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Possible revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services— drafting materials addressing the use of electronic communications in public procurement

Note by the Secretariat

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I. Introduction

1. The background to the current work of Working Group I (Procurement) on the revision of the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the “Model Procurement Law” or the “Model Law”)¹ is set out in paragraphs 5 to 33 of document A/CN.9/WG.I/WP.37, submitted to the Working Group for its consideration at this session. The main task of the Working Group is to update and revise the Model Law as necessary, so as to take account of recent developments in public procurement, including the use of electronic communications and technologies in procurement.

2. At its seventh session (New York, 4-8 April 2005) the Working Group addressed the following topics: electronic publication and communication of procurement-related information, other aspects arising from the use of electronic means of communication in the procurement process (such as controls over their use), electronic reverse auctions, and abnormally low tenders (see, further, document A/CN.9/575). The Working Group requested the Secretariat to prepare drafting materials for consideration on these topics at its eighth session, and also to present a comparative study on the use of framework agreements (A/CN.9/568, para. 78 and A/CN.9/575, para. 9).

3. This working paper will present for the Working Group’s consideration drafting materials for provisions to govern the use of electronic means of communication in the procurement process, including controls over such use. Further working papers will present drafting materials on the topics of electronic publication of procurement-related information, and electronic reverse auctions and abnormally low tenders respectively (A/CN.9/WG.I/WP.39 and A/CN.9/WG.I/WP.40). As also requested by the Working Group at its seventh session, the Secretariat will address the question of framework agreements in two further working papers (A/CN.9/WG.I/WP.41 and A/CN.9/WG.I/WP.42 respectively).

II. Guidance given by the Working Group for drafting revisions to the text of the Model Law and in the Guide to Enactment to provide for the use of electronic communications and technologies in the procurement process

A. Scope and extent of revisions to the Model Law and Guide to Enactment

1. General remarks

4. The Working Group has reaffirmed that principles governing public procurement should be located in the text of the revised Model Law, and appropriate guidance on their application should be set out in its accompanying Guide to Enactment (A/CN.9/568, para. 24, A/CN.9/575, para. 11).

5. This approach is a continuation of that adopted when the Model Law and its accompanying Guide to Enactment were promulgated in 1994. Paragraph 12 of the Guide, under the heading “A ‘framework’ law to be supplemented by procurement regulations”, notes that:

“The Model Law is intended to provide all the essential procedures and principles for conducting procurement proceedings in the various types of circumstances likely to be encountered by procuring entities. However, it is a ‘framework’ law that does not itself set forth all the rules and regulations that may be necessary to implement those procedures in an enacting State. Accordingly, the Model Law envisages the issuance by enacting States of ‘procurement regulations’ to fill in the procedural details for procedures authorized by the Model Law and to take account of the specific, possibly changing circumstances at play in the enacting State—without compromising the objectives of the Model Law.”

6. In considering the scope of revisions to be made to the text of the Model Law, the Working Group has taken into account its twin goals of updating and simplifying the text, and rendering it more precise, and the impact that those revisions would have on those countries that have based their procurement legislation on the current Model Law (A/CN.9/575, para. 10). Accordingly, the Working Group has expressed the wish not to revise the text of the current Model Law beyond the extent reasonably necessary to achieve its goals.

7. Paragraph 7 of the Guide to Enactment, under the heading “Purpose of this Guide”, notes that:

“The information presented in the Guide is intended to explain why the provisions in the Model Law have been included as essential minimum features of a modern procurement law designed to achieve the objectives set forth in the Preamble to the Model Law. Such information might assist States also in exercising the options provided for in the Model Law and in considering which, if any, of the provisions of the Model Law might have to be varied to take into account particular national circumstances... taking into account that the Model Law is a ‘framework’ law providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations, the Guide identifies and discusses possible areas to be addressed by regulation rather than by statute.”

8. As to the nature and level of detail in the guidance to be provided, and in the context of its consideration of electronic procurement, the Working Group has noted the importance of guidelines from UNCITRAL to ensure consistency in regulations governing procurement in various jurisdictions. The Working Group has also expressed concern that practices could otherwise be developed that would be divergent and inconsistent with the principles of the Model Law (A/CN.9/575, para. 61).

9. The Working Group may therefore wish to consider whether to broaden the scope of the Guide to Enactment, so as not only to continue to fulfil its functions as set out in paragraph 7 above, but also to address the concern set out in the preceding paragraph. The Working Group may consider that the Guide may usefully provide greater detail of the regulations that enacting States may wish to promulgate in the form of a narrative or even draft regulations themselves, for example when

introducing or enabling electronic communications in public procurement (A/CN.9/568, para. 38). A Guide of such type may also require more prescriptive language than is found in the current text (see, further, para. 23 below). The Guide would then be addressing practical procedures in some detail, and may need to allow for the possibility of changes to procedures, as new technologies and modes of operation arise.

10. The Working Group may consider, for the assistance of procurement officials in enacting States, that the practical procedures included in the Guide to Enactment should address issues that arise for procuring entities as contracting parties in procurement. In this regard, the International Chamber of Commerce (ICC) has issued a Guide to Electronic Contracting and the ICC e-Terms 2004,² the aim of which is to enhance the legal certainty of contracts made by electronic means. Although strictly beyond the scope of the Model Law, therefore, the Working Group may wish to consider whether reference could be made to other publications that discuss such issues, such as the ICC Guide.

11. Given the possible substantial additions to the text of the Guide, the Working Group may wish to consider whether to produce a new Guide to Enactment (perhaps entitled “Guide to Enactment and Use”), or to make additions to the current text by way of addenda. In order to assist the Working Group in considering the form that the revised Guide to Enactment should take, the Secretariat has set out below drafting suggestions as regards the text that might appear in the Guide on the topic of the use of electronic communications in the procurement process (the text following para. 20 below). The Working Group may wish to consider this text as an example of how the revised Guide may be presented.

2. Contract administration and implementation phase in procurement

12. The Model Law addresses the procedures to be followed when awarding a procurement contract. As the text of the current Guide to Enactment notes, at paragraph 10:

“The Model Law sets forth procedures to be used by procuring entities in selecting the supplier or contractor with whom to enter into a given procurement contract. The Model Law does not purport to address the contract performance or implementation phase. Accordingly, one will not find in the Model Law provisions on issues arising in the contract implementation phase, issues such as contract administration, resolution of performance disputes or contract termination. The enacting State would have to ensure that adequate laws and structures are available to deal with the implementation phase of the procurement process.”

13. In the light of the general comments made regarding the scope of the Model Law and Guide to Enactment above, the Working Group may wish to consider whether to address the contract administration and implementation phase in the texts (see, further, para. 78 of A/CN.9/WG.I/WP.36), also so as to address the concern expressed in paragraph 8 above. This Note does not suggest any changes to the text of the Model Law and Guide to Enactment that may be necessary if this aspect of procurement is to be addressed, a matter that may be necessary.

B. General legislative principles and policy approaches for dealing with electronic communications and technologies in the procurement process – interaction with electronic commerce and other law

1. General remarks

14. At its seventh session, the Working Group decided to base its future deliberations on the form of communications in the procurement process to provide for a general principle of functional equivalence in the use of communications in procurement (A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 11).³ These principles are those upon which the UNCITRAL Model Law on Electronic Commerce (1996)⁴ (the Model Law on Electronic Commerce) is based.

15. The Guide to Enactment accompanying the Model Law on Electronic Commerce sets out the functions of a document in paragraph 16, as follows: “[a document should] be legible by all; [should] remain unaltered over time; [should] allow for the reproduction of a document so that each party would hold a copy of the same data; [should] allow for the authentication of data by means of a signature; and [should] be in a form acceptable to public authorities and courts”.

16. The functional equivalent approach is based on the recognition that legal requirements for paper-based documentation, which have satisfied the above functions of a document, constitute the main obstacle to the use of electronic communications, in that the latter may not enjoy the same degree of contractual certainty and legal recognition as their paper counterparts. Examples include requirements for documents to be in “writing”, to be “original”, or to be “documentary evidence”. The functional equivalent approach aims to ensure that all documents have the same degree of contractual certainty and legal recognition.

17. The Working Group has also expressed the wish that the Model Procurement Law’s provisions should be technologically neutral, for the same reasons as are set out in paragraph 24 of the Guide to Enactment that accompanies the Model Law on Electronic Commerce:

“The approach used in the Model Law [on Electronic Commerce] is to provide in principle for the coverage of all factual situations where information is generated, stored or communicated, irrespective of the medium on which such information may be affixed. It was felt during the preparation of the Model Law [on Electronic Commerce] that exclusion of any form or medium by way of a limitation in the scope of the Model Law [on Electronic Commerce] might result in practical difficulties and would run counter to the purpose of providing truly “media-neutral” rules [that purpose is set out in paragraph 6 of that Guide].”

18. However, the Working Group has also noted that in some enacting States, provision has already been made to address issues arising from the use of electronic communications and technologies in procurement in States’ general body of law. Additionally, there may be specific rules for the use of electronic communications in government activities, including in the procurement process (A/CN.9/WG.I/WP.34, para. 12). Consequently, the Working Group has decided that such issues as are questions of the general law on electronic commerce and not of procurement law

should not be addressed in the Model Law itself. Rather, an enacting State's general body of law should govern the issues raised by electronic commerce generally, and the Working Group will not recommend provisions regarding electronic communications in the Model Law unless the procurement context strictly requires such provision (A/CN.9/575, para. 50).

19. Nonetheless, the Working Group's recommendations as to the contents of the Guide to Enactment indicate that its text should provide guidance for enacting States on requirements for relevant legislation, such as discussing the rules that enacting States may wish to ensure are in place in order to ensure effective procurement contracting using electronic communications and technologies. These general rules may in some cases be supplemented by regulations, addressing such issues as those set out in Chapters II and III of the Model Law on Electronic Commerce, under the titles: "Application of legal requirements to data messages" (Chapter II) and "Communication of data messages" (Chapter III) (the term "data message" is equivalent to an electronic communication).⁵ The Working Group may therefore wish to consider the extent to which the guidance to be provided should address these issues and make reference to other documents, such as the Model Law on Electronic Commerce, where solutions are to be found.

2. Possible Guide to Enactment text on the use of electronic communications in the procurement process

(a) General remarks

20. The Working Group may find it useful to address the substance of the anticipated revisions to the text of the Model Law in a new section in the introduction to the Guide to Enactment, though the appropriate location of the text will depend to some extent on the solutions chosen by the Working Group for the principles governing the use of electronic communications to be included in the revised Model Law. In addition, and as it is from those principles that the proposed revisions to the text of the Model Law are drawn, proposed text that could form the basis of the guidance on this issue to be provided in the Guide to Enactment is found in the following paragraphs, with the proposed revisions to the text of the Model Law itself and article-specific commentary thereafter.

21. The Working Group may care to note the following points as regards the drafting of the proposed text. First, where reference is made to the Model Law, and to avoid any confusion during the course of the Working Group's deliberations, the Model Law is referred to as the "1994 Model Law". Secondly, the text includes the full text of quotations from the Model Law on Electronic Commerce, but the Working Group may wish to consider whether and how to make reference to its provisions when the Guide is produced. Thirdly, stylistic and other minor changes may be required (including new terminology to distinguish between the 1994 Model Law and revised Model Law) so as to ensure internal consistency in the Guide when finalized. Fourthly, references to working papers and reports of the Working Group would be deleted, but are included in the suggestions below for ease of reference during the Working Group's deliberations. For the same reason, the draft appears with sub-headings footnotes, which could also be deleted in the final text. Finally, and according to whether the Working Group decides to revise the Guide using addenda or by producing a new Guide, the paragraph numbering will need to be revised.

22. The text does not seek to address more than the main issues raised by the use of electronic communications in the procurement process. The Working Group may wish to consider, therefore, the appropriate level for such a discussion (see, for example, draft paragraph 11, on the question of electronic signatures).

23. If the Guide to Enactment is to operate as a guide to both enactment and use of the Model Law, the Working Group may wish to consider whether some of its guidance should have a fairly prescriptive character. Accordingly, the Working Group will find alternative text for its consideration, addressing the question of sufficiency of general electronic commerce law in enacting States, for example, presented as “Enacting States [will also] [may] wish to consider [whether the law is adequate]” in the proposed text for the Guide to Enactment below.

(b) Proposed text

(i) Introduction to provisions introducing the use of electronic communications in the procurement process

(1) The UNCITRAL Model Procurement Law (1994 version) was adopted at a time at which the use of information technology and electronic communications was anticipated, but not yet widespread. Although some of its provisions may allow for the use of electronic communications and technologies in the procurement process, the Model Law was not primarily concerned with legal issues related to the use of these technologies, and a number of its provisions reflect a background of communications, record-keeping and evidentiary systems that were largely based on information recorded on paper. Examples include references to “documentary evidence” and similar concepts set out in articles 6 (2), 7 (3)(a)(iii), 10, 27 (c), 36, 38 (f) of the current 1994 Model Law, the rules on preparation, modification, withdrawal, submission and opening of tenders, and the conclusion of a procurement contract.

(2) Since the adoption of the Model Law in 1994, the use of electronic communications and technologies in public procurement, including the use of procurement methods based on the Internet, to which this Guide will refer generally as “electronic procurement”, has increased rapidly. Electronic procurement has been observed to offer many potential benefits, including improved value for money from more rigorous competition in a broader procurement market, better information for suppliers and contractors and more competitive techniques, savings in time and costs, improved administration of contracts awarded, and, in some cases, improved compliance with rules and policies and fewer opportunities for corruption and abuse. Further, electronic procurement provides valuable opportunities to enhance public confidence and transparency in the procurement process. UNCITRAL therefore considers that the Model Law should make provision so as to enable the use of electronic procurement.

(3) However, concerns have also been expressed that controls on the use of electronic procurement may be needed to address the relative novelty of electronic communications, possible discrimination where access to the necessary infrastructure may be lacking, issues of security, confidentiality and authenticity in electronic communications, and the impact of modern

procurement methods on other socio-economic policy goals. The revisions to the original Model Law seek to address these concerns, and this Guide sets out the objectives of the revisions themselves.

(4) Although some of the issues raised by electronic procurement can be accommodated within the Model Law's existing provisions (or through the interpretation of existing laws and rules, including as set out in the Guide to Enactment), UNCITRAL has revised the text of the Model Law so as to make appropriate provision or provide clarification where necessary and, where possible, to promote the use of electronic procurement as a means of enhancing the achievement of the objectives of the Model Law itself.

(ii) Interaction between legislation concerning electronic procurement and electronic commerce legislation

(5) Electronic procurement has a natural dependence on the existing level of use and regulation of electronic commerce in general. This Guide will also, therefore, make reference to the interaction between the legislation governing electronic commerce and that governing procurement where appropriate. It will not be appropriate for a procurement law to govern electronic commerce generally in an enacting State, and for this reason, the Model Law will not address issues that fall to be treated as a matter of general electronic commerce law. However, provision is made where the procurement context requires additional measures (such as the submission of tenders). In the light of the above, enacting States may wish to ensure that their existing legislation governing the use of electronic commerce indeed provides adequate recognition of electronic communications, and that it addresses the issues set out in the following paragraphs. For ease of reference of enacting States, the solutions to the issues that UNCITRAL has provided in its main electronic commerce text (the UNCITRAL Model Law on Electronic Commerce (1996)) are also set out.^a

(6) One of the main fetters on the use of electronic communications is a legal obstacle: that is, uncertainty as to the legal recognition, validity or enforceability of electronic communications generated in the contractual process. These obstacles may arise in requirements for "written" or "original" communications and documents, the formalities of contract formation and the admissibility of evidence in court (A/CN.9/568, para. 30 and A/CN.9/WG.I/WP.34/Add.1, para. 44). The UNCITRAL Model Law on Electronic Commerce seeks to enable commercial transactions to be conducted electronically, by removing these legal obstacles and so providing certainty in the use of electronic communications.

(7) The approach of the UNCITRAL Model Law on Electronic Commerce is to provide a general principle of functional equivalence in communications,

^a For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>).

such that electronic communications are afforded the same degree of recognition as traditional paper-based documents. The functions of documents, including communications, are more fully described in paragraph 16 of the Guide to Enactment accompanying that Model Law, which notes that they should, *inter alia*, fulfil the following functions: “to ... be legible by all; to provide that a document would remain unaltered over time; to allow for the reproduction of a document so that each party would hold a copy of the same data; to allow for the authentication of data by means of a signature; and to provide that a document would be in a form acceptable to public authorities and courts.”

(8) Articles 5, 6 and 8 of the UNCITRAL Model Law on Electronic Commerce in material part provide for the functional equivalence of paper-based and electronic communications, addressing the “legal recognition of data messages [electronic communications]”, and the notions of “writing”, and “original”. The combined effect of these provisions, which should be read together, is that electronic communications have the same degree or legal recognition and validity as paper-based ones—that is, the two types of communications are functionally equivalent.

(9) The UNCITRAL Model Law on Electronic Commerce addresses these issues as follows:

(a) Article 5: “[I]nformation shall not be denied legal effect, validity or enforceability solely on the grounds that it is in the form of a data message”. The commentary to that article in the Guide to Enactment of the Model Law on Electronic Commerce notes that “article 5 merely indicates that the form in which certain information is presented or retained cannot be used as the only reason for which that information would be denied legal effectiveness, validity or enforceability. However, article 5 should not be misinterpreted as establishing the legal validity of any given data message or of any information contained therein”;

(b) Article 6: “[w]here the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference.” The commentary notes that “article 6 is intended to define the basic standard to be met by a data message in order to be considered as meeting a requirement ... that information be retained or presented “in writing” (or that the information be contained in a “document” or other paper-based instrument)”;

(c) Article 8: “[w]here the law requires information to be presented or retained in its original form, that requirement is met by a data message if: (a) there exists a reliable assurance as to the integrity of the information from the time when it was first generated in its final form, as a data message or otherwise; and (b) where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.” The commentary explains that although the adjective “original” normally refers to documents of title and negotiable instruments, the provision may be needed in some jurisdictions in certain additional transactions.

(10) [The specific considerations arising when documents are signed electronically, and those arising in the conclusion of contracts by electronic

means are addressed in the commentary to article 36 (“Acceptance of tender and entry into force of procurement contract”) below.] [As regards the electronic signature of documents, article 7 of the UNCITRAL Model Law on Electronic Commerce, provides as follows: “[w]here the law requires a signature of a person, that requirement is met by a data message if (a) a method is used to identify that person and to indicate that person’s approval of the information contained in the data message; and (b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement ...”.]

(11) Enacting States may also wish to issue regulations covering such matters as technical disruptions, disclaimers of liability and practical issues such as time zones, issue of receipts, etc.

(iii) Approach to enabling the use of electronic communications in the revised Model Law

(12) This revised Model Procurement Law addresses the use of electronic communications in the procurement process adopting the functional equivalent approach from the UNCITRAL Model Law on Electronic Commerce, but, as noted above, will not make provision for matters addressed in the general law of electronic commerce unless the procurement context requires additional provisions. Consequently, the Model Procurement Law does not address the following topics: the general legal recognition of electronic communications, what is meant by “writing”, what is an “original” document, electronic or digital signatures, the general admissibility and evidential weight of electronic communications, the formation, validity and operation of contracts, the attribution of electronic communications, and acknowledgements of receipt of electronic communications other than tenders.

(13) The provisions presented in this revised Model Procurement Law set out that any requirement for writing, for a record or to a meeting in the Model Law itself can be met by using electronic communications. (In the context of a meeting, using electronic communications means that the participants can follow and participate in the proceedings by electronic means of communication.) It does not provide that such communications are of themselves legally valid, a matter that will be provided for in an enacting State’s general electronic commerce legislation. However, the procurement context requires specific provision in areas such as regarding the submission of tenders under the provisions of articles 27 (h), (q), (r), and (z), 30, 31 (2) and 33 of the current Model Law. In such cases, the reasons for the need and objectives of the provisions are set out in the relevant section of this Guide (A/CN.9/WG.I/WP.34, para. 13, A/CN.9/575, para. 11).

(14) The revised Model Law also, where possible, encourages (but does not require) the use of electronic communications and technologies in public procurement (A/CN.9/575, para. 10, A/CN.9/568, para. 33), save in the case of [cross reference to electronic procurement, such as ERA and dynamic purchasing systems].

(15) The use of electronic communications raises issues of authenticity, confidentiality and integrity of communications, documents and data, as noted above. Enacting States [will also] [may] wish to consider the extent to which their domestic electronic commerce law provides adequate controls over communications that could be generated in the procurement context. This topic is further addressed in the sections of this Guide addressing the form of communications (under article 9 of the 1994 Model Law) and the submission of tenders by electronic means (under article 30 of the 1994 Model Law).

(16) The principle of flexibility in method of communicating, based on functional equivalence, applies not only to general communications in procurement, but equally to the publication of opportunities and procurement-related information, the exchanging of information concerning procurement, the submission and opening of tenders, holding pre-tender conferences, the maintenance, storage and dissemination of information and documents (including the record of the procurement proceedings required under article 11 of the Model Procurement Law), and the conclusion of contracts. Accordingly, proposed article 4 bis [or proposed article 5 bis] are drafted in broad fashion, so as to cover all aspects of the generation, transfer and storage of information in communications and documents, and the controls and accessibility standards described in the preceding paragraphs should apply equally to these broader notions.

III. Proposed draft text for the revised Model Procurement Law to accommodate the use of electronic communications during the procurement process

A. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

1. General remarks

24. The Working Group has addressed drafting the new provisions to provide for the use of electronic communications from two angles. First, the Working Group has decided to include a new provision setting out the principle of functional equivalence of methods of communication as described above (including the notions of certainty in the use of and legal recognition of electronic communications), and, secondly, it wishes to ensure that the Model Law's overall provisions regarding the form of communications are sufficient to allow for the principle to operate (which may require additional changes to the current text).

2. Proposed new text for the Model Law: new article 4 bis to address functional equivalence

25. The Working Group decided at its seventh session to continue its deliberations taking into account the following alternative drafts of a new article 4 bis of the Model Law, to set out the principle of functional equivalence:

(a) Variant A

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any [provision] [requirement] under this Law for:

- (a) A document to be in writing;
- (b) A document to be signed;
- (c) A document to be in a sealed envelope;
- (d) A document to be published or provided or made accessible;
- (e) A record to be created or maintained;
- (f) Meeting of persons to take place; and
- (g) The opening of tenders

or any other requirement implying physical presence or a paper-based environment may be met by the use of electronic, optical or comparable means [, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the enacting State or procuring entity is satisfied that such use complies with the accessibility standards contained in [article 4 bis or 5 bis].]^b

(b) Variant B

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any provision of this Law related to writing, to a record or to a meeting shall be interpreted to include electronic, optical or comparable means, [including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy] [provided that the enacting State or procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the enacting State or procuring entity is satisfied that such use complies with the accessibility standards contained in article [article 4 bis or 5 bis].]

^b As regards the proposed article 5 bis, see paragraph 30 below.

[with the inclusion of the list found in Variant A in the Guide to Enactment.]
(A/CN.9/568, para. 13).

3. Commentary

26. Each variant includes three notions:

(a) Some description of the methods of communicating, publishing, exchanging or storing information or documents, and holding meetings referred to;

(b) A statement that electronic “means” of so doing will be sufficient, though the word “means” is neither defined nor further refined;

(c) The inclusion of a control over the use of electronic “means”, such that they serve the objectives of the Model Law and, particularly, do not operate as a barrier to access to procurement (these are the notions set out paragraphs (a), (b) and (c) of the proposed article 4 bis or 5 bis, the “accessibility standards” that the Working Group has decided should apply to any means of communication chosen (A/CN.9/575 (paras. 14, 25, 32, 33, 39, 45 and 50)).⁶

27. The difference between the variants arises in the location of the description “all methods of communicating, publishing, exchanging or storing information or documents”. Variant A provides a non-exhaustive list of methods and Variant B presents the description in a generic manner, with examples to be provided in the Guide to Enactment. The Working Group may wish to consider whether the enhanced understanding that may be provided by setting out examples in the text may be outweighed by the risk of confusion should other situations in which information or documents are communicated, published, exchanged or stored arise and as business modalities change.

28. The Working Group may also wish to consider whether the word “methods” in the heading should be changed to “means”, so as to conform to the use of “means” in the text. Secondly, the Working Group may consider that the words “physical presence” should be followed by the words “of a person”. Thirdly, as the word “means” is not itself defined in the text, the words “of communicating, publishing, exchanging or storing information or documents” could be inserted after the word “means” in either variant. Alternatively, a phrase such as “of so doing” (Variant A) or “of such notions” (Variant B) could be inserted after the word “means”, thus making clear that the word “means” refers to the manner of description of the items set out immediately preceding it. Finally, the Working Group may wish to place the obligation to address the accessibility standards on the procuring entity rather than the enacting State in the alternative. In this regard, the Working Group may wish to consider the following further Variant C for the proposed article 4 bis, which is based on Variant A above but could equally be presented in the form of Variant B, *mutatis mutandis*:

Variant C

Article 4 bis. Functional equivalence of all methods of communicating, publishing, exchanging or storing information or documents

(1) Any [provision] [requirement] under this Law for:

(a) A document to be in writing;

- (b) A document to be signed;
- (c) A document to be in a sealed envelope;
- (d) A document to be published or provided or made accessible;
- (e) A record to be created or maintained;
- (f) Meeting of persons to take place; and
- (g) The opening of tenders

or any other requirement implying physical presence or a paper-based environment may be met by the use of electronic, optical or comparable means [of communicating, publishing, exchanging or storing information or documents]. [Such means may include, but are not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy], [provided that procuring entity is satisfied that such use:

- (a) [Does not represent an obstacle to the procurement process] [uses means of communication generally available];
- (b) Promotes economy and efficiency in the procurement process; and
- (c) Will not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition] [provided that the procuring entity is satisfied that such use complies with the accessibility standards contained in [article 4 bis or 5 bis].]^c

29. Proposed guidance on this issue to be provided in Guide to Enactment is addressed in the draft general guidance set out following paragraph 23 above.

B. Accessibility standards

1. Proposed new text for the Model Law: new article 5 bis, to address accessibility standards

30. As to the “accessibility standards” described in the proposed draft article 4 bis above,⁷ the Working Group decided at its seventh session that the standards were a critical part of the introduction of provisions enabling flexibility in the form of communications to be chosen, and that the location of the description of those standards should be considered in the light of all the revisions addressing this issue (A/CN.9/575, para. 14). The Working Group may wish to consider, therefore, whether the standards should be located in the proposed article 4 bis, the revisions to article 9 (set out in the following section), or perhaps as a new article 5 bis, which could take the following form:

Article 5 bis. Accessibility standards

- (1) The procuring entity shall ensure that its use of any method of communication for publishing, exchanging or storing information or documents or holding a meeting during the procurement process:

^c As regards the proposed article 5 bis, see paragraph 30 below.

(a) [Shall not represent an obstacle to the procurement process] [shall use means of communication generally available];

(b) Should promote economy and efficiency in the procurement process; and

(c) Shall not result in discrimination among or against potential suppliers or contractors or otherwise substantially limit competition.

2. Commentary

31. The Working Group may wish to consider whether the formulation of the accessibility standards as currently drafted may contain some degree of internal inconsistency. A reference to a means of communication that is “generally available” in subparagraph (a) may be regarded as potentially in conflict with subparagraph (c), in that a means of communication may be generally available but nonetheless discriminatory as regards some suppliers or contractors.

3. Proposed new text for the Guide to Enactment regarding article 4 bis or 5 bis of the Model Law, to address accessibility standards

32. The Working Group may wish to consider whether the Guide to Enactment should address the concept of accessibility standards, for example in the following terms:

Article [4][5] bis. Accessibility standards

(1) The new provisions attach conditions to the use of electronic means of communication to safeguard the objectives of the Model Law, so as to prevent the means of communication chosen from operating as a barrier to access (A/CN.9/568, para. 30). The criteria set out in subparagraphs (a), (b) and (c) of the proposed article 4 bis [or 5 bis] are referred to as “accessibility standards” that should apply to any means of communication chosen (A/CN.9/575 (paras. 14, 25, 32, 33, 39, 45 and 50)). Their aim is to ensure that a procuring entity does not discriminate among suppliers or contractors in the manner of communication, as currently provided in article 9 (3) of the 1994 Model Law.

(2) Electronic means of communication typically rely upon a network able to handle and transmit digital signals, which must be open and generally available to any person, such as the Internet, which is (at the time of writing) widely if not universally available. However, given the rapid pace of technological advancement, new technologies may emerge that, for a period of time, may not be sufficiently accessible (whether for technical reasons, reasons of cost or otherwise). The “accessibility standards” therefore require procuring entities to be satisfied when commencing a procurement process that the means of communication chosen must not only be non-discriminatory and accessible to all at that time, but should [fulfil the objectives of the Model Law as set out in its preamble] [not obstruct the procurement process].

Notes

¹ For the text of the Model Law, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* and corrigendum (A/49/17 and Corr.1), annex I (also

published in the *Yearbook of the United Nations Commission on International Trade Law*, vol. XXV:1994 (United Nations publication, Sales No. E.95.V.20), part three, annex I. The Model Law is available in electronic form at the UNCITRAL website (<http://www.uncitral.org/english/texts/procurem/ml-procure.htm>).

- ² Available at <http://www.iccwbo.org/law/econtracting/>.
- ³ The functional equivalent approach is entirely consistent with the provisions of the current text of the UNCITRAL Model Procurement Law as regards the use of communications in the procurement process. Article 9 (1) of the UNCITRAL Model Procurement Law provides that, subject to any requirement of form specified by the procuring entity when first soliciting participation, communications are to be in a form that “provides a record of the content of the communication” and there is no definition of the methods or means of communication.
- ⁴ For the text of the Model Law, see *Official Records of the General Assembly, Fifty-first session, Supplement No. 17 (A/51/17)*, annex I (also published in the *UNCITRAL Yearbook*, vol. XXVII:1996 (United Nations publication, Sales No. E.98.V.7), part three, annex I). The Model Law and its accompanying Guide to Enactment have been published as United Nations publication, Sales No. E.99.V.4, and are available in electronic form at the UNCITRAL website <http://www.uncitral.org/english/texts/electcom/ml-ecomm.htm>.
- ⁵ Chapter II addresses the following issues: “Legal recognition of data messages”, “Incorporation by reference”, “Writing”, “Signature”, “Original”, “Admissibility and evidential weight of data messages”, “Retention of data messages”, and Chapter III the following issues: “Formation and validity of contracts”, “Recognition by parties of data messages”, “Attribution of data messages”, “Acknowledgement of receipt”, and “Time and place of dispatch and receipt of data messages”. The Working Group may be aware that UNCITRAL’s Working Group on Electronic Commerce has made recommendations to the Commission as to draft provisions for a Convention on Electronic Contracting. The Commission approved the text at its thirty-eighth session, held in Vienna from 4 to 15 July 2005. The draft provisions do not differ materially from those in the Model Law on Electronic Commerce and it is anticipated that, if adopted by the Commission, the process of ratification of the Convention and its coming into force will take a considerable period of time. Thus the Working Group may wish to base its deliberations for the time being on the provisions of the Model Law on Electronic Commerce, but to update them if need be, before its work is completed.
- ⁶ The means of communication imposed should not present an unreasonable barrier to participation in the procurement proceedings (a principle that would allow a requirement for paper-based or electronic communications in appropriate circumstances).
- ⁷ Which standards apply equally to the publication and storage of information, further discussed in A/CN.9/WG.I/WP.39.