

## II. THE TWELFTH SESSION (1979)

### A. Report of the United Nations Commission on International Trade Law on the work of its twelfth session (Vienna, 18-29 June 1979) (A/34/17)\*

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#### INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the Commission's twelfth session, held at Vienna from 18 to 29 June 1979.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

\* Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17.

#### CHAPTER I. ORGANIZATION OF THE SESSION

##### A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its twelfth session on 18 June 1979. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.

##### B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII),

the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 December 1973 and 15 December 1976, are the following States:<sup>1</sup> Argentina,\* Australia,\*\* Austria,\*\* Barbados,\* Belgium,\* Brazil,\* Bulgaria,\* Burundi,\*\* Chile,\*\* Colombia,\*\* Cyprus,\* Czechoslovakia,\* Egypt,\*\* Finland,\*\* France,\*\* Gabon,\* German Democratic Republic,\*\* Germany, Federal Republic of,\* Ghana,\*\* Greece,\* Hungary,\* India,\* Indonesia,\*\* Japan,\*\* Kenya,\* Mexico,\* Nigeria,\*\* Philippines,\* Sierra Leone,\* Singapore,\*\* Syrian Arab Republic,\* Union of Soviet Socialist Republics,\*\* United Kingdom of Great Britain and Northern Ireland,\*\* United Republic of Tanzania,\*\* United States of America\* and Zaire.\*

5. With the exception of Barbados, Bulgaria, Burundi, Colombia, Gabon, Sierra Leone, the Syrian Arab Republic, the United Republic of Tanzania and Zaire, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Algeria, Burma, Canada, Cuba, Ecuador, Iraq, Ireland, Italy, Luxembourg, Nicaragua, Oman, Poland, Portugal, Romania, Spain, Thailand, Trinidad and Tobago, Tunisia, Turkey, Uruguay, Venezuela and Yugoslavia.

7. The following specialized agency intergovernmental organizations and international non-governmental organizations were represented by observers:

(a) *Specialized agency*

World Bank (International Centre for the Settlement of Investment Disputes).

(b) *Intergovernmental organizations*

Asian-African Legal Consultative Committee, Bank for International Settlements, Commission of the European

Communities, Council of Europe, Council for Mutual Economic Assistance, European Free Trade Association, Hague Conference on Private International Law and International Institute for the Unification of Private Law.

(c) *International non-governmental organizations*

Baltic and International Maritime Conference, International Bar Association, International Chamber of Commerce and International Law Association.

C. *Election of officers*

8. The Commission elected the following officers by acclamation:<sup>2</sup>

Chairman . . . . . Mr. L. Kopač (Czechoslovakia)

Vice-Chairmen . . Mr. G. Barrera-Graf (Mexico)  
Mr. R. Herber (Federal Republic of Germany)  
Mr. H. Nimpuno (Indonesia)

Rapporteur . . . . . Mr. P. K. Mathanjuki (Kenya)

D. *Agenda*

9. The agenda of the session as adopted by the Commission at its 210th meeting, on 18 June 1979, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda; tentative schedule of meetings
4. International trade contracts
5. International payments
6. International arbitration
7. New international economic order
8. Transport law
9. Training and assistance in the field of international trade law
10. Ratification of the 1978 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules)
11. Future work
12. Other business
13. Date and place of the thirteenth session
14. Adoption of the report of the Commission.

E. *Decisions of the Commission*

10. The decisions taken by the Commission in the course of its twelfth session were all reached by consensus.

F. *Adoption of the report*

11. The Commission adopted the present report at its 226th meeting, on 29 June 1979.

<sup>2</sup> The election took place at the 210th and 211th meetings, on 18 June, and at the 212th meeting, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.210 to 212. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that, together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14 (Yearbook . . . 1968-1970, part two, I, para. 14)).

\* Term of office expires on the day before the opening of the regular annual session of the Commission in 1980.

\*\* Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years, except that, in connexion with the initial election, the terms of 14 members, selected by the President of the Assembly by drawing lots, expired at the end of three years (31 December 1970); the terms of the 15 other members expired at the end of six years (31 December 1973). Accordingly, the General Assembly, at its twenty-fifth session, elected 14 members to serve for a full term of six years, ending on 31 December 1976, and, at its twenty-eighth session, elected 15 members to serve for a full term of six years, ending on 31 December 1979. The General Assembly, at its twenty-eighth session, also selected seven additional members. Of these additional members, the term of three members, selected by the President of the Assembly by drawing lots, would expire at the end of three years (31 December 1976) and the term of four members would expire at the end of six years (31 December 1979). To fill the vacancies on the Commission which would occur on 31 December 1976, the General Assembly, at its thirty-first session, on 15 December 1976, elected (or re-elected) 17 members to the Commission. Pursuant to resolution 31/99 of 15 December 1976, the new members took office on the first day of the regular annual session of the Commission immediately following their election (23 May 1977) and their term will expire on the last day prior to the opening of the seventh regular annual session of the Commission following their election (in 1983). In addition, the term of office of those members whose term would expire on 31 December 1979 was by the same resolution extended till the last day prior to the beginning of the regular annual session of the Commission in 1980.

CHAPTER II. INTERNATIONAL TRADE CONTRACTS<sup>3</sup>

## A. Introduction

12. The Commission, at its eleventh session, decided to commence a study of international contract practices with special reference to "hardship" clauses, *force majeure* clauses, liquidated damages and penalty clauses, and clauses protecting parties against the effects of fluctuations in the value of currency.<sup>4</sup> The Commission requested the Secretariat to undertake preliminary studies in respect of those and other clauses used in international trade contracts.

13. At the present session, the Commission had before it a note by the Secretary-General containing information on the establishment of a collection of international trade contracts, general conditions and various clauses (A/CN.9/160).\*

14. In the course of the general discussion, the view was expressed that model clauses would not necessarily reflect consistent commercial practice and that their interpretation would probably vary according to the law applicable to the contract of which a clause forms part and according to the context in which a clause was placed. However, there was general agreement that the Secretariat should proceed with its study of contemporary international contract practices. Such a study might reveal whether generally acceptable clauses could indeed be identified or whether guidelines should be prepared and issued on the matters which might be covered in different types of contract.

15. It was also noted that although the collection of clauses in international contracts on various commodities was an extensive one it did not yet reflect the commercial practices of all regions. Accordingly, the Commission requested its Secretariat to make every effort to render that collection more representative and, to this end, appealed to its members to facilitate the work of the Secretariat by transmitting to it copies of such clauses.

16. The Commission considered separately and in turn the report of the Secretary-General on international barter or exchange, liquidated damages and penalty clauses, and clauses protecting parties against the effects of currency fluctuations.

B. Barter or exchange<sup>5</sup>

## Introduction

17. The Commission, at its eleventh session, retained the subject of barter or exchange in international trade in its programme of work and requested a further

study of the subject by the Secretariat.<sup>6</sup> At the present session, the Commission had before it a report of the Secretary-General entitled "Barter or exchange in international trade" (A/CN.9/159).\*

18. The report states that inquiries have indicated that the conclusion of a true barter contract, in which the parties exchange goods for goods, remains a rare event in international trade. The report suggests, therefore, that the Commission may wish to conclude that it would not be useful to undertake the unification of the law relating to barter in the strict legal sense of the term.

19. In respect of barter-like transactions in which the parties exchange goods, services or other items of economic value with the intention that no more than a minimum amount of money ultimately be transferred from one party to the other, the report notes that such transactions as used in international trade tend to be complex and involve several separate agreements. The report further notes that such several separate agreements are, for the most part, ordinary contracts of licence of industrial property, sale of goods, services or construction of plant with the usual terms found in such contracts.

20. The report suggests, however, that there are at least two sets of provisions which differ from those to be found in the ordinary contract in order to effectuate the barter-like nature of the transaction: payment terms and the remedies for non-performance. The report suggests that, in the context of its future work on international contract practices, the Commission may wish to consider whether standard clauses should be prepared dealing with those two subjects.

## Discussion at the session

21. During the discussion of the report, there was general agreement that, although the incidence of true barter contracts wherein goods are exchanged for goods was relatively infrequent, barter-like transactions (often called compensation contracts) were a significant factor in international trade. It was also agreed that their use created various kinds of legal problems which the Commission might consider.

22. Although there was some support for the preparation of either a convention or a model law to unify the law in respect of barter-like transactions, the view was widely held that such transactions took too many different forms to admit of regulation by means of uniform rules. On the other hand it was agreed that, within the context of its work on contract practices, the Commission might attempt to prepare model clauses for use by parties in such transactions.

23. The Commission, after deliberation, decided to request its Secretariat to include, in the studies being conducted in respect of contract practices, consideration of clauses of particular importance in barter-like transactions. The Commission also requested the Secretariat to approach other organizations within the United Na-

\* Reproduced in this volume, part two, I, B.

<sup>3</sup> The Commission considered this subject at its 211th meeting, on 18 June 1979, and at its 212th and 213th meetings, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.211 to 213.

<sup>4</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 47, 67 (c) (i) b (Yearbook... 1978, part one, II, A).

<sup>5</sup> The Commission considered this subject at its 211th meeting, on 18 June 1979; a summary record of this meeting is contained in A/CN.9/SR.211.

\* Reproduced in this volume, part two, I, A.

<sup>6</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 67-69.

tions, such as the Economic Commission for Europe, which are engaged in studies on such transactions, and to report to it on the work being undertaken by these organizations.

### C. *International contract practices*

#### 1. *Liquidated damages and penalty clauses*<sup>7</sup>

##### *Introduction*

24. At its tenth session, the Commission requested the Secretary-General to consider, as part of the study on the future long-term programme of work of the Commission to be presented to its eleventh session, the feasibility and desirability of establishing a uniform régime governing liquidated damages clauses in international contracts.<sup>8</sup> In response to that request, the study on the long-term programme of work presented to the eleventh session included a note by the Secretary-General (A/CN.9/149/Add.1)\* examining the desirability and feasibility of unifying the rules on liquidated damages and penalty clauses in relation to a wide range of international commercial contracts. At its eleventh session, after considering this note, the Commission included liquidated damages and penalty clauses as a priority topic in its new programme of work<sup>9</sup> and requested the secretariat to undertake a preliminary study of the subject. At the present session the Commission had before it a report of the Secretary-General entitled "Liquidated damages and penalty clauses" (A/CN.9/161).\*\*

25. The report first describes the purposes sought to be achieved by liquidated damages and penalty clauses, and then attempts to distinguish such clauses from other clauses which may sometimes serve the same purposes. Thereafter, the report focuses on two main issues: first, the treatment of liquidated damages and penalty clauses under different legal systems and, secondly, the use of such clauses in international trade contracts and general conditions. On the first issue, the report describes both common features and differences in the regulation by different legal systems of liquidated damages and penalty clauses. In particular, the report analyzes the different approaches of the civil law and the common law to such clauses, and the circumstances under which such clauses may be declared invalid under different legal systems. On the second issue, the report examines the way in which liquidated damages and penalty clauses are used in sample international trade contracts and general conditions. It also examines the use of such clauses in the CMEA General Conditions of Delivery, 1968-1975.

26. In conclusion, the report considers the difficulties that stand in the way of formulating uniform rules

regulating the different aspects of liquidated damages and penalty clauses, including their validity, and the circumstances in which valid clauses may be useful to contracting parties.

##### *Discussion at the session*

27. During the discussion of the report, there was wide agreement on the utility of continuing work in this field. The Commission noted that liquidated damages and penalty clauses served useful purposes, and were therefore widely used in international trade contracts. However, there was often uncertainty as to their validity or effect owing to different treatment of such clauses by the various legal systems, combined with the fact that there was often doubt as to what would be the applicable law. Uniform rules which would eliminate or reduce these uncertainties would therefore be useful.

28. The view was expressed that future work should be restricted to liquidated damages clauses whose purpose was to pre-estimate the compensation payable on breach of contract. Punitive clauses should be excluded, as they were undesirable and should be discouraged. The prevailing view, however, was that the work should include both types of clauses. In support of the latter view, it was noted that most legal systems empowered the judge to mitigate harsh punitive clauses, and that there was no great difference in over-all result between clauses pre-estimating compensation payable and punitive clauses which had been mitigated.

29. As to the possible scope of uniform rules which might be formulated regulating these clauses, the suggestion was made that they might be restricted to apply to contracts for the international sale of goods, as these clauses appeared to be inserted most often in such contracts. There was, however, general agreement that it would be more useful to attempt to formulate uniform rules applicable to a wide range of international trade contracts. It was also observed that any uniform rules formulated must contain safeguards protecting contracting parties in a weaker bargaining position from the imposition of unfair clauses.

30. As to the desirable method of unification to be adopted, support was expressed for three different approaches: the formulation of model clauses, the drafting of a model law, and the drafting of a convention. It was observed that the formulation of model clauses would not result in unification, as the model clauses would be modified by different applicable laws of a mandatory character. It was generally agreed that it was unnecessary at the present stage to decide whether the uniform rules should take the form of a model law or a convention, it being recognized that each of these forms had its advantages and disadvantages. Further work should be entrusted to a working group which would report back to the Commission.

##### *Decision of the Commission*

31. At its 212th meeting, on 19 June 1979, the Commission adopted the following decision:

\* Yearbook . . . 1978, part two, IV, A, annex I.

\*\* Reproduced in this volume, part two, I, C.

<sup>7</sup> The Commission considered this subject at its 211th meeting, on 18 June 1979, and at its 212th meeting, on 19 June 1979; summary records of these meetings are contained in A/CN.9/SR.211 and 212.

<sup>8</sup> Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 18, and annex I, para. 513 (Yearbook . . . 1977, part one, II, A).

<sup>9</sup> Ibid., Thirty-third Session, Supplement No. 17 (A/33/17), para. 67 (c) (i) b (Yearbook . . . 1978, part one, II, A).

*The United Nations Commission on International Trade Law*

1. *Decides* that work should be undertaken directed to the formulation of uniform rules regulating liquidated damages and penalty clauses;
  2. *Further decides* that the work be entrusted to the Working Group on International Contract Practices;
  3. *Requests* the Working Group to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.
2. *Clauses protecting parties against the effects of currency fluctuations*<sup>10</sup>

*Introduction*

32. The Commission, at its eleventh session, decided that, as part of the general study of international contract practices, special consideration should be given to clauses in international trade contracts by which parties seek to protect themselves against the effects of currency fluctuations.<sup>11</sup>

33. At the present session the Commission had before it a report of the Secretary-General entitled "Clauses protecting parties against the effects of currency fluctuations" (A/CN.9/164).\*

34. The report describes the commercial reasons for clauses designed to protect creditors against changes of the value of a currency in relation to other currencies or by which creditors seek to maintain the purchasing value of the monetary obligation under such contracts. The report analyses two broad categories of clauses used in international trade contracts, according to the kind of monetary risk: pure monetary clauses and purchasing value maintenance clauses.

35. Under the first category are examined compensatory interest rate clauses, stipulation of exchange rate clauses, clauses that denominate the debt in the currency of either the creditor or the debtor or in a currency other than that of the creditor or the debtor, optional currency clauses, combination of currencies devices, reference-to-gold clauses, and the composite unit of account or "basket of currencies" method. Under the second category are examined index clauses, quantity adjustment clauses and hardship clauses.

36. The report considers the legal and policy framework in which such clauses operate in a selected number of countries. It suggests that the Commission may wish to request the Secretariat to carry out further studies and to refer the item to the Working Group on International Negotiable Instruments.

*Discussion at the session*

37. There was wide agreement that the development of clauses of the type described in the report would bene-

\* Reproduced in this volume, part two, I, D.

<sup>10</sup> The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

<sup>11</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), para. 67 (c) (i) b.*

fit international trade. The subject was of great current interest in view of the floating of major trade currencies. Monetary obligations, particularly under long-term contracts, were subject to changes in value and there was thus a need for value-protection devices. In this connexion, the view was expressed that it was the task of the Commission to prepare model clauses that provided a check on the possible abuses of such clauses by economically strong creditors to the detriment of economically weak debtors.

38. Some doubts were expressed as to the effectiveness of value maintenance clauses as a safeguard against currency fluctuations. It was therefore suggested that, before taking a decision on whether to refer the matter to a Working Group, the Secretariat should undertake further studies.

39. The view was also expressed that it was doubtful whether it was possible for the Commission to regulate, on a world-wide basis, the content of clauses that sought to eliminate most or all of the risks involved in long-term contracts. There was an obvious connexion with monetary policy which, in many States, was a matter of public policy. Hence, it was important that further studies should be made and that, as suggested by the Secretariat, a questionnaire should be circulated to Governments and banking and trade circles. It might well be that in the long term the only possibility would be for the Commission to prepare a document explaining to what extent particular types of clauses were enforceable in the legal systems of different countries.

*Decision of the Commission*

40. At its 213th meeting, on 19 June 1979, the Commission, after deliberation, adopted the following decision:

*The United Nations Commission on International Trade Law*

*Requests* the Secretariat to carry out further studies in respect of clauses protecting parties against the effects of currency fluctuations, in consultation with the Study Group on International Payments, including the circulation of a questionnaire to Governments and interested international organizations and trade and banking circles, and, after consultation with the Working Group on International Negotiable Instruments, with specific reference to the desirability and feasibility of work by the Commission on this topic, to submit a report on its findings to the Commission with appropriate recommendations.

CHAPTER III. INTERNATIONAL PAYMENTS

A. *Draft Convention on International Bills of Exchange and International Promissory Notes*<sup>12</sup>

41. The Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its seventh session, held in New

<sup>12</sup> The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

York from 3 to 12 January 1979 (A/CN.9/157).<sup>\*</sup> The report sets forth the progress so far made by the Working Group in its work on the preparation of a draft convention on international bills of exchange and international promissory notes. The proposed convention would establish uniform rules applicable to an international negotiable instrument (bill of exchange or promissory note) for optional use in international payments.

42. As indicated in its report, the Working Group at its seventh session continued its consideration of the revised text of the draft convention on international bills of exchange and international promissory notes, prepared by the Secretariat on the basis of the deliberations and decisions of the Working Group at its six previous sessions relative to the draft uniform law first prepared by the Secretary-General in response to a decision of the Commission<sup>13</sup> and referred by the Commission to the Working Group.<sup>14</sup> The report indicates that the Working Group at this session completed consideration of articles 54 to 68, and 70.

43. The report sets forth the deliberations and conclusions of the Working Group with respect to the provisions of the draft uniform law regarding presentment for payment, recourse and payment. The report also notes that the Working Group is nearing completion of its work on the draft convention, but that at least one more session is required in order to accomplish this. The Secretariat informed the Commission that it would be possible to hold such a meeting within the budgetary appropriations for the year 1979.

#### *Decision of the Commission*

44. At its 213th meeting, on 19 June 1979, the Commission adopted the following decision:

#### *The United Nations Commission on International Trade Law*

1. *Takes note with appreciation* of the report of the Working Group on International Negotiable Instruments on the work of its seventh session;

2. *Requests* the Working Group to continue its work under the terms of reference set forth by the Commission in the decision adopted in respect of negotiable instruments at its fifth session, and to complete that work expeditiously;

3. *Agrees* with the request of the Working Group that it should hold a further session in the course of 1979;

4. *Recalls* its request addressed to the Working Group at the fifth session of the Commission that it consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft convention to international

cheques or by drawing up separate draft rules on international cheques;

5. *Authorizes* the Working Group, if it is of the view that the formulation of uniform rules for international cheques is desirable because of the use of the cheque for settling international payments and that the application of the draft convention can be extended to include international cheques, to proceed accordingly;

6. *Requests* the Secretary-General to carry out, in accordance with the directives of the Working Group on International Negotiable Instruments, further work in connexion with the draft uniform law on international bills of exchange and with the inquiries regarding the use of cheques for settling international payments, in consultation with the Commission's Study Group on International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

#### *B. Stand-by letters of credit<sup>15</sup>*

45. At its eleventh session, the Commission included, as a priority topic in its new programme of work, the item entitled "Stand-by letters of credit" and requested the Secretariat to study this topic in conjunction with the International Chamber of Commerce (ICC). The Commission further requested the Secretariat to undertake a preliminary study of the topic.<sup>16</sup> At the current session the Commission had before it a report of the Secretary-General entitled "Stand-by letters of credit" (A/CN.9/163).<sup>\*</sup>

46. The report notes that the parties to a contract (referred to in this connexion as "the underlying contract") may agree that, in the event of non-performance or defective performance by the obligor (referred to in this connexion as "the account party"), a specified sum was to be payable to the obligee (referred to in this connexion as "the beneficiary") under a letter of credit (the "stand-by letter of credit") to be opened by a bank in favour of the beneficiary at the instance of the account party. Difficulties sometimes arose when, under the terms of the stand-by letter of credit, the non-performance or defective performance by the account party was proved solely by the certification by the beneficiary to the bank of such default. Such certification was sometimes challenged by the account party as being fraudulent. The report considers methods of reducing claims which are fraudulent or not made in good faith.

47. The report considers the existing protection given to an account party against fraudulent claims, and other possible means of protection against fraud, including certification of default by a third party, determination of default by the bank, or compulsory arbitration between the parties as to the validity of the claim of the

<sup>\*</sup>Reproduced in this volume, part two, II, A.

<sup>13</sup> *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, para. 35 (Yearbook ... 1971, part one, II, A).

<sup>14</sup> *Ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 61 (Yearbook ... 1972, part one, II, A).

<sup>\*</sup>Reproduced in this volume, part two, II, B.

<sup>15</sup> The Commission considered this subject at its 213th meeting, on 19 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

<sup>16</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 67 (c) (ii) a, and (d).

account party. The report also notes that, in view of the frequent use of stand-by letters of credit in international trade transactions, work directed to eliminating the abuse noted above would be useful. The report states that a joint Working Party of ICC and the secretariat of the Commission has been constituted to carry forward the work, and recommends that ICC be encouraged to continue this work in collaboration with the Secretariat, subject to a review of the results by the Commission.

#### *Discussion at the session*

48. It was observed that the suggestions contained in the report as to possible means of protecting the account party against fraud needed further examination. The Commission noted that the work of ICC in respect of documentary letters of credit and contract guarantees had a direct bearing on work in respect of stand-by letters of credit. For this reason, there was general agreement that ICC should be encouraged to continue its work on stand-by letters of credit in co-operation with the Commission's Secretariat and should be requested to consider the possible means of protection against fraud that had already been developed by the UNCITRAL Study Group on International Payments. The Secretariat was requested to report on the progress of work to the Commission. The Commission also requested ICC to submit to it the results of its work before final adoption by its competent organs.

#### *C. Security interests in goods<sup>17</sup>*

##### *Introduction*

49. At its tenth session, the Commission had before it three reports<sup>18</sup> submitted by the Secretary-General in compliance with a request made by the Commission at its eighth session.<sup>19</sup> After considering these reports the Commission requested the Secretary-General to submit to it at its twelfth session a further report on the feasibility of uniform rules on security interests and on their possible content.<sup>20</sup>

50. At the present session the Commission had before it a report of the Secretary-General entitled "Security interests: feasibility of uniform rules to be used in the financing of trade". The report examines the role of security interests in a credit system, whether that role is fulfilled under the rules obtaining in national legal systems, and whether action by the Commission could be useful to improve the situation. The report advances two arguments in favour of action by the Commission: (a) there is a demonstrable need for modernization of the law of security interests in most parts of the world, and countries which might wish to make their laws more receptive to present-day requirements might welcome

the aid which the Commission could give by furnishing them with a model text; and (b) as long as the law of security interests differs significantly in different countries, the legal problems which arise when goods subject to a non-possessory security interest are moved from one State to another are difficult to solve satisfactorily.

51. The report suggests that, in the present state of development of the law, it would not be feasible to try to achieve unification by means of a uniform law in the form of a convention but that, instead, a model law could be formulated with suggested alternatives for provisions which present particular difficulties.

#### *Discussion at the session*

52. The discussion in the Commission revealed two currents of opinion. According to one view, the subject of security interests was strongly rooted in particular legal concepts of the various legal systems and could not satisfactorily be dealt with unless other branches of law, in particular that of bankruptcy, were unified. Moreover, the law of security interests was strongly affected by public policy determinations and required a system of registration or publicity which it would be difficult to establish on a world-wide basis. Hence, the preparation of uniform rules would be an arduous task and, in view of the greater importance of other items on the Commission's work programme, should be given a low priority or deleted from the programme of work altogether. Proponents of this view suggested that a better approach might be the preparation of conflict rules and that the attention of the Hague Conference on Private International Law should be drawn to the desirability of undertaking the unification of the rules of conflict of laws in this matter.

53. According to another view, the very fact of the important differences in the law of security interests in different legal systems was a cogent reason for undertaking the unification or harmonization of the substantive law. Those differences interfered with the financing of international trade. Moreover, it was pointed out that in many countries the law in respect of security interests was not adequate for the purposes of commercial credit. It was agreed by those who held this view that unification of the law by means of a convention would not be feasible. However, it was suggested that the preparation of a model law could be useful for those legal systems which wished to modernize their law of security interests and, over a period of time, it could be expected that the existence of a model law might have the effect of reducing the differences in the law which currently exist. Moreover, one representative proposed the consideration of whether such a model law should provide for a specific type of security interest to be introduced into all national legislations in addition to the existing security interests under domestic legal systems.

#### *Decision of the Commission*

54. At its 225th meeting, on 27 June 1979, the Commission decided to request the Secretariat to prepare a report setting out the issues to be considered in the preparation of uniform rules on security interests

<sup>17</sup> The Commission considered this subject at its 213th meeting, on 20 June 1979; a summary record of this meeting is contained in A/CN.9/SR.213.

<sup>18</sup> A/CN.9/130, A/CN.9/131 and A/CN.9/132. For documents A/CN.9/131 and A/CN.9/132, see Yearbook... 1977, part two, II, A and B.

<sup>19</sup> Official Records of the General Assembly, Thirtieth Session, Supplement No. 17 (A/10017), para. 63 (Yearbook... 1975, part one, II, A).

<sup>20</sup> Ibid., Thirty-second Session, Supplement No. 17 (A/32/17), para. 37 (Yearbook... 1977, part one, II, A).



and to propose the manner in which those issues might be decided.

#### D. *Other matters*

55. The Commission took note of a statement by its Secretary on the work at present being carried out within the UNCITRAL Study Group on International Payments, a consultative body composed of representatives of banking and trade institutions. The Study Group, at its meetings in September 1978 and April 1979, had continued its consideration of legal problems of electronic funds transfer (a topic included in the work programme of the Commission with a low priority) and had commenced work on the determination of a universal unit of account for international conventions (included in the Commission's programme of work at the suggestion of France).

56. The Commission, recognizing the complex technical aspects of these topics, requested the Secretariat to continue the preparatory work within the framework of the Study Group and to present progress reports to it at a future session.

### CHAPTER IV. INTERNATIONAL COMMERCIAL ARBITRATION AND CONCILIATION

#### A. *UNCITRAL Arbitration Rules*

##### *Introduction*

57. The Commission had before it a note by the Secretariat setting forth certain "Issues relevant in the context of the UNCITRAL Arbitration Rules" (A/CN.9/170).<sup>\*</sup> The issues brought to the attention of the Commission relate to the use of the Rules in administered arbitration and to the designation of an appointing authority.

58. The first issue concerns the fact that existing arbitral institutions have approached the UNCITRAL Arbitration Rules in the context of administered arbitration in different ways and that regional arbitration centres are, or soon will be, established for which this question of approach is of particular importance. The note sets forth certain suggestions for consideration by the Commission.

59. The second issue relates to the fact that the assistance of an appointing authority may be an essential element in the arbitral process under the UNCITRAL Arbitration Rules. In order to further the availability of such assistance, the Commission was invited to consider the desirability of issuing a list of arbitral institutions that have declared their willingness, if so requested, to serve as appointing authorities under the UNCITRAL Arbitration Rules.

##### *Discussion on the use of the UNCITRAL Arbitration Rules in administered arbitration*<sup>21</sup>

60. The Commission considered certain questions relating to the use of the UNCITRAL Arbitration Rules

in administered arbitration brought to its attention by the above-mentioned note by the Secretariat (A/CN.9/170). It was noted with satisfaction that the UNCITRAL Arbitration Rules had proved to be successful in that they were widely applied in practice. It was also noted that various arbitral institutions had declared their willingness to serve as administrative bodies in connexion with these Rules, or had adopted them as their own.

61. It was recalled in that context that the Rules, when first submitted in preliminary draft form, had provided for "administered" and "non-administered" arbitration but that the prevailing view in the Commission at its eighth session had been "to exclude, for the time being, administered arbitration from the scope of the Rules" (see A/CN.9/170, paras. 2 and 3). Consequently, the final version of the Rules had been drafted and adopted for *ad hoc* arbitration, but the Rules were sufficiently flexible to permit parties or arbitrators to arrange for administrative assistance in order to facilitate the conduct of cases. It was reported that such arrangements had been made in various contexts.

62. The basic question considered by the Commission at its present session was whether it should take any steps to facilitate the use of the Rules in administered arbitration and seek to prevent disparity in their use by various existing or future arbitral institutions. There was considerable support for the proposal that, if a list of arbitral institutions were prepared (see discussion in paras. 67 to 69 below), it should also indicate whether the institution in question had declared its willingness to provide administrative services for arbitral proceedings under the UNCITRAL Arbitration Rules. The question of the preparation of administrative model rules or guidelines on administrative services was also discussed, in particular such model rules or guidelines which might be of assistance to new arbitral centres. It was suggested that such preparation might be done in collaboration with existing arbitration institutions and interested bodies.

63. According to one view, the promulgation of such rules or guidelines would be inadvisable on the following grounds. There was no real need for administrative rules because the established institutions had their own rules or because the recent use of the UNCITRAL Arbitration Rules by arbitral institutions had apparently not caused any problem. Also, the Rules should remain exclusively designed for *ad hoc* arbitration. Furthermore, the preparation of rules or guidelines on administrative services would face insurmountable problems in view of the different local conditions and organizational structures of the various institutions, and such an undertaking would probably fall outside the competence and mandate of the Commission.

64. According to another view, the Commission should facilitate the use of the Rules in administered arbitration. Under one proposal, the model arbitration clause could be modified so as to provide parties with the option of entrusting the appointing authority with administrative functions. Such an approach would not, in substance, modify the Rules. Such rules or guidelines would not be detailed procedural rules. They would not

<sup>\*</sup> Reproduced in this volume, part two, III, E.

<sup>21</sup> The Commission considered this subject at its 218th and 219th meetings, on 22 June 1979; summary records of these meetings are contained in A/CN.9/SR.218 and 219.



be binding on parties or institutions, but would provide a check list of the various administrative services, largely of a secretariat nature, which the parties or the arbitrators might wish to request and which institutions would be free to state whether they were willing to perform. The decision taken at the eighth session that the UNCITRAL Arbitration Rules should not deal with administered arbitration should be reconsidered in the light of the recent developments, i.e., the use of the Rules by arbitral institutions in divergent ways.

65. The view was also expressed that it was premature to take any firm decision at the present stage. Further studies should be undertaken by the Secretariat including, but not limited to, inquiries among arbitral institutions and other interested bodies to determine the feasibility of such rules or guidelines, the extent of their acceptability by various arbitral institutions, and, in the light of such studies, to suggest to the Commission any such rules or guidelines as might be appropriate.

66. After extensive discussion, the prevailing view in the Commission was that it was desirable that the UNCITRAL Arbitration Rules be applied without change, even where arbitral institutions administer arbitration under the UNCITRAL Arbitration Rules. Where modification was required to adjust the UNCITRAL Arbitration Rules to administered arbitration, that could be achieved if the parties agreed to have their arbitration conducted under the administrative rules of the arbitral institution. While each arbitral institution was in no way bound to adhere to the UNCITRAL Arbitration Rules, the preparation by the Commission of guidelines or a check list of issues relevant to administrative services would have two results: first, it would assist arbitral institutions to formulate their administrative rules for the administration of arbitration under the UNCITRAL Arbitration Rules; secondly, it would encourage arbitral institutions to utilize the UNCITRAL Arbitration Rules unchanged. In this connexion, it was noted that the arbitration centres which had been recently established by the Asian-African Legal Consultative Committee would welcome an initiative by the Commission in preparing such guidelines for administrative rules.

#### *Discussion on the designation of an appointing authority<sup>22</sup>*

67. The Commission considered the desirability and feasibility of issuing a list of arbitral and other institutions that have declared their willingness to serve if so requested as appointing authorities under the UNCITRAL Arbitration Rules. No agreement was reached on whether or not such a list should be issued.

68. There was support for the view that a carefully prepared list would be of great assistance to parties and that its practical value would outweigh any possible short-comings or undesirable implications. However, concern was expressed about the potential difficulties and negative effects of such an undertaking. Neither the Commission nor the Secretariat was in a position to

judge whether the institutions which applied for inclusion in the list were genuine and qualified. This aspect was particularly crucial in view of the fact that inclusion in a list published by the United Nations might be interpreted as carrying with it a stamp of approval or recommendation.

69. There was, however, general agreement that the Secretariat should be asked to carry out further inquiries and studies in consultation with arbitral organizations concerning the feasibility and possible methods of compiling such a list. The Secretariat should also study the experience gained by other bodies, in particular, with the list of arbitral institutions published by the Economic Commission for Europe in connexion with the 1961 European Convention on International Commercial Arbitration and the Arbitration Rules of that Commission of 1966.

70. There was wide agreement on the continuing need to promote and facilitate the use of the UNCITRAL Arbitration Rules. In this connexion it was suggested that States and arbitral institutions should make every effort to ensure the widest possible publication and distribution of the Rules. It was recalled that, in its resolution 31/98 of 15 December 1976, the General Assembly requested the Secretary-General to arrange for the widest possible distribution of the Rules. It was suggested that this could be facilitated by the Secretary-General contacting arbitral institutions and chambers of commerce in various States and regions, as well as regional commissions, requesting them to make available to interested parties copies of the Rules and information concerning their use. Such activities were reported to have been undertaken in several parts of the world. It was also suggested by some representatives that the Secretary-General might convene periodic meetings of institutions which are willing to perform such functions in order to share experiences and further develop methods for promoting the Rules. Such meetings might be conveniently held in conjunction with meetings of the International Council for Commercial Arbitration.

#### *Decision of the Commission on both issues*

71. The Commission, at its 219th meeting, on 22 June 1979, adopted the following decision:

#### *The United Nations Commission on International Trade Law*

1. Takes note of the note by the Secretariat entitled "Issues relevant in the context of the UNCITRAL Arbitration Rules";<sup>23</sup>

2. Requests the Secretary-General:

(a) To prepare for the next session, if possible in consultation with interested international organizations, guidelines for administering arbitration under the UNCITRAL Arbitration Rules, or a check list of issues which may arise when the UNCITRAL Arbitration Rules are used in administered arbitration;

(b) To consider further, in consultation with interested international organizations, including the

<sup>22</sup> The Commission considered this subject at its 219th meeting, on 22 June 1979; a summary record of this meeting is contained in A/CN.9/SR.219.

<sup>23</sup> A/CN.9/170.

International Council for Commercial Arbitration, the advantages and disadvantages in the preparation of a list of arbitral and other institutions that have declared their willingness to act as appointing authorities under the UNCITRAL Arbitration Rules, and to submit its report to the Commission at a future session;

(c) To consider methods to promote and facilitate use of the UNCITRAL Arbitration Rules.

**B. Recommendations addressed to the Commission by the Asian-African Legal Consultative Committee**

*Introduction*

72. The Commission, at its tenth session, considered certain recommendations of the Asian-African Legal Consultative Committee (AALCC) relating to international commercial arbitration.<sup>24</sup> These recommendations were aimed at ensuring the autonomy of parties to agree on arbitration rules irrespective of any contrary provision of the law applicable to the arbitration, at safeguarding fairness in arbitral proceedings, and at excluding reliance on sovereign immunity in international commercial arbitration.<sup>25</sup> It was suggested by AALCC that these issues could possibly be clarified in a protocol to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

73. In the decision taken at its tenth session, the Commission requested the Secretary-General to consult with AALCC and other interested international organizations and to prepare studies on the matters raised by AALCC.<sup>26</sup> Pursuant to that decision, the Secretariat had consultations with representatives of the secretariat of AALCC, members of the International Council for Commercial Arbitration and of the International Chamber of Commerce at Paris in September 1978, and with representatives of member States of AALCC at that organization's twentieth and twenty-first sessions in 1978 and 1979.

74. The Commission, at its present session, had before it two studies. One was a report of the Secretary-General entitled "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (A/CN.9/168).<sup>\*</sup> This report contains an analytical survey of over a hundred court decisions concerning the application and interpretation of the 1958 New York Convention. It identifies ambiguities, divergencies and problems encountered in the application of the Convention and ascertains the practical value of the Convention for the promotion of international commercial arbitration. The report concludes that the Convention, despite some minor deficiencies, has satisfactorily met the general purpose for which it was adopted and that it

would therefore be inadvisable to amend its provisions or prepare a protocol, at least for the time being.

75. The second was a note by the Secretariat entitled "Further work in respect of international commercial arbitration" (A/CN.9/169),<sup>\*</sup> which discusses the need for greater uniformity of national laws on arbitral procedure and the desirability of establishing standards for modern and fair arbitration procedures. The note suggests that the Commission commences work on a model law on arbitral procedure which could help to overcome most of the problems identified in the above survey and meet the concerns expressed in the recommendations of AALCC.

*Discussion at the session<sup>27</sup>*

76. The Commission considered the issues raised in the recommendations of AALCC in the light of the report on the interpretation and application of the 1958 New York Convention (A/CN.9/168) and the note on further work in respect of international commercial arbitration (A/CN.9/169). The discussion in the Commission focused on the question whether there was a need to modify or amend the 1958 Convention, possibly by way of a protocol, and whether the Commission should attempt to elaborate a model law on arbitral procedure which could, to a large extent, meet the concerns expressed by AALCC.

77. It was generally agreed that there was no need to alter or amend, by way of revision or protocol, the 1958 Convention. In support of that view it was noted that the Convention worked well in practice, despite some minor divergencies in its application and interpretation; it was also stressed that any modification or amendment might have a harmful effect in that it could cause confusion and impede further accessions to or ratification of the Convention. In this connexion, it was suggested that the attention of the General Assembly of the United Nations should be drawn to the need for wider adherence to the Convention and that States which had not yet done so should be invited to accede to, or ratify, the Convention.

78. As to the suggestion that a model law on arbitral procedure be prepared, there was wide agreement in the Commission to request the Secretariat to undertake the necessary preliminary studies and to prepare a preliminary draft of such a law. A model law could assist States in reforming and modernizing their law on arbitration procedure and would thus help to reduce the divergences encountered in the interpretation of the 1958 Convention. A model law would also meet in large measure the concerns expressed by AALCC in its recommendations in that a model law, if accepted by States, would minimize the possible conflicts between national laws and arbitration rules. The view was expressed that in developing a model law, the Commission would be helping to bring about fairness and equality in business relation-

<sup>\*</sup> Reproduced in this volume, part two, III, C.

<sup>24</sup> Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), annex II, paras. 27-37 (Yearbook . . . 1977, part one, II, A, annex II).

<sup>25</sup> The recommendations of AALCC are contained in the annex to document A/CN.9/127 (Yearbook . . . 1977, part two, III).

<sup>26</sup> Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), annex II, para. 39.

<sup>\*</sup> Reproduced in this volume, part two, III, D.

<sup>27</sup> The Commission considered this subject at its 220th meeting, on 25 June 1979; a summary record of this meeting is contained in A/CN.9/SR.220.

ships, and that this was therefore relevant to the Commission's consideration of the legal aspects of a new international economic order.

79. As to the scope of application of such model law, it was generally agreed that it should be restricted to international commercial arbitration in view of the specific features inherent in the settlement of international disputes. This would, however, not prevent States which were willing to do so from adopting the model provisions also for domestic arbitrations.

80. It was further agreed that it would be useful to prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, setting forth the major differences between such provisions as well as possible conflicts between national laws and the UNCITRAL Arbitration Rules. It was suggested that this compilation should also include instances of divergences in the interpretation of the 1958 Convention which were due to certain provisions of national law.

#### *Decision of the Commission*

81. The Commission, at its 220th meeting, on 25 June 1979, adopted the following decision:

#### *The United Nations Commission on International Trade Law*

1. *Takes note* of the report on the interpretation and application of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>28</sup> and the note on further work in respect of international commercial arbitration;<sup>29</sup>

2. *Requests* the Secretary-General:

(a) To prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, including a comparison of such laws with the UNCITRAL Arbitration Rules and the 1958 Convention;

(b) To prepare, in consultation with interested international organizations, in particular the Asian-African Legal Consultative Committee and the International Council for Commercial Arbitration, a preliminary draft of a model law on arbitral procedure, taking into account the conclusions reached by the Commission, and in particular:

- (i) That the scope of application of the draft uniform rules should be restricted to international commercial arbitration;
- (ii) That the draft uniform law should take into account the provisions of the 1958 Convention and of the UNCITRAL Arbitration Rules;

(c) To submit this compilation and the draft to the Commission at a future session;

3. *Draws the attention* of the General Assembly to the desirability of achieving world-wide adherence to the 1958 New York Convention and of inviting

States, which have not yet done so, to ratify, or accede to, that Convention.

#### *C. UNCITRAL Conciliation Rules*

##### *Introduction*

82. Among the priority items included in the Commission's new programme of work adopted at its eleventh session<sup>30</sup> was "Conciliation of international trade disputes and its relation to arbitration and to the UNCITRAL Arbitration Rules".<sup>31</sup> Pursuant to that decision, the Secretariat held consultations with representatives of the International Council for Commercial Arbitration (ICCA) and the International Chamber of Commerce (ICC) in September 1978 and February 1979.

83. At the present session the Commission had before it the text of a preliminary draft of the UNCITRAL Conciliation Rules (A/CN.9/166)\* and a report of the Secretary-General entitled "Conciliation of international trade disputes" (A/CN.9/167).\*\*<sup>32</sup> The report, in chapter I, deals with the nature and characteristics of conciliation as distinguished from other methods of dispute settlement and discusses the purpose and potential advantages of conciliation. Chapter II of the report contains a commentary on the preliminary draft UNCITRAL Conciliation Rules.

##### *Discussion at the session on the desirability and general principles of conciliation rules*<sup>33</sup>

84. The Commission had a full discussion, before considering the draft UNCITRAL Conciliation Rules in detail, on the desirability of elaborating a set of conciliation rules and on the general principles and features of conciliation. The Commission, though divided on the question of whether there was a world-wide need for UNCITRAL Conciliation Rules, reached a consensus that it should have an exchange of views on the draft set of rules in detail in the light of certain principles agreed upon by it.

85. Doubts were expressed about the practical value of conciliation rules: conciliation, if unsuccessful, could lead to additional costs and time to be spent by parties; there was a certain similarity between conciliation proceedings and party negotiations; and parties might well be reluctant to have recourse to conciliation for fear of later risks in adversary proceedings. According to another view, however, there was a growing tendency in many countries to settle disputes by conciliation; conciliation as an amicable settlement method was in many respects a viable alternative to arbitration and court proceedings; conciliation had been found useful in regions

\* Reproduced in this volume, part two, III, A.

\*\* Reproduced in this volume, part two, III, B.

<sup>30</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 69 (Yearbook... 1978, part one, II, A).

<sup>31</sup> *Ibid.*, para. 67 (c) (iv).

<sup>32</sup> Professor Pieter Sanders (Netherlands) who had acted as a consultant to the Secretariat in the drafting of the UNCITRAL Arbitration Rules also acted as a consultant in the preparation of the draft UNCITRAL Conciliation Rules.

<sup>33</sup> The Commission considered this subject at its 221st meeting, on 25 June 1979; a summary record of this meeting is contained in A/CN.9/SR.221.

<sup>28</sup> A/CN.9/168.

<sup>29</sup> A/CN.9/169.

and countries where it was well known and frequently used, and sometimes was a necessary prerequisite to the institution of arbitral or judicial proceedings.

86. While, under one view, conciliation was regarded as closely linked to arbitration and, as it were, its first stage, under another view conciliation should be conceived as a distinct, independent, and basically different method of settlement. There was wide agreement in the Commission that the procedure envisaged in the conciliation rules should be simple, flexible, and expeditious; that the parties should be free to modify the rules and to terminate the proceedings at any time; that the conciliator should play an active role and have wide discretion in the conduct of the proceedings; and that the conciliation rules should contain clear provisions so that arbitrators would not be influenced by what had occurred in the conciliation.

#### *Discussion of the draft UNCITRAL Conciliation Rules<sup>34</sup>*

87. The Commission considered the preliminary draft UNCITRAL Conciliation Rules contained in A/CN.9/166 article by article. It was understood that this discussion was a preliminary exchange of views which should be taken into account by the Secretariat in its further studies and in revising the draft Rules. A summary of this discussion is set forth in annex I to the present report.

#### *Decision of the Commission*

88. After deliberation, the Commission, at its 225th meeting, on 27 June 1979, adopted the following decision:

#### *The United Nations Commission on International Trade Law*

1. Takes note of the preliminary draft UNCITRAL Conciliation Rules<sup>35</sup> and the report of the Secretary-General entitled "Conciliation of international trade disputes";<sup>36</sup>

2. Requests the Secretary-General:

(a) To prepare, in consultation with interested international organizations and arbitral institutions, including the International Council for Commercial Arbitration, a revised draft of the UNCITRAL Conciliation Rules, taking into account the views expressed during the discussions at the present session;

(b) To transmit the revised draft Rules, together with a commentary, to Governments and interested international organizations and institutions for their observations;

(c) To submit to the Commission at the thirteenth session the revised draft Rules and commentary together with the observations received.

<sup>34</sup> The Commission considered the draft UNCITRAL Conciliation Rules at its 222nd and 223rd meetings, on 26 June 1979, and at its 224th and 225th meetings, on 27 June 1979; summary records of these meetings are contained in A/CN.9/SR.222 to 225.

<sup>35</sup> A/CN.9/166.

<sup>36</sup> A/CN.9/167.

## CHAPTER V. NEW INTERNATIONAL ECONOMIC ORDER<sup>37</sup>

### *Introduction*

89. At its eleventh session, the Commission decided to include in its work programme a topic entitled "The legal implications of the new international economic order" and to accord priority to the consideration of this subject. The Commission on that occasion also established a Working Group, but deferred the designation of the States members of that Group until the present session, and requested the Secretary-General to prepare a report setting forth subject-matters that are relevant in the context of the development of a new international economic order and that would be suitable for consideration by the Commission.<sup>38</sup>

90. At the present session, the Commission had before it a report of the Secretary-General entitled "New international economic order: possible work programme of the Commission" (A/CN.9/171).\*

91. The report reflects the views expressed and the proposals submitted at the eleventh session of the Commission, during the discussions in the Sixth Committee of the General Assembly on the Commission's report on the work of its eleventh session, and in the replies of Governments to a note verbale of the Secretary-General, dated 6 October 1978. The report also draws upon the Declaration on the Establishment of a New International Economic Order,<sup>39</sup> the Programme of Action on the Establishment of a New International Economic Order<sup>40</sup> and the Charter of Economic Rights and Duties of States.<sup>41</sup>

92. The report reviews subject-matters of possible relevance to international trade under the following headings: general principles of international economic development, commodities, trade, monetary system, industrialization, transfer of technology, transnational corporations, and permanent sovereignty of States over natural resources. The report then examines certain issues relevant to the work of the Commission: the scope of international trade law and co-ordination and co-operation.

#### *Discussion at the session*

93. The Commission recalled that the Working Group on the New International Economic Order, established at its eleventh session, had been given the mandate to examine the report of the Secretary-General in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission. Therefore, the Commission focused its discussion on the two issues set out in the ~~second part of the Secretary-General's report—scope~~

\* Reproduced in this volume, part two, IV.

<sup>37</sup> The Commission considered this subject at its 214th and 215th meetings, on 20 June 1979; summary records of these meetings are contained in A/CN.9/SR.214 and 215.

<sup>38</sup> Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17), para. 71 (2) (a) (Yearbook . . . 1978, part one, II, A).

<sup>39</sup> General Assembly resolution 3201 (S-VI).

<sup>40</sup> General Assembly resolution 3202 (S-VI).

<sup>41</sup> General Assembly resolution 3281 (XXIX).

of international trade law and co-ordination of work—in order to provide the Working Group with certain guidelines for its work. The general view was that the Working Group should interpret its mandate in a flexible manner and that it was free, for instance, to consider items that were not mentioned in the report of the Secretary-General. One representative reaffirmed the opposition of his Government to work by the Commission pertaining to the new international economic order and the establishment of a special working group. However, he recognized certain changes in world trade and the possible usefulness of studying problems which such changes entailed. Consequently, his Government would be ready to work in or with the Working Group.

94. Some representatives expressed the view that it would be useful if the consideration of subject-matters by the Working Group include the legal basis of the relations between States where such relationships were connected with international trade, and in particular should include the principle of non-discrimination, the principle of most-favoured-nation treatment, and the democratic and equitable basis of such relationships in the context of international trade. On the other hand, some representatives recalled decisions of the Commission from the beginning which, in their view, led to the inescapable conclusion that the Commission would concentrate on private law matters relating to trade practice and not deal with trade policies. These representatives favoured the continuation of this approach which they regarded as the most prudent. The view was expressed that no progress could be made in the Commission on such matters as non-discrimination and most-favoured-nation clauses.

95. There was general agreement on the need for effective co-ordination of work between international organizations and bodies engaged in the unification of international trade law within and outside the United Nations system. Co-ordination of work became especially important in the context of the new international economic order.

96. Various suggestions were made in respect of the ways and means of co-ordination. According to one view, the Secretariat should continue with, and strengthen, its traditional policy of information and consultation. Useful results had been obtained, through periodic contacts at high secretariat level, between the secretariats of UNCITRAL, the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law, the Asian-African Legal Consultative Committee and the International Chamber of Commerce. According to another view, adequate co-ordination at the secretariat level would not always lead to satisfactory results. Notably, the degree of co-ordination of work within the United Nations system left much to be desired. Where such was the case, action by Governments and their representatives in various United Nations bodies would be required to allocate different types of work to the bodies most competent to deal with them, and thereby prevent overlapping of functions.

97. The view was also held that the responsibility for co-ordination rested with the Commission itself and not with its secretariat.

98. Many representatives were of the view that the General Assembly should be asked to stress the importance of co-ordination of work in respect of the legal regulation of international trade, in particular where the new international economic order was concerned. It was most important that the legal texts prepared by various organs and bodies in the field of international trade law reflect a common approach and constitute a coherent system. Co-ordination would also mitigate the danger of duplication of efforts and of the adoption of legal texts that were in conflict with each other or reflected divergent policies.

99. The view was also expressed that what mattered was not only the co-ordination of work in the sense of a division of labour between various international organizations but also, and perhaps more important, the identification of those legal problems which cut across the various issues dealt with in different bodies. In this respect it was felt that it was not only necessary to continue to exchange information between the organizations concerned, and for the Secretariat to continue to provide surveys of the legal activities of those organizations, but also to analyse and identify the general legal issues, and to prepare recommendations for the Commission as to the action to be taken.

#### *Decision by the Commission*

100. At its 226th meeting, on 29 June 1979, the Commission unanimously adopted the following decision:

#### *The United Nations Commission on International Trade Law,*

*Recalling* the decision taken at its eleventh session on the establishment of a Working Group on the New International Economic Order and the mandate conferred upon the Working Group,

1. *Decides* that the Working Group on the New International Economic Order should be composed of 17 members of the Commission, as follows:

Argentina, Australia, Chile, Czechoslovakia, France, German Democratic Republic, Germany, Federal Republic of, Ghana, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America;

2. *Requests* the Secretary-General to invite Member States of the United Nations and the specialized agencies and interested international organizations to attend meetings of the Working Group as observers;

3. *Requests* the Working Group to examine the report of the Secretary-General on the new international economic order<sup>42</sup> and to take into account the discussions on this subject by the Commission at its twelfth session in order to make recommendations as to specific topics which could appropriately form part of the programme of work of the Commission and to report to the Commission at its thirteenth session;

<sup>42</sup> A/CN.9/171.

4. *Further requests* the Working Group to bear in mind the need for co-ordination in the field of international trade law as set out in the decision adopted by the Commission at its 225th meeting, on 27 June 1979,<sup>43</sup> and to make recommendations in respect of the steps that could usefully be taken by the Commission.

## CHAPTER VI. TRANSPORT LAW<sup>44</sup>

### *Introduction*

101. At its eleventh session, the Commission decided to include the topic of transportation in its future work programme, and to accord priority to the consideration of this subject.<sup>45</sup> The Commission also requested the Secretariat to prepare a study setting forth the work accomplished so far by international organizations in the field of multimodal transport, charter-parties, marine insurance, transport by container and the forwarding of goods.<sup>46</sup>

102. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/172)\* containing a survey of the work of international organizations in the field of transport law. This report mentions in brief the major resolutions in the field of transport that have been adopted by the General Assembly, the Economic and Social Council and the United Nations Conference on Trade and Development (UNCTAD). The report then considers the work of international organizations in the five areas of transportation law, as requested by the Commission.

103. The report notes that within the United Nations primary responsibility concerning multimodal transport and containerized transport has been entrusted to UNCTAD. The report then states that the topics of charter-parties and marine insurance have received some preliminary consideration by UNCTAD bodies and suggests that the Commission may wish to consult UNCTAD as to the desirability of preparing an international agreement or uniform rules on either or both topics. The report also notes that the Commission may wish to consider whether there is justification for the drafting of rules concerning the legal status of freight forwarders in respect of which UNIDROIT has carried out preparatory work.

### *Discussion at the session*

104. There was no support in the Commission for work on either multimodal transport or transport by container, it being noted that a draft Convention on International Multimodal Transport had been completed by an UNCTAD Intergovernmental Group. Furthermore, it was agreed that the Commission should not undertake work on the regulation of contracts for the forwarding of goods, because the need for uniform rules was not clearly established and the proposed convention on International Multimodal Transport might resolve some of the difficulties which were currently experienced. It was also agreed that the Commission should not commence work on charter-parties or marine insurance, as these subjects were under consideration by the UNCTAD Working Group on International Shipping Legislation. However, there was agreement that the UNCTAD Working Group should be informed of the willingness of the Commission to undertake work of a legal character on these subjects if the UNCTAD Working Group determined that work directed to unification in these subjects was desirable.

105. Suggestions were made that the Commission might undertake work on the following subjects: the liability of port authorities for damage caused in the storing or handling of goods; regulation of the warehousing contract; and liability for the transport of dangerous goods. The Commission did not adopt these suggestions.

### *Decision of the Commission*

106. At its 217th meeting, on 21 June 1979, the Commission unanimously adopted the following decision:

#### *The United Nations Commission on International Trade Law*

1. *Takes note* of the survey of the work of international organizations in the field of transport;<sup>47</sup>

2. *Decides*:

(a) To request the Secretariat to continue to follow such work and to report the developments in this field to the Commission;

(b) To inform the UNCTAD Working Group on International Shipping Legislation, by a letter of the Chairman of the Commission, of the willingness of the Commission to undertake work of a legal character in the fields of charter-parties and marine insurance, if the UNCTAD Working Group determines that work directed to unification in these subjects is desirable.

## CHAPTER VII. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW<sup>48</sup>

### *Introduction*

107. In regard to the programme of work of the Commission in this field, the Commission had before it a note by the Secretary-General (A/CN.9/173) dealing with the UNCITRAL symposia on international trade law, and fellowship and internship arrangements.

### *UNCITRAL symposia*

108. In regard to the UNCITRAL symposia, the note recalls that, at its tenth session, consequent upon the cancellation for lack of funds of the second

\* Reproduced in this volume, part two, V, A.

<sup>43</sup> For this decision, see chapter IX, paragraph 131 below.

<sup>44</sup> The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

<sup>45</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, paras. 67 (c) (vii), 68 and 69.

<sup>46</sup> *Ibid.*, paras. 67 (c) (vii) and 68.

<sup>47</sup> A/CN.9/172.

<sup>48</sup> The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

UNCITRAL symposium on international trade law planned in connexion with that session, the Commission recommended to the General Assembly that it "should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations".<sup>49</sup> In response to this recommendation, the General Assembly requested the Secretary-General to study the problem of financing the symposia. Accordingly, the Secretary-General submitted to the Assembly at its thirty-third session a report (A/33/177) containing suggestions in this regard.

109. After considering this report, the General Assembly, at its thirty-third session: (a) expressed the view that the United Nations Commission on International Trade Law should continue to hold symposia on international trade law; and (b) appealed to all Governments and to organizations, institutions and individuals to consider making financial and other contributions that would make possible the holding of a symposium on international trade law during 1980, as envisaged by the United Nations Commission on International Trade Law, and authorized the Secretary-General to apply towards the cost of the United Nations Commission on International Trade Law symposia, in whole or in part, as may be necessary to finance up to 15 fellowships for participants in the said symposia, voluntary contributions to the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law not specifically earmarked by the contributors to some other activity within the Programme.

110. The note by the Secretary-General (A/CN.9/173) further states that the funds available both by way of contributions specifically made to the UNCITRAL symposia, and by way of contributions to the above Programme of Assistance, are inadequate for financing a symposium in 1980, and that in any event, by reason of other items occurring in the programme of work, the earliest date for which the next UNCITRAL symposium could be scheduled is 1981.

#### *Discussion at the session*

111. There was general agreement that the UNCITRAL symposia were very useful, and should be continued. The representatives of Austria, Canada, the Federal Republic of Germany and Finland expressed the willingness of their Governments to pledge monies for a symposium, disbursements to be made, however, only provided that other developed States in turn undertook to make contributions.

112. After deliberation, the Commission decided to place on the agenda of its thirteenth session the financing of the symposia, with a view to organizing a symposium in 1981.

#### *Fellowship and internship arrangements*

113. The Commission noted with appreciation that the Government of Belgium, as it had in the past few years, had again in 1979 offered two fellowships to candidates from developing countries for academic and practical training in international law, and that the Government of Poland had also indicated a willingness to award three similar fellowships for English-speaking candidates for study in Poland. The representative of Austria expressed the readiness of his Government to award a similar fellowship for study in Austria to a candidate from a developing country, and the Commission took note with appreciation of this offer.

### CHAPTER VIII. STATE OF SIGNATURES AND RATIFICATIONS OF THE UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA<sup>50</sup>

#### *Introduction*

114. The Commission, at its seventh session, decided to maintain on its agenda the question of the ratification of conventions concluded on the basis of texts prepared by it.<sup>51</sup>

115. At the present session, the Commission had before it a note by the Secretary-General concerning the state of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) (A/CN.9/174).

116. This Convention was opened for signature on 31 March 1978 and remained open for signature until 30 April 1979. The Convention is subject to ratification by the signatory States and since 30 April 1979 is open for accession by all States which are not signatory States.

#### *Discussion at the session*

117. The Commission noted with appreciation that as at 30 April 1979 the United Nations Convention on the Carriage of Goods by Sea had been signed by the following 27 States: Austria, Brazil, Czechoslovakia, Chile, Denmark, Ecuador, Egypt, Finland, France, Germany, Federal Republic of, Ghana, Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, United States of America, Venezuela and Zaire.

118. The Commission also noted with appreciation that the Convention had been ratified by Egypt on 23 April 1979.

119. The hope was expressed that the Convention would receive wide acceptance at an early date. In this connexion, some representatives indicated the intention of their Governments to initiate the ratification process in respect of the Convention in the near future.

<sup>50</sup> The Commission considered this subject at its 217th meeting, on 21 June 1979; a summary record of this meeting is contained in A/CN.9/SR.217.

<sup>51</sup> Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 17 (A/9617), para. 64 (Yearbook... 1974, part one, II, A).

<sup>49</sup> Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 45 (Yearbook... 1977, part one, II, A).



120. The Commission requested the Secretariat to submit information, at each of its sessions, in respect of the state of signatures, accessions and ratifications relating to conventions concluded on the basis of texts prepared by the Commission.

#### CHAPTER IX. FUTURE WORK AND OTHER BUSINESS<sup>52</sup>

##### A. *Venue of sessions of the Commission and its Working Groups*

121. The Commission was informed by the Secretariat that, although the normal rule was that all meetings of the United Nations body and its subsidiary organs should be held at the place where the secretariat of that body was located, the Committee on Conferences had decided that sessions of the Commission and its Working Groups which had alternated between New York and Geneva should now alternate between New York and Vienna. In this connexion, the view was expressed that representatives of some developing countries found it easier to attend meetings in New York or Geneva rather than in Vienna. Under another view, however, the interests of efficiency and economy required that sessions when held in Europe be held at the location of the Commission's secretariat.

122. After deliberation, the Commission was agreed that sessions of the Commission and its Working Groups should, as a general rule, alternate between New York and Vienna.

##### B. *Date and place of the thirteenth session of the Commission*

123. It was decided that the thirteenth session of the Commission would be held from 9 to 20 June 1980 in New York.

##### C. *Constitution and sessions of Working Groups*

124. It was decided that the future sessions of the Working Group on International Negotiable Instruments would be held as follows:

- (a) Eighth session, from 3 to 14 September 1979, at Geneva.
- (b) If a further session were required, ninth session, from 2 to 11 January 1980 in New York.

125. It was decided that the Working Group on the New International Economic Order would meet from 14 to 25 January 1980 in New York.

126. It was decided that the name of the Working Group on the International Sale of Goods should be changed to the Working Group on International Contract Practices. This Working Group would meet from 24 to 28 September 1979 in Vienna.

##### D. *General Assembly resolution on the report of the Commission on the work of its eleventh session*

127. The Commission took note of General Assembly resolution 33/92 of 16 December 1978 on the

report of the United Nations Commission on International Trade Law on the work of its eleventh session.

##### E. *General Assembly resolution on the United Nations Conference on Contracts for the International Sale of Goods*

128. The Commission took note of General Assembly resolution 33/93 of 16 December 1978 convening the United Nations Conference on Contracts for the International Sale of Goods. It was noted that the Conference would take place at Vienna from 10 March to 11 April 1980, with a possible extension of one week to 18 April 1980.

##### F. *Current activities of international organizations related to the harmonization and unification of international trade law*

129. The Commission took note of a report of the Secretary-General on the current activities of international organizations related to the harmonization and unification of international trade law (A/CN.9/175).\*

130. The Commission recalled that during its discussion on the new international economic order (see paras. 95 and 98 above) there was general agreement on the need for greater co-ordination among bodies engaged in the harmonization and unification of international trade law, and that many representatives were of the view that the General Assembly should be asked to stress the importance of co-ordination of work in respect of the legal regulation of international trade. The Commission had before it a draft resolution of the General Assembly submitted by Algeria, Egypt, Ghana, India, Indonesia, Kenya, Nigeria and Yugoslavia intended to reaffirm both the need for greater co-ordination and the mandate of the Commission in the co-ordination process, which the Commission should propose for adoption by the General Assembly.

131. After deliberation at its 225th meeting, on 27 June 1979, the Commission decided to recommend to the General Assembly the adoption of the following draft resolution:

#### CO-ORDINATION IN THE FIELD OF INTERNATIONAL TRADE LAW

##### *The General Assembly,*

*Noting* that the significant increase in economic and trade relations between States and their peoples has given rise to increased activities of a legislative nature by international bodies and organs both within and without the United Nations system,

*Being of the view* that such activities should not result in duplication of work or establishment of conflicting rules, resulting in non-ratification by States or non-application by the courts,

*Recalling* that the General Assembly, in resolution 2205 (XXI) of 17 December 1966 by which it established the United Nations Commission on International Trade Law, conferred upon that Commission

<sup>52</sup> The Commission considered this subject at its 225th meeting, on 27 June 1979; a summary record of this meeting is contained in A/CN.9/SR.225.

\* Reproduced in this volume, part two, VI.

the mandate of furthering the progressive harmonization and unification of the law of international trade by, *inter alia*, co-ordinating the work of organizations active in this field and encouraging co-operation among them,

Considering that, by virtue of the mandate conferred upon it by the General Assembly, it is among the tasks of the Commission to ensure that legal texts prepared by various international organizations in the field of international trade law contribute to a coherent and generally acceptable system of international law,

Bearing in mind the establishment of that Commission's Working Group on the new international economic order and its mandate, as well as the work programmes of the other Working Groups of the Commission,

Reaffirming General Assembly resolution 33/92 of 16 December 1978,

1. Reaffirms the mandate of the United Nations Commission on International Trade Law in co-ordinating legal activities in the field of international trade law;

2. Calls the attention of all organs and bodies within the United Nations system to this mandate of the Commission;

3. Invites all organs and organizations concerned to co-operate with the Commission by providing it with relevant information on their activities and by consulting with it;

4. Calls upon all Governments to bear in mind the importance of improved co-ordination of activities related to the participation in the various international organizations concerned with international trade law;

5. Requests the Secretary-General:

(a) To take effective steps to secure a close co-ordination especially between those parts of the Secretariat which are serving the United Nations Commission on International Trade Law, the International Law Commission, the United Nations Conference on Trade and Development, the United Nations Industrial Development Organization and the Commission on Transnational Corporations;

(b) To place before the United Nations Commission on International Trade Law, at each of its sessions, a report on the legal activities of the international organs, bodies and organizations concerned, together with recommendations as to steps to be taken by the Commission.

#### G. Ratification of or adherence to conventions concerning international trade law

132. The view was expressed that, in addition to the Commission noting at each session the state of ratification of or adherence to conventions concerning international trade law based on drafts prepared by the Commission, the members of the Commission should also exchange views on the prospects for, and possible

impediments to, ratification of or adherence to such conventions in particular with regard to the intentions of their Governments. There was general agreement that such a discussion would be useful, and that the agenda of future sessions of the Commission should include as an item such an exchange of views.

#### H. Transfer of the International Trade Law Branch to Vienna

133. There was some support for the view that the Commission should request the General Assembly to defer the transfer of the Branch, now scheduled for September 1979, by one year, as such a deferment would help the International Trade Law Branch to handle the heavy work programme which it faced in the period between the current session and the thirteenth session of the Commission. The prevailing view, however, was that on balance it would be preferable that no request should be addressed to the General Assembly in this regard.

### ANNEX I

#### Summary of discussion in the Commission of the draft UNCITRAL Conciliation Rules<sup>a</sup>

##### Scope of application

##### Article 1

(1) These Rules shall apply when the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to conciliation under the UNCITRAL Conciliation Rules.

(2) The parties may also agree to refer to conciliation under these Rules disputes arising out of legal relationships that are not contractual.

(3) The parties may agree in writing to any modification of these Rules.

1. There was general support for the substance of paragraph (1). It was observed that the present wording may not make sufficiently clear that the agreement to refer a dispute to conciliation can be contained either in a contract as a conciliation clause, or in a separate conciliation agreement. Although the availability of both alternatives clearly appeared from the provisions of article 4, paragraph (1) (c), it was suggested that the provision be redrafted.

2. It was further observed that the present wording of paragraph (1), and the model conciliation clause suggested in A/CN.9/167,\* paragraph 26, could be construed as imposing on the parties who had agreed to conciliation an obligation to have recourse to conciliation once a dispute had arisen. It was felt that this issue of interpretation was basic to the nature and concept of conciliation. It was also felt that this issue was closely connected with the provisions on the commencement of conciliation proceedings (art. 3), which were based on the idea that conciliation could usefully take place only if both parties, in the event of a dispute, were still willing to seek an amicable solution to their differences.

3. It was the general view that conciliation could be a pre-condition to arbitration or court proceedings. The prevailing view was that the concept of conciliation embodied in the UNCITRAL Conciliation Rules should stress the voluntary non-binding nature of conciliation and any commitment

\* Reproduced in this volume, part two, III, B.

<sup>a</sup> The report of the Secretary-General entitled "Conciliation of international trade disputes" (A/CN.9/167) contains a commentary on each article of the draft UNCITRAL Conciliation Rules. The summary of the discussion set forth below on each article is preceded by the text of the article.

thereto, as the norm, but should be sufficiently flexible to permit parties to agree that some amount of conciliation must occur as a pre-condition to arbitration and court proceedings where permitted by the applicable law. There was also general support for the view that paragraph (1) should more clearly reflect that concept, for example, by omitting the word "shall" in that provision. It was further stated that this concept was also related to the question whether and when parties could resort to arbitration or court proceedings (cf. the discussion on art. 22).

4. Since the question as to whether conciliation was, in a sense, mandatory depended on the specific terms of the conciliation clause or the separate conciliation agreement, it was suggested that parties be provided with two different model clauses, one giving the parties complete freedom to have recourse to conciliation or to refuse conciliation and the second implying a kind of binding obligation, for example, to commence conciliation proceedings or, at least, to request the other party to consent to the commencement. The Commission requested the Secretariat to study this matter and prepare model clauses.

5. It was the general view that paragraphs (2) and (3) of article 1 were generally acceptable in their present form.

#### *Number of conciliators*

##### *Article 2*

There shall be one conciliator unless the parties have agreed that there shall be three conciliators.

6. The Commission noted that article 2 envisaged conciliation by a sole conciliator or, if parties preferred this, by three conciliators. The policy underlying the Rules was that the necessary impartiality and independence of a conciliator was best secured if the sole conciliator and, where there are three conciliators, the third conciliator, were not appointed by the parties. Under the policy of the Rules, it was this aspect of impartiality and independence of the sole conciliator, or the "presiding" conciliator, which should distinguish conciliation from the basically different procedure of negotiations between the parties through their counsel.

7. The Commission was of the view that the approach taken by article 2 was not acceptable. In particular, the possibility of having two conciliators should also be taken into account. There was no valid reason for envisaging only an uneven number of conciliators. In this connexion, it was stated that a panel of two conciliators was not uncommon in international conciliation procedures. The notion that party-appointed conciliators were not sufficiently impartial and independent could not be retained. It was also pointed out that an uneven number of conciliators, while facilitating the internal decision-making process, was not necessary in conciliation since it was the task of conciliators to make recommendations for a settlement and not to render decisions.

8. According to one view, the Rules should not indicate a preferred number of conciliators, but should leave that entirely to the parties. The prevailing view, however, was that the Rules should indicate the number of conciliators without thereby precluding parties from choosing a different number of conciliators. This solution was preferred on the ground that it provided guidance to the parties and that certain subsequent provisions of the Rules, for example, those relating to appointment, conduct of proceedings and costs, could then be more precisely formulated.

9. After deliberation, it was generally felt that the UNCITRAL Conciliation Rules should contemplate conciliations with one, two or three conciliators and set out the specific implications of such alternatives. As to the number of conciliators to be specified in article 2, one view was to formulate the article along the following lines: "There shall be one conciliator unless the parties have agreed that there shall be two or three conciliators". Under another view, the article should be formulated along the following lines: "There shall be one conciliator unless the parties have agreed that there shall be more than one conciliator".

#### *Commencement of conciliation proceedings*

##### *Article 3*

(1) The party initiating recourse to conciliation shall give to the other party a written notice of conciliation.

(2) The other party shall within 30 days after receipt of the notice of conciliation reply to the party having given notice.

(3) (a) If in his reply the other party consents to conciliation, the conciliation proceedings shall commence on the date on which such reply is received by the party having given notice;

(b) If in his reply the other party refuses conciliation or if he does not reply within 30 days, there shall be no conciliation proceedings.

10. The Commission considered whether the notice of the party requesting conciliation should, as suggested in article 3, paragraph (1), be in written form. According to one view, the written form should not be required because it was too formal and inflexible, and because there was no sanction for its non-observance. It was suggested that it was sufficient if the notice was given orally, since all that was required was to ascertain whether the other party was willing to conciliate. The written form should only be required in respect of a detailed statement of the points at issue after both parties had decided to commence the conciliation proceedings.

11. However, the prevailing view was that the written form should be required for the notice of conciliation. This would facilitate proof, and provide certainty to the parties; it would also facilitate determining the 30-day period mentioned in paragraphs (2) and (3). The written form also seemed preferable because of the possible contents of the notice set forth in article 4 and because of the fact that the notice would later be forwarded to the conciliator or, possibly, the appointing authority (cf. arts. 6 and 9).

12. It was suggested that the term "notice" be replaced by a less formal term, such as "invitation" or "request".

13. The Commission considered paragraphs (2) and (3) of article 3 which deal with the reply of the party to whom a notice of conciliation was given. According to one view, paragraph (2) was not acceptable because it was superfluous in view of paragraph (3) (b), and because there was no sanction for not replying as required under that provision. It was suggested that these paragraphs be restructured by stating that the other party in his reply may accept or refuse the invitation to conciliation, and by regulating the consequences of possible silence. Under another view, however, the policy underlying the draft article was acceptable because it clearly called on the other party to reply and would not unduly emphasize the implied option of refusal.

14. Opinions differed in respect of the period of 30 days laid down in paragraphs (2) and (3) (b). According to one view this period of time was appropriate in that it was designed as a maximum period which seemed reasonable in the context of international relationships. Account should also be had of the possible contents of the reply referred to in article 4, paragraph (3). Another view was that a shorter period, for example, 15 days, would be preferable since this would speed up the procedure. Yet another view was that there was no need for a fixed time-limit and that it would suffice to use a general, flexible term, such as "without undue delay" or "as soon as possible".

15. Concern was expressed about the provision of paragraph (3) (b) that there shall be no conciliation proceedings if the other party does not reply within a period of 30 days. While it was the general view that, according to article 22, both parties were free to resort to arbitration or court proceedings until the commencement of the conciliation proceedings, it was suggested that the expiry of the period should not be construed as a definite cut-off date. Thus, conciliation should still be possible even if the other party did not reply within that period. On the other hand, it was suggested that the initiating party should be permitted to assume that, in case of silence of the other party, that other party was rejecting recourse to conciliation.

*Notice of conciliation**Article 4*

- (1) The notice of conciliation shall include:
- (a) An invitation that the dispute be referred to conciliation;
  - (b) The names and addresses of the parties;
  - (c) A reference to the conciliation clause or the separate conciliation agreement that is invoked;
  - (d) A reference to the contract the legal relationship out of or in relation to which the dispute arises;
  - (e) A brief description of the general nature of the dispute;
  - (f) A brief description of the points at issue.
- (2) The notice of conciliation may also include:
- (a) If no agreement has previously been reached on the number of conciliators, a proposal that there shall be one conciliator or three conciliators;
  - (b) (i) In conciliation proceedings with one conciliator, a proposal as to the name of the conciliator;
  - (ii) In conciliation proceedings with three conciliators, the name of the conciliator appointed by the party giving notice of conciliation.

(3) The party consenting to conciliation may in his reply give his own description of the general nature of the dispute and the points at issue. He may also indicate in his reply his agreement or disagreement with the proposals made by the other party under paragraph (2) (a) and (b) (i) of this article and, in conciliation proceedings with three conciliators, indicate the name of the conciliator appointed by him.

16. It was noted that, in line with the principle that conciliation procedures should be flexible, it was inadvisable that paragraph (1) of this article should require the inclusion in the notice of conciliation of the items of information listed in subparagraphs (a) to (f). The inclusion of such detailed information was more appropriate to adversary procedures. Furthermore, there was no sanction if the required items were not included. The contrary view was expressed that, since the information in the notice of conciliation and the reply was of assistance to the parties as well as to appointing authorities in selecting suitable conciliators (art. 6 (1)) and to the conciliators appointed (art. 9), the inclusion of full information in the notice of conciliation was desirable.

17. After deliberation it was the general view that an effort should be made in redrafting the provision to consider elements which might be omitted at this stage of the conciliation and postponed to a later stage. Further thought should be given to the question as to what information should be required at the different stages of the conciliation.

*Appointment of conciliator(s)**Article 5*

(1) If a sole conciliator is to be appointed, and if within 15 days after the commencement of the conciliation proceedings the parties have not agreed on the name of the conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(2) If three conciliators are to be appointed, each party shall appoint one conciliator. The two conciliators thus appointed shall choose the third conciliator who will act as presiding conciliator. If within 15 days upon their appointment the conciliators appointed by the parties have not agreed on the name of the third conciliator, either party may apply to the appointing authority agreed upon by the parties to make the appointment according to the procedure laid down in article 7 of these Rules.

(3) If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses

to act or fails to appoint the conciliator within 60 days of the receipt of a party's request therefor, either party may request X to designate an appointing authority. The request shall be accompanied by a copy of the notice of conciliation and of the reply given thereto.

18. It was the general view that article 5 and subsequent provisions on the appointment of conciliators should be revised so as to correspond with the earlier agreed numbers of conciliators, in particular, the added option of having two conciliators (see discussion on art. 2). Divergent views were expressed on whether the Rules should provide for an appointing authority as suggested in the draft.

19. According to one view, the Rules should provide for resort to an appointing authority. This was considered as a useful mechanism for securing appointment of the sole or the third conciliator. In this connexion, it was stressed that the appointing authority would act only after the commencement of conciliation proceedings initiated because both parties wanted it. Therefore, it was regarded as a helpful procedure which would assist the parties to implement their previous agreement.

20. Under another view, however, a rule which may lead to an imposed appointment upon the request of only one party would be contrary to the voluntary, "non-mandatory" spirit of conciliation which, in the general view, should be stressed. It was argued that the conciliation proceedings should be considered terminated if no agreement on the sole or third conciliator could be reached. It was understood that a party was free to seek non-binding assistance of an institution or individual, and advice or information on qualified candidates. Also, a binding appointment by an appointing authority could be envisaged, but only if both parties made a request to that effect, or included in their agreement to conciliate a provision for appointment to be made by an appointing authority.

21. The view was expressed that article 5 should include provisions that all conciliators should be independent and impartial persons.

22. The Commission requested the Secretariat to take these possibilities into account when revising the draft and preparing model clauses.

*Application to appointing authority**Article 6*

(1) The application to the appointing authority shall be accompanied by a copy of the notice of conciliation and of the reply given thereto and may suggest the professional qualifications of the sole or the presiding conciliator.

(2) The party applying to the appointing authority shall send a copy of the application to the other party. The other party may within 15 days after the receipt of the copy of the application send to the appointing authority such suggestions as he may wish to make on the professional qualifications of the sole or the presiding conciliator.

23. It was noted that this procedural provision related to article 5 and the revised version would depend on the answer that would be given to the question whether the Rules should provide for an appointing authority.

*Appointment of conciliator by appointing authority**Article 7*

(1) The appointing authority shall, by telegram or telex, confirm to the parties the receipt of the application.

(2) The appointing authority shall proceed with the appointment of the sole or presiding conciliator without undue delay, using the following list-procedure:

(a) The appointing authority shall communicate to the parties an identical list containing at least three names;

(b) Within 15 days after the receipt of this list, each party may return the list to the appointing authority after having deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;

(c) After the expiration of the above period of time, the appointing authority shall appoint the sole or the presiding conciliator from among the names approved on the lists returned to it in accordance with the order of preference indicated by the parties;

(d) If for any reason the appointment cannot be made according to this procedure, the appointing authority shall exercise its discretion in appointing the sole or the presiding conciliator.

(3) In making the appointment, the appointing authority shall have regard to the suggestions of the parties as to the qualifications of the sole or the presiding conciliator and to such considerations as are likely to secure the appointment of an independent and impartial person. It shall also take into account the advisability of appointing a sole or a presiding conciliator of a nationality other than the nationalities of the parties.

24. It was noted that, like article 6, this provision related to article 5, and that the revised version would depend on whether the Rules will make provision for an appointing authority.

25. The view was expressed that the functions of the appointing authority could be set out in a model clause providing for recourse to an appointing authority. According to another view, it was preferable to have procedural provisions in both the Rules themselves and the model clause. It was also the view of some that the procedure envisaged in draft article 7 was too complex and time-consuming.

#### *Notification of appointment of conciliator*

##### *Article 8*

The appointing authority, upon making the appointment, shall forthwith notify the parties of the name and address of the conciliator.\*

\* This and all following articles, in which the expression "conciliator" is used without qualification, apply to either a sole conciliator or to three conciliators, as the case may be.

26. As this provision sets out another duty of the appointing authority, it was noted that the considerations concerning article 7 apply also to this article.

#### *Forwarding of notice and reply to conciliator*

##### *Article 9*

A copy of the notice of conciliation and of the reply thereto shall be given to the conciliator promptly after his appointment. This shall be done by the parties if they made the appointment, or by the appointing authority if it made the appointment.

27. No specific comments were made on this article.

#### *Representation and assistance*

##### *Article 10*

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party and to the conciliator; such communication must specify whether the appointment is being made for purposes of representation or assistance.

28. No views were expressed objecting to this article.

#### *Role of conciliator*

##### *Article 11*

(1) The role of the conciliator shall be to assist the parties to reach an amicable settlement of their dispute.

(2) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may have expressed and the need for a speedy settlement of the dispute.

(3) In assisting the parties to reach a fair and equitable settlement, the conciliator shall give consideration to, among other things, the terms of the contract, the law applicable to the substance of the dispute, the usages of the trade concerned and the circumstances surrounding the dispute.

29. It was suggested that this article (or art. 5) should stress the independent and impartial role of the conciliator, irrespective of whether he is appointed by only one party, by both parties or by an appointing authority. It was also suggested that there be incorporated into this article the provision on the conciliator's function to make proposals for a settlement (present art. 18). Another suggestion was that article 11 should state guidelines in respect of the conduct of proceedings by a panel of conciliators. For example, in the case of three conciliators, a majority could be required for any decision to be taken. In the case of two conciliators, consensus could be required, except perhaps in respect of diverging settlement proposals which, it was submitted, could each be communicated to the parties. In case of two conciliators, failure to reach the required consensus would be a basis for terminating the conciliation.

30. Paragraph (3) of article 11 sets out the points to which, among other things, consideration should be given by the conciliator in assisting the parties to reach a fair and equitable settlement. According to one view, the points listed did not fully accord with the idea of conciliation. It was stated, for example, that some of the points were too reminiscent of standards of adversary proceedings; that too much emphasis was placed on the legal aspects, and too little importance attached to such standards as fairness, justice or equity. It was submitted, in this connexion, that not only lawyers should be envisaged as possible conciliators. It was also suggested that the Rules should not set forth any standards at all because such a list would unduly restrict the conciliator in performing his task.

31. Under another view, however, the points listed in paragraph (3) were appropriate and represented a reasonably balanced set of standards. It was pointed out that the ideas of fairness and equity were not neglected in that provision, but set forth as the two basic criteria of a settlement that would thus govern the conciliator's efforts. It was pointed out that the points were quite different from the standards laid down in article 33 of the UNCITRAL Arbitration Rules. A suggestion was made to list as an additional point the previous business practices between the parties.

#### *Request by conciliator for information*

##### *Article 12*

(1) The conciliator may request each party to submit to him a written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. He may also request each party to submit a fuller statement of points at issue.

(2) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

32. The view was expressed that the second sentence of paragraph (1) was superfluous in that the right to "request a fuller statement of points at issue", as provided for in that sentence, was covered by paragraph (2) of that article, which dealt with the "request for additional information". Another view was that this article should not be changed because paragraph (1) related to what might be called the "pleadings", whereas paragraph (2) was directed towards production of evidence which the conciliator might consider necessary and therefore would be helpful in practice. It was also submitted that in the first sentence of paragraph (1) the words "that such party deems appropriate" were superfluous. A contrary view was that these words were desirable in underscoring the autonomy of the parties in preparing their written submissions and to eliminate arguments that any such submissions were void because of incompleteness.

33. The suggestion was made to change the right of the conciliator under paragraph (1) into a duty, by substituting the word "shall" for the word "may". This suggestion was based on the assumption that the notice envisaged under article 4 would merely contain a short statement of the intent to conciliate a particular dispute. It would, then, be appropriate to oblige the conciliator to request a detailed statement from the parties. While under another view the discretion of the conciliator was preferable, it was the general view that the issue had to be considered in connexion with the provision on the contents of the notice.

#### *Communication between conciliator and parties*

##### *Article 13*

(1) If, after reviewing the written materials submitted to him, the conciliator deems it advisable, he may invite the parties to meet with him.

(2) The conciliator may have oral discussions or communicate in writing with either party alone.

(3) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

34. No specific comments were made on this article.

#### *Administrative assistance*

##### *Article 14*

In order to facilitate the conduct of the conciliation, the parties, or the conciliator after consultation with the parties, may arrange for administrative assistance to be provided by the appointing authority or other suitable institution.

35. While no specific comments were made on this provision, it was noted that the reference to the appointing authority should be considered in the light of the approach which the Rules would take in respect of the appointing authority.

#### *Party suggestions for settlement of dispute*

##### *Article 15*

The conciliator may invite the parties, or a party, to submit to him suggestions for settlement of the dispute. A party may do so upon his own initiative.

36. No specific comments were made on this article.

#### *Obligation of parties to co-operate*

##### *Article 16*

The parties shall in good faith endeavour to comply with requests by the conciliator to submit written materials, provide evidence, attend meetings and otherwise co-operate with him.

37. It was submitted that the heading of this article was misleading in that it implied that there was a binding obligation. It was, therefore, suggested that the term "obligation" be omitted and, for example, the heading "co-operation of parties with conciliator" be used.

#### *Disclosure of information*

##### *Article 17*

The conciliator, having regard to the procedures which he believes are most likely to lead to a settlement of the dispute, may determine the extent to which anything made known to him by a party shall be disclosed to the other party; provided, however, that he shall not disclose to a party anything made known to him by the other party subject to the condition that it be kept confidential.

38. The view was expressed that any statements, pleadings, or submissions of evidence as envisaged under articles 4 and 12 should be disclosed to the other party. It was, thus, suggested

that provision should be made for a corresponding exception to the general rule of discretion contained in the above provision on disclosure of information.

#### *Proposals for settlement*

##### *Article 18*

At any stage of the conciliation proceedings the conciliator may make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

39. No specific comments were made on this article.

#### *Settlement agreement*

##### *Article 19*

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he may formulate the terms of a possible settlement and submit them to the parties for their observations.

(2) If the parties reach agreement on a settlement of the dispute, they shall draw up and sign a written settlement agreement. Upon request of the parties, the conciliator shall draw up, or assist parties in drawing up, the settlement agreement.

(3) Upon signing by the parties the settlement agreement becomes binding on them.

40. It was suggested that there be added to paragraph (1) of this article a provision which would enable the conciliator, after having received the observations of the parties, to reformulate the terms of a possible settlement in the light of these observations.

41. Under one view, paragraph (3), which states the binding effect of the signed settlement agreement, was superfluous and potentially misleading. The reason was that the legal nature of the settlement agreement, including its validity and enforceability, depended on the terms of the agreement itself and on the applicable law. According to another view, it was preferable to have a rule expressing the binding effect of a signed settlement agreement in order to emphasize the ultimate purpose of conciliation, i.e., final settlement of the dispute. Thus, it should be made clear that the agreement had not merely a moral effect, although the applicable law might in some instances render the agreement invalid and non-enforceable.

42. As to this possibility, it was suggested that the provision be drafted in such a way that parties were made aware of the potential risk. It was further suggested that the Secretariat should also study the legal nature and effect of the settlement agreements under various national laws.

#### *Confidentiality*

##### *Article 20*

Unless otherwise agreed by the parties or required by law, the conciliator and the parties shall keep confidential all matters relating to the conciliation proceedings, including any settlement agreement.

43. It was suggested that there be excluded from this provision the settlement agreement itself to the extent its disclosure might become necessary in an arbitral or judicial proceeding for its enforcement.

#### *Termination of conciliation proceedings*

##### *Article 21*

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written notice of a party to the conciliator and the other party to the effect that the conciliation proceedings are terminated, 30 days after the date of the declaration [unless such party revokes the declaration prior to the expiration of the 30-day period].

44. It was doubted whether the provisions on termination in this article were needed, in particular, the exact determination of the effective dates. However, under another view, this article, in its substance, was necessary in order to provide certainty in relations between parties and in view of article 22 which excluded recourse to arbitration or court proceedings before termination of the conciliation proceedings. In this respect, article 21 would have to be considered in the light of the position taken in regard to article 22.

45. It was suggested that termination by the conciliator (subpara. (b)) be dependent upon his having made at least one settlement proposal to the parties. However, another view was that in practice conduct of parties might make termination advisable before the conciliator had sufficient information upon which to base a recommendation. It was further suggested that in a revised draft the square brackets at the end of subparagraph (d) be omitted, and that the wording of that subparagraph, particularly the French version, be improved. Another suggestion was that insolvency or bankruptcy of one party should be a further cause of termination.

#### *Resort to arbitral or judicial proceedings*

##### *Article 22*

Neither party shall initiate arbitral or judicial proceedings in respect of a dispute that is the subject of conciliation proceedings from the date of the commencement of the conciliation proceedings, as defined in article 3, paragraph (3) (a), of these Rules, to the date of their termination, as provided in article 21.

46. It was noted that this provision does not cover the case where arbitral or judicial proceedings are initiated before the commencement of the conciliation proceedings.

47. In view of this possibility of parallel proceedings, it was suggested that parties be also permitted to initiate arbitral or court proceedings after the conciliation has started because there were no convincing reasons to treat these two cases differently. It was submitted that initiation of arbitral or court proceedings after conciliation had started would not necessarily indicate an unwillingness to conciliate. Such initiation could take place for reasonable purposes, such as preventing expiry of a prescription period or meeting the requirement, contained in some arbitration rules, of prompt submission of a dispute to arbitration.

48. Under another view, the idea behind this article was correct in that it emphasized the value of serious conciliation efforts although exceptions should be made for the last mentioned cases of initiation of arbitral or court proceedings for reasonable purposes. A suggestion in that direction was to request the party initiating arbitral or judicial proceedings to inform the other party and the conciliator in advance about such step and the purposes of it.

49. Another objection against the rule of exclusion contained in this article was that such exclusion would not be valid and enforceable under various applicable laws. Various suggestions were made in this respect. One was to not have any rule of exclusion in order to save parties from confusion or undesirable surprises. Another suggestion was to indicate in some way the potential risk of unenforceability of the rule. Yet another suggestion was to formulate the prohibition on the parties in terms of a "moral", not legally binding, obligation. It was the general view that these suggestions needed careful consideration.

#### *Costs*

##### *Article 23*

(1) Upon the termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the sole or the presiding conciliator, to be fixed by that conciliator in accordance with article 24 of these Rules;

(b) The travel and other expenses of the sole or the presiding conciliator and of any witnesses requested by a conciliator after consultation with the parties;

(c) The cost, travel and other expenses of any expert advice requested by a conciliator after consultation with the parties;

(d) The cost of any administrative assistance provided pursuant to article 14 of these Rules;

(e) Any fees and expenses of the appointing authority and X.

(2) The costs, as defined above, shall be borne equally by the parties. All other expenses incurred by a party, including the fee, travel and other expenses of a conciliator appointed by a party, shall be borne by that party.

50. It was pointed out that, in the light of the view previously expressed by the Commission that all conciliators should be independent and impartial, subparagraph (a) of paragraph (1) should relate to the fees of all conciliators, and not only to those of the sole or presiding conciliator.

51. It was suggested that, since the amount of the cost, travel and other expenses referred to in subparagraphs (b) and (c) of paragraph (1) might be considerable, the article should only make the parties liable to pay that amount if it had been agreed to by them; accordingly, the words "after consultation with" should be replaced by "if agreed to by".

52. It was observed that there was a possible difficulty created by the terms of the opening words of paragraph (1), taken together with the terms of article 25, paragraph (1). For while under article 25, paragraph (1), the conciliator was empowered, upon his appointment, to request each party for an advance of the costs referred to in article 23, paragraph (1), the latter costs were only fixed upon the termination of the conciliation proceedings.

53. It was suggested that paragraph (2) of this article be restructured in order to clarify the distinction between the two following categories of costs: costs which were to be borne equally by the parties, and all other expenses incurred by a party, which were to be borne by the party concerned.

54. There was support for the view that to make the party who has himself appointed a conciliator solely responsible for the fee, travel and other expenses of that conciliator implied that that conciliator acted as an agent of the appointing party. The Commission had, however, supported the principle that conciliators, including those appointed by one party, were intended to be impartial and independent. It followed that the fee, travel and other expenses of all conciliators should be borne equally by the parties.

55. It was observed that it might not always be appropriate that costs as defined in paragraph (1) should be borne equally by the parties. A fair and equitable settlement could require that one party bore a greater proportion of the costs.

#### *Fees of conciliator*

##### *Article 24*

The fees of the conciliator shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the conciliator and other relevant factors.

56. It was noted that the criteria adopted by this article to determine the amount of the fees of conciliators was the same



as those adopted by article 39 (1) of the UNCITRAL Arbitration Rules which determines the fees of arbitrators. However, in view of the differences between conciliation and arbitration, this might not be appropriate. One view was that the article should merely require the conciliator's fees to be reasonable in amount, without specification of the relevant factors to be considered. Another view, however, considered that specification of criteria was necessary in order to provide practical guidance to conciliators.

#### *Deposits*

##### *Article 25*

(1) The sole or the presiding conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 23, paragraph (1).

(2) During the course of the conciliation proceedings the sole or the presiding conciliator may request supplementary deposits in an equal amount from each party.

(3) Where a conciliator has been appointed by a party he may request a deposit or a supplementary deposit only from that party.

(4) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within 30 days after the receipt of a request therefor, the conciliator may suspend the proceedings or may make a written declaration of termination in accordance with article 21, subparagraph (b), of these Rules.

57. It was suggested that a provision be added to the article along the lines of article 41 (5) of the UNCITRAL Arbitration Rules, requiring the conciliator to render an accounting to the parties of deposits, and to return any unexpended balance.

#### *Role of conciliator in subsequent proceedings*

##### *Article 26*

Unless the parties have agreed otherwise, no conciliator may act as an arbitrator in subsequent arbitral proceedings, or as a representative or counsel of a party, or be called as a

witness by a party in any arbitral or judicial proceedings in respect of a dispute that was the subject of the conciliation proceedings.

58. No objection was expressed to the principle embodied in this article. However, it was noted that the circumstances in which a conciliator may be prohibited from being a witness in other proceedings may be regulated by the applicable law. Accordingly, provisions of the applicable law may invalidate the prohibition contained in this article against calling a conciliator in arbitral or judicial proceedings in respect of disputes which were the subject of the conciliation proceedings.

#### *Admissibility of evidence in other proceedings*

##### *Article 27*

A party shall not be entitled to rely on or to introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed by the other party in respect of a possible solution of the dispute;

(b) Admissions made by the other party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that the other party has indicated his willingness to accept a proposal for settlement made by the conciliator.

59. It was noted that it might be more appropriate to formulate the prohibition contained in this article against relying on or introducing evidence in the form of an agreement by the parties instead of a rule prohibiting parties from relying on, or introducing, evidence.

## **ANNEX II**

### **List of documents before the Commission**

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]

## **B. List of relevant documents not reproduced in the present volume**

<i>Title or description</i>	<i>Document symbol</i>
Provisional agenda, annotations thereto and tentative schedule of meetings: note by the Secretary-General	A/CN.9/158
Memorandum on the second co-ordination meeting, held at Rome on 9 and 10 April 1979, as agreed upon by the participants	A/CN.9/162
Training and assistance in the field of international trade law: note by the Secretary-General	A/CN.9/173
State of signatures and ratifications of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), adopted at Hamburg on 30 March 1978: note by the Secretary-General	A/CN.9/174