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I. Introduction

1. Background information on the work of the Working Group on legal issues related to identity management (IdM) and trust services may be found in document A/CN.9/WG.IV/WP.169, paragraphs 4–20.

II. Organization of the session

2. The Working Group, composed of all States members of the Commission, held its sixty-second session from 22 to 26 November 2021. The session was held in line with the decision taken by the Commission at its fifty-fourth session to extend the arrangements for the sessions of UNCITRAL working groups during the COVID-19 pandemic as contained in documents A/CN.9/1078 and A/CN.9/1038 (annex I) until its fifty-fifth session (A/76/17, para. 248). Arrangements were made to allow delegations to participate in person at the Vienna International Centre and remotely.

3. The session was attended by representatives of the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, China, Colombia, Czechia, Dominican Republic, Ecuador, France, Germany, Ghana, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Italy, Japan, Lebanon, Malaysia, Mexico, Pakistan, Peru, Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Switzerland, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Angola, Armenia, Bahrain, Bolivia (Plurinational State of), Burkina Faso, Cambodia, Chad, Democratic Republic of the Congo, Egypt, El Salvador, Jordan, Kuwait, Lao People's Democratic Republic, Lithuania, Madagascar, Myanmar, Niger, Panama, Qatar, Senegal and Sweden.

5. The session was attended by observers from the Holy See and from the European Union.

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

(a) *United Nations system*: United Nations Environment Programme (UNEP) and World Bank;

(b) *Intergovernmental organizations*: Cooperation Council for the Arab States of the Gulf and Hague Conference on Private International Law;

(c) *International non-governmental organizations*: All India Bar Association, Alumni Association of the Willem C. Vis International Commercial Arbitration Moot, Barreau de Paris, Center for International Legal Education – University of Pittsburgh School of Law, China Council for the Promotion of International Trade, China International Economic and Trade Arbitration Commission, CISG Advisory Council, Council of the Notariats of the European Union, European Law Institute, European Law Students' Association, Grupo Latinoamericano de Abogados para el Derecho del Comercio Internacional, Institute of Law and Technology – Masaryk University, International and Comparative Law Research Center, International Association of Young Lawyers, International Bar Association, International Union of Notaries, Kozolchyk National Law Center, Law Association for Asia and the Pacific and Union Internationale des Hussiers de Justice.

7. According to the decision of the Commission (see para. 2 above), the following persons continued their office:

Chairperson: Ms. Giusella Dolores FINOCCHIARO (Italy)

Rapporteur: Mr. Paul KURUK (Ghana)

8. The Working Group had before it the following documents:

(a) An annotated provisional agenda (A/CN.9/WG.IV/WP.169);

(b) A note by the secretariat containing draft provisions on the use and cross-border recognition of IdM and trust services (A/CN.9/WG.IV/WP.170) ("draft provisions");

(c) A note by the secretariat containing a draft explanatory note to the draft provisions on the use and cross-border recognition of identity management and trust services (A/CN.9/WG.IV/WP.171) ("draft explanatory note");

9. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Adoption of the agenda.
3. Draft instrument on the use and cross-border recognition of identity management and trust services.
4. Other business.

III. Deliberations and decisions

10. The Working Group engaged in discussions on the draft provisions and the draft explanatory note. The deliberations and decisions of the Working Group thereon are reflected in chapter IV below.

11. The secretariat was requested to revise the draft provisions and the explanatory note to reflect those deliberations and decisions and to transmit the revised text to the Commission, in the form of a model law, for consideration at its fifty-fifth session. The secretariat was also asked to circulate the revised text to all Governments and relevant international organizations for comment, and to compile the comments received for the consideration of the Commission.

IV. Draft instrument on the use and cross-border recognition of identity management and trust services

A. Preliminary matters

12. The Working Group heard that, at its fifty-fourth session, the Commission had expressed its satisfaction with the progress made by the Working Group towards completion of an instrument in the form of a legislative text and had encouraged the Working Group to finalize its work and to submit it to the consideration of the Commission at its fifty-fifth session in 2022 (A/76/17, paras. 207–208). The Working Group proceeded with a third read-through of the draft instrument.

B. Article 1. Definitions

1. "Electronic identification" versus "authentication"

13. The Working Group reaffirmed that IdM comprised two stages and that the definition of "electronic identification" in article 1(c) accurately described the second stage. However, divergent views were expressed as to whether the term "electronic identification" should remain as the defined term.

14. On one view, the term should be replaced with "authentication". In support of that view, it was noted that the definition in article 1(c) described what was understood in both technical and common parlance as authentication and aligned with the meaning given to that term in digital trade agreements. It was added that the term

"electronic identification" risked being misunderstood as referring to both the first and second stages of IdM.

15. On another view, "electronic identification" should remain the defined term. In support of that view, it was noted that there was still some difference in how the term "authentication" was understood, and that the term "electronic identification" was more consistent with the terminology used in other UNCITRAL texts on electronic commerce. The point was made that, in some legal systems, "authentication" required an indication of intention with respect to the data being authenticated, along the lines of an electronic signature. It was also added that the process described in article 1(c) necessarily involved the presentation of credentials to be verified or authenticated, which itself was an act of identification. Therefore, "electronic identification", which had a broader connotation, was preferable.

16. It was noted that, regardless of whether "electronic identification" was retained or replaced with "authentication", the term defined in article 1(c) did not carry the meaning given in the definition in all provisions of the draft in which it was used. In particular, it was explained that, when used in article 1(e), article 5 (chapeau), article 6(a)(iv) and article 9, context suggested that the term referred to both stages of IdM. It was proposed that, if the term "authentication" was used as the defined term, the term "electronic identification" should be retained in those provisions, and a definition should be inserted to define that term to mean both stages of IdM. In response, it was noted that the term "IdM" was already used in the draft instrument to refer to both stages of IdM, consistent with the terminology used elsewhere in the draft, such as the definitions of "IdM services" and "IdM system".

17. A concern was expressed that, at this advanced stage in its work, the Working Group should avoid reopening discussions on substantive provisions in which the term was used, lest it prolong deliberations and jeopardize the ability of the Working Group to meet the time frame set by the Commission. In response, it was noted that the diverging views expressed with respect to article 1(c) revealed that discussions on some of those provisions might be warranted, and that accepting the term "electronic identification" in the text without those discussions might not serve the objective of developing uniform rules capable of a common understanding.

18. Following the discussion wherein delegations expressed different views, it was concluded that the term "electronic identification" would be retained as the defined term, noting that issues regarding the use of the term could be revisited in its subsequent discussion of the substantive provisions in which that term was used, and that corresponding clarifying text would be added to the explanatory note.

2. Reference to electronic identification "of persons in electronic form"

19. The Working Group agreed to delete the words "of persons in electronic form" in the definitions of "IdM services" and "IdM system" on the basis that those elements were already addressed in the definitions of "identity proofing" and "electronic identification".

3. Definition of "IdM services" and "IdM service provider"

20. It was proposed that the definition of "IdM service provider" in article 1(g) should be amended to refer to a person that provides "any IdM service". It was explained that the proposal was designed to align the existing text with the understanding, reflected in paragraph 50 of the draft explanatory note, that not all functions listed in article 6 were relevant to all IdM systems and therefore that not all IdM service providers would perform all functions that article 6 required an IdM service provider to perform.

21. In response, it was noted that the regime under the draft instrument centred on the reliability of the totality of functions listed in article 6, and that it was necessary for the IdM service provider to be responsible for the performance of all functions. Accordingly, it was suggested that the definition of "IdM service provider" should not

be amended as proposed, and that the definition of "IdM services" should instead be amended so as to consist of managing identity proofing "and" electronic identification.

22. The Working Group reaffirmed the view, reflected in paragraph 77 of the explanatory note, that the IdM service provider should be responsible for the full suite of IdM services provided to the subscriber, while also being free to enter into arrangements with third parties to perform some of the functions listed in article 6. Several alternative proposals were made to reflect that view more clearly in the text. A first proposal was to amend the definition of "IdM services" by inserting the words "whether or not through the use of a third party IdM system as defined in article 1(h)" at the end of the definition. That proposal did not gather support. A second proposal was to amend the definitions of "IdM service provider" and "trust service provider" to refer to the "arrangement" referred to in article 1(j). The Working Group agreed to amend both definitions to refer to a person who enters into an arrangement with a subscriber for the provision of IdM services or trust services, respectively.

23. A query was raised as to the scope of the term "arrangement", noting that some of the functions listed in article 6 would be performed by an authority acting not under contract but rather in the performance of a function that it was mandated to perform by law. It was asked whether the term referred only to contractual agreements. In response, it was indicated that the scope of the draft instrument aimed to encompass all possible forms of IdM and trust services, and that therefore the term "arrangement" could refer also to a non-contractual relationship. The Working Group agreed to revise the explanatory note accordingly. A further observation was made that, in such arrangement, due care should be given to the mandatory law of the place of the provision of the service.

24. It was also suggested to define the terms "level of assurance" and "level of reliability" in article 1.

C. Article 2. Scope of application

25. The view was expressed that the scope of the instrument should be restricted to cross-border recognition, and that the explanatory note should indicate that the domestic application of the instrument was optional. It was suggested that a provision should be inserted in the draft instrument to illustrate that the instrument should not affect the principles of State sovereignty, equality and non-intervention. It was also indicated that the meaning of the term "trade-related services" in article 2(1) was unclear and that the term should be defined.

26. Different proposals were heard on the possible redrafting of article 2. It was indicated that the content of article 2(2) was related to the voluntary use of IdM and trust services, rather than to the scope of application. It was also indicated that article 2(3) should apply also to trust services to preserve legal requirements to use specific trust services.

27. After discussion, the Working Group agreed to delete subparagraphs (b) and (c) of article 2(2), to retain the words "or that a trust service be used" without square brackets in article 2(3) and to retain the words "or to use a particular IdM service or trust service" without square brackets in article 3.

D. Article 3. Voluntary use of IdM and trust services

28. The Working Group agreed to amend article 3 as outlined in paragraph 27 above. With regard to paragraph 2, some concerns were raised on how such consent might be inferred from a party's conduct, in particular, when that party had poor knowledge or was not necessarily aware of this fact. Therefore, it was proposed to determine such consent in a clearer and more reliable way.

E. Article 6. Obligations of IdM service providers

29. Different views were heard with respect to retaining the words “at a minimum” in the chapeau and subparagraph (a) of article 6.

30. It was indicated that the words “at a minimum” should be retained in the chapeau to indicate that the functions listed in article 6 set a minimum core. In that regard, it was proposed to indicate more explicitly that the IdM service provider could not derogate from the performance of those functions by agreement. However, it was added that the words “at a minimum” should be deleted in paragraph (a) as they conflicted with the balancing exercise provided for by the reference to “as appropriate to the purpose and design of the IdM system”.

31. On the other hand, it was indicated that the two references to “at a minimum” served distinct purposes, with the words in paragraph (a) referring to the requirements to be addressed in the operational rules, policies and practices that the service provider was required to have in place. It was also suggested that subparagraph (a)(iv) should be set out as a separate paragraph.

32. In response to a question as to whether it was possible for two IdM service providers to be held jointly liable to perform the functions listed in article 6, it was reiterated that article 6 contained a list of core functions for IdM service providers, and that issues of allocating liability, such as joint liability or crossclaim along the chain of subcontracts, should be discussed in relation to article 12.

33. After discussion, the Working Group decided to retain “at a minimum” without square brackets in the chapeau and paragraph (a) of article 6.

34. In the case of cross-border provision of IdM services, some concerns were raised with regard to the necessity of compliance of the operational rules, policies and practices of IdM service providers with the mandatory law of the country where their service was provided. It was further noted that cooperation of foreign-based IdM service providers with law enforcement and judicial authorities of the country that received the service for the purposes of criminal or judicial investigations was deemed necessary. Accordingly, it was suggested to insert such obligations in article 6 and to align article 14 with it.

F. Article 7. Obligations of IdM service providers in case of data breach

35. It was indicated that several actions listed in article 7 could fall under data protection and privacy laws, and therefore that all actions listed, and not just notification, should be performed in accordance with applicable law (A/CN.9/1045, para. 99). To reflect that understanding, it was suggested that the words “in accordance with the law” should be deleted in article 7(1)(c) and retained without square brackets in the chapeau of article 7. After discussion, the Working Group agreed to amend article 7 accordingly.

G. Article 8. Obligations of subscribers

36. The Working Group considered the alternative drafting options presented in paragraphs (a) and (b) of article 8, which reflected the outcome of discussions at its sixtieth session (A/CN.9/1045, para. 105). The view was reiterated that both paragraphs imposed too high an expectation on the subscriber. It was added that paragraph (b) would be difficult to apply in practice and would also be difficult to prove in the event of a dispute. Another view, which received broad support within the Working Group, was that paragraph (a) would impose an unreasonably high expectation on the subscriber if the obligation on the subscriber to notify were triggered by knowledge that the identity credentials “may have” been compromised. It was suggested that the explanatory note should indicate that a failure of the

subscriber to comply with its obligations under article 8 did not necessarily release the IdM service provider from liability.

37. The Working Group agreed to delete the words “or may have” in paragraph (a) and to retain paragraph (b) without square brackets. The Working Group further agreed to align article 15 with article 8, and thus to delete the word “so” in article 15(b).

H. Article 9. Identification of a person using IdM

38. The Working Group considered the words in square brackets referring to identification for a particular “purpose”. It was recalled that the Working Group had agreed to insert those words at its sixtieth session in response to concerns about the workability of article 9 as a functional equivalence rule (see A/CN.9/1045, paras. 110–117). While a query was raised as to the need for the words, noting that the purpose of identification would be apparent from the requirement to identify, there was broad support within the Working Group to retain them. It was also felt that, despite reference in other provisions of the draft to “purpose” of the IdM system and “function” of electronic identification, the word “purpose” was appropriate in article 9. The Working Group agreed to retain the words as drafted without square brackets.

39. It was observed that article 9 no longer referred to a “reliable” method. It was explained that article 10(1) required the method to be either “as reliable as appropriate for the purpose for which the IdM service is being used” or “proven in fact to have fulfilled the function described in article 9”, and that it might not be appropriate to refer to a method complying with the latter requirement as being “reliable” as it did not necessarily involve an assessment of the factors of reliability listed in article 10(2). It was explained that reliability and function were different aspects of an IdM service, that the function pursued by the use of IdM services was identification, and that, according to article 10(1), that function could be fulfilled by the use of a reliable method or in fact.

40. Nevertheless, it was indicated that, while a safety clause against non-repudiation should be retained in article 10(1)(b) alongside the relative standard of reliability in article 10(1)(a), reliability was the touchstone of the draft instrument. It was added that retaining a freestanding provision that ostensibly permitted the use of any method to satisfy a requirement to identify could support arguments that non-reliable methods had some legal effect, and that any suggestion that the instrument gave legal recognition to the use of unreliable methods should be avoided. It was also observed that article 10(5)(a) effectively assumed reliability as a common denominator for all methods. It was further added that article 10(5)(a) was not inconsistent with article 10(1)(b), and the Working Group rejected a suggestion to delete article 10(1)(b) in light of article 10(5)(a).

41. Widespread support was expressed within the Working Group to clarify further the link between articles 9 and 10 with respect to reliability. Two options were put forward: first, to amend article 9 to reinsert the reference to the use of a “reliable” method; second, to insert words in article 9 to the effect that the method must comply with article 10. The Working Group agreed that the option chosen for article 9 should be reflected in articles 16 to 21, and therefore that it would revisit the choice in the context of its subsequent consideration of those provisions.

I. Article 10. Reliability requirements for IdM services

1. “IdM system” versus “IdM service”

42. It was observed that several provisions of articles 10 and 11 referred to IdM systems as an alternative to referring to IdM services, and the Working Group was invited to choose between the two terms. The Working Group reiterated the view that

the notion of IdM system encompassed the notion of IdM service, and that a single IdM system could support multiple IdM services with different levels of reliability. There was broad support for the view that articles 10 and 11 were concerned with the reliability of IdM services and the designation of reliable IdM services, respectively, and that therefore the provisions should refer to "IdM services". The Working Group agreed to amend articles 10 and 11 accordingly, and to align the other provisions of the draft instrument, including article 5(b). It was observed that, despite the amendment, it was still appropriate for the draft instrument to refer to IdM systems in some of the remaining provisions, particularly given that the appraisal of the IdM system used by an IdM service might be relevant to determining the reliability of that IdM service.

2. Factors relevant to determining reliability

43. The Working Group heard a range of suggestions with respect to the factors listed in article 10(2). It was suggested that compliance with mandatory law of the country where the service was provided and also its relevant level of reliability should be added to the list. It was also suggested that the concept of "governance" should be clarified. It was further suggested that the geographic location of the IdM services or IdM service provider was relevant to reliability, and therefore that article 10(3) should be amended so as to be subject to a determination by a court or other competent authority. Similar amendments were proposed to be made to article 22. It was noted that the meaning of "recognized international standards" in article 10(2)(b) was unclear as there were no international standards recognized globally and that some standards might be recognized in certain jurisdictions and not in others. One delegation stated that, if this reference were to remain in the provisions, the explanatory note should address this point.

44. Different views were expressed regarding the reference to level of assurance frameworks in article 10(2)(b). It was indicated that the reference was useful and reflected existing practice and should therefore be retained. It was noted that such reference addressed the market need for guidance on the degree of trustworthiness of IdM services offered. In reply to a query, it was indicated that an IdM service provider making no reference to levels of assurance in its operational rules, policies and practices would likely be considered as offering services with the lowest level of assurance.

45. In response, it was noted that the term "level of assurance framework" did not have a generally accepted meaning, and that this reflected the absence of applicable recognized international standards and procedures that were globally accepted. It was suggested that the explanatory report should acknowledge that absence. It was also suggested that the term "trust frameworks" should be used instead of "level of assurance frameworks". A view was also expressed that levels of assurance should be defined at the national level and comply with applicable international and national law.

46. After discussion, the Working Group agreed to retain "level of assurance frameworks" without square brackets and to delete the second set of text in square brackets in article 10(2)(b).

J. Article 11. Designation of reliable IdM services

47. In line with its decision regarding article 10 (see para. 42 above), the Working Group agreed to refer to "IdM services" throughout article 11 and to delete references to "IdM systems".

48. It was indicated that paragraph 2(b) should require the publication of a list of designated IdM services. It was noted that the publication of lists was an effective way of sharing information of importance to subscribers, provided that the list was easily accessible. It was added that the use of other methods to inform the public

about designated IdM services was possible but should complement rather than replace the publication of a list.

49. After discussion, the Working Group decided to delete the words ", or otherwise inform the public" in paragraph 2(b).

50. With regard to paragraph 3, a query was raised as to the existence of such recognized international standards and procedures, and it was requested to clarify them. Moreover, it was indicated that in the designation process, in particular, when the IdM service providers offered their services across borders, due regard should be given to the mandatory law of the country that received the service. It was added that similar points could be made with respect to article 23(3).

51. Out of concerns similar to those raised with respect to article 10(3), it was suggested to amend paragraph 4 so that the designation of an IdM system be subject to a determination by the competent authority (see para. 43 above). Accordingly, the same amendment was proposed to be made to article 23(4).

K. Article 12. Liability of IdM service providers

52. It was indicated that article 12 introduced a statutory basis of liability that operated alongside contractual and extracontractual liability. It was suggested that the explanatory note should be revised accordingly, including by deleting reference to a "single liability regime" in paragraph 123. It was also indicated that the explanatory note should better reflect that domestic law prevailed over article 12. Due to the uncertainty that often existed with regard to competent jurisdiction and applicable law in case of cross-border services leading to liability disputes, it was noted that, in such cases, the mandatory law of the country where the service was provided became highly relevant and should be taken into account. It was added that the same concerns could be raised with respect to article 24.

53. Support was expressed for retaining paragraph 3(b) as well as the words "to any person" in paragraph 1. However, the view was also expressed that paragraphs 1 and 3 should be more closely aligned, so that the IdM service provider could limit liability towards all those who might invoke liability under article 12(1). It was added that exposing the IdM service provider to unlimited liability towards an indefinite number of entities would pose serious challenges to market development.

54. It was explained that, in practice, IdM service providers faced liability towards both subscribers and relying parties. It was added that liability towards relying parties could be limited at law by making relevant information publicly available in the policies and practices of the IdM service provider. It was suggested that paragraph 3 could be revised to clarify that limitation of liability of the IdM service provider towards subscribers was based on contract, and that limitation of liability of the IdM service provider towards relying parties could be achieved by informing those parties of the limitations on the purpose or value of the transactions for which the IdM service may be used. It was added that a specific obligation for the IdM service provider to provide that information could be inserted in article 6 and drafted along the lines of article 9(1)(d)(ii) of the UNCITRAL Model Law on Electronic Signatures.

55. The Working Group heard a proposal to address the various views expressed by reformulating article 12 along the following lines:

(a) Reinserting the definition of "relying party" contained in article 1(i) of A/CN.9/WG.IV/WP.160 (i.e. "a person that may act on the basis of IdM services or trust services");

(b) Amending article 6 to insert the following paragraph after paragraph (d):

"(e) Provide reasonably accessible means that enable a relying party to ascertain, where relevant:

(i) Any limitation on the purpose or value for which the IdM service may be used; and

(ii) Any limitation on the scope or extent of liability stipulated by the IdM service provider;"

(c) Amending articles 12(1) and 12(3) so that they both applied only to liability towards a subscriber or a relying party, and amending article 12(1) to specify that liability would be engaged by a breach of obligations under articles 6 and 7; and

(d) Amending article 12(3) so that paragraphs 3(a) and 3(b) applied to limiting liability towards a subscriber, while paragraph 3(a) but not paragraph 3(b) applied to limiting liability towards a relying party, as would a revised paragraph 3(c) to the effect that the IdM service provider had provided reasonably accessible means according to new paragraph (e) of article 6.

56. The proposal was received favourably by the Working Group, noting that it complemented well the provisions on the obligations of the IdM service provider. Further proposals were put forward to fine-tune article 12, as reformulated, as well as new paragraph (e) of article 6. It was indicated that, rather than addressing subscribers and relying parties in a single paragraph (article 12(3)), it would be clearer to address each in separate paragraphs.

57. Different views were expressed about the relevance of the agreement between the IdM service provider and the subscriber to limiting the liability of the IdM service provider to the relying party. On one view, the agreement was not relevant as the relying party would not ordinarily be privy to the terms of service. On another view, the agreement was relevant as the IdM service provider should in no case be allowed to avoid liability for use exceeding limitations that were not contained in the terms of service. It was therefore proposed that paragraph 3(b) of article 12, which required the agreement of the IdM service provider and subscriber, should also apply to limiting liability towards a relying party. It was also queried whether it was necessary to apply paragraph 3(b) to limiting liability towards a subscriber if the limitations had been made known to the subscriber in a similar way as they had been made known to the relying party.

58. Different views were also expressed on the reference to "agreed" limitations in paragraph 3(b). The Working Group was reminded of its earlier deliberations on the meaning of the term "arrangement" as it appeared in the definition of "subscriber" (see para. 23 above). It was noted that, as the arrangement between IdM service provider and subscriber could be entered into by contract (e.g. in the case of private IdM system) or by operation of law (e.g. in the case of a public IdM system), it was not appropriate to refer to the subscriber "agreeing" limitations with the IdM service provider.

59. Broad support was expressed within the Working Group to ensure that paragraph 3(b) applied to limitations with respect to IdM services provided otherwise than under a contractual agreement. Accordingly, it was proposed to replace the word "agreed" with the words "contained in the arrangement". However, some doubts were expressed as to whether the meaning of the replacement words was sufficiently clear. Several alternative proposals were put forward. A first alternative was to retain "agreed" but to clarify in the explanatory note that it covered IdM services provided otherwise than under a contractual agreement. A second alternative was to accept the replacement words but to clarify in the explanatory note that those words covered, among other things, IdM services provided under a contractual agreement. A third alternative was to refer to limitations that were "contained in the operational rules, policies and practices of the IdM service provider". A fourth alternative was to refer to the consent of the subscriber, picking up the wording of article 3.

60. While some doubts were expressed as to whether the third and fourth alternatives were sufficient to capture the limitations with which paragraph 3(a) was concerned, broad support emerged for the second alternative. After discussion, the Working Group agreed to amend paragraph 3(b) by replacing "agreed" with "contained in the arrangement", and to revise the explanatory note accordingly.

61. With respect to the new paragraph (e) of article 6, it was observed that paragraph (d) of article 6 already referred to making the operational rules, policies and practices "easily accessible" to the subscriber, and it was proposed that the same standard should apply to new paragraph (e). It was added that doing so would not only maintain consistency in the text, but also provide a more appropriate standard, particularly given that the relying party could be a micro or small enterprise. The Working Group agreed to amend the new paragraph by replacing "reasonably accessible" with "easily accessible".

62. With respect to the remaining provisions of article 12, the Working Group was reminded of its earlier decision regarding the use of "IdM service" instead of "IdM system" (see para. 42 above). It also heard a proposal to amend paragraph 2(b) by deleting the first instance of the words "under [this instrument]". It was explained that the amendment would align the paragraph more closely with its intended purpose, which was to preserve the application of rules on liability and other legal consequences under laws other than the draft instrument. A suggestion was also made to revise the explanatory note to address the concern previously expressed about the primacy of domestic law over the enacted instrument (see para. 52 above). After discussion, the Working Group decided to delete the first instance of the words "under [this instrument]" in paragraph 2(b) and to amend the explanatory note accordingly. Finally, the Working Group heard a proposal to amend paragraph 1 by replacing "loss" with "any loss" in view of the use of the word "any" in paragraph 2. In response, it was noted that, while it might be appropriate to use the word "any" in paragraphs 2 and 3 to qualify the scope of liability under paragraph 1, it might not be appropriate to do so in paragraph 1 to define the scope of liability.

63. The Working Group agreed to proceed in its consideration of article 12, as reformulated (see para. 55 above), with the further amendments agreed to fine-tune paragraph 3(b) of article 12 (see para. 60 above), and new paragraph (e) of article 6 (see para. 61 above).

64. In particular, the Working Group considered a proposal to replace article 12(3) with the following:

> 3. Notwithstanding paragraph 1, the IdM service provider shall not be liable to a subscriber for loss arising from the use of an IdM service to the extent that:
>
> (a) That use exceeds the limitations on the purpose or value of the transactions for which the IdM service may be used; and
>
> (b) Those limitations are contained in the arrangement between the IdM service provider and the subscriber.
>
> 4. Notwithstanding paragraph 1, the IdM service provider shall not be liable to a relying party for loss arising from the use of an IdM service to the extent that:
>
> (a) That use exceeds the limitations on the purpose or value of the transactions for which the IdM service may be used; and
>
> (b) The IdM service provider has provided easily accessible means according to article 6(e) to the relying party of those limitations.

65. It was explained that, in practice, IdM service providers sought to limit their liability differently depending on the party (i.e. subscriber or relying party) and the type of service chosen by the subscriber (e.g. high or low transaction value). It was added that, while the IdM service provider was aware of the legal regime, including limitations, applicable to the subscriber and the relying party as contained in its

policies and practices as well as in contract, the subscriber and the relying party were typically unaware of the legal regime applicable to the other, and that this state of affairs was in line with established market practice reflecting business needs.

66. It was added that it was important for article 12 to identify both limitations on the purpose or value of the transaction and limitations on the amount of liability that applied to the transaction for which the IdM service was actually used. To that end, different drafting suggestions were heard. One suggestion was to add the words "applicable to the relying party as relating to the subscriber concerned" at the end of paragraph 4(b); an alternative suggestion was to add the words "and the policy on which the IdM service has been provided to the subscriber concerned" at the end of that paragraph.

67. Yet another suggestion was to amend paragraph 4(a) so that it referred to "the transaction for which the IdM service is used". Broad support was expressed for that suggestion. However, it was also noted that, while the amendment identified the limitations on the purpose or value of the transaction, it did not identify limitations on the amount of liability, and therefore the insertion of the words "applicable to the relying party as relating to the subscriber concerned" at the end of paragraph 4(b) was still needed. The view was also expressed that paragraph 4(b) could simply require the service provider to act in accordance with article 6(e), and that additional considerations could be contained in the explanatory note. It was added that article 6(e) could be amended to point at the relevant transaction rather than at the general limitation regime. The Working Group agreed to continue its consideration of these proposals.

68. The Working Group considered a revised proposal to amend paragraph 4(a) by referring to the "transaction for which the IdM service is used" and to amend paragraph 4(b) by referring to the IdM service provider having "complied with its obligations under article 6, paragraph (e) with respect to that transaction".

69. Broad support was expressed for the revised proposal, which was said to address the concerns raised with respect to the earlier proposal.

70. It was observed that, as revised, paragraph 4 applied to exclude liability in the event that the limitations on the purpose or value of the transaction had been exceeded. A query was raised as to whether article 12 affected the ability of the IdM service provider to limit the amount of liability in the event that loss had been suffered, but the limitations on the purpose or value of the transactions had not been exceeded. In response, it was observed that nothing in article 12 affected the ability of the IdM service provider to rely on other laws to give effect to a liability cap, especially if the IdM service provider had complied with its obligations under the instrument, including its obligation under article 6(e). It was added that subparagraph (ii) of article 6(e) acknowledged that the IdM service provider could limit the "scope or extent of liability", and thus cap the amount of its liability towards the relying party.

71. After discussion, the Working Group agreed to retain (new) article 6(e) with the amendments agreed (see para. 61 above), and confirmed its agreement to retain article 12 with the revisions proposed to article 12(4) (see para. 64 above). The Working Group took note of an editorial suggestion to replace "that use" with "such use" in paragraph (a) of article 12(4).

72. With regard to the definition of "relying party", a couple of proposals were put forward to refine the definition. First, it was proposed to replace "may act" with "acts" to avoid an overly broad interpretation of the term that encompassed persons other that those who actually acted on the basis of IdM and trust services. Second, it was proposed that, to align with the notion of trust services as reflected in article 13, the definition should refer to persons acting on the basis of the "result" of the service or the result deriving from the use thereof. It was explained that, in the example of an electronic signature, the relying party would thus be a person acting on the electronic signature and not on the trust service used to create the electronic signature.

73. The Working Group agreed to amend article 1 to insert a definition of "relying party" along the following lines:

> "'Relying party' means a person who acts on the basis of the result of IdM services or trust services".

L. Article 14. Obligations of trust service providers

74. It was indicated that the term "functions" should be deleted in paragraph 1(a) as it was more appropriate to make reference to "purpose and design of the trust service", consistent with article 6(a). The Working Group agreed to delete the term "functions" in paragraph 1(a).

75. It was also indicated that the words "in accordance with the law" should be deleted in article 14(2)(c) and retained without square brackets in the chapeau of article 14(2) for the same reasons provided for the corresponding amendment agreed for article 7 (see para. 35 above) and to maintain consistency between the two provisions. The Working Group agreed to amend article 14 accordingly.

76. It was suggested to insert the words "at a minimum" in the chapeau of article 14(1) to indicate that article 14(1) provided a list of core obligations of trust service providers, similar to what article 6 did for IdM service providers. After discussion, the Working Group agreed to insert the words "at a minimum" in the chapeau of article 14(1). The Working Group further agreed to amend article 14(1) to impose the obligation in (new) article 6(e) on trust service providers.

M. Article 15. Obligations of subscribers

77. It was noted that the reference in paragraph (a) to the trust service being compromised was rather broad since the subscriber was unlikely to have immediate knowledge of issues affecting the trust service as a whole. It was explained that, in practice, the subscriber could be aware of visible information being compromised but might also be aware of risks involving information not directly visible to the subscriber, such as a private key. It was therefore suggested that the paragraphs (a) and (b) should refer to different things. Different drafting proposals were put forward to reflect those considerations. One proposal was to refer to the "subscriber's credentials" in paragraph (a). In response, it was observed that, while the draft instrument used and defined the term "identity credentials" in the context of IdM services, it did not use the term "credentials" in the context of trust services. Moreover, it was queried whether credentials were used for all trust services, and that an express reference to credentials might not reflect current practice and address future developments in the market. Another proposal was to refer more generically to "the data or means used by the subscriber for access and usage of the trust service".

78. After discussion, the Working Group accepted the latter proposal and agreed to insert the words "data or means used by the subscriber for access and usage of" before the words "the trust service" in paragraph (a).

79. A proposal was made to insert an article on the core rights and freedoms of subscribers, in particular, with regard to the protection of their personal data, as it was reflected in the European Union General Data Protection Regulation, and to predict a corresponding liability regime.

80. In view of the agreement of the Working Group to reintroduce the notion of "relying party" into the draft, it was strongly suggested to include provisions regarding the rights and obligations of relying parties and the corresponding liability regime. While the suggestion attracted some support, it was not taken up by the Working Group.

N. Article 16. Electronic signatures

81. It was recalled that articles 16 to 21 should be revised in light of the conclusion reached by the Working Group with respect to the reference to reliability in article 9 (see para. 41 above).

82. It was indicated that the term “identify” in subparagraph (a) was not defined in the draft instrument, while other terms relating to identity were. It was also indicated that an electronic signature was a means to indicate identity but was not in itself an identity. A concern was shared that the current draft could give rise to misunderstanding with respect to the meaning of the term “identify”.

83. In response, it was noted that the word “identify” had a settled usage in UNCITRAL texts containing rules on functional equivalence between handwritten and electronic signatures, dating back to article 7(1)(a) of the UNCITRAL Model Law on Electronic Commerce, and that any modification in wording could significantly affect the uniform interpretation of the numerous domestic enactments of those UNCITRAL texts.

84. The Working Group agreed that the meaning of the term “identify”, as used in article 16, should be illustrated in the explanatory note.

O. Article 17. Electronic seals

85. It was suggested that the words “and date” should be retained in article 17(b) for consistency with other provisions on trust services which referred to “time and date”. Conversely, it was noted that reference to “time” would suffice as it usually included reference to “date”.

86. After discussion, the Working Group agreed to retain the words “and date” without square brackets in article 17(b).

P. Article 22. Reliability requirements for trust services

87. It was indicated that different functions could achieve the purpose for which a trust service was used. In light of the reference to “purpose” contained in paragraph 1(a) of article 22, and with a view to maintaining consistency with the use of the terms “function” and “purpose” in other provisions of the draft instrument, it was proposed that the word “function” should be replaced with the word “purpose” in paragraph 2(h). The Working Group agreed to that proposal.

88. The Working Group also heard suggestions to amend paragraphs 2 and 3 similar to suggestions made earlier with respect to paragraphs 2 and 3 of article 10 (see para. 43 above).

Q. Article 24. Liability of trust service providers

89. The Working Group recalled that it had so far considered articles 12 and 24 together and that no reason had been advanced to justify applying different liability rules to IdM and trust services. Accordingly, the Working Group agreed that article 24 should be amended to align mutatis mutandis with the revisions to article 12.

R. Article 25. Cross-border recognition

1. Level of equivalence

90. The Working Group heard arguments for and against the two options presented in article 25(1) for the level of equivalence required for cross-border recognition. It

was explained that IdM or trust services varied significantly in terms of their design and operation, which made it difficult to establish exact equivalence between them. It was added that the words “substantially equivalent”, which were drawn from article 12(2) of the UNCITRAL Model Law on Electronic Signatures, provided the flexibility needed to determine equivalence. However, a preference was expressed for retaining the words “at least an equivalent” which, it was added, were less open to interpretation and facilitated the recognition of foreign IdM and trust services that offered significantly higher levels of reliability.

91. The Working Group agreed to delete the words “a substantially equivalent” and to retain the words “at least an equivalent” without square brackets in article 25(1) and likewise in article 25(2).

92. It was suggested that the explanatory note should clarify the relationship between the “level of reliability” of IdM and trust services referred to in article 25 and the “level of assurance” of IdM services referred to in article 10(2)(b), and how equivalence was to be assessed, particularly in view of the different role played by recognized international standards in each provision. It was also suggested to replace “shall” with “may” in article 25(1), noting that the determination of reliability in an enacting jurisdiction was a sovereign act. It was also noted that, in the absence of any recognized international standards, the equivalence of a foreign trust service would be assessed in accordance with the mandatory law of the enacting jurisdiction.

2. Article 25(3)

93. The attention of the Working Group was drawn to the commentary on article 25(3) in paragraphs 191 to 193 of the draft explanatory note. Broad support was expressed for enabling the practice whereby the designating authority of an enacting jurisdiction could rely on the designation of IdM and trust services by a foreign designating authority. It was added that the practice substantially enhanced cross-border recognition in practice. However, out of concerns similar to those raised with respect to articles 10(3), 11(4), 22(3) and 23(4) regarding the relevance of the geographic location of IdM and trust service providers in determining reliability, some delegations still cast some doubts on the appropriateness of this practice.

94. It was queried whether, on its terms, article 25(3) still required a determination by the designating authority of the enacting jurisdiction. It was also suggested that the provision could be revised to clarify that it was concerned with equivalence referred to in article 25(1), namely “at least an equivalent level of reliability”.

95. After discussion, the Working Group agreed to retain article 25(3) without square brackets and asked the secretariat to revise the wording to clarify that the provision was concerned with equivalence of systems, services and credentials referred to in article 25(1).

3. Object of cross-border recognition

96. A query was raised as to whether it was appropriate for article 25(1) to refer to giving “legal effect” to identity credentials, IdM systems, IdM services and trust services. It was observed that the instrument gave legal effect to the results deriving from the use of IdM services (i.e. “electronic identification”) and trust services, but not to the means used to achieve those results. It was added that, if the object of cross-border recognition were to remain, a different term, such as “legal standing”, “legal validity” or “legal value”, should be used.

97. Broad support was expressed for referring to giving legal effect to the results deriving from the use of IdM and trust services, and the Working Group agreed to amend article 25(1) accordingly. It was acknowledged that the amendment might require splitting article 25 into two articles: one for IdM services, one for trust

services. With respect to the cross-border recognition of trust services, the Working Group considered the following revised text:

> "The result deriving from the use of a trust service provided outside [*the enacting jurisdiction*] shall have the same legal effect in [*the enacting jurisdiction*] as the result deriving from the use of a trust service provided in [*the enacting jurisdiction*] if the method used by the trust service offers at least an equivalent level of reliability."

98. It was suggested that, for added clarity, the text should refer to the method used by the trust service "provided outside the [*enacting jurisdiction*]", and to offering at least an equivalent level of reliability "as the trust service provided in the [*enacting jurisdiction*]". In response to a query, it was noted that a focus on the "method used" still allowed to take into account all factors relevant to determining equivalence in the level of reliability.

99. In view of its decision as to the object of recognition in article 25(1) (see para. 97 above), and recalling its earlier request to clarify that article 25(3) was concerned with equivalence referred to in article 25(1) (see para. 95 above), the Working Group considered a proposal to reformulate article 25(3) as follows:

> "For the purposes of paragraph 1, the trust service shall be presumed to offer at least an equivalent level of reliability if [*the person, organ or authority specified by the enacting jurisdiction pursuant to article 23*] has determined that equivalence, taking into account the circumstances listed in article 22, paragraph 2."

100. It was explained that the reformulated text clarified that article 25(3) referred to designation and therefore would only be enacted if the enacting jurisdiction chose to implement the "ex ante approach" (see A/CN.9/1005, para. 11). It was further explained that it also clarified that the designating authority would take into account the same factors in determining equivalence as if it were designating the trust service under article 23, and thus achieved greater coherence and consistency in the text.

101. It was observed that paragraph 4 of article 22 would also be relevant in determining equivalence, and support was expressed for a proposal to refer to article 22 in general. The Working Group agreed to reformulate article 25(3) as proposed without the words "the circumstances listed in".

4. Relationship with article 22

102. The Working Group engaged in a detailed discussion on the relationship between articles 22 and 25.

103. On one view, article 22(3) already allowed for the reliability of a foreign trust service to be assessed, and therefore left little work for article 25 to do. It was contended that it would be inconsistent with the reliability requirements in article 22 for article 25 to impose an additional requirement on the foreign trust service to "offer at least an equivalent level of reliability" as a domestic trust service. It was proposed that, to avoid inconsistency and the unequal treatment of domestic and foreign providers, article 25(1) should be amended to require the foreign trust service instead to "meet the standard for reliability in article 22". It was added that, by removing a requirement to determine equivalence, the amendment rendered articles 25(2) and 25(3) redundant. It was further pointed out that article 25 was not concerned with compliance of foreign trust services with a legal requirement in the enacting jurisdiction to offer a particular level of reliability, and that such a requirement would be preserved under article 2(3), as amended (see para. 27 above).

104. On another view, article 25 was a core provision of the instrument that allowed for the cross-border recognition of trust services, which in turn was the original objective behind the current mandate of the Working Group. Some delegations took the view that this provision should not be revisited at this advanced stage of work. Some delegations noted that the rule in article 25(1) as currently in the draft

provisions applied to IdM and trust services the well-tested rule in article 12(3) of the UNCITRAL Model Law on Electronic Signatures.

105. With a view to bridging the different views, it was suggested that a new item should be inserted in article 22(2) to refer to "any relevant level of reliability of the method used" as a factor relevant for assessing reliability. It was mentioned that, in this regard, the mandatory law of the country in which the service was provided should be also taken into account. It was explained that the insertion would clarify that the same set of standards for assessing reliability applied in articles 22 and 25. It was added that a similar insertion should be made in article 10 for IdM services. Broad support was expressed for the suggestion, although it was added that the insertion did not obviate the need to refer to "at least an equivalent level of reliability".

106. After discussion, the Working Group agreed to insert the words "Any relevant level of reliability of the method used" after subparagraph (c) in article 10(2) and after subparagraph (b) in article 22(2).

107. It was indicated that corresponding changes to article 25 were necessary so that the standard in article 25 would be the same as that in article 22. A compromise proposal was made to modify article 25(1) to incorporate the standard in article 22 while also making explicit reference to requirements pertaining to levels of reliability. Different views were expressed on this, and the issue remained open for further discussion and would be one of the topics for discussion at the informal consultations (see para. 113 below).

S. Article 26. Cooperation

108. It was indicated that cooperation should take place on a voluntary basis and in compliance with relevant national laws and the principles of State sovereignty, equality and non-intervention, and that therefore the term "may" should be used. In response to a query, it was explained that the term "foreign entities" aimed at capturing all entities, regardless of their legal nature, that could usefully contribute to cooperation, and that the enacting jurisdiction would be better placed to identify those entities. A suggestion was made that cooperation should extend to sharing information on lists of blocked and allowed service providers, which was of significant practical importance. At the same time, it was suggested that the article could also encompass cooperation of foreign-based service providers with law enforcement and judicial authorities of countries where they offered their services through exchange of information, collection of evidence, designation of legal representatives and other forms of cooperation for judicial and law enforcement purposes.

109. After discussion, the Working Group agreed to retain the word "may" without square brackets and to delete the word "shall".

T. Form of the instrument

110. The Working Group recalled that, at its fifty-ninth session, broad support had been expressed for the preparation of an instrument taking the form of a model law (A/CN.9/1005, para. 123), and that that decision had informed its subsequent discussions and deliberations.

111. It was noted that the Working Group had achieved significant progress towards the finalization of a legislative text, and had identified common elements for the issues still under discussion. Accordingly, it was suggested that the instrument should take the form of a model law to better promote legal uniformity.

112. However, it was also said that the pending issues concerned core provisions, and that, absent an agreement, the draft instrument should take the form of a non-legislative text. It was stressed that any legislative text must be compatible with existing regional legislation.

113. It was suggested that the Working Group should submit the draft instrument in the form of a model law for the consideration of the Commission at its fifty-fifth session, in 2022, without prejudice to the final decision of the Commission on the final form of the instrument. It was also suggested that pending issues should be considered in informal intersessional consultations, and that the secretariat should report to the Working Group on those consultations at its sixty-third session for further deliberations. The Working Group agreed with those suggestions.

114. Recalling UNCITRAL practice to circulate the text transmitted to the Commission by an UNCITRAL working group to all Governments and relevant international organizations for comment, and noting that the same practice should be followed with respect to the draft instrument, it was suggested that the secretariat should prepare a revised version of the draft instrument and explanatory note and circulate the revised text. The Working Group agreed with that suggestion.

V. Other business

115. The Working Group was informed of the deliberations of the Commission, at its fifty-fourth session, concerning the exploratory and preparatory work undertaken by the UNCITRAL secretariat on legal issues related to the digital economy, and in particular on a proposal by the secretariat for legislative work on electronic transactions and the use of artificial intelligence ("AI") and automation set out in document A/CN.9/1065 (A/76/17, paras. 225-237). It recalled that the Commission had mandated the Working Group to hold a focused conceptual discussion at its sixty-third session on the use of AI and automation in contracting with a view to refining the scope and nature of the work to be conducted on the topic. The Working Group heard that the secretariat was intending to submit a paper to the Working Group ahead of its next session to assist in framing the discussion. Members of the Working Group and observers were encouraged to share relevant expertise on the topic at that session.

116. The Working Group heard a message of support for future work on legal issues related to the digital economy, in particular the role of UNCITRAL in developing guidance on a legal framework for data contracts.