms in order to provide an adequate framework for dealing with the realities of current international economic and financial relations and to respond to the needs of the vast majority of the poor. It was reiterated that progress must be made in enhancing the coherence of the international economic architecture, particularly the interplay of the multilateral trading system and the international financial and monetary systems. Need for more inclusive and transparent governance of global economic relations, with an adequate voice and participation of developing countries in international economic decision-making was emphasized.

121. Besides expressing concerns on the failure of the Doha Round negotiations in WTO to meet the expectations of the developing countries, it was asserted that 'all WTO members should uphold and reiterate their commitment for WTO to promote an open, equitable, rule-based, predictable, non-discriminatory and development-friendly multilateral trading system'[25]. Also expressed concerns over the current financial and credit crisis as well as the recent financial market instability and their adverse impact on the development prospects of developing countries, including the latter's access to crucial finance and credits. It was reiterated that such situations required an enthusiastic international response to ensure that the sustained growth of the world economy and the development efforts of developing countries are not severely affected. The need for the establishment of new international financial architecture that guarantees the full participation of developing countries, including through reforms of the monitoring and regulatory systems was highlighted. Such architecture should further improve response capabilities for dealing with the emergence and spread of financial crises, and provide developing countries greater flexibility and autonomy in the management of capital flows and on the democratization of international economic decision-making, enhanced measures to mitigate excessive volatility, and financing for development.

122. The Group objected and rejected the imposition of laws and regulations that entail extraterritorial consequences and all other forms of coercive economic measures, including unilateral sanctions against developing countries and urged the international community to adopt urgent and effective measures to eliminate the use of such measures.

123. The Declaration of the Least Developed Countries Ministerial Meeting at the UNCTAD XII urged its trading and development partners to step up efforts to support their development process though, *inter alia*, improved and strengthened international support measures, particularly in the areas of official development assistance (ODA), debt relief, market access, foreign direct investment (FDI), and transfer of technology and technological know-how to those countries.

[25] Para 8 of the Ministerial Declaration of the Group of 77 and China in the Report at page 56.

B. Fifty-Fifth Annual Session of the Trade and Development Board (15 - 26 September 2008, Geneva)

124. The Fifty-Fifth Annual Session of the Trade and Development Board (TDB) was held from 15 - 26 September 2008 at Geneva[26] with high-level discussion that focused on measures to enhance abilities of developing-country economies to offer more varied and sophisticated products to world markets. The intent was to spur broad-based economic growth that creates jobs, reduces poverty, and allows achievement of the United Nations Millennium Development Goals (MDGs). It was highlighted that decades-long neglect of the agricultural sector in the developing world was the major cause of the highly publicized food crisis. The debate surrounded at "trade and productive capacities for achieving internationally agreed development goals, including the Millennium Development Goals."

125. It was discussed that how the TDB can contribute to the achievement of such MDGs to half the extreme poverty by the year 2015. The fact remains that international aid and attention had focused severely on the social and health sectors, which though extremely important do not contribute towards building national economies. The Board examined the economic status of the 49 least developed countries (LDCs), discussions were based on the latest UNCTAD Least Developed Countries Report, which gave detailed evaluation of the state of these countries essential exports, such as coffee, cotton, peanuts, horticulture, fish, and textiles, and of their burgeoning tourism sectors. The TDB considered the situation in Africa, based on the report of the Economic Development in Africa 2008. A prime concern was despite trade liberalization why does export growth on that continent has lagged behind other regions, and what can be done to improve African economic performance. The TDB also reviewed the trends in investment by transnational corporations in developing-country infrastructure. Such investment has increased recently, and, if would be managed well, could help developing nations gain much-needed electricity supply, roads, and telecommunications services.

126. The following were the agenda items of the Forty-Fifth Session:

(i) Review of progress in the implementation of the Programme of Action for the Least Developed Countries for the Decade 2001 – 2010;
(ii) Economic development in Africa: trade liberalization and export performance in Africa; and
(iii) Review of the technical cooperation activities of UNCTAD and their financing.

127. Other topics that were discussed constituted: (i) High-level segment: Trade and productive capacities for achieving internationally agreed development goals, including the Millennium Development Goals; (ii) Interdependence: mobilizing resources for development – commodity prices, productive capacity, supply and distribution; (iii) Review of progress in the implementation of the Programme of Action for the Least

[26] See TD/B/55/10: Report of the Trade and Development Board, at its Fifty-Fifth Session held in Geneva from 15 - 26 September 2008.

Developed Countries for the Decade 2001–2010; (iv) Economic development in Africa: trade liberalization and export performance in Africa; (v) Evolution of the international trading system and of international trade from a development perspective; (vi) Development strategies in a globalized world: financial policies and productive investment related to trade and development; (vii) Investment for development: transnational corporations, infrastructure and development; (viii) UNCTAD's contribution to the implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic and social fields; (ix) Review of the technical cooperation activities of UNCTAD; and (x) Report on UNCTAD's assistance to the Palestinian people.

128. The participants agreed that effective global economic governance and multilaterally concerted actions were urgently needed to address far-reaching, deep-rooted development challenges and the imminent prospect of a global economic downturn, which adversely affected economic welfare and exacerbated poverty. International trade and the trading system should operate in a coherent manner within a broader system of global economic governance. In this regard, governments had a prominent role to play in creating enabling environments for trade and development.

129. Further, it was reiterated that the global food crisis had affected progress towards eradicating poverty and hunger, as well as promoting health. The crisis was partly caused by disincentives in agricultural sectors and weakened agricultural productive capacities in developing countries, including as a result of trade policy measures and structural adjustments. The enhancement of agricultural productivity through aid for agriculture, the elimination of trade distortion, and diversification in commodity-dependent developing countries were essential tools. High energy and commodity prices had raised transport and other input costs in the production of goods and services, and changed the terms of trade for countries. With Global warming which is the contemporary long-term human challenge, with possible measures to combat climate change being carbon taxes and border tax adjustments, these could have adverse effects on developing countries' trade. Increased international migration, with the associated remittance flows, had also paved the way for trade, investment and development links between countries, and for the transfer of technology and skills.

IV. REPORT ON THE WORK OF INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

130. The triennium work programme for the year 2006 - 2008 of the UNIDROIT[27] as drawn up by Governing Council at its Eighty-Fourth Session (18 - 20 April 2005) and subsequently approved by General Assembly at its Fifty-Ninth Session are as follows: (i) Principles of International Commercial Contracts, (ii) Model Law on Leasing, (iii) International Interests in Mobile Equipment, and (iv) Transactions on Transnational and Connected Capital Markets.

A. Principles of International Commercial Contracts

131. The Third Session of the Working Group for the preparation of the third edition of the UNIDROIT Principles of International Commercial Contracts was held in Rome from 26 - 29 May 2008. The session examined five draft chapters on (i) Unwinding of Failed Contracts,[28] (ii) Illegality[29], (iii) Plurality of Obligors and/or Obligees[30], (iv) Conditional Obligations,[31] and (v) Position Paper with Draft provisions on Termination of long-term contracts for just cause.[32] The Rapporteurs were asked to prepare revised draft chapters on their respective topics to be submitted to the Group for discussion at its next plenary Session to be held in Rome from 25 - 29 May 2009.

B. Preparation of Model Law on Leasing

132. The State Parties to the UNIDROIT Convention on International Financial Leasing, 1988, majority being developing countries and countries in transition raised a special need for the development of leasing legislation. As a result, there was a consultation with potential key economic stakeholders in the project and it was decided to prepare a "Preliminary Draft Model Law on Leasing"[33]. The Advisory Board which was entrusted with the task of preparing this model law were required to reflect upon the legal and economic systems that were intended to be the essential beneficiaries of the project.

133. The Reporter to the Advisory Board after various discussions prepared a second version of the preliminary draft model law. The basic structure of the preliminary draft encompasses to: (i) cover both financial leases and operating leases, keeping in mind the present day needs of developing countries, transition economies and the changing market

[27] The Working method of the Institute is as follows: Once a subject has been entered on UNIDROIT Work Programme, the Secretariat will draw up a preliminary "Comparative law report" designed to ascertain the desirability and feasibility of Law reform. If the Governing Council is satisfied that the preliminary report has made out a case for taking action, it will ask the Secretariat to convene a study Group or the preparation of a preliminary draft convention or model laws, legal guides, etc. Typically, in the case of a preliminary draft Convention, these will consist in its asking the Secretariat to convene a *committee of governmental experts* for the finalization of a draft convention capable of submission for adoption to a diplomatic conference. In the case of one of the alternatives to a preliminary draft Convention not suitable by virtue of its nature for transmission to a committee of governmental experts, the Council will be called upon to authorize its publication and dissemination by UNIDROIT in the circles for which it has been prepared.

[28] UNIDROIT 2008 – Study L – Doc. 105.

[29] UNIDROIT 2008 – Study L – Doc. 106.

[30] UNIDROIT 2008 – Study L – Doc. 107.

[31] UNIDROIT 2008 – Study L – Doc. 108.

[32] UNIDROIT 2007 – Study L – Doc. 104.

[33] UNIDROIT 2006 – Study LIX-A-Doc.11 available at its official website - http://www.unidroit.org/english/publications/proceedings/2006/study/59a/s-59a-11-e.pdf

trends; (ii) provide uniform rules governing the effects of leasing agreement,[34] the performance of the leasing agreement,[35] etc; and (iii) default remedies like definition of default, need to give notice, measure of damages, liquidated damages, termination etc.

134. So far two Sessions were held; the first Session of the UNIDROIT Committee of governmental experts for the preparation of a draft model law on leasing was held in Johannesburg from 7 - 10 May 2007. One of the major issues that were resolved by the Committee during the Johannesburg session was on coordination of relationship between the preliminary draft model law, on the one hand, and the draft Legislative Guide on Secured Transactions under preparation by the UNCITRAL, on the other. The solution reached in Article 3 consisted in endorsement of the joint proposal submitted to the Committee by the UNIDROIT and UNCITRAL Secretariats. The second Session was held from 6 - 9 April 2008, at Muscat, Oman. The Preliminary draft Model Law on Leasing as reviewed by the Committee of Governmental experts during the Muscat Session was laid before the UNIDROIT Governing Council, at its 87th session which was held in Rome from 21 - 23 April 2008. The Aviation Working Group (AWG) made representations to the UNIDROIT secretariat regarding unsuitability of the draft model law applying to the leasing of aircraft, helicopters or engines or other components installed on aircraft or helicopter.

135. The Joint Session of the UNIDROIT General Assembly and the UNIDROIT Committee of governmental experts for finalisation and adoption of a draft model law on leasing, held in Rome from 10 - 13 November 2008.[36] This Joint session adopted joint proposal of the Secretariat and the AWG. It was agreed that the Model Law should not apply to leases functioning as security rights. The main focus of the Joint Session was to polish up the text of the draft model law, in the light of the comments submitted by Governments and Organisations. The principal issues on which the Joint Session focussed were three in number,

> (i) whether or not to accept the joint proposal submitted by the UNIDROIT Secretariat and the Aviation Working Group regarding the application of the projected model law in respect of aircraft transactions,
>
> (ii) how best to reconcile the ambition of the drafters to enhance the access of developing countries and transition economies to lease finance while preserving the lessee's right to terminate the leasing agreement where the lessor had committed a fundamental default and,
>
> (iii) while relieving the lessor in a financial lease, qua lessor and owner, from liability to the lessee or third parties for death, personal injury or damage to property caused by the leased asset or use thereof, how best to make it clear that

[34] Uniform rules governing the effects of leasing agreement includes enforceability, the running of the supplier's duties to the lessee, priority in relation to liens and liability for death, personal injury or property damage to third parties.

[35] The performance of the leasing agreement includes irrevocability of the lessee's duties as from the time when the leasing agreement is entered into, the risk of loss under a lease, the lessee's rights in the event of damage to the leased asset, the conditions for, and consequences of the lessee's acceptance and rejection of the leased asset, the extent of the right of the parties to the leasing agreement to transfer their rights and duties there under, the extent of the warranties of the parties to a leasing agreement, the extent of the lessee's duty to maintain and return the leased asset.

[36] UNIDROIT 2008 Study LIXA – Doc. 17, "UNIDROIT Model Law on Leasing" dated December 2008.

such relief should not affect any liability that it might have for acts committed fraudulently or fault nor any liability that might be incumbent upon it under international Conventions, such as the *International Convention on Civil Liability for Oil Pollution Damage* adopted in Brussels in 1969 and amended in London in 1984.

136. There was a general agreement that leases or supply agreements for large aircraft equipment (of the type covered by the Protocol to the *Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment*, adopted in Cape Town in 2001, i.e. airframes, aircraft engines and helicopters of a certain size) should be excluded from the sphere of application of the proposed model law, unless the lessor, the lessee and the supplier otherwise agreed in writing. At the same time, the draft model law was amended with a view to removing what was seen as a potential source of conflict between the proposed model law and the Convention on International Interests in Mobile Equipment in general. There was an agreement that in a financial lease, the lessor should be relieved from liability to the lessee or third parties for death, personal injury or damage to property caused by the leased asset or use thereof when acting in its capacity of lessor and as owner within the limits of the transaction, as documented under the supply agreement and the lease.

137. The preliminary draft model law consists of 24 articles contained in four chapters. The first chapter, entitled "General provisions", contains certain rules and definitions that are necessary for the operation of the future model law as a whole, including the law's sphere of application, its relationship to other laws, its interpretation and the philosophy of freedom of contract that underpins the preliminary draft.

138. Chapters II and III, entitled "Effect of leasing agreement" and "Performance" respectively, deal with the meaning and operation of a leasing transaction respectively. Chapter II defines the nature of the relationships that are created among the lessee, lessor, supplier and third parties. Chapter III provides for the manner in which the parties may carry out their agreement, with provisions governing, *inter alia*, the lessee's duty to pay rentals, the parties' powers to transfer their rights under a lease and the warranties owed by the lessor and lessee. Chapter IV, entitled "Default", deals with the many issues that arise as a transaction comes to an end. The consequences of a party's default, the parties' ability to terminate a lease, the calculation of damages and the disposition of the leased asset at the end of the lease are all covered in this chapter.

139. The preliminary draft model law focuses on the private law aspects of leasing, with clear emphasis on fiscal, accounting and supervision aspects. It applies only to commercial leases and, therefore, does not extend to consumer leases, hence, focussing on the transactions judged to be most critical to economic development. The preliminary draft model law applies to an extended range of assets, in short encompassing all those categories of asset used in the trade or business of the lessee (and, in particular, plant, land, capital goods, equipment, future assets, specially manufactured assets, plants and living and unborn animals). It covers a broader range of leasing transactions than the UNIDROIT Convention, the idea being, while recognising that financial leasing is the most powerful engine of growth in this field, to avoid channelling the development of the industry into any particular category of transaction: it, therefore, applies to both financial leases and non-financial leases.

C. International Interests in Mobile Equipment

140. The Convention on International Interests in Mobile Equipment came into force on 1 April 2004. Resolution No.2 of the Conference invited the International Civil Aviation Organization (ICAO) to accept the functions of Supervisory Conference of the International Registry Task Force. On 15 June 2005, the ICAO Council decided to confirm its acceptance of State functions and assumed the role. The gamut of "Mobile Equipment" regime consists of:

(a) Convention on International Interests in Mobile Equipment and Protocol thereto on Matters specific to Aircraft Equipment (Aircraft Protocol);

(b) Draft Protocol to the Cape Town Convention on Matters Specific to Railway Rolling Stock (Railway Rolling Stock Protocol);

(c) Preliminary Draft Protocol to the Cape Town Convention on Matters Specific to Space Assets (Space Assets Protocol); and

(d) Future Protocol to Cape Town Convention on Agricultural Construction and Mining Equipment.

141. On the Draft Space Assets Protocol, the following key outstanding issues that were considered by the Steering Committee, namely; (i) the sphere of application of the preliminary draft Protocol and the definition of space assets in general and components in particular, (ii) the application of the Aircraft Protocol as applied to space assets to debtor's rights and related rights; and (ii) the transfer of related rights and the identification of space assets for the purposes of registration in the future International Registry. At the 87th session of the UNIDROIT, held in 2008, the Governing Council had decided that the tentative draft of the fourth Protocol to the Cape Town Convention on International Interests in Mobile Equipment on agricultural, construction and mining equipment was prepared by the Secretariat for its consideration and was circulated among the member States for comments and were invited to transmit their comments and suggestions, and those comments would be transmitted by member States to the Governing Council for consideration at its 88th Session.

D. Transactions on Transnational and Connected Capital Markets

142. The UNIDROIT Draft Convention on Substantive Rules regarding Securities held with an Intermediary (hereinafter: the 'draft Convention') was developed as the first item of a series of UNIDROIT projects relating to transactions on transnational and connected capital markets (Study LXXVIII). The draft Convention is intended as an international instrument to improve the legal framework for securities holding, transfer and collateralisation, in order to enhance the internal stability of national financial markets and their cross-border compatibility and, as such, to promote capital formation.

143. The draft convention was intended to bring about a legal framework that deal with modern system of holding through intermediaries practice in many countries and for improving the legal framework for securities holding, transfer and collateralisation. It was particularly intended to fill the legal uncertainty that occurred due to the fact that securities are increasingly held and transferred across borders. A study group was constituted to address this issue, which held its first meeting in September 2002. A preliminary draft

Convention was submitted in 2004 and it was complemented by a set of explanatory notes too. The preliminary Draft Convention served as a basis for an international negotiation process to the first Session of Committee of Governmental Experts (CGE) held in May 2005. The fourth Session of CGE was held in May 2007.

144. The First Session of the Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities was held in Geneva from 1 to 12 September 2008. Three key issues discussed were: (1) the rules of securities and clearing systems and those of central securities depositories; (2) innocent acquisition of intermediated securities; (3) insolvency-related issues. At this session, last outstanding policy choices had been successfully accomplished and the second reading of the text of the draft Convention had been finalised. Moreover, it was decided that a draft Official Commentary to the draft Convention would be prepared and that the final session of the diplomatic Conference will be held in Geneva in October 2009 with a view to finalising the work and adopting the Convention.

145. The final Session of the Diplomatic Conference to adopt a Convention on Substantive Rules regarding Intermediated Securities is scheduled to be held in Geneva from 5 to 7 October 2009, with a view to finalising the work and adopting the Convention. It has invited delegations and observers to submit any request to amend the text of the draft Convention within six weeks prior to the opening of the final session (24th August 2009), indicating significant problems capable of preventing the Convention from working properly; it has also requested a specific Committee to work in close co-operation with the UNIDROIT Secretariat, to examine those requests and to provide the Conference with recommendations.

V. REPORT ON THE WORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH)

146. This part of the report seeks to provide an overview of the major activities of the Hague Conference on Private International Law during the year 2008.[37]

A. Special Commission on Maintenance Obligations

147. The Working Group on the Law Applicable to Maintenance Obligations (WGAL) established by the Special Commission on the International Recovery of Child Support and Other Forms of Family Maintenance of May 2003 proceeded with its task in accordance with the mandate received from the Special Commission in June 2004. During the first meeting, held in The Hague on 15 June 2004, the WGAL developed a first sketch of provisions relating to applicable law, and outlined the elaboration of a Questionnaire relating to the law applicable to maintenance obligations. This questionnaire was later sent to all the Member States.

148. In 2007 Meeting, the question of applicable law was the major discussion issue. The Commission decided at the start that the rules relating to the applicable law would be formulated in a protocol, formally separate from the Convention. The Commission then held in-depth discussions on the provisions of the Working Draft presented by the WGAL; the main basis of this text was maintained in the preliminary draft Protocol, but after substantial modification. Finally, the Special Commission held an initial discussion on the general provisions and final clauses to be included in the preliminary draft, using as a basis the suggestions formulated by the Permanent Bureau, but without reaching any definitive conclusion.

149. In August 2007, "Hague Preliminary Draft Convention on the International Recovery of Child Support and other forms of Family Maintenance" draft explanatory report was drafted and finalized. The Draft Convention consists of 60 articles divided into 9 chapters.

B. Intercountry Adoption

150. The Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption of 29 May 1993 is considered to be one of the most successful international treaties drawn up by the Hague Conference on Private International Law. The Special Commission in its recommendations gave its general endorsement to the draft Guide to Good Practice dealing with Implementation of the 1993 Convention prepared by the Permanent Bureau. Under the guide to good practice and certain general principles were discussed and were grouped under four headings like the protection of the child's best interests, the safeguards for the child against abduction, sale or trafficking, the establishment of a framework of co-operation between authorities and the establishment of a framework for authorization of competent authorities to approve inter country

[37] The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions constituted of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference. The work in progress of the Hague Conference during 2008 includes issues relating to: Child Abduction, Cooperation with UNCITRAL on Insolvency, E-commerce, General Affairs, Inter country Adoption and Maintenance Obligations.

adoptions.[38] In order for such approval by the competent authorities (central authority) there are certain mandatory rules to be fulfilled like establishing that a child is adoptable, reporting on the child and the prospective adoptive parents, preparing the prospective adoptive parents (like proper counseling) preserving the information and search of origins. Few legal issues surrounding the implementation which was considered relevant were: (i) Existence of Bilateral Agreement; (ii) Placing Units on Intercountry Adoption by Countries of Origin; (iii) Nationality Issues of the Adopted Child (wherein States of origin argued that receiving States should give their nationality at the time of adoption so that complications of the child's statelessness is avoided); (iv) Habitual Residence of the Prospective Adoptive Parents; (v) Private Adoptions; and (vi) Adoptions by same Sex Couples.

151. The implementation of the Intercountry Adoption Implementation Assistance Programme, was based on a fact-finding mission that started its function from 26 February - 9 March 2007. The mission brought out the report of the fact-finding mission to Guatemala in relation to Inter-country adoption in May 2007.

152. The Permanent Bureau has released the official publication of the 1st Guide to Good Practice for the 1993 Hague Intercountry Adoption Convention: The *Implementation and Operation of the 1993 Hague Intercountry Adoption Convention: A Guide to Good Practice* in September 2008. The new Guide identifies important matters related to planning, establishing and operating the legal and administrative framework to implement the Convention. Importantly, the Guide emphasizes on the shared responsibility of receiving States and States of origin to develop and maintain ethical intercountry adoption practices. The Core issues relates to the child's best interests, which must be the fundamental principle that supports the development of a national child care and protection system as well as an ethical, child-centred approach to intercountry adoption.

153. Another activity of the HCCH during 2008 was convening the Third Asia Pacific Regional Conference jointly with the Government of the Hong Kong Special Administrative Region during 24 to 26 September 2008 at Hong Kong. Among the topics discussed were the latest work of the Hague Conference and the implementation in the Asia Pacific of the Hague Conventions drawn up in the fields of international judicial and administrative co-operation and cross-border family relations, including the protection of children and vulnerable adults, matrimonial matters and succession. The Conference facilitated to discuss the relevance, implementation and operation of the Conventions of the Hague Conference within the Asia Pacific Region in the areas of family relations, legal cooperation, litigation, and finance law. The Conventions discussed included those on child abduction, intercountry adoption, protection of children, international recovery of child and family support, divorce, marriage, protection of adults, the service of documents, the taking of evidence, the abolition of legalisation for foreign public documents, choice of court agreements and holding of securities by intermediaries.

[38] The report on the inter-country adoption by the special commission is available at: http://www.hcch.net/upload/wop/adop2005_rpt-e.pdf

VI. COMMENTS AND OBSERVATIONS OF THE AALCO SECRETARIAT

154. It is significant to note that the United Nations General Assembly at its Sixty-Third Session adopted the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea on 11 December 2008, drafted and adopted by the UNCITRAL at its Forty-First Session. The Convention aims to create a modern and uniform law concerning the international carriage of goods, which include an international sea leg, but which is not limited to port-to-port carriage of goods. In addition to providing for modern door-to-door container transport, there are many innovative features contained in the draft Convention which includes provision allowing for electronic transport records, and other more technical features to fill the perceived gaps in existing transport regimes. The overwhelming support for increase in the limits on carrier liability for cargo loss or damage would result in benefit of shippers, particularly in the developing and least developed countries. There is no doubt that the harmonization and modernization of the legal regime in this area, which in many countries dates back to the 1920s or earlier, will lead to an overall reduction in transaction costs, increased predictability when problems are encountered, and greater commercial confidence when doing business at international level.

155. It is also welcoming that all other Working Groups established by the Commission have made considerable progress in this session. AALCO Secretariat hopes that the Member States would continue to support and actively participate in the work of the UNCITRAL and its Working Groups. In this regard, it may be recalled that the Resolution (RES/47/S 12) adopted at the Forty-Seventh Session (New Delhi, HQ, 2008) on the agenda item, urges the Member States of AALCO to consider adopting, ratifying or acceding to the instruments adopted by the UNCITRAL, in order to promote uniformity and consistency in the international trading system.

156. The recent Twelfth Ministerial Session of the UNCTAD and the Fifty-Fifth Annual Session of the Trade and Development Board addressed various issues of relevance to AALCO Member States, specifically emphasising on the need to revamp agricultural sector of the developing countries in order to be more self-producing countries so that the financial crisis and the food crisis could be mitigated. In this regard, it was essential to make all efforts to promote the agricutral sector in one's own country and utilise effectively their natural resources. These initiatives would be of great concern to countries from Asian-African region considering that they could contribute towards bringing the world food supplies market into stability.

157. UNIDROIT's current work progress saw the finalisation of Model Law on Leasing. Further, the Member States of AALCO needs to actively participate in order to facilitate functional and efficient model laws and principles that the Organization is preparing. The forthcoming negotiations in *ad hoc* working groups, preparatory forums and other preliminary groups needs to be well represented in order to formulate a uniform procedure in international trade law regime. Alongside this, the research works carried out by the Hague Conference on Private International Law (HCCH) also should be closely monitored and efficiently participate to address the issues faced by AALCO Member States which would add strength to furnishing consolidated view from the Asian-African perspective. Such cooperative mechanisms would facilitate in effective functioning, collect country positions and best practices available throughout the world in order to bringout future international trade law documents in a well-represented manner.