

# UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Vienna, 10 March – 11 April 1980

## OFFICIAL RECORDS

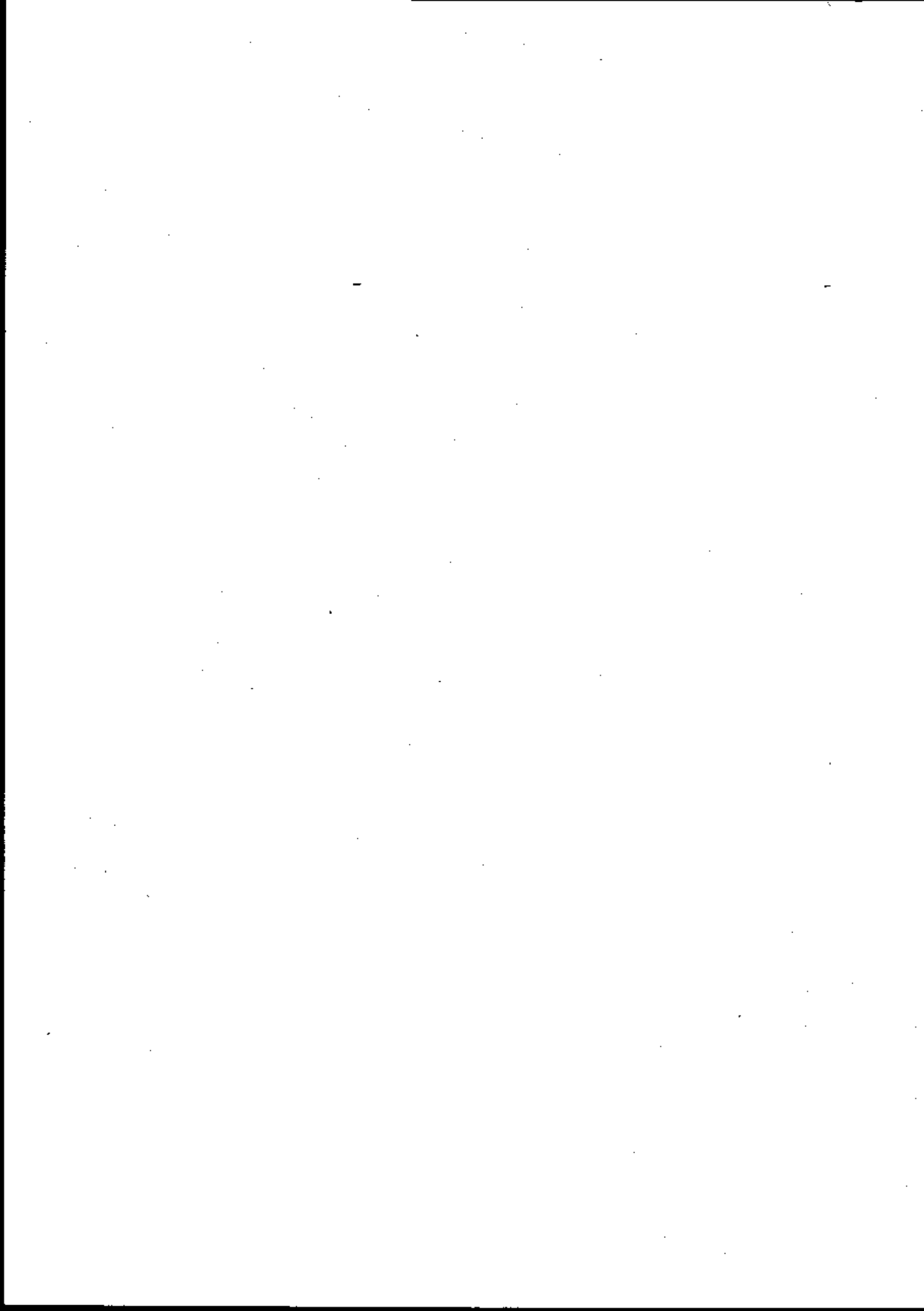
*Documents of the Conference  
and  
Summary Records of the Plenary Meetings  
and of the Meetings  
of the Main Committees*

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## GENERAL ASSEMBLY RESOLUTION CONVENING THE CONFERENCE\*

### Resolution 33/93. United Nations Conference on Contracts for the International Sale of Goods

#### *The General Assembly,*

Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission,

Also recalling its resolution 32/145 of 16 December 1977, by which it deferred until its thirty-third session a decision as to the appropriate time for convening a conference of plenipotentiaries on the international sale of goods and the terms of reference of such a conference,

Having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its eleventh session,<sup>1</sup> which contains the text of a draft Convention on Contracts for the International Sale of Goods,

Noting that the Commission considered and approved the draft Convention, taking note of observations and comments submitted by Governments and by international organizations,

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic co-operation among all States on a basis of equality and to the elimination of discrimination in international trade and, thereby, to the well-being of all peoples,

Convinced that the adoption of a convention on contracts for the international sale of goods, which would take into account the different social, economic and legal systems of States and remove existing uncertainties and ambiguities regarding the rights and obligations of buyers and sellers, would contribute considerably to the harmonious development of international trade,

1. Expresses its appreciation to the United Nations Commission on International Trade Law for the valuable work done in preparing a draft Convention on Contracts for the International Sale of Goods;

2. Decides that an international conference of plenipotentiaries shall be convened in 1980 at the location of the International Trade Law Branch, or at any other suitable place for which the Secretary-General may receive an invitation, to consider the draft Convention on Contracts for the International Sale of Goods prepared by the United Nations Commission on International

Trade Law and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;

3. Also decides that the United Nations Conference on Contracts for the International Sale of Goods, referred to in paragraph 2 above, should consider the desirability of preparing a Protocol to the Convention on the Limitation Period in the International Sale of Goods,<sup>2</sup> adopted at New York on 12 June 1974, which would harmonize the provisions of that Convention with those of the Convention on Contracts for the International Sale of Goods as it may be adopted by the Conference;

4. Refers to the Conference the draft Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law, together with draft provisions concerning implementation, reservations and other final clauses to be prepared by the Secretary-General;

5. Requests the Secretary-General:

(a) To circulate the draft Convention on Contracts for the International Sale of Goods, together with a commentary and draft provisions concerning implementation, reservations and other final clauses to be prepared by the Secretary-General, to Governments and interested international organizations for comments and proposals;

(b) To convene the Conference for a period of five weeks in 1980, with the possibility of extension for up to a further week if necessary, at any of the places mentioned in paragraph 2 above;

(c) To arrange for the preparation of summary records of the proceedings of the plenary meetings of the Conference and of meetings of committees of the whole which the Conference may wish to establish, and for the publication of the official records of the Conference;

(d) To invite all States to participate in the Conference;

(e) To invite representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and the work of all international conferences convened under its auspices in the capacity of observers, to participate in the Conference in that capacity in accordance with Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976;

(f) To invite representatives of the national liberation movements recognized in its region by the Organization of African Unity to participate in the Conference in the capacity of observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974;

\* Resolution 33/93 was also issued as document A/CONF.97/1.

<sup>1</sup> Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17).

<sup>2</sup> Official Records of the United Nations Conference on Prescription (Limitation) in the International Sale of Goods (United Nations publication, Sale No. E.74.V.8), p. 101.

(g) To invite the United Nations Council for Namibia to participate in the Conference in accordance with paragraph 3 of General Assembly resolution 32/9 E of 4 November 1977;

(h) To invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested international organizations, to be represented at the Conference by observers;

(i) To draw the attention of the States and other participants referred to in subparagraphs (d) to (h) above to the desirability of appointing among their representatives persons especially competent in the field to be considered;

(j) To place before the Conference:

- (i) All comments and proposals received from Governments and interested international organizations;

- (ii) An analytical compilation of such comments and proposals prepared by the Secretary-General;

- (iii) Draft provisions concerning implementation, reservations and other final clauses;

- (iv) All relevant documentation and recommendations relating to methods of work and procedure;

- (k) To arrange for adequate staff and facilities for the Conference;

- (l) To ensure that the necessary arrangements are made for the effective participation in the Conference of the representatives referred to in subparagraphs (e) and (f) above, including the requisite financial provisions for their travel expenses and per diem;

6. *Decides* that the languages of the Conference shall be those used in the General Assembly and its Main Committees.

16 December 1978

## OFFICERS OF THE CONFERENCE AND ITS COMMITTEES

### President of the Conference

Mr. Gyula Eörsi (Hungary).

### Vice Presidents of the Conference

The representatives of the following States: Argentina, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Egypt, German Democratic Republic, Germany, Federal Republic of, Greece, Kenya, Libyan Arab Jamahiriya, Pakistan, Peru, Philippines, Republic of Korea, Romania, Spain, Sweden, Union of Soviet Socialist Republics and Zaire.

### First Committee

*Chairman:* Mr. R. Loewe (Austria).

*Vice-Chairman:* Mr. Peter K. Mathanjuki (Kenya).

*Rapporteur:* Mr. Shinichiro Michida (Japan).

### Second Committee

*Chairman:* Mr. Roberto Luis Mantilla-Molina (Mexico).

*Vice-Chairman:* Mr. Mikola P. Makarevitch (Ukrainian Soviet Socialist Republic).

*Rapporteur:* Mr. Venkataramiah Kuchibhotla (India).

### Drafting Committee

*Chairman:* Mr. Warren Khoo Leang Huat (Singapore).

*Vice-Chairman:* Mr. Leif Sevon (Finland).

*Rapporteur:* Mr. Ludvik Kopac (Czechoslovakia).

*Members:* Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libyan Arab Jamahiriya, Republic of Korea, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Zaire.

### Credentials Committee

*Chairman:* Mr. Peter K. Mathanjuki (Kenya).

*Members:* Belgium, China, Ecuador, Kenya, Libyan Arab Jamahiriya, Mexico, Pakistan, Union of Soviet Socialist Republics and United States of America.

## SECRETARIAT OF THE CONFERENCE

Mr. Erik Suy, The Legal Counsel, Office of Legal Affairs (Representative of the Secretary-General of the United Nations).

Mr. Willem Vis, Chief of the International Trade Law Branch, Office of Legal Affairs (Executive Secretary of the Conference; Secretary of the General Committee).

Mr. Eric Bergsten, Senior Legal Officer, International Trade Law Branch (Assistant Secretary of the Conference; Secretary of the Drafting Committee).

Mr. Fritz Enderlein, Senior Legal Officer, International Trade Law Branch (Secretary of the Second Committee).

Mr. Sinha Basnayake, Legal Officer, International Trade Law Branch (Secretary of the First Committee).

- Mr. Miroslav Kotora, Legal Officer, International Trade Law Branch (Assistant Secretary of the Drafting Committee).
- Mr. Gerold Herrmann, Legal Officer, International Trade Law Branch (Assistant Secretary of the General Committee; Assistant Secretary of the First Committee; Secretary of the Credentials Committee).
- Mrs. Kheng-Lian Koh, Legal Officer, International Trade Law Branch (Assistant Secretary of the First Committee; Assistant Secretary of the Credentials Committee).
- Miss Anne-Marie Trahan, Legal Officer, International Trade Law Branch (Assistant Secretary of the Drafting Committee).
- Mr. Jacques Roman, Office of Legal Affairs (Deputy Chief, Treaty Section).

## AGENDA\*

1. Opening of the Conference
2. Election of the President
3. Adoption of the agenda
4. Adoption of the rules of procedure
5. Election of Vice-Presidents of the Conference and of a chairman of each of the main committees
6. Credentials of representatives to the Conference
  - (a) Appointment of the Credentials Committee
  - (b) Report of the Credentials Committee
7. Appointment of members of the Drafting Committee
8. Organization of work
9. Consideration of the question of contracts for the international sale of goods in accordance with General Assembly resolution 33/93 of 16 December 1978
10. Consideration of the question of a protocol to the Convention on the Limitation Period in the International Sale of Goods, adopted at New York on 12 June 1974, to harmonize the provisions of that Convention with those of the Convention on Contracts for the International Sale of Goods as it may be adopted by the Conference in accordance with General Assembly resolution 33/93 of 16 December 1978
11. Adoption of a convention and other instruments deemed appropriate, and of the Final Act of the Conference
12. Signature of the Final Act and of the Convention and other instruments
13. Closure of the Conference

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\* As adopted by the Conference at its 1st plenary meeting.



## **RULES OF PROCEDURE**

### **CHAPTER I**

#### **Representation and credentials**

##### *Composition of delegations*

###### **Rule 1**

The delegation of each State participating in the Conference shall consist of a head of delegation and such other accredited representatives, alternate representatives and advisers as may be required.

##### *Alternates and advisers*

###### **Rule 2**

An alternate representative or an adviser may act as a representative upon designation by the head of delegation.

##### *Submission of credentials*

###### **Rule 3**

The credentials of representatives and the names of alternate representatives and advisers shall be submitted to the Executive Secretary of the Conference if possible not later than 24 hours after the opening of the Conference. Any later change in the composition of delegations shall also be submitted to the Executive Secretary. The credentials shall be issued either by the Head of State or Government or by the Minister for Foreign Affairs.

##### *Credentials Committee*

###### **Rule 4**

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of nine members, who shall be appointed by the Conference on the proposal of the President. It shall examine the credentials of representatives and report to the Conference without delay.

##### *Provisional participation in the Conference*

###### **Rule 5**

Pending a decision of the Conference upon their credentials, representatives shall be entitled to participate provisionally in the Conference.

### **CHAPTER II**

#### **Officers**

##### *Elections*

###### **Rule 6**

The Conference shall elect a President and 22 Vice-Presidents, as well as a Chairman for each of the two main committees provided for in rule 44. These officers shall be elected on the basis of ensuring the representative character of the General Committee provided for

in rule 10. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

##### *Acting President*

###### **Rule 7**

1. If the President finds it necessary to be absent from a meeting or any part thereof, he shall designate a Vice-President to take his place.

2. A Vice-President acting as President shall have the powers and duties of the President.

##### *Replacement of the President*

###### **Rule 8**

If the president is unable to perform his functions, a new President shall be elected.

##### *The President shall not vote*

###### **Rule 9**

The President, or a Vice-President acting as President, shall not vote in the Conference, but shall designate another member of his delegation to vote in his place.

### **CHAPTER III**

#### **General Committee**

##### *Composition*

###### **Rule 10**

There shall be a General Committee of 25 members, consisting of the President and Vice-Presidents of the Conference and the Chairmen of the main committees.

##### *Chairman*

###### **Rule 11**

The President, or in his absence, one of the Vice-Presidents designated by him, shall serve as Chairman of the General Committee.

##### *Substitute members*

###### **Rule 12**

If the President or a Vice-President of the Conference finds it necessary to be absent during a meeting of the General Committee, he may designate a member of his delegation to sit and vote in the Committee. In case of absence, the Chairman of a main committee shall designate the Vice-Chairman of that Committee as his substitute. When serving on the General Committee, the Vice-Chairman of a main committee shall not have the right to vote if he is of the same delegation as another member of the General Committee.

*Functions**Rule 13*

The General Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the co-ordination of its work.

## CHAPTER IV

*Secretariat**Duties of the Secretary-General**Rule 14*

1. The Secretary-General of the United Nations shall be the Secretary-General of the Conference. He, or his representative, shall act in that capacity in all meetings of the Conference.

2. The Secretary-General shall appoint an Executive Secretary of the Conference and shall provide and direct the staff required by the Conference.

*Duties of the Secretariat**Rule 15*

The Secretariat of the Conference shall, in accordance with these rules:

- (a) Interpret speeches made at meetings;
- (b) Receive, translate, reproduce and distribute the documents of the Conference;
- (c) Publish and circulate the official documents of the Conference;
- (d) Prepare and circulate records of public meetings;
- (e) Make and arrange for the keeping of sound recordings of meetings;
- (f) Arrange for the custody and preservation of the documents of the Conference in the archives of the United Nations; and
- (g) Generally perform all other work that may be required in connection with the servicing of the Conference.

*Statements by the Secretariat**Rule 16*

The Secretary-General or any member of the staff designated for that purpose may at any time make either oral or written statements concerning any question under consideration.

## CHAPTER V

*Conduct of business**Quorum**Rule 17*

The President may declare a meeting open and permit the debate to proceed when representatives of at least one third of the States participating in the Conference are present. The presence of representatives of a majority of

the States so participating shall be required for any decision to be taken.

*General powers of the President**Rule 18*

1. In addition to exercising the powers conferred upon him elsewhere by the rules, the President shall preside at the plenary meetings of the Conference, declare the opening and closing of each meeting, direct the discussion, ensure observance of these rules, accord the right to speak, put questions to the vote and announce decisions. The President shall rule on points of order and, subject to these rules, have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the closure of the list of speakers, a limitation on the time to be allowed to speakers and on the number of times each representative may speak on a question, the adjournment or the closure of the debate and the suspension or the adjournment of a meeting.

2. The President, in the exercise of his functions, remains under the authority of the Conference.

*Speeches**Rule 19*

1. No one may address the Conference without having previously obtained the permission of the President. Subject to rules 20, 21 and 24 to 26, the President shall call upon speakers in the order in which they signify their desire to speak. The Secretariat shall be in charge of drawing up a list of such speakers. The President may call a speaker to order if his remarks are not relevant to the subject under discussion.

2. The Conference may limit the time allowed to each speaker and the number of times each representative may speak on a question. Before a decision is taken, two representatives may speak in favour of, and two against, a proposal to set such limits. When the debate is limited and a speaker exceeds the allotted time, the President shall call him to order without delay.

*Precedence**Rule 20*

The Chairman or another representative of a subsidiary organ, may be accorded precedence for the purpose of explaining the conclusions arrived at by that subsidiary organ.

*Points of order**Rule 21*

During the discussion of any matter, a representative may at any time raise a point of order, which shall be decided immediately by the President in accordance with these rules. A representative may appeal against the ruling of the President. The appeal shall be put to the vote immediately, and the President's ruling shall stand unless overruled by a majority of the representatives present and voting. A representative may not, in raising a point



of order, speak on the substance of the matter under discussion.

#### *Closing of list of speakers*

##### *Rule 22*

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed.

#### *Right of reply*

##### *Rule 23*

The right of reply shall be accorded by the President to a representative of a State participating in the Conference who requests it. Any other representative may be granted the opportunity to make a reply. Such replies should be as brief as possible.

#### *Adjournment of debate*

##### *Rule 24*

During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the motion, after which the motion shall be put to the vote immediately.

#### *Closure of debate*

##### *Rule 25*

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall be put to the vote immediately.

#### *Suspension or adjournment of the meeting*

##### *Rule 26*

During the discussion of any matter, a representative may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall be put to the vote immediately.

#### *Order of motions*

##### *Rule 27*

Subject to rule 21, the motions indicated below shall have precedence in the following order over all proposals or other motions before the meeting:

- (a) To suspend the meeting;
- (b) To adjourn the meeting;
- (c) To adjourn the debate;
- (d) To close the debate.

#### *Basic proposals*

##### *Rule 28*

1. The basis for consideration by the Conference of the Convention on Contracts for the International Sale of Goods shall be the following proposals:

(a) The draft articles for a Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law as contained in the report of the Commission on the work of its eleventh session;\* and

(b) The draft provisions concerning implementation, reservations and other final clauses prepared by the Secretary-General.\*\*

2. The basis for consideration of a protocol to the Convention on the Limitation Period in the International Sale of Goods, adopted at New York on 12 June 1974, to harmonize the provisions of that Convention with those of the Convention on Contracts for the International Sale of Goods as it may be adopted by the Conference shall be the draft provisions prepared by the Secretary-General.\*\*\*

3. Other proposals shall be those submitted at the Conference in accordance with rule 29.

#### *Submission of other proposals*

##### *Rule 29*

Other proposals shall normally be submitted in writing to the Executive Secretary of the Conference, who shall circulate copies to all delegations. As a general rule no proposal shall be discussed or put to the vote at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the discussion and consideration of amendments even though these amendments have not been circulated or have only been circulated the same day.

#### *Decisions on competence*

##### *Rule 30*

Subject to rule 21, any motion calling for a decision on the competence of the Conference to discuss any matter or to adopt a proposal or an amendment submitted to it shall be put to the vote before the matter is discussed or a vote is taken on the proposal or amendment in question.

#### *Withdrawal of proposals and motions*

##### *Rule 31*

A proposal or a motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that it has not been amended. A proposal or a motion which has thus been withdrawn may be reintroduced by any representative.

#### *Reconsideration of proposals*

##### *Rule 32*

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-

\* Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17); draft reproduced in document A/CONF.97/5.

\*\* Document A/CONF.97/6.

\*\*\* Document A/CONF.97/7.

thirds majority of the representatives present and voting, so decides. Permission to speak on the motion to reconsider shall be accorded only to two speakers opposing the motion, after which it shall be put to the vote immediately.

## CHAPTER VI

### Voting

#### *Voting rights*

##### *Rule 33*

Each State represented at the Conference shall have one vote.

#### *Majority required*

##### *Rule 34*

1. Decisions of the Conference on all matters of substance shall be taken by a two-thirds majority of the representatives present and voting.

2. Decisions of the Conference on matters of procedure shall be taken by a majority of the representatives present and voting.

3. If the question arises whether a matter is one of procedure or of substance, the President shall rule thereon. An appeal against this ruling shall be put to the vote immediately and the President's ruling shall stand unless overruled by a majority of the representatives present and voting.

4. For the purpose of these rules, the phrase "representatives present and voting" means representatives present and casting an affirmative or negative vote. Representatives who abstain from voting shall be considered as not voting.

5. If the vote is equally divided on a decision requiring a majority of the representatives present and voting, the proposal or motion shall be regarded as rejected.

#### *Method of voting*

##### *Rule 35*

The Conference shall normally vote by show of hands or by standing, but any representative may request a roll call. The roll call shall be taken in the English alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President.

#### *Conduct during voting*

##### *Rule 36*

The President shall announce the commencement of voting, after which no representative shall be permitted to intervene until the result of the vote has been announced, except on a point of order in connection with the process of voting.

#### *Explanation of vote*

##### *Rule 37*

Representatives may make brief statements consisting solely of explanation of their votes, before the voting has

commenced or after the voting has been completed. The representative of a State sponsoring a proposal or motion shall not speak in explanation of vote thereon except if it has been amended.

#### *Division of proposals*

##### *Rule 38*

A representative may move that parts of a proposal shall be voted on separately. If objection is made to the request for division, the motion for division shall be voted upon. If the motion for division is carried, those parts of the proposal which are subsequently approved shall be put to the vote as a whole. If all operative parts of the proposal have been rejected, the proposal shall be considered to have been rejected as a whole.

#### *Amendments*

##### *Rule 39*

An amendment is a proposal that does no more than add to, delete from or revise part of another proposal. Unless specified otherwise, the word "proposal" in these rules shall be considered as including amendments.

#### *Voting on amendments*

##### *Rule 40*

When an amendment is moved to a proposal, the amendment shall be voted on first. When two or more amendments are moved to a proposal, the Conference shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom, and so on until all the amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote. If one or more amendments are adopted, the amended proposal shall then be voted upon.

#### *Voting on proposals*

##### *Rule 41*

If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted. The Conference may, after each vote on a proposal, decide whether to vote on the next proposal.

#### *Elections*

##### *Rule 42*

All elections shall be held by secret ballot. In the absence of any objection, the Conference may decide otherwise in an election where the number of candidates does not exceed the number of places to be filled.

##### *Rule 43*

1. When one or more elective places are to be filled at one time under the same conditions, those candidates, in a number not exceeding the number of such places, obtaining in the first ballot a majority of the votes cast and the largest number of votes, shall be elected.

2. If the number of candidates obtaining such majority is less than the number of places to be filled, additional ballots shall be held to fill the remaining places.

## CHAPTER VII

### Subsidiary organs

#### *Main committees, sub-committees and working groups*

##### *Rule 44*

1. The Conference shall establish two main committees (the "First Committee" and the "Second Committee") each of which may set up sub-committees or working groups.

2. The Conference shall determine the matters to be considered by each main committee. The General Committee, upon the request of the Chairman of a main committee, may adjust the allocation of work between the main committees.

#### *Drafting Committee*

##### *Rule 45*

1. The Conference shall establish a Drafting Committee consisting of 15 members appointed by the Conference on the proposal of the General Committee. The Rapporteur of each of the main committees may participate *ex officio*, without a vote, in the work of the Drafting Committee.

2. The Drafting Committee shall prepare drafts and give advice on drafting as requested by the Conference or by a main committee. It shall co-ordinate and review the drafting in the languages of the Conference of all texts adopted, and shall report as appropriate either to the Conference or to the main committee concerned.

#### *Officers*

##### *Rule 46*

1. Each main committee shall have a chairman, a vice-chairman and a rapporteur. Other subsidiary organs shall have a chairman and such other officers as may be required.

2. Except as otherwise provided in rules 6 and 11, each committee, sub-committee and working group shall elect its own officers.

#### *Applicable rules*

##### *Rule 47*

The rules contained in chapters II, IV, V and VI above shall be applicable, *mutatis mutandis*, to the proceedings of subsidiary organs, except that:

(a) The Chairmen of the General, Drafting and Credentials Committees and the chairmen of sub-committees and working groups may exercise the right to vote.

(b) The chairman of a main committee may declare a meeting open and permit the debate to proceed when representatives of at least one quarter of the States participating in the Conference are present. The presence of re-

presentatives of a majority of the States so participating shall be required for any decision to be taken.

(c) A majority of the representatives on the General, Drafting or Credentials Committee shall constitute a quorum.

(d) Decisions of subsidiary organs shall be taken by a majority of the representatives present and voting, except that a motion to reconsider a proposal shall require the majority established by rule 32.

## CHAPTER VIII

### Languages and records

#### *Languages of the Conference*

##### *Rule 48*

Arabic, Chinese, English, French, Russian and Spanish shall be the languages of the Conference.

#### *Interpretation*

##### *Rule 49*

1. Speeches made in a language of the Conference shall be interpreted into the other such languages.

2. A representative may speak in a language other than a language of the Conference. In this case he shall himself provide for interpretation into one of the languages of the Conference and interpretation into the other languages by the interpreters of the Secretariat may be based on the interpretation given in the first such language.

#### *Records and sound recordings of meetings*

##### *Rule 50*

1. Summary records of the plenary meetings of the Conference and of the meetings of the Main Committees shall be kept in the languages of the Conference. As a general rule, they shall be circulated as soon as possible in all the languages of the Conference, to all representatives, who shall inform the Secretariat within five working days after the circulation of the summary record of any corrections they wish to have made.

2. The Secretariat shall make sound recordings of meetings of the Conference and of the main committees. Such recordings shall be made of meetings of other subsidiary organs when the body concerned so decides.

#### *Language of official documents*

##### *Rule 51*

Official documents shall be made available in the languages of the Conference.

## CHAPTER IX

### Public and private meetings

#### *Plenary and main committees*

##### *Rule 52*

The plenary meetings of the Conference and the meetings of its Main Committees shall be held in public unless the body concerned decides otherwise.

*Subsidiary organs**Rule 53*

As a general rule meetings of subsidiary organs other than main committees shall be held in private.

## CHAPTER X

**Other participants and observers***Representatives of the United Nations Council for Namibia**Rule 54*

Representatives designated by the United Nations Council for Namibia may participate in the deliberations of the Conference, its main committees and, as appropriate, in other subsidiary organs. They shall have the right to submit proposals.

*Representatives of organizations that have received a standing invitation from the General Assembly to participate in the sessions and work of all international conferences convened under the auspices of the General Assembly in the capacity of observer*

*Rule 55*

Representatives designated by organizations that have received a standing invitation from the General Assembly to participate in the sessions and work of all international conferences convened under the auspices of the General Assembly may participate as observers, without the right to vote, in the deliberations of the Conference, its main committees and, as appropriate, in other subsidiary organs.

*Representatives of national liberation movements**Rule 56*

Representatives designated by national liberation movements invited to the Conference may participate as observers, without the right to vote, in the deliberations of the Conference, its main committees and, as appropriate, in other subsidiary organs.

*Representatives of United Nations organs and agencies**Rule 57*

Representatives designated by organs of the United Nations, the specialized agencies and the International Atomic Energy Agency may participate as observers, without the right to vote, in the deliberations of the Conference, its main committees and, as appropriate, in other subsidiary organs.

*Observers for other intergovernmental organizations**Rule 58*

Observers designated by other intergovernmental organizations invited to the Conference may participate, without the right to vote, in the deliberations of the Conference, its main committees and, as appropriate, in other subsidiary organs.

*Observers for non-governmental organizations**Rule 59*

1. Observers designated by non-governmental organizations invited to the Conference may attend public meetings of the Conference and its main committees and, as appropriate, other subsidiary organs.

2. Upon the invitation of the presiding officer of the body concerned and subject to the approval of that body, such observers may make oral statements on questions in which they have a special competence.

*Written statements**Rule 60*

Written statements related to the work of the Conference submitted by the designated representatives or observers referred to in rules 54 to 59 shall be distributed by the Secretariat to all delegations in the quantities and in the languages in which the statements are made available to the Secretariat for distribution, provided that a statement submitted on behalf of a non-governmental organization is on a subject in which it has a special competence and is related to the work of the Conference.

## CHAPTER XI

**Amendment or suspension of the rules of procedure***Method of amendment**Rule 61*

These rules may be amended by a decision of the Conference taken by a two-thirds majority of the representatives present and voting upon a recommendation of the General Committee.

*Method of suspension**Rule 62*

These rules may be suspended by a decision of the Conference, provided that 24 hours' notice of the proposal for the suspension has been given which may be waived if no representative objects; subsidiary organs may by unanimous consent waive rules pertaining to them. Any suspension shall be limited to a specific and stated purpose and to the period required to achieve it.

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A/CONF.97/C.1/L.177	China	Preamble	Considered by the Drafting Committee
A/CONF.97/C.1/L.178	China	75	
A/CONF.97/C.1/L.179	United States of America	43	
A/CONF.97/C.1/L.180	United States of America	42	
A/CONF.97/C.1/L.181 and Corr.1 (Chinese only)	United States of America	46	
A/CONF.97/C.1/L.182	Federal Republic of Germany	53	
A/CONF.97/C.1/L.183	Turkey	51	
A/CONF.97/C.1/L.184	Norway		Proposed new subtitles
A/CONF.97/C.1/L.185	Norway	60	
A/CONF.97/C.1/L.186	Denmark	65	
A/CONF.97/C.1/L.187	Federal Republic of Germany	62	
A/CONF.97/C.1/L.188	Argentina, Spain, Portugal	77	
A/CONF.97/C.1/L.189	Argentina, Spain, Portugal	54	
A/CONF.97/C.1/L.190	Finland	65	
A/CONF.97/C.1/L.191/ Rev.1	Norway	65	
A/CONF.97/C.1/L.192	Norway	66	
A/CONF.97/C.1/L.193	Norway	71	
A/CONF.97/C.1/L.194	Norway	72	
A/CONF.97/C.1/L.195	Norway	80	
A/CONF.97/C.1/L.196	Pakistan	51	
A/CONF.97/C.1/L.197	Pakistan	61	
A/CONF.97/C.1/L.198	Pakistan	44	
A/CONF.97/C.1/L.199	Federal Republic of Germany, France, Norway, Sweden	42	
A/CONF.97/C.1/L.200	Argentina, Spain, Portugal	51	
A/CONF.97/C.1/L.201	Argentina, Spain, Portugal	50	
A/CONF.97/C.1/L.202	India	51	
A/CONF.97/C.1/L.203	United States of America	44	
A/CONF.97/C.1/L.204	Finland, Ghana, Kenya, Nigeria, Pakistan, Sweden	37	Adopted as a new article to follow article 40
A/CONF.97/C.1/L.205	France	51	
A/CONF.97/C.1/L.206	Argentina, Spain, Portugal	New article 55 <i>bis</i> and <i>ter</i>	Considered under article 55
A/CONF.97/C.1/L.207	Argentina, Spain, Portugal	52	
A/CONF.97/C.1/L.208	Federal Republic of Germany	65	
A/CONF.97/C.1/L.209	Turkey	60	
A/CONF.97/C.1/L.210	Turkey	65	
A/CONF.97/C.1/L.211	Federal Republic of Germany	74	
A/CONF.97/C.1/L.212	Federal Republic of Germany	New article 81 <i>bis</i>	Considered under article 81
A/CONF.97/C.1/L.213	Bulgaria, Canada, German Democratic Republic, Federal Republic of Germany, Netherlands, Norway, United States of America	44	

<i>Symbol</i>	<i>Sponsors or Title</i>	<i>Article</i>	<i>Observations</i>
A/CONF.97/C.1/L.214	Working Group: Argentina, France, Iraq, Republic of Korea, Singapore, United Kingdom, Union of Soviet Socialist Republics	33	
A/CONF.97/C.1/L.215 and Adds.1-14	Draft Report of the First Committee		
A/CONF.97/C.1/L.216	Denmark, Finland, Greece, Sweden	New article 73 <i>bis</i>	Considered under article 69
A/CONF.97/C.1/L.217	German Democratic Republic	65 and new article 65 <i>bis</i>	
A/CONF.97/C.1/L.218	Czechoslovakia	New article 60 <i>bis</i>	Considered under article 69
A/CONF.97/C.1/L.219	Kenya	61	
A/CONF.97/C.1/L.220	Italy	51	
A/CONF.97/C.1/L.221	Norway	60	
A/CONF.97/C.1/L.222	Japan	New article 73 <i>bis</i>	Considered under article 69
A/CONF.97/C.1/L.223	Pakistan	65	
A/CONF.97/C.1/L.224	Australia, Canada	New article 62 <i>bis</i>	Considered under article 62
A/CONF.97/C.1/L.225	Pakistan	69	
A/CONF.97/C.1/L.226/ Rev.1	United Kingdom	69	
A/CONF.97/C.1/L.227	Australia	75	
A/CONF.97/C.1/L.228	United States of America	73	
A/CONF.97/C.1/L.229/ Rev.1	United States of America	82	
A/CONF.97/C.1/L.230	Norway		Drafting proposals considered under article 78
A/CONF.97/C.1/L.231	United States of America	80	
A/CONF.97/C.1/L.232	Working Group: Argentina, France, Ghana, India, Italy, Pakistan, Portugal, Sweden, Turkey, Union of Soviet Socialist Republics	51	
A/CONF.97/C.1/L.233	United States of America	79	
A/CONF.97/C.1/L.234	German Democratic Republic	New article 65 <i>bis</i>	Considered under article 65
A/CONF.97/C.1/L.235	Pakistan	70	
A/CONF.97/C.1/L.236	Pakistan	79	
A/CONF.97/C.1/L.237	Pakistan	80	
A/CONF.97/C.1/L.238	United Kingdom	79	
A/CONF.97/C.1/L.239	Canada	66	
A/CONF.97/C.1/L.240	Canada	80	
A/CONF.97/C.1/L.241	Australia	79	
A/CONF.97/C.1/L.242	Australia	81	
A/CONF.97/C.1/L.243	Working Group: German Democratic Republic, Ghana, Norway, Sweden, Switzerland	65	
A/CONF.97/C.1/L.244	India	80	
A/CONF.97/C.1/L.245	Australia, Greece, Norway, Republic of Korea	72	
A/CONF.97/C.1/L.246	Working Group: Argentina, Canada, Netherlands, Portugal	77	
A/CONF.97/C.1/L.247	Working Group: Argentina, Czechoslovakia, Denmark, Ghana, Greece, India, Italy, Pakistan, Sweden, United States of America, Yugoslavia	New article 73 <i>bis</i>	Considered under article 69
A/CONF.97/C.1/L.248 and Adds.1-3	Report of Drafting Committee		
A/CONF.97/C.1/L.249	Egypt	62	
A/CONF.97/C.1/L.250	Egypt	65	
A/CONF.97/C.1/L.251	Italy	62	
A/CONF.97/C.1/L.252	Working Group: Argentina, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Iraq, Mexico, Republic of Korea, United States of America	62	
A/CONF.97/C.1/L.253	Working Group: Argentina, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Iraq, Mexico, Republic of Korea, United States of America	63	

## Documents submitted during the Conference to the Second Committee

<i>Symbol</i>	<i>Sponsors or Title</i>	<i>Article</i>	<i>Observations</i>
A/CONF.97/C.2/L.1	Provisional agenda		
A/CONF.97/C.2/L.2	Canada		
A/CONF.97/C.2/L.3	Australia	New article C bis	
A/CONF.97/C.2/L.4	Austria	New article Y	
A/CONF.97/C.2/L.5	United Kingdom	X	
A/CONF.97/C.2/L.6	United Kingdom	H	
A/CONF.97/C.2/L.7	Czechoslovakia	C and new article C bis	See also A/CONF.97/L.4 and A/CONF.97/C.1/L.7 and L.17
A/CONF.97/C.2/L.8	United Kingdom	J	
A/CONF.97/C.2/L.9	Union of Soviet Socialist Republics	D	
A/CONF.97/C.2/L.10	Canada, Finland, France, Netherlands	C	
A/CONF.97/C.2/L.11	France, Federal Republic of Germany, Japan, Netherlands, Hague Conference on Private International Law	E	
A/CONF.97/C.2/L.12	United Kingdom	J	
A/CONF.97/C.2/L.13	Australia, Canada, Norway	B	
A/CONF.97/C.2/L.14	Norway	Protocol	
A/CONF.97/C.2/L.15	United Kingdom	K	
A/CONF.97/C.2/L.16	United Kingdom	K	
A/CONF.97/C.2/L.17	Secretary-General	J	
A/CONF.97/C.2/L.18 and Add.1 and 2	Secretary-General	Protocol	
A/CONF.97/C.2/L.19	Norway	Protocol	
A/CONF.97/C.2/L.20	Union of Soviet Socialist Republics	E	
A/CONF.97/C.2/L.21	Federal Republic of Germany	Protocol	
A/CONF.97/C.2/L.22	Austria	Protocol	
A/CONF.97/C.2/L.23	Netherlands	C	
A/CONF.97/C.2/L.24	Secretary-General	Titles and order of draft articles concerning implementation, declarations, reservations and other final clauses	
A/CONF.97/C.2/L.25 and Add.1—3	Draft report of Second Committee		
A/CONF.97/C.2/L.26 and Add.1 and 2	Japan	Protocol	
A/CONF.97/C.2/L.27	Czechoslovakia	Protocol	
A/CONF.97/C.2/L.28	Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods		



*Part One*

**DOCUMENTS OF THE CONFERENCE**





## PROPOSALS, REPORTS AND OTHER DOCUMENTS

### A. REPORT OF THE CREDENTIALS COMMITTEE

*Document A/CONF.97/10*

*[Original: English]  
[1 April 1980]*

1. At its 3rd plenary meeting on 11 March 1980, the Conference, in accordance with rule 4 of its rules of procedure, appointed a Credentials Committee composed of the following States: Belgium, China, Ecuador, Kenya, Libyan Arab Jamahiriya, Mexico, Pakistan, Union of Soviet Socialist Republics and United States of America.

2. The Credentials Committee held one meeting on 31 March 1980. Mr. Peter K. Mathanjuki (Kenya) was unanimously elected Chairman.

3. The Committee noted from a memorandum submitted to it by the Executive Secretary of the Conference that as at 28 March 1980:

(a) 62 States were participating in the Conference and one State had sent an observer;

(b) Credentials issued by the Head of State or Government or the Minister for Foreign Affairs had been submitted, as provided for in rule 3 of the rules of procedure of the Conference, by 39 participating States;

(c) The credentials of the representatives of six States were communicated to the Executive Secretary of the Conference in the form of cables from their respective Ministers for Foreign Affairs;

(d) The representatives of 13 States were designated in letters or notes verbales from their respective Permanent Representatives, Permanent Missions, Ambassadors or Embassies in New York or Vienna;

(e) In respect of four States participating in the Conference, no communication regarding the designation of their representatives had been received, but the Executive Secretary of the Conference had been informed that proper credentials for these representatives had been dispatched.

4. The Committee noted that the credentials issued by four States included full powers to sign any conven-

tion that might be adopted by the Conference. The Committee thought it desirable to draw to the attention of the Conference the fact that, while no special powers were needed for signing the Final Act of the Conference, those representatives who intended to sign a convention at the close of the Conference should be in possession of appropriate full powers for that purpose.

5. On the proposal of the Chairman, the Committee agreed to accept the credentials of the 39 States referred to in subparagraph (b) of paragraph 3 above. The Committee further agreed that, in the light of past practice and in view of the approaching end of the Conference, the communications referred to in subparagraphs (c) and (d) of paragraph 3 above should be accepted provisionally, pending the receipt of the formal credentials of the representatives concerned. The Committee noted that in the latter instances assurances had been given that proper credentials would be transmitted as soon as possible. Furthermore, in respect of the representatives referred to in subparagraph (e) of paragraph 3 above, the Committee agreed that they should be entitled to continue to participate provisionally in the Conference, in accordance with rule 5 of the rules of procedure, it being understood that their credentials had already been dispatched.

6. The Committee requested the Secretariat to prepare, in consultation with the Chairman, a draft report of the Committee and distribute it to all members of the Committee for their comments and approvals. The Committee authorized its Chairman to submit the report of the Committee on its behalf to the Plenary Conference and to report directly to the Conference in the event that, in the time intervening between the meeting of the Credentials Committee and consideration by the Plenary Conference of the Committee's report, further credentials were received.

### B. HISTORICAL INTRODUCTION TO THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, PREPARED BY THE SECRETARIAT\*

*Document A/CONF.97/5*

*[Original: English]  
[14 March 1979]*

1. The draft Convention on Contracts for the International Sale of Goods, which has been referred by the General Assembly to the United Nations Conference on

the International Sale of Goods,<sup>1</sup> is the outcome of a long process of unification whose origin goes back to the early days of the movement in respect of the unification of international trade law.

\* This historical introduction was originally published as the introduction to document A/CONF.97/5.

<sup>1</sup> Resolution 33/93 of 16 December 1978.

2. In April 1930 the International Institute for the Unification of Private Law (UNIDROIT) decided to undertake the preparation of a uniform law on the international sale of goods. Two drafts were prepared and distributed to Governments for comments through the League of Nations prior to the cessation of work on this project in 1939 on account of the Second World War.

3. In 1951, the Government of the Netherlands organized a Diplomatic Conference on the International Sale of Goods in order to consider the draft prepared by UNIDROIT and to determine the means by which the work could be brought to a successful conclusion. The Conference decided that the work should be continued and appointed a "Special Committee" to prepare a new draft on the basis of the suggestions made at the Conference.<sup>2</sup>

4. The Special Committee prepared a revised draft in 1956 which was circulated by the Government of the Netherlands to interested Governments for comments.<sup>3</sup> On the basis of the replies a modified draft was prepared by the Special Committee in 1963. In 1964 the Government of the Netherlands convened a diplomatic conference at The Hague to which it submitted the 1963 draft for consideration.

5. In the meantime UNIDROIT had prepared a draft of the Uniform Law on the Formation of Contracts for the International Sale of Goods. The Government of the Netherlands also circulated this draft to interested Governments for their comments. The draft and the comments thereon were also submitted to the 1964 Hague Conference.

6. The 1964 Hague Conference adopted the two uniform laws as well as the conventions to which they were annexed, i.e. the Convention relating to a Uniform Law on the International Sale of Goods<sup>4</sup> (1964 Hague Sales Convention) and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods<sup>5</sup> (1964 Hague Formation Convention). The two 1964 Hague Conventions were opened for signature on 1 July 1964.

7. The 1964 Hague Sales Convention entered into force on 18 August 1972. It has been ratified, or acceded to, by Belgium, the Gambia, Germany, Federal Republic of, Israel, Italy, the Netherlands (for the Kingdom in Europe), San Marino and the United Kingdom of Great Britain and Northern Ireland. The 1964 Hague Formation Convention entered into force on 23 August 1972. It has been ratified, or acceded to, by the States listed above with the exception of Israel.

8. At the first session of the United Nations Commission on International Trade Law (UNCITRAL) held in 1968, it was decided that, in respect of the two 1964 Hague Conventions, which were then not yet in force, the Commission should determine the position of States in respect of those Conventions. Accordingly, the Commission requested the Secretary-General to send a questionnaire to States Members of the United Nations and States members of any of its specialized agencies.<sup>6</sup>

9. The replies and an analysis of the replies were submitted to the second session of the Commission in 1969. After consideration of the 1964 Hague Conventions and the replies the Commission decided to create a Working Group on the International Sale of Goods of 14 member States which was instructed to ascertain:

"which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose . . ."

10. The Working Group, which was subsequently enlarged to 15 members, held nine sessions. At its first seven sessions it considered the Sales Convention,<sup>7</sup> and at its eighth and ninth sessions it considered the Formation Convention.<sup>8</sup> In both cases the Working Group recommended that the Commission adopt new texts. These texts modified the rules contained in the two uniform laws to make them more acceptable to countries of different legal, economic or social systems.

11. The Commission, at its tenth session in 1977, adopted the draft Convention on the International Sale of Goods based upon the text proposed by the Working Group, and at its eleventh session in 1978 adopted the rules on the formation of contracts for the international sale of goods based upon the text proposed by the Working Group.<sup>9</sup> At its eleventh session the Commission also decided to combine the draft Convention on the International Sale of Goods which it had adopted at its tenth ses-

<sup>6</sup> Report of the United Nations Commission on International Trade Law on the work of its first session (1968), *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 48 (14) (*Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No. E.71.V.1), part two, I, A, para. 48 (14)).

<sup>7</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 38 (*Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication: Sales No. E.71.V.1), part two, II, A, para. 38).

<sup>8</sup> The reports of the Working Group on the International Sale of Goods on the work of its first seven sessions are to be found in documents A/CN.9/35, A/CN.9/52, A/CN.9/62 and Add.1-2, A/CN.9/75, A/CN.9/87, A/CN.9/100 and A/CN.9/116, which have been reproduced in volumes I through VII of the *Yearbook*.

<sup>9</sup> The reports of the Working Group on the International Sale of Goods on the work of its eighth and ninth sessions are to be found in documents A/CN.9/128 and A/CN.9/142.

<sup>10</sup> *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 35 (*Yearbook of the United Nations Commission on International Trade Law, Volume VIII: 1977* (United Nations publication, Sales No. E.78.V.7), part one, II, A, para. 35); *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 28.

<sup>2</sup> The Final Act of the Conference is contained in *Unification of Law* (1954), pp. 282-305.

<sup>3</sup> The various drafts and comments by Governments thereon, beginning with the 1956 draft, are reproduced in *Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2-25 April 1964, Records and Documents of the Conference, Volume II - Documents*.

<sup>4</sup> United Nations, *Treaty Series*, vol. 834, No. 11929, p. 107, *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, vol. I (United Nations publication, Sales No. E.71.V.3), p. 39.

<sup>5</sup> United Nations, *Treaty Series*, vol. 834, No. 11930, p. 107, *Register of Texts*, vol. I, p. 64.

sion with the rules on formation of contracts into the draft Convention on Contracts for the International Sale of Goods.<sup>11</sup> It is this draft Convention which the General Assembly, on the recommendation of the Commission,

has submitted to the Conference of Plenipotentiaries for its consideration.

<sup>11</sup> *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 18.

## C. TEXT OF DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS APPROVED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW\*

### *Document A/CONF.97/5*

[Previously published in the report of the Commission on the work of its eleventh session]\*\*

[Original: English]  
[14 March 1979]

## PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

### CHAPTER I. SPHERE OF APPLICATION

#### *Article 1*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

#### *Article 2*

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

#### *Article 3*

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

#### *Article 4*

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

#### *Article 5*

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

### CHAPTER II. GENERAL PROVISIONS

#### *Article 6*

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

#### *Article 7*

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

\* For relationship of the draft articles to the provisions in the United Nations Convention on Contracts for the International Sale of Goods, see the comparative table in part III of this volume.

\*\* See *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*; chap. II, para. 28.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### *Article 8*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### *Article 9*

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### *Article 10*

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

#### *Article 11*

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

### **PART II. FORMATION OF THE CONTRACT**

#### *Article 12*

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the of-

feror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

#### *Article 13*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

#### *Article 14*

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or

(b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### *Article 15*

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

#### *Article 16*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

*Article 17*

(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

*Article 18*

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

*Article 19*

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

*Article 20*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

*Article 21*

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

*Article 22*

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

## PART III. SALES OF GOODS

## CHAPTER I. GENERAL PROVISIONS

*Article 23*

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

*Article 24*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

*Article 25*

Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

*Article 26*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

*Article 27*

(1) A contract may be modified or abrogated by the mere agreement of the parties.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

## CHAPTER II. OBLIGATIONS OF THE SELLER

*Article 28*

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

## SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

*Article 29*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place — in placing the goods at the buyer's disposal at that place;

(c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

*Article 30*

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

*Article 31*

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date; or

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

*Article 32*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

## SECTION II. CONFORMITY OF THE GOODS AND THIRD PARTY CLAIMS

*Article 33*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

*Article 34*

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

*Article 35*

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

*Article 36*

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

*Article 37*

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

*Article 38*

The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

*Article 39*

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

*Article 40*

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that

the goods would be resold or otherwise used in that State; or

(b) in any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

SECTION III. REMEDIES FOR BREACH OF CONTRACT  
BY THE SELLER

*Article 41*

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) exercise the rights provided in articles 42 to 48;

(b) claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

*Article 42*

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

*Article 43*

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.



*Article 44*

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

*Article 45*

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) in respect of late delivery, after he has become aware that delivery has been made; or

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

*Article 46*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44

or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

*Article 47*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

*Article 48*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

## CHAPTER III. OBLIGATIONS OF THE BUYER

*Article 49*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

## SECTION I. PAYMENT OF THE PRICE

*Article 50*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

*Article 51*

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

*Article 52*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.



*Article 53*

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

*Article 54*

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

*Article 55*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

## SECTION II. TAKING DELIVERY

*Article 56*

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

SECTION III. REMEDIES FOR BREACH OF CONTRACT  
BY THE BUYER*Article 57*

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) exercise the rights provided in articles 58 to 61;
- (b) claim damages as provided in articles 70 to 73.

(2) The seller is not deprived of any right he may have

to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

*Article 58*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

*Article 59*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

*Article 60*

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or the declaration by the buyer that he will not perform his obligations within such an additional period.

*Article 61*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

#### CHAPTER IV. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

##### SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

###### Article 62

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

###### Article 63

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

###### Article 64

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future

deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

##### SECTION II. EXEMPTIONS

###### Article 65

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such nonreceipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

##### SECTION III. EFFECTS OF AVOIDANCE

###### Article 66

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

###### Article 67

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

#### Article 68

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

#### Article 69

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

### SECTION IV. DAMAGES

#### Article 70

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

#### Article 71

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

#### Article 72

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if

he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

#### Article 73

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

### SECTION V. PRESERVATION OF THE GOODS

#### Article 74

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

#### Article 75

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

#### Article 76

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

#### Article 77

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable

delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### CHAPTER V. PASSING OF RISK

##### Article 78

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

##### Article 79

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

##### Article 80

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

##### Article 81

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

##### Article 82

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

### D. COMMENTARY ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, PREPARED BY THE SECRETARIAT

*Document A/CONF.97/5*

*[Original: English]  
[14 March 1979]*

#### PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

##### CHAPTER I. SPHERE OF APPLICATION

##### Article 1

*[Sphere of application]<sup>1</sup>*

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

<sup>1</sup> The titles to the articles have been prepared by the Secretariat at the request of the United Nations Commission on International Trade Law

but have not been approved by the Commission (United Nations Commission on International Trade Law, summary record of the 208th meeting, A/CN.9/SR.208, para 47).

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration.

#### PRIOR UNIFORM LAW

Uniform Law on the International Sale of Goods (ULIS), articles 1, 2 and 7.

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Prescription Convention), articles 2 and 3.

#### Commentary

1. This article provides the general rules for determining whether this Convention is applicable to a contract of sale of goods as well as to its formation.

#### Basic criterion, paragraph (1)

2. Article 1 (1) provides that the basic criterion for the application of this Convention to a contract of sale of goods as well as to its formation is that the places of business of the parties are in different States.<sup>2</sup>

3. This Convention is not concerned with the law governing contracts of sale or their formation where the parties have their places of business within one and the same State. These matters will normally be governed by the domestic law of that State.

4. By focusing on the sale of goods between parties whose places of business are in different States, the Convention will serve its three major purposes:

- (1) to reduce the search for a forum with the most favourable law;
- (2) to reduce the necessity of resorting to rules of private international law;
- (3) to provide a modern law of sales appropriate for transactions of an international character.

#### Additional criteria, subparagraphs (1) (a) and (1) (b)

5. Even though the parties have their places of business in different States, this Convention applies only if:

- (1) the States in which the parties have their places of business are Contracting States; or
- (2) the rules of private international law lead to the application of the law of a Contracting State.

6. If the two States in which the parties have their places of business are Contracting States this Convention applies even if the rules of private international law of the forum would normally designate the law of a third country, such as the law of the State in which the contract was concluded. This result could be defeated only if the litigation took place in a third non-Contracting State, and the rules of private international law of that State would apply the law of the forum, i.e., its own law, or the law of a fourth non-Contracting State to the contract.

7. Even if one or both of the parties to the contract have their places of business in a State which is not a Contracting State, the Convention is applicable if the rules of private international law of the forum lead to the application of the law of a Contracting State. In such a situation the question is then which law of sales of that State shall apply. If the parties to the contract are from different States, the appropriate law of sales is this Convention.

8. A further application of this principle is that if two parties from different States have designated the law of a Contracting State as the law of the contract, this Convention is applicable even though the parties have not specifically mentioned the Convention.

<sup>2</sup> If a party has places of business in more than one State, the relevant place of business is determined by article 9 (a).

#### Awareness of situation, paragraph (2)

9. Under paragraph (2), the Convention does not apply if "the fact that the parties have their places of business in different States . . . does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract". One example of such a situation is where the parties appeared to have their places of business in the same State but one of the parties was acting as the agent for an undisclosed foreign principal. In such a situation paragraph (2) provides that the sale, which appears to be between parties whose places of business are in the same State, is not governed by this Convention.

#### Nationality of the parties, civil or commercial character of the transaction, paragraph (3)

10. International conventions which affect the rights of individuals are often intended to protect the rights of the nationals of the Contracting States in their dealings in or with the other Contracting State or States. Therefore, it is typical that these conventions apply only to relations between "nationals" of the Contracting States.

11. However, the question whether this Convention is applicable to a contract of sale of goods is determined primarily by whether the relevant "places of business" of the parties are in different Contracting States. The relevant "place of business" of a party is determined by application of article 9 (a) without reference to his nationality, place of incorporation, or place of head office. This paragraph reinforces that rule by making it clear that the nationality of the parties is not to be taken into consideration.

12. In some legal systems the law relating to contracts of sale of goods is different depending on whether the parties or the contract are characterized as civil or commercial. In other legal systems this distinction is not known. In order to ensure that the scope of application provisions of this Convention are not interpreted to apply only to contracts of sale characterized as "commercial" or between parties characterized as "commercial" under the law of a Contracting State, article 1 (3) provides that the civil or commercial character of the parties or of the contract is not to be taken into consideration.

13. It should be noted, however, that article 2 excludes from the sphere of application of this Convention certain contracts for the sale of goods which are likely to be characterized as "civil" contracts by a legal system which recognizes the distinction between civil and commercial contracts. Most notably, article 2 (a) excludes from the sphere of application of this Convention sales "of goods bought for personal, family or household use."

14. Paragraph (3) applies only to the scope of application provisions of this Convention. It does not mean that the civil or commercial character of the parties may not be taken into consideration for the purposes of determining such matters as the period of time which is to be regarded as a reasonable period of time for giving notice of lack of conformity of the goods under article 37 (1).

#### Article 2

##### [Exclusions from Convention]

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

## PRIOR UNIFORM LAW

ULIS, article 5.  
ULF, article 1 (6).  
Prescription Convention, article 4.

## Commentary

1. Article 2 sets out those sales which are excluded from the application of this Convention. The exclusions are of three types: those based on the purpose for which the goods were purchased, those based on the type of transaction and those based on the kinds of goods sold.

*Exclusion of consumer sales, subparagraph (a)*

2. Subparagraph (a) of this article excludes consumer sales from the scope of this Convention. A particular sale is outside the scope of this Convention if the goods are bought for "personal, family or household use." However, if the goods were purchased by an individual for a commercial purpose, the sale would be governed by this Convention. Thus, for example, the following situations are within the Convention: the purchase of a camera by a professional photographer for use in his business; the purchase of soap or other toiletries by a business for the personal use of the employees; the purchase of a single automobile by a dealer for resale.

3. A rationale for excluding consumer sales from the Convention is that in a number of countries such transactions are subject to various types of national laws that are designed to protect consumers. In order to avoid any risk of impairing the effectiveness of such national laws, it was considered advisable that consumer sales should be excluded from this Convention. In addition, most consumer sales are domestic transactions and it was felt that the Convention should not apply to the relatively few cases where consumer sales were international transactions, e.g. because the buyer was a tourist with his habitual residence in another country<sup>1</sup> or that the goods were ordered by mail.

4. If the goods were purchased for personal, family or household use, this Convention does not apply "unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use." The seller might have no reason to know that the goods were purchased for such use if the quantity of goods purchased, the address to which they were to be sent or other aspects of the transaction were those not normal in a consumer sale. This information must be available to the seller at least by the time of the conclusion of the contract so that he can know whether his rights and obligations in respect of the sale are those under this Convention or those under the applicable national law.

*Exclusion of sales by auction, subparagraph (b)*

5. Subparagraph (b) of this article excludes sales by auction from the scope of this Convention. Sales by auction are often subject to special rules under the applicable national law and it was considered desirable that they remain subject to those rules even though the successful bidder was from a different State.

*Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)*

6. Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are normally governed by special rules in the State under whose authority the execution sale is made. Furthermore, such sales do not constitute a significant part of international trade and may, therefore, safely be regarded as purely domestic transactions.

*Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)*

7. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments or money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries are subject to special mandatory

<sup>1</sup> See article 9 (b).

rules. Moreover, in some legal systems such commercial paper is not considered to be "goods." Without the exclusion of the sales of such paper, there might have been significant differences in the application of this Convention.

8. This subparagraph does not exclude documentary sales of goods from the scope of this Convention even though, in some legal systems, such sales may be characterized as sales of commercial paper.

*Exclusion of sales of ships, vessels or aircraft, subparagraph (e)*

9. This subparagraph excludes from the scope of the Convention all sales of ships, vessels and aircraft. In some legal systems the sale of ships, vessels and aircraft are sales of "goods" while in other legal systems some sales of ships, vessels and aircraft are assimilated to sales of immovables. Furthermore, in most legal systems at least some ships, vessels and aircraft are subject to special registration requirements. The rules specifying which ones must be registered differ widely. In order not to raise questions of interpretation as to which ships, vessels or aircraft were subject to this Convention, especially in view of the fact that the relevant place of registration, and therefore the law which would govern the registration, might not be known at the time of the sale, the sale of all ships, vessels and aircraft was excluded from the application of this Convention.

*Exclusion of sales of electricity, subparagraph (f)*

10. This subparagraph excludes sales of electricity from the scope of this Convention on the ground that in many legal systems electricity is not considered to be goods and, in any case, international sales of electricity present unique problems that are different from those presented by the usual international sale of goods.

## Article 3

[Contracts for services or for goods to be manufactured]

(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

## PRIOR UNIFORM LAW

ULIS, article 6.  
ULF, article 1 (7).  
Prescription Convention, article 6.

## Commentary

1. Article 3 deals with two different situations in which the contract includes some act in addition to the supply of goods.

*Sale of goods and supply of labour or other services by the seller, paragraph (1)*

2. This paragraph deals with contracts under which the seller undertakes to supply labour or other services in addition to selling goods. An example of such a contract is where the seller agrees to sell machinery and undertakes to set it up in a plant in working condition or to supervise its installation. In such cases, paragraph (1) provides that if the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. Thus, the question whether

the seller's obligations relating to the sale of goods and those relating to the supply of labour or other services can be considered as two separate contracts (under what is sometimes called the doctrine of "severability" of contracts), will be resolved in accordance with the applicable national law.

*Supply of materials by the buyer, paragraph (2)*

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured or produced by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods.

5. However, the concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production," is designed to exclude from the scope of this Convention those contracts under which the buyer undertakes to supply the seller (the manufacturer) with a substantial part of the necessary materials from which the goods are to be manufactured or produced. Since such contracts are more akin to contracts for the supply of services or labour than to contracts for sale of goods, they are excluded from the scope of this Convention, in line with the basic rule of paragraph (1).

**Article 4**

**[Substantive coverage of Convention]**

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

**PRIOR UNIFORM LAW**

ULIS, articles 4, 5 (2) and 8.

**Commentary**

1. Article 4 limits the scope of the Convention, unless elsewhere expressly provided in the Convention, to governing the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from a contract of sale.

*Validity, subparagraph (a)*

2. Although there are no provisions in this Convention which expressly govern the validity of the contract or of any usage, some provisions may provide a rule which would contradict the rules on validity of contracts in a national legal system. In case of conflict the rule in this Convention would apply.

3. The only article in which the possibility of such a conflict is apparent is article 10, which provides that a contract of sale of goods need not be concluded in or by writing and is not subject to any other requirements as to form. In some legal systems the requirement of a writing for certain contracts of sale of goods is considered to be a matter relating to the validity of the contract. It may be noted that pursuant to article 11 and article (X), a Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may make a declaration that, *inter alia*, article 10 shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

*Passing of property, subparagraph (b)*

4. Subparagraph (b) makes it clear that the Convention does not govern the passing of property in the goods sold. In some legal systems

property passes at the time of the conclusion of the contract. In other legal systems property passes at some later time such as the time at which the goods are delivered to the buyer. It was not regarded possible to unify the rule on this point nor was it regarded necessary to do so since rules are provided by this Convention for several questions linked, at least in certain legal systems, to the passing of property: the obligation of the seller to transfer the goods free from any right or claim of a third person;<sup>1</sup> the obligation of the buyer to pay the price;<sup>2</sup> the passing of the risk of loss or damage to the goods;<sup>3</sup> the obligation to preserve the goods.<sup>4</sup>

**Article 5**

**[Exclusion, variation or derogation by the parties]**

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

**PRIOR UNIFORM LAW**

ULIS, article 3.

ULF, article 2.

Prescription Convention, article 3 (3).

**Commentary**

1. The non-mandatory character of the Convention is explicitly stated in article 5. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.

2. The second sentence of ULIS, article 3, providing that "such exclusion may be express or implied" has been eliminated lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the Convention had been wholly excluded.

**CHAPTER II. GENERAL PROVISIONS**

**Article 6**

**[Interpretation of Convention]**

In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity and the observance of good faith in international trade.

**PRIOR UNIFORM LAW**

ULIS, article 17.

Prescription Convention, article 7.

**Commentary**

*International character of Convention*

1. National rules on the law of sales of goods are subject to sharp divergencies in approach and concept. Thus, it is especially important to avoid differing constructions of the provisions of this Convention by national courts, each dependent upon the concepts used in the legal system of the country of the forum. To this end, article 6 emphasizes the importance, in the interpretation and application of the provisions of

<sup>1</sup> Articles 39 and 40.

<sup>2</sup> Article 49.

<sup>3</sup> Articles 78 to 82.

<sup>4</sup> Articles 74 to 77.



the Convention, of having due regard for the international character of the Convention and for the need to promote uniformity.

### *Observance of good faith in international trade*

2. Article 6 requires that the provisions of the Convention be interpreted and applied in such a manner that the observance of good faith in international trade is promoted.

3. There are numerous applications of this principle in particular provisions of the Convention. Among the manifestations of the requirement of the observance of good faith are the rules contained in the following articles:

— article 14 (2) (b) on the non-revocability of an offer where it was reasonable for the offeree to rely upon the offer being held open and the offeree acted in reliance on the offer;

— article 19 (2) on the status of a late acceptance which was sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time;

— article 27 (2) in relation to the preclusion of a party from relying on a provision in a contract that modification or abrogation of the contract must be in writing;

— articles 35 and 44 on the rights of a seller to remedy non-conformities in the goods;

— article 38 which precludes the seller from relying on the fact that notice of non-conformity has not been given by the buyer in accordance with articles 36 and 37 if the lack of conformity relates to facts of which the seller knew or could not have been unaware and which he did not disclose to the buyer;

— articles 45 (2), 60 (2) and 67 on the loss of the right to declare the contract avoided;

— articles 74 to 77 which impose on the parties obligations to take steps to preserve the goods.

4. The principle of good faith is, however, broader than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention.

## *Article 7*

### *[Interpretation of conduct of a party]*

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

### *PRIOR UNIFORM LAW*

ULIS, article 9 (3).

ULF, articles 4 (2), 5 (3), 12 and 13 (2).

UNIDROIT Draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods, articles 3, 4 and 5.

### *Commentary*

1. Article 7 on interpretation furnishes the rules to be followed in interpreting the meaning of any statement or other conduct of a party which falls within the scope of application of this Convention. Interpretation of the statements or conduct of a party may be necessary to determine whether a contract has been concluded, the meaning of the contract, or the significance of a notice given or other act of a party in the performance of the contract or in respect of its termination.

2. Article 7 states the rules to be applied in terms of interpreting the unilateral acts of each party, i.e. communications in respect of the proposed contract, the offer, the acceptance, notices, etc. Nevertheless, article 7 is equally applicable to the interpretation of "the contract" when the contract is embodied in a single document. Analytically, this Convention treats such an integrated contract as the manifestation of an offer and an acceptance. Therefore, for the purpose of determining whether a contract has been concluded as well as for the purpose of interpreting the contract, the contract is considered to be the product of two unilateral acts.

### *Content of the rules of interpretation*

3. Since article 7 states rules for interpreting the unilateral acts of each party, it does not rely upon the common intent of the parties as a means of interpreting those unilateral acts. However, article 7 (1) recognizes that the other party often knows or could not be unaware of the intent of the party who made the statement or engaged in the conduct in question. Where this is the case, that intent is to be ascribed to the statement or conduct.

4. Article 7 (1) cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, article 7 (2) provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

5. In determining the intent of a party or the intent a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or conduct even if they appear to give a clear answer to the question. It is common experience that a person may dissimulate or make an error and the process of interpretation set forth in this article is to be used to determine the true content of the communication. If, for example, a party offers to sell a quantity of goods for Swiss francs 50,000 and it is obvious that the offeror intended Swiss francs 500,000 and the offeree knew or could not have been unaware of it, the price term in the offer is to be interpreted as Swiss francs 500,000.

6. In order to go beyond the apparent meaning of the words or the conduct by the parties, article 7 (3) states that "due consideration is to be given to all relevant circumstances of the case." It then goes on to enumerate some, but not necessarily all, circumstances of the case which are to be taken into account. These include the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

## *Article 8*

### *[Usages and established practices]*

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.



## PRIOR UNIFORM LAW

ULIS, article 9.  
ULF, article 13.

## Commentary

1. This article describes the extent to which usages and practices between the parties are binding on the parties to the contract.

2. By the combined effect of paragraphs (1) and (2), usages to which the parties have agreed, are binding on them. The agreement may be express or it may be implied.

3. In order for there to be an implied agreement that a usage will be binding on the parties, the usage must meet two conditions: it must be one "of which the parties knew or ought to have known" and it must be one "which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." The trade may be restricted to a certain product, region or set of trading partners.

4. The determining factor whether a particular usage is to be considered as having been impliedly made applicable to a given contract will often be whether it was "widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." In such a case it may be held that the parties "ought to have known" of the usage.

5. Since usages which become binding on the parties do so only because they have been explicitly or implicitly incorporated into the contract, they will be applied rather than conflicting provisions of this Convention on the principle of party autonomy.<sup>3</sup> Therefore, the provision in ULIS article 9, paragraph 2, that in the event of conflict between an applicable usage and the Uniform Law, the usages prevail unless otherwise agreed by the parties, a provision regarded to be in conflict with the constitutional principles of some States and against public policy in others, has been eliminated as unnecessary.

6. This article does not provide any explicit rule for the interpretation of expressions, provisions or forms of contract which are widely used in international trade and for which the parties have given no interpretation.<sup>2</sup> In some cases such an expression, provision or form of contract may be considered to be a usage or practice between the parties, in which case this article would be applied.

## Article 9

## (Place of business)

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

## PRIOR UNIFORM LAW

ULIS, article 1 (2).  
ULF, article 1 (2).  
Prescription Convention, articles 2 (c) and (d).

## Commentary

1. This article deals with the determination of the relevant "place of business" of a party.

<sup>1</sup> Article 5.

<sup>2</sup> Article 7 provides rules for the interpretation of statements made by and other conduct of a party.

## Place of business, subparagraph (a)

2. Subparagraph (a) deals with the situation in which a party to a contract has more than one place of business. The question arises in this Convention in respect of a number of different matters.

3. First, the determination of the relevant place of business may be important in determining whether this Convention applies to the contract. For this Convention to apply, the contract must be between parties whose places of business are in different States.<sup>1</sup> Moreover, in most cases those States must be Contracting States.<sup>2</sup> For the purpose of determining whether this Convention applies no problem arises where all the places of business of one party (X) are situated in Contracting States other than the Contracting State in which the other party (Y) has his place of business. Whichever one is designated as the relevant place of business of X, the places of business of X and Y will be in different Contracting States. The problem arises only when one of X's places of business is situated either in the same State as the place of business of Y or in a non-Contracting State. In such a case it becomes crucial to determine which of X's different places of business is the relevant place of business within the meaning of article 1.

4. The determination of the relevant place of business is also necessary for the purposes of article 11, 18 (2), 22, 29 (c), 40 (1) (b), 53 (1) (a) and (X). In the case of articles 18 (2), 22, 29 (c) and 53 (1) (a) it may be necessary to choose between two places of business within a given State as to choose between places of business in two different States.

5. In addition, article 81 (2) provides the rule in respect of passage of risk of loss when "the buyer is required to take over the goods at a place other than any place of business of the seller . . ." In this case it is not necessary to determine the relevant place of business under article 9.

6. Subparagraph (a) lays down the criterion for determining the relevant place of business: It is the place of business "which has the closest relationship to the contract and its performance." The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. The location of the head office or principal place of business is irrelevant for the purposes of article 9 unless that office or place of business becomes so involved in the transaction concerned as to be the place of business "which has the closest relationship to the contract and its performance."

7. In determining the place of business which has the "closest relationship," subparagraph (a) states that regard is to be given to "the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." Therefore, when article 9 (a) refers to the performance of the contract, it is referring to the performance that the parties contemplated when they were entering into the contract. If it was contemplated that the seller would perform the contract at his place of business in State A, a determination that his "place of business" under article 9 (a) was in State A would not be altered by his subsequent decision to perform the contract at his place of business in State B.

8. Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by a head office located in another State, or the foreign origin or final destination of the goods. When these factors are not known to or contemplated by both parties at the time of entering into the contract, they are not to be taken into consideration.

## Habitual residence, subparagraph (b)

9. Subparagraph (b) deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 2 (a) of this

<sup>1</sup> Article 1 (1). See, however, article 5.

<sup>2</sup> Article 1 (1) (a).

Convention. The present provision provides that in this situation, reference is to be made to his habitual residence.

### Article 10

#### [Form of contract]

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

#### PRIOR UNIFORM LAW

ULIS, article 15.  
ULF, article 3.

#### Commentary

1. Article 10 provides that a contract of sale need not be evidenced by writing and is not subject to any other requirements as to form.<sup>1</sup>

2. The inclusion of article 10 in the Convention was based on the fact that many contracts for the international sale of goods are concluded by modern means of communication which do not always involve a written contract. Nevertheless, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of enforcing exchange control laws, or otherwise, would still be enforceable against a party which concluded the non-written contract even though the contract itself would be enforceable between the parties.

3. Some States consider the requirement that contracts for the international sale of goods be in writing to be a matter of important public policy. Accordingly, article 11 provides a mechanism for Contracting States to prevent the application of the rule in article 10 to transactions where any party has a place of business in their State.

### Article 11

#### [Effect of declarations relating to form]

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

#### PRIOR UNIFORM LAW

None.

#### Commentary

1. Article 11 recognizes that some States consider that it is an important element of public policy that contracts or their modification or abrogation be in writing. Therefore, article 11 enables a Contracting State to make a declaration under article (X)<sup>1</sup> to prevent the application of any provision of article 10, article 27 or Part II of the Convention which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any

<sup>1</sup> See also para. 3 of the commentary to article 4 and the commentary to article 11.

<sup>2</sup> The text of article (X) is reproduced with the other proposed final clauses in document A/CONF.97/6.

form other than in writing where any party has his place of business in that Contracting State.

2. As the operation of article 11 is confined to articles 10 and 27 and to Part II of this Convention (i.e. articles 12 to 22) it does not encompass all notices or indications of intention required under the Convention but only those which relate to the formation of the contract, its modification and its abrogation. Other notices may be given by means appropriate in the circumstances.<sup>2</sup>

3. Since the requirement of writing in relation to the matters mentioned in article 11 is considered to be a question of public policy in some States, the general principle of party autonomy is not applicable to this article. Accordingly, article 11 cannot be varied or derogated from by the parties.

## PART II. FORMATION OF THE CONTRACT

### Article 12

#### [Offer]

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

#### PRIOR UNIFORM LAW

ULF, article 4.

#### Commentary

1. Article 12 states the conditions that are necessary in order for a proposal to conclude a contract to constitute an offer.

#### *Proposal sent to one or more specific persons*

2. In order for a person to accept an offer, that offer must have been addressed to him. In the usual case, the requirement causes no difficulties since the offer to buy or sell goods will have been addressed to one specific person or, if the goods are to be bought or sold by two or more persons acting together, to those specific persons. The specifications of the addressee will usually be by name, but it could be made in some other way such as "the owner or owners of . . .".

3. It is also possible that an offer to buy or sell will be made simultaneously to a large number of specific persons. An advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specific persons," whereas the same advertisement or catalogue distributed to the public at large would not. If an advertisement or catalogue sent to "specific persons" indicated the intention to be bound to a contract in case of acceptance and if it was "sufficiently definite", it would constitute an offer under article 12 (1).

#### *Proposal sent to other than one or more specific persons, paragraph (2)*

4. Some legal systems restrict the concept of an offer to communications addressed to one or more specific persons while other legal systems also admit of the possibility of a "public offer". Public offers are of two types, those in which the display of goods in a store window,

<sup>2</sup> See articles 24 and 25 and the commentary thereto.

vending machine or the like are said to be a continuing offer to any person to buy that article or one identical to it, and advertisements directed to the public at large. In those legal systems which admit of the possibility of a public offer, the determination as to whether an offer in the legal sense has been made depends upon an evaluation of the total circumstances of the case, but does not necessarily require a specific indication of intention to make an offer. The fact that the goods are on display for sale or the wording of the advertisement may be enough for a court to determine that there was a legal offer.

5. This Convention, in article 12 (2), takes a middle position in respect of public offers. It states that a proposal other than one addressed to one or more specific persons is normally to be treated merely as an invitation for the recipients to make offers. However, it constitutes an offer if it meets the other criteria for being an offer and the intention that it be an offer is clearly indicated. Such an indication need not be an explicit statement such as "this advertisement constitutes an offer" but it must clearly indicate an intention to make an offer, for example, by a statement that, "these goods will be sold to the first person who presents cash or an appropriate banker's acceptance".

#### *Intention to be bound, paragraph (1)*

6. In order for the proposal for concluding a contract to constitute an offer it must indicate "the intention of the offeror to be bound in case of acceptance." Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labelled by the parties as an "offer" or as an "acceptance". Whether there is the requisite intention to be bound in case of acceptance will be established in accordance with the rules of interpretation contained in article 7.

7. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 14.

#### *An offer must be sufficiently definite, paragraph (1)*

8. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. It goes on to state that an offer is sufficiently definite if it:

- indicates the goods, and
- expressly or implicitly fixes or makes provision for determining the quantity, and
- expressly or implicitly fixes or makes provision for determining the price.

9. The remaining terms of the contract resulting from the acceptance of an offer which only indicates the goods and fixes or makes provision for determining the quantity and the price would be supplied by usage or by the provisions in Part III on the law of sales: If, for example, the offer contained no term as to how or when the price was to be paid, article 53 (1) provides that the buyer must pay it at the seller's place of business and article 54 (1) provides that he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal. Similarly, if no delivery term is specified, article 29 provides how and where the goods are to be delivered and article 31 provides when they are to be delivered.

10. Nevertheless, the fact that a proposal contains only the three terms necessary for the offer to be sufficiently definite may indicate, in a given case, that there was no intention on the part of the offeror to be bound in case of acceptance. For example, it would be necessary to interpret the proposal in the light of article 7 to determine whether there was an intention to be bound in case of acceptance where a seller offered to sell equipment to be manufactured with the only specifications being the type and quantity of the goods and a price of Swiss francs 10 million. It would normally be the case that a seller would not contract for such a large sale without specification of delivery dates, quality standards, etc. Therefore, the lack of any indication in respect of these matters suggests that there might have been as yet no intention to

be bound to a contract in case of acceptance. However, even in the case of such a large and complicated sale, the applicable law of sales can supply all of the missing terms if the intention to contract is found to have existed.

#### *Quantity of the goods, paragraph (1)*

11. Although, according to article 12, the proposal for concluding a contract will be sufficiently definite to constitute an offer if it expressly or implicitly fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

12. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

13. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the supply of the goods considered to be ancillary provisions. Article 12 makes it clear that such a contract is enforceable even if it is denominated by the legal system as a contract of sale rather than as a concession agreement.

#### *Price, paragraph (1)*

14. Article 12 provides the same rule in respect of the price that it does in respect of quantity. Thus, for the proposal to constitute an offer it must expressly or implicitly fix or make provision for the price. It is not necessary that the price could be calculated at the time of the conclusion of the contract. For example, the offer, and the resulting contract, might call for the price to be that prevailing in a given market on the date of delivery, which date might be months or even years in the future. In such a case the offer would expressly make provision for determining the price.

15. Where the buyer sends an order for goods listed in the seller's catalogue or where he orders spare parts, he may decide to make no specification of the price at the time of placing the order. This may occur because he does not have a price list of the seller or he may not know whether the price list he has is current. Nevertheless, it may be implicit in his action of sending the order that he is offering to pay the price currently being charged by the seller for such goods. If such is the case, the buyer has implicitly made provision for the determination of the price and his order for the goods would constitute an offer.

16. Similarly, where the buyer orders goods from a catalogue for future delivery it may be implicit in his order and from other relevant circumstances that the buyer is offering to pay the price currently being charged by the seller at the time of the delivery.

17. In order to determine whether a proposal implicitly fixes or makes provision for determining the price it is necessary to interpret the proposal in the light of article 7, and in particular paragraph (3) of that article.

### *Article 13*

#### *[Time of effect of offer; withdrawal of offer]*

(1) An offer becomes effective when it reaches the offeree.

(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable.

## PRIOR UNIFORM LAW

ULF, article 5.

## Commentary

1. Article 13 (1) provides that an offer becomes effective when it reaches<sup>1</sup> the offeree. Therefore, until that moment even though the offeree may have learned of the dispatch of the offer by some means, he cannot accept it.

2. For most purposes the rule as stated above is only of theoretical interest. However, it assumes practical importance if the offeror changes his mind after dispatch of the offer but prior to the time the offer reaches the offeree.

3. If the offeror withdraws the offer and the withdrawal reaches the offeree before or at the same time as the offer, the offer never becomes effective. Therefore, an offer which, once it became effective, would be irrevocable under article 14 (2), can nevertheless be withdrawn so long as the withdrawal reaches the offeree no later than the offer reaches him.

4. This distinction between withdrawal of an offer and revocation is of less significance if the offer is revocable under article 14 (1) since a purported withdrawal which reached the offeree after the offer had reached him would be treated as a revocation. For the effect of the dispatch of an acceptance after the arrival of an offer but prior to the arrival of the revocation, see paragraph 4 of the commentary to article 14.

## Article 14

## [Revocability of offer]

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or

(b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer.

## PRIOR UNIFORM LAW

ULF, article 5.

## Commentary

## Revocation of an offer, paragraph (1)

1. Article 14 states that offers are in general revocable and that the revocation is effective when it reaches<sup>1</sup> the offeree.

2. The right of the offeror to revoke his offer terminates at the moment the contract is concluded. For the reasons explained in paragraph 4 of this commentary, this basic rule applies only in those cases in which the offeree orally accepts the offer and in those cases in which the offeree accepts the offer in conformity with article 16 (3).

3. Under article 16 (3) if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent without giving notice to the offeror by performing an act, such as one relating to the dispatch of the goods or payment of the price, the acceptance is effective at the moment the act is performed. Since the acceptance is effective and the contract is concluded at the moment the act is performed, the right of the offeror to revoke his offer terminates at that same moment.

4. In the typical case in which the offer is accepted by a written indication of assent, article 14 (1) provides that the right of the offeror to

<sup>1</sup> Article 22 contains a definition of the term "reaches".

revoke his offer terminates at the moment the offeree has dispatched his acceptance, and not at the moment the acceptance reaches the offeror. This rule was adopted even though article 16 (2) provides that it is at this later moment that the acceptance is effective and the contract is therefore concluded in accordance with article 21.

5. The value of a rule that a revocable offer becomes irrevocable prior to the moment at which the contract is concluded lies in the fact that it contributes to an effective compromise between the theory of general revocability of offers and the theory of general irrevocability of offers. Although all offers except those which fall within the scope of article 14 (2) are revocable, they become irrevocable once the offeree makes his commitment by dispatching the acceptance.

## Irrevocable offers, paragraph (2)

6. Article 14 (2) (a) provides that an offer cannot be revoked if it indicates that it is irrevocable. It should be noted that this provision does not require a promise on the part of the offeror not to revoke his offer nor does it require any promise, act or forbearance on the part of the offeree for the offer to become irrevocable. It reflects the judgement that in commercial relations, and particularly in international commercial relations, the offeree should be able to rely on any statement by the offeror which indicates that the offer will be open for a period of time.

7. The offer may indicate that it is irrevocable in different ways. The most obvious is that the offer may state that it is irrevocable or that it will not be revoked for a particular period of time. The offer may also indicate that it is irrevocable by stating a fixed time for acceptance.

8. Article 14 (2) (b) provides that the offeror cannot revoke his offer if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

## Article 15

## [Termination of offer by rejection]

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

## PRIOR UNIFORM LAW

None.

## Commentary

1. Once the offeror has received a rejection of an offer, he should be free to contract with someone else without concern that the offeree will change his mind and attempt to accept the offer which he had previously rejected. Most, if not all, legal systems accept this solution in respect of revocable offers. Many legal systems also accept it in respect of irrevocable offers, but some legal systems hold that an irrevocable offer is not terminated by a rejection. Article 15 accepts the solution in respect of both revocable and irrevocable offers and provides that an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

2. An offer may be rejected either expressly or by implication. In particular, article 17 (1) provides that "a reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." A tribunal may find that a given communication from the offeree to the offeror which contained inquiries about possible changes in the terms or which proposed different terms did not purport to be an acceptance and, therefore, that it did not fall under article 17 (1)<sup>1</sup>. Nevertheless, if the communication was found to contain additions, limitations or other modifications to the offer, the offer would be rejected and the offeree could no longer accept it.

<sup>1</sup> See paragraph 4 of the commentary to article 17.

3. Of course, the rejection of an offer by a reply which contains additions, limitations or other modifications of the offer does not make it impossible to conclude a contract. The reply would constitute a counter-offer which the original offeror might accept. If the additions, limitations or other modifications did not materially alter the terms of the offer, article 17 (2) provides that the reply would constitute an acceptance and the terms of the contract are the terms of the offer with the modifications contained in the acceptance. If the offeror rejected the proposed additions, limitations or other modifications, the parties could agree to contract on the terms of the original offer.

4. Therefore, in the context of a reply to an offer which constitutes an explicit or implicit rejection, the significance of article 15 is that the original offer terminates and any eventual contract must be concluded on the basis of a new offer and acceptance.

## Article 16

### [Acceptance; Time of effect of acceptance]

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article.

#### PRIOR UNIFORM LAW

ULF, articles 2 (2), 6 and 8.

#### Commentary

1. Article 16 sets out the conduct of the offeree which constitutes acceptance and the moment at which an acceptance is effective.

#### *Acts constituting acceptance, paragraph (1)*

2. Most acceptances are in the form of a statement by the offeree indicating assent to an offer. However, article 16 (1) recognizes that other conduct by the offeree indicating assent to the offer may also constitute an acceptance.

3. In the scheme used in this Convention, any conduct indicating assent to an offer is an acceptance. However, subject to the special case governed by article 16 (3), article 16 (2) provides that the acceptance is effective only at the moment the indication of assent reaches the offeror.

4. Article 16 (1) also makes it clear that silence in itself does not amount to acceptance. However, if the silence is coupled with other factors which give sufficient assurance that the silence of the offeree is an indication of assent, the silence can constitute acceptance. In parti-

cular, silence can constitute an acceptance if the parties have previously so agreed. Such an agreement may be explicit or it may be established by an interpretation of the intent of the parties as a result of the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties as provided by the rules of interpretation in article 7.

*Example 16A:* For the past 10 years Buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders Seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question Seller neither shipped the goods nor notified Buyer that he would not do so. Buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that Seller did not need to acknowledge the order and, in such a case, the silence of Seller constituted acceptance of the offer.

*Example 16B:* One of the terms in a concession agreement was that Seller was required to respond to any orders placed by Buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by Seller. On 1 July Seller received an order for 100 units from Buyer. On 25 July Seller notified Buyer that he could not fill the order. In this case a contract was concluded on 15 July for the sale of 100 units.

#### *Moment at which acceptance by declaration is effective, paragraph (2)*

5. Article 16 (2) provides that an acceptance is effective only at the moment a notice of that acceptance reaches the offeror. Therefore, no matter what is the form of the acceptance under article 16 (1), a notice of that acceptance must in some manner reach the offeror in order to bring about the legal consequences associated with the acceptance of an offer.

6. There are two exceptions to this rule. The first exception is mentioned in the opening words of article 16 (2) which state that the rule is subject to article 16 (3). Under article 16 (3), in certain limited circumstances, it is possible for an offer to be accepted by the performance of an act without the necessity of a notice. The other exception follows from the general rule in article 5 that the parties may, subject to article 11, derogate from or vary the effect of any provision of this Convention. In particular, if they have agreed that the silence of the offeree will constitute acceptance of the offer, they have by implication also agreed that no notice of that acceptance is required.<sup>1</sup>

7. It is not necessary that the indication of assent required by article 16 (2) be sent by the offeree. A third party, such as a carrier or a bank, may be authorized to give to the offeror the notice of the conduct which constitutes acceptance. It is also not necessary for the notice to state explicitly that it is notice of acceptance, so long as it is clear from the circumstances surrounding the notice that the conduct of the offeree was such as to manifest his intention to accept.

8. Article 16 (2) adopts the receipt theory of acceptance. The indication of assent is effective when it reaches the offeror, not when it is dispatched as is the rule in some legal systems.

9. Article 16 (2) states the traditional rule that an acceptance is effective only if it reaches the offeror within the time fixed or, if no such time was fixed, within a reasonable time. However, article 19 provides that an acceptance which arrives late is, or may be, considered to have reached the offeror in due time. Nevertheless, the sender-offeree still bears the risk of nonarrival of the acceptance.

#### *Acceptance of an offer by an act, paragraph (3)*

10. Article 16 (3) governs the limited but important situation in which the offer, the practices which the parties have established between themselves or usage permit the offeree to indicate assent by performing an act without notice to the offeror. In such a case the acceptance is effective at the moment the act is performed.

<sup>1</sup> No specific rule is given as to when acceptance by silence is effective. See, however, example 16B in which it is concluded that the acceptance was effective at the expiration of the relevant period of time. In at least one legal system the effect of silence is related back to the time when the offer is received by the offeree. Swiss Code of Obligations, art. 10, subs. 2.

11. An offer might indicate that the offeree could accept by performing an act by the use of such a phrase as "Ship immediately" or "Procure for me without delay . . .".

12. The act by which the offeree can accept in such a case is that act authorized by the offer, established practice or usage. In most cases it would be by the shipment of the goods or the payment of the price but it could be by any other act, such as the commencement of production, packing the goods, opening of a letter of credit or, as in the second illustration in paragraph 11 above, the procurement of the goods for the offeror.

### Article 17

#### [Additions or modifications to the offer]

(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.

#### PRIOR UNIFORM LAW

ULF, article 7.

#### Commentary

##### General rule, paragraph (1)

1. Article 17 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. However, the acceptance need not use the exact same words as used in the offer so long as the differences in the wording used in the acceptance would not change the obligations of the parties.

4. Even if the reply makes inquiries or suggests the possibility of additional terms, it may be that the reply does not purport to be an acceptance under article 17 (1). The reply may be an independent communication intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

5. This point is of special importance in the light of article 15 which provides that "an offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

6. Although the explanation for the rule in article 17 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 17 (1), does not give desirable results. Article 17 (2) creates an exception to article 17 (1) in regard to one of these situations.

#### Non-material alterations, paragraphs (2) and (3)

7. Article 17 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which do not materially alter the terms of the offer. Article 17 (3) provides that certain terms are normally to be considered as material.

8. In most cases in which a reply purports to be an acceptance the offeree does not consider the additional or different terms to be material alterations of the offer. This is particularly the case where the parties do not enter into formal negotiations but communicate with one another by means of an exchange of telegrams, telex or the like or by the exchange of an order form and an acceptance form.

9. If the additional or different terms do not in fact materially alter the terms of the offer, the reply constitutes an acceptance and, according to article 21, a contract is concluded on its receipt. In such a case, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

10. Even if the additional or different terms do not materially alter the terms of the offer, the offeror may object to them. In such a case the reply of the offeree is to be considered as a rejection of the offer rather than as an acceptance.

11. Additional or different terms which are of routine significance to the personnel engaged in ordering or selling the goods may constitute material alterations of the offer from a legal point of view. Article 17 (3), by way of example, sets out a non-exhaustive list of provisions in respect of which any additional or different term in the purported acceptance is considered to be material. Additional or different terms in respect of such a provision would not, however, be considered to be material alterations if the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror.<sup>1</sup>

12. For example, an offeree might reply to an offer stating that the offeror has 50 tractors available for sale at a certain price by sending a telegram which accepts the offer but adds "ship immediately." Or a seller who receives an order for a certain quantity of a particular animal fibre might accept by use of a form containing a clause calling for arbitration by the relevant international trade association.

13. Article 17 (3) indicates that the additional or different terms contained in these two replies would constitute material alterations since the term "ship immediately" would change the time of delivery<sup>1</sup> and the arbitration clause is in respect of the settlement of disputes.

14. In both of these cases it may be that the offeree would have, by virtue of the offer or the particular circumstances of the case, reason to believe that the additional or different terms he proposed are acceptable to the offeror. If that was the case, the terms would not constitute a material alteration.

15. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by notice to the original offeree of the shipment or payment. In such a case the terms of the contract would be those of the counter-offer, including the additional or different term.

<sup>1</sup> In the absence of the "ship immediately" term in the contract, delivery would have to be effected "within a reasonable time after the conclusion of the contract" by virtue of article 31 (c).



## Article 18

## [Time fixed for acceptance]

(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

## PRIOR UNIFORM LAW

ULF, article 8 (2).

UNCITRAL Arbitration Rules, article 2 (2).

## Commentary

1. Article 18 (1) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

2. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 18 (1) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the moment the telegram is handed in for dispatch."

3. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope." This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

## Article 19

## [Late acceptance]

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect.

## PRIOR UNIFORM LAW

ULF, article 9.

## Commentary

1. Article 19 deals with acceptances that arrive after the expiration of the time for acceptance.

*Power of offeror to consider acceptance as having arrived in due time, paragraph (1)*

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 19 (1) provides that the late acceptance becomes an effective acceptance if the offeror without delay informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to be effective.

3. Article 19 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance as of the moment of its receipt, even though it requires a subsequent notice to validate it. Under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

*Acceptances which are late because of a delay in transmission, paragraph (2)*

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that, if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment the acceptance reaches the offeror, unless the offeror without delay notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have reached the offeror in due time, the offeror must notify, without delay, the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must notify, without delay, the offeree that he considers the acceptance to be effective pursuant to article 19 (1).

## Article 20

## [Withdrawal of acceptance]

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

## PRIOR UNIFORM LAW

ULF, article 10.

## Commentary

Article 20 provides that an acceptance cannot be withdrawn after it has become effective. This provision complements the rule in article 21 that a contract of sale is concluded at the moment the acceptance becomes effective.<sup>1</sup>

## Article 21

## [Time of conclusion of contract]

A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention.

<sup>1</sup> Articles 16 (2) and 16 (3) state when an acceptance becomes effective.

## PRIOR UNIFORM LAW

None.

## Commentary

1. Article 21 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention which depend on the time of the conclusion of the contract.

2. On the other hand article 21 does not state an express rule for the place at which the contract is concluded. Such a provision is unnecessary since no provision of this Convention depends upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. However, the fact that article 21, in conjunction with article 16, fixes the moment at which the contract is concluded may be interpreted in some legal systems to be determinative of the place at which it is concluded.

## Article 22

## [Definition: "reaches"]

For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

## PRIOR UNIFORM LAW

ULF, article 12.

## Commentary

1. Article 22 defines the point of time at which any indication of intention "reaches" the addressee for the purposes of Part II of this Convention. A communication "reaches" the addressee when it is delivered to him, not when it is dispatched.

2. One consequence of this rule, as set out in articles 13 and 20, is that an offer, whether revocable or irrevocable, or an acceptance may be withdrawn if the withdrawal reaches the other party before or at the same time as the offer or the acceptance which is being withdrawn. Furthermore, an offeree who learns of an offer from a third person prior to the moment it reaches him may not accept the offer until it has reached him. Of course, a person authorized by the offeror to transmit the offer is not a third person in this context.

3. An offer, an acceptance or other indication of intention "reaches" the addressee when it is delivered to "his place of business or mailing address." In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

4. When the addressee does not have a place of business or a mailing address, and only in such a situation, an indication of intention "reaches" the addressee on delivery to his habitual residence, i.e. his personal abode.<sup>1</sup> As with an indication of intention delivered to the addressee's place of business or mailing address, it will produce its legal effect even though the addressee may not know of its delivery.

5. In addition the indication of intention "reaches" the addressee whenever it is made personally to him, whether orally or by any other

<sup>1</sup> See also article 9 (b).

means. There are no geographical limitations on the place at which personal delivery can be made.<sup>2</sup> In fact such delivery is often made directly to the addressee at some place other than his place of business. Such delivery may take place at the place of business of the other party, at the addressee's hotel, or at any other place at which the addressee may be located.

6. Personal delivery to an addressee which has legal personality includes personal delivery to an agent who has the requisite authority. The question as to who would be an authorized agent is left to the applicable national law.

## PART III. SALES OF GOODS

## CHAPTER I. GENERAL PROVISIONS

## Article 23

## [Fundamental breach]

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

## PRIOR UNIFORM LAW

ULIS, article 10.

## Commentary

1. Article 23 defines "fundamental breach".

2. The definition of fundamental breach is important because various remedies of buyer and seller,<sup>1</sup> as well as some aspects of the passing of the risk,<sup>2</sup> rest upon it.

3. The basic criterion for a breach to be fundamental is that "it results in substantial detriment to the [injured] party." The determination whether the injury is substantial must be made in the light of the circumstances of each case, e.g., the monetary value of the contract, the monetary harm caused by the breach, or the extent to which the breach interferes with other activities of the injured party.

4. Once this basic criterion is met, a criterion which looks to the harm suffered by the injured party, a breach is fundamental unless the party in breach can prove that he "did not foresee and had no reason to foresee such a result," i.e. the result which did occur. It should be noted that the party in breach does not escape liability merely by proving that he did not in fact foresee the result. He must also prove that he had no reason to foresee it.

5. Article 23 does not specify at what moment the party in breach should have foreseen the consequences of the breach, whether at the time the contract was concluded or at the time of the breach. In case of dispute, that decision must be made by the tribunal.

## Article 24

## [Notice of avoidance]

A declaration of avoidance of the contract is effective only if made by notice to the other party.

<sup>2</sup> The Spanish language version of article 22 does not conform to the other language versions on this point.

<sup>1</sup> See articles 42 (2), 44 (1), 45 (1) (a), 47 (2), 60 (1) (a), 63, 64 (1) and 64 (2).

<sup>2</sup> See article 82.



## PRIOR UNIFORM LAW

None.

## Commentary

1. Avoidance of the contract by one party may have serious consequences for the other party. He may need to take immediate action to minimize the consequences of the avoidance such as to cease manufacturing, packing or shipping the goods or, if the goods have already been delivered, to retake possession and arrange to dispose of them.

2. For this reason article 24 provides that a declaration of avoidance is effective only if made by notice to the other party. It follows that the contract is avoided at the time notice of the declaration of avoidance<sup>1</sup> is given to the other party.

3. The Convention does not require, as do some legal systems, that an advance notice be given of the intention to declare the contract avoided. This Convention requires only one notice, the notice of the declaration of avoidance.<sup>2</sup>

4. The notice can be oral or written and can be transmitted by any means. If the means chosen are appropriate in the circumstances, article 25 provides that a delay or error in the transmission of the notice does not impair the legal effect of the notice.

## Article 25

## [Delay or error in communication]

Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

## PRIOR UNIFORM LAW

ULIS, articles 14 and 39 (3).

ULF, article 12 (2).

## Commentary

1. Article 25 states that the risk of delay or error in the transmission of any notice, request or other communication under Part III of this Convention or its failure to arrive is to be borne by the addressee.<sup>1</sup> This rule applies if the communication is given "in accordance with Part III and by means appropriate in the circumstances."

2. There may be more than one means of communication which is appropriate in the circumstances. In such a case the sender may use the one which is the most convenient for him.

3. A communication is appropriate "in the circumstances" if it is appropriate to the situation of the parties. A means of communication which is appropriate in one set of circumstances may not be appropriate in another set of circumstances. For example, even though a particular form of notice may normally be sent by airmail, in a given case the need for speed may make only electronic communication, telegram, telex, or telephone, a means appropriate "in the circumstances".

<sup>1</sup> Articles 45, 60, 63 and 64 provide for a declaration of avoidance of a contract under appropriate circumstances.

<sup>2</sup> However, a party who declares the contract avoided pursuant to article 45 (1) (b) or article 60 (1) (b) must have previously fixed an additional period of time of reasonable length for performance by the other party under article 43 (1) or article 59 (1). In such a case the party who declares the contract avoided must necessarily send two communications to the other party.

<sup>3</sup> Part II of the Convention contains special rules dealing with the time of effect of communications and other indications of intention made during the formation process. See, in particular, articles 19 and 22.

4. The general rule that the risk of delay, error or loss in respect of a communication is to be borne by the addressee arises out of the consideration that it is desirable to have, as far as possible, one rule governing the hazards of transmission. Acceptance of a generalized receipt theory would have required that the Convention contain supporting procedural rules to establish whether a notice had in fact been received by the addressee since legal systems which operated on the theory that notices were effective on dispatch often did not contain such supporting rules. However, Part III of the Convention contains exceptions to this rule in cases where it was considered that a communication ought to be received to be effective.<sup>2</sup>

## Article 26

## [Judgement for specific performance]

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

## PRIOR UNIFORM LAW

Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964, article VII.

ULIS, article 16.

## Commentary

1. This article considers the extent to which a national court is required to enter a judgement for specific performance of an obligation arising under this Convention.

2. If the seller does not perform one of his obligations under the contract of sale or this Convention, article 42 provides that "the buyer may require performance by the seller". Similarly, article 58 authorizes the seller to "require the buyer to pay the price, take delivery or perform his other obligations".

3. The question arises whether the injured party can obtain the aid of a court to enforce the obligation of the party in default to perform the contract. In some legal systems the courts are authorized to order specific performance of an obligation. In other legal systems courts are not authorized to order certain forms of specific performance and those States could not be expected to alter fundamental principles of their judicial procedure in order to bring this Convention into force. Therefore, article 26 provides that a court is not bound to enter a judgement providing for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention, e.g., domestic contracts of sale. Therefore, if a court has the authority under any circumstances to order a particular form of specific performance, e.g. to deliver the goods or to pay the price, article 26 does not limit the application of articles 42 or 58. Article 26 limits their application only if a court could not under any circumstances order such a form of specific performance.<sup>1</sup>

4. It should be noted that articles 42 and 58, where not limited by this article, have the effect of changing the remedy of obtaining an order by a court that a party perform the contract from a limited remedy, which in many circumstances is available only at the discretion of the court, to a remedy available at the discretion of the other party.

## Article 27

## [Modification or abrogation of contract]

(1) A contract may be modified or abrogated by the mere agreement of the parties.

<sup>1</sup> Articles 43 (2), 44 (4), 59 (2), 61 (1), 61 (2) and 65 (4).

<sup>2</sup> See also paragraph 9 of the commentary to article 42.

(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

PRIOR UNIFORM LAW

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and abrogation of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a contract may be modified or abrogated merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because "consideration" is lacking.

3. Many of the modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 27 (1) are effective, thereby overcoming the common law rule that "consideration" is required.

4. In addition, article 27 (1) is applicable to the question as to whether the terms in a confirmation from or in an invoice sent by one party to the other after the conclusion of the contract modify the contract where those terms are additional or different from the terms of the contract as it was concluded. If it is found that the parties have agreed to the additional or different terms, article 27 (1) provides that they become part of the contract. As to whether the silence on the part of the recipient amounts to an agreement to the modification of the contract, see article 16 (1) and the commentary to that article.

5. A proposal to modify the terms of an existing contract by including additional or different terms in a confirmation or invoice should be distinguished from a reply to an offer which purports to be an acceptance but which contains additional or different terms. This latter situation is governed by article 17.

Modification or abrogation of a written contract, paragraph (2)

6. Although article 10 provides that a contract of sale need not be concluded in or evidenced by writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or abrogation unless in writing, can be modified or abrogated orally.

7. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 10 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 27 (2) provides that a written contract which excludes any modification or abrogation unless in writing cannot be otherwise modified or abrogated.

8. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, article 27 (2) goes on to state that to the extent the other party has relied on such conduct, the first party cannot assert the provision.

9. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or abrogation to

be in writing is precluded from doing so only to the extent that the other party has relied on the conduct of the first party. This may mean in a given case that the terms of the original contract may be reinstated once the first party denies the validity of the non-written modification.

*Example 27A:* A written contract for the sale to A over a two-year period of time of goods to be manufactured by B provided that all modifications or abrogations of the contract had to be in writing. Soon after B delivered the first shipment of goods to A, A's contracting officer told B to make a slight modification in the design of the goods. If this modification was not made, he would instruct his personnel to reject future shipment and not to pay for them. Even though B did not receive written confirmation of these instructions, he did modify the design as requested. The next five monthly deliveries were accepted by A but the sixth was rejected as not conforming to the written contract. In this case A must accept all goods manufactured according to the modified design but B must reinstate the original design for the remainder of the contract.

CHAPTER II. OBLIGATIONS OF THE SELLER

Article 28

[General obligations]

The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

PRIOR UNIFORM LAW

ULIS, article 18.

Commentary

Article 28 states the principal obligations of the seller and introduces chapter II of Part III of the Convention. The principal obligations of the seller are to deliver the goods, to hand over any documents relating thereto and to transfer the property in the goods.<sup>1</sup> The seller must carry out his obligations "as required by the contract and this Convention." Since article 5 of this Convention permits the parties to exclude its application or, subject to article 11, to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and this Convention, the seller must fulfil his obligations as required by the contract.

SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

Article 29

[Absence of specified place for delivery]

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;

(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular

<sup>1</sup> Although this Convention provides that the seller must transfer the property in the goods, article 4 (b) specifies that, unless expressly provided, the Convention is not concerned with the effect which the contract may have on the property in the goods sold. This matter is left to the applicable law. See also article 39 and the commentary thereto.

place — in placing the goods at the buyer's disposal at that place;

(c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

#### PRIOR UNIFORM LAW

ULIS, articles 19 (2) and 23.

#### Commentary

1. The seller's primary obligation is to "deliver the goods" as required by the contract and this Convention.

2. Article 29 states how and where the seller's obligation to deliver is fulfilled. Article 31 states when the seller is obligated to deliver. Articles 78 to 82 deal with the related problems of the passage of the risk of loss.

#### "The goods" which must be delivered

3. In order for the seller to deliver "the goods", in the case of specific goods, he must deliver the exact goods called for in the contract. In the case of unidentified goods, he must deliver goods which generally conform to the description of the type of goods called for by the contract. Therefore, if the contract calls for the delivery of corn, the seller has not delivered if he provides potatoes. However, the seller has delivered "the goods" if he does the appropriate act called for by subparagraphs (a) to (c) in respect of the specific goods described in the contract or, in the case of unidentified goods, of goods which conform to the generic description in the contract even though they are non-conforming or are not delivered at the time required or by the means of transportation specified. Therefore, the handing over to the carrier of No. 3 grade corn when No. 2 grade was called for or the handing over to the carrier of five tons when 10 tons were called for would constitute delivery of "the goods". Even though "the goods" had been "delivered", the buyer would be able to exercise any rights which he might have because of the seller's failure to "deliver the goods . . . as required by the contract and this Convention".<sup>1</sup> Among the buyer's rights would be the right to avoid the contract where the failure of the seller amounted to a fundamental breach.<sup>2</sup> Nevertheless, the seller would have "delivered the goods".

#### Where the contract of sale involves the carriage of goods, subparagraph (a)

4. Where the contract of sale involves the carriage of goods, the general rule is that the seller's obligation to deliver the goods consists of handing them over to the first carrier for transmission to the buyer.

5. The contract of sale involves the carriage of goods if the seller is required or authorized to send the goods to the buyer. Both shipment contracts (e.g. CIF, FOB, FOR) and destination contracts (e.g. Ex Ship, Delivered at . . .) are contracts of sale which involve carriage of the goods.

6. In many cases where the contract of sale involves the carriage of goods, the contract either explicitly or by the use of a trade term specifies the place at which the goods are to be delivered. Where this is the case, the seller's obligation to deliver does not consist of handing the goods over to the first carrier but in doing the act specified in the contract.

7. Therefore, if the contract is a destination contract, the seller's obligation to deliver consists of placing the goods at the disposal of the buyer at the place of destination. Similarly, if the contract is FOB or CIF named port of shipment, the seller's obligation to deliver as determined by the contract consists of placing the goods on board a vessel at the named port of shipment.<sup>3</sup> This is the case even though the seller may need to provide for transport from an inland point to the port of shipment.

<sup>1</sup> Article 28. Buyer's remedies for seller's breach are set forth in article 41.

<sup>2</sup> Article 45 (1) (a). For the effect of a fundamental breach by seller on the passing of the risk of loss, see article 82.

<sup>3</sup> E.g. see Incoterms, FOB condition A.2; CIF condition A.4. ("Incoterms", ICC publication No. 274).

8. However, if the contract does not require the seller to deliver the goods at any other particular place and the goods are to be transported by two or more carriers, delivery of the goods is made by handing them over "to the first carrier for transmission to the buyer". Therefore, in such a case if the goods are shipped from an inland point by rail or truck to a port where they are to be loaded aboard a ship, delivery is effected when the goods are handed over to the railroad or trucking firm.

9. The delivery of the goods is effected by handing over the goods to the carrier, not by handing over the documents to the buyer. Even if the seller never handed over the documents to the buyer as required by the contract, he would have delivered the goods when they were handed over to the carrier. Of course the seller would be subject to any remedies provided by the contract and this Convention for his failure to hand over the documents.

#### Goods at or to be manufactured or produced at a particular place, subparagraph (b)

10. If, at the time of the conclusion of the contract, the parties knew that the goods were at or were to be manufactured or produced at a particular place and the contract does not require or authorize the shipment of the goods, the seller's obligation to deliver the goods consists of placing the goods at the buyer's disposal at the place at which the goods were located or at the place at which they were to be manufactured or produced.

11. There are a number of different situations envisaged by this subparagraph. The first is that the goods are specific goods. For example, if the contract was for the sale by one dealer to another dealer of a specific painting which the parties knew was at a particular location, delivery would be effected by the seller placing the painting at the buyer's disposal at that location. The same solution is given if 10 tons of scrap steel are to be drawn from a specific pile of scrap steel or if 100 chairs are to be manufactured in a particular factory.

12. If the goods are already in transit at the time of the conclusion of the contract, the contract of sale is not one which "involves" the carriage of goods under subparagraph (a) of this article but is one which involves goods which are at a particular place and which are therefore subject to this subparagraph. This is true whether the sale is of an entire shipment under a given bill of lading, in which case the goods are specified goods, or whether the sale is of only a part of the goods covered by a given bill of lading. Otherwise, if the contract of sale of goods already in transit were held to "involve the carriage of goods", thereby making it subject to article 29 (a), the seller would never "deliver the goods" because the goods would not be handed over to the carrier "for transmission to the buyer". However, by virtue of article 80 the risk of loss would pass to the buyer at the time the goods were handed over to the carrier who issued the documents controlling the disposition of the goods even though the handing over took place prior to the conclusion of the contract of sale.

13. Both parties must know of the location of the specific goods, of the location of the specific stock from which the goods to be delivered are to be drawn, or of the place at which the goods are to be manufactured or to be produced. They must have actual knowledge; it does not suffice if one or the other party ought to have such knowledge but did not. Moreover, they must have this knowledge at the time of the conclusion of the contract.

#### In other cases, subparagraph (c)

14. In other cases, not covered by subparagraphs (a) and (b), the seller's obligation to deliver consists of placing the goods at the buyer's disposal where the seller had his place of business at the time of the conclusion of the contract. If the seller had more than one place of business, the place at which delivery is to be made is governed by article 9 (a).

15. Although subparagraph (c) is a residuary rule to cover those situations not discussed in subparagraphs (a) and (b), it does not state a rule for "all other cases." In particular, the contract may provide for delivery to be made at the buyer's place of business or at some other particular place not mentioned in this article. The opening phrase of article 29 recognizes that in all such cases delivery would be made by

handing over the goods or by placing them at the buyer's disposal, whichever is appropriate, at the particular place provided in the contract.

*Placed at the disposal of the buyer*

16. Goods are placed at the disposal of the buyer when the seller has done that which is necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation, such as packing, to be done by the seller, and the giving of such notification to the buyer as would be necessary to enable him to take possession.

17. If the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over the buyer in appropriate form the documents which control the goods.

*Effect of reservation of title*

18. Delivery is effected under this article and risk of loss passes under article 79, 80 or 81 even though the seller reserves title to the goods or otherwise reserves an interest in the goods if such reservation of title or other interest is for the purpose, *inter alia*, of securing the payment of the price.<sup>4</sup>

### Article 30

#### [Obligations in respect of carriage of goods]

(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

PRIOR UNIFORM LAW

ULIS, articles 19 (3) and 54.

Commentary

1. Article 30 describes several additional obligations of the seller where the contract of sale involves the carriage of goods.

*Identification of the goods, paragraph (1)*

2. The seller will normally identify the goods to the contract at or before the time of shipment by marking them with the name and address of the buyer, by procuring shipping documents which specify the buyer as the consignee or as the party to be notified on the arrival of the goods, or by some similar method. However, if the seller ships identical goods to several buyers he may fail to take any steps to identify the goods prior to their arrival. This may especially be the case where the sale is of goods such as grains which are shipped in bulk.

3. Article 30 (1) states that one of the seller's obligations is either to mark the goods with an address, or otherwise to identify them to the

<sup>4</sup> Article 79 (1) provides, *inter alia*, "The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."

contract, or to send the buyer a notice of the consignment which specifies the goods. If the seller does none of these three acts, article 79 (2) provides that the risk of loss does not pass.<sup>1</sup> In addition, the buyer has available all the usual remedies for the seller's breach of an obligation, including the right to require the seller to give notice of the consignment, the right to claim damages and, if the seller's failure to identify the goods to the contract or to send the notice of the consignment amounts to a fundamental breach, the right to avoid the contract.

*Contract of carriage, paragraph (2)*

4. Certain common trade terms such as CIF and C and F require the seller to arrange for the contract of carriage of the goods while in other cases, such as FOB sales where the seller would not normally be required to do so, the parties on occasion agree that the seller will in fact make the shipping arrangements. Paragraph (2) specifies that in all such cases where "the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation".

*Insurance, paragraph (3)*

5. Either the seller or the buyer may be obligated under the contract of sale to procure insurance for loss of the goods during their carriage. This obligation will normally be determined by the trade term used in the contract of sale and is not governed by the passage of the risk of loss. For example, if the price is quoted CIF, the seller must procure the insurance<sup>2</sup> even though the risk of loss passes to the buyer when the goods are handed over to the carrier for transmission to the buyer.<sup>3</sup> If the price is quoted C and F or FOB, in the absence of other indications in the contract, it is the buyer's responsibility to procure any necessary insurance.<sup>4</sup>

6. Paragraph (3) provides that if the seller is not bound by the contract to procure the insurance, he must provide the buyer with all available information necessary to enable him to effect such insurance. This is not a general obligation on the seller as he only has to provide such information if the buyer requests it of him. However, in some trades the seller may be required to give such information even without request on the buyer's part by virtue of a usage which becomes part of the contract pursuant to article 8 of this Convention.

### Article 31

#### [Time of delivery]

The seller must deliver the goods:

(a) if a date is fixed by or determinable from the contract, on that date; or

(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

(c) in any other case, within a reasonable time after the conclusion of the contract.

PRIOR UNIFORM LAW

ULIS, articles 20, 21 and 22.

Commentary

1. Article 31 deals with the time at which the seller must fulfil his obligation to deliver the goods.

<sup>1</sup> Article 81 (3) has a similar rule for those cases in which the contract of sale does not involve the carriage of goods.

<sup>2</sup> E.g. Incoterms, CIF, condition A.5.

<sup>3</sup> If Incoterms, CIF is used, the risk of loss passes to the buyer when the goods have effectively passed the ship's rail at the port of shipment (condition A.6). For the rule under this Convention, see article 79 (1) and paras. 4 to 7 of the commentary thereto.

<sup>4</sup> See, for example, Incoterms, CIF, and FOB.

2. Since the seller's obligation is to deliver at a certain time, he must hand over the goods to the carrier, place the goods at the buyer's disposal at the appropriate place as required by article 29 or do such other act as may constitute delivery under the terms of the contract at or by the time specified. Article 31 does not require that the buyer have taken physical possession on the date on which delivery was due or even have been in a position to take physical possession if, for example, delivery was made by handing over the goods to a carrier.

*Delivery on fixed or determinable date, subparagraph (a)*

3. If the date for delivery is fixed by or determinable from the contract, the seller must deliver on that date. The date for delivery is fixed by or determinable from the contract if it is fixed by or determinable from a usage made applicable to the contract by article 8.

*Delivery during a period, subparagraph (b)*

4. In international trade it is common for the date of delivery to be fixed in terms of a period of time. This is generally to allow the seller some flexibility in preparing the goods for shipment and in providing for the necessary transportation. Therefore, subparagraph (b) authorizes the seller to deliver goods "at any time within that period".

5. However, it should be noted that in some cases the parties may have modified their original agreement which called for delivery within a period by specifying a particular date for delivery, a date which might fall within or without the period of time originally specified. For instance, if the contract originally called for delivery in July, by subsequent agreement the seller may have agreed to deliver on 15 July. In such case delivery must be made on that date.

6. On occasion the provision in the contract or in an applicable usage that delivery must be within a specified period of time is intended to permit the buyer to arrange for carriage of the goods or to schedule the exact arrival time of the goods in order to fulfil his needs and not overtax his storage or handling capacity as those needs or capacity may be determined subsequent to the conclusion of the contract. Subparagraph (b) states, therefore, that the seller may not choose the exact delivery date if the "circumstances indicate that the buyer is to choose a date".

7. It should be noted that where the buyer is to choose the delivery date, the seller will need notice of that date in time to prepare the goods for shipment and to make any contracts of carriage he may be required to make under the contract of sale. If the buyer does not give such notice in adequate time, the seller would not be liable for his own non-performance to the extent he could prove that this lack of knowledge constituted an impediment beyond his control within the meaning of article 65 (1).

*Delivery in all other cases, subparagraph (c)*

8. In all other cases not governed by subparagraphs (a) and (b) the seller must deliver the goods within a reasonable time after the conclusion of the contract. What is a reasonable time depends on what constitutes acceptable commercial conduct in the circumstances of the case.

*Early delivery*

9. For the right of the buyer to take delivery or to refuse to take delivery of goods delivered before the date fixed, see article 48 (1) and the commentary thereto.

10. If the seller has delivered goods before the date for delivery, his right to remedy before that date any lack of conformity in those goods is governed by article 35. His right to remedy the lack of conformity after the date for delivery is governed by article 44.

**Article 32**

**[Handing over of documents]**

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

PRIOR UNIFORM LAW

ULIS, article 50.

**Commentary**

1. Article 32 deals with the second obligation of the seller described in article 28, i.e., to hand over to the buyer any documents relating to the goods. The location of this article with the articles dealing with the delivery of the goods emphasizes the close relationship between the handing over of documents and the delivery of the goods.

2. The article does not itself list which documents the seller must hand over to the buyer. In addition to documents of title, such as bills of lading, dock receipts and warehouse receipts, the seller may be required by the contract to hand over certificates of insurance, commercial or consular invoices, certificates of origin, weight or quality and the like.

3. The documents must be handed over at the time and place and in the form required by the contract. Normally, this will require the seller to hand over the documents in such time and in such form as will allow the buyer to take possession of the goods from the carrier when the goods arrive at their destination, bring them through customs into the country of destination and exercise claims against the carrier or insurance company.

4. Article 32 does not limit the right of the seller to withhold the documents until paid by the buyer when the contract calls for payment against documents.<sup>1</sup>

SECTION II. CONFORMITY OF THE GOODS AND  
THIRD PARTY CLAIMS

**Article 33**

**[Conformity of the goods]**

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

PRIOR UNIFORM LAW

ULIS, articles 33 and 36.

**Commentary**

1. Article 33 states the extent of the seller's obligation to deliver goods which conform to the contract.

<sup>1</sup> Article 54.

2. This article differs from ULIS in one important respect. Under ULIS the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under this Convention, if the seller has handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality.<sup>1</sup> It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods.<sup>2</sup>

3. However, the seller's obligation under articles 39 and 40 to deliver goods free from any right or claim of a third party, including a right or claim based on industrial or intellectual property, is independent of the seller's obligation to deliver goods which conform to the contract.<sup>3</sup>

*Seller's obligations as to conformity of the goods, paragraph (1)*

4. Paragraph (1) states the standards by which the seller's obligation to deliver goods which conform to the contract is measured. The first sentence emphasizes that the goods must conform to the quantity, quality and description required by the contract and must be contained or packaged in the manner required by the contract. This provision recognizes that the overriding source for the standard of conformity is the contract between the parties. The remainder of paragraph (1) describes specific aspects of the seller's obligations as to conformity which apply "except where otherwise agreed."

*Fit for ordinary purposes, subparagraph (1) (a)*

5. Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used. The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. The scope of the seller's obligation under this subparagraph is not determined by whether the seller could expect the buyer himself to use the goods in one of the ways in which such goods are ordinarily used. In particular, the obligation to furnish goods which are fit for all the purposes for which goods of the contract description are ordinarily used also covers a buyer who has purchased the goods for resale rather than use. For goods to be fit for ordinary purposes, they must be honestly resalable in the ordinary course of business. If the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order if necessary.

6. The seller is not obligated to deliver goods which are fit for some special purpose which is not a purpose "for which goods of the same description would ordinarily be used" unless the buyer has "expressly or impliedly made known to the seller at the time of the conclusion of the contract" such intended use.<sup>4</sup> This problem may arise if the buyer intends to use the goods for a purpose for which goods of this kind are sometimes, but not ordinarily used. In the absence of some indication from the buyer that such a particular purpose is intended, the seller would have no reason to attempt to supply goods appropriate for such purpose.

*Fit for particular purpose, subparagraph (1) (b)*

7. Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to

the seller such purpose, the seller must deliver goods fit for that purpose.

8. The purpose must be known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose.

9. The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if "the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement". The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation it may be held that the buyer had not relied on the seller's skill and judgement in making the purchase. If the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer.<sup>5</sup> If the buyer went ahead and purchased the goods it would then be clear that he did not rely on the seller's skill and judgement.

10. It would also be unreasonable for the buyer to rely on the seller's skill and judgement if the seller did not purport to have any special knowledge in respect of the goods in question.

*Sample or model, subparagraph (1) (c)*

11. If the contract is negotiated on the basis of a sample or model, the goods delivered must possess the qualities which are possessed by the goods the seller has held out as the sample or model. Of course, if the seller indicates that the sample or model is different from the goods to be delivered in certain respects, he will not be held to those qualities of the sample or model but will be held only to those qualities which he has indicated are possessed by the goods to be delivered.

*Packaging, subparagraph (1) (d)*

12. Subparagraph (1) (d) makes it one of the seller's obligations in respect of the conformity of the goods that they "are contained or packaged in the manner usual for such goods". This provision which sets forth a minimum standard, is not intended to discourage the seller from packaging the goods in a manner that will give them better protection from damage than would the usual manner of packaging.

*Buyer's knowledge of the non-conformity, paragraph (2)*

13. The obligations in respect of quality in subparagraphs (1) (a) to (d) are imposed on the seller by this Convention because in the usual sale the buyer would legitimately expect the goods to have such qualities even if they were not explicitly stated in the contract. However, if at the time of contracting the buyer knew or could not have been unaware of a non-conformity in respect of one of those qualities, he could not later say that he had expected the goods to conform in that respect.

14. This rule does not go to those characteristics of the goods explicitly required by the contract and, therefore subject to the first sentence of paragraph (1). Even if at the time of the conclusion of the contract the buyer knew that the seller would deliver goods which would not conform to the contract, the buyer has a right to contract for full performance from the seller. If the seller does not perform as agreed, the buyer may resort to any of his remedies which may be appropriate.<sup>6</sup>

## Article 34

### [Seller's liability for lack of conformity]

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even

<sup>1</sup> The necessity that the seller hand over or place at the buyer's disposal goods which meet the contract description in order to have "delivered the goods" is discussed in paragraph 3 of the commentary on article 29.

<sup>2</sup> Article 41 (1).

<sup>3</sup> For the significance of this rule, see articles 39 and 40 and the commentary to these articles.

<sup>4</sup> Article 33 (1) (b). See paragraphs 7 to 10 below.

<sup>5</sup> This appears to follow from the requirement of the observance of good faith in article 5.

<sup>6</sup> Article 41 (1).



though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

#### PRIOR UNIFORM LAW

ULIS, article 35.

#### Commentary

1. Article 34 deals with the time at which it is to be judged the conformity of the goods to the requirements of the contract and this Convention.

#### Basic rule, paragraph (1)

2. Paragraph (1) contains the basic rule that the seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time the risk passes even though the lack of conformity becomes apparent only after that date. The rule that the conformity of the goods to the contract is to be measured as of the time risk passes is a necessary implication of the rules on risk of loss or damage.

3. Although the conformity of the goods is measured at the time the risk passes, the buyer may not know of a non-conformity until much later. This may occur because the non-conformity becomes evident only after the goods have been used. It may also occur because the contract involves the carriage of goods. In such a case the risk may pass when the goods are handed over to a carrier for transmission to the buyer.<sup>1</sup> The buyer, however, will normally not be able to examine the goods until after they have been handed over to him by the carrier at the point of destination, some time after the risk has passed. In either case if the non-conformity existed at the time the risk passed, the seller is liable.

*Example 34A:* A contract called for the sale of "No. 1 quality corn, FOB seller's city". Seller shipped No. 1 corn, but during transit the corn was damaged by water and on arrival the quality was No. 3 rather than No. 1. Buyer has no claim against Seller for non-conformity of the goods since the goods did conform to the contract when risk of loss passed to Buyer.

*Example 34B:* If the corn in example 34A had been No. 3 quality when shipped, Seller would have been liable even though Buyer did not know of the non-conformity until the corn arrived at Buyer's port or place of business.

#### Damage subsequent to passage of risk, paragraph (2)

4. Paragraph (2) provides that even after the passage of the risk the seller remains liable for any damage which occurs as a breach of one of his obligations. Although this is most evidently true when the damage occurs because of some positive act on the part of the seller, it is also true when the obligation which has been breached is an express guarantee given by the seller that the goods will retain some particular characteristics for a specified period after the risk of loss has passed. Since article 34 (1) states that conformity of the goods is to be judged at the time risk passes, it was considered necessary to state specifically that the seller was liable for any breach of an express guarantee of quality.

5. It should be noted that article 34 (2) states that the seller is liable "for any lack of conformity" which occurs after the risk has passed

rather than "for the consequences of any lack of conformity", which appeared in ULIS article 35, paragraph 2. This makes it clear that the defect or flaw in the goods does not have to have existed at the time the risk passed if the lack of conformity in question is due to a breach of any of the obligations of the seller.

#### Article 35

#### [Cure of lack of conformity prior to date for delivery]

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

#### PRIOR UNIFORM LAW

ULIS, article 37.

#### Commentary

1. Article 35 deals with the situation in which the seller has delivered goods before the final date which the contract prescribes for delivery but his performance does not conform with the contract.<sup>1</sup> It would be possible to say that the decision whether the seller's performance conforms to the requirements of the contract shall be made once and for all at the time delivery has been made. However, article 35 provides that the seller may remedy the non-conformity by delivering any missing part or make up any deficiency in the quantity of the goods, by delivering replacement goods which are in conformity with the contract, or by remedying any non-conformity in the goods.<sup>2</sup>

2. The seller has the right to remedy the non-conformity of the goods under article 35 only until the "date for delivery". After the date for delivery his right to remedy is based on article 44. In those international sales which involve carriage of the goods, unless the contract otherwise provides, delivery is effected by handing over the goods to the first carrier.<sup>3</sup> Therefore, in those contracts, the date until which the seller may remedy any non-conformity of the quantity or quality of the goods under article 35 is the date by which he was required by the contract to hand over the goods to the carrier.

3. The seller's right to remedy any non-conformity is also limited by the requirement that his exercise of that right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

*Example 35A:* The contract required Seller to deliver 100 machine tools by 1 June. He shipped 75 by an appropriate carrier on 1 May which arrived on 15 June. He also shipped an additional 25 machine tools on 30 May which arrived on 15 July. Seller remedied the non-conformity by handing over these machine tools to the carrier before the contract date for delivery of the 100 machine tools, 1 June.

*Example 35B:* If the contract in example 35A did not authorize Seller to deliver by two separate shipments, Seller could remedy the original non-conformity as to quantity only if receiving the missing 25 machine tools in a later second shipment did not cause Buyer "unreasonable inconvenience or unreasonable expense".

<sup>1</sup> The buyer is not required to take delivery of the goods prior to the delivery date: article 48 (1).

<sup>2</sup> In order for the seller to be made aware of any non-conformity so that he can effectively exercise his right of remedy, the buyer is required by article 36 to examine the goods within as short a period as is reasonable in the circumstances and by article 37 to give the seller notice of the non-conformity.

<sup>3</sup> Article 29 (a). For the point of time at which risk of loss passes, see article 79 and commentary to that article.

<sup>1</sup> Article 79 (1). If the goods are not clearly marked with an address or otherwise identified to the contract, article 79 (2) provides that the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

*Example 35C:* On arrival of the machine tools described in example 35A at Buyer's place of business on 15 June and 15 July, the tools were found to be defective. It was too late for Seller to cure under article 35 because the date for delivery (1 June) had passed. However, Seller may have a right to remedy the lack of conformity under article 44.

*Example 35D:* The machine tools described in example 35A were handed over to Buyer by the carrier prior to 1 June, the contractual delivery date. When examined by Buyer the tools were found to be defective. Although Seller had the ability to repair the tools prior to the delivery date, he would have had to do the work at Buyer's place of business. If Seller's efforts to remedy the lack of conformity under such circumstances would cause "unreasonable inconvenience or unreasonable expense" to Buyer, Seller would have no right to effect the remedy.

### Article 36

#### [Examination of the goods]

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

#### PRIOR UNIFORM LAW

ULIS, article 38.

#### Commentary

1. Article 36 describes the point of time when the buyer is obligated to examine the goods. The buyer's right to examine the goods prior to paying the price is considered in article 54 (3).

2. This article is prefatory to article 37, which provides that if the buyer fails to notify the seller of lack of conformity of the goods within a reasonable time after he has discovered it or ought to have discovered it, he loses the right to rely on the lack of conformity. The time when the buyer is obligated to examine the goods under article 36 constitutes the time when the buyer "ought to have discovered" the lack of conformity under article 37, unless the non-conformity is one which could not have been discovered by such examination.

3. The examination which this article requires the buyer to make is one which is reasonable in the circumstances. The buyer is normally not required to make an examination which would reveal every possible defect. That which is reasonable in the circumstances will be determined by the individual contract and by usage in the trade and will depend on such factors as the type of goods and the nature of the parties. For example, a party would not be expected to discover a lack of conformity of the goods if he neither had nor had available the necessary technical facilities and expertise, even though other buyers in a different situation might be expected to discover such a lack of conformity. Because of the international nature of the transaction, the determination of the type and scope of examination required should be made in the light of international usages.

4. Paragraph (1) states the basic rule that the buyer must examine the goods or cause them to be examined "within as short a period as is practicable in the circumstances". Paragraphs (2) and (3) state special applications of this rule for two particular situations.

5. Paragraph (2) provides that if the contract of sale involves the carriage of goods "examination may be deferred until after the goods have arrived at their destination". This rule is necessary because, even though delivery is effected when the goods are handed over to the first carrier for transmission to the buyer and even though risk of loss may also pass at that time,<sup>1</sup> the buyer is normally not in a physical position to examine the goods until they arrive at the destination.<sup>2</sup>

6. Paragraph (3) carries this thought one step further. Where the buyer redispaches the goods without a reasonable opportunity for examination by him, examination of the goods may be deferred until after the goods have arrived at the new destination. The typical situation in which the buyer will not have a reasonable opportunity to examine the goods prior to their redispach is where they are packed in such a manner that unpacking them for inspection prior to their arrival at the final destination is impractical. The redispach of the goods may be necessary because the buyer intends to use the goods himself at some place other than the place of destination of the contract of carriage, but more often it will arise because the buyer is a middleman who has resold the goods in quantities at least equal to the quantities in which they are packed.

7. The examination may be deferred until after the goods have arrived at the new destination only if the seller knew or ought to have known at the time the contract was concluded of the possibility of redispach. It is not necessary that the seller knew or ought to have known that the goods would be redispached, only that there was such a possibility.

### Article 37

#### [Notice of lack of conformity]

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

#### PRIOR UNIFORM LAW

ULIS, article 39.

Prescription Convention, articles 8 and 10 (2).

#### Commentary

1. Article 37 states the consequences of the buyer's failure to give notice of non-conformity of the goods to the seller within a reasonable time. The consequences of the buyer's failure to give notice of third party rights or claims over the goods are dealt with in articles 39 (2) and 40 (3).

#### Obligation to give notice, paragraph (1)

2. Under paragraph (1) the buyer loses his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof within a specified time. If notice is not given within that time, the buyer cannot claim damages under article 41 (1) (b), require the seller to cure

<sup>1</sup> Articles 29 (a) and 79 (1). See paras. 3 to 8 of the commentary to article 79 for a discussion of the rules which determine when risk passes if the contract of sale involves carriage of the goods.

<sup>2</sup> See paragraph 6 of the commentary to article 54 for a discussion of the buyer's obligation to pay the price prior to examination of the goods.



the lack of conformity under article 42, avoid the contract under article 45 or declare a reduction of the price under article 46.<sup>1</sup>

3. The buyer must send the notice to the seller within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If the lack of conformity could have been revealed by the examination of the goods under article 36, the buyer ought to have discovered the lack of conformity at the time he examined them or ought to have examined them.<sup>2</sup> If the lack of conformity could not have been revealed by the examination, the buyer must give notice within a reasonable time after he discovered the non-conformity in fact or ought to have discovered it in the light of the ensuing events.

*Example 37A:* The non-conformity in the goods was not such that Buyer ought to have discovered it in the examination required by article 36. However, the non-conformity was such that it ought to have been discovered once Buyer began to use the goods. In this case Buyer must give notice of the non-conformity within a reasonable time after he "ought to have discovered" it by use.

4. The purpose of the notice is to inform the seller what he must do to remedy the lack of conformity, to give him the basis on which to conduct his own examination of the goods, and in general to gather evidence for use in any dispute with the buyer over the alleged lack of conformity. Therefore, the notice must not only be given to the seller within a reasonable time after the buyer has discovered the lack of conformity or ought to have discovered it, but it must specify the nature of the lack of conformity.

#### *Termination of the right to rely on non-conformity, paragraph (2)*

5. Even though it is important to protect the buyer's right to rely on latent defects which become evident only after a period of time has passed, it is also important to protect the seller against claims which arise long after the goods have been delivered. Claims made long after the goods have been delivered are often of doubtful validity and when the seller receives his first notice of such a contention at a late date, it would be difficult for him to obtain evidence as to the condition of the goods at the time of delivery, or to invoke the liability of a supplier from whom the seller may have obtained the goods or the materials for their manufacture.

6. Paragraph (2) recognizes this interest by requiring the buyer to give the seller notice of the non-conformity at the latest two years from the date the goods were actually handed over to him. In addition, under articles 8 and 10 of the Prescription Convention the buyer must commence judicial proceedings against the seller within four years of the date the goods were actually handed over. It should be noted that while the principles which lie behind paragraph (2) of this article and articles 8 and 10 of the Prescription Convention are the same and while the starting points for the running of the two or four year periods are the same, the obligation under paragraph (1) to give notice is a completely separate obligation from that to commence judicial proceedings under the Prescription Convention.

7. The overriding principle of the autonomy of the will of the parties recognized by article 5, would allow the parties to derogate from the general obligation to give the notice required by paragraph (2). However, in the absence of a special provision, it would not be clear whether the obligation to give notice within two years was affected by an express guarantee that the goods would retain specified qualities or characteristics for a specified period.<sup>3</sup> Accordingly, paragraph (2) provides that this obligation to give notice within two years will not apply if "such time-limit is inconsistent with a contractual period of guarantee". Whether it is, or is not, inconsistent is a matter of interpretation of the guarantee.

<sup>1</sup> For a discussion of failure to give notice in relation to the passing of risk, see paragraph 3 of the commentary on article 82 and example 82B.

<sup>2</sup> For a discussion of the extent to which the buyer ought to have discovered a lack of conformity of the goods by the examination required by article 36, see paragraph 3 of the commentary on that article.

<sup>3</sup> Article 34 (2) provides that the seller is liable for any lack of conformity of the goods which occurs after the delivery date if that lack of conformity is in breach of an express guarantee.

*Example 37B:* The contract for the sale of machine tools provides that the machine tools will produce a minimum of 100 units per day for at least three years. Because of the three-year guarantee, this clause is inconsistent with the two-year time-limit in paragraph (1). It would be a matter of interpretation of the guarantee clause in the contract whether the notice of failure to produce 100 units per day had to be given within three years to notify Seller that within the three-year period there was a breach of the guarantee.

*Example 37C:* The contract provides that the machine tools will produce a minimum of 100 units per day for one year. It would be unlikely that this contract calling for a specified performance for one year would be interpreted to affect the two-year time-limit in article 37 (2) within which notice must be given.

*Example 37D:* The contract provides that notice of a failure to produce at least 100 units per day must be given within 90 days of the date of delivery. Such an express clause would be inconsistent with the two-year time-limit in paragraph (2).

## Article 38

### [Seller's knowledge of lack of conformity]

The seller is not entitled to rely on the provision of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### PRIOR UNIFORM LAW

ULIS, article 40.

#### Commentary

Article 38 relaxes the notice requirements of articles 36 and 37 where the lack of conformity relates to facts which the seller knew or of which he could not have been unaware and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

## Article 39

### [Third party claims in general]

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

#### PRIOR UNIFORM LAW

ULIS, article 52.

#### Commentary

### *Claims of third parties, paragraph (1)*

1. Article 39 states the obligation of the seller to deliver goods which are free from the right or claim of any third party other than a right or claim based on industrial or intellectual property.

2. In contrast to article 33 (2) in respect of the lack of conformity of the goods and article 40 (2) (a) in respect of third-party claims based on industrial or intellectual property, article 39 holds the seller liable to the buyer even if the buyer knew or could not have been unaware of the third-party right or claim, unless the buyer agreed to take the goods

subject to that right or claim. Such an agreement will often be expressed, but it may also be implied from the facts of the case.

3. The seller has breached his obligation not only if the third party's claim is valid, i.e., if the third party has a right in or to the goods; the seller has also breached his obligation if a third party makes a claim in respect of the goods. The reason for this rule is that once a third party has made a claim in respect of the goods, until the claim is resolved the buyer will face the possibility of litigation with and potential liability to the third party. This is true even though the seller can assert that the third-party claim is not valid or a good faith purchaser can assert that, under the appropriate law applicable to his purchase, he buys free of valid third-party claims, i.e., that *possession vaut titre*. In either case the third party may commence litigation that will be time-consuming and expensive for the buyer and which may have the consequence of delaying the buyer's use or resale of the goods. It is the seller's responsibility to remove this burden from the buyer.

4. This article does not mean that the seller is liable for breach of his contract with the buyer every time a third person makes a frivolous claim in respect of the goods. However, it is the seller who must carry the burden of demonstrating to the satisfaction of the buyer that the claim is frivolous.<sup>1</sup> If the buyer is not satisfied that the third-party claim is frivolous, the seller must take appropriate action to free the goods from the claim<sup>2</sup> or the buyer can exercise his rights as set out in article 41.

5. Third-party rights and claims to which article 39 is addressed include only rights and claims which relate to property in the goods themselves by way of ownership, security interests in the goods, or the like. Article 39 does not refer to claims by the public authorities that the goods violate health or safety regulations and may not, therefore, be used or distributed.<sup>3</sup>

#### *Notice, paragraph (2)*

6. Paragraph (2) requires the buyer to give the seller a notice similar to the notice required by article 37 (1) in respect of goods which do not conform to the contract. If this notice is not given within a reasonable time after the buyer became aware or ought to have become aware of the third-party right or claim, the buyer does not have the right to rely on the provisions of paragraph (1).

#### *Relationship to lack of conformity of the goods*

7. In some legal systems the seller's obligation to deliver goods free from the right or claim of any third party is part of the obligation to deliver goods which conform to the contract. However, in this Convention the two obligations are independent of each other.

8. As a consequence, those provisions in this Convention which apply to the seller's obligation to deliver goods which conform to the contract do not apply to the seller's obligation to deliver goods free from the right or claim of any third party under article 39. Those provisions are:

- article 33, Conformity of the goods
- article 34, Seller's liability for lack of conformity
- article 35, Cure of lack of conformity prior to date for delivery
- article 37, Notice of lack of conformity
- article 38, Seller's knowledge of lack of conformity
- article 42 (2), Buyer's right to require performance (paragraph (2) deals with delivery of substitute goods)

<sup>1</sup> Cf. article 62 on the right of a party suspend his performance when he has reasonable grounds to believe that the other party will not perform a substantial part of his obligation.

<sup>2</sup> Although the seller may ultimately free the goods from the third person's claim by successful litigation, this could seldom be accomplished within a reasonable time from the buyer's point of view. When it cannot, the seller must either replace the goods, induce the third person to release the claim as to the goods or provide the buyer with indemnity adequate to secure him against any potential loss arising out of the claim.

<sup>3</sup> If the goods delivered are subject to such restrictions, there may be a breach of the seller's obligations under article 33 (1) (a) or (b).

- article 46, Reduction of the price
- article 47, Partial non-performance.

#### *Article 40*

[Third party claims based on industrial or intellectual property]

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) in any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

#### *PRIOR UNIFORM LAW*

None.

#### *Commentary*

1. Third-party claims based on industrial and intellectual property raise somewhat different problems than do other third-party claims.<sup>1</sup> Therefore, such claims are considered specifically in article 40.

#### *Claims for which seller is liable, paragraph (1)*

2. Article 40 provides that the seller is liable to the buyer if a third-party has a right or claim in respect of the goods based on industrial or intellectual property. The reasons for this rule and the consequences of it are the same as those described in paragraphs 3 and 4 of the commentary to article 39.

3. It appears to be the general rule in most, if not all, legal systems that the seller is obligated to deliver goods free from any right or claim of any third party based on industrial or intellectual property.<sup>2</sup> In the

<sup>1</sup> In current usage the term "intellectual property" is usually understood to include "industrial property." See, Convention Establishing the World Intellectual Property Organization (Stockholm 14 July 1967), article 2 (viii). Nevertheless, it was thought to be preferable to use the term "industrial and intellectual property", rather than "intellectual property", in order to leave no question as to whether third-party claims based on, *inter alia*, an alleged infringement of a patent were covered by article 40 of this Convention.

<sup>2</sup> The exception to the seller's liability in article 40 (2) (b) of this Convention is found in at least some legal systems.

context of a domestic sale, this rule is appropriate. The producer of the goods should be ultimately responsible for any infringement of industrial or intellectual property rights in the country within which he is both producing and selling. A rule that places the liability on the seller allows for this liability ultimately to be placed on the producer.

4. It is not as obvious that the seller of goods in an international trade transaction should be liable to the buyer in the same degree for all infringements of industrial and intellectual property rights. In the first place, the infringement will almost always take place outside the seller's country and, therefore, the seller cannot be expected to have as complete knowledge of the status of industrial and intellectual property rights which his goods might infringe as he would have in his own country. In the second place, it is the buyer who will decide to which countries the goods are to be sent for use or resale. This decision may be made either before or after the contract of sale is concluded. It will even be the case that the buyer's subpurchasers may take the goods to a third country for use.

5. Paragraph (1), therefore, limits the seller's liability to the buyer for infringements of the industrial or intellectual property rights of third parties. This limitation is achieved by specifying which industrial or intellectual property laws are relevant in determining whether the seller has breached his obligation to supply goods free from the industrial or intellectual property rights or claims of a third party. The seller breaches his obligation under the Convention if a third party has industrial or intellectual property rights or claims under the law of a State where the goods were to be resold or used if such resale or use was contemplated by the parties at the time of the conclusion of the contract. In all other cases the relevant law is the law of the State where the buyer has his place of business.<sup>3</sup> In either case, the seller is in a position to ascertain whether any third party has industrial or intellectual property rights or claims pursuant to the law of that State in respect of the goods he proposes to sell.

6. Paragraph (1) introduces an additional limitation on the liability of the seller in that the seller is liable to the buyer only if at the time of the conclusion of the contract the seller knew or could not have been unaware of the existence of the third-party claim. The seller "could not have been unaware" of the third-party claim if that claim was based on a patent application or grant which had been published in the country in question. However, for a variety of reasons it is possible for a third party to have rights or claims based on industrial or intellectual property even though there has been no publication. In such a situation, even if the goods infringe the third party's rights, article 40 (1) provides that the seller is not liable to the buyer.

7. It should be noted that paragraph (1) does not limit any rights which the third party may have against either the buyer or the seller. These rights would follow from the law of industrial or intellectual property of the country in question. Paragraph (1) is limited to providing that it is the buyer, rather than the seller, who must bear any loss arising out of the existence of third-party rights of which the seller could not have been aware at the time of the conclusion of the contract.

8. If the parties did contemplate that the goods would be used or resold in a particular State, it is the law of that State which is relevant even if the goods are in fact used or resold in a different State.

#### *Limitations on seller's liability, paragraph (2)*

9. Article 40 (2) (a), like article 33 (2) in respect of lack of conformity of the goods, provides that the seller is not liable to the buyer if at the time of the conclusion of the contract the buyer knew or could not have been unaware of the third party's right or claim. It differs from article 39 (1) which exempts the seller from liability only if the buyer has agreed to take the goods subject to the third party's right or claim.

10. Article 40 (2) (b) also exempts the seller from liability to the buyer if the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer. In such a case it is the buyer, not the seller, who has taken the initiative to produce or make available the goods which

infringe on the third-party's rights and, therefore, who should bear the responsibility. However, a seller who knows or could not be unaware that the goods as ordered would or might infringe on a third-party's rights based on industrial or intellectual property may have an obligation under other doctrines of law to notify the buyer of such possible infringement.

#### *Notice, paragraph (3)*

11. The notice requirement in paragraph (3) is identical to that found in article 39 (2) and similar to that in article 37 (1).

#### *Relationship to lack of conformity of the goods*

12. For the relationship of this article to the consequences of the seller's failure to deliver goods which conform to the contract, see paragraphs 7 and 8 of the commentary to article 39.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### *Article 41*

[Buyer's remedies in general: claim for damages;  
no period of grace]

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

- (a) exercise the rights provided in articles 42 to 48;
- (b) claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### PRIOR UNIFORM LAW

U.I.S., articles 24, 41, 51, 52 and 55.

#### *Commentary*

1. Article 41 serves both as an index to the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and this Convention and as the source for the buyer's right to claim damages.

2. Article 41 (1) (a) provides that in case of the seller's breach, the buyer may "exercise the rights provided in articles 42 to 48". The substantive conditions under which those rights may be exercised are set forth in the articles cited.

3. In addition, article 41 (1) (b) provides that the buyer may "claim damages as provided in articles 70 to 73" "if the seller fails to perform any of his obligations under the contract and this Convention." In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfill his obligations. Articles 70 to 73, to which article 41 (1) (b) refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. First, all the seller's obligations are brought together in one place without the confusion generated by the complexities of repetitive remedial provisions. This makes it easier to understand what the seller must do, that which is of prime interest to merchants. Second, prob-

<sup>3</sup> The criteria for determining where the buyer has his place of business are set out in article 9.

items of classification are reduced with a single set of remedies. Third, the need for complex cross referencing is lessened.

5. Paragraph (2) provides that a party who resorts to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) provides that if a buyer resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the buyer has resorted to the remedy. The reasons for this provision are discussed in paragraphs 3-5 of the commentary to article 43. Such a provision seems desirable in international trade.

### Article 42

#### [Buyer's right to require performance]

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirements.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

#### PRIOR UNIFORM LAW

ULIS, articles 24 to 27, 30, 31, 42, 51 and 52.

#### Commentary

1. Article 42 describes the buyer's right to require the seller to perform the contract after the seller has in some manner failed to perform as agreed.

#### General rule, paragraph (1)

2. Paragraph (1) recognizes that after a breach of an obligation by the seller, the buyer's principal concern is often that the seller perform the contract as he originally promised. Legal actions for damages cost money and may take a considerable period of time. Moreover, if the buyer needs the goods in the quantities and with the qualities ordered, he may not be able to make substitute purchases in the time necessary. This is particularly true if alternative sources of supply are in other countries, as will often be the case when the contract was an international contract of sale.

3. Therefore, paragraph (1) grants the buyer the right to require the seller to perform the contract. The seller must deliver the goods or any missing part, cure any defects or do any other act necessary for the contract to be performed as originally agreed.

4. In addition to the right to require performance of the contract, article 41 (2) ensures that the buyer can recover any damages he may have suffered as a result of the delay in the seller's performance.

5. It may at times be difficult to know whether the buyer has made demand that the seller perform under this article or whether the buyer has voluntarily modified the contract by accepting late performance pursuant to article 27.

6. The application of paragraphs 4 and 5 of this commentary can be illustrated as follows:

**Example 42A:** When the goods were not delivered on the contract date, 1 July, Buyer wrote Seller "Your failure to deliver on 1 July as promised may not be too serious for us but we certainly will need the goods by 15 July." Seller subsequently delivered the goods on 15 July. It is difficult to tell whether Buyer's statement was a demand for performance by 15 July or a modification of the contract delivery date from 1 July to 15 July. If it is interpreted as a demand for performance, Buyer can recover any damages he may have suffered as a result of the

late delivery. If Buyer's statement is interpreted as a modification of the delivery date, Buyer could receive no damages for late delivery.

7. In order for the buyer to exercise the right to require performance of the contract, he must not have resorted to a remedy which is inconsistent with that right, e.g. by declaring the contract avoided under article 45 or by declaring a reduction of the price under article 46.

8. The style in which article 42 in particular and Section III on the buyer's remedies in general is drafted should be noted. That style conforms to the view in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgment of a court granting the requested relief.<sup>1</sup> However, these two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 42 (1) provides that "the buyer may require performance by the seller", it anticipates that, if the seller does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

9. Although the buyer has a right to the assistance of a court or arbitral tribunal to enforce the seller's obligation to perform the contract, article 26 limits that right to a certain degree. If the court could not give a judgment for specific performance under its own law in respect of similar contracts of sale not governed by this Convention, it is not required to enter such a judgment in a case arising under this Convention, even though the buyer had a right to require the seller's performance under article 42. However, if the court could give such a judgment under its own law, it would be required to do so if the criteria of article 42 are met.<sup>2</sup>

10. Among the other means which may be available to a buyer to enforce the seller's obligation to perform the contract would be in a clause in the sales contract that if the seller fails to perform his obligations in certain respects, such as a failure to deliver on time, the seller must pay the buyer a specific sum of money. Such a clause, sometimes referred to as a "liquidated damages clause" and sometimes as a "penalty clause," can serve both the function of estimating the damages which the buyer would suffer as a cause of the breach so as to ease the problems of proof and of creating a penalty sufficiently large to reduce the likelihood that the seller will fail to perform. All legal systems appear to recognize the validity and social utility of a clause which estimates future damages, especially where proof of actual damage would be difficult. However, while some legal systems approve of the use of a "penalty clause" to encourage performance of the principal obligation, in other legal systems such a clause is invalid. Article 42 does not have the effect of making such clauses valid in those legal systems which do not otherwise recognize their validity.<sup>3</sup>

11. Subject to the rule in paragraph (2) relating to the delivery of substitute goods, this article does not allow the seller to refuse to perform on the grounds that the non-conformity was not substantial or that performance of the contract would cost the seller more than it would benefit the buyer. The choice is that of the buyer.

#### Substitute goods, paragraph (2)

12. If the goods which have been delivered do not conform to the contract, the buyer may want the seller to deliver substitute goods which do conform. However, it could be expected that the costs to the seller of shipping a second lot of goods to the buyer and of disposing of the non-conforming goods already delivered might be considerably

<sup>1</sup> United Kingdom: Sale of Goods Act 1893, sect. 52 (in part). "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

United States of America: Uniform Commercial Code, sect. 2-716 (1). "Specific performance may be decreed where the goods are unique or in other proper circumstances."

<sup>2</sup> See also paragraph 3 of the commentary to article 26.

<sup>3</sup> Article 4 provides in part that "this Convention is not concerned with . . . the validity of the contract or any of its provisions . . ."

greater than the buyer's loss from having non-conforming goods. Therefore, paragraph (2) provides that the buyer can "require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice under article 37 or within a reasonable time thereafter."

13. If the buyer does require the seller to deliver substitute goods, he must be prepared to return the unsatisfactory goods to the seller. Therefore, article 67 (1) provides that, subject to three exceptions set forth in article 67 (2), "the buyer loses his right . . . to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

#### *Buyer's right to remedy the lack of conformity*

14. In place of requesting the seller to perform pursuant to this article, the buyer may find it more advantageous to remedy the defective performance himself or to have it remedied by a third party. Article 73, which requires the party who relies on a breach of contract to mitigate the loss, authorizes such measures to the extent that they are reasonable in the circumstances.

### *Article 43*

#### [Fixing of additional period for performance]

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

#### PRIOR UNIFORM LAW

ULIS, articles 27 (2), 31 (2), 44 (2) and 51.

#### *Commentary*

1. Article 43 states the right of the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations and specifies one of the consequences of his having fixed such a period.

#### *Fixing additional period, paragraph (1)*

2. Article 43 is a companion of article 42 which states the right of the buyer to require performance of the contract by the seller and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the seller delays performing the contract, the judicial procedure for enforcement may require more time than the buyer can afford to wait. It may consequently be to the buyer's advantage to avoid the contract and make a substitute purchase from a different supplier. However, it may not be certain that the seller's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 45 (1) (a).

3. Different legal systems take different attitudes towards the right of buyer to avoid the contract because of the seller's failure to deliver on the contract delivery date. In some legal systems the seller's failure to deliver on the contract delivery date normally authorizes the buyer to avoid the contract. However, in a given case the court or tribunal may decide that the buyer may not avoid the contract at that time because the failure to deliver on the contract delivery date was either not sufficiently serious or the buyer had waived his right to prompt delivery. In other legal systems the seller can request a period of grace from a court or tribunal which, in effect, establishes a new delivery date.<sup>1</sup> In still

other legal systems the general rule is that late delivery of the goods does not authorize the buyer to avoid the contract unless the contract provided for such a remedy or unless, after the seller's breach, the buyer specifically fixed a period of time within which the seller had to deliver the goods.

4. This Convention specifically rejects the idea that in a commercial contract for the international sale of goods the buyer may, as a general rule, avoid the contract merely because the contract delivery date has passed and the seller has not as yet delivered the goods. In these circumstances the buyer may do so if, and only if, the failure to deliver on the contract delivery date causes him substantial detriment and the seller foresaw or had reason to foresee such a result.<sup>2</sup>

5. As a result of this rule in this Convention there was no reason to allow the seller to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 27 (3) provides that "No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract."

6. Although the buyer can declare the contract avoided in any case in which the delay in delivery constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the seller is late in performing, the buyer may be legitimately doubtful that the seller will be able to perform by the time that performance will be essential for the buyer. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods on the point of time at which the detriment to the buyer would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 43 (1) authorizes the buyer to fix an additional period of time of reasonable length for performance by the seller of his obligations. This may entail the delivery of all or part of the goods, the remedy of any lack of conformity by repair of the goods or the delivery of substitute goods or the performance of any other act which would constitute performance of the seller's obligations. However, article 45 (1) (b) allows the buyer to declare the contract avoided only "if the seller has not delivered the goods" within the additional period of time.

7. The procedure authorized by article 43 (1) of fixing an additional period of time after which the buyer can declare the contract avoided if the goods have not been delivered would have the danger that a buyer could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 45 (1) (a) into a basis for declaring the contract avoided under article 45 (1) (b). Therefore, article 43 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the buyer that the seller perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 43 (1).

8. It should be pointed out that, although the procedure envisaged by article 43 (1) has a certain parentage in the German procedure of "*Nachfrist*" and the French procedure of a "*mise en demeure*," in its current form it does not partake of either one. In particular, the procedure envisaged by article 43 (1) is not mandatory and need not be used in order to declare the contract avoided if the delay in performance amounts to a fundamental breach.

#### *Buyer's other remedies, paragraph (2)*

9. In order to protect the seller who may be preparing to perform the contract as requested by the buyer, perhaps at considerable expense, during the additional period of time of reasonable length the buyer may not resort to any remedy for breach of contract, unless the

<sup>2</sup> Article 23, which defines "fundamental breach", and article 45 (1) (a), which authorizes the buyer to declare the contract avoided for fundamental breach.

<sup>1</sup> Cf. article 41 (3). See para. 5 below.

buyer has received notice from the seller that he will not comply with the request. Once the additional period of time has expired without performance by the seller, the buyer may not only avoid the contract under article 45 (1) (b) but may resort to any other remedy he may have.

10. In particular, the buyer may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the seller has performed his obligations within the additional period of time fixed by the buyer.

#### Article 44

##### [Seller's right to remedy failure to perform]

(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

#### PRIOR UNIFORM LAW

ULIS, article 44 (1).

#### Commentary

1. Article 44 regulates the right of the seller to remedy any failure to perform his obligations under the contract and this Convention after the date for delivery. It is a companion article to article 35 which regulates the right of the seller to remedy any failure to perform his obligations prior to the date for delivery and to articles 42 and 43 which regulate the buyer's right to require performance. The date for delivery is established in accordance with article 31.

##### General rule, paragraph (1)

2. Paragraph (1) permits the seller to remedy any failure to perform his obligations after the date for delivery subject to three conditions: (1) the seller must be able to perform without such delay as will amount to a fundamental breach of contract, (2) the seller must be able to perform without causing the buyer unreasonable inconvenience or unreasonable uncertainty of reimbursement by the seller of expenses advanced by the buyer, and (3) the seller must exercise his right to remedy his failure to perform prior to the time the buyer has declared the contract avoided.

3. The seller may remedy his failure to perform under this article even though the failure to perform amounts to a fundamental breach, so long as that fundamental breach was not a delay in performance. Thus, even if the failure of the goods to operate at the time of delivery

constituted a fundamental breach of contract, the seller would have the right to remedy the non-conformity in the goods by repairing or replacing them, unless the buyer terminated the seller's right by declaring the contract avoided.

4. Once the seller has remedied his failure to perform or has remedied it to the extent that it no longer constitutes a fundamental breach of contract, the buyer may no longer declare the contract avoided.

5. In some cases the failure of the goods to operate or to operate in accordance with the contract specifications would constitute a fundamental breach only if that failure was not remedied within an appropriate period of time. Until the passage of that period of time, the buyer could not preclude the seller from remedying the non-conformity by declaring the contract avoided.

6. The rule that the seller may remedy his failure to perform only if he can do so without such delay as would amount to a fundamental breach of contract applies to two different situations: where there is a complete or substantial failure to deliver the goods and where the goods as delivered, have such a non-conformity that either at the moment of delivery, or at some later time, the condition of those goods, if not remedied, would constitute a fundamental breach of contract. The seller no longer has the right to remedy the failure to perform after the delay amounts to a fundamental breach even if the buyer has not as yet declared the contract avoided.

7. Of course, even if the seller no longer has the right to remedy his failure to perform under this article, the parties can agree to his doing so.

8. If the seller has failed to deliver only a small portion of the goods or there is such a minor non-conformity in the goods that the seller's failure will never amount to a fundamental breach of contract, the seller's right to remedy his failure is limited only by the provision that he cannot remedy the failure if doing so would cause unreasonable inconvenience to the buyer or uncertainty of reimbursement by the seller of expenses advanced by the buyer.

9. At some point of time the buyer must be able to use or resell the goods free of the specter that the seller will claim the right to remedy his failure to perform. It is clear from the text of article 44 (1) that the simple fact that the buyer has declared the price reduced or claimed damages is not enough to cut off the seller's right to remedy his failure to perform.<sup>1</sup> However, the fact that the buyer has declared the price reduced or claimed damages may be a factor in determining whether it would now be unreasonably inconvenient to the buyer for the seller to remedy his failure to perform.

10. It might also be unreasonably inconvenient to the buyer if the seller needed extensive access to the buyer's place of business in order to remedy the failure to perform.

11. Article 44 (1) recognizes that the buyer may have to incur certain expenses in order for the seller to remedy his failure to perform. This in itself does not give the buyer a reason to refuse to allow the seller to remedy his failure to perform. However, if the amount of expenses incurred prior to reimbursement by the seller would be an unreasonable inconvenience to the buyer or if there was an unreasonable uncertainty that the buyer would be reimbursed for those expenses, the buyer may refuse to allow the seller to remedy his failure to perform.

12. The seller's right to remedy his failure to perform under article 44 (1) is a strong right in that it goes against the terms of the contract. For instance, if the seller has not delivered by the contract delivery date of 1 June but delivers on 15 June, he has cured his failure to deliver but he has not and cannot cure his failure to deliver by 1 June. Nevertheless, article 44 (1) authorizes him to remedy his failure in this manner if he can do so before the delay amounts to a fundamental breach.

<sup>1</sup> The fact that the buyer has declared a reduction of the price pursuant to article 46 will not prevent the seller from curing the defect since the remedy of price reduction is expressly subject to the seller's right to cure under article 44 (1). The buyer's right to claim damages is expressly preserved in article 44 (1) (as it is in article 35) so a claim for damages, by itself, will not cut off the seller's right to cure. The original damage claim will, of course, be modified by the cure.



*Notice by the seller, paragraphs (2) and (3)*

13. If the seller intends to cure the non-conformity he will normally so notify the buyer. He will also often inquire whether the buyer intends to exercise his remedies of avoiding the contract or declaring the price to be reduced or whether he wishes, or will accept, cure by the seller.

14. The first sentence of article 44 (2) makes it clear that the seller must indicate the time period within which the proposed cure will be effected. If there is no indication of this period but merely an offer to cure, the seller can draw no conclusions nor derive any rights from a failure by the buyer to respond.

*Risk of loss or error in transmission, paragraph (4)*

15. The seller in breach bears the risk of loss or error in transmission of a request or notice under articles 44 (2) and 44 (3). However, the reply by the buyer is governed by the rule in article 25, i.e. if it is given by "means appropriate in the circumstances" it is effective even if it does not arrive or is delayed or contains errors in transmission.

16. Paragraph (2) provides that if the seller sends the buyer such a notice, the buyer must reply within a reasonable time. If the buyer does not reply, the seller may perform and the buyer may not resort to any remedy inconsistent with performance by the seller during the period of time the seller indicated would be necessary to cure the defect. Even if the seller's notice said only that he would perform the contract within a specific period of time, paragraph (3) provides that the buyer must make known his decision or else he will be bound by the terms of the seller's notice unless he can show that for some reason the seller's notice should not be treated as including a request to the buyer to respond.

*Article 45**[Buyer's right to avoid contract]*

(1) The buyer may declare the contract avoided:

(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

(a) in respect of late delivery, after he has become aware that delivery has been made; or

(b) in respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period.

*PRIOR UNIFORM LAW*

ULIS, articles 26, 30, 32, 43, 44 (2), 51, 52 (3), 52 (4) and 55 (1).

*Commentary*

1. Article 45 describes the buyer's right to declare the contract avoided. The seller's right to declare the contract avoided is described in article 60.

*Declaration of avoidance*

2. The contract is avoided as a result of the seller's breach only if "the buyer . . . declare[s] the contract avoided". This narrows the rule from that found in articles 26 and 30 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the buyer. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 45 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

*Fundamental breach, subparagraph (1) (a)*

4. The typical situation in which the buyer may declare the contract avoided is where the failure by the seller to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there has been a fundamental breach of contract, the buyer has an immediate right to declare the contract avoided. He need not give the seller any prior notice of his intention to declare the contract avoided or any opportunity to remedy the breach under article 44.

6. However, in some cases the fact that the seller is able and willing to remedy the non-conformity of the goods without inconvenience to the buyer may mean that there would be no fundamental breach unless the seller failed to remedy the non-conformity within an appropriate period of time.

7. The rule that the buyer can normally avoid the contract only if there has been a fundamental breach of contract is not in accord with the typical practice under CIF and other documentary sales. Since there is a general rule that the documents presented by the seller in a documentary transaction must be in strict compliance with the contract, buyers have often been able to refuse the documents if there has been some discrepancy in them even if that discrepancy was of little practical significance.

*Seller's delay in performance, subparagraph (1) (b)*

8. Subparagraph (1) (b) further authorizes the buyer to declare the contract avoided in one restricted case. If the seller has not delivered the goods and the buyer has fixed an additional period of time of reasonable length for the seller to perform pursuant to article 43, the buyer can avoid the contract if the seller "has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed".<sup>1</sup>

*Loss or suspension of right to avoid, paragraph (2)*

9. Article 45 (2) provides that where the seller has made delivery, the buyer will lose his right to declare the contract avoided if he does not make the declaration within a specified period of time. The buyer does not lose his right to declare the contract avoided under this provision until all the goods have been delivered.

10. If the fundamental breach on which the buyer relies to declare the contract avoided is the late delivery of the goods, article 45 (2) (a) provides that once the seller has made delivery, the buyer loses his right to declare the contract avoided if he has not done so within a reasonable time after he becomes aware that delivery has been made.

11. If the seller has made delivery but there is a fundamental breach of the contract in respect of some obligation other than late delivery,

<sup>1</sup> However, see article 47 (2) and the commentary thereon.

such as the non-conformity of the goods to the contract, article 45 (2) (b) provides that the buyer loses his right to declare the contract avoided if he has not done so within a reasonable time after he knew or ought to have known of the breach.<sup>2</sup>

12. Article 45 (2) (b) may also take away the right of the buyer to declare the contract avoided in cases where he has fixed an additional period for performance under article 43 (1). If the seller performs after the additional period fixed pursuant to article 43 or if he performs after he has declared that he would not perform within that additional period of time, the buyer loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of that additional period or within a reasonable time after the seller has declared that he would not perform within that additional period of time.

13. Since the buyer does not lose his right to declare the contract avoided under article 45 (2) until all the goods have been delivered, under this provision all the instalments in an instalment contract must be delivered before the buyer loses the right to declare the contract avoided. However, under article 64 (2) the buyer's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the seller which justifies the declaration of avoidance.

14. In addition to article 45 (2), several other articles provide for the loss or suspension of the right to declare the contract avoided.

15. Article 67 (1) provides that "the buyer loses his right to declare the contract avoided . . . if it is impossible for him to make restitution of the goods substantially in the condition in which he received them" unless the impossibility is excused for one of the three reasons listed in article 67 (2).

16. Article 37 provides that a buyer loses his right to rely on a lack of conformity of the goods, including the right to avoid the contract, if he does not give the seller notice thereof within a reasonable time after he has discovered the lack of conformity or ought to have discovered it and at the latest within a period of two years from the date on which the goods were actually handed over to the buyer.

17. If the seller wishes to cure any defect after the delivery date, the buyer's right to avoid the contract may be suspended for the period of time indicated by the seller as necessary to effect the cure.<sup>3</sup>

#### *Right to avoid prior to the date of delivery*

18. For the buyer's right to avoid the contract prior to the contract date of delivery, see articles 63 and 64 and the commentaries thereon.

#### *Effects of avoidance*

19. The effects of avoidance are described in articles 66 to 69. The most significant consequence of avoidance for the buyer is that he is no longer obligated to take delivery and pay for the goods. However, avoidance of the contract does not terminate either the seller's obligation to pay any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>4</sup> Such a provision was important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration and clauses specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

### *Article 46*

#### *[Reduction of the price]*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same propor-

tion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

#### *PRIOR UNIFORM LAW*

ULIS, article 46.

#### *Commentary*

1. Article 46 states the conditions under which the buyer can declare the price to be reduced if the goods do not conform with the contract.

2. Under article 33 (1) goods do not conform with the contract, and are therefore subject to reduction of the price, unless they are of the quantity, quality and description required by the contract, and meet the four specific requirements set out in article 33 (1) (a) to (d). Goods may conform with the contract even though they are subject to the right or claim of a third party under article 39 or 40.

3. The remedy of reduction of the price is a remedy which is not known in some legal systems. In those legal systems it would be natural to see this remedy as a form of damages for non-performance of the contract. However, although the two remedies lead to the same result in some situations, they are two distinct remedies to be used at the buyer's choice.

4. The remedy of reduction of the price also leads to results which are similar to those which would result from a partial avoidance of the contract under article 47.

5. First, article 46 itself makes it clear that the price can be reduced by the buyer even though he has already paid the price.<sup>1</sup> Article 46 does not depend on the buyer's ability to withhold future sums due. Second, even if the seller is excused from paying damages for his failure to perform the contract by virtue of article 65, the buyer may still reduce the price if the goods do not conform with the contract. Third, the right to reduce the price is not affected by the limitation to which a claim for damages is subjected under article 70 i.e. that the amount of damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of the contract. Fourth, similar to that which prevails in respect of avoidance, the amount of monetary relief which is granted the buyer is measured in terms of the contract price which need not be paid (or which can be recovered from the seller if already paid), and not in terms of monetary loss which has been caused to the buyer. This can have an important effect on the calculation of monetary relief where there has been a change in price for the goods between the time at which the contract was concluded and the time the goods were delivered.

6. The comparison between the remedy of reduction of the price and avoidance of the contract is obvious if the lack of conformity of the goods consists of the delivery of less than the agreed upon quantity. This aspect of the rule can be illustrated by the following examples:

*Example 46A:* Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$ 200 a ton for a total of \$ 2,000. Seller delivered only 2 tons. Since such an extensive short delivery constituted a fundamental breach, Buyer avoided the contract, took none of the corn and was not obligated to pay the purchase price.

*Example 46B:* Under the same contract as in example 46A, Seller delivered 9 tons. Buyer accepted the 9 tons and reduced the price by 10 per cent, paying \$ 1,800.

<sup>1</sup> In this respect article 46 follows the same policy as does article 66 (2). It is also true, of course, that a claim for damages does not depend on the buyer's ability to withhold future sums due.

<sup>2</sup> See article 36.

<sup>3</sup> See para. 16 to the commentary on article 44.

<sup>4</sup> Article 66 (1).



7. The calculation is the same if the non-conformity of the goods delivered relates to their quality rather than to their quantity. This can be illustrated by the following example:

**Example 46C:** Under the same contract as in example 46A, Seller delivered 10 tons of No. 3 corn instead of 10 tons of No. 1 corn as required. At the time of contracting the market price for No. 3 corn was \$150 a ton. If the delivery of No. 3 corn in place of No. 1 corn constituted a fundamental breach of the contract, Buyer could avoid the contract and not pay the contract price. If the delivery of No. 3 corn did not constitute a fundamental breach or if Buyer did not choose to avoid the contract, Buyer could declare the reduction of the price from \$2,000 to \$1,500.

8. Although the principle is simple to apply in a case where, as in example 46C, the non-conformity as to quality is such that the goods delivered have a definite market price which is different from that for the goods which should have been delivered under the contract, it is more difficult to apply to other types of non-conformity as to quality. For instance:

**Example 46D:** Seller contracted to furnish decorative wall panels of a certain design for use by Buyer in an office building being constructed by Buyer. The wall panels delivered by Seller were of a less attractive design than those ordered. Buyer has the right to "declare the price . . . reduced in the same proportion as the value that the goods actually delivered would have had at the time of conclusion of the contract bears to the value that conforming goods would have had at that time".

9. In example 46D there may be no easy means of determining the extent to which the value of the goods was diminished because of the non-conformity, but that does not affect the principle. It should be noted that it is the buyer who makes the determination of the amount by which the price is reduced. However, if the seller disputes the calculation, the matter can finally be settled only by a court or an arbitral tribunal.

10. It should also be noted that the calculation is based on the extent to which the value of the goods "at the time of the conclusion of the contract" has been diminished. The calculation of the reduction of the price does not take into consideration events which occurred after this time as does the calculation of damages under articles 70 to 72. In the case envisaged in example 46D this would normally cause no difficulties because the extent of lost value would probably have been the same at the time of the conclusion of the contract and at the time of the non-conforming delivery. However, if there has been a price change in the goods between the time of the conclusion of the contract and the time of the non-conforming delivery, different results are achieved if the buyer declares the price reduced under this article rather than if the buyer claims damages. These differences are illustrated by the following examples:

**Example 46E:** The facts are the same as in example 46C. Seller contracted to deliver 10 tons of No. 1 corn at the market price of \$200 a ton for a total of \$2,000. Seller delivered 10 tons of No. 3 corn. At the time of contracting the market price for No. 3 corn was \$150 a ton. Therefore, if Buyer declared a reduction of the price, the price would be \$1,500. Buyer would in effect have received monetary relief of \$500.

However, if the market price had fallen in half by the time of delivery of the non-conforming goods so that No. 1 corn sold for \$100 a ton and No. 3 corn sold for \$75 a ton, Buyer's damages under article 70 would have been only \$25 a ton or \$250. In this case it would be more advantageous to Buyer to reduce the price under article 46 than to claim damages under article 70.

**Example 46F:** If the reverse were to happen so that at the time of delivery of the non-conforming goods the market price of No. 1 corn had doubled to \$400 a ton and that of No. 3 corn to \$300 a ton, Buyer's damages under article 70 would be \$100 a ton or \$1,000. In this case it would be more advantageous to Buyer to claim damages under article 70 than to reduce the price under article 46.

11. The results in examples 46E and 46F are caused by the fact that the remedy of reducing the price has a similar effect to a partial avoidance of the contract. The same result occurs in even greater degree if the buyer totally avoids the contract as is illustrated in the following example:

**Example 46G:** In example 46E it was shown that if the market price for No. 1 corn had dropped in half from \$200 a ton to \$100 a ton and the price of No. 3 corn had dropped from \$150 a ton to \$75 a ton, Buyer could retain the No. 3 corn and either receive \$250 in damages or reduce the price by \$500. If the delivery of No. 3 corn in place of No. 1 corn amounted to a fundamental breach of contract and Buyer avoided the contract pursuant to article 45 (1) (a), he could purchase in replacement 10 tons of No. 3 corn for \$750, i.e., for \$1,250 less than the contract price. However, if he declared the contract avoided, he would be more likely to purchase 10 tons of No. 1 corn for \$1,000, i.e., for an amount of \$1,000 less than the contract price.

12. Except for example 46D, all of the examples above have assumed a fungible commodity for which substitute goods were freely available thereby making it feasible for the buyer to avoid the contract, providing a ready market price as a means of measuring damages, and precluding any additional damages by way of lost profits or otherwise. If there is not such a ready market for the goods, the problems of evaluation are more difficult and the possibility of additional damages is greater. These factors do not change the means by which article 46 works but they may change the relative advantage to the buyer of one remedy rather than another.

13. Article 41 (2) makes it clear that the buyer can claim damages in addition to declaring the reduction of the price in those cases where reducing the price does not give as much monetary relief as would an action for damages. A buyer might wish to combine the two remedies in a case like example 46F if there was some possibility that damages could not be recovered, either because there was a question as to whether the seller was exempted from damages (but not from reduction of the price) under article 65 or because there was a question as to whether the damages had been foreseeable under article 70. A declaration of reduction of the price would give the buyer some immediate relief while the rest of his claim for damages was subject to negotiation or litigation. More likely, however, would be the case in which the buyer had suffered additional expenses incurred as a result of the breach.<sup>2</sup>

#### *Limitation on right to reduce price*

14. The buyer's right to declare a reduction in the price is expressly subject to the seller's right to remedy any failure to perform his obligations pursuant to article 44.<sup>3</sup> If the seller subsequently remedies his failure to perform or is not allowed by the buyer to remedy that failure, the "declaration of reduction of the price is of no effect".

### *Article 47*

#### *[Partial non-performance]*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### *PRIOR UNIFORM LAW*

U.I.L.S., article 45.

#### *Commentary*

1. Article 47 states the buyer's remedies when the seller fails to perform only a part of his obligations.

<sup>2</sup> See example 70D.

<sup>3</sup> See paras. 2 to 12 of the commentary to article 44 for a discussion of this rule.

*Remedies in respect of the non-conforming part, paragraph (1)*

2. Paragraph (1) provides that if the seller has failed to perform only a part of his obligations under the contract by delivering only a part of the goods or by delivering some goods which do not conform to the contract, the provisions of articles 42 to 46 apply in respect of the quantity which is missing or which does not conform to the contract. In effect, this paragraph provides that the buyer can avoid a part of the contract under article 45. This rule was necessary because in some legal systems a party cannot avoid only a part of the contract. In those legal systems the conditions for determining whether the contract can be avoided at all must be determined by reference to the entire contract. However, under article 47 (1) it is clear that under this Convention the buyer is able to avoid a part of the contract if the criteria for avoidance are met as to that part.

*Remedies in respect of the entire contract, paragraph (2)*

3. Paragraph (2) provides that the buyer may avoid the entire contract "only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract". Although this provision reiterates the rule which would otherwise be applied under article 45 (1) (a), it is useful that it be made clear.

4. The use of the word "only" in article 47 (2) also has the effect of negating the implication which might have been thought to flow from article 45 (1) (b) that the entire contract could be avoided on the grounds that the seller failed to deliver a part of the goods within the additional period of time fixed by the buyer in accordance with article 43 even though such failure to deliver did not in itself amount to a fundamental breach of the entire contract.

*Article 48**[Early delivery; delivery of excess quantity]*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

## PRIOR UNIFORM LAW

ULIS, articles 29 and 47.

*Commentary*

1. Article 48 deals with two situations where the buyer may refuse to take delivery of goods which have been placed at his disposal.

*Early delivery, paragraph (1)*

2. Article 48 (1) deals with the situation where goods have been delivered to the buyer before the delivery date fixed pursuant to article 31. If the buyer were forced to accept these goods, it might cause him inconvenience and expense in storing them longer than anticipated. Furthermore, if the contract links the day payment is due to the day delivery is made, early delivery will force early payment with consequent interest expense. Therefore, the buyer is given the choice of taking delivery of the goods or refusing to take delivery of them when the seller delivers them prior to the delivery date.

3. The buyer's right to take delivery or to refuse to take delivery is exercisable upon the fact of early delivery. It does not depend on whether early delivery causes the buyer extra expense or inconvenience.<sup>1</sup>

<sup>1</sup> Nevertheless, the buyer must have a reasonable commercial need to refuse to take delivery since article 6 requires the observance of good faith in international trade.

4. However, where the buyer does refuse to take delivery of the goods under article 48 (1), according to article 75 (2) he will still be bound to take possession of them on behalf of the seller if the following four conditions are met: (1) the goods have been placed at his disposal at their place of destination, (2) he can take possession without payment of the price, e.g., the contract of sale does not require payment in order for the buyer to take possession of the documents covering the goods, (3) taking possession would not cause the buyer unreasonable inconvenience or unreasonable expense, and (4) neither the seller nor a person authorized to take possession of the goods on his behalf is present at the destination of the goods.

5. If the buyer refuses to take the early delivery, the seller is obligated to redeliver the goods at the time for delivery under the contract.

6. If the buyer does take early delivery of the goods, he may claim from the seller for any damages he may have suffered unless, under the circumstances, the acceptance of early delivery amounts to an agreed modification of the contract pursuant to article 27.<sup>2</sup>

*Excess quantity, paragraph (2)*

7. Article 48 (2) deals with the situation where an excess quantity of goods has been delivered to the buyer.

8. Unless there are other reasons which justify the buyer's refusal to take delivery, the buyer must accept at least the quantity specified in the contract. In respect of the excess amount, the buyer may either refuse to take delivery or he may take delivery of some or all of it. If the buyer refuses to take delivery of the excess quantity, the seller is liable for any damages suffered by the buyer. If the buyer takes delivery of some or all of the excess quantity he must pay for it at the contract rate.

9. If it is not feasible for the buyer to reject only the excess amount, as where the seller tenders a single bill of lading covering the total shipment in exchange for payment for the entire shipment, the buyer may avoid the contract if the delivery of such an excess quantity constitutes a fundamental breach. If the delivery of the excess quantity does not constitute a fundamental breach or if for commercial reasons the buyer is impelled to take delivery of the shipment, he may claim any damages he has suffered as a result.

## CHAPTER III. OBLIGATIONS OF THE BUYER

*Article 49**[General obligations]*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

## PRIOR UNIFORM LAW

ULIS, article 56.

*Commentary*

Article 49 states the principal obligations of the buyer and introduces Chapter III of Part III of the Convention. The principal obligations of the buyer are to pay the price for the goods and to take delivery of them. The buyer must carry out his obligations "as required by the contract and this Convention." Since article 5 of the Convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the Convention the buyer must fulfil his obligations as required by the contract.

<sup>2</sup> Article 48 (1) does not refer to the buyer's right to seek damages. However, the buyer's right to damages is a general right under article 41 (1) (b).

## SECTION I. PAYMENT OF THE PRICE

## Article 50

## [Obligation to pay the price]

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

## PRIOR UNIFORM LAW

ULIS, article 69.

## Commentary

1. Articles 50 to 55 provide a number of the details involved in the obligation of the buyer to pay the price, an obligation which is set out in article 49. In the case of article 50, it includes as part of the buyer's obligation to pay the price an obligation to take a number of preliminary actions in order to make possible the payment of the price.

2. Article 50 envisages that, as part of the buyer's obligation to pay the price, he must take the steps and comply with the formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made. These steps may include applying for a letter of credit or a bank guarantee of payment, registering the contract with a government office or with a bank, procuring the necessary foreign exchange or applying for official authorization to remit the currency abroad. Unless the contract specifically placed one of these obligations on the seller, it is the buyer who must take these steps.

3. The buyer's obligation under article 50 is limited to taking steps and complying with formalities. Article 50 does not require the buyer to undertake that his efforts will result in the issuance of a letter of credit, the authorization to procure the necessary foreign exchange or even that the price will finally be paid. Of course, under article 49 the buyer is obligated to see that the price is paid, an obligation the consequences of which he may be relieved in part by the exemption provision in article 65.

4. Nevertheless, the buyer is obligated to take all the appropriate measures to persuade the relevant Governmental authorities to make the funds available and cannot rely on a refusal by those authorities unless he has taken such measures.

5. The major significance of article 50 lies in the fact that taking such steps and complying with such formalities as may be required to enable payment to be made is considered to be a current obligation, the breach of which gives rise to remedies under articles 57 to 60, and is not considered to be "conduct in preparing to perform or in actually performing the contract", which may give rise to questions of anticipatory breach under articles 62 to 64.<sup>1</sup>

## Article 51

## [Calculation of the price]

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

## PRIOR UNIFORM LAW

ULIS, article 57.

<sup>1</sup> The quoted words are from article 62 (1).

## Commentary

1. Article 51 provides a means for the determination of the price when a contract has been validly concluded but the contract does not state a price or expressly or impliedly make provision for its determination.

2. Article 12 (1) provides that a proposal for concluding a contract is sufficiently definite so as to constitute an offer if, *inter alia*, "it . . . expressly or implicitly fixes or makes provision for determining . . . the price". Therefore, article 51 has effect only if one of the parties has his place of business in a Contracting State which has ratified or accepted this Convention as to Part III (Sales of goods) but not as to Part II (Formation of the contract) and if the law of that State provides that a contract can be validly concluded even though it does not expressly or implicitly fix or make provision for determining the price.

## Time of calculation of price

3. The price to be determined by the application of article 51 is that charged at the time of the conclusion of the contract. It is the price which would presumably have been agreed upon by the parties at the time of contracting if they had agreed upon a price at that time. Moreover, if a contract had been validly concluded even without specification of the price, the article recognizes that the seller should not later be able to claim that the price was that prevailing at the time of the delivery of the goods, if that price was higher than the one the seller was charging at the time of the conclusion of the contract.

## Article 52

## [Price fixed by weight]

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

## PRIOR UNIFORM LAW

ULIS, article 58.

## Commentary

1. Article 52 supplies a convenient rule of interpretation of the contract. If the parties have not expressly or impliedly stipulated otherwise, the buyer does not pay for the weight of the packing materials.

## Article 53

## [Place of payment]

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

(a) at the seller's place of business; or

(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

## PRIOR UNIFORM LAW

ULIS, article 59.

## Commentary

1. Article 53 provides a rule for the place at which payment of the price is to be made. Because of the importance of the question, the contract will usually contain specific provisions on the mode and place of payment. Accordingly, the rule in article 53 is expressly stated to apply

only if "the buyer is not bound to pay the price at any other particular place".<sup>1</sup>

2. It is important that the place of payment be clearly established when the contract is for the international sale of goods. The existence of exchange controls may make it particularly desirable for the buyer to pay the price in his country whereas it may be of equal interest to the seller to be paid in his own country or in a third country where he can freely use the proceeds of the sale.

3. This Convention does not govern the extent to which exchange control regulations or other rules of economic public order may modify the obligations of the buyer to pay the seller at a particular time or place or by a particular means. The buyer's obligations to take the steps which are necessary to enable the price to be paid are set forth in article 50. The extent to which the buyer may be relieved of liability for damages for his failure to pay as agreed because of exchange control regulations or the like is governed by article 65.<sup>2</sup>

#### *Place of payment, paragraph (1)*

4. Article 53 (1) (a) provides the primary rule that the buyer must pay the price at the seller's place of business. If the seller has more than one place of business, the place of business at which payment must be made "is that which has the closest relationship to the contract and its performance".<sup>3</sup>

5. If payment is to be made against the handing over of the goods or of documents, article 53 (1) (b) provides that payment must be made at the place where the handing over takes place. This rule will be applied most often in the case of a contract stipulation for payment against documents.<sup>4</sup> The documents may be handed over directly to the buyer, but they are often handed over to a bank which represents the buyer in the transaction. The "handing over" may take place in either the buyer's or the seller's country or even in a third country.

*Example 53A:* The contract of sale between Seller with his place of business in State X and Buyer with his place of business in State Y called for payment against documents. The documents were to be handed over to Buyer's bank in State Z for the account of Buyer. Under article 53 (1) (b) Buyer must pay the price at his bank in State Z.

#### *Change of seller's place of business, paragraph (2)*

6. If the seller changes his place of business at which the buyer is to make payment subsequent to the conclusion of the contract, the buyer must make payment at the seller's new place of business. However, any increase in expenses incidental to payment must be borne by the seller.

### **Article 54**

#### **[Time of payment; payment as condition for handing over: examination before payment]**

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will

not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### **PRIOR UNIFORM LAW**

ULIS, articles 71 and 72.

#### **Commentary**

1. Article 54 governs the time for the buyer's payment in relation to performance by the seller.

#### *General rule, paragraph (1)*

2. Article 54 (1) recognizes that, in the absence of an agreement, the seller is not required to extend credit to the buyer. Therefore, the general rule stated in paragraph (1) is that the buyer is required to pay the price at the time the seller makes the goods available to the buyer, by placing either the goods or documents controlling their disposition at the buyer's disposal. If the buyer does not pay at that time, the seller may refuse to hand over the goods or documents.

3. The converse of this rule is that, unless otherwise agreed, the buyer is not bound to pay the price until the seller places either the goods or documents controlling their disposition at the buyer's disposal. Furthermore, under article 54 (3), which is discussed below, the buyer is not bound to pay the price until he has had an opportunity to examine the goods.

#### *Where the contract involves carriage of the goods, paragraph (2)*

4. Paragraph (2) states a specific rule in implementation of paragraph (1) where the contract of sale involves carriage of the goods. In such a case "the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price." The goods may be so dispatched unless there is a clause in the contract providing otherwise, in particular by providing for credit.

#### *Payment and examination of the goods, paragraph (3)*

5. Paragraph (3) states the general rule that the buyer is not required to pay the price unless he has had an opportunity to examine the goods. It is the seller's obligation to provide a means for the buyer's examination prior to payment and handing over.

6. Where the contract of sale involves carriage of the goods and the seller wishes to exercise his right under article 54 (2) to ship the goods on terms whereby neither the goods nor the documents will be handed over to the buyer prior to payment, the seller must preserve the buyer's right to examine the goods. Since the buyer normally examines the goods at the place of destination,<sup>1</sup> the seller may be required to make special arrangements with the carrier to allow the buyer access to the goods at the destination prior to the time the goods or documents are handed over in order to allow for the buyer's examination.

7. The buyer loses the right to examine the goods prior to payment where the procedures for delivery or payment agreed upon by the parties are inconsistent with the buyer having had such an opportunity. This Convention does not set forth which procedures for delivery or payment are inconsistent with the buyer's right to examine the goods prior to payment. However, the most common example is the agreement that payment of the price is due against the handing over of the documents controlling the disposition of the goods whether or not the goods have arrived. The quotation of the price on CIF terms contains such an agreement.<sup>2</sup>

<sup>1</sup> See article 36 (2).

<sup>2</sup> Incoterms, CIF condition B. 1, provides that the buyer must accept the documents when tendered by the seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract.

<sup>1</sup> This result is also reached through the operation of article 5. However, the express re-iteration of the principle emphasizes the importance that the contract will usually attach to the place of payment of the price.

<sup>2</sup> For the extent to which the seller may be relieved of the duty to deliver the goods if the buyer does not pay as agreed, see articles 54 (1), 60, 62, 63 and 64.

<sup>3</sup> Article 9 (a). But see also article 53 (2) and paragraph 6 below.

<sup>4</sup> The documents referred to in article 53 (1) (b) are those which the seller is required to hand over by virtue of articles 28 and 32.

8. It should be noted that since the buyer loses the right to examine the goods prior to payment of the price only if the procedures for payment or delivery "agreed upon by the parties" are inconsistent with such right, he does not lose his right to examine the goods prior to payment where the contract provides that he must pay the price against the handing over of the documents after the arrival of the goods. Since payment is to take place after the arrival of the goods, the procedure for payment and delivery are consistent with the right of examination prior to payment. Similarly, the buyer does not lose his right to examine the goods prior to payment where the seller exercises his right under article 54 (2) to dispatch the goods on terms whereby the documents controlling the disposition of the goods will be handed over to the buyer only upon the payment of the price.

9. The buyer's right to examine the goods where the contract of sale involves the carriage of the goods is illustrated by the following examples:

*Example 54A:* The contract of sale quoted the price on CIF terms. Therefore, it was anticipated that payment would be made in the following manner. Seller would draw a bill of exchange on Buyer for the amount of the purchase price. Seller would forward the bill of exchange accompanied by the bill of lading (along with other documents enumerated in the contract) to a collecting bank in Buyer's city. The contract provided that the bill of lading (and other documents) would be handed over to Buyer by the bank only upon the payment of the bill of exchange. Since this agreed-upon procedure for payment requires payment to be made at the time the bill of exchange is presented, often at a time the goods are still in transit, the means of payment is inconsistent with Buyer's right to examine the goods prior to payment. Therefore, Buyer did not have such a right in this case.

*Example 54B:* The contract of sale was not on CIF terms and made no other provision for the time or place of payment. Therefore, pursuant to the authority in article 54 (2) Seller took the same actions as in example 54A. Seller drew a bill of exchange on Buyer for the purchase price and forwarded it accompanied by the bill of lading through his bank to a collecting bank in the Buyer's city. Seller gave the collecting bank instructions that it should not hand over the bill of lading to Buyer until Buyer had paid the bill of exchange.

In this example the means of payment, though authorized by article 54 (2), were not "agreed upon by the parties" as is required by article 54 (3). Therefore, Buyer does not lose his right to examine the goods prior to paying the price, i.e., prior to paying the bill of exchange. It is Seller's obligation to assure Buyer of the possibility of examination prior to payment.

*Example 54C:* The contract of sale provided for payment of the price on presentation of the documents at the point of arrival of the goods but only after the arrival of the goods. In this case the procedures for delivery and payment expressly stipulated by the parties are not inconsistent with the right of Buyer to examine the goods prior to payment even though the price was to be paid against the presentation of the documents.

### Article 55

#### [Payment due without request]

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

#### PRIOR UNIFORM LAW

ULIS, article 60.

#### Commentary

Article 55 is intended to deny the applicability of the rule in some legal systems which states that in order for the payment to become due

the seller must make a formal demand for it from the buyer. Under article 55 the buyer must pay the price on the date fixed by or determinable from the contract and this Convention<sup>1</sup> whether or not the seller has requested payment.

## SECTION II. TAKING DELIVERY

### Article 56

#### [Obligation to take delivery]

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

#### PRIOR UNIFORM LAW

ULIS, article 65.

#### Commentary

1. Article 56 describes the second obligation of the buyer set out in article 49, i.e., to take delivery of the goods.

2. The buyer's obligation to take delivery consists of two elements. The first element is that he must do "all the acts which could reasonably be expected of him in order to enable the seller to make delivery." For example, if under the contract of sale the buyer is to arrange for the carriage of the goods, he must make the necessary contracts of carriage so as to permit the seller to "[hand] the goods over to the first carrier for transmission to the buyer".<sup>1</sup>

3. The buyer's obligation is limited to doing those "acts which could reasonably be expected of him". He is not obliged to do "all such acts as are necessary in order to enable the seller to hand over the goods", as was the case under ULIS.<sup>2</sup>

4. The second element of the buyer's obligation to take delivery consists of his "taking over the goods". This aspect of the obligation to take delivery is of importance where the contract calls for the seller to make delivery by placing the goods at the buyer's disposal at a particular place or at the seller's place of business.<sup>3</sup> In such case the buyer must physically remove the goods from that place in order to fulfil his obligation to take delivery.<sup>4</sup>

## SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

### Article 57

#### [Seller's remedies in general; claim for damages; no period of grace]

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

- (a) exercise the rights provided in articles 58 to 61;
- (b) claim damages as provided in articles 70 to 73;

<sup>1</sup> For example, a date for payment may be established by usage (article 8) or through the operation of the rule in article 54 (1).

<sup>2</sup> Article 29 (a). Cf. article 30 (2).

<sup>3</sup> ULIS, article 65.

<sup>4</sup> Article 29 (b) and (c).

<sup>5</sup> Cf. the buyer's obligation under article 75 (2) to take possession on behalf of the seller of goods which have been dispatched to and have been put at the disposal of the buyer at the place of destination and in respect of which the buyer has exercised his right to reject.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### PRIOR UNIFORM LAW

ULIS, articles 61 to 64, 66 to 68 and 70.

#### Commentary

1. Article 57 serves both as an index to the remedies available to the seller if the buyer fails to perform any of his obligations under the contract and this Convention and as the source for the seller's right to claim damages. Article 57 is comparable to article 41 on the remedies available to the buyer.

2. Article 57 (1) (a) provides that in case of the buyer's breach, the seller may "exercise the rights provided in articles 58 to 61." Although the provisions on the remedies available to the seller in articles 58 to 61 are drafted in terms comparable to those available to the buyer in articles 42 to 48, they are less complicated. This is so because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. Therefore, the seller has no remedies comparable to the following which are available to the buyer: reduction of the price because of non-conformity of the goods (article 46), right to partially exercise his remedies in the case of partial delivery of the goods (article 47),<sup>1</sup> right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods (article 48).

3. Article 57 (1) (b) provides that the seller may "claim damages as provided in articles 70 to 73: if the buyer fails to perform any of his obligations under the contract of sale and this Convention." In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is true in some legal systems. Damages are available for the loss resulting from any objective failure by the buyer to fulfil his obligations. Articles 70 to 73, to which article 57 (1) (b) refers, do not provide the substantive conditions for the exercise of a claim for damages but the rules for the calculation of the amount of damages.

4. A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the buyer. First, all the buyer's obligations are brought together in one place without confusions generated by the complexities of repetitive remedial provisions. This makes it easier to understand the rules on what the buyer must do, which are the provisions of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross-referencing is lessened.

5. Paragraph (2) provides that a party who has resorted to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred.

6. Paragraph (3) provides that if a seller resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the seller has resorted to the remedy. The reasons for this provision are discussed in paragraphs 3 to 5 of article 43. Such a provision seems desirable in international trade.

#### Article 58

##### [Seller's right to require performance]

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the sel-

<sup>1</sup> However, article 64 (1) allows the seller to declare the contract avoided as to one instalment where the buyer's failure to perform in respect of that instalment amounts to a fundamental breach of that instalment.

ler has resorted to a remedy which is inconsistent with such requirement.

#### PRIOR UNIFORM LAW

ULIS, articles 61 and 62 (1).

#### Commentary

1. Article 58 describes the seller's right to require the buyer to perform his obligations under the contract and this Convention.

##### *Failure to pay the price*

2. This article recognizes that the seller's primary concern is that the buyer pay the price at the time it is due. Therefore, if the price is due under the terms of articles 54 and 55 and the buyer does not pay it, this article authorizes the seller to require the buyer to pay it.

3. Article 58 differs from the law of some countries in which the seller's remedies in respect of the price are restricted. In those countries, even though the buyer may have a substantive obligation to pay under the contract, the general principle is that the seller must make a reasonable effort to resell the goods to a third party and recover as damages any difference between the contract price and the price he received in the substitute transaction. The seller may recover the price if resale to a third person is not reasonably possible.

4. However, under article 58, when the buyer has a substantive obligation to pay the price under articles 54 and 55, the seller has available a remedy to require him to pay it.<sup>1</sup>

5. The style in which article 58 in particular and Section III on the buyer's remedies in general is drafted should be noted at this point. That style conforms to the view held in many legal systems that a legislative text on the law of sales governs the rights and obligations between the parties and does not consist of directives addressed to a tribunal. In other legal systems the remedies available to one party on the other party's failure to perform are stated in terms of the injured party's right to the judgement of a court granting the required relief.<sup>2</sup> However, the two different styles of legislative drafting are intended to achieve the same result. Therefore, when article 58 provides that the "seller may require the buyer to pay the price, take delivery or perform his other obligations", it anticipates that, if the buyer does not perform, a court will order such performance and will enforce that order by the means available to it under its procedural law.

6. Although the seller has a right to the assistance of a court or arbitral tribunal to enforce the buyer's obligations to pay the price, take delivery and perform any of his other obligations, article 26 limits that right to a certain degree. If the court could not give a judgement for specific performance under its own law in respect of similar contracts of sale not governed by this Convention, it is not required to enter such a judgement in a case arising under this Convention even though the seller had a right to require the buyer's performance under article 58. However, if the court could give such a judgement under its own law, it would be required to do so if the criteria of article 58 are met.

7. The seller can require performance under this article and also sue for damages. Where the buyer's non-performance of one of his obligations consists in the delay in the payment of the price, the seller's damages would normally include interest.

##### *Failure to perform other obligations*

8. Article 58 goes on to authorize the seller to require the buyer to "take delivery or perform his other obligations".<sup>3</sup>

<sup>1</sup> As to the relationship of the principle of mitigation to the right to require payment of the price, see para. 3 of the commentary to article 73.

<sup>2</sup> See the examples in foot-note 1 to para. 8 of the commentary to article 42.

<sup>3</sup> The obligation to "take delivery" is specifically mentioned because it is the second of the two obligations of the buyer set forth in article 49. The definition of taking delivery is found in article 56.



9. In some cases the seller may be authorized or required to substitute his own performance for that which the buyer has failed to do. Article 61 provides that in a sale by specification, if the buyer fails to make the specifications required on the date requested or within a reasonable time after receipt of a request from the seller, the seller may make the specifications himself. Similarly, if the buyer is required by the contract to name a vessel on which the goods are to be shipped and fails to do so by the appropriate time, article 73, which requires the party who relies on a breach of contract to mitigate the losses, may authorize the seller to name the vessel so as to minimize the buyer's losses.

#### *Inconsistent acts by the seller*

10. Article 58 also provides that in order for the seller to exercise the right to require performance of the contract he must not have acted inconsistently with that right, e.g. by avoiding the contract under article 60.

### *Article 59*

#### *[Fixing of additional period for performance]*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

#### *PRIOR UNIFORM LAW*

ULIS, article 66 (2).

#### *Commentary*

1. Article 59 states the right of the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations and specifies one of the consequences of his having fixed such a period.

#### *Fixing additional period, paragraph (1)*

2. Article 59 is a companion to article 58 which states the right of the seller to require performance of the contract by the buyer and which anticipates the aid of a court or arbitral tribunal in enforcing that right. If the buyer delays performing the contract, the use of judicial procedures for enforcement may not seem feasible or may require more time than the seller can afford to wait. This may be particularly the case if the buyer's failure to perform consists of delay in procuring the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee, or of securing the permission to import the goods or pay for them in restricted foreign exchange. It may be to the seller's advantage to avoid the contract and make a substitute sale to a different purchaser. However, at that time it may not be certain that the buyer's delay constitutes a fundamental breach of contract justifying the avoidance of the contract under article 60 (1) (a).

3. Different legal systems take different attitudes towards the right of a seller to avoid the contract because of the buyer's failure to pay the price or perform his other obligations on the date specified in the contract. In some legal systems the buyer's failure to perform on the contract date normally authorizes the seller to avoid the contract. However, in a given case the court or tribunal may decide that the seller may not avoid the contract at that time because the failure to perform on the contract date was either not sufficiently serious or the seller had waived his right to prompt performance. In other legal systems the buyer can request a delay of grace from a court or tribunal which, in effect, establishes a new performance date.<sup>1</sup> In still other legal systems the general

rule is that late performance does not authorize the seller to avoid the contract unless the contract provided for such a remedy or unless after the buyer's breach the seller specifically fixed a time period within which the buyer had to perform.

4. This Convention specifically rejects the idea that in a commercial contract of sale of goods the seller may, as a general rule, avoid the contract once the contract date for performance has passed and the buyer has not as yet performed one or more of his obligations. In these circumstances the seller may do so if, and only if, the failure to perform on the contract date causes him substantial detriment and the buyer foresaw or had reason to foresee such a result.<sup>2</sup>

5. As a result of this rule in this Convention there was no reason to allow the buyer to apply to a court for a delay of grace, as is permitted in some legal systems. Moreover, the procedure of applying to a court for a delay of grace is particularly inappropriate in the context of international commerce, especially since this would expose the parties to the broad discretion of a judge who would usually be of the same nationality as one of the parties. Therefore, article 57 (3) provides that "No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

6. Although the seller can declare the contract avoided in any case in which the delay in performance constitutes a fundamental breach, this will not always be a satisfactory solution for him. Once the buyer is late in performing, the seller may be legitimately doubtful that the buyer will be able to perform by the time that performance will be essential for the seller. This situation is similar to the problems raised by an anticipatory breach under articles 62, 63 and 64. Furthermore, in most contracts for the sale of goods the point of time at which the detriment to the seller would become sufficiently substantial to constitute a fundamental breach would be somewhat imprecise. Therefore, article 59 (1) authorizes the seller to fix an additional period of time of reasonable length for performance by the buyer of his obligations. However, article 60 (1) (b) allows the seller to declare the contract avoided only if the buyer has not performed his obligation to pay the price<sup>3</sup> or has not taken delivery of the goods,<sup>4</sup> or if he has declared that he will not do so within the additional period of time.

7. The procedure authorized by article 59 (1) of fixing an additional period of time after which the seller can declare the contract avoided if the buyer has not performed his obligation to pay the price or taken delivery of the goods would have the danger that a seller could turn an inconsequential delay which would not justify declaring the contract avoided for fundamental breach under article 60 (1) (a) into a basis for declaring the contract avoided under article 60 (1) (b). Therefore, article 59 (1) says that the additional period must be "of reasonable length". This period may be fixed either by specifying the date by which performance must be made (e.g. 30 September) or by specifying a time period (e.g. "within one month from today"). A general demand by the seller that the buyer perform or that he perform "promptly" or the like is not a "fixing" of a period of time under article 59 (1).

8. It should be pointed out that, although the procedure envisaged by article 59 (1) has a certain parentage in the German procedure of "Nachfrist" and the French procedure of a "mise en demeure," in its current form it does not partake of either one. In particular, the procedure envisaged by article 59 (1) is not mandatory and need not be used in order to avoid the contract if the delay in performance amounts to a fundamental breach.

#### *Seller's other remedies, paragraph (2)*

9. In order to protect the buyer who may be preparing to perform the contract as requested by the seller, perhaps at considerable expense, during the additional period of time of reasonable length the seller may not resort to any remedy for breach of contract, unless the seller has re-

<sup>2</sup> Article 23 which defines "fundamental breach", and article 60 (1) (a), which authorizes the seller to declare the contract avoided for fundamental breach.

<sup>3</sup> As to the buyer's obligation to pay the price, see article 50 and the commentary thereto.

<sup>4</sup> As to the buyer's obligation to take delivery of the goods, see article 56 and the commentary thereto.

<sup>1</sup> Cf. article 57 (3). See para. 5 below.

ceived notice from the buyer that he will not comply with the request. Once the additional period of time has expired without performance by the buyer, the seller may not only avoid the contract under article 60 (1) (b) but may resort to any other remedy he may have.

10. In particular, the seller may claim any damages he may have suffered because of the delay in performance. Such damages may arise even though the buyer has performed his obligations within the additional period of time fixed by the seller.

### Article 60

#### [Seller's right to avoid contract]

(1) The seller may declare the contract avoided;

(a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59 or the declaration by the buyer that he will not perform his obligations within such an additional period.

#### PRIOR UNIFORM LAW

ULIS, articles 61 (2), 62, 66 and 70.

#### Commentary

1. Article 60 describes the seller's right to declare the contract avoided. The buyer's right to declare the contract avoided is described in article 45.

#### Declaration of avoidance

2. The contract is avoided as a result of the buyer's breach only if "the seller . . . declare[s] the contract avoided". This narrows the rule from that found in articles 61 and 62 of ULIS which provided for an automatic or *ipso facto* avoidance in certain circumstances in addition to avoidance by declaration of the seller. Automatic or *ipso facto* avoidance was deleted from the remedial system in this Convention because it led to uncertainty as to whether the contract was still in force or whether it had been *ipso facto* avoided. Under article 60 of this Convention the contract is still in force unless the buyer has affirmatively declared it avoided. Of course, uncertainty may still exist as to whether the conditions had been met authorizing the buyer to declare the contract avoided.

3. Article 24 provides that "a declaration of avoidance of the contract is effective only if made by notice to the other party". The consequences which follow if a notice of avoidance fails to arrive or fails to arrive in time or if its contents have been inaccurately transmitted are governed by article 25.

#### Fundamental breach, subparagraph (1) (a)

4. The typical situation in which the seller may declare the contract avoided is where the failure by the buyer to perform any of his obligations amounts to a fundamental breach. The concept of fundamental breach is defined in article 23.

5. If there is a fundamental breach of contract, the seller has an immediate right to declare the contract avoided. He need not give the buyer any prior notice of his intention to declare the contract avoided. It may be questioned, however, how often the buyer's failure to pay the price, take delivery of the goods or perform any of his other obligations under the contract and this Convention would immediately constitute a fundamental breach of contract if they were not performed on the date they were due. If it would seem that in most cases the buyer's failure would amount to a fundamental breach as it is defined in article 23 only after the passage of some period of time.

#### Buyer's delay in performance, subparagraph (1) (b)

6. Subparagraph (1) (b) further authorizes the seller to declare the contract avoided in one restricted case. If the buyer has not paid the price or taken delivery of the goods and the seller requests him to do so under article 59, the seller can avoid the contract "if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed."

7. The buyer's obligation to pay the price includes taking such steps and complying with such formalities which may be required by the contract and by any relevant laws and regulations to enable payment to be made, such as registering the contract with a government office or with a bank, procuring the necessary foreign exchange, as well as applying for a letter of credit or a bank guarantee to facilitate the payment of the price.<sup>1</sup> Therefore, the buyer's failure to take any of these steps within an additional period of time fixed by the seller in accordance with article 59 would authorize the seller to declare the contract avoided under article 60 (1) (b). The seller would not be required to use the procedures of either article 60 (1) (a) on fundamental breach or article 63 on anticipatory breach.

#### Loss or suspension of right to avoid, paragraph (2)

8. Article 60 (2) provides that where the buyer has paid the price, the seller will lose the right to declare the contract avoided if he does not declare the contract avoided within a specified period of time. The seller does not lose his right to declare the contract avoided until the total price has been paid.

9. If the fundamental breach on which the seller relies to declare the contract avoided is the late performance of an obligation, paragraph (2) (a) provides that where the price has been paid, the seller loses his right to declare the contract avoided at the time he becomes aware that the performance has been rendered. Since the late performance in question will most often be in respect of the payment of the price, in most cases the seller will lose the right to declare the contract avoided under article 60 (1) (a) at the time he becomes aware that the price has been paid.

10. If the buyer has paid the price but there is a fundamental breach of the contract in respect of some obligation other than late performance by the buyer, paragraph (2) (b) provides that the seller loses the right to declare the contract avoided if the seller does not declare the contract avoided within a reasonable time after he knew or ought to have known of such breach.

11. Article 60 (2) (b) may also take away the right of the seller to declare the contract avoided in cases where he has fixed an additional period for performance under article 59 (1). If the buyer performs after the additional period fixed pursuant to article 59 (1) or after he has declared that he will not perform within that additional period of time, the seller loses the right to declare the contract avoided if he does not do so within a reasonable time after the expiration of the additional pe-

<sup>1</sup> See article 50 and the commentary thereto.



ried or within a reasonable time after the buyer has declared that he will not perform within that additional period of time.

12. Since the seller does not lose his right to declare the contract avoided under article 60 (2) until the total price is paid, under this provision all the instalments in an instalment contract must be paid before the seller loses the right to declare the contract avoided. However, under article 64 (2) the seller's right to declare the contract avoided in respect of future instalments must be exercised "within a reasonable time" after that failure to perform by the buyer which justifies the declaration of avoidance.

#### *Right to avoid prior to the date for performance*

13. For the seller's right to avoid prior to the contract date of performance, see articles 63 and 64 and the commentaries thereon.

#### *Effects of avoidance*

14. The effects of avoidance by the seller are described in articles 66 and 69. The most significant consequence of avoidance for the seller is that he is no longer required to deliver the goods and he may claim their return if they have already been delivered.

15. Avoidance of the contract does not terminate either the buyer's obligation to any damages caused by his failure to perform or any provisions in the contract for the settlement of disputes.<sup>2</sup> Such a provision is important because in many legal systems avoidance of the contract eliminates all rights and obligations which arose out of the existence of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, which usually means arbitration clauses, terminate with the rest of the contract.

### *Article 61*

#### *[Specification by seller]*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specifications himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

#### *PRIOR UNIFORM LAW*

ULIS, article 67.

#### *Commentary*

1. Article 61 describes the seller's rights where the buyer fails to specify some aspect or quality of the goods ordered by the date on which he was obligated to do so.

2. It often occurs that the buyer wishes to contract for the purchase of goods even though at that moment he is as yet undecided about some feature of the goods ordered. For example, on 1 April the buyer might order 1,000 pairs of shoes at a certain price for delivery on or before 1 October. The contract might also state that the buyer must specify the styles and sizes to the seller before 1 September or it might state that the buyer has the right, but not the obligation, to make the specification.

The seller may be a merchant who will assemble the quantity to be delivered from inventory or he may be a manufacturer who will, subsequent to the notification, manufacture the goods according to the buyer's specifications.

3. Even in these cases in which the buyer is obligated to make the specification, he may fail to do so by the date required, before 1 September in this example, either through oversight or because he would now prefer not to receive the 1,000 pairs of shoes. If he now desires not to receive the shoes, it will usually be because of changes in business conditions which have reduced his need for the 1,000 pairs of shoes or because the price has declined and he could buy them at a lower price elsewhere.

#### *Seller's remedies, paragraph (1)*

4. Article 61 rejects any suggestion that the contract is not complete until the buyer has notified the seller of the specification or that the buyer's notification of the specification is a condition to the seller's right to deliver the goods and demand payment of the price.

5. Article 61 (1) authorizes the seller, at his choice, to provide the specification himself or to exercise any other rights he may have under the contract and this Convention for the buyer's breach. Of course, the buyer's failure to make the specification would constitute a breach of the contract only if the buyer was obligated to do so, not if he was merely authorized to do so.

6. If the buyer's failure to make the specification constituted a breach of contract, the seller could pursue his remedies for that breach, in place of or in addition to making the specification himself under article 61. Therefore, the seller could: (1) sue for damages under article 57 (1) (b), (2) if the buyer's failure to make the required specification amounted to a fundamental breach of contract, avoid the contract under article 60 (1) (a) and sue for any damages,<sup>1</sup> or (3) fix an additional period of reasonable length for the buyer to perform his obligation under article 59 (1). If, pursuant to article 59, the seller fixes an additional period of time of reasonable length for performance by the buyer and the buyer does not perform within this additional time, the seller could avoid the contract under article 60 (1) (b) and sue for any damages even if the buyer's failure to make the specification did not constitute a fundamental breach of contract.

7. If the seller chooses to exercise his right to make the specification himself pursuant to article 61 (1), he may do so immediately upon the passage of the date agreed upon in the contract as the date by which the buyer would make the specification. Alternatively, the seller may request the specification from the buyer, in which case the seller must await a reasonable time after the buyer has received the request from the seller before he can make the specification himself.<sup>2</sup>

#### *Notice to the buyer, paragraph (2)*

8. Article 61 imposes three obligations on a seller who intends to make the specification himself. According to article 61 (1) he must make the specification "in accordance with any requirement of the buyer that may be known to him". According to article 61 (2) the seller must inform the buyer of the specification and its details and he must fix a reasonable time within which the buyer may make a different specification.

9. If the seller does not make the specification in accordance with the requirements of the buyer or does not inform the buyer of the specification and its details, the specification would not be binding on the buyer. If the seller does not fix a reasonable period of time for the buyer to make a different specification, the buyer would, nevertheless, be entitled to such a period in which to make the specification.

10. Although the seller is called on to fix the period in the notice by which he informs the buyer of the specification, the reasonableness of that period is measured from the time at which the buyer receives the

<sup>1</sup> Article 66 (1) preserves the right to sue for damages even though the contract has been avoided.

<sup>2</sup> It should be noted that the request for specification here is pursuant to article 61 (1) and not pursuant to article 59 as discussed in para. 6 *supra*.

<sup>2</sup> Article 66 (1).

specification. If the specification is never received by the buyer, it never becomes binding on him.<sup>3</sup>

11. Within the reasonable period of time after the buyer receives the specification, he must either make a new specification or that made by the seller is binding.

#### CHAPTER IV. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

##### SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

#### Article 62

##### [Suspension of performance]

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

##### PRIOR UNIFORM LAW

ULIS, article 73.

##### Commentary

1. Article 62 describes the extent to which a party may suspend the performance of his obligations because of the existence of good grounds to conclude that the other party will not perform a substantial part of his obligations.

##### *Right to suspend performance, paragraph (1)*

2. Paragraph (1) provides that a party may suspend the performance of his obligations if it is reasonable to do so because after the conclusion of the contract a serious deterioration of the other party's ability or willingness to perform "gives good grounds to conclude that the other party will not perform a substantial part of his obligations."

3. The deterioration must have been in the other party's ability to perform or in his creditworthiness or must be manifested by his conduct in preparing to perform or in actually performing the contract in question. It is not enough that the other party's performance in respect of other contracts raises questions as to his future performance in this contract. However, defective performance in other contracts might contribute to a decision that his current conduct gave "good" grounds

to conclude he will not perform a substantial part of his obligations in this contract. Moreover, the buyer's failure to pay his debts on other contracts may indicate a serious deterioration of his creditworthiness.

4. The circumstances which justify suspension may relate to general conditions so long as those general conditions affect the other party's ability to perform. For example, the outbreak of war or the imposition of an export embargo may give good grounds to conclude that the party from that country will not be able to perform his obligations.

5. It should be noted that there must be good grounds to conclude that he will not perform a substantial part of his obligations. There is no right to suspend if the other party's performance is apt to be deficient in less than a substantial way. A party who suspends his performance without good grounds to conclude that the other party will not perform a substantial part of his obligations would himself be in breach of the contract.

6. These rules are illustrated by the following examples:

*Example 62A:* Buyer fell behind in his payments to Seller in respect of other contracts. Even though the late payments were in respect of other contracts, such late payments might indicate a serious deterioration in Buyer's creditworthiness authorizing Seller to suspend performance.

*Example 62B:* Buyer contracted for precision parts which he intended to use immediately upon delivery. He discovered that, although there had been no deterioration in Seller's ability to manufacture and deliver parts of the quality required, defective deliveries were being made to other buyers with similar needs. These facts alone do not authorize Buyer to suspend his performance. However, if the cause of Seller's defective deliveries to other buyers was the result of using a raw material from a particular source, Seller's conduct in preparing to use the raw material from the same source would give Buyer good grounds to conclude that Seller would deliver defective goods to him also.

7. The question may arise as to whether the parties have impliedly derogated from this article under the provisions of article 5 by using a particular form of contract. For example, if payment is to be made by means of an irrevocable letter of credit, the issuer of the credit is required to pay a draft drawn on it if accompanied by the proper documents even though the buyer has good grounds to believe that the goods are seriously defective.<sup>1</sup> Similarly, it may be that where the buyer has assumed the risk of payment before inspection of the goods, as in a contract of sale on CIF or similar cash against documents terms, that risk is not to be evaded by a demand for assurance.

8. If the criteria discussed in paragraphs 2 to 4 above are met, the party "may suspend the performance of his obligations". A party who is authorized to suspend performance is freed both from the obligation to render performance to the other party and from the obligation to prepare to perform. He is not obligated to incur additional expenses for which it is reasonable to assume he will never be compensated.

9. If an obligation is suspended for a period of time and then reinstated pursuant to article 62 (3), the date required for performance will be extended for the period of the suspension. This principle is illustrated by the following examples:

*Example 62C:* Under the contract of sale, Seller was required to deliver the goods by 1 July. Because of reasonable doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods. Seller must now deliver the goods by 15 July.

*Example 62D:* As in example 62C, Seller was required to deliver the goods by 1 July. Because of doubts of Buyer's creditworthiness, on 15 May Seller suspended performance. On 29 May Buyer provided adequate assurances that he would pay for the goods and Seller delivered on 15 July. However, Buyer contended that the deterioration in his creditworthiness after the conclusion of the contract were not such as to give Seller "good grounds" that he would not pay. If Buyer can sub-

<sup>3</sup> The requirement that the buyer must have received the specification from the seller places the risk of transmission on the sender of the notice and thus reverses the general rule contained in article 25.

<sup>1</sup> Uniform customs and practice for documentary credits (1974), (ICC publication No. 290), art. 9. However, in some legal systems the buyer may be able to obtain a court order directing the bank not to pay under an irrevocable letter of credit where there was fraud, forgery or some other defect not apparent on the face of the documents.

stantiate this claim — before a court or arbitral tribunal if necessary — Seller must reimburse Buyer for any damages he suffered because he furnished the assurances and because of late delivery.

#### *Stoppage in transit, paragraph (2)*

10. Paragraph (2) continues the policy of paragraph (1) in favour of a seller who has already shipped the goods. If the deterioration of the buyer's creditworthiness gives the seller good grounds to conclude that the buyer will not pay for the goods, the seller has the right as against the buyer to order the carrier not to hand over the goods to the buyer even though the buyer holds a document which entitles him to obtain them, e.g., an ocean bill of lading, and even if the goods were originally sold on terms granting the buyer credit after receipt of the goods.

11. The seller loses his right to order the carrier not to hand over the goods if the buyer has transferred the document to a third party who has taken it for value and in good faith.

12. Since this Convention governs the rights in the goods only between the buyer and the seller,<sup>2</sup> the question whether the carrier must or is permitted to follow the instructions of the seller where the buyer has a document which entitles him to obtain them is governed by the appropriate law of the form of transport in question.<sup>3</sup>

#### *Notice and adequate assurances of performance, paragraph (3)*

13. Paragraph (3) provides that the party suspending performance pursuant to paragraph (1) or stopping the goods in transit pursuant to paragraph (2) must immediately notify the other party of that fact. The other party can reinstate the first party's obligation to continue performance by giving the first party adequate assurance that he will perform. For such an assurance to be "adequate", it must be such as will give reasonable security to the first party either that the other party will perform in fact, or that the first party will be compensated for all his losses from going forward with his own performance.

*Example 62E:* The contract of sale provided that Buyer would pay for the goods 30 days after their arrival at Buyer's place of business. After the conclusion of the contract Seller received information which gave him reasonable grounds to doubt Buyer's creditworthiness. After he suspended performance and so notified Buyer, Buyer offered either (1) a new payment term so that he would pay against documents, or (2) a letter of credit issued by a reputable bank, or (3) a guarantee by a reputable bank or other such party that it would pay if Buyer did not, or (4) a security interest in sufficient goods owned by Buyer to assure Seller of reimbursement. Since any one of these four alternatives would probably give Seller adequate assurances of being paid,<sup>4</sup> Seller would be required to continue performance.

*Example 62F:* The contract of sale called for the delivery of precision parts for Buyer to use in assembling a high technology machine. Seller's failure to deliver goods of the requisite quality on the delivery date would cause great financial loss to Buyer. Although Buyer could have the parts manufactured by other firms, it would take a minimum of six months from the time a contract was signed for any other firm to be able to deliver substitute parts. The contract provided that Buyer was to make periodic advance payments of the purchase price during the period of time Seller was manufacturing the goods.

When Buyer received information giving him good grounds to conclude that Seller would not be able to deliver on time, Buyer notified Seller that he was suspending any performance due the Seller. Seller gave Buyer written assurances that he would deliver goods of the con-

tract quality on time and offered a bank guarantee for financial reimbursement of all payments made under the contract if he failed to meet his obligations.

In this case Seller has not given adequate assurance of performance. Seller's statements that he would perform, unless accompanied by sufficient explanations of the information which caused Buyer to conclude that Seller would not deliver on time, were only a reiteration of his contractual obligation. The offer of a bank guarantee of reimbursement of payments under the contract was not an adequate assurance to a Buyer who needs the goods at the contract date in order to meet his own needs.

14. The first party's obligation to perform remains suspended until either (1) the other party performs his obligations, (2) adequate assurances are given, (3) the first party declares the contract avoided, or (4) the period of limitation applicable to the contract has expired.<sup>5</sup>

15. Prior to the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 63 were met. After the date on which the other party was required to perform, the first party could declare the contract avoided only if the criteria of article 45 or 60 were met. Avoidance of one or more instalments of a contract for delivery of goods by instalments is governed by article 64.

16. If the party suspending performance suffers damages because the other party did not provide adequate assurances as required by this article, he may recover any damages he may have suffered, whether or not he declares the contract avoided.<sup>6</sup> For example, if the buyer in example 62F declared the contract avoided and purchased substitute goods elsewhere at a higher price, he can recover the difference between his repurchase price and the cover price.<sup>7</sup>

### *Article 63*

#### *[Avoidance prior to the date for performance]*

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

#### *PRIOR UNIFORM LAW*

ULIS, article 76.

#### *Commentary*

1. Article 63 provides for the special case where prior to the date for performance it is clear that one of the parties will commit a fundamental breach. In such a case the other party may declare the contract avoided immediately.

2. The future fundamental breach may be clear either because of the words or actions of the party which constitute a repudiation of the contract or because of an objective fact, such as the destruction of the seller's plant by fire or the imposition of an embargo or monetary controls which will render impossible future performance.<sup>1</sup> The failure by a party to give adequate assurances that he will perform when properly requested to do so under article 62 (3) may help make it "clear" that he will commit a fundamental breach.

<sup>1</sup> Under the Convention on the Limitation Period in the International Sale of Goods, art. 8, that period would be four years. That Convention does not prescribe as to whether the rights under the contract are terminated or whether it is the right of a party to commence an action to enforce such a right which is terminated.

<sup>2</sup> Article 66 (1) preserves the right of a party who declares the contract avoided to claim any damages which may occur from the breach of contract.

<sup>3</sup> Article 71. If the buyer did not declare the contract avoided, the measure of damages would be calculated according to article 70.

<sup>4</sup> Even though the imposition of an embargo or monetary controls which renders future performance impossible justifies the other party's avoidance of the contract under article 63, the non-performing party may be excused from damages by virtue of article 65.

<sup>2</sup> Article 62 (2) expressly states that it relates only to the rights in goods as between the buyer and the seller. This reflects the general principles expressed in article 4.

<sup>3</sup> The rules governing the carrier's obligation to follow the consignor's orders to withhold delivery from the consignee differ between modes of transportation and between various international conventions and national laws.

<sup>4</sup> The offer of a security interest would be an adequate assurance only if the national law in question allowed such interests and provided a procedure on default which was adequate to assure the creditor prompt reimbursement of his claim.

3. A party who intends to declare the contract avoided pursuant to article 63 should do so with caution. If at the time performance was due no fundamental breach would have occurred in fact, the original expectation may not have been "clear" and the declaration of avoidance itself be void. In such a case, the party who attempted to avoid would be in breach of the contract for his own failure to perform.

4. Where it is in fact clear that a fundamental breach of contract will occur, the duty to mitigate the loss enunciated in article 73 may require the party who will rely upon that breach to take measures to reduce his loss, including loss of profit, resulting from the breach, even prior to the contract date of performance.<sup>2</sup>

#### Article 64

##### [Avoidance of instalment contracts]

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

#### PRIOR UNIFORM LAW

ULIS, article 75.

#### Commentary

1. Article 64 describes the right to avoid the contract where the contract calls for the delivery of goods by instalments. The contract calls for the delivery by instalments if it requires or authorizes the delivery of goods in separate lots.

2. In a contract for delivery by instalments a breach by a party in respect of one or more instalments can affect the other party in respect of that instalment, in respect of future instalments and in respect of instalments already delivered. The three paragraphs of article 64 treat these three aspects of the problem.

##### *Failure to perform in respect of one instalment, paragraph (1)*

3. Paragraph (1) authorizes a party to declare a contract avoided in respect of a single instalment where the other party has committed a fundamental breach in respect of that instalment.<sup>1</sup>

<sup>2</sup> See the commentary on article 73 and especially examples 73A and 73B.

<sup>1</sup> A similar result is achieved by article 47 but only in cases where the seller is in breach. Article 64 (1), however, may be utilized by both buyer and seller.

*Example 64A:* The contract called for the delivery of 1,000 tons of No. 1 grade corn in 10 separate instalments. When the fifth instalment was delivered, it was unfit for human consumption. Even if in the context of the entire contract one such delivery would not constitute a fundamental breach of the entire contract, the buyer could avoid the contract in respect of the fifth instalment. As a result, the contract would in effect be modified to a contract for the delivery of 900 tons at a proportionately reduced price.

4. There are no particular difficulties in determining whether a breach in respect of an instalment is fundamental where each instalment consists of goods that are usable or resalable independently of the other instalments, as in example 64A. However, it may be more difficult where the individual instalments are parts of an integrated whole. This would be the case, for example, where the sale is of a large machine which is delivered in segments to be assembled at the buyer's place. In such a case the determination as to whether the breach in respect of that instalment was fundamental should be made in the light of the detriment suffered by the buyer in respect of the entire contract, including the ease with which the failure in respect of the individual instalment can be remedied by repair or replacement. If the breach is fundamental and, because of their interdependence, instalments already delivered or to be delivered could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract, article 64 (3) authorizes the buyer to declare the contract avoided in respect of those deliveries.

##### *Avoidance in respect of future deliveries, paragraph (2)*

5. Paragraph (2) considers the situation where the failure of one party to perform any of his obligations under the contract in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments. In such a case he may declare the contract avoided for the future, provided only that he declares the avoidance of the future performance within a reasonable time of the failure to perform. It should be noted that article 64 (2) permits the avoidance of the contract in respect of future performance of an instalment contract even though it is not "clear" that there will be a fundamental breach of the contract in the future as would be required by article 63.

6. It should be noted that the test of the right to avoid under article 64 (2) is whether a failure to perform in respect of an instalment gives the other party good reason to fear that there will be a fundamental breach in respect of future instalments. The test does not look to the seriousness of the current breach. This is of particular significance where a series of breaches, none of which in itself is fundamental or would give good reason to fear a future fundamental breach, taken together does give good reason for such a fear.

##### *Avoidance in respect of past or future deliveries, paragraph (3)*

7. In some contracts it will be the case that none of the deliveries can be used for the purpose contemplated by the parties to the contract unless all of the deliveries can be so used. This would be the case, for example, where, as described in paragraph 4 above, a large machine is delivered in segments to be assembled at the buyer's place. Therefore, paragraph (3) provides that a buyer who avoids the contract in respect of any delivery, an action which can be taken under article 64 (1), may also avoid in respect of deliveries already made or of future deliveries "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract". The declaration of avoidance of past or future deliveries must take place at the same time as the declaration of avoidance of the current delivery.

8. For the goods to be interdependent they need not be part of an integrated whole, as in the example of the large machine. For example, it may be necessary that all of the raw material delivered to the buyer be of the same quality, a condition which might be achievable only if they were from the same source. If this was the case, the various deliveries would be interdependent and article 64 (3) would apply.

## SECTION II. EXEMPTIONS

## Article 65

## [Exemptions]

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect only for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

## PRIOR UNIFORM LAW

ULIS, article 74.

## Commentary

1. Article 65 governs the extent to which a party is exempted from liability for a failure to perform any of his obligations because of an impediment beyond his control.

## General rule, paragraphs (1) and (5)

2. Paragraph (1) sets out the conditions under which a party is not liable for a failure to perform any of his obligations. Paragraph (5) provides that exemption from liability under this article prevents the other party from exercising only his right to claim damages, but does not prevent him from exercising any other right he may have.<sup>1</sup>

3. Under articles 41 (1) (b) and 57 (1) (b) a party has a right to claim damages for any non-performance of the other party without the necessity of proving fault or a lack of good faith or the breach of an express promise on his part, as is required by some legal systems. However, under article 65 the non-performing party is exempt from liability if he proves (1) that the failure to perform was due to an impediment beyond his control, (2) that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, (3) that he could not reasonably have been expected to have avoided the impediment or its consequences and (4) that he could not reasonably have been expected to have overcome the impediment or its consequences.

4. The impediment may have existed at the time of the conclusion of the contract. For example, goods which were unique and which were the subject of the contract may have already perished at the time of the

conclusion of the contract. However, the seller would not be exempted from liability under this article if he reasonably could have been expected to take the destruction of the goods into account at the time of the conclusion of the contract. Therefore, in order to be exempt from liability, the seller must not have known of their prior destruction and must have been reasonable in not expecting their destruction.

5. It is this later element which is the most difficult for the non-performing party to prove. All potential impediments to the performance of a contract are foreseeable to one degree or another. Such impediments as wars, storms, fires, government embargoes and the closing of international waterways have all occurred in the past and can be expected to occur again in the future. Frequently, the parties to the contract have envisaged the possibility of the impediment which did occur. Sometimes they have explicitly stated whether the occurrence of the impeding event would exonerate the non-performing party from the consequences of the non-performance. In other cases it is clear from the context of the contract that one party has obligated himself to perform an act even though certain impediments might arise. In either of these two classes of cases, article 5 of this Convention assures the enforceability of such explicit or implicit contractual stipulations.

6. However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract. In the final analysis this determination can only be made by a court or arbitral tribunal on a case-by-case basis.

7. Even if the non-performing party can prove that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, he must also prove that he could neither have avoided the impediment nor overcome it nor avoided or overcome the consequences of the impediment. This rule reflects the policy that a party who is under an obligation to act must do all in his power to carry out his obligation and may not await events which might later justify his non-performance. This rule also indicates that a party may be required to perform by providing what is in all the circumstances of the transaction a commercially reasonable substitute for the performance which was required under the contract.

8. The effect of article 65 (1) in conjunction with article 65 (5) is to exempt the non-performing party only from liability for damages. All of the other remedies are available to the other party, i.e. demand for performance, reduction of the price or avoidance of the contract. However, if the party who is required to overcome an impediment does so by furnishing a substitute performance, the other party could avoid the contract and thereby reject the substitute performance only if that substitute performance was so deficient in comparison with the performance stipulated in the contract that it constituted a fundamental breach of contract.

9. Even if the impediment is of such a nature as to render impossible any further performance, the other party retains the right to require that performance under article 42 or 58. It is a matter of domestic law not governed by this Convention as to whether the failure to perform exempts the non-performing party from paying a sum stipulated in the contract for liquidated damages or as a penalty for non-performance or as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-performance.<sup>2</sup>

*Example 65A:* The contract called for the delivery of unique goods. Prior to the time when the risk of loss would have passed pursuant to articles 79 or 80 the goods were destroyed by a fire which was caused by events beyond the control of Seller. In such a case Buyer would not have to pay for the goods for which the risk had not passed but Seller would be exempted from liability for any damage resulting from his failure to deliver the goods.

<sup>2</sup> Cf. article 26 which provides that if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

<sup>1</sup> See para. 8 below.

*Example 65B:* The contract called for the delivery of 500 machine tools. Prior to the passage of the risk of loss, the tools were destroyed in similar circumstances to Example 65A. In such a case Seller would not only have to bear the loss of the 500 tools but he would also be obligated to ship to Buyer an additional 500 tools. The difference between this example and example 65A is that in example 65A Seller cannot provide that which was contracted for whereas under example 65B Seller can overcome the effect of the destruction of the tools by shipping replacement goods.

*Example 65C:* If the machine tools shipped in replacement of those destroyed in example 65B could not arrive in time, Seller would be exempted from damages for late delivery.

*Example 65D:* The contract called for the goods to be packed in plastic containers. At the time the packing should have been accomplished, plastic containers were not available for reasons which Seller could not have avoided. However, if other commercially reasonable packing materials were available, Seller must overcome the impediment by using those materials rather than refuse to deliver the goods. If Seller used commercially reasonable substitute packing materials, he would not be liable for damages. In addition, Buyer could not avoid the contract because there would have been no fundamental breach of the contract but Buyer could reduce the price under article 46 if the value of the goods had been diminished because of the non-performing packing materials.

*Example 65E:* The contract called for shipment on a particular vessel. The schedule for the vessel was revised because of events beyond the control of both Buyer and Seller and it did not call at the port indicated within the shipment period. In this circumstance the party responsible for arranging the carriage of the goods must attempt to overcome the impediment by providing an alternative vessel.

10. Although it is probably true that the insolvency of the buyer by itself is not an impediment which exempts the buyer from liability for non-payment of the price, the unanticipated imposition of exchange controls, or other regulations of a similar nature, may make it impossible for him to fulfil his obligation to pay the price at the time and in the manner agreed. The buyer would, of course, be exempted from liability for damages for the non-payment (which as a practical matter would normally mean interest on the unpaid sum) only if he could not overcome the impediment by, for example, arranging for a commercially reasonable substitute form of payment.<sup>3</sup>

#### *Non-performance by a third person, paragraph (2)*

11. It often happens that the non-performance of a party is due to the non-performance of a third person. Paragraph (2) provides that where this is the case, "that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him".

12. The third person must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials to the seller.

#### *Temporary impediment, paragraph (3)*

13. Paragraph (3) provides that an impediment which prevents a party from performing for only a temporary period of time exempts the non-performing party from liability for damages only for the period during which the impediment existed. Therefore, the date at which the exemption from damages terminates is the contract date for performance or the date on which the impediment was removed, whichever is later in time.

*Example 65F:* The goods were to be delivered on 1 February. On 1 January an impediment arose which precluded Seller from delivering the goods. The impediment was removed on 1 March. Seller delivered on 15 March.

Seller is exempted from any damages which may have occurred because of the delay in delivery up to 1 March, the date on which the im-

pediment was removed. However, since the impediment was removed after the contract date for delivery, the Seller is liable for any damages which occurred as a result of the delay in delivery between 1 March and 15 March.

14. Of course, if the delay in performance because of the temporary impediment amounted to a fundamental breach of the contract, the other party would have the right to declare the avoidance of the contract. However, if the contract was not avoided by the other party, the contract continues in existence<sup>4</sup> and the removal of the impediment reinstates the obligations of both parties under the contract.

*Example 65G:* Because of a fire which destroyed Seller's plant, Seller was unable to deliver the goods under the contract at the time performance was due. He was exempted from damages under paragraph (1) until the plant was rebuilt. Seller's plant was rebuilt in two years. Although a two-year delay in delivery constituted a fundamental breach which would have justified Buyer in declaring the avoidance of the contract, he did not do so. When Seller's plant was rebuilt, Seller was obligated to deliver the goods to Buyer and, unless he decided to declare the contract avoided because of fundamental breach, Buyer was obligated to take delivery and to pay the contract price.<sup>5</sup>

#### *Duty to notify, paragraph (4)*

15. The non-performing party who is exempted from damages by reason of the existence of an impediment to the performance of his obligation must notify the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, the non-performing party is liable for damages resulting from the failure of the notice to be received by the other party.<sup>7</sup> It should be noted that the damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice and not those arising out of the non-performance.

16. The duty to notify extends not only to the situation in which a party cannot perform at all because of the unforeseen impediment, but also to the situation in which he intends to perform by furnishing a commercially reasonable substitute. Therefore, the seller in example 65D and the party responsible for arranging the carriage of the goods in example 65E must notify the other party of the intended substitute performance. If he does not do so, he will be liable for any damages resulting from the failure to give notice. If he does give notice but the notice fails to arrive he will be also liable for damages resulting from the failure of the notice to have been received by the other party.

### SECTION III. EFFECTS OF AVOIDANCE

#### *Article 66*

[Release from obligations; contract provisions for settlement of disputes; restriction]

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any dama-

<sup>4</sup> See para. 2 of the commentary on article 45 and para. 2 of the commentary on article 60.

<sup>5</sup> Neither article 65 nor any other provision of this Convention would release the seller from the obligation to deliver the goods on the grounds that there had been such a major change in the circumstances that the contract was no longer that originally agreed upon. The parties could, of course, include such a provision in their contract.

<sup>6</sup> The Seller would have no right to insist that the buyer take the goods if the delay constituted a fundamental breach of contract or if the delay caused the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer even if the buyer had not declared the avoidance of the contract (article 44 (1)).

<sup>7</sup> The requirement that the notice be received by the other party places the risk of transmission on the sender of the notice and thus reserves the general rule contained in article 25.

<sup>3</sup> As to the unpaid seller's right to stop delivery of the goods, see articles 54 (1) and 62 (2).



ges which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitutions, they must do so concurrently.

#### PRIOR UNIFORM LAW

ULIS, article 78.

#### Commentary

1. Article 66 sets forth the consequences which follow from a declaration of avoidance. Articles 67 to 69 give detailed rules for implementing certain aspects of article 66.

#### *Effect of avoidance, paragraph (1)*

2. The primary effect of the avoidance of the contract by one party is that both parties are released from their obligations to carry out the contract. The seller need not deliver the goods and the buyer need not take delivery or pay for them.

3. Partial avoidance of the contract under article 47 or 64 releases both parties from their obligations as to the part of the contract which has been avoided and gives rise to restitution under paragraph (2) as to that part.

4. In some legal systems avoidance of the contract eliminates all rights and obligations which arose out of the contract. In such a view once a contract has been avoided, there can be no claim for damages for its breach and contract clauses relating to the settlement of disputes, including provisions for arbitration, choice of law, choice of forum, and clauses excluding liability or specifying "penalties" or "liquidated damages" for breach, terminate with the rest of the contract.

5. Paragraph (1) provides a mechanism to avoid this result by specifying that the avoidance of the contract is "subject to any damages which may be due" and that it "does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract." It should be noted that article 66 (1) would not make valid an arbitration clause, a penalty clause, or other provision in respect of the settlement of disputes if such a clause was not otherwise valid under the applicable national law. Article 66 (1) states only that such a provision is not terminated by the avoidance of the contract.

6. The enumeration in paragraph (1) of two particular obligations arising out of the existence of the contract which are not terminated by the avoidance of the contract is not exhaustive. Some continuing obligations are set forth in other provisions of this Convention. For example, article 75 (1) provides that "if the goods have been received by the buyer, and if he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them" and article 66 (2) permits either party to require of the other party the return of whatever he has supplied or paid under the contract. Other continuing obligations may be found in the contract itself<sup>1</sup> or may arise out of the necessities of justice.

#### *Restitution, paragraph (2)*

7. It will often be the case that at the time the contract is avoided, one or both of the parties will have performed all or part of his obligations. Sometimes the parties can agree on a formula for adjusting the price to the deliveries already made. However, it may also occur that

one or both parties desires the return of that which he has already supplied or paid under the contract.

8. Paragraph (2) authorizes either party to the contract who has performed in whole or in part to claim the return of whatever he has supplied or paid under the contract. Subject to article 67 (2), the party who makes demand for restitution must also make restitution of that which he has received from the other party. "If both parties are required to make restitution, they must do so concurrently," unless the parties agree otherwise.

9. Paragraph (2) differs from the rule in some countries that only the party who is authorized to avoid the contract can make demand for restitution. Instead, it incorporates the idea that, as regards restitution, the avoidance of the contract undermines the basis on which either party can retain that which he has received from the other party.

10. It should be noted that the right of either party to require restitution as recognized by article 66 may be thwarted by other rules which fall outside the scope of the international sale of goods. If either party is in bankruptcy or other insolvency procedures, it is possible that the claim of restitution will not be recognized as creating a right in the property or as giving a priority in the distribution of the assets. Exchange control laws or other restrictions on the transfer of goods or funds may prevent the transfer of the goods or money to the demanding party in a foreign country. These and other similar legal rules may reduce the value of the claim of restitution. However, they do not affect the validity of the rights between the parties.

11. The person who has breached the contract giving rise to the avoidance of the contract is liable not only for his own expenses in carrying out the restitution of the goods or money, but also the expenses of the other party. Such expenses would constitute damages for which the party in breach is liable. However, the obligation under article 73 of the party who relies on the breach of the contract to "take such measures as are reasonable in the circumstances to mitigate the loss" may limit the expenses of restitution which can be recovered by means of damages if physical return of the goods is required rather than, for example, resale of the goods in a local market where such resale would adequately protect the seller at a lower net cost.<sup>2</sup>

#### Article 67

##### [Buyer's loss of right to avoid or to require delivery of substitute goods]

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:

(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or

(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

<sup>2</sup> Cf. article 77 on the authority of one party who holds goods for the account of the other party to sell the goods for the account of the other party.

<sup>1</sup> Article 5.

## PRIOR UNIFORM LAW

ULIS, article 79.

## Commentary

*Loss of right by buyer to avoid or require substitute goods, paragraph (1)*

1. Article 67 states that "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

2. The rule in paragraph (1) recognizes that the natural consequences of the avoidance of the contract or the delivery of substitute goods is the restitution of that which has already been delivered under the contract. Therefore, if the buyer cannot return the goods, or cannot return them substantially in the condition in which he received them, he loses his right to declare the contract avoided under article 45 or to require the delivery of substitute goods under article 42.

3. It is not necessary that the goods be in the identical condition in which they were received; they need be only in "substantially" the same condition. Although the term "substantially" is not defined, it indicates that the change in condition of the goods must be of sufficient importance that it would no longer be proper to require the seller to retake the goods as the equivalent of that which he had delivered to the buyer even though the seller had been in fundamental breach of the contract.<sup>1</sup>

*Exceptions, paragraph (2)*

4. Paragraph (2) states three exceptions to the above rule. The buyer should be able to avoid the contract or require substitute goods even though he cannot make restitution of the goods substantially in the condition in which he received them (1) if the impossibility of doing so is not due to his own act or omission, (2) if the goods or part of them have perished or deteriorated as a result of the normal examination of the goods by the buyer provided for in article 36, and (3) if part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before the lack of conformity with the contract was discovered or ought to have been discovered.

5. A fourth exception to the rule stated in article 67 (1) is to be found in article 82 which states that if the seller has committed a fundamental breach of contract, the passage of the risk of loss under article 79, 80 or 81 does not impair the remedies available to the buyer on account of such breach.<sup>2</sup>

## Article 68

[Buyer's retention of other remedies]

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies.

## PRIOR UNIFORM LAW

ULIS, article 80.

## Commentary

Article 68 makes it clear that the loss of the right to declare the contract avoided or to require the seller to deliver substitute goods because he cannot return the goods substantially in the condition in which he received them does not deprive the buyer of the right to claim damages under article 41 (1) (b), to require that any defects be cured under article 42, or to declare the reduction of the price under article 45.

<sup>1</sup> The buyer may require the delivery of substitute goods under article 42 or, with the exception of article 45 (1) (b), declare the avoidance of the contract only if the seller is in fundamental breach of the contract.

<sup>2</sup> See para. 2 of the commentary to article 82.

## Article 69

[Accounting for benefits in case of restitution]

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

(a) if he must make restitution of the goods or part of them; or

(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

## PRIOR UNIFORM LAW

ULIS, article 81.

## Commentary

1. Article 69 reflects the principle that a party who is required to refund the price or return the goods because the contract has been avoided or because of a request for the delivery of substitute goods must account for any benefit which he has received by virtue of having had possession of the money or goods. Where the obligation arises because of the avoidance of the contract, it is irrelevant which party's failure gave rise to the avoidance of the contract or who demanded restitution.<sup>1</sup>

2. Where the seller is under an obligation to refund the price, he must pay interest from the date of payment to the date of refund. The obligation to pay interest is automatic because it is assumed that the seller has benefited from being in possession of the purchase price during this period. Since the obligation to pay interest partakes of the seller's obligation to make restitution and not of the buyer's right to claim damages, the rate of interest payable would be based on that current at the seller's place of business.

3. Where the buyer must return the goods, it is less obvious that he has benefited from having had possession of the goods. Therefore, paragraph (2) specifies that the buyer is liable to the seller for all benefits which he has derived from the goods only if (1) he is under an obligation to return them or (2) it is impossible for him to make restitution of the goods or part of them but he has nevertheless exercised his right to declare the contract avoided or to require the seller to deliver substitute goods.

## SECTION IV. DAMAGES

## Article 70

[General rule for calculation of damages]

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

<sup>1</sup> See article 66 (2) and para. 9 of the commentary thereon.



## PRIOR UNIFORM LAW

ULIS, article 82.

## Commentary

1. Article 70 introduces the Section containing the rules on damages in case of a claim under article 41 (1) (b) or article 57 (1) (b) by setting forth the basic rule for the calculation of those damages. Articles 71 and 72 implement article 70 by providing the means of calculating damages in certain defined cases when the contract has been avoided. Article 73 provides a rule on mitigation of damages while article 65 provides the rules on exemption from liability because of an impediment to performance of the obligation.

2. Article 70 provides the rule for the calculation of damages whenever and to the extent that articles 71 and 72 are not applicable. Therefore, article 70 applies whenever the contract has not been declared avoided by the party claiming damages, whether or not it could have been. It also applies where the contract has been avoided but there are damages in addition to those which can be calculated under article 71 or 72.

## Basic damages

3. Article 70 provides that the injured party may recover as damages "a sum equal to the loss, including loss of profit, suffered . . . as a consequence of the breach". This makes it clear that the basic philosophy of the action for damages is to place the injured party in the same economic position he would have been in if the contract had been performed. The specific reference to loss of profit is necessary because in some legal systems the concept of "loss" standing alone does not include loss of profit.

4. Since article 70 is applicable to claims for damages by both the buyer and the seller and these claims might arise out of a wide range of situations, including claims for damages ancillary to a request that the party in breach perform the contract or to a declaration of avoidance of the contract, no specific rules have been set forth in article 70 describing the appropriate method of determining "the loss . . . suffered . . . as a consequence of the breach." The court or arbitral tribunal must calculate that loss in the manner which is best suited to the circumstances. The following paragraphs discuss two common situations which might arise under article 70 and suggest means of calculating "the loss . . . suffered . . . as a consequence of the breach".

5. Where the breach by the buyer occurs before the seller has manufactured or procured the goods, article 70 would permit the seller to recover the profit which he would have made on the contract plus any expenses which he had incurred in the performance of the contract. The profit lost because of the buyer's breach includes any contribution to overhead which would have resulted from the performance of the contract.

*Example 70A:* The contract provided for the sale for \$ 50,000 FOB of 100 machine tools which were to be manufactured by the seller. Buyer repudiated the contract prior to the commencement of manufacture of the tools. If the contract had been performed, Seller would have had total costs of \$ 45,000 of which \$ 40,000 would have represented costs incurred only because of the existence of this contract (e.g., materials, energy, labour hired for the contract or paid by the unit of production) and \$ 5,000 would have represented an allocation to this contract of the overhead of the firm (cost of borrowed capital, general administrative expense, depreciation of plant and equipment). Because Buyer repudiated to contract, Seller did not expend the \$ 40,000 in costs which would have been incurred by reason of the existence of this contract. However, the \$ 5,000 of overhead which were allocated to this contract were for expenses of the business which were not dependent on the existence of the contract. Therefore, those expenses could not be reduced and, unless the Seller has made other contracts which have used his entire productive capacity during the period of time in question, as a result of Buyer's breach Seller has lost the allocation of \$ 5,000 to overhead which he would have received if the contract had been performed. Thus, the loss for which Buyer is liable in this example is \$ 10,000.

Contract price	\$ 50,000
Expenses of performance which could be saved	\$ 40,000
Loss arising out of breach	\$ 10,000

*Example 70B:* If, prior to Buyer's repudiation of the contract in example 70A, Seller had already incurred \$ 15,000 in non-recoverable expenses in part performance of the contract, the total damages would equal \$ 25,000.

*Example 70C:* If the product of the part performance in example 70B could be sold as salvage to a third party for \$ 5,000, Seller's loss would be reduced to \$ 20,000.

6. Where the seller delivers and the buyer retains defective goods,<sup>1</sup> the loss suffered by the buyer might be measured in a number of different ways. If the buyer is able to cure the defect, his loss would often equal the cost of the repairs. If the goods delivered were machine tools, the buyer's loss might also include the loss resulting from lowered production during the period the tools could not be used.

7. If the goods delivered had a recognized value which fluctuated, the loss to the buyer would be equal to the difference between the value of the goods as they exist and the value the goods would have had if they had been as stipulated in the contract.<sup>2</sup> Since this formula is intended to restore him to the economic position he would have been in if the contract had been performed properly, the contract price of the goods is not an element in the calculation of the damages. To the amount as calculated above there may be additional damages, such as those arising out of additional expenses incurred as a result of the breach.<sup>3</sup>

*Example 70D:* The contract provided for the sale of 100 tons of grain for a total price of \$ 50,000 FOB. When delivered the grain had more moisture in it than allowable under the contract description and, as a result of the moisture, there had been some deterioration in quality. The extra cost to Buyer of drying the grain was \$ 1,500. If the grain had been as contracted, its value would have been \$ 55,000, but because of the deterioration caused by the moisture after it was dried the grain was worth only \$ 51,000.

Contract price	\$ 50,000
Value the grain would have had if as contracted	\$ 55,000
Value of grain as delivered	\$ 51,000
	\$ 4,000
Extra expenses of drying the grain	\$ 1,500
Loss arising out of breach	\$ 5,500

## Foreseeability

8. The principle of recovery of the full amount of damages suffered by the party not in breach is subject to an important limitation. The amount of damages that can be recovered by the party not in breach "may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract". Should a party at the time of the conclusion of a contract consider that breach of the contract by the other party would cause him exceptionally heavy losses or losses of an unusual nature, he may make this known to the other party with the result that if such damages are actually suffered they may be recovered. This principle of excluding the recovery of damages for unforeseeable losses is found in the majority of legal systems.

9. In some legal systems the limitation of damages to those "which the party in breach foresaw or ought to have foreseen at the time of the

<sup>1</sup> If the delivery of the defective goods constituted a fundamental breach of contract, the buyer could avoid the contract. In such a case he would measure his damages under article 71 or 72 to the extent that those articles were applicable.

<sup>2</sup> Article 70 gives no indication of the time and place at which "the loss" to the injured party should be measured. Presumably it should be at the place the seller delivered the goods and at an appropriate point of time, such as the moment the goods were delivered, the moment the buyer learned of the non-conformity of the goods or the moment that it became clear that the non-conformity would not be remedied by the seller under article 35, 42, 43 or 44, as the case may be.

<sup>3</sup> These additional elements of the buyer's damages will often be limited by the requirement of foreseeability discussed in para. 8 *infra*.

conclusion of the contract" is not applicable if the non-performance of the contract was due to the fraud of the non-performing party. However, no such rule exists in this Convention.

### Article 71

#### [Damages in case of avoidance and substitute transaction]

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70.

#### PRIOR UNIFORM LAW

ULIS, article 85.

#### Commentary

1. Article 71 sets forth a means of calculating damages when the contract has been avoided and replacement goods have in fact been purchased or the seller has in fact resold the goods.

#### Basic formula

2. In such case the injured party may "recover the difference between the contract price and the price in the substitute transaction", i.e. the price paid for the goods bought in replacement or that obtained in the resale. In addition, he may recover any further damages recoverable under article 70.<sup>1</sup>

3. If the contract has been avoided, the formula contained in this article will often be the one used to calculate the damages owed the injured party since, in many commercial situations, a substitute transaction will have taken place. If the substitute transaction occurs in a different place from the original transaction or is on different terms, the amount of damages must be adjusted to recognize any increase in costs (such as increased transportation) less any expenses saved as a consequence of the breach.

4. Article 71 provides that the injured party can rely on the difference between the contract price and the price in the substitute transaction only if the resale or cover purchase were made in a reasonable manner. For the substitute transaction to have been made in a reasonable manner within the context of article 71, it must have been made in such a manner as is likely to cause a resale to have been made at the highest price reasonably possible in the circumstances or a cover purchase at the lowest price reasonably possible. Therefore, the substitute transaction need not be on identical terms of sale in respect of such matters as quantity, credit or time of delivery so long as the transaction was in fact in substitution for the transaction which was avoided.

5. It should also be noted that the time limit within which the resale or cover purchase must be made for it to be the basis for calculating damages under article 71 is "a reasonable time after avoidance". Therefore, this time limit does not begin until the injured party has in fact declared the contract avoided.

6. If the resale or cover purchase is not made in a reasonable manner or within a reasonable time after the contract was avoided, damages would be calculated as though no substitute transaction had taken place. Therefore, resort would be made to article 72 and, if applicable, to article 70.

7. If resort is made to article 72, the difference between the contract price and the market price is calculated as of the time the party claiming damages first has the right to declare the contract avoided, which is also the earliest moment in time that the difference between the contract price and the price received on resale or paid for the cover purchase may be calculated under article 71.

<sup>1</sup> See paras. 8 and 9 *infra*.

#### Additional damages

8. Article 71 recognizes that the injured party may incur further damages which would not be compensated by the basic formula. These further damages are recoverable under article 70.

9. The most usual type of further damages to be recovered under article 70 would be the additional expenses which may have been caused as a result of the receipt of non-conforming goods or the necessity to purchase substitute goods as well as losses which may have been caused if goods purchased in the substitute transaction could not be delivered by the original contract date. The amount of the recoverable damages of this type is often limited by the requirement of foreseeability in article 70.<sup>2</sup>

### Article 72

#### [Damages in case of avoidance and no substitute transaction]

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

#### PRIOR UNIFORM LAW

ULIS, article 84.

#### Commentary

1. Article 72 sets forth an alternative means of measuring damages where the contract has been avoided but no substitute transaction was entered into under article 71.

#### Basic formula

2. Where the contract has been avoided, both parties are released from any future performance of their obligations<sup>1</sup> and restitution of that which has already been delivered may be required.<sup>2</sup> Therefore, the buyer would normally be expected to purchase substitute goods or the seller to resell the goods to a different purchaser. In such a case the measure of damages could normally be expected to be the difference between the contract price and the resale or repurchase price as is provided under article 71.

3. Article 72 permits the use of such a formula even though no resale or cover purchase took place in fact or where it is impossible to determine which was the resale or purchase contract in replacement of the contract which was breached<sup>3</sup> or where the resale or purchase was not

<sup>2</sup> See para. 8 of the commentary to article 70.

<sup>1</sup> Article 66 (1).

<sup>2</sup> Article 66 (2). If the contract calls for delivery by instalments, article 64 (3) allows avoidance of the contract and a demand for restitution in respect of deliveries already made only "if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

<sup>3</sup> If the seller has a finite supply of the goods in question or the buyer has a finite need for such goods, it may be clear that the seller has resold or that the buyer has made a cover purchase, as the case may be. However, if the injured party is constantly in the market for goods of the type in question, it may be difficult or impossible to determine

made in a reasonable manner and within a reasonable time after avoidance, as is required by article 71.

4. Pursuant to article 72 (2), the price to be used in the calculation of damages under article 72 (1) is the current price prevailing at the place where delivery of the goods should have been made. Article 72 (1) provides that the relevant date for determining the current price is the date on which the contract could first have been declared avoided.

5. The place where delivery should have been made is determined by the application of article 29. In particular, where the contract of sale involves carriage of the goods, delivery is made at the place the goods are handed over to the first carrier for transmission to the buyer whereas in destination contracts delivery is made at the named destination.

6. The "current price" is that for goods of the contract description in the contract amount. Although the concept of a "current price" does not require the existence of official or unofficial market quotations, the lack of such quotations raises the question whether there is a "current price" for the goods.

7. "If there is no current price" at the place where delivery of the goods should have been made, the price to be used is that "at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods". If no such price exists, damages must be calculated under article 70.

#### *Additional damages*

8. Article 72 recognizes that the injured party may incur additional losses, including loss of profit, which would not be compensated by the basic formula. In such a case the additional losses may be recovered under article 70, provided, of course, the conditions of article 70 are satisfied.

*Example 72A:* The contract price was \$ 50,000 CIF. Seller avoided the contract because of Buyer's fundamental breach. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place where the goods were to be handed over to the first carrier was \$ 45,000. Seller's damages under article 72 were \$ 5,000.

*Example 72B:* The contract price was \$ 50,000 CIF. Buyer avoided the contract because of Seller's non-delivery of the goods. The current price on the date on which the contract could first have been avoided for goods of the contract description at the place the goods were to be handed over to the first carrier was \$ 53,000. Buyer's extra expenses caused by the Seller's breach were \$ 2,500. Buyer's damages under articles 70 and 72 were \$ 5,500.

### *Article 73*

#### *[Mitigation of damages]*

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

#### *PRIOR UNIFORM LAW*

ULIS, article 88.

#### *Commentary*

1. Article 73 requires a party who relies on a breach of contract to adopt such measures as may be reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach.

2. Article 73 is one of several articles which states a duty owed by the injured party to the party in breach.<sup>1</sup> In this case the duty owed is

which of the many contracts of purchase or sale was the one in replacement of the contract which was breached. In such a case the use of article 71 may be impossible.

<sup>1</sup> Under articles 74 to 77 the party in possession of goods has a duty under certain circumstances to preserve these goods and to sell them for

the obligation of the injured party to take actions to mitigate the harm he will suffer from the breach so as to mitigate the damages he will claim under article 41 (1) (b) or 57 (1) (b). "If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

3. The sanction provided by article 73 against a party who fails to mitigate his loss only enables the other party to claim a reduction in the damages. It does not affect a claim for the price by the seller pursuant to article 58 or a reduction in the price by the buyer pursuant to article 46.<sup>2</sup>

4. The duty to mitigate applies to an anticipatory breach of contract under article 63 as well as to a breach in respect of an obligation the performance of which is currently due. If it is clear that one party will commit a fundamental breach of the contract, the other party cannot await the contract date of performance before he declares the contract avoided and takes measures to reduce the loss arising out of the breach by making a cover purchase, reselling the goods or otherwise. The use of the procedure set forth in article 62, if applicable, would be a reasonable measure even though it may delay the avoidance of the contract and the cover purchase, resale of the goods or otherwise, beyond the date on which such actions would otherwise have been required.

*Example 73A:* The contract provided that Seller was to deliver 100 machine tools by 1 December at a total price of \$ 50,000. On 1 July he wrote Buyer and said that because of the rise in prices which would certainly continue for the rest of the year, he would not deliver the tools unless Buyer agreed to pay \$ 60,000. Buyer replied that he would insist that Seller deliver the tools at the contract price of \$ 50,000. On 1 July and for a reasonable time thereafter, the price at which Buyer could have contracted with a different seller for delivery on 1 December was \$ 56,000. On 1 December Buyer made a cover purchase for \$ 61,000 for delivery on 1 March. Because of the delay in receiving the tools, Buyer suffered additional losses of \$ 3,000.

In this example Buyer is limited to recovering \$ 6,000 in damages, the extent of the losses he would have suffered if he had made the cover purchase on 1 July or a reasonable time thereafter, rather than \$ 14,000, the total amount of losses which he suffered by awaiting 1 December to make the cover purchase.

*Example 73B:* Promptly after receiving Seller's letter of 1 July, in example 73A, pursuant to article 62 Buyer made demand on Seller for adequate assurances that he would perform the contract as specified on 1 December. Seller failed to furnish the assurances within the reasonable period of time specified by Buyer. Buyer promptly made a cover purchase at the currently prevailing price of \$ 57,000. In this case Buyer can recover \$ 7,000 in damages rather than \$ 6,000 as in example 73A.

### *SECTION V. PRESERVATION OF THE GOODS*

#### *Article 74*

##### *[Seller's obligation to preserve]*

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

the benefit of the party who has breached the contract, even though the risk of loss is on the party in breach.

<sup>2</sup> Article 46 contains a principle of mitigation in that the buyer is not permitted to reduce the price if he does not permit the seller to remedy any failure on his part in respect of any of his obligations under the contract.

## PRIOR UNIFORM LAW

ULIS, article 91.

## Commentary

If the buyer is in delay in taking delivery of the goods and the seller is in physical possession of the goods or is in a position to control the disposition of the goods which are in the possession of a third person, it is appropriate that the seller be required to take reasonable steps to preserve the goods for the benefit of the buyer. It is also appropriate that the seller "may retain [the goods] until he has been reimbursed his reasonable expenses by the buyer," as is provided in article 74.

*Example 74A:* The contract provided that Buyer was to take delivery of the goods<sup>1</sup> at the Seller's warehouse during the month of October. Seller made delivery on 1 October by placing the goods at Buyer's disposal.<sup>2</sup> On 1 November, the day when Buyer was in breach of his obligation to take delivery and the day on which the risk of loss passed to Buyer,<sup>3</sup> Seller shifted the goods to a portion of the warehouse which was less appropriate for the storage of such goods. On 15 November Buyer took delivery of the goods at which time the goods were damaged because of the inadequacies of the portion of the warehouse to which they had been shifted. In spite of the fact that the risk of loss had passed to Buyer on 1 November, Seller is liable for the damage to the goods which occurred between 1 November and 15 November by reason of the breach of his obligation to preserve them.

*Example 74B:* The contract called for delivery on CIF terms. Buyer wrongfully dishonoured the bill of exchange when it was presented to him. As a result, the bill of lading and other documents relating to the goods were not handed over to the Buyer. Article 74 provides that in this case Seller, who is in a position to control the disposition of the goods through his possession of the bill of lading, is obligated to preserve the goods when they are discharged at the port of destination.<sup>4</sup>

## Article 75

## [Buyer's obligation to preserve]

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

## PRIOR UNIFORM LAW

ULIS, article 92.

## Commentary

1. Article 75 sets forth the buyer's obligation to preserve goods which he intends to reject.

2. Paragraph (1) provides that if the goods have been received by the buyer and he intends to reject them, he must take reasonable steps to preserve them. The buyer may retain those goods until he has been reimbursed his reasonable expenses by the seller.

<sup>1</sup> The buyer's obligation to take delivery is set forth in article 56.

<sup>2</sup> See article 29 (b) and 29 (c).

<sup>3</sup> Article 81 (i).

<sup>4</sup> Compare example 75C.

3. Paragraph (2) provides for the same result where goods which have been dispatched to the buyer have been placed at his disposal at their destination and he exercises his right to reject them.<sup>1</sup> However, since the goods are not in the buyer's physical possession at the time he exercises his right to reject them, it is not as clear that he should be required to take possession of them on behalf of the seller. Therefore, paragraph (2) specifies that the buyer need take possession only if "he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense" and only if the seller or a person authorized to take charge of the goods for him is not present at the place of destination.

4. Paragraph (2) is applicable only if goods which have been dispatched to the buyer "have been placed at his disposal at their destination." Therefore, the buyer is obligated to take possession of the goods only if the goods have physically arrived at their destination prior to his rejection of them. He is not obligated to take possession of the goods under paragraph (2) if before the arrival of the goods he rejects the shipping documents because they indicate that the goods do not conform to the contract.

*Example 75A:* After the goods were received by Buyer he rejected them because of their failure to conform to the contract. Buyer is required by article 75 (1) to preserve the goods for the Seller.

*Example 75B:* The goods were shipped to Buyer by railroad. Prior to taking possession, Buyer found on examination of the goods that there was a fundamental breach of the contract in respect of their quality. Even though Buyer has the right to avoid the contract under article 45 (1) (a), by virtue of article 75 (2) he is obligated to take possession of the goods and to preserve them, provided that this may be done without payment of the price and without unreasonable inconvenience or unreasonable expense and provided that Seller or a person authorized to take possession on his behalf is not present at the place of destination.

*Example 75C:* The contract provided for delivery on CIF terms. When the bill of exchange was presented to Buyer, he dishonoured it because the accompanying documents were not in conformity with the contract of sale. In this example Buyer is not obligated to take possession of the goods for two reasons. If the goods have not arrived and been put at his disposal at the place of destination at the time Buyer dishonours the bill of exchange, the provisions of article 75 (2) do not apply at all. Even if article 75 (2) were to apply, because Buyer could take possession of the goods only by paying the bill of exchange, he would not be required by article 75 (2) to take possession and preserve the goods.<sup>2</sup>

## Article 76

## [Deposit with third person]

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

## PRIOR UNIFORM LAW

ULIS, article 93.

## Commentary

Article 76 permits a party who is under obligation to take steps to preserve the goods to discharge his obligation by depositing them in the warehouse of a third person. The term "warehouse" should be interpreted broadly as any place appropriate for the storage of goods of the type in question.

<sup>1</sup> Para. (2) states that the buyer "must take possession of [the goods] on behalf of the seller". Once possession is taken, the obligation to preserve the goods arises out of para. (1).

<sup>2</sup> Compare example 74B.

## Article 77

## [Sale of the preserved goods]

(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

## PRIOR UNIFORM LAW

ULIS, articles 94 and 95.

## Commentary

1. Article 77 sets forth the right to sell the goods by the party who is bound to preserve them.

*Right to sell, paragraph (1)*

2. Under paragraph (1) the right to sell the goods arises where there has been an unreasonable delay by the other party in taking possession of them or in taking them back or in paying the cost of preservation.

3. The sale may be by "any appropriate means" after "notice of the intention to sell" has been given. The Convention does not specify what are appropriate means because conditions vary in different countries. To determine whether the means used are appropriate, reference should be made to the means required for sales under similar circumstances under the law of the country where the sale takes place.

4. The law of the State where the sale under this article takes place, including the rules of private international law, will determine whether the sale passes a good title to the purchaser if the party selling the goods has not complied with the requirements of this article.<sup>1</sup>

*Goods subject to loss, paragraph (2)*

5. Under paragraph (2) the party who is bound to preserve the goods must make reasonable efforts to sell them if (1) the goods are subject to loss or rapid deterioration or (2) their preservation would involve unreasonable expense.

6. The most obvious example of goods which must be sold, if possible, because they are subject to loss or rapid deterioration is fresh fruits and vegetables. However, the concept of "loss" is not limited to a physical deterioration or loss of the goods but includes situations in which the goods threaten to decline rapidly in value because of changes in the market.

7. Paragraph (2) only requires that reasonable efforts be made to sell the goods. This is so because goods which are subject to loss or rapid deterioration may be difficult or impossible to sell. Similarly, the obligation to give notice of the intent to sell exists only to the extent to which such notice is possible. If the goods are rapidly deteriorating, there may not be sufficient time to give notice prior to sale.

<sup>1</sup> Article 4.

8. If the party bound to sell the goods under this article does not do so, he is liable for any loss or deterioration arising out of his failure to act.

*Right to reimbursement, paragraph (3)*

9. The party selling the goods may reimburse himself from the proceeds of the sale for all reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance. If the party selling the goods has other claims arising out of the contract or its breach, under the applicable national law he may have the right to defer the transmission of the balance until the settlement of those claims.

## CHAPTER V. PASSING OF RISK

## Article 78

## [Loss after risk has passed]

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

## PRIOR UNIFORM LAW

ULIS, article 96.

## Commentary

1. Article 78 introduces the provisions in the Convention that regulate the passing of the risk of loss.

2. The question whether the buyer or the seller must bear the risk of loss is one of the most important problems to be solved by the law of sales. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement with its attendant strain on current assets, and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the allocation of the risk has an even sharper impact.

3. Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C and F may specify the moment when the risk of loss passes from the seller to the buyer.<sup>1</sup> Where the contract sets forth rules for the determination of the risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in this Convention.<sup>2</sup>

4. Article 78 states the main consequence of the passing of the risk. Once the risk has passed to the buyer, the buyer is obligated to pay for the goods notwithstanding their subsequent loss or damage. This is the converse of the rule stated in article 34 (1) that "the seller is liable . . . for any lack of conformity which exists at the time when the risk passes to the buyer".

5. Nevertheless, even though the risk has passed to the buyer prior to the time that the goods are lost or damaged, the buyer is discharged from his obligation to pay the price to the extent that the loss or damage was due to an act or omission of the seller.

6. The loss or damage to the goods may be caused by an act or omission of the seller which does not amount to a breach of the seller's obligations under the contract. For example, if the contract was on FOB terms, the risk would normally pass when the goods passed the ship's

<sup>1</sup> E.g., Incoterms, FOB, A.4 and B.2; CIF, A.6 and B.3; C & F, A.5 and B.3 provide that the seller bears the risk until the goods pass the ship's rail from which time the risk is borne by the buyer.

The use of such terms in a contract without specific reference to Incoterms or to some other similar definition and without a specific provision in the contract as to the moment when risk passes may nevertheless be sufficient to indicate that moment if the court or arbitral tribunal finds the existence of a usage. See para. 6 of the commentary to article 8.

<sup>2</sup> Article 5.

rail.<sup>3</sup> If the seller damaged the goods at the port of discharge when he was recovering his containers, the damage to the goods may be considered not to be a breach of the contract but, instead, to constitute a tort. If the loss or damage to the goods constitutes a tort rather than a breach of the contract, none of the buyer's remedies under articles 41 to 47 would apply.<sup>4</sup> Nevertheless, article 78 provides that the buyer would not be obligated to pay the price as stated in the contract but would have the right to deduct the damages as they would be calculated under the applicable law of tort.

### Article 79

#### [Passage of risk when sale involves carriage]

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

#### PRIOR UNIFORM LAW

ULIS, articles 19 (2), 19 (3) and 97 (1).

#### Commentary

1. Article 79 governs the passage of the risk of loss where the contract involves the carriage of the goods and the parties have not, by the use of trade terms or otherwise, provided for a different rule in respect of the risk of loss.<sup>1</sup>

2. The contract of sale involves carriage of the goods if the seller is required to ship the goods or is authorized to ship the goods and in fact does so. It does not involve carriage of the goods if the buyer takes delivery of the goods at the seller's place of business, even though they may need to be shipped by public carrier from that place, or if the buyer makes the arrangements for the goods to be shipped.

3. Contracts of sale which involve the carriage of goods fall into three categories for the purpose of determining the point of time at which the risk passes from the seller to the buyer.

#### First category

4. If the contract of sale provides for carriage of the goods from the seller's place of business, or such other place at which the goods may be located at the time of shipment, but does not require the seller to hand them over to the buyer or to the carrier at any place other than the place at which the carriage begins, "the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer".

5. In many, perhaps in most, of the cases of the first category there will only be one carrier involved. For example, the contract provides

<sup>3</sup> See footnote 1 above.

<sup>4</sup> Article 41 (1) makes these remedies applicable only if the seller "fails to perform any of his obligations under the contract and this Convention".

<sup>1</sup> Article 82 affects the application of article 79 if there has been a fundamental breach of contract.

that the seller is to arrange for carriage of the goods by truck from his place of business to that of the buyer. In some cases there will be two or more carriers. For example, the contract provides that the seller is to arrange for carriage by rail to a port at which point the goods are to go by ship. In still other cases the contract may provide that the seller is to arrange for the carriage but it is up to his judgement as to the modes of transport to be used.

#### Second category

6. In many contracts of sale which involve carriage of the goods, the seller is required to hand the goods over to a carrier at a place other than the seller's place of business. For example, an inland seller who contracts to sell on CIF terms is required to hand over the goods to an ocean carrier at a port. By necessity the seller will have to arrange for the goods to be carried to the port. The seller may be able to accomplish this by his own personnel and vehicles, but normally he will use an independent carrier.

7. In cases of the second category where the contract requires the seller to hand the goods over to a carrier at a place other than either the point of original shipment or the final destination of the goods, the risk passes when the goods are handed over to the carrier at that place. Therefore, where the goods are to be handed over to an ocean carrier at a port, risk passes when the goods are handed over to the ocean carrier and not when they are handed over to "the first carrier", i. e. the road or rail carrier, for carriage to the port.

#### Third category

8. Where the contract provides that the seller is to hand the goods over to the buyer at a particular destination, e.g. by use of an Ex Ship terms, a term which calls for delivery at the port of destination named in the contract, the risk of loss does not pass under article 79 but passes under article 81 (1) after the goods have arrived at the named port of destination. The exact time at which risk passes depends upon factors discussed in the commentary to article 81.

#### Retention of documents by the seller

9. It is a normal practice for an unpaid seller to retain the shipping documents as a form of security until such time as payment is made. In some legal systems "title" or "property" in the goods does not pass to the buyer until the documents are handed over to him. This can raise the question as to whether the risk of loss has passed.

10. The third sentence of article 79 (1) makes it clear that the fact that the seller is authorized to retain documents controlling the disposition of the goods, or the fact that he acts in accordance with that authority, does not affect the passage of the risk, even though under the applicable national law it may affect the passage of "title" or "property".<sup>2</sup>

#### Identification of the goods, paragraph (2)

11. It is not infrequent that goods are shipped for the purpose of fulfilling a sales contract but the shipment is such that it would not be possible to tell from the markings on the packages, if any, or from the documents accompanying the shipment or in any other manner that the goods are intended to fill that particular contract. This situation can arise if the seller ships the goods to a party other than the buyer, such as an agent of the seller, who is to arrange for delivery to the buyer. Similarly, goods to fulfil more than one contract may be shipped in bulk. For example, a seller might ship 10,000 tons of wheat to fulfil his obligations to deliver 5,000 tons to each of two separate buyers.

12. In any of these cases in which the goods are not identified to the contract, article 79 (2) provides that the risk does not pass as provided in article 79 (1). Instead, it passes at the moment the seller sends the buyer a notice of the consignment which specifies the goods.

<sup>2</sup> Article 4 (b) provides that this Convention is not concerned with "the effect which the contract may have on the property in the goods sold".



**Article 80****[Passage of risk when goods sold in transit]**

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

## PRIOR UNIFORM LAW

ULIS, article 99.

**Commentary**

1. If the goods were in transit at the time the contract of sale was concluded, the risk of loss is deemed to have passed retroactively at the time the goods were handed over to the carrier who issued the documents controlling their disposition. This rule that the risk of loss passes prior to the making of the contract arises out of purely practical concerns. It would normally be difficult or even impossible to determine at what precise moment in time damage known to have occurred during the carriage of the goods in fact occurred. It is simpler if the risk of loss is deemed to have passed at a time when the condition of the goods was known. In addition, it will usually be more convenient for the buyer, who is in physical possession of the goods at the time the loss or damage is discovered, to make claim against the carrier and the insurance company.

2. However, any loss or damage which had already occurred at the time of the conclusion of the contract and of which the seller knew or ought to have known but which he did not disclose to the buyer is at the risk of the seller.

**Article 81****[Passage of risk in other cases]**

(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

## PRIOR UNIFORM LAW

ULIS, articles 97 and 98.

**Commentary**

1. Article 81 gives the general rule for passage of the risk of loss in those cases which do not fall within articles 79 and 80. In the cases governed by article 81 it is anticipated that the buyer will take possession of the goods and arrange for any necessary transport himself, either in his own vehicles or in public carriers.

**Buyer takes over the goods, paragraph (1)**

2. Where the buyer takes over the goods at a place of business of the seller, the risk passes when he takes over the goods.

**Buyer fails to take over the goods, paragraph (1)**

3. If the buyer was obligated to take over the goods at a place of business of the seller and the seller placed the goods at the buyer's disposal but the buyer failed to take them over in due time, the risk passes when the buyer commits a breach of contract by failing to take them over.

*Example 81A:* Buyer was to take delivery of 100 cartons of transistors at Seller's warehouse during the month of July. On 1 July Seller marked 100 cartons with Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July Buyer took delivery of the 100 cartons. Therefore, the risk of loss passed to Buyer on 20 July at the moment that the goods were taken over by him.

*Example 81B:* In the contract described in example 81A Buyer did not take over the 100 cartons until 10 August. The risk of loss passed to him at the close of business on 31 July, the moment at which the Buyer was in breach of contract for failing to take delivery.

*Example 81C:* Although Seller in the contract described in example 81A should have had the 100 cartons ready for Buyer to take delivery at any time during the month of July, no cartons were marked with Buyer's name or otherwise identified to the contract until 15 September. Buyer took delivery on 20 September, which was within a reasonable time after he was notified of the availability of the goods. The risk of loss passed to Buyer on 20 September, the time when Buyer took delivery of the goods. This result occurs, rather than the result given in example 81B, because Buyer was not in breach of the contract for not taking delivery before 20 September.

**Goods not at a place of business of seller, paragraph (2)**

4. The considerations which go into determining the appropriate time for the passage of the risk are different when the goods are at a place other than any place of business of the seller. So long as the goods are in the physical possession of the seller and the last day of the period during which the buyer was obligated to take over the goods has not as yet passed, it is appropriate that the seller should bear the risk of loss. It is the seller who is in the best position to protect the goods from loss or damage and, if loss or damage occurs, to present claims against those who might have caused the loss or against the insurance carrier.

5. These considerations are no longer present when the goods are in the hands of a third party, such as a public warehouse. The seller is in no better position than the buyer to guard the goods against loss. Nor is the seller in any better position than the buyer to present claims against the third party, a person responsible for causing the loss or an insurance carrier, as the case may be.

6. The Convention chooses the rule that the risk passes to the buyer at the time the buyer is in a position to withdraw the goods from the control of the third party. That time is when delivery of the goods is due, the goods have been placed at the disposal of the buyer and he is aware that they have been placed at his disposal.

**Placed at the disposal of the buyer**

7. Goods are placed at the disposal of the buyer when the seller has done that which is necessary for the buyer to be able to take possession. Normally, this would include the identification of the goods to be delivered, the completion of any pre-delivery preparation, such as packing, to be done by the seller, and the giving of such notification to the buyer as would be necessary to enable him to take possession.

8. If the goods are in the possession of a bailee, such as a warehouseman or a carrier, they might be placed at the disposal of the buyer by such means as the seller's instructions to the bailee to hold the goods for the buyer or by the seller handing over to the buyer in appropriate form the documents which control the goods.

## Article 82

## [Effect of fundamental breach on passage of risk]

If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach.

PRIOR UNIFORM LAW

ULIS, article 97 (2).

## Commentary

1. Article 82 provides that the passage of the risk of loss under articles 79, 80 and 81 does not impair any remedies which the buyer may have which arise out of a fundamental breach of contract by the seller.

2. The primary significance of article 82 is that the buyer may be able to insist on the delivery of substitute goods under article 42 or 43 or to declare the contract avoided under article 45 (1) (a) or (b) even though the goods have been lost or damaged after the passage of the risk of loss under article 79, 80 or 81. In this respect article 82 constitutes an exception to article 67 (1) as well as to articles 79, 80 and 81 in that, subject to three exceptions enumerated in article 67 (2), "the buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them".

3. Article 82 must be read in connection with articles 37 and 45 (2) because in some examples the buyer will lose his right to declare the contract avoided or to require the seller to deliver substitute goods because he did not act within the time-limits required by those articles.

*Example 82A:* The contract was the same as in example 81A. Buyer was to take delivery of 100 cartons of transistors at Seller's warehouse during the month of July. On 1 July Seller marked 100 cartons with Buyer's name and placed them in the portion of the warehouse reserved for goods ready for pick-up or shipment. On 20 July Buyer took delivery of the 100 cartons at which time he paid the price. Therefore, under article 81 (1) the risk of loss passed to Buyer on 20 July.

On 21 July, before Buyer could make the examination required under article 36, 50 of the cartons were destroyed in a fire. When Buyer examined the contents of the remaining 50 cartons, the transistors were found not to conform to the contract to such a degree that the lack of conformity constituted a fundamental breach of the contract.

In spite of Buyer's inability to return all 100 cartons because of the fire which had occurred after the passage of the risk of loss, Buyer could avoid the contract and recover the price he had paid.

*Example 82B:* The facts are the same as in example 82A except that Buyer did not examine the remaining 50 cartons of transistors for six months after he received them. In such a case he could probably not avoid the contract because it would probably be held under article 37

(1) that he had not given notice of the lack of conformity "within a reasonable time after he . . . ought to have discovered it" and under article 45 (2) (b) that he had not declared the contract avoided "within a reasonable time . . . after he . . . ought to have known of such breach".

*Example 82C:* In partial fulfilment of his obligations under the contract in example 82A on 1 July Seller identified to the contract 50 cartons of transistors rather than the 100 cartons called for in the contract.

On 5 August, before Buyer took delivery of the goods, the 50 cartons were destroyed in a fire in Seller's warehouse. Even though the risk of loss in respect of the 50 cartons had passed to Buyer at the close of business on 31 July,<sup>1</sup> if identifying to the contract only 50 cartons instead of 100 cartons constituted a fundamental breach of contract, Buyer could still declare the contract avoided by reason of article 82. However, he must do so "within a reasonable time . . . after he knew or ought to have known" of the shortage or he will lose the right to declare the contract avoided by virtue of article 45 (2) (b).

*Example 82D:* Although Seller in the contract described in example 82A should have had the 100 cartons ready for Buyer to take delivery at any time during the month of July, no cartons were marked with Buyer's name or otherwise identified to the contract until 15 September. Buyer took delivery on 20 September. As was stated in example 81C, the risk of loss passed to the Buyer on 20 September, the time when Buyer took delivery of the goods.

On 23 September the goods were damaged through no fault of Buyer. If Seller's delay in putting the goods at Buyer's disposal amounted to a fundamental breach, article 82 provides that the damage to the goods after the passage of the risk of loss would not prohibit Buyer from declaring the contract avoided. However, under article 45 (2) (a), it is likely that it would be held that once Buyer had taken delivery of the goods by picking them up at Seller's warehouse, he had lost the right to declare the contract avoided for not having "done so within a reasonable time . . . after he [became] aware that delivery has been made".

*Example 82E:* The contract was similar to that in example 82A except that Seller was to ship the goods on FOB terms during the month of July. The goods were shipped late on 15 September. Under article 79 (1) the risk of loss passed on 15 September.

On 17 September the goods were damaged while in transit. On 19 September both the fact that the goods had been shipped on 15 September and that they were damaged on 17 September were communicated to Buyer. Under these facts, if the late delivery constituted a fundamental breach, Buyer could avoid the contract if he did so "within a reasonable time . . . after he has become aware that delivery has been made",<sup>2</sup> a time which would undoubtedly be very short under the circumstances.

<sup>1</sup> See example 81B.

<sup>2</sup> Article 45 (2) (a).

## E. DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: DRAFT ARTICLES CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES

Prepared by the Secretary-General

Document A/CONF.97/6

[Original: English]  
[31 October 1979]

## Introduction

1. The General Assembly, by resolution 33/93 of 16 December 1978 entitled "United Nations Conference on Contracts for the International Sale of Goods", requested the Secretary-General, among other things, to prepare and circulate draft provisions concerning implementa-

tion, reservations and other final clauses for the draft Convention on Contracts for the International Sale of Goods. This document is submitted to the Conference in compliance with that request.

2. The draft articles set forth in this document have not been approved by the United Nations Commission



on International Trade Law, the Commission being of the view that, with the exception of article (X) of the draft Convention,<sup>1</sup> it should not officially comment on the suitability of the substance of any clauses.<sup>2</sup> However, an earlier version of these draft articles was placed by the Secretary-General before the tenth session of the Commission and the texts proposed in this document take account of the views expressed at the session by representatives and observers.<sup>3</sup> At that session, the Commission also invited federal and non-unitary States to indicate their views on the desirability of a federal State clause in the Convention.<sup>4</sup> Two alternative clauses are presented in article B.

3. Finally, the Commission, at its eleventh session, when it consolidated the texts of the draft Convention on the International Sale of Goods and the draft Convention on the Formation of Contracts for the International Sale of Goods, requested the Secretary-General to include in the draft provisions on implementation, reservations and other final clauses a provision which would allow a Contracting State to ratify or accede to Parts I (Sphere of Application and General Provisions) and II (Formation of the Contract), or Parts I and III (Sale of Goods), or Parts I, II and III.<sup>5</sup> Such a provision is contained in draft article G.

#### *Article A. Depositary<sup>1</sup>*

The Secretary-General of the United Nations is hereby designated as the depositary<sup>2</sup> of this Convention.

#### *Article B. Federal State clause<sup>1</sup>*

##### *Alternative P*

In the case of a federal or non-unitary State, the following provisions shall apply:

<sup>1</sup> Article (X) was redrafted by the Commission at its eleventh session to take account of the decision to consolidate the draft Convention on the International Sale of Goods with the draft Convention on the Formation of Contracts for the International Sale of Goods.

<sup>2</sup> The Commission requested the Secretariat to take particular note of two proposals submitted by delegations. These proposals are reflected in articles C and D of the draft final clauses.

<sup>3</sup> A/CN.9/135.

<sup>4</sup> Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, Annex I, para. 50.

<sup>5</sup> *Ibid.*, *Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 27, subpara. 2 (b).

<sup>1</sup> This article is identical to article 27 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (A/CONF.89/13) (hereafter referred to as the Hamburg Rules).

<sup>2</sup> The general functions of a depositary are described in article 77 of the Vienna Convention on the Law of Treaties. Additional functions of the depositary of this Convention are set out in article J of these draft articles. Throughout the remainder of these draft articles the Secretary-General of the United Nations is referred to as "the depositary" without repetition of his title.

<sup>3</sup> At its tenth session (1977) the Commission requested the Secretariat to invite federal and non-unitary States to indicate their views on the

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal government shall to this extent be the same as those of Parties which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting Party transmitted through the depositary, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action.

##### *Alternative II<sup>3</sup>*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

(3) If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification, acceptance, approval or accession, the Convention shall have effect within all territorial units of that State.

desirability of a federal State clause in the Convention (A/32/17, para. 18 and Annex I, para. 360). (A member of the Commission made a reservation to this decision.) Two alternative clauses are presented here in order to enable those States to comment on the desirability of these types of clauses together with any observations they wish to make on other articles in the draft Convention.

<sup>2</sup> Alternative I is essentially identical to article 11 of the Convention on the Recovery Abroad of Maintenance, 1956 (268 U.N.T.S. 3).

<sup>3</sup> Alternative II is essentially identical to the text of article 31 of the Convention on the Limitation Period in the International Sale of Goods, 1974 (A/CONF.63/13) (hereafter referred to as the Prescription Convention). It should be noted that at the United Nations Conference on the Convention on Prescription (Limitation) in the International Sale of Goods many States considered that both this Alternative and formulations based on Alternative I were unacceptable. (See Report of the Second Committee, paras. 14-19; summary records of plenary meetings, 9th meeting, paras. 52-61; summary records of Second Committee, 1st meeting, paras. 14-25; 2nd meeting, paras. 8-9; 3rd meeting, paras. 1-3; 4th meeting, paras. 1-43. (*Official Records of the United Nations Conference on Prescription [Limitation] in the International Sale of Goods*; United Nations Publication, Sales No. 74.V.8; hereafter referred to as *Official Records*)).

### Article C. Declaration of non-application of Convention<sup>1</sup>

(1) A Contracting State may at any time declare that the Convention does not apply to the formation of contracts of sale or to contracts of sale between a party having a place of business in that State and a party having a place of business in another State because the two States apply to matters governed by this Convention the same or closely related rules.

(2) If that other State is a Contracting State, such declarations shall be made jointly by the two Contracting States or by reciprocal unilateral declarations.

### Article (X). Declarations relating to contracts in writing<sup>1</sup>

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration.

### Article D. Relationship with Conventions containing provisions dealing with matters governed by this Convention<sup>1</sup>

This Convention shall not prevail over conventions already entered into or which may be entered into, and

<sup>1</sup> This article reproduces the substance of a proposal made by a member of the Commission at the tenth session (1977) (A/32/17, Annex I, para. 559 (b)). That proposal was made in the context of the draft Convention on the International Sale of Goods. The proposal has been changed to conform to the integrated text. The original proposal was as follows:

"(1) A Contracting State may at any time declare that contracts of sale between a seller having a place of business in that State and a buyer having a place of business in another State shall not be governed by this Convention, because the two States apply to the matters governed by this Convention the same or closely related legal rules.

"(2) If that other State is a Contracting State, such declarations must be made jointly by the two Contracting States or by reciprocal unilateral declarations."

This article is similar to article 34 of the Prescription Convention and to paragraph 1 of Article II of the Convention Relating to a Uniform Law on the International Sale of Goods done at the Hague, 1 July 1964, 834 U.N.T.S. 107 (hereafter referred to as the 1964 Hague Sales Convention).

<sup>1</sup> The text of article (X) was initially adopted by the Commission at its tenth session (1977) (A/32/17, Annex I, para. 134). The current text is that adopted by the Commission at its eleventh session (1978) as a result of its decision to consolidate the draft Convention on the International Sale of Goods with the draft Convention on the Formation of Contracts for the International Sale of Goods (A/33/17, Annex I, para. 196).

<sup>1</sup> This article reproduces the substance of a proposal made by a member of the Commission both at the tenth session (1977) (A/32/17, Annex I, para. 559 (a)), and the eleventh session (1978) (A/33/17, Annex I, para. 197). That proposal was made in the context of the draft Convention on the International Sale of Goods. The proposal has

which contain provisions concerning the matters governed by this Convention, provided that the offeror and offeree or seller and buyer as the case may be have their places of business in States parties to such a convention.<sup>2</sup>

### Article E. Date of application<sup>1</sup>

Each Contracting State shall apply the provisions of this Convention to:

(a) the formation of contracts falling within the scope of article 1 of this Convention when the proposal for concluding the contract has been made on or after the date of entry into force of this Convention in respect of the States in which the parties have their places of business; and to

(b) contracts falling within the scope of article 1 of this Convention which were concluded on or after the date of entry into force of this Convention in respect of the States in which the parties have their places of business.

### Article F. Signature, ratification, acceptance, approval, accession<sup>1</sup>

(1) This Convention is open for signature at the concluding meeting of the Conference on . . . . . and shall remain open for signature at the Headquarters of the United Nations, New York until . . . . .

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

been changed to conform to the integrated text. The original proposal was as follows:

"This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention."

<sup>2</sup> This provision is similar to article 37 of the Prescription Convention. It makes the Convention on Contracts for the International Sale of Goods subordinate to any existing or future Conventions that deal with matters governed by this Convention. However, this provision does not extend to the 1964 Hague Sales Convention or to the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (hereafter referred to as the 1964 Hague Formation Convention) since a Contracting State to this Convention must denounce those Conventions pursuant to article J unless it had excluded either Part II or Part III of this Convention pursuant to Article G in which case it could remain party to either the 1964 Hague Sales Convention or the 1964 Hague Formation Convention as the case may be (see Articles J (4) and J (5)).

This provision makes this Convention subordinate only to other Conventions. The case of other legal rules dealing with contracts for the international sale of goods is dealt with by Article C which, however, does not operate automatically but requires a declaration by the Contracting State or Contracting States concerned.

<sup>1</sup> This provision selects the time of the proposal for concluding a contract or the time of the conclusion of the contract (as the case may be) as the date for determining the point of time from which the provisions of this Convention apply. This provision is based on article 33 of the Prescription Convention and article 30 (3) of the Hamburg Rules.

<sup>1</sup> Article F describes the manner in which States may become parties to the Convention. The provision is based on article 28 of the Hamburg Rules which is a simplification of articles 41, 42 and 43 of the Prescription Convention to accord with modern methods of treaty making practice.

(3) This Convention shall be open for accession by all States which are not signatory States.

(4) Instruments of ratification, acceptance, approval and accession shall be deposited with the depositary.

*Article G. Partial ratification, acceptance, approval or accession<sup>1</sup>*

(1) A Contracting State may declare at the time of signature, ratification, acceptance or accession that it will not be bound by the provisions of Part II of this Convention or that it will not be bound by the provisions of Part III of this Convention.

(2) A Contracting State which makes a declaration pursuant to paragraph (1) of this article in respect of Part II or Part III of this Convention shall not be considered to be a Contracting State within article 1 (1) of this Convention in respect of matters governed by the Part that it has not accepted.

*Article H. Declarations<sup>2</sup>*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance, approval or accession.

(2) Declarations, and the confirmation of declarations, shall be in writing and shall be formally notified to the depositary.<sup>3</sup>

(3) Declarations made under article B shall state expressly the territorial units to which the Convention applies.<sup>3</sup>

(4) If a Contracting State described in article B makes no declaration at the time of signature, ratification, acceptance, approval or accession, the Convention has effect within all territorial units of that State.<sup>4</sup>

(5) Declarations take effect simultaneously with the entry into force of this Convention in respect of the State concerned, except for declarations of which the deposit-

ary receives formal notification after such entry into force. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the depositary except that reciprocal unilateral declarations under article C shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(6) Any State which has made a declaration under this Convention may withdraw it at any time by means of a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(7) In the case of a withdrawal of a declaration made under article C of this Convention, such withdrawal also renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

*Article J. Entry into force<sup>1</sup>*

(1) This Convention enters into force on the first day of the month following the expiration of [thirteen] months after the date of deposit of the [tenth] instrument of ratification, acceptance, approval or accession (including the deposit of an instrument of ratification, acceptance, approval or accession by which a State declares that it will not be bound by the provisions of Part II or Part III of this Convention pursuant to article G above).<sup>2</sup>

<sup>1</sup> Article J defines the date on which this Convention enters into force and deals with its relationship to the 1964 Hague Formation Convention and the 1964 Hague Sales Convention.

<sup>2</sup> This provision is similar to article 44 of the Prescription Convention except that this Convention does not enter into force until 13 months after the date of deposit of the [tenth] instrument of ratification, acceptance, approval or accession rather than the six-month period selected in the Prescription Convention. That period of six months was chosen to give Governments which became party to the Prescription Convention sufficient time to notify all the national organizations and individuals concerned that a Convention which would affect them would soon enter into force (Summary records of the Second Committee, 1st meeting, paras. 45-50 (Official Records, part two)).

However, the period of 13 months is suggested in respect of this Convention to allow sufficient time for denunciations of either or both the 1964 Hague Conventions to take effect on the same date as this Convention would enter into force in respect of any State which is a Party to either or both the 1964 Hague Conventions. Those Conventions provide that denunciations are effective 12 months after receipt by the Government of the Netherlands. The additional one month is to allow adequate time for the Government of the Netherlands to be notified of the denunciation, as provided for in paragraph (3) of this article.

The number of instruments of ratification required to bring the Prescription Convention into force is 10. However, the Conference may consider that it should not be necessary for that number of States to ratify a convention on a private law matter to bring it into force. It might be noted that the 1964 Hague Conventions came into force by virtue of five ratifications or accessions and the Inter-American Convention on International Commercial Arbitration done at Panama City on 30 January 1975 came into force by virtue of only two ratifications. Accordingly, the word "tenth" has been placed in square brackets in paragraphs (1), (2) and (6) of this article.

Partial ratification, acceptance, approval or accession to the Convention pursuant to article G is treated in the same way as ratification, acceptance, approval or accession to the entire Convention (see paragraph (3) of this article).

<sup>3</sup> This provision enables a Contracting State to be bound only by the rules on formation or the rules on sales instead of being bound by both sets of provisions. This provision is presented pursuant to the decision of the Commission to integrate the draft Convention on the Formation of Contracts for the International Sale of Goods with the draft Convention on the International Sale of Goods but to enable a Contracting State to ratify or accept the integrated text in part (Report of the United Nations Commission on International Trade Law on the work of its eleventh session, A/33/17, at para. 27, subpara. 2 (b)).

<sup>4</sup> Article H defines the manner of making declarations under this Convention, the manner of their withdrawal and the time at which a declaration or a withdrawal of a declaration becomes effective. Article 31 (1) of the Prescription Convention and Alternative II of article B contain a procedure for the amendment of declarations made pursuant to those articles by submitting a further declaration.

<sup>2</sup> Paragraph (2) ensures that all declarations are formally notified to the depositary. Article 77 (i) (e) of the Vienna Convention on Treaties provides that the functions of a depositary, unless provided otherwise, comprise (*inter alia*) "Informing the parties and the States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty."

<sup>3</sup> Paragraphs (3) and (4) of this article implement a federal State clause of the type found in Alternative II of article B of these draft provisions. If no provision similar to Alternative II of article B is adopted, paragraphs (3) and (4) of this article should be deleted.

<sup>4</sup> See footnote 3 above.

(2) For each State ratifying, accepting, approving or acceding to this Convention after the [tenth] instrument of ratification, acceptance, approval or accession has been deposited, this Convention, with the exception of the Part excluded, enters into force in respect of that State on the first day of the month following the expiration of [thirteen] months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.<sup>3</sup>

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a Party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect, such denunciation or denunciations to be effective on the date this Convention enters into force in respect of that State.<sup>4</sup>

(4) A State which partially ratifies, accepts, approves or accedes to this Convention pursuant to article G by declaring that it will not be bound by the provisions of Part II of this Convention and which is a party to the 1964 Hague Sales Convention shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect, such denunciation to be effective on the date this Convention enters into force in respect of that State.<sup>5</sup>

(5) A State which partially ratifies, accepts, approves or accedes to this Convention pursuant to article G by declaring that it will not be bound by the provisions of Part III of this Convention and which is a party to the 1964 Hague Formation Convention shall at the same

time denounce that Convention by notifying the Government of the Netherlands to that effect, such denunciation to be effective on the date this Convention enters into force in respect of that State.<sup>6</sup>

(6) Upon the deposit of the [tenth] instrument of ratification, acceptance, approval or accession (including an instrument which contains a declaration pursuant to article G), the depositary shall inform the Government of the Netherlands as the depositary of the 1964 Hague Formation Convention and the 1964 Hague Sales Convention of the date on which this Convention will enter into force and of the names of the Contracting States to this Convention.<sup>7</sup>

#### *Article K. Denunciation<sup>1</sup>*

(1) A Contracting State may denounce this Convention (or Part II or Part III thereof), by means of a formal notification in writing addressed to the depositary.<sup>2</sup>

(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.<sup>3</sup>

DONE at . . . . ., this day of . . . . .  
 . . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.<sup>4</sup>

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

<sup>6</sup> Paragraph (5) deals with the case of a denunciation of the 1964 Hague Formation Convention by a State which has declared that it will not be bound by the provisions of Part III of this Convention pursuant to article G.

<sup>7</sup> Paragraph (6) of this article is a procedural measure requiring the depositary to notify the Government of the Netherlands of the entry into force of this Convention so that it will be aware of the effective date of any denunciations of which it may already have been notified.

<sup>1</sup> Article K prescribes the manner in which this Convention may be denounced.

<sup>2</sup> Paragraph (1) of this article is based on article 45 (1) of the Prescription Convention. The words in brackets would enable partial denunciation of the Convention. Since a State which makes a declaration under article G to exclude either Part II or Part III is a Contracting State to the Convention, no special provision for denunciation by those States is required.

<sup>3</sup> Paragraph (2) of this article is identical to article 34 (2) of the 'Hamburg Rules and reflects modern treaty making practice.

<sup>4</sup> This simplification of article 46 of the Prescription Convention is based on the authentic text and witness clause in the Hamburg Rules.

<sup>3</sup> Paragraph (2) of this article is similar to article 44 (2) of the Prescription Convention. However, as in paragraph (1), a thirteen month period must elapse before its entry into force with respect to the State which ratifies, accepts, approves or accedes to the Convention to permit simultaneous denunciation of the 1964 Hague Conventions pursuant to paragraph (5) of this article.

This paragraph also deals with the question of partial ratification, acceptance, approval or accession to the Convention.

<sup>4</sup> Paragraph (3) provides that the denunciation of the 1964 Hague Conventions shall be effective on the date that this Convention enters into force with respect to that State.

<sup>5</sup> Paragraph (4) deals with the case of a denunciation of the 1964 Hague Sales Convention by a State which has declared that it will not be bound by the provisions of Part II of this Convention pursuant to article G.

## F. ANALYSIS OF COMMENTS AND PROPOSALS BY GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, AND ON DRAFT PROVISIONS CONCERNING IMPLEMENTATION, RESERVATIONS AND OTHER FINAL CLAUSES

Prepared by the Secretary-General

Document A/CONF.97/9

[Original: English]

[21 February 1980]

### I. Introduction

1. This document analyses the comments and proposals of Governments and interested international organizations on the draft Convention on Contracts for the International Sale of Goods and is submitted to the Conference in response to a decision of the General Assembly.<sup>1</sup>

2. All comments and proposals received as at 8 February 1980 are analysed. As of that date comments and proposals had been received from the following Governments and international organizations:<sup>2</sup>

#### Governments

Australia (Add.1), Austria (Add.4), Byelorussian Soviet Socialist Republic (Add.1), Canada, Czechoslovakia (Add.4), Finland (Add.2), France (Add.4), Germany, Federal Republic of, Ireland (Add.2), Israel (Add.1), Netherlands (Add.3), Norway, Portugal (Add.3), Sweden (Add.1), Switzerland (Add.2), United Kingdom of Great Britain and Northern Ireland (Add.3), United States of America and Yugoslavia (Add.3).

#### International organizations

World Intellectual Property Organization (WIPO) (Add.2), Central Office of International Railway Transport, Berne (OCTI) and International Chamber of Commerce (ICC) (Add.2).

3. Since the analysis is complementary to document A/CONF.97/8 and the addenda thereto (which reproduce the comments and proposals in full), the analysis only sets forth the substance of the comment or proposal and the principal arguments adduced in support thereof.

### II. Analysis of comments and proposals

#### A. COMMENTS AND PROPOSALS ON THE DRAFT CONVENTION AS A WHOLE

1. The following respondents, in commenting on the draft Convention as a whole, are of the view that its pro-

visions are, in general, acceptable and that the draft Convention would be a suitable basis for the discussions at the United Nations Conference on Contracts for the International Sale of Goods: Australia, Austria, Czechoslovakia, Finland, Germany, Federal Republic of, Norway, Portugal, Sweden, United States, Yugoslavia, ICC.

2. The respondents mentioned in paragraph 1 above give the following reasons for their general approval of the draft Convention:

(a) The draft Convention was the result of a thorough preparatory process (Austria, Finland) and takes account of the principles of the different legal systems in the world (Portugal, Yugoslavia).

(b) The draft Convention is a substantial improvement over the Uniform Law on the International Sale of Goods (ULIS)<sup>3</sup> and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)<sup>4</sup> (Czechoslovakia, Finland, Norway, ICC) and is, as a result, more likely to receive widespread acceptance around the world than have ULIS and ULF (Sweden, United States).

(c) The draft Convention constitutes a significant achievement in the unification of international commercial law (Portugal, Yugoslavia). As a result, it will serve to facilitate international trade and diminish the risk of conflict between the parties to a sales contract (Sweden).

(d) The practical application of the draft Convention by practitioners will be made easy by the fact that it has been drafted in a flexible manner (Portugal) and the solutions chosen to a great extent comply with the need for simplification and clarity (Sweden).

(e) The Convention will be of major international importance and have a great prestige, particularly in the developing countries, since they participated in its elaboration and since it can reasonably be expected to play a significant role in the modification of the existing rules of the international sale of goods, which do not protect sufficiently the interests of the weaker contracting party (Yugoslavia).

3. All the respondents who find the draft Convention as a whole generally acceptable and suitable for consideration by the United Nations Conference on Contracts for the International Sale of Goods (listed in para. 1 above) note, however, that particular difficulties

<sup>1</sup> The draft Convention is reproduced in document A/CONF.97/5. Draft provisions concerning implementation, reservations and other final clauses, prepared by the Secretary-General are reproduced in document A/CONF.97/6. However, this document was not published at the time comments and proposals were requested.

<sup>2</sup> The comments and proposals received as at 14 December 1979 are reproduced in document A/CONF.97/8, and comments and proposals received thereafter are reproduced in addenda to that document. Unless otherwise indicated, the comments and proposals are reproduced in A/CONF.97/8.

<sup>3</sup> Annexed to the Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964.

<sup>4</sup> Annexed to the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, The Hague, 1 July 1964.

still exist with the present text and suggest methods to resolve these difficulties. These comments are noted below in the discussion of the respective articles of the draft Convention to which they pertain.

4. Yugoslavia states that at the final drafting still greater consideration should be given to equal protection of the interests of both exporting and importing countries, i.e. to the interests of the buyer and seller, a result which would constitute a contribution to the establishment of the new international economic order. Yugoslavia goes on to state that the interests of the developing countries and the need for the establishment of the new international economic order should be taken into consideration at the adoption of the final text of the Convention.

5. ICC stressed the importance of the fact that a number of States have ratified ULIS and ULF already, and, therefore, that the new text ought not, without compelling reasons, differ from these uniform laws. Furthermore, due consideration should be given to the transitional provisions for those States which have ratified those conventions.

6. ICC states its regret that the new text is presented in the form of a convention and not, as were ULIS and ULF, as uniform laws annexed to a convention.

7. Portugal states that certain provisions of the draft Convention are too detailed.

#### B. COMMENTS AND PROPOSALS ON PROVISIONS OF THE DRAFT CONVENTION

##### PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

##### *Sphere of application as a whole*

1. The United States notes that these provisions have been the subject of lengthy discussions. Although it acknowledges that some variants to be found in the Convention on Limitation in the International Sale of Goods and in the UNIDROIT draft Convention on agency may have some slight advantage, it states that it is not desirable to devote much time to these problems at the Conference.

2. Austria states that it is particularly important not to permit reservations to the rules on sphere of application of the type permitted to ULIS. Doing so would probably lead to the failure of the work of UNCITRAL in this extremely important field.

3. Czechoslovakia in respect of article 1 also comments on the question of reservations to the sphere of application.

##### *Article 1. [Sphere of application]*

1. Switzerland and ICC state that the rules in respect of sphere of application are an improvement over those in ULIS.

2. Czechoslovakia states that the final provisions of

the Convention should contain a provision enabling a reservation in respect of the sphere of application only in respect of contracts for the sale of goods where the parties have their places of business in different contracting States.

3. ICC finds that paragraph (1)(b) when combined with paragraph (1)(a) represents a useful compromise in contrast to the provision in article 2 of ULIS which excludes the rules of private international law for the purpose of application of the uniform law.

4. The Federal Republic of Germany recommends the deletion of paragraph (1)(b) since the rules of private international law apply differently to the formation of contracts than they do to the substantive rules. Alternatively it recommends an amendment to paragraph (1)(b) which would make it apply only to the contractual rights and duties of the parties.

##### *Article 2. [Exclusions from Convention]*

1. Switzerland finds the exclusions from the application of the Convention as set out in article 2 to be justified.

2. ICC believes that the exclusion of consumer sales in paragraph (1)(a) may make the Convention acceptable to a larger number of States.

##### *Article 3. [Contracts for services or for goods to be manufactured]*

1. Norway suggests that the order of paragraphs (1) and (2) be reversed.

2. Switzerland states that the exclusion of the sales mentioned in paragraph (1) is justified. It notes, on the other hand, that under paragraph (2) a contract for the supply of goods to be manufactured or produced is assimilated to a sale.

3. Czechoslovakia suggests the deletion of paragraph (1) and that paragraph (2) be reworded in such a way that the applicability of the proposed Convention be excluded in all cases where the buyer of goods is expected to supply all or any part of the materials needed for the production of the goods.

4. The United Kingdom suggests that the words "preponderant part" in paragraph (1) will cause uncertainty and are likely to be interpreted in different ways by the courts. It suggests a new text for the paragraph.

5. Norway suggests a new text for paragraph (2) which states when the supply of goods to be manufactured or produced is to be considered a sale rather than when it is not to be considered a sale as in the present text.

##### *Article 4. [Substantive coverage of Convention]*

1. Finland, France and the United States propose new provisions which would exclude from the coverage of the Convention claims for damages due to personal injury. France would also exclude claims due to death.



Finland would also exclude liability of the seller for damage caused by the goods sold to other goods, unless the goods sold were used in the production of the damaged goods.

2. Norway suggests a new paragraph which would exclude from the Convention the effect between the parties of a retention of title clause.

*Article 5. [Exclusion, variation or derogation by the parties]*

1. Switzerland notes that the fact that article 5 permits the parties to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions should reassure the practitioners in that the Convention does not impose rules on them to which they are not accustomed.

2. Canada recommends that the Convention apply only if the parties to the contract "opt-in" rather than the rule in article 5 that the Convention applies only if the parties "opt-out".

3. The United Kingdom suggests that article 5 should be amended so that it would state specifically that the parties could exclude the application of the Convention or derogate from or vary any of its provisions by implication as well as expressly.

*Article 6. [Interpretation of Convention]*

1. The United States regards the present text as an acceptable compromise with respect to "good faith". In particular, it finds it preferable to a separate article imposing an obligation of "good faith". It proposes a minor redrafting to improve clarity.

2. Yugoslavia considers the present wording of article 6 unsatisfactory and feels that the provision on good faith and fair conduct should be formulated as a separate article of the Convention.

3. ICC does not see the need for a reference in this context to "the observance of good faith in international trade" and prefers its deletion. If it is to be retained, it recommends that the wording be improved so as to exclude a construction of the concept that would be derogatory to the terms of the contract.

*Article 7. [Interpretation of conduct of a party]*

1. The United States states that it is important to have such a provision on interpretation in the Convention and supports the present wording of the article.

2. ICC recommends the deletion of article 7 on the grounds that a general rule on interpretation, applying to the formation of contracts as well as to the contract itself, should not have its place in a uniform law on sales. If such a rule was to be included, a more objective standard of interpretation should be set up.

3. The United Kingdom is of the view that the two conditions in paragraph (1) are tautologous since, if a

party "could not have been unaware" of the other party's intent, then he must have known what that intent was. Therefore, it is suggested that the second condition be deleted.

*Article 8. [Usages and established practices]*

1. The United States proposes that it be made clear that the article applies to the formation of a contract by adding the words "or its formation" to paragraph (2).

2. Switzerland notes that practitioners should be reassured by the fact that the draft Convention recognizes the existence of an important network of clauses, model contracts and general conditions of sale in that under this article the parties to a contract of sale are bound by the usages to which they have consented and the practices they have established between themselves.

3. Czechoslovakia suggests that paragraph (2) should be supplemented in such a way that the usages applicable in accordance with this provision are applicable only to the extent they would not be in contradiction with the contents of the Convention. If this is not acceptable, it may be preferable to delete article 8 and rely upon article 4(a), i.e. that the Convention is not concerned with the validity of usages.

4. Sweden, Yugoslavia and ICC state that there should be a specific reference to the interpretation of trade terms, either by an amendment of paragraph (2) (Sweden) or by reintroducing article 9, paragraph 3 of ULIS (Sweden, Yugoslavia, ICC).

5. The United Kingdom asks whether, if two merchants in different common law States contract on c.i.f. or other trade terms, the Convention's rules on, for instance, risk of loss would prevail over the common law rules governing contracts entered into on the basis of those terms.

6. Yugoslavia states that paragraph (2) should not refer to a usage "in international trade widely known" because this is contained to a considerable extent in the preceding sentence according to which the parties "knew or ought to have known" a usage.

7. Yugoslavia goes on to say that if the formulation remains in the text, the word "international" should be dropped. ICC desires the same result in that it states that sometimes local usages must be taken into consideration, e.g. usages of a certain port from which the goods are to be shipped.

*Article 9. [Place of business]*

1. ICC states that it should be made clear in article 9 that for a place to be a place of business, a permanent business organization including a physical location and employees for the sale of goods or services should be maintained.

2. Finland and ICC state that the expression "closest relationship" is vague. Finland proposes a text which relies on the place from which the first offer or reply was

made which led to the conclusion of the contract. ICC states that only if the contract was concluded in the name of a branch (as distinguished from a subsidiary) should such place of business be relevant for the application of the Convention.

3. The Federal Republic of Germany, considering article 9 to be an article giving definitions, recommends a new subparagraph defining a "writing" as including a telegram and telex.

#### *Article 10. [Form of contract]*

1. ICC stresses the importance of this provision since a considerable part of world trade relies upon arrangements other than written contracts.

2. Czechoslovakia suggests that it should be made clear in article 10 that a contract must be in writing to be valid if either party so requires or, alternatively, to supplement article 16 to provide that an offer can be accepted only in a written form if the offer so requires.

3. Portugal states that once it is agreed that the contract can be proved by any means, it does not see why there should be special mention of witnesses.

#### *Article 11. [Effect of declarations relating to form]*

##### *Article (X)*

1. The United Kingdom and ICC express their concern over the consequences of articles 11 and (X).

2. Norway sees particular practical difficulties in applying the requirement of written form to all minor subsequent modifications of the contract.

3. Austria states that it would be preferable to return to the principle that a contract of sale is not subject to any requirements as to form. If that is not possible, Austria recommends that articles 11 and (X) be combined into a single provision which would permit a State whose law poses requirements as to form not to apply article 10 when one of the parties has its place of business in that State.

4. Netherlands suggests that article (X) may be too broad in that it allows a reservation if the legislation of a contracting State "requires a contract of sale to be concluded . . . in writing" (emphasis supplied).<sup>\*</sup> This would allow a reservation if even a single specific type of contract of sale must be in writing. Therefore, it suggests an amendment to article (X) that a reservation be allowed if the legislation of the State requires "contracts of sale" to be in writing.

#### PART II. FORMATION OF THE CONTRACT

##### *In general*

1. Switzerland, the United States and Yugoslavia approve of the decision to include the rules on formation

<sup>\*</sup> Note by the Secretariat: There seems to be some difference between the various language versions on this point.

of contracts in the same text with the rules on the substantive rights and obligations of the parties.

2. Norway doubts that the benefits of a single text will outweigh the problems that some States might encounter in implementing into their national law only parts of an entire text or in implementing the different parts in different national statutes and it would, therefore, favour two separate conventions or one convention on the international sale of goods with a protocol or an appendix on the formation of contracts for the international sale of goods.

3. Finland, Portugal and Norway (as an alternative to its position in para. 2 above) support the possibility for a State to ratify only the part dealing with formation of contracts or only the part dealing with the sale of goods.

4. Switzerland states that it would be regrettable if States could adhere to only the part on formation of contracts or only the part on sale of goods.

5. Finland and Norway (as an alternative to its position in para. 2 above) would have the provisions of each part of the Convention numbered separately so that references to the provisions of the Convention can be made in the same way irrespective of what part of the Convention a State has acceded to.

6. Finland suggests that articles 10, 11 and 27 deal with the formation of contracts and that they should therefore be in part II of the Convention.

#### *Article 12. [Offer]*

1. Austria, the Byelorussian SSR, Finland, the Netherlands, Norway, Sweden, the United Kingdom, the United States and ICC express their disagreement with the second sentence of paragraph (1).

2. The United States notes that the offeror is not clearly permitted to leave a choice among terms to the offeree, as where the offeree may within limits choose the quantity or specify selection of the goods.

3. Finland, Norway and Sweden state that the second sentence should be understood to give only an example of what is a definite offer but that it should not be understood to be a definition. Sweden points out that in some cases the time and place of performance seem to be a *sine qua non* for a proposal to be sufficiently definite. Norway states that whether a proposal constitutes an offer should depend upon the intention of the offeror to be bound, and the question as to whether the offer is sufficiently definite should be only a factor in deciding whether there is such an intention.

4. Austria, the Netherlands, Sweden, the United Kingdom, the United States and ICC state that the provision is too strict in requiring the proposal to expressly or implicitly fix or make provisions for determining the price. They would leave questions relating to the price to be decided by article 51.

5. The Byelorussian SSR states that articles 12 and 51



are too permissive in respect of the price. If the price is neither determined nor determinable, it is not possible to speak of a contract.

6. Austria, the Netherlands, Norway, Sweden, the United Kingdom and the United States propose the deletion of the second sentence of paragraph (1). Finland as a primary proposal, and Austria, Norway and Sweden as alternative proposals, suggest redrafted versions of the second sentence.

7. The Byelorussian SSR proposes the deletion of the words "expressly or implicitly" in the second sentence of paragraph (1) as well as the deletion of article 51 in its entirety.

#### *Article 13. [Time of effect of offer; withdrawal of offer]*

1. ICC accepts the compromise in articles 13 to 15 between the legal systems in which an offer is irrevocable, at least for a reasonable time, and those in which an offer can always be revoked until it has been accepted. It states, however, that the distinction between withdrawal of an offer and revocation of an offer is puzzling and suggests that they be combined.

2. ICC also states that the rule that an offer cannot be withdrawn after it has "reached" the addressee seems too narrow to be applied to letters or telex communications.

3. Israel states that the possibility of withdrawal of an irrevocable offer may cause misunderstanding and suggests, therefore, the deletion of the second sentence of paragraph (1). Alternatively a redrafted text is proposed.

#### *Article 14. [Revocability of offer]*

1. Yugoslavia states that the general principle should be that of the irrevocability of an offer.

2. Australia notes that the words "dispatched an acceptance" are inadequate to cover the case of an acceptance by conduct and proposes an amendment to paragraph (1).

3. Israel proposes a redraft of paragraph (1) so that it provides merely for the commencement of the time when an offer may be revoked without referring to the conclusion of a contract.

4. The United Kingdom proposes an addition to paragraph (1) dealing with the revocation of public offers.

5. The United States supports the present text and notes, in particular, that paragraph (2)(a) permits the distinction to be made between the revocation of an offer (by countermand of the offeror) and the lapse of an offer (by passage of time). It notes that it is commonly accepted that an offeror may specify a time within which his offer will lapse without making it irrevocable for that period.

6. Norway and the United Kingdom state that paragraph (2)(a) adopts the general rule that, if the offer has

stated a fixed time for acceptance, it is irrevocable for that time. Norway supports this interpretation. The United Kingdom proposes an amendment to provide that the stating of a fixed time for acceptance would not of itself indicate that an offer was irrevocable.

7. Yugoslavia states that paragraph (2)(b) is too subjective and may cause difficulties in practice.

#### *Article 15. [Termination of offer by rejection]*

Israel suggests that other circumstances in which an offer is terminated besides rejection be considered such as death, bankruptcy or legal incapacity of the offeror or offeree.

#### *Article 16. [Acceptance; Time of effect of acceptance]*

1. ICC suggests that paragraph (3) may be too narrow and that it may be preferable to return to article 6(2) of ULF.

2. The United States proposes an amendment to paragraph (3) so that an offeror who was not notified of the acceptance could treat the offer as having lapsed before acceptance.

#### *Article 17. [Additions or modifications to the offer]*

1. The United States supports the article as it is now drafted as it embodies an important compromise.

2. The United Kingdom suggests the deletion of paragraphs (2) and (3) so that the rule would be as stated in paragraph (1).

3. ICC states that the rule in paragraph (1) that a reply purporting to be an acceptance but being a counter-offer terminates the first offer may in some cases be too strict.

4. The Netherlands proposes to replace in paragraph (2) the words "without undue delay" by the word "promptly", which should be inserted between "offeror" and "objects".

5. The Netherlands suggest a new sentence to be added to paragraph (2) to permit the offeree to retract the additional or different terms to which the offeror has objected so that the terms of the contract would be those of the offer.

6. ICC finds that paragraph (3), which was intended to clarify and make more precise the words "not materially alter the terms of the offer", in fact extends it and will give rise to questions of interpretation. Therefore, it suggests deleting paragraph (3) and making paragraph (2), if possible, more precise by another wording.

#### *Article 18. [Time fixed for acceptance]*

1. Portugal states that it does not see any reason for the Convention to govern the matters covered by this article. However, if the article is retained, it would prefer that in respect of letters preference be given to the date on the envelope.

2. Israel suggests that in order to simplify matters the period of time for acceptance fixed by an offeror should in every case commence from the time the offer reaches the offeree, irrespective of the means of communication.

3. The United Kingdom suggests that both sentences in paragraph (1) should be qualified by the expression "Unless otherwise stated by the offeree" so that it would be clear that the offeror can state a point of time different from that laid down in the article.

#### *Article 19. [Late acceptance]*

1. Israel suggests that for the sake of clarity the last part of paragraph (1) should read "... the offeror so informs the offeree, without delay, orally or in writing."

2. Australia states that the rules as to late acceptance work well where the offeror has stated a specific time for acceptance but not where no time for acceptance has been stated and the offer must, therefore, be accepted within a reasonable time. In such a case it suggests that the best solution would be that a late acceptance is effective unless the offeror notifies the acceptor orally or in writing to the contrary, without delay after receiving the notice of acceptance.

### PART III. SALES OF GOODS

#### *Article 23. [Fundamental breach]*

1. ICC states that the present definition is a considerable improvement compared to the definition in ULIS.

2. The Federal Republic of Germany, Portugal and ICC suggest amended versions of the text so that the test as to whether a breach is fundamental will depend more on the content of the contract.

3. Portugal and the United Kingdom state that the article should prescribe the point in time at which the party in breach should have foreseen the detriment if the breach is to be treated as a fundamental one and that the appropriate point should be the time when the parties enter into contractual relations.

4. Ireland states that it is difficult to accept the principle that simply because the party in breach did not foresee or had no reason to foresee the substantial detriment that this would stop the breach from being a fundamental one.

#### *Article 24. [Notice of avoidance]*

1. ICC approves of the doing away of the principle of *ipso facto* avoidance and its replacement by avoidance by notice to the other party.

2. Portugal proposes to add that this notice is not subject to any conditions as to form.

#### *Article 25. [Delay or error in communication]*

1. The Netherlands notes that part II of the Convention follows a receipt rule whereas, under article 25,

part III generally favours a dispatch rule. It suggests that this matter be reconsidered and that a general rule in favour of the concept of receipt is preferable to the rule now contained in article 25.

2. The Federal Republic of Germany suggests that article 25 be made applicable to the entire Convention by inserting it in part I and by referring to "This Convention" rather than to "part III".

3. Norway recommends that article 25 be made applicable to article 65 (4) by appropriate amendment to that article.

#### *Article 26. [Judgement for specific performance]*

The United States and the United Kingdom recommend amending the article so that a court would be bound to order specific performance of a contract under the Convention only if the court "would" do so in relation to similar contracts under its own law, rather than whether it "could" do so as is provided in the current text.

#### *Article 27. [Modification or abrogation of the contract]*

1. The United States states that this article on modification is of considerable practical utility and that paragraph (1) is of special importance for common law countries.

2. ICC expresses disagreement with the article since a failure to use a written form when the contract itself requires a written form for modifications may make the oral modification null and void.

3. Finland, Norway, Sweden and ICC recommend moving the article from part III to part II of the Convention.

4. Portugal suggests a rewording of paragraph (1) which would emphasize that the modification or abrogation of the contract by only one of the parties is admitted only under unusual circumstances.

#### *Article 29. [Absence of specified place for delivery]*

1. The Netherlands states that subparagraph (a) as well as the equivalent provision in article 79, should be restricted to cases where the contract of sale involves carriage of goods by sea since it is doubtful whether the rule contained in these articles fits all modes of transportation.

2. ICC recommends the amendment of article 29 to make it clear that when a delivery term, such as FOB, has been agreed upon, such cases fall outside the scope of article 29.

#### *Article 30. [Obligations in respect of carriage of goods]*

Yugoslavia states that as regards paragraph (3), which provides for certain duties of the seller in cases when he "is not bound to effect insurance in respect of the carriage of the goods", it is not clear whether this applies to his contract obligations only or to those arising from

usages. If the usages are not taken into account in this formulation, it would be useful to point that out explicitly.

*Article 31. [Time of delivery]*

1. ICC states that subparagraphs (b) and (c) should be amended by a provision that the seller has to give the buyer notice of the seller's choice in order to prevent the seller from merely leaving the goods somewhere before the buyer takes them over.

2. Portugal states that subparagraph (b) should be rewritten to anticipate the case where the buyer and seller together are to choose a date.

*Article 32. [Handing over of documents]*

1. Portugal expresses its doubts as to the utility of this article. It suggests that there might be a provision stating the content of the obligation where there is an obligation to hand over documents but the contract does not indicate the time or the place or the form in which the documents are to be handed over.

2. Israel and Yugoslavia state that the obligation under this article can arise not only by contract but by usage, and that this should be expressed.

*Article 33. [Conformity of the goods]*

1. Australia suggests including a clause in this article providing that any non-conformity under the article which is clearly insignificant not be taken into consideration.

2. Yugoslavia states that it is not clear whether the introductory sentence of paragraph (1) covers conformity of the goods with regard to the larger or smaller quantity as well as to the delivery of other goods.

3. Portugal suggests the deletion of the words "Except where otherwise agreed" in the second sentence of paragraph (1).

4. The Federal Republic of Germany recommends that paragraph (1)(b) be amended to read "are fit for any particular purpose expressly or impliedly made part of the contract".

5. ICC states that it should be understood that the seller's responsibility is engaged under paragraph (1)(b) only when the particular purpose for which the goods have been purchased has been made clear to him. If that is not understood, the text should be clarified.

6. ICC states that the seller cannot be responsible for the conformity of the goods with administrative regulations in the buyer's country. Such non-conformity would not touch on the purpose for which they are ordinarily used and the question whether they would be fit for the particular purpose of being used in the buyer's country would have to be answered by application of paragraph (1)(b).

7. WIPO suggests that at the end of paragraph (1)(c) be added the words "or of goods bearing the brand name

where the buyer has selected the goods by that brand name".

8. The United Kingdom suggests deleting the words "or could not have been unaware". Israel suggests replacing them by "or ought to have known of".

*Article 36. [Examination of the goods]*

1. The Netherlands suggests reintroducing into paragraph (3) the reference to an intervening transshipment of the goods as contained in article 38 (3) of ULIS.

2. Israel suggests reintroducing article 38 (4) of ULIS dealing with methods of examination.

*Article 37. [Notice of lack of conformity]*

1. Czechoslovakia suggests that the effect of a failure to give notice should be only the unenforceability of the rights or legal effects similar to prescription rather than the loss of rights.

2. Czechoslovakia, Portugal, Yugoslavia and ICC recommend that the two-year period be shortened to one year.

3. The Netherlands suggests that the time limit should not apply to claims for personal injuries arising out of the non-conformity of the goods or to damage caused to other goods intended for private use or consumption.

*Article 38. [Seller's knowledge of lack of conformity]*

The United Kingdom suggests that the words "or could not have been unaware" should be deleted.

*Article 39. [Third party claims in general]*

1. As to the use of the terminology "industrial or intellectual property", see the comment of the World Intellectual Property Organization to article 40.

2. Portugal suggests deleting the last phrase of paragraph (1), which it says is already embodied in the principle of autonomy of the will, and replacing it by a new phrase which would limit the buyer's rights where he knew or could not have been unaware of the right or claim of the third party.

3. Portugal suggests deleting the reference to industrial or intellectual property as unnecessary in the light of the following article. Yugoslavia also suggests deletion because the reference can lead to a wrong interpretation.

4. The Federal Republic of Germany recommends a new article 40 bis which would deny to the seller the right to rely on the provisions of article 39 (2), as well as article 40 (3), if he already knew of the right or claim of the third party.

5. Norway proposes a redrafting of paragraph (2): "The buyer loses the right . . .".

6. Ireland questions how paragraph (2) would work in an actual trade transaction in that it might be late for

the buyer to advise the seller after the buyer received a consignment of goods that there was a third party claim over them.

7. Norway proposes a new paragraph (3) so that the buyer would have the remedies which follow from the delivery of goods which do not conform with the contract, except for article 45 (1) (b).

8. ICC proposes a new provision, which it labels article 48 bis, which would allow the buyer to require the seller to cause the goods to be freed from any right or claim of a third party. If this were not achieved within a reasonable time, the buyer could avoid the contract and claim damages.

9. See the comments of Finland and Norway to article 46.

*Article 40. [Third party claims based on industrial or intellectual property]*

1. Yugoslavia states that the article may be useful for an uninformed buyer by warning him of the various implications of industrial property when selling goods.

2. WIPO recommends changing the reference to "industrial or other intellectual property" since industrial property is a form of intellectual property.

3. See the comments of the Federal Republic of Germany to article 39.

4. The United Kingdom proposes the deletion of "could not have been unaware" in both paragraphs (1) and (2).

5. ICC states that the Commentary is incorrect where it says that the seller "could not have been unaware" of a claim if that claim was based on a patent application or grant which had been published in the country in question.

6. See the ICC proposal in respect of remedies set out in article 39.

*Article 41. [Buyer's remedies in general; claim for damages; no period of grace]*

1. ICC does not object to the consolidated system of remedies provided that the remedies for different kinds of breaches, such as non-delivery of goods, delivery of defective goods and non-payment, are differentiated sufficiently.

2. The Netherlands also approves the consolidated system of remedies. It suggests, however, that the Convention should provide, as did articles 34 and 53 of ULIS, that the buyer has no contractual remedies other than those conferred on him by the Convention. Another possibility would be to extend the two year notice provision in article 37 (2) to such actions as those based on error or on a claim that the sale was void because the goods sold did not belong to the seller.

3. Yugoslavia states that the provisions relating to sanctions in case of breach of contract are concise and

simplified, but that this is to the detriment of the clarity and general layout of the text.

4. Portugal doubts that paragraph (2) has any utility. It also suggests as a drafting matter the addition of "and" between subparagraphs (a) and (b) in paragraph (1).

*Article 42. [Buyer's right to require performance]*

1. Norway sets out its understanding that the buyer's right to require performance is limited by article 65 and, by reason of article 26, any limitation or conditions in national domestic law. It gives an example in respect of limitation on the right to require repair of the goods.

2. Finland, the Federal Republic of Germany, the Netherlands, Norway, Portugal, Sweden and ICC propose that the right to require repair be made specific in the text. All but the Netherlands and Portugal propose specific texts.

3. The United States proposes that the buyer not have the right to require performance if he could purchase substitute goods without [unreasonable] [substantial] additional expense or inconvenience.

4. The United States also proposes a text to restrict the right of specific performance with regard to time.

5. The Federal Republic of Germany states that if the goods do not conform with the contract, the buyer should always be entitled to require delivery of substitute goods, unless the seller could not reasonably be expected to deliver substitute goods.

*Article 43. [Fixing of additional period for performance]*

1. The United States proposes to reword paragraph (1) so that it would apply only where the seller has failed to deliver some or all of the goods, thereby bringing it into conformity with article 45 (1) (b).

2. See the comment of the Netherlands to article 45.

3. The United Kingdom proposes to reword paragraph (1) so that the fixing would be by notice to the seller.

4. The Netherlands recommends that paragraph (2) be amended so that the buyer may not resort to any remedy for breach of contract which is inconsistent with the fixing of an additional period of time for performance by the seller.

5. Portugal recommends the deletion of the second sentence of paragraph (2), since it already follows from article 41.

*Article 44. [Seller's right to remedy failure to perform]*

1. ICC proposes a rewording of paragraph (1) which would make it clear that there would be no fundamental breach of contract if the defect, although serious in itself, could be cured easily.

2. The Federal Republic of Germany suggests that the words "unless the buyer has declared the contract

avoided in accordance with article 45" be deleted from paragraph (1). If this proposal were accepted, paragraphs (2) and (3) could also be deleted.

3. Portugal recommends the deletion of the second sentence of paragraph (1) since it already follows from article 41.

4. ICC approves of paragraph (2).

5. The Federal Republic of Germany states that if paragraph (2) is not deleted as suggested above, it should at any rate be supplemented so that the seller may not make the request if the buyer has already fixed a period for performance under article 43.

6. Finland and Norway propose to add at the end of the first sentence in paragraph (2) the words "or, if no time is indicated, within a reasonable time after the buyer had given notice under article 37".

#### *Article 45. [Buyer's right to avoid contract]*

1. ICC comments on the effect of paragraph (1)(b) where the goods in their entirety have not been delivered.

2. The Netherlands proposes a rewording of paragraph (1)(b) so that it would not be limited to a failure to deliver but would apply to all cases where notice had been given under article 43. See also its comment to article 60.

3. See the comment of the United States to article 43.

4. Norway proposes an amendment to paragraph (1)(b) so that it would not apply where the buyer has fixed an additional period for repair or delivery of substitute goods.

5. The Federal Republic of Germany and Norway propose amendments to paragraph (2)(b) so that it would also refer to a period of time fixed under article 44.

#### *Article 46. [Reduction of the price]*

1. The United Kingdom proposes a reworded text which would confer a substantive right on the buyer to reduce the price instead of merely enabling him to declare that the price is reduced.

2. The United States urges that consideration be given to the possibility that article 46, when read together with article 70, may give to the buyer a choice that can lead to irrational differences when prices change between the making of the contract and the time for delivery.

3. Finland and Norway propose a reworded text which would establish the relationship at the time delivery was made between the value of goods conforming with the contract and the goods actually delivered.

4. The United States proposes a revised text which would reduce the price to the value that such non-conforming goods would have had at the conclusion of the contract.

5. Ireland states that in regard to the final sentence, the remedy might not equal the loss of value that would occur.

6. Finland and Norway suggest that price reduction should be a remedy for a breach arising under article 39.

7. The Federal Republic of Germany suggests that the second sentence should be made to cover the case of article 35 as well as article 44.

#### *Article 47. [Partial non-performance]*

Ireland states that the remedy may be inadequate, especially where only the total delivery has value and partial delivery has no value at all, no matter how adequate or satisfactory the partially supplied goods were.

#### *Article 51. [Calculation of the price]*

The Byelorussian SSR suggests the deletion of article 51 since, if the price is not determined or determinable, no contract can be said to have been concluded. This suggestion is based on article 12(1) which makes a provision for determining the price one of the principal elements of the offer.

#### *Article 53. [Place of payment]*

1. Ireland states that it may be pertinent to clarify if paragraph (1) could include exchange rate variation of price.

2. The Federal Republic of Germany proposes a new paragraph (3) which denies the inference that the buyer's obligation to pay the price at the seller's place of business gives rise to the jurisdiction of the courts at that place to deal with an action against the buyer.

#### *Article 57. [Seller's remedies in general; claim for damages; no period of grace]*

Portugal makes the same proposal in respect of article 57 that it did for article 41.

#### *Article 58. [Seller's right to require performance]*

1. The United States proposes that the seller not have the right to require payment of the price if the buyer has not taken delivery of the goods and the seller can resell the goods without [unreasonable] [substantial] additional expense or inconvenience.

2. The United States also proposes a text to restrict the right to require payment of the price with regard to time.

#### *Article 59. [Fixing of additional period for performance]*

Portugal suggests the deletion of the second sentence of paragraph (2) because it already follows from other provisions in the Convention.

*Article 60. [Seller's right to avoid contract]*

1. ICC proposes amendments to paragraphs (1)(a) and (2) which would distinguish between those cases in which the buyer has taken delivery of the goods and those in which he has not.

2. The Netherlands proposes a rewording of paragraph (1)(b) so that it would not be limited to a failure to pay the price or take delivery of goods but would apply to all cases where notice had been given under article 59. See also its comments to article 45.

3. Czechoslovakia states that paragraph (2) should apply to the violation of other obligations of the buyer aimed at securing payment of the price, such as opening of a letter of credit.

4. Finland and Norway propose amended texts of paragraph (2) which would restrict the effect of paragraph (2)(a) to late payment of the price (alternative solution for Norway) and set the cut-off time at the moment the seller has become aware payment has been made.

5. Czechoslovakia states that a buyer who does not pay the price at the time of its maturity should be obliged to pay interest on overdue payments in principle at a rate one per cent higher than the official discount rate valid in the country of the debtor.

*Article 62. [Suspension of performance]*

1. The Federal Republic of Germany and the Netherlands suggest that paragraph (1) be revised to make it clear that the deterioration may have occurred prior to the conclusion of the contract but the knowledge of it must have come to the other party after the conclusion of the contract.

2. ICC suggests replacing the words "gives good grounds to conclude" in paragraph (1) by the words "makes clear".

3. OCTI wonders whether it would not be useful to include in the first sentence of paragraph (2) an express reservation regarding the application of transport law and to complete the second sentence with the text of paragraph 11 of the commentary.

4. The Federal Republic of Germany recommends that in paragraph (3) several examples be given as to what would be assurances, such as "by guarantee, documentary credit or otherwise".

*Article 65. [Exemptions]*

1. Norway recommends adding to paragraph (1) the following underlined words: "... beyond his control and of a kind ...".

2. ICC proposes a revision of paragraph (1).

3. Norway queries whether paragraph (2) covers a supplier to the seller. ICC states that it should. Finland proposes a text which would make it clear that a supplier is included.

4. Finland, Netherlands and Norway propose amended versions of paragraph (3) to deal with the problem of impediments which last for a long duration.

5. Australia proposes an amended version of paragraph (3) to deal with the effect on the non-performing party's obligation after the impediment has ceased.

6. ICC proposes an amendment to paragraph (3) which would exclude from exemption under this article "damages to persons or property caused by any lack of conformity of the goods".

7. Finland and Norway propose to place the risk of transmission of the notice under paragraph (4) on the recipient.

8. Australia, Austria, the Federal Republic of Germany, the Netherlands and Norway propose that paragraph (5) be amended so that the right of the other party to require performance could also be exempted under the condition of this article. The United Kingdom expresses its concern about this problem. Australia would also exempt a reduction of the price.

9. ICC proposes that paragraph (5) be amended to assure that an exemption would not preclude the injured party from claiming interest or compensation due to any change in currency rates.

10. The United Kingdom suggests that in some cases covered by this article preservation of the right to avoid the contract with the consequence of restitution under article 66 might be too inflexible and extreme a remedy.

11. Australia proposes that in all cases of unavoidable loss under this article, the loss should be shared equally by the parties.

*Article 66. [Release from obligations; contract provisions for settlement of disputes; restitution]*

1. Norway proposes a new paragraph (3) to govern the buyer's obligation to make restitution when he requires delivery of substitute goods.

2. In this connection Norway also proposes to change the title of section III to "Effects of avoidance or request for substitute goods".

*Articles 67, 68, 69*

1. Portugal states that all three articles should be transferred to article 42(2).

2. Czechoslovakia proposes that an obligation to pay interest should be stipulated in article 69 similar to its proposal in regard to article 60 but without the additional one per cent.

*Article 70. [General rule for calculation of damages]*

1. Czechoslovakia (in comments to article 60), Finland, the Netherlands, Sweden (article 73 bis) and ICC (article 73 bis) propose that the right to receive interest be made specific.

2. ICC suggests the deletion of the second sentence and would rely on a limitation of damages of a more general nature.

3. Israel suggests that section IV include a provision making a rate of damages agreed in the contract binding, unless reduced by the court for being excessive.

*Article 72. [Damages in case of avoidance and no substitute transaction]*

1. Finland and Norway propose that the time at which the current price is to be determined be the time of delivery or the time of avoidance, whichever is the earlier.

2. ICC proposes that the time should be the time of avoidance.

3. The Netherlands and ICC suggest that the place at which the current price is measured should be the market where the contract has been concluded.

*Article 73. [Mitigation of damages]*

1. The United States, as an alternative to its proposal in respect of article 58, proposes that the mitigation principle be extended to a corresponding modification or adjustment of other remedies than damages.

2. The United Kingdom disagrees with the Commentary that the principle of mitigation applies to anticipatory breach.

3. Israel suggests that provision be made for indemnification of the injured party for expenses incurred in mitigating the loss.

*Article 74. [Seller's obligation to preserve]*

The Federal Republic of Germany states that in addition to the case where the buyer is in delay in taking delivery of the goods article 74 should likewise be applicable if the payment of the price and the delivery of the goods are concurrent conditions and the buyer is in delay in paying the price.

*Article 76. [Deposit with third person]*

Portugal suggests the deletion of this article since the right conferred in it follows from the general obligation to preserve the goods.

*Article 77. [Sale of the preserved goods]*

1. Portugal proposes redrafting this article to make it clear that the goods can be sold only as a last resort and only if keeping the goods places an excessive burden on the person charged with preserving them.

2. Ireland asks the extent to which the party who had the right or the obligation to sell the goods would be liable for the damages arising out of an unforeseen or unknown condition of those goods to the parties who bought them.

*Articles 78 to 82*

1. Finland and Norway recommend that the articles on passages of risk be moved to follow chapter II, Obligations of the seller or, in the case of Norway, immediately after chapter III, Obligations of the buyer.

*Article 79. [Passage of risk when sale involves carriage]*

1. The Netherlands proposes that article 81 as the general rule should precede articles 79 and 80.

2. ICC recommends the amendment of article 79 to make it clear that when a delivery term, such as f.o.b., has been agreed upon, such cases fall outside the scope of article 79.

3. The United States proposes to delete the second sentence of paragraph (1) since the situation seems to be adequately covered by the first sentence.

4. Yugoslavia states that it is not clear who is the first carrier. It suggests adding "in accordance with the contract" after mentioning the first carrier.

5. The United Kingdom suggests that in the first sentence of paragraph (1) reference be made to delivery at a particular place rather than at a particular destination.

6. The United States proposes an amendment to paragraph (2) indicating other ways by which the goods can be identified to the contract.

*Article 80. [Passage of risk when goods sold in transit]*

1. Finland and Norway propose to add a new sentence after the present first sentence to cover the case where no document controlling disposition of the goods has been issued.

2. The United States proposes substituting the words "embodying the contract of carriage" for "controlling their disposition" in the first sentence.

*Article 81. [Passage of risk in other cases]*

The Federal Republic of Germany proposes a new article 81 bis to cover breaches of contract by the buyer other than where the buyer has not taken delivery of the goods placed at his disposal, which is covered by article 81 (1).

*Article 82. [Effect of fundamental breach on passage of risk]*

1. Australia recommends that article 82 be deleted since it does not appear to add anything to the rights the buyer would have in its absence.

2. The United States proposes a redrafting of the article.

3. The United Kingdom states that it assumes that the buyer's right to damages for fundamental breach subsists notwithstanding the fact that the risk has passed to him.



### C. COMMENTS AND PROPOSALS IN RESPECT OF IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES

Even though document A/CONF.97/6 containing the draft provisions concerning implementation, declarations, reservations and other final clauses as prepared by the Secretary-General had not been published at the time comments and proposals were requested, comments were received from several States. These comments are analysed in the order in which the relevant draft provisions appear in document A/CONF.97/6.

#### Article B. Federal State clause

Canada expresses its strong preference for the provision that appears in article 31 of the Convention on the Limitation Period in the International Sale of Goods.

#### Article (X). Declarations relating to contracts in writing

The comments of Austria, the Netherlands, the United Kingdom and ICC are analysed under article 11.

#### Article G. Partial ratification, acceptance, approval or accession

The comments of Finland, Norway, Portugal and Switzerland are analysed under part II of the draft Convention.

#### Article H. Declarations

The comments of Austria are analysed under part I of the Convention, while those of Czechoslovakia are analysed under article 1.

#### Article J. Entry into force

ICC states that it is important that in the elaboration of the transitional provisions due consideration be given to the situation of States which have already ratified ULIS and ULF and other conventions and to the difficulties for these States of replacing the said conventions by the new one.

## G. REPORT OF THE FIRST COMMITTEE

### Document A/CONF.97/11

[Original: English]  
[7 April 1980]

#### I. Introduction

##### A. SUBMISSION OF THE REPORT

1. The Conference at its first plenary meeting entrusted the First Committee with the consideration of articles 1 to 82 of the draft Convention on Contracts for the International Sale of Goods (A/CONF.97/5), and of draft article "Declarations relating to contracts in writing" in the draft provisions prepared by the Secretary-General concerning implementation, declarations, reservations and other final clauses of the draft Convention (A/CONF.97/6).

2. The present document contains the report of the First Committee to the Conference on its consideration of the draft articles referred to it, and of other proposals made to the First Committee during its deliberations.

##### B. ELECTION OF OFFICERS

3. At its second plenary meeting on 10 March 1980, the Conference unanimously elected Mr. R. Loewe (Austria) as Chairman of the First Committee. On 11 March 1980, at the 2nd meeting of the First Committee, Mr. S. Michida (Japan) was elected Rapporteur of the First Committee, and on 12 March 1980 at the 3rd meeting Mr. P. K. Mathanjuki (Kenya) was elected Vice-President.

#### Meetings, organization of work and structure of this report

##### (i) Meetings

4. The First Committee held 38 meetings, between 10 March 1980 and 7 April 1980.

##### (ii) Organization of work

5. At its first meeting on 10 March 1980, the First Committee adopted as its agenda the provisional agenda contained in A/CONF.97/C./L.1.

6. The First Committee proceeded mainly by way of an article-by-article discussion of the draft articles before it and of the amendments to these draft articles submitted by representatives during the Conference. After initial consideration of an article and amendments by the First Committee and subject to the decisions taken on these amendments, the article was referred to the Drafting Committee.

##### (iii) Plan of this report

7. This report describes the work of the First Committee relating to each article before it, in accordance with the following scheme:

- (a) Text of UNCITRAL's draft article;
- (b) Texts of amendments, if any, with a brief description of the manner in which they are dealt with;
- (c) Proceedings of the First Committee, subdivided as follows:
  - (i) Meetings
  - (ii) Consideration of the article.



## II. Consideration by the First Committee of the draft Convention on Contracts for the International Sale of Goods

### ARTICLE 1

#### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### *"Article 1*

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

"(a) when the States are Contracting States; or

"(b) when the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration."

#### B. AMENDMENTS

2. Amendments were submitted to article 1 by the Federal Republic of Germany (A/CONF.97/C.1/L.7 and L.17) and Egypt (A/CONF.97/C.1/L.3).

3. These amendments were to the following effect:

##### *Paragraph (1).*

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.7):

Delete paragraph (1), subparagraph (b)

[Rejected: see Consideration, 5, below.]

(ii) *Federal Republic of Germany* (A/CONF.97/C.1/L.17):

Re-word article 1, subparagraph (b) as follows:

"(b) When the rules of private international law, with regard to the contractual rights and duties of the parties, lead to the application of the law of a Contracting State."

[Rejected: see Consideration, 5, below.]

##### *Paragraph (2).*

*Egypt* (A/CONF.97/C.1/L.3):

Delete paragraph (2)

[Rejected: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) *Meetings*

4. The First Committee considered article 1 at its 1st meeting on 10 March 1980;

##### (ii) *Consideration*

5. At the first meeting the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.7) was rejected by a vote of 7 in favour, 25 against, with 10 abstentions. The amendments by Egypt (A/CONF.97/C.1/L.3) and the Federal Republic of Germany (A/CONF.97/C.1/L.17) were also rejected, and the UNCITRAL text adopted.

### ARTICLE 2

#### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### *"Article 2*

"This Convention does not apply to sales:

"(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;

"(b) by auction;

"(c) on execution or otherwise by authority of law;

"(d) of stocks, shares, investment securities, negotiable instruments or money;

"(e) of ships, vessels or aircraft;

"(f) of electricity."

#### B. AMENDMENTS

2. Amendments were submitted to article 2 by Czechoslovakia (A/CONF.97/C.1/L.2), Canada (A/CONF.97/C.1/L.11), India (A/CONF.97/C.1/L.12).

3. These amendments were to the following effect:

##### *Paragraph (a).*

*Czechoslovakia* (A/CONF.97/C.1/L.2):

Article 2 (a) to read as follows:

"(a) of goods bought for personal, family or household use, if the seller, at any time before or at the conclusion of the contract, knew or ought to have known that the goods were bought for such a use;"

[Withdrawn: see Consideration, 5, below.]

##### *Paragraph (e).*

(i) *Canada* (A/CONF.97/C.1/L.11):

Delete article 2 (e)

[Rejected: see Consideration, 6, below.]

(ii) *India* (A/CONF.97/C.1/L.12):

Amend to read as follows:

"(e) of ships, vessels, aircraft or hovercraft."

[Adopted: see Consideration, 7, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 2 at its 1st and 2nd meetings.

## (ii) Consideration

5. At the 1st meeting, the amendment by Czechoslovakia (A/CONF.97/C.1/L.2) was withdrawn.

6. At the 2nd meeting, the amendment by Canada was rejected by 11 votes in favour, 28 against, with 6 abstentions.

7. At the 2nd meeting, the amendment by India was adopted by 15 votes in favour, 12 against, with 17 abstentions, and the UNCITRAL text adopted subject to this amendment.

## ARTICLE 3

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 3"*

"(1) This Convention does not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

"(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production."

2. Amendments were submitted to article 3 by France (A/CONF.97/C.1/L.9), Norway (A/CONF.97/C.1/L.13), Belgium (A/CONF.97/C.1/L.25), United Kingdom (A/CONF.97/C.1/L.26) and Czechoslovakia (A/CONF.97/C.1/L.27).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *Belgium* (A/CONF.97/C.1/L.25):

"This Convention does not apply to contracts in which the supply of goods is accessory to other services by the party upon which the obligation falls."

[Referred to an *ad hoc* working group: see Consideration, 5, below.]

(ii) *United Kingdom* (A/CONF.97/C.1/L.26):

Revise paragraph (1) to read as follows:

"This Convention does not apply where the supply of labour or other services represents the major part in value of the seller's obligations."

[Withdrawn: see Consideration, 5, below.]

(iii) *Czechoslovakia* (A/CONF.97/C.1/L.27):

Delete paragraph (1) of this article.

[Rejected: see Consideration, 5, below.]

*Paragraph (2)*

(i) *France* (A/CONF.97/C.1/L.9):

That paragraph (2) should read as follows:

"(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders them supplies a substantial part of the materials necessary for such manufacture or production."

[Referred to an *ad hoc* working group: see Consideration, 5, below.]

(ii) *Norway* (A/CONF.97/C.1/L.13):

Invert the provisions of paragraphs (1) and (2), and formulate paragraph (2) as follows:

"(2) Contracts for the supply of goods to be manufactured or purchased are to be considered sales where the party who takes the order undertakes to supply all, or the substantial part, of the materials necessary for such manufacture or production."

[Referred to an *ad hoc* working group: see Consideration, 5, below.]

(iii) *United Kingdom* (A/CONF.97/C.1/L.26):

Revise paragraph (2) to read as follows:

"Contracts for the supply of goods to be manufactured or purchased are to be considered sales unless the party who orders the goods undertakes to supply:

"(a) a substantial part of the materials; or

"(b) the information or expertise necessary for such manufacture or production."

[Withdrawn: see Consideration, 7, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 3 at its 2nd, 3rd and 8th meetings on 11, 12 and 17 March 1980.

## (ii) Consideration

5. At the 2nd meeting, the amendment by the United Kingdom with regard to paragraph (1) (A/CONF.97/C.1/L.26) was withdrawn, and the amendment by Czechoslovakia (A/CONF.97/C.1/L.27) was rejected. The amendments by France (A/CONF.97/C.1/L.9), Norway (A/CONF.97/C.1/L.13) and Belgium (A/CONF.97/C.1/L.25) were referred for consideration to an *ad hoc* working group composed of the representatives of Belgium, Egypt, Mexico, France, Hungary, Norway, Kenya and the United States.

6. At the 3rd meeting, the *ad hoc* working group submitted the following text of article 3 (A/CONF.97/C.1/L.72):

"(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

"(2) This Convention does not apply to contracts in which the preponderant part of the obligation of the party who furnishes the goods consists in the supply of labour or other services."

7. The amendment by the United Kingdom (A/CONF.97/C.1/L.26) was withdrawn and the Committee adopted the text submitted by the *ad hoc* working group.

## ARTICLE 4

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 4

"This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

"(a) The validity of the contract or of any of its provisions or of any usage;

"(b) the effect which the contract may have on the property in the goods sold."

### B. AMENDMENTS

2. Amendments were submitted to article 4 by Norway (A/CONF.97/C.1/L.14), United States of America (A/CONF.97/C.1/L.4), France (A/CONF.97/C.1/L.20), Finland (A/CONF.97/C.1/L.21), and Finland, France, United States of America (A/CONF.97/C.1/L.51).

3. These amendments were to the following effect:

*New paragraph (2).*

(i) *Norway* (A/CONF.97/C.1/L.14):

Add the following as a new paragraph 2:

"(2) This Convention does not govern the settlement between the parties in cases where the seller exercises his right under a contractual clause reserving the right of property in, or other lien on, the goods for the purpose of securing payments due under the contract." [Withdrawn: see Consideration, 5, below.]

(ii) *United States of America* (A/CONF.97/C.1/L.4):

Add a new paragraph to read as follows:

"(c) claims for damages due to personal injury."

[Consolidated into joint proposal, Finland, France, United States of America (A/CONF.97/C.1/L.51). Adopted and referred to Drafting Committee: see Consideration, 6, below.]

(iii) *France* (A/CONF.97/C.1/L.20):

Insert a new article 4 *bis* reading as follows:

"This Convention does not apply to the liability of the seller for physical injury or death caused by the goods."

[Consolidated into joint proposal, Finland, France, United States of America (A/CONF.97/C.1/L.51). Adopted and referred to Drafting Committee: see Consideration, 6, below.]

(iv) *Finland* (A/CONF.97/C.1/L.21):

Add the following new paragraph to article 4:

"This Convention does not govern the liability of the seller for injury to person or for damage caused by the goods sold to other goods."

[Consolidated into joint proposal, Finland, France, United States of America (A/CONF.97/C.1/L.51). Adopted and referred to Drafting Committee: see Consideration, 6, below.]

(v) *Finland, France, United States of America* (A/CONF.97/C.1/L.51):

Add a new article 4 *bis* to read as follows:

"This Convention does not apply to the liability of the seller for death or injury caused by the goods to any person."

[Adopted and referred to Drafting Committee: see Consideration, 6, below.]

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered article 4 at its 3rd meeting on 12 March 1980.

#### (ii) Consideration

5. At the 3rd meeting, the amendment by Norway (A/CONF.97/C.1/L.14) was withdrawn.

6. At the 3rd meeting, the amendments by United States of America (A/CONF.97/C.1/L.4), France (A/CONF.97/C.1/L.20) and Finland (A/CONF.97/C.1/L.21) were consolidated as a joint proposal of Finland, France, United States of America (A/CONF.97/C.1/L.51). The joint proposal (A/CONF.97/C.1/L.51) was adopted and referred to the Drafting Committee, and the UNCITRAL text adopted.

## ARTICLE 5

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 5

"The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions."

### B. AMENDMENTS

2. Amendments were submitted to article 5 by the United Kingdom (A/CONF.97/C.1/L.8), Canada (A/CONF.97/C.1/L.10), India (A/CONF.97/C.1/L.30), German Democratic Republic (A/CONF.97/C.1/L.32), Belgium (A/CONF.97/C.1/L.41), Pakistan (A/CONF.97/C.1/L.45) and Italy (A/CONF.97/C.1/L.58).

3. These amendments were to the following effect:

(i) *United Kingdom* (A/CONF.97/C.1/L.8):

Add the following sentence to article 5:

"Such exclusion, derogation or variation may be express or implied."

[Rejected: see Consideration, 6, below.]

(ii) *Canada* (A/CONF.97/C.1/L.10):

Revise article 5 to read as follows:

"(1) The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions. However, except where the parties have wholly excluded this Convention, the obligations of good faith, diligence and reasonable care prescribed by this Convention may not be excluded by agreement, but the parties may by agreement determine the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.

"(2) A provision in the contract that the contract shall be governed by the law of the particular State shall be deemed sufficient to exclude the application of this Convention even where the law of that State incorporates the provisions of the Convention."

[Rejected as orally amended: see Consideration, 5 and 6, below.]

(iii) *India* (A/CONF.97/C.1/L.30):

Revise the article to read as follows:

"Subject to article 11, the parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

[Referred to Drafting Committee: see Consideration, 5, below.]

(iv) *German Democratic Republic* (A/CONF.97/C.1/L.32):

Article 5 should be amended as follows:

"Even if this Convention is not applicable in accordance with articles 2 or 3, it shall apply if it has been validly chosen by the parties."

[Rejected as orally amended: see Consideration, 6, below.]

(v) *Belgium* (A/CONF.97/C.1/L.41):

Add a new paragraph (2):

"Such exclusion, derogation or variation must be express or derive with certainty from the circumstances of the case."

Add a new paragraph (3):

"The application of this Convention shall be excluded if the parties have stated that their contract is subject to a specific national law."

[Rejected: see Consideration, 6, below.]

(vi) *Pakistan* (A/CONF.97/C.1/L.45):

The word "expressly" may be added after the words "the parties may".

[Rejected: see Consideration, 6, below.]

(vii) *Italy* (A/CONF.97/C.1/L.58):

Add a new paragraph (2) to article 5 to read as follows:

"(2) The Convention may only be excluded in its entirety where the parties have expressly so agreed or where they have chosen the law of a non-contracting State to govern their contract."

[Rejected as orally amended: see Consideration, 8, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 5 at its 3rd and 4th meetings on 12 and 13 March 1980 respectively.

(ii) *Consideration*

5. At the 3rd meeting, the amendment by India (A/CONF.97/C.1/L.30) was referred to the Drafting Committee. The first paragraph of the amendment by Canada (A/CONF.97/C.1/L.10) was orally amended by the deletion of the words "by agreement, but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable" and rejected by a vote of 4 in favour, and a greater number against.

6. At the 4th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.8) was rejected by a vote of 12 in favour and 19 against; the second paragraph of the amendment by Canada (A/CONF.97/C.1/L.10) was rejected by a vote of 3 in favour, and a greater number against; the amendment by Belgium (A/CONF.97/C.1/L.41) to add a new paragraph (2) was rejected by a vote of 8 in favour, and a greater number against; and the amendment by Pakistan (A/CONF.97/C.1/L.45) was rejected by a vote of 4 in favour, and a greater number against. The amendment by the German Democratic Republic (A/CONF.97/C.1/L.32) as orally amended by the substitution for "2" of "2(b)—2(f)" was rejected by a vote of 9 in favour and 21 against. The amendment by Belgium (A/CONF.97/C.1/L.41) to add a new paragraph (3) was withdrawn.

7. At the 4th meeting, the amendment by Italy (A/CONF.97/C.1/L.58) was orally amended to read as follows:

"Even if this Convention is not applicable in accordance with article 2, sub-paragraphs (b), (c), (d), (e) or (f), or with article 3, it shall apply if it has been validly chosen by the parties, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen this Convention."

8. It was rejected, and the UNCITRAL text adopted subject to the reference to the Drafting Committee of the amendment by India (A/CONF.97/C.1/L.30).

## ARTICLE 6

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 6"*

"In the interpretation and application of the provisions of this Convention, regard is to be had to its in-

ternational character and to the need to promote uniformity and the observance of good faith in international trade."

#### B. AMENDMENTS

2. Amendments were submitted to article 6 by Bulgaria (A/CONF.97/C.1/L.16), Czechoslovakia (A/CONF.97/C.1/L.15), Italy (A/CONF.97/C.1/L.49 and L.59), the United States of America (A/CONF.97/C.1/L.5), France (A/CONF.97/C.1/L.22) and Norway (A/CONF.97/C.1/L.28).

3. These amendments were to the following effect:  
*Proposed additional paragraphs for article 6.*

(i) *Bulgaria* (A/CONF.97/C.1/L.16):

Add a new paragraph (2) to article 6, reading as follows:

"(2) Questions which cannot be solved according to paragraph (1) of this article shall be settled according to the law of the seller's place of business. The same applies to the questions mentioned in article 4, paragraph (a), as well as to other questions, governed by the law proper to the contract."

[Rejected: see Consideration, 5, below.]

(ii) *Czechoslovakia* (A/CONF.97/C.1/L.15):

Add a new paragraph (2) to article 6 to read as follows:

"(2) Questions concerning matters governed by this Convention which are not settled therein shall be settled in conformity with the law applicable by virtue of the rules of private international law."

[Rejected: see Consideration, 5, below.]

(iii) *Italy* (A/CONF.97/C.1/L.59):

Delete the words "and the observance of good faith in international trade" (cf. in this respect the proposed new article 6 *ter*) and add a new sentence:

"Questions concerning matters governed by this Convention which are not expressly settled therein shall be settled in conformity with the general principles on which this Convention is based or, in the absence of such principles, by taking account of the national law of each of the parties."

Add a new article 6 *ter* to read as follows:

"In the formation [interpretation] and performance of a contract of sale the parties shall observe the principles of good faith and international co-operation."

[Rejected: see Consideration, 5, below.]

(iv) *Italy* (A/CONF.97/C.1/L.49):

Insert the following new article after article 6:

#### "Article 6 bis

##### "Interpretation of contracts

"For the purposes of this Convention, the contract of sale shall be interpreted in accordance with the common will of the parties, reference being made even to their conduct."

[Rejected: see Consideration, 5, below.]

#### Revision of article 6.

(i) *United States of America* (A/CONF.97/C.1/L.5):

Revise article 6 to read as follows:

"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application as well as to ensure the observance of good faith in international trade."

[Referred to Drafting Committee: see Consideration, 6, below.]

(ii) *France* (A/CONF.97/C.1/L.22):

It is proposed that article 6 should read as follows:

"For the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

[Referred to Drafting Committee: see Consideration, 6, below.]

(iii) *Norway* (A/CONF.97/C.1/L.28):

Delete the words:

"and the observance of good faith in international trade"

#### Article 7

At the end of paragraph 3, add the words:

"having regard to the need to ensure the observance of good faith in international trade"

[Withdrawn: see Consideration, 6, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 6 at its 5th meeting on 13 March 1980.

##### (ii) Consideration

#### *Proposed additional paragraphs for article 6.*

5. At the 5th meeting, the amendment by Czechoslovakia (A/CONF.97/C.1/L.15) was rejected by a vote of 9 in favour and 20 against, and the amendment by Bulgaria (A/CONF.97/C.1/L.16) was also rejected. The amendment by Italy (A/CONF.97/C.1/L.59) was rejected by a vote of 10 in favour and 18 against, and another amendment by Italy (A/CONF.97/C.1/L.49) was also rejected.

The German Democratic Republic submitted the following oral proposal:

"Questions concerning matters governed by this Convention which are not expressly settled therein shall be settled in conformity with the general principles on which this Convention is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

This proposal was adopted by 17 votes in favour, 14 against, with 11 abstentions.

#### *Revision of article 6.*

6. At the 5th meeting, the amendment of Norway (A/CONF.97/C.1/L.28) was withdrawn. The UNCITRAL text was adopted, subject to consideration by the Drafting Committee of the amendments by the United States (A/CONF.97/C.1/L.5) and France (A/CONF.97/C.1/L.22).

## ARTICLE 7

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 7"*

"(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

"(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

## B. AMENDMENTS

2. Amendments were submitted to article 7 by Norway (A/CONF.97/C.1/L.28), India (A/CONF.97/C.1/L.31), United Kingdom (A/CONF.97/C.1/L.33), Egypt (A/CONF.97/C.1/L.43), Italy (A/CONF.97/C.1/L.50), Sweden (A/CONF.97/C.1/L.52) and Pakistan (A/CONF.97/C.1/L.53).

3. These amendments were to the following effect:  
*Article as a whole.*

(i) *Sweden* (A/CONF.97/C.1/L.52):

Delete this article.

[Rejected: see Consideration, 5, below.]

*Paragraph (1)*

(ii) *India* (A/CONF.97/C.1/L.31):

Revise paragraph (1) to read as follows:

"For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or ought to have known what that intent was."

[Rejected: see Consideration, 6, below.]

(iii) *United Kingdom* (A/CONF.97/C.1/L.33):

Revise paragraph (1) to read as follows:

"For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew what that intent was."

[Rejected: see Consideration, 6, below.]

(iv) *Italy* (A/CONF.97/C.1/L.50):

Delete paragraph (1).

[Withdrawn: see Consideration, 6, below.]

*Paragraph (2)*

(v) *Egypt* (A/CONF.97/C.1/L.43):

Amend paragraph (2) to read as follows:

"If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person acting in the same capacity would have had in the same circumstances."

[Adopted: see Consideration, 7, below.]

(vi) *Pakistan* (A/CONF.97/C.1/L.53):

Revise paragraph (2) as follows:

"If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person would unavoidably have had in the same circumstances."

[Rejected: see Consideration, 7, below.]

(vii) *Norway* (A/CONF.97/C.1/L.8):

At the end of paragraph (3), add the words:

"having regard to the need to ensure the observance of good faith in international trade."

[Withdrawn: see Consideration, 8, below.]

(viii) *Pakistan* (A/CONF.97/C.1/L.53):

Revise paragraph (3) to read as follows:

"In determining the intent of a party or the understanding a reasonable person would unavoidably have had in the same circumstances, due consideration is to be given to all circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

[Withdrawn: see Consideration, 8, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 7 at its 6th meeting on 14 March 1980.

(ii) *Consideration**Article as a whole.*

5. At the 6th meeting, the amendment by Sweden (A/CONF.97/C.1/L.52) was rejected by a vote of 6 in favour, and a greater number against.

*Paragraph (1).*

6. At the 6th meeting, the amendment by India (A/CONF.97/C.1/L.31) was rejected by a vote of 6 in favour and 24 against; and the amendment of the United Kingdom (A/CONF.97/C.1/L.33) was rejected by a vote of 7 in favour and 26 against. The amendment by Italy (A/CONF.97/C.1/L.50) was withdrawn, and the UNCITRAL text adopted.

*Paragraph (2).*

7. At the 6th meeting, the amendment by Pakistan (A/CONF.97/C.1/L.53) was rejected, and the amendment by Egypt (A/CONF.97/C.1/L.43) was adopted by a vote of 19 in favour and 13 against, and referred to the Drafting Committee.

*Paragraph (3).*

8. At the 6th meeting, the amendments by Norway (A/CONF.97/C.1/L.8) and Pakistan (A/CONF.97/C.1/L.53) were withdrawn, and the UNCITRAL text adopted.

## ARTICLE 8

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 8"*

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

## B. AMENDMENTS

2. Amendments were submitted to article 8 by China (A/CONF.97/C.1/L.24), Czechoslovakia (A/CONF.97/C.1/L.40), India (A/CONF.97/C.1/L.34), Sweden (A/CONF.97/C.1/L.19), Pakistan (A/CONF.97/C.1/L.64), United States of America (A/CONF.97/C.1/L.6), France (A/CONF.97/C.1/L.23) and Egypt (A/CONF.97/C.1/L.44).

3. These amendments were to the following effect:

*Paragraph (2).*

(i) *China* (A/CONF.97/C.1/L.24):

Paragraph (2) should be revised by adding "reasonable" before "usage" to read:

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a reasonable usage of which the parties knew or ought to have known . . ."

[Rejected: see Consideration, 6, below.]

(ii) *Czechoslovakia* (A/CONF.97/C.1/L.40):

Add the following words at the end of paragraph (2) of article 8:

"provided the usage is not contrary to this Convention."

[Rejected: see Consideration, 6, below.]

(iii) *India* (A/CONF.97/C.1/L.34):

Revise paragraph (2) of article 8 to read as follows:

"The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known at the time of the contract."

[Rejected: see Consideration, 6, below.]

(iv) *Sweden* (A/CONF.97/C.1/L.19):

In order to clarify the substance of the Convention on

this point we propose that the words "or an interpretation of a trade term" are inserted in article 8, paragraph (2) between the words "a usage" and "of which the parties knew".

An alternative would be to reintroduce the provision in article 9, paragraph 3 of ULIS 1964.

[Rejected: see Consideration, 6, below.]

(v) *Pakistan* (A/CONF.97/C.1/L.64):

Replace the words "unless otherwise agreed" in paragraph (2) of article 8 by the words "unless their conduct shows otherwise".

[Rejected: see Consideration, 6, below.]

(vi) *United States of America* (A/CONF.97/C.1/L.6):

Revise paragraph (2) of article 8 to read as follows:

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned".

[Adopted and referred to Drafting Committee: see Consideration, 6, below.]

*Drafting proposal to paragraph (2).*

*France* (A/CONF.97/C.1/L.23):

Proposition de rédaction du paragraphe 2:

(2) Sauf convention contraire des parties, celles-ci sont réputées s'être tacitement référées à tout usage dont elles avaient connaissance ou auraient dû avoir connaissance et qui, . . . (le reste sans changement).

[Adopted: see Consideration, 7, below.]

*New paragraph (3).*

*Egypt* (A/CONF.97/C.1/L.44):

Add a paragraph (3):

"Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

[Rejected: see Consideration, 8, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 8 at its 6th and 7th meetings on 14 March 1980.

(ii) *Consideration**Paragraph (1).*

5. At the 7th meeting, the UNCITRAL text was adopted.

*Paragraph (2).*

6. At the 6th and 7th meetings, the amendment by China (A/CONF.97/C.1/L.24) was rejected by 9 votes in favour, 17 against, with 15 abstentions; the amendment by India (A/CONF.97/C.1/L.34) was rejected by 9 votes in favour and 25 against; the amendment by Swe-

den (A/CONF.97/C.1/L.19) was rejected by 12 votes in favour, and 23 against; and the amendment by Pakistan (A/CONF.97/C.1/L.64) was rejected by 15 votes in favour and 18 against. The amendment by the United States (A/CONF.97/C.1/L.6) was adopted by 19 votes in favour, 17 against, with 3 abstentions, and referred to the Drafting Committee, and the UNCITRAL text adopted.

*Drafting proposal to paragraph (2).*

7. At the 7th meeting, the drafting amendment by France (A/CONF.97/C.1/L.23 in the French text only) was adopted, and referred to the Drafting Committee.

*New paragraph (3).*

8. At the 7th meeting, the amendment by Egypt (A/CONF.97/C.1/L.44) was rejected by 16 votes in favour, and 21 against.

## ARTICLE 9

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 9*

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

(b) if a party does not have a place of business, reference is to be made to his habitual residence."

### B. AMENDMENTS

2. Amendments were submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.18) and Pakistan (A/CONF.97/C.1/L.67).

3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.18):

The following sub-paragraph (c) should be added:

"(c) 'writing' includes telegram and telex."

[Adopted: see Consideration, 5, below.]

(ii) *Pakistan* (A/CONF.97/C.1/L.67):

Add to article 9 a definition of the term "party" used therein.

[Withdrawn, subject to the inclusion of a statement in the summary records: see Consideration, 5, below.]

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered this article at its 7th meeting on 14 March 1980.

#### (ii) Consideration

5. At the 7th meeting, the amendment by Pakistan (A/CONF.97/C.1/L.67) was withdrawn subject to a statement being included in the summary records of Committee I, that in the understanding of the Committee, the term "party" included a state agency participating in international trade. The amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.18) was adopted, by 36 votes in favour, and none against, and the UNCITRAL text adopted subject to this amendment.

## ARTICLE 10

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 10*

"A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses."

### B. AMENDMENTS

2. An amendment was submitted to article 10 by Canada (A/CONF.97/C.1/L.54/Rev.1).

3. This amendment was to the following effect:

*New paragraph (2).*

Add a paragraph (2) reading as follows (revised version):

"Between the parties to a contract of sale evidenced by a written document, evidence by witnesses shall be inadmissible for the purposes of confuting or altering its terms, unless there is *prima facie* evidence resulting from a written document from the opposing party, from his evidence or from a fact the existence of which has been clearly demonstrated. However, evidence by witnesses shall be admissible for purposes of interpreting the written document."

[Rejected: see Consideration, 5, below.]

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered article 10 at its 7th meeting on 14 March 1980.

#### (ii) Consideration

5. At the 7th meeting, the amendment by Canada (A/CONF.97/C.1/L.54/Rev.1) was rejected.

## ARTICLE 11 AND (X)

### A. UNCITRAL TEXT AND TEXT OF ARTICLE (X)

1. The Committee considered together article 11 of the text of the United Nations Commission on International Trade Law, and article (X) of the draft articles concerning implementation, declarations, reservations



and other final clauses prepared by the Secretary-General (A/CONF.97/6).

2. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 11*

"Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article."

3. The text prepared by the Secretary-General provided as follows:

*"Article (X)*

"Declarations relating to contracts in writing

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration."

**B. AMENDMENTS**

4. Amendments were submitted to article 11 and article (X) by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.35) and Austria (A/CONF.97/C.1/L.42).

5. An amendment was submitted to article 11 by the Netherlands (A/CONF.97/C.1/L.71).

6. Amendments were submitted to article (X) by the Netherlands (A/CONF.97/C.1/L.76), the United Kingdom (A/CONF.97/C.1/L.88) and the Federal Republic of Germany (A/CONF.97/C.1/L.96).

7. These amendments were to the following effect:

*Article 11 and article (X).*

(i) *Union of Soviet Socialist Republics* (A/CONF.97/C.1/L.35):

Add a reference to article 24 in article 11 and article (X).

[Withdrawn: see Consideration, 9, below.]

(ii) *Austria* (A/CONF.97/C.1/L.42):

Delete article 11 and amend article (X) to read as follows:

A Contracting State may at the time of signature, ratification or accession make a declaration that it will not apply any provision of this Convention which allows a contract of sale or its modification or abroga-

tion or any offer, acceptance, or other indication of intention to be made in any form other than in writing where any party has his place of business in a Contracting State which has made such a declaration.

Alternative proposal:

Delete articles 11 and (X).

[Rejected: see Consideration, 9, below.]

*Article 11.*

(iii) *Netherlands* (A/CONF.97/C.1/L.71):

In the first sentence of article 11, insert the words "to this effect" between the words "has made a declaration" and the words "under article (X)".

[Referred to Drafting Committee: see Consideration, 10, below.]

*Article (X).*

(iv) *Netherlands* (A/CONF.97/C.1/L.76):

Revise article (X) to read as follows:

A Contracting State whose legislation requires *all or certain types of contracts* of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply *to the contracts concerned* where any party has his place of business in a Contracting State which has made such a declaration.

[Rejected: see Consideration, 11, below.]

(v) *United Kingdom* (A/CONF.97/C.1/L.88):

1. Insert after the word "ratification" in the second line of article (X) the words "acceptance, approval".

2. Replace the words "a Contracting State" in the last line by the words "the Contracting State".

[Referred to the Second Committee: see Consideration, 11, below.]

(vi) *Federal Republic of Germany* (A/CONF.97/C.1/L.96):

Insert after the words "at the time of signature, ratification or accession" the words "or at any time thereafter".

[Referred to the Second Committee: see Consideration, 11, below.]

**C. PROCEEDINGS IN THE FIRST COMMITTEE**

(i) *Meetings*

8. The First Committee considered article 11 and article (X) at its 8th meeting on 17 March 1980.

(ii) *Consideration*

*Article 11 and article (X).*

9. At the 8th meeting, the amendment by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.35) was withdrawn, and the amendment by Austria (A/CONF.97/C.1/L.42) was rejected.

*Article 11.*

10. At the 8th meeting, the amendment by the Netherlands (A/CONF.97/C.1/L.71) was referred to the Drafting Committee, and the UNCITRAL text adopted.

*Article (X).*

11. At the 8th meeting the amendment by the Netherlands (A/CONF.97/C.1/L.76) was rejected by a vote of 11 in favour and 16 against. The amendments by United Kingdom (A/CONF.97/C.1/L.88) and the Federal Republic of Germany (A/CONF.97/C.1/L.96) were referred to the Second Committee for consideration in relation to article (X).

## ARTICLE 12

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 12*

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal."

## B. AMENDMENTS

2. Amendments were submitted to article 12 by the United Kingdom (A/CONF.97/C.1/L.36), Union of Soviet Socialist Republics (A/CONF.97/C.1/L.37), Finland (A/CONF.97/C.1/L.29), Norway (A/CONF.97/C.1/L.38), Austria (A/CONF.97/C.1/L.46), the United States of America (A/CONF.97/C.1/L.55), an *ad hoc* working group (A/CONF.97/C.1/L.103) and Australia (A/CONF.97/C.1/L.69).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *United Kingdom* (A/CONF.97/C.1/L.36):

1. Delete the second sentence of paragraph (1) of article 12.

2. If the above proposal is rejected, revise the second sentence of paragraph (1) of this article to read as follows:

"A proposal is sufficiently definite if it contains terms relating to matters such as the goods, the quantity or the price which enable the offeree to decide whether or not to accept the proposal."

3. If both the proposals at 1. and 2. above are rejected, revise the second sentence of paragraph (1) of this article to read as follows:

"A proposal is sufficiently definite if it indicates the

goods, whether ascertained or not, and expressly or implicitly fixes or makes provision for determining the quantity and the price."

[Rejected: see Consideration, 5, below.]

(ii) *Union of Soviet Socialist Republics* (A/CONF.97/C.1/L.37):

"In paragraph 1, delete the words 'or implicitly', or the words 'expressly or implicitly', in order to avoid complications that may arise in interpreting the idea of *implicit* fixing of the procedure for determining the quantity and the price, particularly in the light of the examples given in the Secretariat's commentary on article 12 of the draft Convention (paragraphs 14-17).

"It should be borne in mind, where a certain practice has become established between the parties to a contract, deletion of the words in question will not cause any difficulties, in view of the general provisions contained, in particular, in draft articles 7 and 8."

[Rejected: see Consideration, 9, below.]

(iii) *Finland* (A/CONF.97/C.1/L.29):

Revise paragraph 1 to read as follows:

"A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it contains terms relating to matters such as the goods, the quantity or the price which enable the offeree to decide whether or not to accept the proposal."

[Referred to *ad hoc* working group: see Consideration, 5, below.]

(iv) *Norway* (A/CONF.97/C.1/L.38):

It is proposed either to delete the sentence or to redraft it for instance as follows:

"A proposal is sufficiently definite if it contains terms relating to matters such as the goods, the quantity or the price which enable the offeree to decide whether or not to accept the proposal."

[Referred to *ad hoc* working group: see Consideration, 5, below.]

(v) *Austria* (A/CONF.97/C.1/L.46):

Delete the second sentence of paragraph (1). Alternative proposal:

Amend this second sentence to read as follows:

"Any proposal is sufficiently definite, in particular, if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

[Referred to *ad hoc* working group: see Consideration, 5, below.]

(vi) *United States of America* (A/CONF.97/C.1/L.55):

Revise paragraph (1) of article 12 to read as follows:

"(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance."

[Delete sentence two.]

[Referred to *ad hoc* working group: see Consideration, 5, below.]

*Paragraph (2).*

*Australia (A/CONF.97/C.1/L.69):*

Add the following words to paragraph (2):

"and the proposal is sufficiently definite in accordance with paragraph (1)."

[Referred to Drafting Committee: see Consideration, 12, below.]

C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 12 at its 8th and 11th meetings on 17th and 18th March, 1980, respectively.

(ii) *Consideration*

*Paragraph (1).*

5. At its 8th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.36) was rejected by 17 votes in favour and 22 against. The amendments by Finland (A/CONF.97/C.1/L.29), Norway (A/CONF.97/C.1/L.38), Austria (A/CONF.97/C.1/L.46) and the United States of America (A/CONF.97/C.1/L.55) were referred to an *ad hoc* working group. At the 11th meeting, the *ad hoc* working group submitted two proposals (A/CONF.97/C.1/L.103) for consideration:

"1. It is proposed that the second sentence of this article read as follows:

"A proposal is sufficiently definite if its terms relating to such matters as the goods, the quantity or the price are such as to enable the conclusion of a contract by acceptance."

6. This amendment was rejected by 15 votes in favour and 26 against.

7. The working group also submitted for consideration the proposal of Austria (A/CONF.97/C.1/L.46):

"Any proposal is sufficiently definite, in particular, if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price."

8. This amendment was rejected by 19 votes in favour and 19 against.

9. The amendment by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.37) was rejected by 9 votes in favour and 24 against.

10. An oral proposal was submitted by Yugoslavia on article 12, paragraph (1) as follows:

"A proposal is sufficiently definite if its terms relating to such matters as the goods and the price are such as to enable the conclusion of a contract by acceptance."

11. This proposal was rejected by 7 votes in favour and 22 against and the UNCITRAL text was adopted.

*Paragraph (2).*

12. At the 8th meeting, the amendment by Australia

(A/CONF.97/C.1/L.69) was referred to the Drafting Committee, and the UNCITRAL text adopted.

ARTICLE 13

A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 13*

"(1) An offer becomes effective when it reaches the offeree.

"(2) An offer may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer. It may be withdrawn even if it is irrevocable."

B. AMENDMENTS

2. An amendment was submitted to article 13 by France (A/CONF.97/C.1/L.47).

3. This amendment was to the following effect:

*France (A/CONF.97/C.1/L.47):*

Amend article 13, paragraph (2) to read as follows:

"An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer."

[Referred to Drafting Committee: see Consideration, 5, below.]

C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The Committee considered article 13 at its 9th meeting on 17 March 1980.

(ii) *Consideration*

5. At the 9th meeting, paragraph (1) of the UNCITRAL text was adopted. The amendment by France (A/CONF.97/C.1/L.47) was referred to the Drafting Committee, and paragraph (2) of the UNCITRAL text adopted.

ARTICLE 14

A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 14*

"(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

"(2) However, an offer cannot be revoked:

"(a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or

"(b) if it was reasonable for the offeree to rely upon the offer as being irrevocable and the offeree has acted in reliance on the offer."

## B. AMENDMENTS

2. Amendments were submitted to article 14 by United Kingdom (A/CONF.97/C.1/L.48) and German Democratic Republic (A/CONF.97/C.1/L.84).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *United Kingdom* (A/CONF.97/C.1/L.48):

Revise paragraph (1) of article 14 to read as follows:

"Until a contract is concluded, an offer addressed to one or more specific persons may be revoked if the revocation reaches the offeree before he has dispatched an acceptance. An offer other than one addressed to one or more specific persons is revoked when the revocation is published in the same way as the offer."

[Rejected: see Consideration, 5, below.]

(ii) *German Democratic Republic* (A/CONF.97/C.1/L.84):

Paragraph (1) should be revised as follows:

"An offer may be revoked if the revocation reaches the offeree before he has either dispatched an acceptance or the contract is concluded by other means."

[Adopted: see Consideration, 5, below.]

*Paragraph (2).*

*United Kingdom* (A/CONF.97/C.1/L.48):

Revise subparagraph (a) of paragraph (2) to read as follows:

"(a) if, and to the extent that, it indicates that it is irrevocable. The stating of a fixed time for acceptance does not of itself indicate that an offer is irrevocable;"

[Rejected: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 14 at its 9th meeting on 17 March 1980.

(ii) *Consideration**Paragraph (1).*

5. At the 9th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.48) was rejected. The amendment by the German Democratic Republic (A/CONF.97/C.1/L.84) was adopted and referred to the Drafting Committee, and the UNCITRAL text adopted.

*Paragraph (2).*

6. At the 9th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.48) was rejected by 7 votes in favour and 31 against, and the UNCITRAL text adopted.

## ARTICLE 15

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 15*

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

## B. AMENDMENTS

2. An amendment was submitted to article 15 by Belgium (A/CONF.97/C.1/L.85).

3. This amendment was to the following effect:

*Belgium* (A/CONF.97/C.1/L.85: for the French text only):

Il est proposé de rédiger en français cette disposition comme suit:

[Caducité de l'offre par refus.]

"Une offre, même irrévocable, devient caduque lorsque son refus parvient à l'auteur de l'offre."

[Referred to Drafting Committee: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The Committee considered article 15 at its 9th meeting on 17 March 1980.

(ii) *Consideration*

5. At the 9th meeting the amendment by Belgium (A/CONF.97/C.1/L.85) was referred to the Drafting Committee, and the UNCITRAL text adopted.

## ARTICLE 16

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 16*

"(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance."

"(2) Subject to paragraph (3) of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise."

"(3) However, if, by virtue of the offer or as a result of practices with the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article."

## B. AMENDMENTS

2. Amendments were submitted to article 16 by the United Kingdom (A/CONF.97/C.1/L.56), Belgium

(A/CONF.97/C.1/L.86), Egypt (A/CONF.97/C.1/L.90) and the United States of America (A/CONF.97/C.1/L.57).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *United Kingdom* (A/CONF.97/C.1/L.56):

Revise paragraph (1) of article 16 to read as follows:

"A statement made by or other conduct of the offeree indicating unqualified assent to an offer is an acceptance. Silence or inactivity shall not of themselves amount to acceptance."

[Withdrawn as to the first sentence. Adopted as to the second sentence and referred to Drafting Committee: see Consideration, 5, below.]

(ii) *Belgium* (A/CONF.97/C.1/L.86):

Amend paragraph (1) to read as follows:

"Any conduct of the offeree implying assent to terms which the offeror considered or may have considered, due account being taken of the circumstances, as *material* during the negotiations is an acceptance within the meaning of this Convention. In no case shall silence alone on the part of the offeree amount to acceptance."

[Rejected: see Consideration, 6, below.]

*Paragraph (2).*

*Egypt* (A/CONF.97/C.1/L.90):

In the second sentence of article 16, paragraph (2), delete the words:

"including the rapidity of the means of communication employed by the offeror."

[Rejected: see Consideration, 7, below.]

*Paragraph (3).*

*United States of America* (A/CONF.97/C.1/L.57):

Revise paragraph (3) of article 16 to read as follows:

"(3) However, if by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down in paragraph (2) of this article. An offeror who is not notified within a reasonable time may treat the offer as having lapsed before acceptance."

[Withdrawn: see Consideration, 9, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) *Meetings*

4. The First Committee considered article 16 at its 9th and 10th meetings on 17th and 18th March 1980, respectively.

### (ii) *Consideration*

*Paragraph (1).*

5. At the 9th meeting, part of the amendment of the United Kingdom (A/CONF.97/C.1/L.56) ("Silence or

inactivity shall not of themselves amount to acceptance.") was adopted by 16 votes in favour, 15 against, and referred to the Drafting Committee. The other part of the United Kingdom amendment ("A statement made by or other conduct of the offeree indicating unqualified assent to an offer is an acceptance.") was postponed for discussion until consideration of article 17. At the 10th meeting on the 18th March this part of the United Kingdom amendment was withdrawn.

6. The amendment submitted by Belgium (A/CONF.97/C.1/L.86) was modified orally by adding the words "and usage." at the end of the second sentence. The amendment as modified orally was rejected by 12 votes in favour and 13 against, and the UNCITRAL text adopted.

*Paragraph (2).*

7. At the 10th meeting the amendment by Egypt (A/CONF.97/C.1/L.90) was rejected by 7 votes in favour and 22 against, and the UNCITRAL text adopted.

8. Belgium orally proposed that at the end of the second sentence of paragraph (2) there should be added the words "and usage". The proposal was rejected by 12 votes in favour and 13 against, and the UNCITRAL text adopted.

*Paragraph (3).*

9. At the 10th meeting the amendment by the United States of America (A/CONF.97/C.1/L.57) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 17

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 17

"(1) A reply to an offer which purports to be an acceptance containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without undue delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

"(3) Additional or different terms relating, *inter alia*, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially, unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeror."

## B. AMENDMENTS

2. Amendments were submitted to article 17 by France (A/CONF.97/C.1/L.60), United Kingdom (A/CONF.97/C.1/L.61), Belgium (A/CONF.97/C.1/L.87), Bulgaria (A/CONF.97/C.1/L.91), Egypt (A/CONF.97/C.1/L.92), United States of America (A/CONF.97/C.1/L.97), Netherlands (A/CONF.97/C.1/L.98) and Federal Republic of Germany (A/CONF.97/C.1/L.157).

3. These amendments were to the following effect:

*Paragraphs (2) and (3).*

(i) *United Kingdom* (A/CONF.97/C.1/L.61):

Delete paragraphs (2) and (3).

[Rejected: see Consideration, 6, below.]

(ii) *Bulgaria* (A/CONF.97/C.1/L.91):

Delete paragraphs (2) and (3).

[Rejected: see Consideration, 6, below.]

*Paragraph (2).*

(iii) *Netherlands* (A/CONF.97/C.1/L.98):

A new sentence should be inserted between the first and the second sentence of paragraph (2):

"If the offeror does so object, the offeree can promptly retract the additional or different terms and the terms of the contract are those of the offer."

[Withdrawn: see Consideration, 7, below.]

(iv) *Federal Republic of Germany* (A/CONF.97/C.1/L.157):

Replace in the first sentence of paragraph (2) the words "unless the offeror objects to the discrepancy without undue delay" by the words:

"unless the offeror, without undue delay, objects to the discrepancy orally or dispatches a notice to that effect."

[Adopted: see Consideration, 8, below.]

*Paragraph (3).*

(v) *France* (A/CONF.97/C.1/L.60):

Amend article 17 (3) to read as follows:

"(3) additional or different terms relating to the price, quality and quantity of the goods are considered to alter the terms of the offer materially, unless . . ."  
(the rest remains unchanged).

[Rejected: see Consideration, 8, below.]

(vi) *Bulgaria* (A/CONF.97/C.1/L.91):

If the proposal to delete paragraphs (2) and (3) is rejected, delete the last portion of paragraph (3) reading:

"unless the offeree by virtue of the offer or the particular circumstances of the case has reason to believe they are acceptable to the offeree".

[Adopted: see Consideration, 8, below.]

(vii) *Egypt* (A/CONF.97/C.1/L.92):

Delete paragraph (3).

[Rejected: see Consideration, 8, below.]

(viii) *United States of America* (A/CONF.97/C.1/L.97):

In paragraph (3), delete the words "inter alia" and substitute the words "among other matters".

[Referred to the Drafting Committee: see Consideration, 8, below.]

*Additional paragraph (4).*

(ix) *Belgium* (A/CONF.97/C.1/L.87):

Add a fourth paragraph reading as follows:

"(4) When the offeror and the offeree have expressly (or implicitly) referred in the course of negotiations to general conditions the terms of which are mutually exclusive the conflict clauses should be considered not to form an integral part of the contract."

[Rejected: see Consideration, 9, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 17 at its 10th, 17th and 18th meetings on 18 and 21 March 1980.

## (ii) Consideration

*Paragraph (1).*

5. At the 10th meeting, the UNCITRAL text was adopted.

*Paragraphs (2) and (3).*

6. At the 10th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.61) was rejected by 20 votes in favour and 22 against, and the amendment by Bulgaria (A/CONF.97/C.1/L.96) was also rejected.

*Paragraph (2).*

7. At the 10th meeting, the amendment by Netherlands (A/CONF.97/C.1/L.98) was withdrawn. At the 18th meeting, the amendment of the Federal Republic of Germany (A/CONF.97/C.1/L.157) was adopted by 36 votes in favour and 2 against, and the UNCITRAL text adopted subject to this amendment.

*Paragraph (3).*

8. At the 10th meeting, the amendment by France (A/CONF.97/C.1/L.60) was rejected, and the amendment by Egypt (A/CONF.97/C.1/L.92) was also rejected by 9 votes in favour and 29 against. The amendment by the United States (A/CONF.97/C.1/L.97) was referred to the Drafting Committee. The amendment by Bulgaria (A/CONF.97/C.1/L.91) was adopted by 28 votes in favour and 13 against, and the UNCITRAL text adopted subject to this amendment.

*Additional paragraph (4).*

9. At the 10th meeting, the amendment by Belgium (A/CONF.97/C.1/L.87) was rejected by 6 votes in favour and 30 against.

## ARTICLE 18

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 18"*

"(1) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the

moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(2) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

#### B. AMENDMENTS

2. Amendments were submitted to article 18 by the United Kingdom (A/CONF.97/C.1/L.62), Bulgaria (A/CONF.97/C.1/L.14) and Egypt (A/CONF.97/C.1/L.93).

3. These amendments were to the following effect:

##### *Paragraph (1).*

(i) *United Kingdom* (A/CONF.97/C.1/L.62):

It is proposed that the words "*Unless otherwise stated by the offeror to the offeree*" should be inserted before both sentences in *paragraph (1)* of this article.

[Withdrawn: see Consideration, 5, below.]

(ii) *Bulgaria* (A/CONF.97/C.1/L.94):

Amend the first sentence of article 18, paragraph (1) to read as follows:

"A period of time for acceptance fixed by an offeror in a telegram or letter begins to run from the moment the telegram or letter is handed in for dispatch."

[Withdrawn: see Consideration, 5, below.]

##### *Paragraph (2).*

*Egypt* (A/CONF.97/C.1/L.93):

Amend the last sentence of article 18 (2) to read as follows:

"Official holidays or non-business days occurring during the running of a period of time for acceptance exceeding ten days are included in calculating the period."

[Withdrawn: see Consideration, 6, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) *Meetings*

4. The First Committee considered article 18 at its 11th meeting on 18 March 1980.

##### (ii) *Consideration*

##### *Paragraph (1).*

5. At the 11th meeting, the amendments by the United Kingdom (A/CONF.97/C.1/L.62) and Bulgaria (A/CONF.97/C.1/L.94) were withdrawn, and the UNCITRAL text adopted.

##### *Paragraph (2).*

6. At the 11th meeting, the amendment by Egypt (A/CONF.97/C.1/L.93) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 19

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### *"Article 19*

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

### B. AMENDMENTS

2. No amendments were submitted to this article.

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) *Meetings*

3. The First Committee considered this article at its 11th meeting on 18 March 1980.

##### (ii) *Consideration*

4. At the 11th meeting, the UNCITRAL text was adopted.

## ARTICLE 20

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### *"Article 20*

"An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

### B. AMENDMENTS

2. No amendments were submitted to this article.

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) *Meetings*

3. The First Committee considered article 20 at its 11th meeting on 18 March 1980.

(ii) *Consideration*

4. At the 11th meeting, the UNCITRAL text was adopted.

## ARTICLE 21

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 21"*

"A contract is concluded at the moment when an acceptance of an offer is effective in accordance with the provisions of this Convention."

## B. AMENDMENTS

2. Amendments were submitted to article 21 by Italy (A/CONF.97/C.1/L.70), Czechoslovakia (A/CONF.97/C.1/L.78), Belgium (A/CONF.97/C.1/L.89) and Canada (A/CONF.97/C.1/L.112).

3. These amendments were to the following effect:

(i) *Italy* (A/CONF.97/C.1/L.70):

Revise article 21 to read as follows:

"A contract is concluded at the moment when *and in the place where* an acceptance of an offer is effective in accordance with the provisions of the Convention."

[Rejected: see Consideration, 5, below.]

(ii) *Belgium* (A/CONF.97/C.1/L.89):

First (existing) paragraph (for the French text only):

Remplacer "conclu" par "formé" dans le texte français du paragraphe (1).

*Additional paragraph (2).*

(iii) *Czechoslovakia* (A/CONF.97/C.1/L.89):

Add a new paragraph (2):

"Where an offer requires to be accepted in writing, the acceptance is effective only if the written form is observed."

[Rejected: see Consideration, 5, below.]

(iv) *Belgium* (A/CONF.97/C.1/L.89):

Add a new paragraph (2) to read as follows:

"Nevertheless, when the contract depends on the granting of *public or administrative authorizations*, the contract is concluded only from the moment these authorizations have been granted."

[Rejected: see Consideration, 5, below.]

(v) *Canada* (A/CONF.97/C.1/L.112):

Add a new paragraph (2) to read as follows:

"A contract may be concluded even though the moment of its conclusion may be undetermined."

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 21 at its 11th meeting on 18 March 1980.

(ii) *Consideration*

5. At the 11th meeting, the amendments by Italy (A/CONF.97/C.1/L.70), Czechoslovakia (A/CONF.97/C.1/L.78) and Canada (A/CONF.97/C.1/L.112) were rejected. The amendment by Belgium (A/CONF.97/C.1/L.89) to add a new paragraph (2) was also rejected. The amendment by Belgium (A/CONF.97/C.1/L.89 relating to the French text only) was referred to the Drafting Committee, and the UNCITRAL text adopted.

## ARTICLE 22

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 22"*

"For the purposes of Part II of this Convention an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address, or, if he does not have a place of business or mailing address, to his habitual residence."

## B. AMENDMENTS

2. No amendments were submitted to this article.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

3. The First Committee considered article 20 at its 11th meeting on 18 March 1980.

(ii) *Consideration*

4. At the 11th meeting, the UNCITRAL text was adopted.

## ARTICLE 23

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 23"*

"A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such result."

## B. AMENDMENTS

2. Amendments were submitted to article 23 by the Federal Republic of Germany (A/CONF.97/C.1/L.63), Czechoslovakia (A/CONF.97/C.1/L.81), Pakistan (A/CONF.97/C.1/L.99), the United Kingdom (A/CONF.97/C.1/L.104), Egypt (A/CONF.97/C.1/L.106), Turkey (A/CONF.97/C.1/L.121) and India (A/CONF.97/C.1/L.126).



3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.63):

Article 23 should be phrased as follows:

"A breach committed by one of the parties is fundamental if, having regard to all express and implied terms of the contract, the breach results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such result."

[Referred to *ad hoc* working group: see Consideration, 5, below.]

(ii) *Czechoslovakia* (A/CONF.97/C.1/L.81):

Replace the existing text by the following:

"A breach of contract is fundamental if the party in breach knew or ought to have known, in the light of the reasons for the conclusion of the contract, or any information disclosed at any time before or at the conclusion of the contract, that the other party would not be interested in performance in case of such a breach."

[Rejected: see Consideration, 5, below.]

(iii) *Pakistan* (A/CONF.97/C.1/L.99):

The words "if it results in substantial detriment to the other party" may be replaced by the words "if it results in such detriment to the other party as would basically change the terms of the transaction".

[Referred to *ad hoc* working group: see Consideration, 5, below.]

(iv) *United Kingdom* (A/CONF.97/C.1/L.104):

Revise article 23 to read as follows:

"A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless at the time when the contract was concluded the party in breach did not foresee and had no reason to foresee such a result. A breach does not result in substantial detriment to the other party if damages would be an adequate remedy for him."

[Withdrawn: see Consideration, 6, below.]

(v) *Egypt* (A/CONF.97/C.1/L.106):

Amend article 23 to read as follows:

"A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach *proves that he did not foresee such a result and that a reasonable person of the same kind in the same circumstances would not have foreseen it.*"

[Adopted as orally amended: see Consideration, 5, below.]

(vi) *Turkey* (A/CONF.97/C.1/L.121):

Insert after the words "A breach" the words "of the contract".

[Referred to the Drafting Committee: see Consideration, 6, below.]

(vii) *India* (A/CONF.97/C.1/L.126):

Insert after the words "had no reason" in the third line of article 23 the words "as a reasonable person".

[Referred to the Drafting Committee: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered the article at its 12th, 13th and 18th meetings on 19 and 21 March 1980.

### (ii) Consideration

5. At the 12th meeting, the amendment by Czechoslovakia (A/CONF.97/C.1/L.81) was rejected by 9 votes in favour and 24 against. The amendment by Egypt (A/CONF.97/C.1/L.106), as orally amended by the deletion of the words "proves that he", was adopted by 26 votes in favour and 14 against, and referred to the Drafting Committee. The amendments by the Federal Republic of Germany (A/CONF.97/C.1/L.63) and Pakistan (A/CONF.97/C.1/L.99) were referred to an *ad hoc* working group consisting of the representatives of Argentina, Czechoslovakia, Germany, Federal Republic of, Ghana, Hungary, Norway, Pakistan, Romania and Spain for the purpose of drafting a text reflecting the ideas contained in these amendments.

6. At the 13th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.104) was withdrawn, and the amendments by Turkey (A/CONF.97/C.1/L.121) and India (A/CONF.97/C.1/L.126) were referred to the Drafting Committee.

7. At the 18th meeting, the *ad hoc* working group, with the exception of Hungary, submitted the following text (A/CONF.97/C.1/L.176).

"A breach of contract committed by one of the parties is fundamental *if it results in such detriment to the other party as will substantially impair his expectations under the contract*, unless the party in breach did not foresee and had no reason to foresee such a result."

8. The text of the *ad hoc* working group was adopted by 22 votes in favour and 18 against, and together with the amendment by Egypt (A/CONF.97/C.1/L.106) as orally amended, referred to the Drafting Committee.

## ARTICLE 24

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 24

"A declaration of avoidance of the contract is effective only if made by notice to the other party."

### B. AMENDMENTS

2. An amendment was submitted to article 24 by Norway (A/CONF.97/C.1/L.100).

3. The amendment was to the following effect:

Norway (A/CONF.97/C.1/L.100):

Replace the word "made" by the word "given".

[Referred to Drafting Committee: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 24 at its 13th meeting on 19th March 1980.

##### (ii) Consideration

5. At the 13th meeting, the amendment by Norway (A/CONF.97/C.1/L.100) was referred to the Drafting Committee.

#### ARTICLE 25

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 25

"Unless otherwise expressly provided in Part III of this Convention, if any notice, request or other communication is given by a party in accordance with Part III and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication."

##### B. AMENDMENTS

2. Amendments were submitted to article 25 by the Federal Republic of Germany (A/CONF.97/C.1/L.65) and the German Democratic Republic (A/CONF.97/C.1/L.123).

3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.65):

It is suggested that article 25 be inserted in Part I of the Convention and that the first lines of the provision be worded as follows:

"Unless otherwise expressly provided in this Convention, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances . . ."

[Rejected: see Consideration, 5, below.]

(ii) *German Democratic Republic* (A/CONF.97/C.1/L.123):

Replace the words "in accordance with Part III" in the third line of article 25 by the words "in accordance with articles 37, 39 (2) and 40 (2)".

[Rejected: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 25 at its 13th meeting on 19 March 1980.

##### (ii) Consideration

5. At the 13th meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.65) was rejected by 7 votes in favour and 25 against, the amendment by the German Democratic Republic (A/CONF.97/C.1/L.123) was rejected by 11 votes in favour and 17 against, and the UNCITRAL text adopted.

#### ARTICLE 26

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 26

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention."

##### B. AMENDMENTS

2. Amendments were submitted to article 26 by the United Kingdom (A/CONF.97/C.1/L.113) and United States of America (A/CONF.97/C.1/L.117). The amendments were identical in substance.

3. These amendments were to the following effect:

(i) *United Kingdom* (A/CONF.97/C.1/L.113):

It is proposed that the word "would" be substituted for the word "could" in this article.

[Adopted: see Consideration, 5, below.]

(ii) *United States of America* (A/CONF.97/C.1/L.117):

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention."

[Adopted: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 26 at its 13th meeting on 19 March 1980.

##### (ii) Consideration

5. At the 13th meeting, the amendments by the United Kingdom (A/CONF.97/C.1/L.113), and the United States of America (A/CONF.97/C.1/L.117), which were identical in substance, were adopted by a vote of 26 in favour, 10 against, and the UNCITRAL text adopted, subject to these amendments.

## ARTICLE 27

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 27"*

"(1) A contract may be modified or abrogated by the mere agreement of the parties.

"(2) A written contract which contains a provision requiring any modification or abrogation to be in writing may not be otherwise modified or abrogated. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct."

## B. AMENDMENTS

2. Amendments were submitted to article 27 by Norway (A/CONF.97/C.1/L.66), the United States (A/CONF.97/C.1/L.119) and Italy (A/CONF.97/C.1/L.68).

3. These amendments were to the following effect:  
*Article as a whole.*

(i) *Norway (A/CONF.97/C.1/L.66):*

It is proposed that article 27 should be placed in part III on formation of the contract, for instance as article 21.

[Rejected: see Consideration, 5, below.]

*Paragraph (1).*

(ii) *United States (A/CONF.97/C.1/L.119):*

Replace the word "abrogated" in paragraph (1) of article 27 by the word "terminated".

[Referred to Drafting Committee: see Consideration, 5, below.]

*Paragraph (2).*

(iii) *United States (A/CONF.97/C.1/L.119):*

In the first sentence of paragraph (2), replace the word "abrogation" by the words "termination by agreement" and the word "abrogated" by the words "terminated by agreement".

[Referred to Drafting Committee: see Consideration, 5, below.]

*New paragraph.*

(iv) *Italy (A/CONF.97/C.1/L.68):*

Add a new paragraph (3) to article 27:

"(3) The preceding paragraph shall not apply where the provision requiring modifications or abrogations of the contract to be in writing is contained in general conditions prepared by one party and that party either directly or through an authorized agent orally agrees to modify or abrogate his general conditions."

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 13th meeting on 19 March 1980.

(ii) *Consideration*

5. At the 13th meeting, the amendment by Norway (A/CONF.97/C.1/L.66) was rejected by 9 votes in favour and 27 against with 9 abstentions, the amendments by the United States (A/CONF.97/C.1/L.119) were referred to the Drafting Committee, the amendment by Italy (A/CONF.97/C.1/L.68) was rejected, and the UNCITRAL text adopted.

## ARTICLE 28

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 28"*

"The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention."

## B. AMENDMENTS

2. An amendment was submitted to article 28 by Greece (A/CONF.97/C.1/L.130).

3. This amendment was to the following effect:

*Article as a whole.*

*Greece (A/CONF.97/C.1/L.130):*

Delete the words "as required by the contract and this Convention" or:

Insert at the end the words "and the law applicable".  
[Withdrawn: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 28 at its 13th meeting on 19th March 1980.

(ii) *Consideration*

*Article as a whole.*

5. At the 13th meeting, the amendment by Greece (A/CONF.97/C.1/L.130) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 29

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 29"*

"If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

"(a) If the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;

"(b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place — in placing the goods at the buyer's disposal at that place;

"(c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."

## B. AMENDMENTS

2. Amendments were submitted to article 29 by Iraq (A/CONF.97/C.1/L.107) and Netherlands (A/CONF.97/C.1/L.120).

3. These amendments were to the following effect:

(i) *Iraq* (A/CONF.97/C.1/L.107):

Re-word article 29, subparagraph (a) as follows:

"(a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the place indicated by the buyer, or, if no such place is indicated, to the buyer's place of business."

[Rejected: see Consideration, 5, below.]

(ii) *Netherlands* (A/CONF.97/C.1/L.120):

Insert after the words "carriage of the goods" the words "by sea".

[Withdrawn: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 29 at its 14th meeting on 19 March 1980.

(ii) *Consideration*

5. At the 14th meeting, the amendment by the Netherlands (A/CONF.97/C.1/L.120) was withdrawn. The amendment by Iraq (A/CONF.97/C.1/L.107) was rejected, and the UNCITRAL text was adopted.

## ARTICLE 30

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 30"*

"(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

"(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

"(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance."

## B. AMENDMENTS

2. An amendment was submitted to article 30 by Australia (A/CONF.97/C.1/L.101).

3. This amendment was to the following effect:

*Australia* (A/CONF.97/C.1/L.101):

In paragraph (1) of article 30, replace the words "If the seller is bound to hand" by the words "If the seller, pursuant to the contract or this Convention, hands".

[Adopted and referred to Drafting Committee: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 30 at its 14th meeting on 19 March 1980.

(ii) *Consideration*

5. At the 14th meeting, the amendment by Australia (A/CONF.97/C.1/L.101) was adopted and referred to the Drafting Committee. The UNCITRAL text of article 30 was adopted subject to this amendment.

## ARTICLE 31

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 31"*

"The seller must deliver the goods:

"(a) if a date is fixed by or determinable from the contract, on that date; or

"(b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

"(c) in any other case, within a reasonable time after the conclusion of the contract."

## B. AMENDMENTS

2. No amendments were submitted to article 31.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

3. The First Committee considered article 31 at its 14th meeting on 19 March 1980.

## (ii) Consideration

4. At its 14th meeting, the UNCITRAL text was adopted.

## ARTICLE 32

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 32*

"If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract."

## B. AMENDMENTS

2. An amendment was submitted to article 32 by Yugoslavia (A/CONF.97/C.1/L.114).

3. The amendment was to the following effect:

*Yugoslavia* (A/CONF.97/C.1/L.114):

At the end of the article add the words "or by usage".  
[Withdrawn: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 32 at its 14th meeting on 19 March 1980.

## (ii) Consideration

5. At the 14th meeting, the amendment by Yugoslavia was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 33

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 33*

"(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

"(a) are fit for the purposes for which goods of the same description would ordinarily be used;

"(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

"(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

"(d) are contained or packaged in the manner usual for such goods.

"(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity."

## B. AMENDMENTS

2. Amendments were submitted to article 33 by Federal Republic of Germany (A/CONF.97/C.1/L.73), Australia (A/CONF.97/C.1/L.74), Union of Soviet Socialist Republics (A/CONF.97/C.1/L.82), Norway (A/CONF.97/C.1/L.102), Canada (A/CONF.97/C.1/L.115) and Singapore (A/CONF.97/C.1/L.143).

3. These amendments were to the following effect:

- (i) *Canada* (A/CONF.97/C.1/L.115):

Replace article 33 by the following text:

"(1) The seller must deliver goods which are of the quantity, quality and description required by the contract [and] which are contained or packaged in the manner required by the contract.

"(2) Unless otherwise agreed, where the seller is a person who deals in goods of the description supplied under the contract, the goods do not conform with the contract unless they:

"(a) are reasonably fit for the purposes for which goods of the same description would ordinarily be used;

"(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

"(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model.

"(3) Paragraph (2) does not apply,

"(a) as regards defects specifically drawn to the buyer's attention before the contract was made;

"(b) if the buyer examined the goods before the contract was made, with respect to any defect that a reasonable examination ought to have revealed; or

"(c) in the case of a sale by sample or model, with respect to any defect that would have been apparent on reasonable examination of the sample or model.

"(4) For the purposes of paragraph (2) (a), the goods are reasonably fit for the purposes for which

goods of the same description would ordinarily be used if,

"(a) they are of such quality and in such condition as it is reasonable to expect having regard to any description applied to them, the price, and all other relevant circumstances;

"and, without limiting the generality of clause (a),

"(b) if the goods,

"(i) are such as pass without objection in the trade under the contract description,

"(ii) in the case of fungible goods, are of fair average quality within the description,

"(iii) within the variations permitted by the agreement, are of even kind, quality and quantity within each unit and among all units involved,

"(iv) are adequately contained, packaged and labeled as the nature of the goods or the agreement require,

"(v) conform to the representations or promises made on the container or label or other material, if any, accompanying the goods, and

"(vi) will remain fit or perform satisfactorily, as the case may be, for a reasonable length of time having regard to all the circumstances."

[Withdrawn: see Consideration, 5, below.]

(ii) *Union of Soviet Socialist Republics* (A/CONF.97/C.1/L.82):

Re-word the first part of *paragraph (1)*: to clearly express that goods do not conform with the contract unless they meet the specifications stated in the contract.

[Referred to an *ad hoc* working group: see Consideration, 7, below.]

(iii) *Federal Republic of Germany* (A/CONF.97/C.1/L.73):

Re-word *paragraph (1)*, sub-paragraph (b) as follows:

"(b) are fit for any particular purpose expressly or impliedly made part of the contract."

[Rejected: see Consideration, 5, below.]

(iv) *Singapore* (A/CONF.97/C.1/L.143):

1. Re-word *paragraph (1)*, sub-paragraph (c) as follows:

"(c) possess the qualities and characteristics of goods which the seller has held out to the buyer as a sample or model."

[Adopted and referred to Drafting Committee: see Consideration, 5, below.]

2. Insert in *paragraph (1)*, after sub-paragraph (c), a new sub-paragraph as follows:

"(d) in general, possess the qualities and characteristics contemplated by the contract."

[Withdrawn: see Consideration, 5, below.]

(v) *Australia* (A/CONF.97/C.1/L.74):

1. Add to *paragraph (1)*, sub-paragraph (d):

"or in a manner which, in the circumstances, would generally afford greater protection than the manner usual for such goods, or where there is no manner usual for such goods, in a manner adequate to preserve and protect the goods."

2. Add a new paragraph (3) as follows:

"(3) No difference in quantity, quality, description or packaging is to be taken into consideration if it is clearly insignificant."

[Rejected: see Consideration, 6, below.]

(vi) *Norway* (A/CONF.97/C.1/L.102):

In *paragraph (2)*, replace the words "subparagraphs (a) to (d) of paragraph (1) of this article" by the words "the preceding paragraph".

[Referred to Drafting Committee: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 33 at its 14th, 15th and 25th meetings, on 19, 20 and 27 March 1980.

### (ii) Consideration

5. At the 15th meeting, the amendments by Singapore (A/CONF.97/C.1/L.143) relating to *paragraph (1)*, sub-paragraph (d), and by Canada (A/CONF.97/C.1/L.115) were withdrawn. The amendment by Singapore relating to sub-paragraph (c) of *paragraph (1)* was adopted and referred to the Drafting Committee. The amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.73) was rejected.

6. The amendment by Australia (A/CONF.97/C.1/L.74) relating to *paragraph (1)*, sub-paragraph (d) was amended orally by restricting the proposed addition to the following words: "or where there is no manner usual for such goods, in a manner adequate to preserve and protect the goods". This amendment was adopted by 22 votes in favour and 19 against. An amendment to the amendment by Australia was proposed orally by Sweden, to the effect that the words to be added read as follows: "or where there is no manner usual for such goods, in a manner necessary to enable the buyer to take delivery of the goods". This amendment was rejected by 15 votes in favour and 18 votes against. The amendment by Australia (A/CONF.97/C.1/L.74) relating to a new *paragraph (3)* was rejected by 9 votes in favour and 27 against. The amendment by Norway (A/CONF.97/C.1/L.102) was referred to the Drafting Committee.

7. At the 15th meeting, the amendment by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.82) was referred to an *ad hoc* working group composed of the representatives of Argentina, France, Iraq, Republic of Korea, Singapore, USSR and United Kingdom.

8. At the 25th meeting, the *ad hoc* working group submitted the following proposal (A/CONF.97/C.1/L.214):

Divide *paragraph (1)* of this article into two paragraphs and modify the introductory language of the sentence so that the corresponding part of the article may read as follows:

"(1) The seller must deliver goods which are of the quantity, quality and description required by the con-

tract and which are contained or packaged in the manner required by the contract.

"(2) *Where the contract does not require otherwise*, the goods do not conform with the contract unless they:

"..... (the rest of the paragraph stays as it is)

"(3) The seller is not liable under *paragraph (2)* of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity."

9. The Committee adopted the proposal, subject to the following change: the introductory words of paragraph (2) "Where the contract does not require otherwise" were rejected by 10 votes in favour and 10 against. The corresponding phrase in the UNCITRAL text "Except where otherwise agreed" was thus retained and referred to the Drafting Committee.

10. The UNCITRAL text of article 33 was adopted subject to the amendments adopted noted in paragraphs 5, 6 and 9 above.

## ARTICLE 34

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 34

"(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

"(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period."

### B. AMENDMENTS

2. Amendments were submitted to article 34 by Turkey (A/CONF.97/C.1/L.122), Norway (A/CONF.97/C.1/L.105) and Pakistan (A/CONF.97/C.1/L.147).

3. These amendments were to the following effect:

#### *Paragraph (1).*

*Turkey (A/CONF.97/C.1/L.122):*

Replace the words "even though the lack of conformity becomes apparent only after that time" by the words "if the lack of conformity becomes apparent within the time stipulated in the contract or within the customary period of time".

[Rejected: see Consideration, 5, below.]

#### *Paragraph (2).*

(i) *Norway (A/CONF.97/C.1/L.105):*

Replace the words "paragraph (1) of this article" by the words "the preceding paragraph".

[Referred to Drafting Committee: see Consideration, 5, below.]

(ii) *Pakistan (A/CONF.97/C.1/L.147):*

Revise paragraph (2) to read:

"The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee or implied warranty that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific or reasonable period as the case may be."

[Rejected: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 34 at its 14th and 15th meetings on 19 and 20 March 1980.

### (ii) Consideration

5. At the 14th meeting, the amendment by Turkey (A/CONF.97/C.1/L.122) was rejected. The amendment by Norway (A/CONF.97/C.1/L.105) was referred to the Drafting Committee.

6. At the 15th meeting, the amendment by Pakistan (A/CONF.97/C.1/L.147) was amended orally to the effect that the expression "warranty" be replaced by the expression "term". As amended, it was rejected by 15 votes in favour and 22 against. An alternative amendment was proposed orally by Greece to the effect that the word "express" before the word "guarantee" in the UNCITRAL text be deleted. This amendment was adopted by 21 votes in favour and 19 against. The UNCITRAL text, thus amended, was adopted and referred to the Drafting Committee for consideration of an appropriate qualification of the period mentioned at the end of paragraph (2) without the use of the term "reasonable".

## ARTICLE 35

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 35

"If the seller has delivered goods before the date for delivery he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer

unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention."

#### B. AMENDMENTS

2. An amendment was submitted to article 35 by Canada (A/CONF.97/C.1/L.116).

3. This amendment was to the following effect:

*Canada (A/CONF.97/C.1/L.116):*

Insert after the words "conformity in the goods delivered" the words "or any documents relating thereto".

[Adopted: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 35 at its 14th meeting on 19 March 1980.

##### (ii) Consideration

5. At the 14th meeting, the amendment by Canada (A/CONF.97/C.1/L.116) was adopted by 20 votes in favour and 11 against. An alternative amendment was proposed orally by the United States to the effect that the words "in the goods delivered" be deleted in the expression "lack of conformity in the goods delivered". This amendment was rejected by 8 votes in favour and 9 against. The UNCITRAL text was adopted, subject to the amendment by Canada.

6. An amendment proposed orally by Mexico to the effect that the title of Section II, be altered to conform with the decision on the amendment by Canada was referred to the Drafting Committee.

#### ARTICLE 36

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 36

"(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

"(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

"(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination."

##### B. AMENDMENTS

2. Amendments were submitted to article 36 by Canada (A/CONF.97/C.1/L.118), India (A/CONF.97/

C.1/L.144), Australia (A/CONF.97/C.1/L.154) and the Netherlands (A/CONF.97/C.1/L.155).

3. These amendments were to the following effect:

##### *Paragraph (1).*

(i) *Canada (A/CONF.97/C.1/L.118):*

Replace *paragraph (1)* by the following text:

"(a) The buyer must examine the goods, or cause them to be examined, within a reasonable period of time following their delivery, and may examine them at any reasonable time and place and in any reasonable manner."

[Rejected: see Consideration, 5, below.]

(ii) *India (A/CONF.97/C.1/L.144):*

Reword *paragraph (1)* as follows:

"The buyer must examine the goods, or cause them to be examined, within a reasonable period in the circumstances."

[Withdrawn: see Consideration, 5, below.]

##### *Paragraph (2).*

*Canada (A/CONF.97/C.1/L.118):*

Substitute the following text:

"(b) Without derogating from the above principle, if the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination."

[Withdrawn: see Consideration, 6, below.]

##### *Paragraph (3).*

(i) *Australia (A/CONF.97/C.1/L.154):*

Reword *paragraph (3)* as follows:

"(3) If the goods are *redirected in transit or redispached, for purposes of resale or otherwise, without the buyer having a reasonable opportunity for examination*, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such *redirection or redispach*, examination may be deferred until after the goods have arrived at the new destination."

[Part was referred to the Drafting Committee and part was rejected: see Consideration, 6, below.]

(ii) *Netherlands (A/CONF.97/C.1/L.155):*

Replace the words "If the goods" in paragraph (3) by the words "If without [an intervening] transshipment the goods".

[Withdrawn: see Consideration, 6, below.]

(iii) *Canada (A/CONF.97/C.1/L.118):*

Substitute the following text:

"(c) If the goods are redispached by the buyer without a reasonable opportunity for examination by him, *or are resold by him in their existing packaging*, and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redispach or *resale*, examination may be deferred until after the goods have arrived at the new destination *or the second buyer has had a reasonable opportunity to examine them.*"

[Withdrawn: see Consideration, 7, below.]



## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 36 at its 14th and 16th meetings on 19th and 20th March 1980.

## (ii) Consideration

## Paragraph (1).

5. At the 14th meeting, the amendment by India (A/CONF.97/C.1/L.144) was withdrawn. The amendment by Canada (A/CONF.97/C.1/L.118) was amended orally to the effect that paragraph (1) should read: "(1) The buyer must examine the goods, or cause them to be examined, within a reasonable period of time in the circumstances, following their delivery". This amendment was rejected by 11 votes in favour and 28 against. Also rejected was an amendment proposed orally by Italy to the effect that after the word "goods" the words "or any documents relating thereto" be added, and the UNCITRAL text adopted.

## Paragraph (2).

6. At the 16th meeting, the amendment by Canada (A/CONF.97/C.1/L.118) was withdrawn, and the UNCITRAL text adopted.

## Paragraph (3).

7. At the 16th meeting, the amendments by Canada (A/CONF.97/C.1/L.118) and the Netherlands (A/CONF.97/C.1/L.155) were withdrawn. The amendment to add the words "*redirected in transit or*" and "*redirection or*" by Australia (A/CONF.97/C.1/L.154) was adopted by 20 votes in favour and 19 against, and was referred to the Drafting Committee, and the UNCITRAL text adopted subject to this amendment. The amendment by Australia to add the words "*for purposes of resale or otherwise, without the buyer having a reasonable opportunity for examination*" was rejected by 15 votes in favour and 24 against.

## ARTICLE 37

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

## "Article 37

"(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

"(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee."

## B. AMENDMENTS

2. Amendments were submitted to article 37 by Czechoslovakia (A/CONF.97/C.1/L.111), Ghana (A/CONF.97/C.1/L.124), Turkey (A/CONF.97/C.1/L.125), German Democratic Republic (A/CONF.97/C.1/L.131), United Kingdom (A/CONF.97/C.1/L.137) and Norway (A/CONF.97/C.1/L.75).

3. These amendments were to the following effect:

## Paragraphs (1) and (2).

(i) Ghana (A/CONF.97/C.1/L.124):

1. Delete article 37, paragraph (1), and the words "In any event" at the beginning of article 37, paragraph (2).

2. Alternatively, article 37 should be revised to read as follows:

"(1) The buyer must give notice to the seller specifying the nature of a lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

"(2) If the buyer fails to give the notice referred to in paragraph (1) above, such failure shall be regarded as a failure to mitigate loss and the party in breach may rely on article 73 to reduce the damages payable by him.

"(3) [Same text as the present article 37, paragraph 2.]

[1. Rejected: see Consideration, 5, below.]

[2. Withdrawn: see Consideration, 5, below.]

## Paragraph (1).

(ii) Czechoslovakia (A/CONF.97/C.1/L.111):

Revise article 37 to read as follows:

"(1) The buyer is not entitled to exercise his right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

[Rejected: see Consideration, 10, below.]

(iii) Turkey (A/CONF.97/C.1/L.125):

Insert at the beginning of paragraph (1) the words "Unless otherwise provided in the contract of sale".

[Rejected: see Consideration, 10, below.]

## Paragraph (2).

(iv) Czechoslovakia (A/CONF.97/C.1/L.111):

Revise article 37 to read as follows:

"(2) In any event, the buyer is not entitled to exercise his right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of one year from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee."

[Rejected: see Consideration, 11, below.]

(v) German Democratic Republic (A/CONF.97/C.1/L.131):

Revise paragraph (2) of article 37 to read as follows:

"(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not

give the seller notice thereof at the latest within a period of two years from the date of delivery, unless such time-limit is inconsistent with a contractual period of guarantee."

[Rejected: see Consideration, 11, below.]

(vi) *Turkey (A/CONF.97/C.1/L.125):*

Replace in paragraph (2) the words "a period of two years" by the words "a period of one year".

[Rejected: see Consideration, 11, below.]

(vii) *United Kingdom (A/CONF.97/C.1/L.137):*

Paragraph (2) of article 37 should be deleted.

[Rejected: see Consideration, 11, below.]

*New paragraph (3).*

(viii) *Norway (A/CONF.97/C.1/L.75):*

Add the following as a new paragraph (3):

"(3) However, in cases where a commercial buyer has sold the goods to a sub-purchaser, and the seller at the time of the conclusion of his contract knew or ought to have known of the possibility of such a further sale, the period provided in paragraph (2) shall not expire before a reasonable time after the buyer has received notice from the sub-purchaser in accordance with the provisions of this article, if at that time the period would otherwise have expired or be near to expire."

[Withdrawn: see Consideration, 12, below.]

(ix) *Czechoslovakia (A/CONF.97/C.1/L.111):*

The addition of the following new paragraph (3) may be considered:

"(3) Where the right to rely on a lack of conformity cannot be exercised by the buyer in accordance with paragraphs (1) or (2), it shall not be recognized or enforced in any legal proceedings, if the expiration of the period of time is invoked by the seller."

[Withdrawn: see Consideration, 12, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered this article at its 16th, 17th and 21st meetings on 20th, 21st and 25th March 1980.

### (ii) Consideration

#### *Paragraphs (1) and (2).*

5. At the 16th meeting, the first alternative in the amendment by Ghana (A/CONF.97/C.1/L.124) was rejected. The second alternative was withdrawn after an indicative vote of 13 in favour and 29 against.

6. At the 17th meeting, by 31 votes in favour and 4 against, it was decided to adjourn the debate on articles 37 and 38.

7. At the 21st meeting, the Committee considered the following joint proposal:

*Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden (A/CONF.97/C.1/L.204):*

#### *Paragraph (1).*

"(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not notify the seller of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it."

#### *Paragraph (2).*

Remains unchanged.

#### *New paragraph (3).*

Add a new paragraph (3)\* to read as follows:

"(3) Notwithstanding the provisions of paragraph (1) of article 37, paragraph (2) of article 39 and paragraph (3) of article 40, the buyer may declare the price reduced in accordance with article 46 or claim damages except for loss of profit if he has a reasonable excuse for his failure to give the required notice. However, the seller shall be entitled to set off, in any claim by the buyer pursuant to this paragraph any foreseeable financial loss caused him by the buyer's failure to give the notice."

8. It was agreed by the sponsors of this joint proposal, during its consideration, that paragraph (1) of the proposal should be replaced by paragraph (1) of the UNCITRAL text, and that the joint proposal should therefore consist only of the addition to the UNCITRAL text of the new paragraph (3).

9. An oral amendment was submitted to paragraph (3) deleting the last sentence therein. The joint proposal as unamended was rejected by 18 votes in favour and 22 against. The joint proposal as amended was adopted by 21 votes in favour and 19 against.

#### *Paragraph (1).*

10. At the 21st meeting, the amendments by Czechoslovakia (A/CONF.97/C.1/L.111) and Turkey (A/CONF.97/C.1/L.125) were rejected.

#### *Paragraph (2).*

11. At the 21st meeting, the amendments by Czechoslovakia (A/CONF.97/C.1/L.111), the German Democratic Republic (A/CONF.97/C.1/L.131), Turkey (A/CONF.97/C.1/L.125) and the United Kingdom (A/CONF.97/C.1/L.137) were rejected. The amendment orally proposed by France to add the phrase "or with the nature of the goods or of the defect" at the end of the UNCITRAL text was rejected.

#### *New paragraph (3).*

12. At the 21st meeting, the amendments by Norway (A/CONF.97/C.1/L.75) and Czechoslovakia (A/CONF.97/C.1/L.111) were withdrawn.

13. The UNCITRAL text of article 37 was adopted. It was decided that new paragraph (3) of the joint proposal which had, as orally amended, been adopted (see 9 above) should form a separate article to be placed after article 40.

\* This paragraph could also be separated as a new article 40 bis.

## ARTICLE 38

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 38"*

"The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."

## B. AMENDMENTS

2. An amendment was submitted to article 38 by the German Democratic Republic (A/CONF.97/C.1/L.132).

3. The amendment was to the following effect:

*German Democratic Republic* (A/CONF.97/C.1/L.132):

This article should be deleted.

[Withdrawn: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 38 at its 17th and 21st meetings on 21 and 25 March 1980.

(ii) *Consideration*

5. At the 21st meeting, the amendment by the German Democratic Republic (A/CONF.97/C.1/L.132) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 39

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 39"*

"(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

"(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim."

## B. AMENDMENTS

2. Amendments were submitted to article 39 by Finland (A/CONF.97/C.1/L.133), Singapore (A/CONF.97/

C.1/L.145), Nigeria (A/CONF.97/C.1/L.159), Norway (A/CONF.97/C.1/L.127), Norway (A/CONF.97/C.1/L.77) and Canada (A/CONF.97/C.1/L.128).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *Finland* (A/CONF.97/C.1/L.133):

Amend the drafting of articles 39 and 40 by replacing the expression "industrial or intellectual property" by the words "industrial property or other intellectual property".

[Withdrawn: see Consideration, 6, below.]

(ii) *Singapore* (A/CONF.97/C.1/L.145):

Revise paragraph (1) of article 39 to read as follows: "(1) Subject to the provisions of article 40, the seller must deliver goods free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim."

[Withdrawn: see Consideration, 6, below.]

(iii) *Nigeria* (A/CONF.97/C.1/L.159):

Paragraph (1) of article 39 and paragraph (1) of article 40 should be remitted to the Drafting Committee with a view to merging both articles into one.

[Withdrawn: see Consideration, 6, below.]

*Paragraph (2).*

(iv) *Norway* (A/CONF.97/C.1/L.127):

In paragraph (2) of article 39, replace the words "the buyer does not have the right" by the words "the buyer loses the right".

[Referred to the Drafting Committee: see Consideration, 7, below.]

*New paragraph (3).*

(v) *Norway* (A/CONF.97/C.1/L.77):

Add the following as a new paragraph (3):

"(3) If the seller fails to perform any of his obligations under this article, the goods are deemed not to conform with the contract for the purposes of applying the provisions of articles 41 to 47."

[Rejected: see Consideration, 8, below.]

*New paragraphs (3) and (4).*

(vi) *Canada* (A/CONF.97/C.1/L.128):

Add new paragraphs (3) and (4) as follows:

"(3) Where the buyer gives notice to the seller of such a right or claim of a third party the seller shall have a reasonable opportunity:

"(a) to discharge or settle such right or claim or to provide satisfactory proof that such claim is ill-founded; or

"(b) to offer the buyer a satisfactory form of indemnity against any loss he may incur by reason of such claim, if the delay involved will not cause serious prejudice or inconvenience to the buyer.

"(4) A seller who meets the requirements of paragraph (3) (a) or (b) shall not be deemed to have committed a fundamental breach of contract."

[Withdrawn: see Consideration, 9, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered this article at its 17th meeting on 21 March 1980.

## (ii) Consideration

## Paragraph (1).

5. At the 17th meeting, the Committee, by 15 votes in favour and 11 against, adopted and referred to the Drafting Committee, an oral amendment by Mexico that a sentence on the following lines should be added to paragraph (1):

"The rights or claims based on intellectual or other industrial property are governed by article 40."

6. The amendments by Finland (A/CONF.97/C.1/L.133), Singapore (A/CONF.97/C.1/L.145) and Nigeria (A/CONF.97/C.1/L.159) were withdrawn, and the UNCITRAL text adopted subject to the amendment set forth in paragraph 5 above.

## Paragraph (2).

7. At the 17th meeting, the amendment by Norway (A/CONF.97/C.1/L.127) was referred to the Drafting Committee with a view to harmonizing the similar language used in this paragraph, in article 37, paragraph (2), and in article 40, paragraph (3). The UNCITRAL text was adopted.

## New paragraph (3).

8. At the 17th meeting, the amendment by Norway (A/CONF.97/C.1/L.77) was rejected.

## New paragraphs (3) and (4).

9. At the 17th meeting, the amendment by Canada (A/CONF.97/C.1/L.128) was withdrawn.

## ARTICLE 40

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

## "Article 40

"(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

"(a) under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

"(b) in any other case under the law of the State where the buyer has his place of business.

"(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

"(a) at the time of the conclusion of the contract the

buyer knew or could not have been unaware of the right or claim; or

"(b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

"(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim."

## B. AMENDMENTS

2. Amendments were submitted to article 40 by Finland (A/CONF.97/C.1/L.133), Nigeria (A/CONF.97/C.1/L.159), German Democratic Republic (A/CONF.97/C.1/L.134) and the Federal Republic of Germany (A/CONF.97/C.1/L.129).

3. These amendments were to the following effect:

## Article as a whole.

Finland (A/CONF.97/C.1/L.133):

Amend the *drafting* of articles 39 and 40 by substituting the expression "industrial or intellectual property" by the words "industrial property or other intellectual property".

[Withdrawn by Finland but reintroduced by Argentina and adopted: see Consideration, 5, below.]

## Paragraph (1).

Nigeria (A/CONF.97/C.1/L.159):

Paragraph (1) of article 39 and paragraph (1) of article 40 should be remitted to the Drafting Committee with a view to merging both articles into one.

[Withdrawn: see Consideration, 6, below.]

## Article 40, paragraph (2).

There were no amendments.

[UNCITRAL text adopted: see Consideration, 7, below.]

## Article 40, paragraph (3).

German Democratic Republic (A/CONF.97/C.1/L.134):  
Revise paragraph (3) of article 40 to read as follows:

"(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim, *at the latest within two years after the date of delivery.*"

[Rejected: see Consideration, 8, below.]

## New article 40 bis.

Federal Republic of Germany (A/CONF.97/C.1/L.129):

After article 40, add a new article 40 *bis* reading as follows:

"The seller is not entitled to rely on the provisions of article 39, paragraph (2), and of article 40, paragraph (3), if he already knew of the right or claim of the third party and the nature thereof."

[Adjourn consideration until after consideration of article 38: see Consideration, 9, below.]

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered article 40 at its 17th and 22nd meetings on 21st and 25th March 1980 respectively.

#### (ii) Consideration

##### *Article as a whole.*

5. At the 17th meeting, the amendment by Finland (A/CONF.97/C.1/L.133) was withdrawn but was re-introduced by Argentina and adopted by a vote of 29 in favour and 3 against, and the UNCITRAL text adopted subject to the amendment.

##### *Paragraph (1).*

6. At the 17th meeting, the amendment by Nigeria (A/CONF.97/C.1/L.159) was withdrawn, and the UNCITRAL text adopted.

##### *Paragraph (2).*

7. At the 17th meeting, the UNCITRAL text was adopted.

##### *Paragraph (3).*

8. At the 17th meeting, the amendment by the German Democratic Republic (A/CONF.97/C.1/L.134) was rejected by a vote of 5 in favour and 11 against, and the UNCITRAL text adopted.

##### *New article 40 bis.*

9. At the 17th meeting the Committee decided to postpone consideration of the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.129) until after consideration of article 38. At the 22nd meeting, the amendment was adopted by a vote of 19 in favour and 4 against, and the UNCITRAL text adopted subject to the amendment.

### ARTICLE 41

#### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### *"Article 41*

"(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

"(a) exercise the rights provided in articles 42 to 48;

"(b) claim damages as provided in articles 70 to 73.

"(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

"(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract."

#### B. AMENDMENTS

2. No amendments were submitted to this article.

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

3. The First Committee considered article 41 at its 17th meeting on 21 March 1980.

#### (ii) Consideration

4. At the 17th meeting, the UNCITRAL text was adopted.

### ARTICLE 42

#### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### *"Article 42*

"(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

"(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter."

#### B. AMENDMENTS

2. Amendments were submitted to article 42 by the United States of America (A/CONF.97/C.1/L.180), Norway (A/CONF.97/C.1/L.79), Germany, Federal Republic of (A/CONF.97/C.1/L.135), Denmark (A/CONF.97/C.1/L.138), Finland (A/CONF.97/C.1/L.139), Sweden (A/CONF.97/C.1/L.173), Joint Proposal of Finland, Germany, Federal Republic of, Norway and Sweden (A/CONF.97/C.1/L.199) and Japan (A/CONF.97/C.1/L.161).

3. The amendments were to the following effect:

##### *Paragraph (1).*

(i) *Norway* (A/CONF.97/C.1/L.79):

(1) The buyer may require performance by the seller [of his obligations] unless the buyer has resorted to a remedy which is inconsistent with such requirement.

[Withdrawn: see Consideration, 5, below.]

##### *New paragraph (1) (bis).*

(ii) *United States of America* (A/CONF.97/C.1/L.180): After paragraph (1) of article 42 add a new paragraph (1 bis) to read as follows:

"(1 bis) The buyer may not require performance by the seller if the buyer can purchase substitute goods without substantial additional expense or inconvenience."

[Rejected: see Consideration, 6, below.]

*Paragraph (2).*(iii) *Norway (A/CONF.97/C.1/L.79):*

"(2) Where the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is not reasonably practicable for the seller, or to deliver substitute goods if the lack of conformity constitutes a fundamental breach.

"(3) Any request for repair or substitute goods may be made only in conjunction with notice given under Article 37 or within a reasonable time thereafter."

[Withdrawn in favour of joint proposal of Finland, Germany, Federal Republic of, Norway and Sweden (A/CONF.97/C.1/L.199): see Consideration, 7, below.]

(iv) *Federal Republic of Germany (A/CONF.97/C.1/L.135):*

Revise paragraph (2) of article 42 to read as follows:

"(2) If the goods do not conform with the contract, the buyer may require the seller to remedy a lack of conformity in the goods by repairing them or to deliver substitute goods unless it is reasonably not practicable for the seller to repair the goods or to deliver substitute goods. Any request to repair the goods or to deliver substitute goods may be made only in conjunction with notice given under article 37 or within a reasonable time thereafter."

[Rejected: see Consideration, 8, below.]

(v) *Denmark (A/CONF.97/C.1/L.138):*

Replace paragraph (2) of article 42 by the following text of paragraphs (2) and (3):

"(2) Where the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair unless this is not reasonably practicable for the seller, or, if the lack of conformity constitutes a fundamental breach, to deliver substitute goods.

"(3) Any request for repair or substitute goods may be made only in conjunction with notice given under article 37 or within a reasonable time thereafter."

[Withdrawn in favour of amendment of Finland: see Consideration, 7, below.]

(vi) *Finland (A/CONF.97/C.1/L.139):*

Replace paragraph (2) of article 42 by the following text of paragraphs (2) and (3):

"(2) Where the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair if such a repair does not cause the seller unreasonable costs or harm. If the lack of conformity constitutes a fundamental breach, the buyer may require the seller to deliver substitute goods.

"(3) Any request for repair or substitute goods may be made only in conjunction with notice given under article 37 or within a reasonable time thereafter."

[Withdrawn in favour of joint proposal of Finland, Germany, Federal Republic of, Norway and Sweden: see Consideration, 7, below.]

(vii) *Sweden (A/CONF.97/C.1/L.173):*

"(2) The buyer may require the seller to remedy a lack of conformity in the goods by repairing them only if the seller can do so without unreasonable inconvenience or unreasonable expense.

"(3) The buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and it is reasonably practicable for the seller to supply substitute goods."

[Withdrawn in favour of joint proposal of Finland, Germany, Federal Republic of, Norway and Sweden: see Consideration, 7, below.]

*New paragraph (3): addendum to UNCITRAL text paragraph (2).*(viii) *Joint Proposal of Finland, Germany, Federal Republic of, Norway and Sweden (A/CONF.97/C.1/L.199):*

"(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair unless this is not reasonably practicable for the seller. A request for repair must be made either in conjunction with notice given under article 37 or within a reasonable time thereafter."

[Adopted as jointly modified orally by France, the Union of Soviet Socialist Republics and the United States of America: see Consideration, 9, below.]

*New paragraph (2 bis).*(ix) *United States of America (A/CONF.97/C.1/L.180):*  
After paragraph (2) of article 42 add a new paragraph (2 bis) to read as follows:

"(2 bis) The buyer loses the right to require performance unless he requests and institutes legal action for it within a reasonable time and before changes in market or other conditions make the exercise of the right unfair or oppressive."

[Rejected: see Consideration, 10, below.]

*New paragraph (4).*(x) *Japan (A/CONF.97/C.1/L.161):*

Add the following paragraph to the proposal in A/CONF.97/C.1/L.139:

"(4) If the buyer has required to remedy the lack of conformity in accordance with paragraphs (2) and (3) of this article, the buyer may not declare the contract avoided unless the seller has declared that he will not comply with the request or a period of time of reasonable length has passed after that request."

[Withdrawn: see Consideration, 11, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 42 at its 18th, 19th and 23rd meetings on 21st, 24th and 25th March 1980 respectively.

(ii) *Consideration**Paragraph (1).*

5. At the 18th meeting, the amendment by Norway (A/CONF.97/C.1/L.79) was withdrawn.

*New paragraph (1) (bis).*

6. At the 18th meeting, the amendment by the United States of America (A/CONF.97/C.1/L.180) was rejected by 7 votes in favour and 34 against.

*Paragraph (2).*

7. At the 18th meeting, the amendment by Denmark (A/CONF.97/C.1/L.138) was withdrawn in favour of the amendment by Finland (A/CONF.97/C.1/L.139). An *ad hoc* working group was established composed of the representatives of Finland, Germany, Federal Republic of, Norway and Sweden to prepare a common text. The amendments by Norway (A/CONF.97/C.1/L.79), Finland (A/CONF.97/C.1/L.139) and Sweden (A/CONF.97/C.1/L.173) were withdrawn.

8. At the 19th meeting, the amendment by Germany, Federal Republic of (A/CONF.97/C.1/L.135) was rejected by 17 votes in favour and 17 against, and the UNCITRAL text adopted.

*New paragraph (3): addendum to UNCITRAL text paragraph (2).*

9. At the 19th meeting, the joint proposal of Finland, Germany, Federal Republic of, Norway and Sweden (A/CONF.97/C.1/L.199) was jointly modified orally by France, the Union of Soviet Socialist Republics and the United States of America, by the addition of the following words: "unless this is not reasonable taking account of all the circumstances." The joint proposal, as modified, was adopted by 31 votes in favour, with no votes against and referred to the Drafting Committee and the UNCITRAL text adopted.

*New paragraph (2 bis).*

10. At the 19th meeting, the amendment by the United States of America (A/CONF.97/C.1/L.180) was rejected.

*New paragraph (4).*

11. At the 19th meeting, the amendment by Japan (A/CONF.97/C.1/L.161) was postponed until consideration of articles 43, 44 and 45. At the 23rd meeting the amendment, as modified orally, was withdrawn.

## ARTICLE 43

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 43*

"(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

"(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance."

## B. AMENDMENTS

2. Amendments were submitted to article 43 by Turkey (A/CONF.97/C.1/L.136), the United Kingdom (A/CONF.97/C.1/L.156), the United States of America (A/CONF.97/C.1/L.179) and the Netherlands (A/CONF.97/C.1/L.163).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *Turkey* (A/CONF.97/C.1/L.136) (for the English version only):

Replace the words "reasonable length" in paragraph (1) of article 43 by the words "reasonable time".

[Referred to the Drafting Committee: see Consideration, 5, below.]

(ii) *United Kingdom* (A/CONF.97/C.1/L.156):

Amend paragraph (1) so that it reads as follows:

"The buyer may give notice to the seller of an additional period of time of reasonable length for performance by the seller of his obligations."

[Rejected as orally amended: see Consideration, 6, below.]

(iii) *United States* (A/CONF.97/C.1/L.179):

Revise paragraph (1) of article 43 to read as follows:

"(1) When the buyer has failed to deliver some or all of the goods, the buyer may fix an additional period of time of reasonable length for the delivery of the missing goods."

[Withdrawn: see Consideration, 6, below.]

*Paragraph (2).*

(iv) *Netherlands* (A/CONF.97/C.1/L.163):

Revise the first sentence of paragraph (2) of article 43 to read as follows:

"(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract which is inconsistent with the fixation of the additional period for performance by the seller."

[Withdrawn: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 19th and 20th meetings on 24 March 1980.

(ii) *Consideration*

5. At the 19th meeting, the amendment by Turkey (A/CONF.97/C.1/L.136) was referred to the Drafting Committee.

6. At the 20th meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.156) was modified orally by adding to that amendment a sentence to the effect that a notice by the buyer under paragraph (1) of this article is not effective unless received by the seller. The amendment by the United Kingdom was rejected by 2 votes in favour and a greater number against, and the proposed



additional sentence was rejected by 10 votes in favour and 27 votes against. The amendments by the Netherlands (A/CONF.97/C.1/L.163) and the United States (A/CONF.97/C.1/L.179) were withdrawn, and the UNCITRAL text adopted.

## ARTICLE 44

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 44"

"(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

"(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

"(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

"(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer."

2. Amendments were submitted to article 44 by Federal Republic of Germany (A/CONF.97/C.1/L.140), Singapore (A/CONF.97/C.1/L.148), Bulgaria (A/CONF.97/C.1/L.160), Japan (A/CONF.97/C.1/L.164), United States of America (A/CONF.97/C.1/L.203), Norway (A/CONF.97/C.1/L.80), Finland (A/CONF.97/C.1/L.141), Norway (A/CONF.97/C.1/L.142), Turkey (A/CONF.97/C.1/L.146) and Pakistan (A/CONF.97/C.1/L.198).

3. These amendments were to the following effect:

#### Paragraph (1).

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.140):

In paragraph (1) of article 44, delete the words "Unless the buyer has declared the contract avoided in accordance with article 45".

[Withdrawn in favour of joint proposal: see Consideration, 8, below.]

(ii) *Singapore* (A/CONF.97/C.1/L.148):

Replace the words "without such delay as will amount

to a fundamental breach of contract" in the first sentence of paragraph (1) by the words "without unreasonable delay".

[Withdrawn in favour of joint proposal: see Consideration, 10, below.]

(iii) *Bulgaria* (A/CONF.97/C.1/L.160):

Delete in paragraph (1) of article 44 the words:

"Unless the buyer has declared the contract avoided in accordance with article 45".

[Withdrawn in favour of joint proposal: see Consideration, 8, below.]

(iv) *Japan* (A/CONF.97/C.1/L.164):

Delete the following words at the beginning of paragraph (1):

"Unless the buyer has declared the contract avoided in accordance with article 45".

[Withdrawn: see Consideration, 10, below.]

(v) *United States* (A/CONF.97/C.1/L.203):

Revise the first sentence of paragraph (1) of article 44 to read as follows:

"(1) Unless the buyer has declared the contract avoided in accordance with article 45 and regardless of any right of the buyer under article 42, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer."

Alternatively, the first sentence of paragraph (1) may commence as follows:

"(1) Unless the buyer has declared the contract avoided in accordance with article 45, the seller may, even after the date for delivery and regardless of any right of the buyer under article 42, remedy at his own expense . . ."

[Rejected: see Consideration, 10, below.]

#### Paragraph (2).

(vi) *Norway* (A/CONF.97/C.1/L.80):

Add the following in paragraph (2) at the end of the first full stop sentence:

"or, if no time is indicated, within a reasonable time after the buyer has given notice under article 37."

[Rejected: see Consideration, 11, below.]

(vii) *Finland* (A/CONF.97/C.1/L.141):

Revise paragraph (2) of article 44 to read as follows:

"(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time the seller may perform within the time indicated in his request, or, if no time is indicated, within a reasonable time after the buyer has given notice under article 37. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller."

[Rejected: see Consideration, 11, below.]



(viii) *Federal Republic of Germany* (A/CONF.97/C.1/L.140):

Revise paragraph (2) of article 44 to read as follows:

"(2) *Unless the buyer has fixed an additional period of time in accordance with paragraph (1) of article 43, the seller may request the buyer to make known whether he will accept performance within the time indicated in the request. If the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.*"

[Withdrawn in favour of joint proposal: see Consideration, 11, below.]

(ix) *Japan* (A/CONF.97/C.1/L.164):

Delete the last sentence of paragraph (2) and add a new paragraph as follows:

"(2 *bis*) The buyer may not resort to any remedy which is inconsistent with performance by the seller during the time necessary for the seller to make such a request, if the seller can do so in accordance with paragraph (1) of this article, and during the time indicated in that request if the seller has requested the buyer in accordance with paragraph (2) of this article."

[Withdrawn: see Consideration, 11, below.]

*Paragraphs (2), (3) and (4).*

(x) *Bulgaria* (A/CONF.97/C.1/L.160):

Delete paragraphs (2), (3) and (4) of article 44.

[Withdrawn in favour of joint proposal: see Consideration, 12, below.]

(xi) *Turkey* (A/CONF.97/C.1/L.146):

Delete paragraphs (2), (3) and (4).

[Rejected: see Consideration, 12, below.]

(xii) *Pakistan* (A/CONF.97/C.1/L.198):

Paragraphs (2), (3) and (4) of article 44 may be deleted.

[Rejected: see Consideration, 12, below.]

(xiii) *Norway* (A/CONF.97/C.1/L.142):

Paragraphs (2), (3) and (4) should be transferred to a new article 44 *bis*, to be given the sub-title "Interpellation".

[Referred to Drafting Committee: see Consideration, 12, below.]

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered this article at its 20th and 22nd meetings on 24 and 25 March 1980.

#### (ii) Consideration

5. At the 20th meeting, a motion for the adjournment of the debate on this article was adopted by 19 votes in favour and 15 against.

#### *Paragraph (1).*

6. At the 22nd meeting, the Committee considered the following joint proposal:

Bulgaria, Canada, German Democratic Republic, Germany, Federal Republic of, Netherlands, Norway, United States of America (A/CONF.97/C.1/L.213).

#### *Alternative I:*

##### *Paragraph (1).*

Revise paragraph (1) of article 44 to read as follows:

2 "(1) *The seller may remedy at his own expense the failure to perform his obligations only if this is consistent with the reasonable interests of the buyer, does not cause him unreasonable inconvenience and the resulting delay does not amount to a fundamental breach of contract. The buyer retains any right to claim damages as provided for in this Convention.*"

#### *Alternative II:*

##### *Paragraph (1).*

Revise paragraphs (1) and (2) of article 44 to read as follows:

"(1) *Subject to article 45 the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.*

"(2) *The seller may request the buyer to make known whether he will accept a remedy of his failure to perform, unless the buyer has fixed an additional period of time in accordance with article 43 or declared the contract avoided in accordance with article 45. If the buyer does not reply within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.*"

#### *Alternative III:*

At the end of article 45 (1) (a), add the following words:

"... and the seller does not remedy the failure in accordance with article 44."

7. It was noted during the consideration of this joint proposal that Alternative III in the proposal formed part of Alternative I.

8. At the 22nd meeting, the amendments of the Federal Republic of Germany (A/CONF.97/C.1/L.140) and Bulgaria (A/CONF.97/C.1/L.160) were withdrawn in favour of the joint proposal (A/CONF.97/C.1/L.213).

9. At the 22nd meeting, Alternative I of the joint proposal (A/CONF.97/C.1/L.213) was rejected by 7 votes in favour and 17 against. Paragraph (1) of Alternative II of the joint proposal (A/CONF.97/C.1/L.213) was adopted in replacement of paragraph (1) of the UNCITRAL text by 19 votes in favour and 7 against. Paragraph (2) of Alternative II of the joint proposal (A/CONF.97/C.1/L.213) was rejected by 10 votes in favour and 16 votes against.

10. At the 22nd meeting, the amendment of Singapore (A/CONF.97/C.1/L.148) was withdrawn in favour of the joint proposal. The amendment of Japan (A/CONF.97/C.1/L.164) was withdrawn, and the amendment of the United States (A/CONF.97/C.1/L.203) was rejected by 10 votes in favour and 10 votes against.

*Paragraph (2).*

11. At the 22nd meeting, the amendment of the Federal Republic of Germany (A/CONF.97/C.1/L.140) was withdrawn in favour of the joint proposal (A/CONF.97/C.1/L.213). The amendments of Norway (A/CONF.97/C.1/L.80) and Finland (A/C.1/L.141) were orally amended by the deletion of the words "under article 37" from each of the amendments. The amendments, as orally amended, were rejected by 7 votes in favour and 24 against. The amendment by Japan (A/CONF.97/C.1/L.164) was withdrawn.

*Paragraphs (2), (3) and (4).*

12. At the 22nd meeting the amendment by Bulgaria (A/CONF.97/C.1/L.160) was withdrawn in favour of the joint proposal (A/CONF.97/C.1/L.213), the amendments by Turkey (A/CONF.97/C.1/L.146) and Pakistan (A/CONF.97/C.1/L.198) were rejected, and the amendment by Norway (A/CONF.97/C.1/L.142) was referred to the Drafting Committee.

13. The text of paragraph (1) of Alternative II of the joint proposal (A/CONF.97/C.1/L.213) and paragraphs (2), (3) and (4) of the UNCITRAL text were adopted.

## ARTICLE 45

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 45*

*"(1) The buyer may declare the contract avoided:*

*"(a) if the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or*

*"(b) if the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed.*

*"(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:*

*"(a) in respect of late delivery, after he has become aware that delivery has been made; or*

*"(b) in respect of any breach other than late delivery, after the knew or ought to have known of such breach, or after the expiration of any additional period*

*of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period."*

### B. AMENDMENTS

2. Amendments were submitted to article 45 by the Netherlands (A/CONF.97/C.1/L.165), Canada (A/CONF.97/C.1/L.150), Norway (A/CONF.97/C.1/L.151), Norway (A/CONF.97/C.1/L.162), Japan (A/CONF.97/C.1/L.161), Australia (A/CONF.97/C.1/L.152), Singapore (A/CONF.97/C.1/L.149) and the Federal Republic of Germany (A/CONF.97/C.1/L.153/Corr.1).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *Netherlands (A/CONF.97/C.1/L.165):*

Revise subparagraph (b) of paragraph (1) to read as follows:

*"(b) if the seller has not, within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, performed his obligations, or has declared that he will not do so within the period so fixed."*

[Rejected as orally amended: see Consideration, 5, below.]

(ii) *Canada (A/CONF.97/C.1/L.150):*

Revise article 45, paragraph (1) (b) to read as follows:

*"(b) if the seller has not delivered the goods or performed any other material obligation within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or has declared that he will not deliver within the period so fixed."*

[Withdrawn: see Consideration, 5, below.]

(iii) *Norway (A/CONF.97/C.1/L.151):*

Revise subparagraph (b) of paragraph (1) of article 45 to begin as follows:

*"(b) in case of non-delivery, if the seller does not deliver"*

[Referred to Drafting Committee: see Consideration, 6, below.]

(iv) *Norway (A/CONF.97/C.1/L.162):*

It should be made clearer that the provision of paragraph (1) (b) does not apply to cases where the buyer has fixed an additional period for repair or new delivery of substitute goods. The following redraft of subparagraph (b) is suggested (a mere drafting amendment):

*"(b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with article 43 [paragraph 1] or declares that he will not deliver within the period so fixed."*

[Referred to Drafting Committee: see Consideration, 6, below.]

*New paragraph (1) (bis).*

(v) *Japan (A/CONF.97/C.1/L.161):*

Add a new paragraph to article 45 as follows:

"(1) (bis) If the buyer has required the seller to remedy the lack of conformity in accordance with paragraphs (2) and (3) of article 42, he may not declare the contract avoided unless the seller has declared that he will not comply with the request or a period of time of reasonable length has passed after that request."  
[Withdrawn: see Consideration, 7, below.]

*Paragraph (2).*

(vi) *Australia (A/CONF.97/C.1/L.152):*

1. Delete from paragraph (2) the words:  
"in cases where the seller has made delivery".
2. Insert in subparagraph (2) (a), after the word "aware", the following words:

*"or ought to have become aware".*

[Paragraph (1) withdrawn. Paragraph (2) rejected; see Consideration, 8, below.]

(vii) *Singapore (A/CONF.97/C.1/L.149):*

Revise paragraph (2) of article 45 to read as follows:

"(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so:

*"(a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;*

*"(b) in respect of any breach other than late delivery, within a reasonable time;*

*"(i) after he knew or ought to have known of such breach; or*

*"(ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43; or*

*"(iii) after the seller has declared that he will not perform his obligations within such an additional period."*

[Referred to Drafting Committee: see Consideration, 9, below.]

(viii) *Federal Republic of Germany (A/CONF.97/C.1/L.153/Corr.1):*

At the end of sub-paragraph (b) of paragraph (2) of article 45, add the following words:

*" , or after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 44, or after the buyer has declared that he will not accept performance."*

[Referred to Drafting Committee: see Consideration, 9, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 45 at its 22nd and 23rd meetings on 25th and 26th March respectively.

### (ii) Consideration

#### *Paragraph (1).*

5. At the 22nd meeting, the amendment by the Netherlands (A/CONF.97/C.1/L.165) was amended

orally by Canada by the insertion of the word "important" immediately before the word "obligations". The amendment by Canada (A/CONF.97/C.1/L.150) was withdrawn in favour of the amendment by the Netherlands as modified orally by Canada. The amendment by the Netherlands, as orally amended, was rejected by 9 votes in favour and 31 against.

6. At the 23rd meeting, the two amendments by Norway (A/CONF.97/C.1/L.151 and A/CONF.97/C.1/L.162) were referred to the Drafting Committee, and the UNCITRAL text was adopted.

#### *New paragraph (1) (bis).*

7. At the 23rd meeting, the amendment by Japan (A/CONF.97/C.1/L.161), as modified orally, was withdrawn.

#### *Paragraph (2).*

8. At the 23rd meeting, part of the amendment by Australia (A/CONF.97/C.1/L.152) which dealt with the deletion from paragraph (2) of the words "in cases where the seller has made delivery" was withdrawn. The other part of the amendment "to insert in subparagraph (2) (a), after the word "aware", the following words: "or ought to have become aware" was rejected.

9. The amendments by Singapore (A/CONF.97/C.1/L.149) and the Federal Republic of Germany (A/CONF.97/C.1/L.153/Corr.1) were referred to the Drafting Committee, and the UNCITRAL text was adopted.

## ARTICLE 46

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### *"Article 46*

*"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect."*

### B. AMENDMENTS

2. Amendments were submitted to article 46 by the Federal Republic of Germany (A/CONF.97/C.1/L.166), Norway (A/CONF.97/C.1/L.167), Argentina, Spain, Portugal (A/CONF.97/C.1/L.168), the United Kingdom (A/CONF.97/C.1/L.169), Finland (A/CONF.97/C.1/L.170) and the United States of America (A/CONF.97/C.1/L.181/Corr.1).

3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.166):

Revise the second sentence of article 46 to read as follows:

"However, if the seller remedies any failure to perform his obligations in accordance with article 35 or article 44 or if the buyer refuses to accept performance by the seller in accordance with article 35 or article 44, the buyer's declaration of reduction of the price is of no effect."

[Adopted: see Consideration, 5, below.]

(ii) *Norway* (A/CONF.97/C.1/L.167):

1. Revise the first sentence of article 46 to read as follows:

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value of goods conforming with the contract [at the time of delivery] has been diminished because of the non-conformity."

[Adopted: see Consideration, 6, below.]

(iii) *Argentina, Spain, Portugal* (A/CONF.97/C.1/L.168):

Add at the end of the first sentence the words:

"at the buyer's place of business or habitual residence."

[Rejected: see Consideration, 7, below.]

(iv) *United Kingdom* (A/CONF.97/C.1/L.169):

Revise article 46 to read as follows:

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer is entitled to reduce the price in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 44 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer may not reduce the price."

[Referred to Drafting Committee: see Consideration, 9, below.]

(v) *Finland* (A/CONF.97/C.1/L.170):

Revise the first sentence of article 46 to read as follows:

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time."

[Adopted: see Consideration, 6, below.]

(vi) *United States of America* (A/CONF.97/C.1/L.181/Corr.1):

Revise the first sentence of article 46 to read as follows:

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced to the value that such non-conforming goods would have had at the conclusion of the contract."

[Withdrawn: see Consideration, 10, below.]

*New paragraph (2).*

*Norway* (A/CONF.97/C.1/L.167):

Price reduction may be practicable also in cases of third party claims as described in article 39. This should be referred to either in article 39 (see proposal regarding a new paragraph (3) to that article, set forth in A/CONF.97/C.1/L.77), or in article 46, for instance in a new paragraph to read as follows:

"(2) The provisions of the preceding paragraph apply correspondingly where the value of the goods is diminished because they are subject to a right or claim by a third party as described in article 39."

[Withdrawn: see Consideration, 11, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 46 at its 23rd meeting on 26th March 1980.

### (ii) Consideration

5. At the 23rd meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.166) was adopted by 27 votes in favour and no votes against.

6. At the 23rd meeting, the amendments by Norway (A/CONF.97/C.1/L.167) and Finland (A/CONF.97/C.1/L.170) were adopted by 20 votes in favour and 17 against.

7. At the 23rd meeting, the joint amendment by Argentina, Spain, Portugal (A/CONF.97/C.1/L.168) was rejected by 11 votes in favour and 23 against. Argentina submitted orally an alternative amendment by the addition at the end of the first sentence of article 46 of the words "at the place of delivery". The oral amendment was rejected by 12 votes in favour and 22 against.

8. The UNCITRAL text was adopted subject to the amendments noted at paragraphs 5 and 6 above.

9. At the 23rd meeting, the amendment by the United Kingdom (A/CONF.97/C.1/L.169) was referred to the Drafting Committee.

10. At the 23rd meeting, the amendment submitted by the United States of America (A/CONF.97/C.1/L.181/Corr.1) was withdrawn.

*New paragraph (2).*

11. At the 23rd meeting, the amendment submitted by Norway (A/CONF.97/C.1/L.167) was withdrawn.

## ARTICLE 47

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 47"*

"(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 42 to 46 apply in respect of the part which is missing or which does not conform.

"(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract."

## B. AMENDMENTS

2. Amendments were submitted to article 47 by Singapore (A/CONF.97/C.1/L.171) and Australia (A/CONF.97/C.1/L.172).

3. These amendments were to the following effect:

*Paragraph (2).*

(i) *Singapore* (A/CONF.97/C.1/L.171):

Delete paragraph (2) of article 47.

[Rejected: see Consideration, 5, below.]

(ii) *Australia* (A/CONF.97/C.1/L.172):

Revise paragraph (2) of article 47 to read as follows:

"(2) The buyer may declare the contract avoided in its entirety *if, notwithstanding there has been part performance*, the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract, *or took place notwithstanding the fixing of an additional period of time under article 43 for the performance by the seller of his obligations.*"

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 23rd meeting on 26 March 1980.

(ii) *Consideration*

5. At the 23rd meeting, the amendment by Singapore (A/CONF.97/C.1/L.171) was rejected, the amendment by Australia (A/CONF.97/C.1/L.172) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 48

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 48"*

"(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

"(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess

quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate."

## B. AMENDMENTS

2. Amendments were submitted to article 48 by Norway (A/CONF.97/C.1/L.174), Iraq (A/CONF.97/C.1/L.108) and the Netherlands (A/CONF.97/C.1/L.175).

3. These amendments were to the following effect:

*Paragraph (1).*

*Norway* (A/CONF.97/C.1/L.174):

At the end of paragraph (1), add the words

"*at that time*".

[Referred to Drafting Committee: see Consideration, 5, below.]

*Paragraph (2).*

*Iraq* (A/CONF.97/C.1/L.108):

In paragraph 2, last sentence, replace the words "he must pay for it at the contract rate" by "he must pay for it *at no more than the contract rate*."

[Rejected: see Consideration, 6, below.]

*New article 48a.*

*Netherlands* (A/CONF.97/C.1/L.175):

"When there are available to the buyer both remedies granted under the Convention for lack of conformity on the one hand and remedies deriving from the invalidity of the contract under the applicable national law on the other, he may exercise the latter only under the terms of articles 36 to 38."

[Rejected: see Consideration, 7, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 48 at its 23rd and 24th meetings on 26th March 1980.

(ii) *Consideration**Paragraph (1).*

5. At the 23rd meeting, the amendment by Norway (A/CONF.97/C.1/L.174) was referred to the Drafting Committee, and the UNCITRAL text adopted.

*Paragraph (2).*

6. At the 24th meeting, the amendment by Iraq (A/CONF.97/C.1/L.108) was rejected, and the UNCITRAL text adopted.

*New article 48a.*

7. At the 24th meeting, the amendment by the Netherlands (A/CONF.97/C.1/L.174) was rejected by 6 votes in favour and 24 against.

## ARTICLE 49

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 49"*

"The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."

## B. AMENDMENTS

2. No amendments were submitted to article 49.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

3. The First Committee considered article 49 at its 24th meeting on 26 March 1980.

(ii) *Consideration*

4. At the 24th meeting, the UNCITRAL text was adopted.

## ARTICLE 50

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 50"*

"The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made."

## B. AMENDMENTS

2. A joint amendment was submitted to article 50 by Argentina, Spain, Portugal (A/CONF.97/C.1/L.201).

3. The amendment was to the following effect:

*Argentina, Spain, Portugal* (A/CONF.97/C.1/L.201):

Add the following sentence to article 50:

"If payment in the contractual currency is not possible, the seller may require equivalent payment in the legal currency of the place of the buyer's place of business."

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 50 at its 24th meeting on 26 March 1980.

(ii) *Consideration*

5. At the 24th meeting, the joint amendment by Argentina, Spain, Portugal (A/CONF.97/C.1/L.201) was rejected by 9 votes in favour and 22 against, and the UNCITRAL text adopted.

## ARTICLE 51

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 51"*

"If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

## B. AMENDMENTS

2. Amendments were submitted to article 51 by Union of Soviet Socialist Republics (A/CONF.97/C.1/L.83), Byelorussian Soviet Socialist Republic (A/CONF.97/C.1/L.158), Turkey (A/CONF.97/C.1/L.183), Pakistan (A/CONF.97/C.1/L.196), Argentina, Portugal, Spain (A/CONF.97/C.1/L.200), India (A/CONF.97/C.1/L.202), France (A/CONF.97/C.1/L.205) and Italy (A/CONF.97/C.1/L.220).

3. These amendments were to the following effect:

- (i) *Union of Soviet Socialist Republics* (A/CONF.97/C.1/L.83):

Delete article 51, on the grounds that in a contract the price must be determined or determinable. It should be borne in mind that in article 12 (1) determinability of the price is recognized as one of the conditions for an offer to be effective.

[Rejected: see Consideration, 5, below.]

- (ii) *Byelorussian Soviet Socialist Republic* (A/CONF.97/C.1/L.158):

Delete the article.

[Rejected: see Consideration, 5, below.]

- (iii) *Turkey* (A/CONF.97/C.1/L.183):

Replace the words "the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances" by the words "the buyer must pay the price current at the time of the conclusion of the contract in the place of delivery for such goods".

[Withdrawn in favour of text submitted by *ad hoc* working group: see Consideration, 8, below.]

- (iv) *Pakistan* (A/CONF.97/C.1/L.196):

Delete in the middle part of the article the words "the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable,".

[Withdrawn in favour of text submitted by *ad hoc* working group: see Consideration, 8, below.]

- (v) *Argentina, Spain, Portugal* (A/CONF.97/C.1/L.200):

Amend the beginning of article 51 to read:

"If the price has not been stated and no provision has expressly or impliedly been made for the determination of the price of goods, and if Part II of this Convention is not applicable to the contract and the

applicable law admits in such cases the existence of a contract of sale, the buyer must pay . . .".

[Withdrawn in favour of text submitted by *ad hoc* working group: see Consideration, 8, below.]

(vi) *India* (A/CONF.97/C.1/L.202):

In the first sentence of article 51 replace the words "If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods" by the words "Where a contract does not either expressly or impliedly state the price of the goods . . .".

[Withdrawn in favour of text submitted by *ad hoc* working group: see Consideration, 8, below.]

(vii) *France* (A/CONF.97/C.1/L.205):

1. Delete article 51.

2. If the above proposal is rejected, amend article 51 to read as follows:

*"Where the contract does not explicitly or implicitly determine the price but merely provides guidelines for determining it, these may consist of an explicit or implicit reference to the price generally charged by the seller at the time of the conclusion of the contract or to the price generally charged at the aforesaid time for such goods sold under comparable circumstances."*

[1. Rejected: see Consideration, 5, below.]

[2. Withdrawn in favour of text submitted by *ad hoc* working group: see Consideration, 8, below.]

(viii) *Italy* (A/CONF.97/C.1/L.220):

Amend article 51 to read as follows:

*"Where a contract does not state the price or expressly or otherwise impliedly make provision for the determination of the price of the goods, the parties are considered to have impliedly agreed that the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract, and if no such price is ascertainable, that the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."*

[Withdrawn: see Consideration, 10, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 51 at its 24th, 25th and 29th meetings on 26 March, 27 March and 31 March 1980 respectively.

### (ii) Consideration

5. At the 24th meeting, the amendment by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.83), the amendment by the Byelorussian Soviet Socialist Republic (A/CONF.97/C.1/L.158) and the first part of the amendment by France (A/CONF.97/C.1/L.205) were rejected by 14 votes in favour and 27 against.

6. At the 24th meeting, a motion to adjourn the debate on this article was adopted by 33 votes in favour and none against, and an *ad hoc* working group composed of the representatives of Argentina, France, Ghana, India, Italy, Pakistan, Portugal, Sweden, Tur-

key and the Union of Soviet Socialist Republics was established to consider the article and submit a proposed text for the article to the Committee.

7. At the 29th meeting, the *ad hoc* working group submitted the following text (A/CONF.97/C.1/L.232):

*"Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties shall be deemed, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in that particular trade."*

8. The amendments by Turkey (A/CONF.97/C.1/L.183), Pakistan (A/CONF.97/C.1/L.196), Argentina, Spain and Portugal (A/CONF.97/C.1/L.200), India (A/CONF.97/C.1/L.202) and the second amendment of France (A/CONF.97/C.1/L.205) were withdrawn in favour of the text submitted by the *ad hoc* working group.

9. The text of the *ad hoc* working group was orally amended twice, firstly by an amendment deleting from the text the word "validly", and secondly by an amendment adding the words "by the seller" after the words "generally charged". The text, with each oral amendment, was rejected. The text as unamended was adopted by 29 votes in favour and 4 against.

10. The amendment by Italy (A/CONF.97/C.1/L.220) was withdrawn.

## ARTICLE 52

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 52

*"If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight."*

### B. AMENDMENTS

2. An amendment was submitted to article 52 by Iraq (A/CONF.97/C.1/L.109) and a joint amendment by Argentina, Portugal, Spain (A/CONF.97/C.1/L.207).

3. These amendments were to the following effect:

#### (i) *Iraq* (A/CONF.97/C.1/L.109):

Add the following at the end of the article:

*"unless otherwise established by usage"*.

[Rejected: see Consideration, 5, below.]

#### (ii) *Argentina, Portugal, Spain* (A/CONF.97/C.1/L.207):

Amend article 52 to read as follows:

*"If the price is stated according to the weight of the goods, the net weight is meant unless otherwise agreed."*

[Rejected: see Consideration, 5, below.]



*New paragraph (2).*

*Iraq (A/CONF.97/C.1/L.109):*

Add a new paragraph (2) as follows:

*"Any loss or increase allowed for by usage shall not be taken into consideration on delivery of the goods."*

[Rejected: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 52 at its 24th meeting on 26 March 1980.

## (ii) Consideration

5. At the 24th meeting, the amendment by Iraq (A/CONF.97/C.1/L.109) was rejected. The joint amendment by Argentina, Portugal, Spain (A/CONF.97/C.1/L.207) was rejected by 10 votes in favour and 22 against, and the UNCITRAL text adopted.

*New paragraph (2).*

6. At the 24th meeting, the amendment by Iraq (A/CONF.97/C.1/L.109) was rejected.

## ARTICLE 53

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 53*

*"(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:*

*"(a) at the seller's place of business; or*

*"(b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.*

*"(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract."*

## B. AMENDMENTS

2. An amendment was submitted to article 53 by the Federal Republic of Germany (A/CONF.97/C.1/L.182).

3. This amendment was to the following effect:

*Federal Republic of Germany (A/CONF.97/C.1/L.182):*

Add the following paragraph (3) to article 53:

*"(3) Jurisdiction of the courts at the seller's place of business in proceedings brought against the buyer for payment of the price cannot be derived from the provisions of paragraph (1), subparagraph (a)".*

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered this article at its 25th meeting on 27 March 1980.

## (ii) Consideration

5. At the 25th meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.182) was rejected and the UNCITRAL text adopted.

## ARTICLE 54

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 54*

*"(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.*

*"(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.*

*"(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."*

## B. AMENDMENTS

2. A joint amendment was submitted by Argentina, Spain, Portugal (A/CONF.97/C.1/L.189).

3. This amendment was to the following effect:

*Paragraph (1).*

*Argentina, Spain, Portugal (A/CONF.97/C.1/L.189):*

Amend the first paragraph of article 54 to read:

*"(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at his disposal in accordance with the contract and this Convention. The seller may in this case defer handing over the goods or documents until payment has been made."*

[Part adopted and part rejected: see Consideration, 5 and 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 54 at its 25th and 27th meetings on 27th and 28th March 1980 respectively.

## (ii) Consideration

*Paragraph (1).*

5. At the 25th meeting, the first part of the joint amendment by Argentina, Spain and Portugal (A/CONF.97/C.1/L.189) ("*(1) If the buyer . . . Con-*



vention.") was adopted by 16 votes in favour and 15 against, and the UNCITRAL text adopted subject to this amendment. The Committee decided to postpone consideration of the second part of the amendment ("The seller . . . made.") until consideration of article 62.

6. At the 27th meeting, the second part of the joint amendment was rejected by 7 votes in favour and 17 against.

*Paragraphs (2) and (3).*

7. At the 25th meeting, the UNCITRAL text was adopted without change.

## ARTICLE 55

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 55

"The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller."

### B. AMENDMENTS

2. An amendment was submitted by Argentina, Portugal, Spain (A/CONF.97/C.1/L.206) for the addition of two new articles 55 *bis* and 55 *ter*.

3. This amendment was to the following effect:

*Argentina, Portugal, Spain (A/CONF.97/C.1/L.206):*

Add new articles to part III, chapter III, section I (Obligations of the buyer, Payment of the price), after article 55:

#### "Article 55 bis

"Unless the contract so permits, the seller may not be obliged to receive part of the price. If the seller agrees to part payment, the provisions of articles 57 to 60 shall apply in respect of the part which is outstanding.

#### "Article 55 ter

"If the buyer pays the price before the appointed date, the seller may accept it or refuse it".

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

4. The First Committee considered this article at its 25th meeting on 27 March 1980.

#### (ii) Consideration

5. At the 25th meeting, the amendment by Argentina, Portugal and Spain (A/CONF.97/C.1/L.206) to add article 55 *bis* was rejected. The amendment to add article 55 *ter* was rejected by 20 votes in favour and 21 against. The UNCITRAL text was adopted.

## ARTICLE 56

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 56

"The buyer's obligation to take delivery consists:

"(a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

"(b) in taking over the goods."

2. No amendments were submitted to this article.

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

3. The First Committee considered this article at its 25th meeting on 27 March 1980.

#### (ii) Consideration

4. At the 25th meeting, the UNCITRAL text was adopted.

## ARTICLE 57

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 57

"(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

"(a) exercise the rights provided in articles 58 to 61;

"(b) claim damages as provided in articles 70 to 73.

"(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

"(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

### B. AMENDMENTS

2. No amendments were submitted to this article.

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

3. The First Committee considered this article at its 25th meeting on 27 March 1980.

#### (ii) Consideration

4. At the 25th meeting, the UNCITRAL text was adopted.

## ARTICLE 58

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 58"*

"The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement."

## B. AMENDMENTS

2. No amendments were submitted to this article.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

3. The First Committee considered this article at its 25th meeting on 27 March 1980.

(ii) *Consideration*

4. At the 25th meeting, the UNCITRAL text was adopted.

## ARTICLE 59

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 59"*

"(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

"(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance."

## B. AMENDMENTS

2. No amendments were submitted to this article.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

3. The First Committee considered this article at its 25th meeting on 27 March 1980.

(ii) *Consideration*

4. At the 25th meeting, the UNCITRAL text was adopted.

## ARTICLE 60

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 60"*

"(1) The seller may declare the contract avoided:

"(a) if the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

"(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

"(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

"(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

"(b) in respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or the declaration by the buyer that he will not perform his obligations within such an additional period."

## B. AMENDMENTS

2. Amendments were submitted to article 60 by Norway (A/CONF.97/C.1/L.185) and Turkey (A/CONF.97/C.1/209).

3. These amendments were to the following effect:

*Paragraph (2).*

- (i) *Norway* (A/CONF.97/C.1/L.185):

Revise paragraph (2) of article 60 to read as follows:

"(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided *unless he has done so*:

"(a) in respect of late performance by the buyer, before the seller has become aware that *payment* has been made; or

"(b) in respect of any breach other than late performance, within a reasonable time after *the seller* knew or ought to have known of such breach, *or after* the expiration of *any additional period of time applicable under article 59.*"

[Withdrawn: see Consideration, 7, below.]

- (ii) *Turkey* (A/CONF.97/C.1/L.209):

In line with paragraph (2) of article 45, amend paragraph (2) of article 60 to read as follows:

"However, the seller loses his right to declare the contract avoided if he has not done so *within a reasonable time*;

"(a) in respect of *late payment* by the buyer, after he has become or should have become aware that payment has been made; or

"(b) in respect of any breach other than *late payment*, after he knew or ought to have known of such breach, or after expiration of the additional period of time fixed by the seller in accordance with paragraph (1) of article 59 or the declaration by the buyer that he will not perform his obligations within such an additional period."

[Withdrawn: see Consideration, 7, below.]

#### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered article 60 at its 25th and 26th meetings on 27 March 1980, and its 33rd meeting on 2 April 1980.

##### (ii) Consideration

###### Paragraph (1).

5. At the 25th meeting, the UNCITRAL text was adopted.

###### Paragraph (2).

6. At the 25th and 26th meetings, an *ad hoc* working group composed of Federal Republic of Germany, Ghana, Greece, Norway, Turkey and the United Kingdom was established to consider paragraph (2) and the amendments thereto.

7. At the 33rd meeting, the amendments by Norway (A/CONF.97/C.1/L.185) and Turkey (A/CONF.97/C.1/L.209) were withdrawn. The *ad hoc* working group submitted a joint proposal (A/CONF.97/C.1/L.221) as follows:

Revise paragraph (2) of article 60 to read as follows:

"(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided *unless he has done so*:

"(a) in respect of *late payment* by the buyer, before the seller has become aware that *payment* has been made;

"(b) in respect of *late performance* by the buyer, other than *late payment*, before the seller has become aware that *such performance* has been rendered; or

"(c) in respect of any breach other than *late performance*, within a reasonable time after the seller knew or ought to have known of such breach, or after the expiration of any additional period of time applicable under article 59."

Paragraph (2) (a) and (b) of the joint proposal (A/CONF.97/C.1/L.221) was rejected by 19 votes in favour and 20 against. Paragraph (2) (c) of the joint proposal (A/CONF.97/C.1/L.221) was withdrawn on the understanding that paragraph (2) (b) of article 60 should

correspond in its wording with article 45, paragraph (2) (b). The UNCITRAL text was adopted.

#### ARTICLE 61

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

###### "Article 61

"(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

"(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding."

##### B. AMENDMENTS

2. Amendments were submitted to article 61 by Iraq (A/CONF.97/C.1/L.110), Pakistan (A/CONF.97/C.1/L.197) and Kenya (A/CONF.97/C.1/L.219).

3. These amendments were to the following effect:

(i) Iraq (A/CONF.97/C.1/L.110):

In paragraph (1), after the words "any other rights he may have," add the words "declare the contract void or".

[Withdrawn: see Consideration, 5, below.]

(ii) Pakistan (A/CONF.97/C.1/L.197):

Delete article 61.

[Rejected: see Consideration, 5, below.]

(iii) Kenya (A/CONF.97/C.1/L.219):

1. In the last part of paragraph (1) replace the words "any requirement" by the words "the requirements".

[Adopted: see Consideration, 5, below.]

2. Revise paragraph (2) to read as follows:

"(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must taking into account the nature and circumstances of the case fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so within a reasonable time after receipt of such communication, the specification made by the seller is binding."

[Rejected as to the first change and adopted as to second change and referred to Drafting Committee: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 61 at its 26th meeting on 27 March 1980.

## (ii) Consideration

5. At the 26th meeting, the amendment by Iraq (A/CONF.97/C.1/L.110) was withdrawn. The amendment by Pakistan (A/CONF.97/C.1/L.197) was rejected by 9 votes in favour and 22 against. The amendment by Kenya (A/CONF.97/C.1/L.219) relating to paragraph (1) was adopted. With regard to paragraph (2), the amendment by Kenya was rejected as to the insertion of the words "taking into account the nature and circumstances of the case", and adopted and referred to the Drafting Committee, as to the wording "within a reasonable time". The UNCITRAL text was adopted subject to these amendments.

## CHAPTER V. PASSING OF RISK

## ARTICLE 78

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 78*

"Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."

## B. AMENDMENTS

2. An amendment was submitted in regard to Chapter V. No amendments were submitted to article 78.

3. The amendment was to the following effect:

*Chapter V — Passing of risk.*

*Norway (A/CONF.97/C.1/L.230):*

Chapter V — Passing of risk should be transferred to a place somewhere in the earlier part of part III, perhaps between the present chapters II and III or immediately after chapter III.

[Referred to Drafting Committee: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered Chapter V — Passing of risk and article 78 at its 31st meeting on 1 April 1980.

## (ii) Consideration

*Chapter V — Passing of risk.*

5. At the 31st meeting, the amendment by Norway

(A/CONF.97/C.1/L.230) was referred to the Drafting Committee.

*Article 78.*

6. At the 31st meeting, the UNCITRAL text was adopted.

## ARTICLE 79

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 79*

"(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

"(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods."

## B. AMENDMENTS

2. Amendments were submitted to article 79 by the United States (A/CONF.97/C.1/L.233), Pakistan (A/CONF.97/C.1/L.236), United Kingdom (A/CONF.97/C.1/L.238) and Australia (A/CONF.97/C.1/L.241).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *United States (A/CONF.97/C.1/L.233):*

Delete the second sentence of paragraph (1).

[Withdrawn: see Consideration, 5, below.]

(ii) *Pakistan (A/CONF.97/C.1/L.236):*

In the first sentence of paragraph (1) of article 79, add after the words "the first carrier" the words "in accordance with the contract".

[Referred to Drafting Committee: see Consideration, 5, below.]

(iii) *United Kingdom (A/CONF.97/C.1/L.238):*

Revise paragraph (1) of article 79 to read as follows:

"(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling

the disposition of the goods does not affect the passage of risk."

[Adopted: see Consideration, 5, below.]

*Paragraph (2).*

(iv) *United States (A/CONF.97/C.1/L.233):*

Amend paragraph (2) to read as follows:

"(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, by markings on the goods, by shipping documents, by notification sent to the buyer or otherwise."

[Adopted: see Consideration, 6, below.]

*New paragraph.*

(v) *Australia (A/CONF.97/C.1/L.241):*

Add the following paragraph:

"(3) If the buyer has requested the seller in accordance with paragraph (3) of article 30 to provide him with all available information necessary to enable him to effect insurance in respect of the carriage of the goods, the risk does not pass to the buyer until the seller provides that information."

[Rejected: see Consideration, 7, below.]

C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 31st meeting on 1 April 1980.

(ii) *Consideration*

*Paragraph (1).*

5. At the 31st meeting, the amendment by the United States (A/CONF.97/C.1/L.233) was withdrawn, and the amendment by Pakistan (A/CONF.97/C.1/L.236) referred to the Drafting Committee. The amendment by the United Kingdom (A/CONF.97/C.1/L.238) was adopted, and the UNCITRAL text adopted subject to this amendment.

*Paragraph (2).*

6. At the 31st meeting, the amendment by the United States (A/CONF.97/C.1/L.233) was adopted and referred to the Drafting Committee.

*New paragraph.*

7. At the 31st meeting, the amendment by Australia (A/CONF.97/C.1/L.241) was rejected.

ARTICLE 80

A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 80*

"The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or

ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller."

B. AMENDMENTS

2. Amendments were submitted to article 80 by Canada (A/CONF.97/C.1/L.240), Pakistan (A/CONF.97/C.1/L.237), United States of America (A/CONF.97/C.1/L.231), Norway (A/CONF.97/C.1/L.195) and India (A/CONF.97/C.1/L.244).

3. These amendments were to the following effect:

*Article 80.*

(i) *Canada (A/CONF.97/C.1/L.240):*

Delete article 80.

[Withdrawn: see Consideration, 5, below.]

(ii) *Pakistan (A/CONF.97/C.1/L.237):*

The first sentence of article 80 may be amended to read as follows:

"The risk in respect of goods sold in transit is assumed by the buyer from the time *the contract is concluded.*"

[Rejected: see Consideration, 6, below.]

(iii) *United States of America (A/CONF.97/C.1/L.231):*

Revise the *first* sentence of article 80 to read as follows:

"The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents *embodying the contract of carriage.*"

[Adopted: see Consideration, 7, below.]

(iv) *Norway (A/CONF.97/C.1/L.195):*

Add the following sentence between the first and second sentences of the existing text of article 80:

"*If no such document is issued, the risk is assumed by the buyer from the time when the goods were handed over to the first carrier for transmission to the seller or a consignee from whom the seller derives his right to the goods.*"

[Withdrawn: see Consideration, 8, below.]

*Article 80, new paragraph (2).*

*India (A/CONF.97/C.1/L.244):*

Amend article 80 by adding a new paragraph after paragraph (1). The second paragraph reads as follows:

"(2) The provisions of paragraph (1) do not apply where the goods are lost or damaged before the conclusion of the contract."

[Rejected: see Consideration, 9, below.]

C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 80 at its 32nd meeting on 1 April 1980.

(ii) *Consideration**Article 80.*

5. At the 32nd meeting, the amendment by Canada (A/CONF.97/C.1/L.240) was withdrawn.

6. At the 32nd meeting, the amendment by Pakistan (A/CONF.97/C.1/L.237) was rejected.

7. At the 32nd meeting, the amendment by the United States of America (A/CONF.97/C.1/L.231) was adopted by 15 votes in favour and 13 against, and the UNCITRAL text adopted subject to this amendment.

8. At the 32nd meeting, the amendment by Norway (A/CONF.97/C.1/L.195) was withdrawn.

*Article 80, new paragraph (2).*

9. At the 32nd meeting, the amendment by India (A/CONF.97/C.1/L.244) was rejected.

## ARTICLE 81

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 81*

"(1) In cases not covered by articles 79 and 80 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

"(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

"(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract."

## B. AMENDMENTS

2. Amendments were submitted to article 81 by the Federal Republic of Germany (A/CONF.97/C.1/L.212) and Australia (A/CONF.97/C.1/L.242).

3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.212):

After article 81, add a new article 81 *bis* as follows:

"(1) Where the delivery of the goods by the seller is delayed owing to a breach of an obligation of the buyer the risk shall pass to the buyer from the last date when, apart from such breach, delivery of the goods could have been made in accordance with the contract.

"(2) If, however, the contract relates to a sale of goods not then identified, the risk does not pass to the buyer until the goods have been clearly identified to

the contract and the seller has notified the buyer that this had been done."

[Rejected: see Consideration, 5, below.]

(ii) *Australia* (A/CONF.97/C.1/L.242):

Insert a new paragraph following paragraph (2), as follows:

"(3) Goods may be regarded as having been placed at the disposal of the buyer, notwithstanding that pursuant to article 54 they or the documents controlling their disposition have not been handed over to the buyer pending payment of the price."

[Withdrawn: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 81 at its 32nd meeting on 1 April 1980.

(ii) *Consideration*

5. At the 32nd meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.212) was rejected, the amendment by Australia (A/CONF.97/C.1/L.242) was withdrawn, and the UNCITRAL text adopted.

## ARTICLE 82

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 82*

"If the seller has committed a fundamental breach of contract, the provisions of articles 79, 80 and 81 do not impair the remedies available to the buyer on account of such breach."

## B. AMENDMENTS

2. An amendment was submitted to article 82 by the United States of America (A/CONF.97/C.1/L.229 Rev.1).

3. The amendment was to the following effect:

*United States of America* (A/CONF.97/C.1/L.229 Rev.1):

Revise article 82 to read as follows:

"If the seller commits a breach of contract that gives the buyer the right to declare the contract avoided under article 45, the risk of loss does not pass to the buyer as long as he may exercise this right."

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 82 at its 32nd meeting on 1 April 1980.

(ii) *Consideration*

5. At the 32nd meeting, the amendment by the United States of America (A/CONF.97/C.1/L.229/Rev.1) was rejected, and the UNCITRAL text adopted.

## ARTICLE 62

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 62*

"(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

"(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

"(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance."

## B. AMENDMENTS

2. Amendments were submitted to article 62 by the Federal Republic of Germany (A/CONF.97/C.1/L.187), and Canada and Australia (A/CONF.97/C.1/L.224) prior to the 27th meeting.

3. These amendments were to the following effect:

*Paragraph (1).*

*Federal Republic of Germany (A/CONF.97/C.1/L.187):*  
Revise paragraph (1) of article 62 to read as follows:

"(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, *it becomes apparent that a serious deficiency* in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations."

[Adopted: see Consideration, 5, below.]

*Paragraph (3).*

*Federal Republic of Germany (A/CONF.97/C.1/L.187):*  
Revise paragraph (3) of article 62 to read as follows:

"(3) A party suspending performance, whether before or after dispatch of the goods, must immediately

give notice to the other party thereof and must continue with performance if the other party, by *guarantee, documentary credit or otherwise*, provides adequate assurance of his performance."  
[Rejected: see Consideration, 7, below.]

*New article 62 bis.*

*Canada and Australia (A/CONF.97/C.1/L.224):*

Add a new article 62 *bis* to read as follows:

"Failure by the other party to provide adequate assurance of performance within a reasonable period of time shall entitle the party requesting the assurance to avoid the contract."

[Rejected: see Consideration, 8, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 62 at its 26th, 27th, 34th and 35th meetings on 27th and 28th March and 3rd and 4th April 1980 respectively, and at its 37th and 38th meetings on 7 April 1980.

(ii) *Consideration**Paragraph (1).*

5. At the 26th meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.187) was adopted by 18 votes in favour and 15 against, and the UNCITRAL text adopted, subject to the amendment.

*Paragraph (2).*

6. At the 26th meeting the UNCITRAL text was adopted.

*Paragraph (3).*

7. At the 26th meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.187) was rejected, and the UNCITRAL text adopted.

*New article 62 bis.*

8. At the 27th meeting, the amendment by Canada and Australia (A/CONF.97/C.1/L.224) was rejected.

9. At the 34th meeting, the Committee, by 27 votes in favour and 6 against, adopted a motion to consider an amendment by Egypt (A/CONF.97/C.1/L.249) submitted after the close of the deliberations on article 62.

10. This amendment was to the following effect:

*Egypt (A/CONF.97/C.1/L.249):*

Replace article 62 by the following text:

"(1) If, prior to the date for performance of the contract, it becomes apparent that one of the parties will commit a fundamental breach of contract, the other party may notify him of his intention to suspend performance of his obligations if the first party fails to provide adequate assurances, within a reasonable period of time, of properly performing his obligations.

"(2) If the party which has been notified fails to provide the assurances described under paragraph (1)

of this article, the other party may declare the contract avoided."

11. An amendment was also submitted by Italy (A/CONF.97/C.1/L.251) which was to the following effect:

*Italy (A/CONF.97/C.1/L.251):*

Revise paragraph (1) of article 62 to read as follows:

"(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations."

12. At the 35th meeting, the Committee considered together the amendments by Egypt to articles 62 and 63 (A/CONF.97/C.1/L.249 and L.250). The amendments were rejected by 19 votes in favour and 19 against.

13. At the 35th meeting, the Committee established an *ad hoc* working group composed of the representatives of Argentina, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Iraq, Mexico, Republic of Korea and United States of America to consider articles 62 and 63 and submit a proposed text of these articles to the Committee.

14. At the 37th meeting, the *ad hoc* working group submitted the following text for article 62 (A/CONF.97/C.1/L.252):

Replace paragraph (1) by the following:

"(1) A party may, if it is reasonable to do so, suspend the performance of his obligations when, after the conclusion of the contract, it appears that the other party will not perform a substantial part of his obligations as a result of:

"(a) a serious deficiency in his ability to perform or in his creditworthiness, or

"(b) his conduct in preparing to perform or in performing the contract."

15. At the 38th meeting, an oral amendment to delete from the text submitted by the *ad hoc* working group the words "if it is reasonable to do so" was adopted by 17 votes in favour and 13 against. A further oral amendment to replace the phrase "when, after the conclusion of the contract" by "if, after the conclusion of the contract" was adopted. A further oral amendment to replace the phrase "it appears" by the phrase "it becomes apparent" was adopted by 20 votes in favour and 5 against. The text submitted by the *ad hoc* working group, subject to the amendments adopted as noted above, was adopted by 31 votes in favour and 4 against. The amendment by Italy (A/CONF.97/C.1/L.251) was withdrawn.

16. At the 38th meeting, paragraphs (2) and (3) of the UNCITRAL text were adopted.

17. At the 38th meeting, articles 62 and 63, as amended, were together adopted by 35 votes in favour and none against.

## ARTICLE 63

### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

#### "Article 63

"If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided."

### B. AMENDMENTS

2. No amendments were submitted to article 63 prior to the 27th meeting.

### C. PROCEEDINGS IN THE FIRST COMMITTEE

#### (i) Meetings

3. The First Committee considered this article at its 27th, 34th and 35th meetings on 28 March and 3 and 4 April 1980 respectively, and its 37th and 38th meetings on 7 April 1980.

#### (ii) Consideration

4. At the 27th meeting, the UNCITRAL text was adopted.

5. At the 34th meeting, the Committee, by 27 votes in favour and 6 against, adopted a motion to consider an amendment by Egypt (A/CONF.97/C.1/L.250) submitted after the close of the deliberations on article 63.

6. This amendment was to the following effect:

*Egypt (A/CONF.97/C.1/L.250):*

Replace article 63 by the following text:

"(1) If the seller has already dispatched the goods before the grounds described in paragraph (1) of article 62 become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

"(2) The seller who prevents the handing over of the goods to the buyer under paragraph (1) of this article must immediately give notice to the buyer of his intention to declare the contract avoided should the buyer fail, within a reasonable time, to provide adequate assurances of properly performing his obligations."

7. At the 35th meeting, the Committee considered together the amendments by Egypt to articles 62 and 63 (A/CONF.97/C.1/L.249 and L.250). The amendments were rejected by 19 votes in favour and 19 against.

8. At the 35th meeting, the Committee established an *ad hoc* working group composed of the representatives of Argentina, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Iraq, Mexico, Republic of Korea and United States of America to consider articles 62 and 63 and submit a proposed text of these articles to the Committee.



9. At the 37th meeting, the *ad hoc* working group submitted the following text for article 63 (A/CONF.97/C.1/L.253):

Add new paragraphs (2) and (3) as follows:

"(2) If time allows, the party intending to declare the contract avoided must give notice reasonably in advance to the other party in order to permit him to provide adequate assurance of his performance.

"(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations."

10. At the 38th meeting an oral amendment to delete from the text submitted by the *ad hoc* working group the words "if time allows" was rejected by 17 votes in favour and 18 against. A further oral amendment to replace the phrase "give notice reasonably in advance" by the phrase "give reasonable notice" was adopted.

11. At the 38th meeting, the UNCITRAL text of paragraph (1) of article 63 was adopted.

12. At the 38th meeting, articles 62 and 63, as amended, were together adopted by 35 votes in favour and none against.

#### ARTICLE 64

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 64"

"(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

"(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

"(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract."

##### B. AMENDMENTS

2. No amendments were submitted to article 64.

##### C. PROCEEDINGS IN THE FIRST COMMITTEE

###### (i) Meetings

3. The First Committee considered this article at its 27th meeting on 28 March 1980.

###### (ii) Consideration

4. At the 27th meeting, the UNCITRAL text was adopted.

#### ARTICLE 70

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 70"

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

##### B. AMENDMENTS

2. Amendments were submitted to article 70 by Norway (A/CONF.97/C.1/L.230) and Pakistan (A/CONF.97/C.1/L.235).

3. These amendments were to the following effect:

##### Articles 70 to 73.

Norway (A/CONF.97/C.1/L.230):

Section IV — Damages, chapter IV (arts. 70 to 73) should be grouped together with section II — Exemptions (art. 65) and placed in a separate chapter between present chapters III and IV.

[Referred to Drafting Committee: see Consideration, 5, below.]

##### Article 70.

Pakistan (A/CONF.97/C.1/L.235):

The second sentence of article 70 may be amended to read as follows:

"Such damages may not exceed the *reasonable expectation* of loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

[Rejected: see Consideration, 6, below.]

##### C. PROCEEDINGS IN THE FIRST COMMITTEE

###### (i) Meetings

4. The First Committee considered article 70 at its 30th meeting on 31 March 1980.

###### (ii) Consideration

##### Articles 70 to 73.

5. At the 30th meeting, the amendment by Norway (A/CONF.97/C.1/L.230) was referred to the Drafting Committee.

*Article 70.*

6. At the 30th meeting, the amendment by Pakistan (A/CONF.97/C.1/L.235) was rejected, and the UNCITRAL text adopted.

## ARTICLE 71

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 71*

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 70."

## B. AMENDMENTS

2. An amendment was submitted to article 71 by Norway (A/CONF.97/C.1/L.193).

3. This amendment was to the following effect:

Norway (A/CONF.97/C.1/L.193):

Revise article 71 to read as follows:

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may, *as part of the damages referred to in article 70, recover the difference between the contract price and the price in the substitute transaction.*"

[Referred to Drafting Committee: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 30th meeting on 31 March 1980.

(ii) *Consideration*

5. At the 30th meeting, the amendment by Norway (A/CONF.97/C.1/L.193) was referred to the Drafting Committee, and the UNCITRAL text adopted.

## ARTICLE 72

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 72*

"(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 70.

"(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."

## B. AMENDMENTS

2. Amendments were submitted to article 72 by Norway (A/CONF.97/C.1/L.194) and jointly by Australia, Greece, Norway, Republic of Korea (A/CONF.97/C.1/L.245).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) Norway (A/CONF.97/C.1/L.194):

Revise paragraph (1) of article 72 to read as follows:

"(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time of *delivery, or at the time of avoidance, whichever is the earlier. He may claim any further damages recoverable under article 70.*"

[Rejected: see Consideration, 5, below.]

(ii) Australia, Greece, Norway, Republic of Korea (A/CONF.97/C.1/L.245):

Revise paragraph (1) of article 72 to read as follows:

"(1) If the contract is avoided and there is a current price for goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the *contract price* and the current price at the time of *avoidance* and any further damages *under article 70. If, however, the party claiming damages has avoided the contract after receiving the goods or the payment, as the case may be, the current price at the time of such receipt shall be applied instead of the current price at the time of avoidance.*"

[Not considered: see Consideration, 9, below.]

*Paragraph (2).*

(iii) Norway (A/CONF.97/C.1/L.194):

In paragraph (2) of article 72, replace the words "paragraph (1) of this article" by the words

"the preceding paragraph."

[Referred to Drafting Committee: see Consideration, 10, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered article 72 at its 30th and 33rd meetings on 31 March and 2 April 1980 respectively.

## (ii) Consideration

## Paragraph (1).

5. At the 30th meeting, the amendment by Norway (A/CONF.97/C.1/L.194) was rejected by 12 votes in favour and 21 votes against.

6. At the 30th meeting, Canada submitted orally the following amendment:

"If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price *at the time he declared the contract avoided* and any further damages recoverable under the provisions of article 70."

The amendment by Canada was rejected by 13 votes in favour and 17 against.

7. At the 30th meeting, Australia submitted orally the following amendment:

"If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price *at the time of delivery, the time of payment of the price or at the time of avoidance, whichever is the earliest* and any further damages recoverable under the provisions of article 70."

The amendment by Australia was rejected.

8. The UNCITRAL text was adopted.

9. At the 33rd meeting, a motion that the Committee should consider the amendment by Australia, Greece, Norway and Republic of Korea (A/CONF.97/C.1/L.245), which was submitted after the close of the deliberations on article 72, was rejected by 14 votes in favour and 21 against.

## Paragraph (2).

10. At the 30th meeting, the amendment by Norway (A/CONF.97/C.1/L.194) was referred to the Drafting Committee, and the UNCITRAL text adopted.

## ARTICLE 73

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

## "Article 73

"The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit resulting from the breach. If he fails to take such

measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

## B. AMENDMENTS

2. An amendment was submitted to article 73 by the United States of America (A/CONF.97/C.1/L.228).

3. This amendment was to the following effect:

*United States (A/CONF.97/C.1/L.228):*

Revise the second sentence of article 73 to read as follows:

"If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated, or a corresponding modification or adjustment of any other remedy."

[Rejected: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered this article at its 30th meeting on 31 March 1980.

## (ii) Consideration

5. At the 30th meeting, the amendment by the United States of America (A/CONF.97/C.1/L.228) was rejected by a vote of 8 in favour and 24 against, and the UNCITRAL text adopted.

## ARTICLE 65

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

## "Article 65

"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

"(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.

"(3) The exemption provided by this article has effect only for the period during which the impediment exists.

"(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the

impediment, he is liable for damages resulting from such non-receipt.

"(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

## B. AMENDMENTS

2. Amendments were submitted to article 65 by Norway (A/CONF.97/C.1/L.191/Rev.1), Denmark (A/CONF.97/C.1/L.186), Finland (A/CONF.97/C.1/L.190), German Democratic Republic (A/CONF.97/C.1/L.217 and 234), Pakistan (A/CONF.97/C.1/L.223), Turkey (A/CONF.97/C.1/L.210) and Federal Republic of Germany (A/CONF.97/C.1/L.208).

3. These amendments were to the following effect:

### Paragraph (1).

Norway (A/CONF.97/C.1/L.191/Rev.1):

Re-word paragraph (1) as follows:

"(1) A party is not liable for a failure to perform his obligations if he proves that the failure was due to an impediment beyond his control and of a kind which he could not reasonably be expected to have taken into account at the time of the conclusion of the contract and that he could not reasonably be expected to have avoided or overcome the impediment or its consequences."

[As to first change referred to Drafting Committee, as to second change rejected: see Consideration, 5, below.]

### Paragraph (2).

(i) Denmark (A/CONF.97/C.1/L.186):

Reword paragraph (2) as follows:

"(2) If the party's failure is due to the failure by his supplier or a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the supplier or the third person would be so exempt if the provision of that paragraph were applied to him."

[Withdrawn: see Consideration, 6, below.]

(ii) Finland (A/CONF.97/C.1/L.190):

Re-word paragraph (2) as follows:

"(2) If the party's failure is due to the failure by his supplier or a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the supplier or the third person would be so exempt if the provisions of that paragraph were applied to him."

[Withdrawn: see Consideration, 6, below.]

(iii) German Democratic Republic (A/CONF.97/C.1/L.217):

Insert, in the above amendments by Denmark and Finland, in both cases after the word "supplier" the word "carrier".

[Withdrawn: see Consideration, 6, below.]

(iv) Turkey (A/CONF.97/C.1/L.210):

Delete paragraph (2).

[Rejected: see Consideration, 6, below.]

(v) Pakistan (A/CONF.97/C.1/L.223):

At the end of paragraph (2), add the words "provided the contract expressly or impliedly envisaged subcontracting by the party".

[Rejected: see Consideration, 6, below.]

### Paragraph (3).

(i) Norway (A/CONF.97/C.1/L.191/Rev.1):

Re-word paragraph (3) as follows:

"(3) Where the impediment is temporary, the exemption provided by this article has effect for the period during which the impediment exists. Nevertheless, the party who fails to perform is permanently exempted to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold him liable."

Alternatively, the word "only" should be deleted.

[First alternative rejected and second alternative adopted: see Consideration, 9, below.]

(ii) German Democratic Republic (A/CONF.97/C.1/L.217):

Re-word paragraph (3) as follows:

"(3) The exemption provided by this article has effect only for the period during which the impediment and its consequences exist."

[Referred to Drafting Committee: see Consideration, 9, below.]

### Paragraph (4).

(i) Norway (A/CONF.97/C.1/L.191/Rev.1):

Re-word the second sentence of paragraph (4) as follows:

"If he fails to do so within a reasonable time after he knew or ought to have known of the impediment, he is liable for the damage resulting from this failure."

[Rejected: see Consideration, 10, below.]

(ii) Finland (A/CONF.97/C.1/L.190):

Re-word the second sentence of paragraph (4) as follows:

"If he fails to do so within a reasonable time after he knew or ought to have known of the impediment, he is liable for damage resulting from this failure."

[Rejected: see Consideration, 10, below.]

### Paragraph (5).

(i) Norway (A/CONF.97/C.1/L.191/Rev.1):

Re-word paragraph (5) as follows:

"(5) Nothing in this article prevents a party from avoiding the contract or reducing the price in accordance with the provisions of this Convention."

[Rejected: see Consideration, 11, below.]

(ii) Federal Republic of Germany (A/CONF.97/C.1/L.208):

Re-word paragraph (5) as follows and place present paragraph (3) at the end of article 65:

"(5) Nothing in this article prevents either party

from exercising any right other than to claim damages or to require performance under this Convention."

[Rejected: see Consideration, 11, below.]

(iii) *German Democratic Republic* (A/CONF.97/C.1/L.217):

Re-word paragraph (5) as follows:

"(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention or to claim any penalties or liquidated damages provided for in the contract."

[Rejected: see Consideration, 11, below.]

*New article 65 bis.*

(i) *German Democratic Republic* (A/CONF.97/C.1/L.217):

Add a new article 65 bis as follows:

"Neither party may exercise any right under this Convention if he has caused by his own act or omission the failure to perform of the other party."

[Withdrawn and replaced by another amendment: see Consideration, 13, below.]

(ii) *German Democratic Republic* (A/CONF.97/C.1/L.234):

Add a new article 65 bis or 23 bis as follows:

"A party may not rely on a failure of the other party to perform insofar as the first party by his own act or omission caused the failure to perform."

[Adopted with additional amendment: see Consideration, 13, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

### (i) Meetings

4. The First Committee considered article 65 at its 27th, 28th, 30th, 32nd and 33rd meetings on 28, 31 March, 1 and 2 April 1980.

### (ii) Consideration

#### *Paragraph (1).*

5. At the 27th meeting, the amendment by Norway (A/CONF.97/C.1/L.191/Rev.1) was, as to its first part, referred to the Drafting Committee and, as to its second part, rejected. The UNCITRAL text was adopted.

#### *Paragraph (2).*

6. At the 27th meeting, the amendments by Denmark (A/CONF.97/C.1/L.186), Finland (A/CONF.97/C.1/L.190) and German Democratic Republic (A/CONF.97/C.1/L.217) were withdrawn. The amendment by Pakistan (A/CONF.97/C.1/L.223) was rejected. The amendment by Turkey (A/CONF.97/C.1/L.210) was also rejected on the understanding that the Committee would be free to reconsider the issue of the deletion of paragraph (2) in the light of the proposal expected from the *ad hoc* working group to be established. The Committee established an *ad hoc* working group, composed of the representatives of German Democratic Republic, Ghana, Norway, Sweden, Switzerland and Turkey to redraft paragraph (2) so as to avoid ambiguities in the in-

terpretation of that paragraph and its relationship to paragraph (1).

7. At the 32nd meeting, the *ad hoc* working group submitted the following proposal (A/CONF.97/C.1/L.243 as correctly orally):

#### *Variant I:*

Revise paragraph (2) of article 65 as follows:

"(2) However, the failure of a third person whom a party has engaged for the performance of the whole or a part of the contract does not exempt that party from liability, unless the said third person also would be so exempt if the provisions of paragraph (1) were applied to him."

#### *Variant II:*

Delete paragraph (2) of article 65.

8. At the 33rd meeting, variant I of the proposal by the *ad hoc* working group was rejected by 16 votes in favour and 21 against. Variant II of that proposal was also rejected, by 22 votes in favour and 23 against. The UNCITRAL text of paragraph (2) was adopted.

#### *Paragraph (3).*

9. At the 27th meeting, the amendment by Norway (A/CONF.97/C.1/L.191/Rev.1) was rejected in its first alternative by 12 votes in favour and 25 against, and it was adopted in its second alternative, i.e. to delete the word "only", by 19 votes in favour and 12 against. At the 28th meeting, the amendment by the German Democratic Republic (A/CONF.97/C.1/L.217) was referred to the Drafting Committee. The UNCITRAL text was adopted subject to these amendments.

#### *Paragraph (4).*

10. At the 28th meeting, the amendments by Norway (A/CONF.97/C.1/L.191/Rev.1) and Finland (A/CONF.97/C.1/L.190) were rejected by 14 votes in favour and 17 against, and the UNCITRAL text was adopted.

#### *Paragraph (5).*

11. At the 28th meeting, the amendment by Norway (A/CONF.97/C.1/L.191/Rev.1) was rejected by 13 votes in favour and 22 against. The amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.208) was rejected by 15 votes in favour and 19 against. The amendment by the German Democratic Republic (A/CONF.97/C.1/L.217) was also rejected. The UNCITRAL text was adopted.

#### *New article 65 bis.*

12. At its 28th meeting, the Committee decided to defer consideration of the proposal by the German Democratic Republic (A/CONF.97/C.1/L.217) in order to enable that delegation to redraft its proposal in the light of the discussion in the Committee.

13. At the 30th meeting, the amendment by the German Democratic Republic (A/CONF.97/C.1/L.217) was withdrawn and replaced by another amendment (A/CONF.97/C.1/L.234) to the effect that a new article 65 bis or 23 bis be added as follows: "A party may not

rely on a failure of the other party to perform insofar as the first party by his own act or omission caused the failure to perform". This amendment was amended orally by the Federal Republic of Germany to the effect that the words "insofar as" be replaced by the words "to the extent that". Thus amended, the amendment was adopted by 34 votes in favour and none against and referred to the Drafting Committee in order to decide whether the article should be a new article 65 *bis* or 23 *bis*.

### SECTION III. EFFECTS OF AVOIDANCE

#### ARTICLE 66

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 66

"(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

"(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."

##### B. AMENDMENTS

2. Amendments were submitted to article 66 by Norway (A/CONF.97/C.1/L.191 and L. 192) and Canada (A/CONF.97/C.1/L.239).

3. These amendments were to the following effect:

(i) Norway (A/CONF.97/C.1/L.191):

Title of Section III of Chapter IV.

Revise this title to read as follows:

"Effects of avoidance or request for substitute goods".

[Referred to Drafting Committee: see Consideration, 5, below.]

(ii) Norway (A/CONF.97/C.1/L.192):

*New paragraph (3).*

Add the following new paragraph (3):

"(3) If the contract is not avoided, but the buyer requires delivery of substitute goods and has paid the price, restitution of the goods he has received must be made concurrently with the new delivery."

[Rejected: see Consideration, 5, below.]

(iii) Canada (A/CONF.97/C.1/L.239):

Amend article 66 by adding one of the following versions of new paragraph (3):

##### *Alternative 1:*

"(3) Notwithstanding paragraph (2), the seller shall not be entitled to claim restitution of his goods where the goods have been delivered to the buyer and the buyer is insolvent or the restitution of the goods would otherwise prejudice the rights of the buyer's creditors."

##### *Alternative 2:*

"(3) Notwithstanding paragraph (2), the seller shall not be entitled to claim restitution of the goods where the goods have been delivered to the buyer and, under the applicable municipal law, title in the goods has passed to the buyer."

[Withdrawn: see Consideration, 6, below.]

##### C. PROCEEDINGS IN THE FIRST COMMITTEE

##### (i) Meetings

4. The First Committee considered this article at its 28th and 33rd meetings on 28 March and 2 April 1980 respectively.

##### (ii) Consideration

5. At the 28th meeting, the amendment by Norway (A/CONF.97/C.1/L.191) was referred to the Drafting Committee. The amendment by Norway (A/CONF.97/C.1/L.192) was rejected by 7 votes in favour and 23 against, and the UNCITRAL text adopted.

6. At the 33rd meeting, the amendment by Canada (A/CONF.97/C.1/L.239), which was submitted after the close of the deliberations on article 66, was withdrawn.

#### ARTICLE 67

##### A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

##### "Article 67

"(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

"(2) Paragraph (1) of this article does not apply:

"(a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission by the buyer; or

"(b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or

"(c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it."

## B. AMENDMENTS

2. No amendments were submitted to article 67.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

3. The First Committee considered this article at its 28th meeting on 28 March 1980.

## (ii) Consideration

4. At the 28th meeting, the UNCITRAL text was adopted.

## ARTICLE 68

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 68"*

"The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies."

## B. AMENDMENTS

2. No amendments were submitted to article 68.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

3. The First Committee considered this article at its 28th meeting on 28 March 1980.

## (ii) Consideration

4. At the 28th meeting, the UNCITRAL text was adopted.

## ARTICLE 69

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 69"*

"(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

"(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

"(a) if he must make restitution of the goods or part of them; or

"(b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless de-

clared the contract avoided or required the seller to deliver substitute goods."

2. In connection with article 69, the First Committee also considered some amendments submitted on the issue of interest on sums that were in arrears.

## B. AMENDMENTS

3. Amendments were submitted to article 69, and on the issue of interest on sums that were in arrears, by Denmark, Finland, Greece, Sweden (A/CONF.97/C.1/L.216), Czechoslovakia (A/CONF.97/C.1/L.218), Japan (A/CONF.97/C.1/L.222), Pakistan (A/CONF.97/C.1/L.225) and United Kingdom (A/CONF.97/C.1/L.226/Rev.1).

4. These amendments were to the following effect:

- (i) *Denmark, Finland, Greece, Sweden* (A/CONF.97/C.1/L.216):

Add a new article 73 *bis* to read as follows:

"If a party fails to pay the price or any other sum as is in arrears, the other party is entitled to interest thereon at the customary rate for commercial credits at his place of business."

As a consequence the title "Section IV. *Damages*" should be amended to read "Section IV. *Damages and interest*".

[Withdrawn: see Consideration, 14, below.]

- (ii) *Czechoslovakia* (A/CONF.97/C.1/L.218):

Add a new article 60 *bis* to read as follows:

"(1) If the breach of contract consists of delay in the payment of the price, the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate prevailing in the country where the buyer has his place of business, at the time of delay increased by one per cent or, if there is no such a rate, at the rate applied to unsecured short-term international commercial credits increased by one per cent.

"(2) The seller may claim damages as provided in this Convention, if the loss is not covered by interests."

[Withdrawn: see Consideration, 14, below.]

- (iii) *Japan* (A/CONF.97/C.1/L.222):

Add a new article 73 *bis* to read as follows:

"If a party has failed to pay the price or any other sum that is in arrears, the other party is presumed to have suffered damages equivalent to the amount calculated at the interest rate for [unsecured short-term commercial credits prevailing] at his place of business."

[Withdrawn: see Consideration, 14, below.]

- (iv) *Pakistan* (A/CONF.97/C.1/L.225):

The following sentence may be added at the end of paragraph (1) of article 69:

"The rate of interest would be the one current at the seller's place of business."

[Withdrawn: see Consideration, 14, below.]

(v) *United Kingdom (A/CONF.97/C.1/L.226/Rev.1):*

The following proposal should replace that made in A/CONF.97/C.1/L.226:

Delete paragraph (1) of article 69.

New article in Part I.

Insert in Part I, chapter I (sphere of application), a new article to read as follows:

"This Convention does not affect any right of the seller or buyer to recover interest on money."

[Withdrawn: see Consideration, 14, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

5. The First Committee considered this article at its 28th, 29th and 34th meetings on 28 and 31 March and 3 April 1980 respectively.

(ii) *Consideration*

6. At the 29th meeting, an *ad hoc* working group composed of the representatives of Argentina, Czechoslovakia, Ghana, Greece, India, Italy, Pakistan and Sweden was established to consider the amendments relating to article 69 and the issue of interest on sums that are in arrears.

7. At the 34th meeting, the *ad hoc* working group submitted the following text:

*Ad hoc Working Group on interest composed of Argentina, Czechoslovakia, Ghana, Greece, India, Italy, Pakistan and Sweden, assisted by Denmark, United States of America and Yugoslavia (A/CONF.97/C.1/L.247):*

*Matter of interest*

(sums that are in arrears)

*Article 73 bis**Alternative I:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate prevailing in the main domestic financial centre of the party claiming payment."

*Alternative II:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate prevailing in the main domestic financial centre of the country of the party in default, or, in case the other party's actual credit costs are higher, at a rate corresponding thereto but not at a rate higher than the first said rate in his own country."

*Alternative III:*

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a short-term commercial credit or at another similar appropriate rate

prevailing in the main domestic financial centre of the party in default. However, in case the party claiming interest is not fairly compensated by such rate, he may claim interest up to the first said rate in his own country."

*(Restitution of price)**Article 69**Paragraph (1).*

Add at the end of paragraph (1) of article 69 the following:

"at the rate as set out in article 73 bis in the country of the seller's place of business."

8. At the 34th meeting, a motion to close the debate on the proposals submitted by the *ad hoc* working group A/CONF.97/C.1/L.247 was adopted by 19 votes in favour and 16 against.

9. Alternative I of the proposals submitted by the *ad hoc* working group A/CONF.97/C.1/L.247 was rejected by 17 votes in favour and 22 against.

10. An oral amendment was submitted to delete from Alternative II of the proposals submitted by the *ad hoc* working group the words "or, in case of the other party's actual credit costs are higher, at a rate corresponding thereto but not at a rate higher than the first said rate in his own country". This oral amendment was rejected by 9 votes in favour and 16 against.

11. An oral amendment was submitted to delete from Alternative III of the proposals submitted by the *ad hoc* working group the words "However, in case the party claiming interest is not fairly compensated by such rate, he may claim interest up to the first said rate in his own country." This oral amendment was rejected by 8 votes in favour and 15 against.

12. Alternative II of the proposals submitted by the *ad hoc* working group as unamended was adopted by 20 votes in favour and 14 against, and referred to the Drafting Committee. An oral amendment to add the word "normal" before the word "rate" in the phrase "rate for a short-term commercial credit" was adopted by 9 votes in favour and 6 against.

13. The proposal of the *ad hoc* working group in regard to paragraph (1) of article 69 was adopted by 26 votes in favour and 8 against, and referred to the Drafting Committee. The UNCITRAL text of article 69 was adopted subject to this amendment.

14. The proposals of Denmark, Finland, Greece, Sweden (A/CONF.97/C.1/L.216), Czechoslovakia (A/CONF.97/C.1/L.218), Japan (A/CONF.97/C.1/L.222), Pakistan (A/CONF.97/C.1/L.225) and the United Kingdom (A/CONF.97/C.1/L.226/Rev.1) were withdrawn.

## ARTICLE 74

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:



*"Article 74*

"If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer."

## B. AMENDMENTS

2. An amendment was submitted to article 74 by the Federal Republic of Germany (A/CONF.97/C.1/L.211).

3. This amendment was to the following effect:

*Federal Republic of Germany* (A/CONF.97/C.1/L.211):

Revise the first sentence of article 74 to read as follows:

"If the buyer is in delay in taking delivery of the goods *or, where payment of the price and delivery of the goods are concurrent conditions, if he is in delay in paying the price,* and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them."

[Adopted: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered article 74 at its 30th meeting on 31 March 1980.

(ii) *Consideration*

5. At the 30th meeting, the amendment by Federal Republic of Germany (A/CONF.97/C.1/L.211) was adopted by 19 votes in favour and 5 votes against, and the UNCITRAL text adopted, subject to the amendment.

## ARTICLE 75

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 75*

"(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

"(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person

authorized to take charge of the goods on his behalf is present at the destination."

## B. AMENDMENTS

2. Amendments were submitted to article 75 by China (A/CONF.97/C.1/L.178) and Australia (A/CONF.97/C.1/L.227).

3. These amendments were to the following effect:

*Paragraph (1).*

(i) *China* (A/CONF.97/C.1/L.178):

Amend paragraph (1) of this article to read as follows:

"If the goods have been received by the buyer *but are found not to be in conformity with the contract* and he intends to reject them, he must, *apart from informing the seller without undue delay of his intention and providing him with the relevant documents including the inspection certificate issued by an inspection firm,* take such steps as are reasonable in the circumstances to preserve the goods . . ."

[Referred to Drafting Committee: see Consideration, 5, below.]

(ii) *Australia* (A/CONF.97/C.1/L.227):

*Paragraph (1).*

Insert after the words "reject them" in paragraph (1) the following words:

"*or if the goods have been taken into possession by the buyer on behalf of the seller under paragraph (2).*"

[Withdrawn in favour of oral amendment: see Consideration, 6, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

(i) *Meetings*

4. The First Committee considered this article at its 30th and 31st meetings on 31 March 1980 and 1 April 1980 respectively.

(ii) *Consideration*

5. At the 30th meeting, the amendment by China (A/CONF.97/C.1/L.178) was referred to the Drafting Committee.

6. At the 31st meeting, the amendment by Australia (A/CONF.97/C.1/L.227) was withdrawn in favour of an oral amendment to insert at the end of the first sentence in paragraph (2) a sentence on the following lines:

"In this case his rights and duties as granted by paragraph (1) apply."

This oral amendment was adopted and referred to the Drafting Committee. The UNCITRAL text was adopted subject to this amendment.

## ARTICLE 76

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 76"*

"The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable."

## B. AMENDMENTS

2. No amendments were submitted to this article.

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

3. The First Committee considered article 76 at its 31st meeting on 1 April 1980.

## (ii) Consideration

4. At the 31st meeting, the UNCITRAL text was adopted.

## ARTICLE 77

## A. UNCITRAL TEXT

1. The text of the United Nations Commission on International Trade Law provided as follows:

*"Article 77"*

"(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

"(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with article 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

"(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance."

## B. AMENDMENTS

2. An amendment was submitted to article 77 by Argentina, Spain, Portugal (A/CONF.97/C.1/L.188).

3. This amendment was to the following effect:

*Paragraph (1).*

*Argentina, Spain, Portugal* (A/CONF.97/C.1/L.188):

Amend the first paragraph of article 77 to read:

"(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost

of preservation, provided that he has given notice to the other party, requiring him to take possession of the goods within a reasonable time with a warning of his intention to proceed with the immediate sale of the goods."

[Withdrawn in favour of the amendment by the *ad hoc* working group: see Consideration, 7, below.]

## C. PROCEEDINGS IN THE FIRST COMMITTEE

## (i) Meetings

4. The First Committee considered this article at its 31st and 33rd meetings on 1 and 2 April 1980 respectively.

## (ii) Consideration

*Paragraph (1).*

5. At the 31st meeting, the amendment by Argentina, Spain, Portugal (A/CONF.97/C.1/L.188) was referred for consideration to an *ad hoc* working group composed of the representatives of Argentina, Canada, Netherlands, Singapore and Spain.

6. At the 33rd meeting, the *ad hoc* working group submitted the following text.

*Ad hoc working group composed of Argentina, Canada, Netherlands and Portugal* (A/CONF.97/C.1/L.246), in which Singapore also participated:

Amend paragraph (1) as follows:

"(1) The party who is bound to preserve the goods in accordance with articles 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party."

7. The amendment by the *ad hoc* working group relating to the addition of the words "*the price or*" was adopted to make paragraph (1) consistent with article 74 as amended by the First Committee at its 30th meeting on 31 March 1980. The amendment by the *ad hoc* working group to add the word "*reasonable*" was adopted by 23 votes in favour and 15 against, and referred to the Drafting Committee.

*Paragraphs (2) and (3).*

8. At the 33rd meeting, the UNCITRAL text was adopted.

## III. Consideration of draft articles submitted by the Drafting Committee

1. At its 35th meeting on 4 April 1980, the First Committee considered draft articles 1 to 17 of the draft Convention on Contracts for the International Sale of Goods, as submitted to the First Committee by the Drafting Committee (A/CONF.97/C.1/L.248) and adopted the text of articles 1 to 17 as set forth in A/CONF.97/11/Add.1.

2. At its 36th meeting on 4 April 1980, the First Committee considered draft articles 18 to 31 of the draft Convention as submitted to the First Committee by the Drafting Committee (A/CONF.97/C.1/L.248 and Add.1) and adopted the text of articles 18 to 31 as set forth in A/CONF.97/11/Add.1.

3. At its 37th meeting on 7 April 1980, the First Committee considered draft articles 32 to 61 and 64 to 82 of the draft Convention as submitted to the First Committee by the Drafting Committee (A/CONF.97/C.1/

L.248/Add.2 and Add.3), and adopted the text of these articles as set forth in A/CONF.97/11/Add.2.

4. At its 38th meeting on 7 April 1980, the First Committee considered draft articles 62 and 63 of the draft Convention as submitted to the First Committee by the Drafting Committee (A/CONF.97/C.1/L.248/Add.2) together with the proposals of an *ad hoc* working group relating to these articles (A/CONF.97/C.1/L.252 and 253). At the 38th meeting, the First Committee adopted the text of these articles as set forth in A/CONF.97/11/Add.2.

## H. REPORT OF THE SECOND COMMITTEE

### Document A/CONF.97/12

[Original: English]  
[1 April 1980]

#### I. Introduction

##### A. SUBMISSION OF THE REPORT

1. The Conference at its 1st plenary meeting entrusted the Second Committee with the consideration of the draft articles concerning implementation, declarations, reservations and other final clauses (A/CONF.97/6) (with the exception of article X: Declarations relating to contracts in writing) and of the draft Protocol to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/7) prepared by the Secretary-General.

2. The present document contains the report of the Second Committee to the Conference on its consideration of the draft articles referred to it, and of other proposals made to the Second Committee during its deliberations.

##### B. ELECTION OF OFFICERS

3. At its 3rd plenary meeting on 11 March 1980 the Conference unanimously elected Prof. Mantilla-Molina (Mexico) as Chairman of the Second Committee. On 17 March 1980, at the 1st meeting of the Second Committee, Mr. Mikola P. Makarevich (Ukrainian Soviet Socialist Republic) was elected Vice-Chairman of the Second Committee. On 18 March 1980, at the 2nd meeting of the Second Committee, Dr. Venkatramiah Kuchibhotla (India) was elected Rapporteur of the Second Committee.

##### C. MEETINGS, ORGANIZATION OF WORK AND STRUCTURE OF THIS REPORT

###### (i) Meetings

4. The Second Committee held 9 meetings, between 17 March and 1 April 1980.

###### (ii) Organization of work

5. At its 1st meeting on 17 March 1980, the Second Committee adopted as its agenda the provisional agenda contained in A/CONF.97/C.2/L.1.

6. The Second Committee proceeded mainly by way of an article-by-article discussion of the draft articles before it and of the amendments to these draft articles submitted by representatives during the Conference. After initial consideration of an article and amendments pertaining thereto by the Second Committee, and subject to the decisions taken on these amendments, the article was referred to the Drafting Committee.

###### (iii) Plan of this report

7. This report describes the work of the Second Committee relating to each article before it, in accordance with the following scheme:

(a) Text of draft article prepared by the Secretary-General;

(b) Texts of amendments, if any, with a brief description of the manner in which they were dealt with;

(c) Proceedings of the Second Committee, subdivided as follows:

(i) Meetings

(ii) Consideration of the article.

## II. Consideration by the Second Committee of the draft Convention on Contracts for the International Sale of Goods: draft articles concerning implementation, declarations, reservations and other final clauses

### ARTICLE [A] DEPOSITARY

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

##### "Article A — Depositary

"The Secretary-General of the United Nations is hereby designated as the depositary of this Convention."

#### B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered the article on depositary at its 1st meeting on 17 March 1980.

## (ii) Consideration

4. The text prepared by the Secretary-General was adopted.

# ARTICLE [D] RELATIONSHIP WITH CONVENTIONS CONTAINING PROVISIONS DEALING WITH MATTERS GOVERNED BY THIS CONVENTION

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

*"Article D — Relationship with Conventions containing provisions dealing with matters governed by this Convention"*

"This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters governed by this Convention, provided that the offeror and offeree or seller and buyer as the case may be have their places of business in States parties to such a convention."

## B. AMENDMENTS

2. An amendment was submitted to the article on "Relationship with Conventions containing provisions dealing with matters governed by this Convention" by the USSR (A/CONF.97/C.2/L.9).

3. This amendment was to the following effect:

Replace the words "over conventions" with the words "over international agreements" and the words "such a convention" with the words "such an agreement."

[Adopted: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

4. The Second Committee considered the article on "Relationship with Conventions containing provisions dealing with matters governed by this Convention" at its 2nd meeting on 18 March 1980.

## (ii) Consideration

5. At its 2nd meeting, the Committee adopted the amendment by the USSR (A/CONF.97/C.2/L.9) as amended orally by Canada to include the word "any" before "international". It rejected an oral amendment by Nigeria to delete Article D.

# ARTICLE [F] SIGNATURE, RATIFICATION, ACCEPTANCE, APPROVAL, ACCESSION

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

*"Article F — Signature, ratification, acceptance, approval, accession"*

"(1) This Convention is open for signature at the concluding meeting of the Conference on . . . . . and shall remain open for signature at the Headquarters of the United Nations, New York, until . . . . ."

"(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

"(3) This Convention shall be open for accession by all States which are not signatory States.

"(4) Instruments of ratification, acceptance, approval and accession shall be deposited with the depositary."

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered the article on "Signature, ratification, acceptance, approval, accession" at its 2nd and 4th meetings on 18 March and 24 March 1980.

## (ii) Consideration

4. The Second Committee decided that the Convention remain open for signature by all States at the Headquarters of the United Nations, New York, until 30 September 1981. The Committee approved a suggestion by the Secretariat that the words "at any time" be added after "signatory States" at the end of paragraph 3. The Committee approved an oral amendment by Canada to replace the word "depositary" by the words "Secretary-General of the United Nations" at the end of paragraph 4.

# ARTICLE [G] PARTIAL RATIFICATION, ACCEPTANCE, APPROVAL OR ACCESSION

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

*"Article G — Partial ratification, acceptance, approval or accession"*

"(1) A Contracting State may declare at the time of signature, ratification, acceptance or accession that it will not be bound by the provisions of Part II of this

Convention or that it will not be bound by the provisions of Part III of this Convention.

"(2) A Contracting State which makes a declaration pursuant to paragraph (1) of this article in respect of Part II or Part III of this Convention shall not be considered to be a Contracting State within article 1 (1) of this Convention in respect of matters governed by the Part that it has not accepted."

#### B. AMENDMENTS

2. No amendments were submitted.

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

3. The Second Committee considered the article on Partial ratification, acceptance, approval or accession at its 2nd meeting on 18 March 1980.

##### (ii) Consideration

4. The Second Committee adopted the article on Partial ratification, acceptance, approval or accession as prepared by the Secretary-General.

### ARTICLE [B] FEDERAL STATE CLAUSE

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

##### "Article B — Federal State clause

##### "Alternative I

"In the case of a federal or non-unitary State, the following provisions shall apply:

"(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the federal government shall to this extent be the same as those of Parties which are not federal States;

"(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the federal government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

"(c) A federal State party to this Convention shall, at the request of any other Contracting Party transmitted through the depositary, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action.

##### "Alternative II

"(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

"(2) These declarations shall be notified to the depositary and shall state expressly the territorial units to which the Convention applies.

"(3) If a Contracting State described in paragraph (1) of this article makes no declaration at the time of signature, ratification, acceptance, approval or accession, the Convention shall have effect within all territorial units of that State."

#### B. AMENDMENTS

2. An amendment was submitted to the article on the federal State clause by Canada (A/CONF.97/C.2/L.2).

3. This amendment was to the following effect:

The article should contain provisions similar to Alternative II in the text prepared by the Secretary-General, and to article 31 of the Convention on the Limitation Period in the International Sale of Goods.

[Adopted as amended by an *ad hoc* working group: see Consideration, 7, below.]

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

4. The Second Committee considered the article on the federal State clause at its 1st and 3rd meetings on 17 and 20 March 1980.

##### (ii) Consideration

5. At its 1st meeting, the Committee showed preference for Alternative II but decided to refer the matter to an informal working group composed of the representatives of Australia and Canada.

6. At the 3rd meeting, the Committee studied the proposal of the *ad hoc* working group composed of Australia and Canada, joined by Norway (A/CONF.97/C.2/L.13). This proposal suggested the addition of a fourth paragraph to Alternative II of Article B.

7. At the 3rd meeting, paragraph 1 of Alternative II was adopted as orally amended by Japan. The effect of this amendment is to add the words "acceptance, approval" after the words "signature, ratification". Paragraph 2 was adopted as drafted. Paragraph 3 was adopted as orally amended by Australia following a discussion pertaining to an oral amendment made by the Federal Republic of Germany, which was subsequently withdrawn. The paragraph as amended now reads:

"(3) If a Contracting State makes no declaration

under paragraph (1) of this article, the Convention shall have effect within all territorial units of that State."

8. At the 3rd meeting, the Committee studied the new paragraph 4 submitted by the *ad hoc* working group; it was adopted as orally amended by Canada. The purpose of this oral amendment was to substitute the indefinite article "a" for the definite article "the" in the fifth line (A/CONF.97/C.2/L.13). The paragraph as adopted reads as follows:

"(4) Where by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, the place of business of a party to a contract shall, for the purposes of this Convention, be deemed not to be in a Contracting State, unless the place of business is in a territorial unit to which the Convention has been extended."

9. A proposal by Bulgaria to change the order of paragraphs (3) and (4) was referred to the Drafting Committee.

## ARTICLE [C] DECLARATION OF NON-APPLICATION OF THE CONVENTION

### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

#### *"Article C — Declaration of non-application of Convention"*

"(1) A Contracting State may at any time declare that the Convention does not apply to the formation of contracts of sale or to contracts of sale between a party having a place of business in that State and a party having a place of business in another State because the two States apply to matters governed by this Convention the same or closely related rules.

"(2) If that other State is a Contracting State, such declarations shall be made jointly by the two Contracting States or by reciprocal unilateral declarations."

### B. AMENDMENTS

2. Amendments to the article on Declaration of non-application of the Convention were submitted by the *ad hoc* working group composed of Canada, Finland, France and the Netherlands (A/CONF.97/C.2/L.10) and by the Netherlands (A/CONF.97/C.2/L.23).

3. These amendments were to the following effect:

(a) The amendment by the *ad hoc* working group proposed new wording for paragraphs 1 and 2 and added a new paragraph 3.

"(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention does not apply to contracts of sale or to their formation where the parties have their pla-

ces of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

"(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-contracting States may at any time declare that the Convention does not apply to contracts of sale or to their formation where the parties have their places of business in those States.

"(3) If a State which is the object of a declaration made under paragraph (2) of this article subsequently ratifies, accedes to, or approves of the present Convention, the declaration shall remain in effect unless the ratifying, acceding or approving State declares that it cannot accept it."

[Adopted as to paragraphs 1 and 2; rejected as to paragraph 3: see Consideration, 5, below.]

(b) The amendment by the Netherlands (A/CONF.97/C.2/L.23) proposed a new paragraph 3 which would read as follows:

"(3) If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1)."

[Adopted as amended: see Consideration, 5, below.]

### C. PROCEEDINGS IN THE SECOND COMMITTEE

#### (i) Meetings

4. The Second Committee considered Article C at its 1st, 3rd, 4th and 5th meetings on 17, 20, 24 and 25 March 1980.

#### (ii) Consideration

5. At its 1st meeting the Second Committee established an *ad hoc* working group composed of Canada, Finland, France and the Netherlands. At the 3rd meeting the proposal of the *ad hoc* working group (A/CONF.97/C.2/L.10) was studied and paragraphs 1 and 2 of the proposal were adopted. At the 5th meeting, the new text of paragraph 3 proposed by the Netherlands (A/CONF.97/C.2/L.23) was adopted as amended orally following a statement by the Secretariat.

## ARTICLE [C bis] PROPOSAL BY AUSTRALIA WITH RESPECT TO "DECLARATION OF APPLICATION"

### A. TEXT SUBMITTED BY AUSTRALIA

1. The text submitted by Australia for a new article C bis (A/CONF.97/C.2/L.3) provided as follows:

"A Contracting State may, at the time of signature, ratification or accession, make a declaration that it will apply the Convention only where the parties have chosen the Convention as the law governing the formation and interpretation of their contract."

## B. AMENDMENTS

2. No amendments to this proposal were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The 2nd Committee considered Article C *bis* by Australia at its 1st and 2nd meetings on 17 and 18 March 1980.

## (ii) Consideration

4. At its 2nd meeting, the Committee rejected Article C *bis* proposed by Australia.

ARTICLE [C *bis* AND C *ter*] PROPOSAL BY CZECHOSLOVAKIA

## A. TEXT SUBMITTED BY CZECHOSLOVAKIA

1. The text submitted by Czechoslovakia for two new articles (A/CONF.97/C.2/L.7) and described as C *bis* and C *ter* by the Chairman provided as follows:

"Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply the Convention only to contracts of sale of goods between parties having their places of business in different Contracting States."

"Any State may declare, at the time of the deposit of its instrument of ratification or accession, that it will apply article 8 paragraph (2) only if a usage is not contrary to the Convention."

## B. AMENDMENTS

2. No amendments to this proposal were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered Articles C *bis* and C *ter* proposed by Czechoslovakia at its 2nd meeting on 18 March 1980.

## (ii) Consideration

4. At its 2nd meeting, the Committee rejected Article C *bis* and C *ter* proposed by Czechoslovakia.

## ARTICLE [X] DECLARATIONS RELATING TO CONTRACTS IN WRITING

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

"Article X — *Declarations relating to contracts in writing*

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or

accession make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, which allows a contract of sale or its modification or abrogation or any offer, acceptance, or other indication of intention to be made in any form other than in writing shall not apply where any party has his place of business in a Contracting State which has made such a declaration."

## B. AMENDMENTS

2. Amendments were submitted to the article on Declarations relating to contracts in writing by the Federal Republic of Germany (A/CONF.97/C.1/L.96) and the United Kingdom (A/CONF.97/C.1/L.88).

3. These amendments were to the following effect:

(i) *Federal Republic of Germany* (A/CONF.97/C.1/L.96):

Insert after the words "at the time of signature, ratification or accession" the words "or at any time thereafter".

[Modified adopted: see Consideration, 6, below.]

(ii) *United Kingdom* (A/CONF.97/C.1/L.88):

1. Insert after the word "ratification" in the second line of Article X the words "acceptance, approval".

[Rejected: see Consideration, 6, below.]

2. Replace the words "a Contracting State" in the last line by the words "the Contracting State".

[Adopted: see Consideration, 7, below.]

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

4. The Second Committee considered the article on Declarations relating to contracts in writing at its 2nd, 3rd and 4th meetings on 18, 20 and 24 March 1980.

## (ii) Consideration

5. When it adopted its agenda, at its 1st plenary meeting, the Conference decided to entrust the consideration of Article (X) to the First Committee. At its 2nd meeting, the Second Committee was informed that a subsequent meeting would be attended by the Rapporteur of the First Committee who would report on the decisions taken by the First Committee and inform the Second Committee of the matters remaining to be considered by the Second Committee. At its 3rd meeting, the Second Committee heard the report of the Rapporteur of the First Committee.

6. At its 3rd meeting, the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.96) and the first part of the amendment by the United Kingdom (A/CONF.97/C.1/L.88) were orally amended by the Netherlands. This amendment was to the effect of striking the words "at the time of signature, ratification or accession" and replacing them by the words "at any time". This amendment was accepted. In referring the

article to the Drafting Committee, the Committee agreed that the words "at any time" did not mean that declarations made in accordance with article X could be applied retroactively.

7. The second part of the amendment by the United Kingdom (A/CONF.97/C.1/L.88) was adopted.

8. The Committee also drew the attention of the Drafting Committee to the fact that the word "abrogation" was to mean "termination by agreement".

## ARTICLE [H] DECLARATIONS

### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

#### *"Article H — Declarations"*

"(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance, approval or accession.

"(2) Declarations, and the confirmation of declarations, shall be in writing and shall be formally notified to the depositary.

"[(3) Declarations made under Article B shall state expressly the territorial units to which the Convention applies.]

"[(4) If a Contracting State described in Article B makes no declaration at the time of signature, ratification, acceptance, approval or accession, the Convention has effect within all territorial units of that State.]

"(5) Declarations take effect simultaneously with the entry into force of this Convention in respect of the State concerned, except for declarations of which the depositary receives formal notification after such entry into force. The latter declarations shall take effect on the first day of the month following the expiration of six months after the date of their receipt by the depositary except that reciprocal unilateral declarations under Article C shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

"(6) Any State which has made a declaration under this Convention may withdraw it at any time by means of a formal notification in writing addressed to the depositary. Such withdrawal takes effect on the first day of the month following the expiration of six months after the date of receipt of the notification of the depositary.

"(7) In the case of withdrawal of a declaration made under Article C of this Convention, such withdrawal also renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article."

## B. AMENDMENTS

2. An amendment to the article on Declarations was submitted by the United Kingdom (A/CONF.97/C.2/L.6).

3. This amendment was to the effect of deleting paragraph 4 and of substituting the words "shall take" for the word "takes" in the third line of paragraph 6 and the words "shall render" for the word "renders" in the second line of paragraph 7.

[Adopted as to paragraph 4 and referred to the Drafting Committee as to paragraphs 6 and 7: see Consideration, 5, below.]

## C. PROCEEDINGS IN THE SECOND COMMITTEE

### (i) Meetings

4. The Second Committee considered the article on Declarations at its 2nd and 5th meetings on 18 and 25 March 1980.

### (ii) Consideration

5. At its 2nd meeting, the Second Committee adopted paragraphs 1, 2 and 6 of the article on Declarations. At the 5th meeting, paragraphs 3 and 4 were deleted on an oral proposal by Canada. Paragraph 5 was approved after an oral amendment by France to suppress the six months' delay provided for by this paragraph had been rejected. Paragraphs 6 and 7 were approved and referred to the Drafting Committee with respect to the proposal by the United Kingdom to use the jussive future (A/CONF.97/C.2/L.6).

## ARTICLE Y — PROPOSAL BY AUSTRIA WITH RESPECT TO RESERVATIONS

### A. TEXT SUBMITTED BY AUSTRIA

1. The text submitted by Austria for a new article Y (A/CONF.97/C.2/L.4) provided as follows:

"No reservation other than that made in accordance with Article X shall be permitted."

## B. AMENDMENTS

2. No amendments to this proposal were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

### (i) Meetings

3. The Second Committee considered new Article Y proposed by Austria at its 6th meeting on 26 March 1980.

### (ii) Consideration

4. At its 6th meeting, the Second Committee adopted the new article Y proposed by Austria with a new wording suggested by the Secretariat. The new article reads:

"No reservations shall be permitted except those expressly authorized in this Convention."



## ARTICLE [J] ENTRY INTO FORCE

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

*"Article J — Entry into force"*

"(1) This Convention enters into force on the first day of the month following the expiration of [thirteen.] months after the date of deposit of the [tenth] instrument of ratification, acceptance, approval or accession by which a State declares that it will not be bound by the provisions of Part II or Part III of this Convention pursuant to Article G above.

"(2) For each State ratifying, accepting, approving or acceding to this Convention after the [tenth] instrument of ratification, acceptance, approval or accession has been deposited, this Convention, with the exception of the part excluded, enters into force in respect of that State on the first day of the month following the expiration of [thirteen] months after the date of deposit of its instrument of ratification, acceptance, approval or accession.

"(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect, such denunciation or denunciations to be effective on the date this Convention enters into force in respect of that State.

"(4) A State which partially ratifies, accepts, approves or accedes to this Convention pursuant to Article G by declaring that it will not be bound by the provisions of Part II of this Convention and which is a party to the 1964 Hague Sales Convention shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect, such denunciation to be effective on the date this Convention enters into force in respect of that State.

"(5) A State which partially ratifies, accepts, approves or accedes to this Convention pursuant to Article G by declaring that it will not be bound by the provisions of Part III of this Convention and which is a party to the 1964 Hague Formation Convention shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect, such denunciation to be effective on the date this Convention enters into force in respect of that State.

"(6) Upon the deposit of the [tenth] instrument of

ratification, acceptance, approval or accession (including an instrument which contains a declaration pursuant to article G), the depositary shall inform the Government of the Netherlands as the depositary of the 1964 Hague Formation Convention and the 1964 Hague Sales Convention of the date on which this Convention will enter into force and of the names of the Contracting States to this Convention."

## B. AMENDMENTS

2. Amendments to the article on Entry into force were submitted by the United Kingdom (A/CONF.97/C.2/L.6, A/CONF.97/C.2/L.8 and A/CONF.97/C.2/L.12) and a revised text of the initial proposal was submitted by the Secretary-General (A/CONF.97/C.2/L.17).

3. These amendments were to the following effect:

(a) In document A/CONF.97/C.2/L.6 the United Kingdom suggested that in paragraphs 1 and 2 of the article the future tense be substituted for the present tense.

[Referred to the Drafting Committee: see Consideration, 5, below.]

(b) The amendment proposed by the United Kingdom in document A/CONF.97/C.2/L.8 was to the effect of substituting in paragraph (1) the words "including an instrument which contains a declaration pursuant to Article G" for the passage starting with "including" to the end of paragraph (1).

[Adopted: see Consideration, 5, below.]

(c) In the proposal contained in A/CONF.97/C.2/L.12, the United Kingdom suggested that the Committee should consider whether the words "such denunciation or denunciations to be effective on the date this Convention enters into force in respect of that State" in paragraph (3) and the similar passages in paragraphs (4) and (5) have any effect.

[Withdrawn: see Consideration, 5, below.]

(d) The new text proposed by the Secretary-General in A/CONF.97/C.2/L.17 is as follows:

"(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the [tenth] instrument of ratification, acceptance, approval or accession (including the deposit of an instrument of ratification, acceptance, approval or accession by which a State declares, pursuant to Article G, that it will not be bound by the provisions of Part II or Part III of this Convention).

"(2) For each State ratifying, accepting, approving or acceding to this Convention after the [tenth] instrument of ratification, acceptance, approval or accession has been deposited, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month follow-

ing the expiration of twelve months after the deposit of its instrument of ratification, acceptance, approval or accession.

"(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at the Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

"(4) A State which partially ratifies, accepts, approves or accedes to this Convention pursuant to Article G by declaring that it will not be bound by the provisions of Part II of this Convention and which is a party to the 1964 Hague Sales Convention shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect.

"(5) A State which partially ratifies, accepts, approves or accedes to this Convention declaring, pursuant to Article G, that it will not be bound by the provisions of Part III and which is a party to the 1964 Hague Formation Convention shall at the same time denounce that Convention by notifying the Government of the Netherlands to that effect.

"(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect."

[Adopted as amended: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

4. The Second Committee considered the article on the Entry into force at its 4th and 5th meetings on 24 and 25 March 1980.

##### (ii) Consideration

5. At its 4th meeting the Second Committee retained the revised text proposed by the Secretary-General in document A/CONF.97/C.2/L.17 as amended by the United Kingdom (A/CONF.97/C.2/L.8). Oral amendments by France and Austria were rejected. Paragraphs (2), (3), (4), (5) and (6) were adopted as drafted. An oral amendment by Ghana purporting to add the words

"after it has entered into force" after the words "this Convention" in the second line of paragraph (2) was rejected. The proposal by the United Kingdom contained in A/CONF.97/C.2/L.6 to use the future tense instead of the present tense was referred to the Drafting Committee. An oral proposal by Iraq to add a new sentence to paragraph (3) which would embody in paragraph (3) the substance of paragraphs (4) and (5) was rejected. The United Kingdom withdrew its proposal contained in document A/CONF.97/C.2/L.12.

#### ARTICLE [E] DATE OF APPLICATION

##### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

##### "Article E — Date of application

"Each Contracting State shall apply the provisions of this Convention to:

"(a) the formation of contracts falling within the scope of article 1 of this Convention when the proposal for concluding the contract has been made on or after the date of entry into force of this Convention in respect of the States in which the parties have their places of business; and to

"(b) contracts falling within the scope of article 1 of this Convention which were concluded on or after the date of entry into force of this Convention in respect of the States in which the parties have their places of business."

##### B. AMENDMENTS

2. Amendments to the article on Date of application were submitted by the USSR (A/CONF.97/C.2/L.20) and by the *ad hoc* working group composed of France, the Federal Republic of Germany, Japan, the Netherlands and the Hague Conference on Private International Law (A/CONF.97/C.2/L.11).

3. These amendments were to the following effect:

(a) The amendment by the USSR proposed that the article should be worded as follows:

"Each Contracting State shall apply the provisions of this Convention to:

"(1) The formation of contracts falling within the scope of article 1 of this Convention when the proposal for concluding the contract has been made on the date of entry into force of this Convention in respect of that State or later;

"(2) Contracts falling within the scope of article 1 of this Convention which were concluded on the date of entry into force of this Convention in respect of that State or later."

[Withdrawn: see Consideration, 5, below.]

(b) The proposal by the *ad hoc* working group composed of France, the Federal Republic of Germany, Japan, the Netherlands and the Hague Conference on

Private International Law proposed a new formulation for Article E which would read as follows:

"(1) This Convention does not apply to contracts concluded before its entry into force in respect of the Contracting States or States referred to in article 1.

"(2) This Convention does not apply to the formation of contracts when the proposal for concluding the contract has been made before its entry into force in respect of the Contracting State or States referred to in article 1."

[Adopted as orally amended: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

4. The Second Committee considered the article on Date of application at its 2nd and 4th meetings on 18 and 24 March 1980.

##### (ii) Consideration

5. At its 2nd meeting, the Second Committee established an *ad hoc* working group composed of France, the Federal Republic of Germany, Japan, the Netherlands and the Hague Conference on Private International Law to draft a new text for Article E. At its 4th meeting, the Second Committee considered the proposal of the *ad hoc* working group. An oral amendment was submitted by the United Kingdom to replace in both paragraphs the words "Contracting States or State" by "the Contracting States or the Contracting State". An oral amendment was submitted by Bulgaria to reverse the order of paragraphs (a) and (b). The Committee adopted the article on Date of application as orally amended by the United Kingdom and Bulgaria. The Netherlands orally submitted an amendment to the French version which was referred to the Drafting Committee. The amendment by the USSR was withdrawn at the 4th meeting.

6. An oral proposal made by France to place the article on Date of application after the article on Entry into force was adopted.

### ARTICLE [K] DENUNCIATIONS

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

##### "Article K — Denunciations

"(1) A Contracting State may denounce this Convention (or Part II or Part III thereof), by means of a formal notification in writing addressed to the depositary.

"(2) The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary. Where a longer period is specified in the notification, the denunciation takes effect upon the expiration of such

longer period after the notification is received by the depositary."

#### B. AMENDMENTS

2. Amendments to the article on Denunciations were submitted by the United Kingdom (A/CONF.97/C.2/L.6 and A/CONF.97/C.2/L.15) and by the German Democratic Republic (A/CONF.97/C.2/L.16).

3. These amendments were to the following effect:

(a) Document A/CONF.97/C.2/L.6 suggested that the future tense be substituted for the present tense in paragraph (2).

[Referred to Drafting Committee: see Consideration, 5, below.]

(b) Document A/CONF.97/C.2/L.15 suggested that the words "for the denunciation to take effect" be added after the words "where a longer period" in the second sentence of paragraph (2).

[Adopted: see Consideration, 5, below.]

(c) Document A/CONF.97/C.2/L.16 suggested adding a new paragraph (3) to read as follows:

"This Convention does not apply to contracts concluded after its denunciation becomes effective for the Contracting State or States referred to in article 1."

[Rejected: see Consideration, 5, below.]

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

4. The Second Committee considered the article on Denunciation at its 6th meeting on 26 March 1980.

##### (ii) Consideration

5. At its 6th meeting, the Committee adopted the article on Denunciation as amended by the United Kingdom (A/CONF.97/C.2/L.15). The other amendment by the United Kingdom (A/CONF.97/C.2/L.6) was referred to the Drafting Committee. A proposal by the German Democratic Republic (A/CONF.97/C.2/L.16) to add a third paragraph was rejected.

### TESTIMONIUM [AUTHENTIC TEXT AND WITNESS CLAUSE]

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text proposed by the Secretary-General provided as follows:

"DONE at . . . . ., this day of . . . . .  
 . . . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

"IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention."

## B. AMENDMENTS

2. No amendments to the Testimonium (authentic text and witness clause) were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered the Testimonium (authentic text and witness clause) at its 6th meeting on 26 March 1980.

## (ii) Consideration

4. The text prepared by the Secretary-General was adopted.

# TITLES AND ORDER OF DRAFT ARTICLES CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General<sup>1</sup> provided as follows:

*"Annex*

"Article A — Depositary

"Article D — Relationship with international agreements containing provisions dealing with matters governed by this Convention

"Article F — Signature, ratification, acceptance, approval, accession

"Article G — Partial ratification, acceptance, approval or accession

"Article B — Federal State clause

"Article C — Declaration of non-application of Convention

"Article X — Clause relating to contracts in writing

"Article H — Procedure relating to declarations

"Article Y — Reservations

"Article J — Entry into force

"Article E — Date of application

"Article K — Denunciation

"Testimonium"

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered the order of the draft articles concerning implementation, declarations, reservations and other final clauses at its 9th meeting on 1 April 1980.

## (ii) Consideration

4. At its 9th meeting the Second Committee approved the order proposed by the Secretary-General and referred the matter to the Drafting Committee.

# III. Consideration by the Second Committee of the draft Protocol to the Convention on the Limitation in the International Sale of Goods

## PREAMBLE

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General<sup>1</sup> provided as follows:

"The States Parties of this Protocol,

"Considering that international trade is an important factor in the promotion of friendly relations amongst States,

"Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

"Considering that amending the Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 12 June 1974, to conform to the Convention on Contracts for the International Sale of Goods, concluded at Vienna on . . . April 1980, would promote the adoption of the uniform rules governing the limitation period contained in the Convention on the Limitation Period in the International Sale of Goods,

"Have agreed to amend the said Convention as follows:"

## B. AMENDMENTS

2. No amendments to the Preamble were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered the Preamble at its 6th meeting on 26 March 1980.

## (ii) Consideration

4. The text prepared by the Secretary-General was adopted.

## ARTICLES I TO VI

## A. TEXT BY THE SECRETARY-GENERAL

1. The Committee had before it documents A/CONF.97/7, A/CONF.97/C.2/L.18, A/CONF.97/C.2/L.18/Add.1 and A/CONF.97/C.2/L.28.

<sup>1</sup> This text is to be found in Annex (A/CONF.97/C.2/L.24).

<sup>1</sup> This text is to be found in A/CONF.97/C.2/L.18.

## B. AMENDMENTS

2. Amendments were submitted by Norway (A/CONF.97/C.2/L.14 and A/CONF.97/C.2/L.19), the Federal Republic of Germany (A/CONF.97/C.2/L.21) and Japan (A/CONF.97/C.2/L.26).

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered these articles at its 7th, 8th and 9th meeting on 27, 28 March and 1 April 1980.

## (ii) Consideration

4. At its 7th and 8th meetings, the Committee considered the comparative table prepared by the Secretary-General concerning provisions of the Prescription Convention and of the Contracts Convention in regard to scope of application and final provisions. At its 8th meeting the Committee decided to include in the draft Protocol articles amending articles 3, 4, 31, 34, 37 and 40 of the Prescription Convention. The relevant articles (I to VI) are to be found in document A/CONF.97/DC/L.8/Rev.1 and were considered and adopted by the Committee at its 9th meeting.

ARTICLE VII  
(old Article VI)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text proposed by the Secretary-General provided as follows:

"The Secretary-General of the United Nations is hereby designated as the depositary for this Protocol."

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered Article VII at its 6th meeting on 26 March 1980.

## (ii) Consideration

4. The text prepared by the Secretary-General was adopted.

ARTICLE VIII  
(old Article V)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text proposed by the Secretary-General provided as follows:

"(1) This Protocol shall be opened for accession by all States that are Contracting Parties or signatories in respect of the Convention of 12 June 1974.

<sup>1</sup> The text of articles VII *et seq.* is to be found in A/CONF.97/C.2/L.18 under the old numbers indicated in brackets.

"(2) Instruments of accession shall be deposited with the Secretary-General of the United Nations."

## B. AMENDMENTS

2. An amendment to article VIII was submitted by Austria (A/CONF.97/C.2/L.22).

3. This amendment was to the effect of including a new article V *bis* to read as follows:

"Ratification of or adherence to this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol."

[Adopted as amended; see Consideration, 5, below.]

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

4. The Second Committee considered article VIII at its 6th, 7th and 9th meetings on 26 and 27 March and 1 April 1980.

## (ii) Consideration

## Paragraph 1

5. At its 9th meeting the Committee accepted an oral amendment submitted by the USSR to delete the words "that are Contracting Parties or signatories in respect of the Convention of 12 June 1974" and adopted the paragraph as amended.

## Paragraph 2

6. At its 7th meeting, the Committee adopted the new article proposed by Austria (A/CONF.97/C.2/L.22) and subsequently amended orally to read as follows:

"Accession to this Protocol by any State which is not a Contracting Party to the Convention shall have the effect of accession to the Convention as amended by this Protocol."

7. At its 9th meeting, the Committee accepted an oral amendment submitted by France to add the new article as paragraph 2 to Article VIII. At the 9th meeting a further oral amendment was adopted to add the words "Subject to the provisions of Article XI" at the end of new paragraph 2.

## Paragraph 3

8. The Committee adopted the text prepared by the Secretary-General (former paragraph (2)) at its 6th meeting.

ARTICLE IX  
(old Article VI)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

"(1) This Protocol shall enter into force on the first day of the . . . . . month following the

deposit of the [second] [sixth] instrument of accession, provided:

- "(a) that the Convention of 12 June 1974 is itself in force on that date; and
- "(b) that the Convention on contracts for the international sale of goods, concluded at Vienna on . . . . . is also in force.

"If applicable, this Protocol shall enter into force on that date when both conditions referred to above are fulfilled.

"(2) For each State acceding to this Protocol after the [second] [sixth] instrument of accession has been deposited, this Protocol shall enter into force on the first day of the . . . . . month following the deposit of the instrument, provided that the conditions set forth in paragraph (1) of this article for the purpose of the initial entry into force of this Protocol are fulfilled by that date.

"If applicable, this Protocol shall enter into force for the State concerned on the date when the said conditions are fulfilled."

#### B. AMENDMENTS

2. No amendments were submitted.

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

3. The Second Committee considered Article IX at its 6th meeting on 26 March 1980.

##### (ii) Consideration

4. At its 6th meeting, the Committee decided that the Protocol should enter into force on the first day of the *sixth* month following the deposit of the *second* instrument. The Committee decided that for each State acceding to the Protocol after the *second* instrument of accession has been deposited, the Protocol should enter into force on the first day of the *sixth* month following the deposit of the instrument. The last sentence of each paragraph of this article was referred to the Drafting Committee.

### NEW ARTICLE VI *bis* — PROPOSAL BY CZECHOSLOVAKIA

#### A. TEXT PROPOSED BY CZECHOSLOVAKIA

1. The text proposed by Czechoslovakia (A/CONF. 97/ C.2/L.27) provided as follows:

##### "New Article VI *bis*

"Any State may declare, at the time of the deposit of its instrument of accession, that it will apply the Protocol only to contracts of sale of goods between parties having their places of business in different Contracting States."

#### B. AMENDMENTS

2. No amendments were submitted.

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

3. The Second Committee considered the new article submitted by Czechoslovakia at its 9th meeting on 1 April 1980.

##### (ii) Consideration

4. The Second Committee rejected the Czechoslovakian proposal.

### ARTICLE X (old Article VII)

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

"Any ratification or accession effected in respect of the Convention of 12 June 1974 after the entry into force of this Protocol shall be considered to constitute an accession in respect of this Protocol provided that the State concerned notifies the depositary accordingly."

#### B. AMENDMENTS

2. No amendments were submitted.

#### C. PROCEEDINGS IN THE SECOND COMMITTEE

##### (i) Meetings

3. The Second Committee considered Article X at its 6th meeting on 26 March 1980.

##### (ii) Consideration

4. At its 6th meeting, the Committee adopted Article X as amended orally by the United States in order to place at the beginning of the article the part of the article which begins with the words "provided that the State". The Netherlands which had made an oral amendment to the same effect withdrew its amendment.

### ARTICLE XI (old Article VIII)

#### A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

"Any State which becomes a Contracting Party to the Convention of 12 June 1974 as amended by this Protocol, by virtue either of Article VI or of Article VII of this Protocol shall, unless it notifies a contrary intention, be deemed to be also a Contracting Party to the Convention of 12 June 1974, unamended, in relation to any Contracting Party to the latter Convention not yet a Contracting Party to this Protocol."

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered Article XI at its 7th meeting on 27 March 1980.

## (ii) Consideration

4. At its 7th meeting, the Committee adopted Article XI as orally amended by the United States of America to add the words "*the depositary of*" after the words "*unless it notifies*" and as further amended to include a reference to article VIII.

ARTICLE XII  
(old Article VIII bis)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General<sup>1</sup> provided as follows:

*"Denunciation"*

- "1. A Contracting State may denounce this Protocol by notifying the depositary to that effect.

- "2. The denunciation shall take effect on the first day of the month following the expiration of 12 months after receipt of the notification by the depositary.

- "3. Any Contracting State in respect of which this Protocol ceases to have effect by application of paragraphs 1 and 2 of this article shall remain a Contracting Party to the Convention of 12 June 1974, unamended, and shall consequently continue to be bound by the said Convention in accordance with the provisions of the latter and with article [VIII] of this Protocol, unless it denounces the unamended Convention in accordance with article 45 thereof."

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered article XII at its 7th, 8th and 9th meetings on 27 and 28 March and 1 April 1980.

## (ii) Consideration

4. At its 7th meeting, the Committee requested the Secretary-General to prepare an article on denunciation to be added to the Draft Protocol. At its 8th meeting, the Committee adopted paragraphs 1 and 2. At its 9th meeting it accepted an oral amendment submitted by Japan to delete the words "and with article [VIII] of this Protocol" and adopted paragraph 3 as amended.

<sup>1</sup> This text is to be found in A/CONF.97/C.2/L.18/Add.2.

ARTICLE XIII  
(old Article IX)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General provided as follows:

"(1) The depositary shall transmit certified true copies of this Protocol to all the Contracting Parties and signatories in respect of the Prescription Convention.

"(2) When this Protocol enters into force in accordance with article VI, the depositary shall prepare a text of the Prescription Convention as amended by this Protocol and shall transmit certified true copies to all States Parties or entitled to become Parties to the Prescription Convention as amended by this Protocol."

## B. AMENDMENTS

2. No amendments were submitted.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

## (i) Meetings

3. The Second Committee considered article XIII at its 7th and 9th meetings on 27 March and 1 April 1980.

## (ii) Consideration

4. At its 7th meeting, the Committee approved an oral amendment submitted by the United States to replace the words "*the Prescription Convention*" by the "*Convention of 12 June 1974*". At its 9th meeting, the Committee approved an oral amendment submitted by the USSR to replace, in paragraph 1, the words "*the Contracting Parties and signatories in respect of the Convention of 12 June 1974*" by the word "*States*", and to delete in paragraph 2, the words "*or entitled to become Parties*". The article as amended was adopted.

TESTIMONIUM (AUTHENTIC TEXT AND  
WITNESS CLAUSE)

## A. TEXT BY THE SECRETARY-GENERAL

1. The text prepared by the Secretary-General<sup>1</sup> provided as follows:

"DONE at . . . . . this day of . . . . .  
. . . . . in a single original, of which the (Arabic), Chinese, English, French, Russian and Spanish text are equally authentic."

## B. AMENDMENTS

2. No amendments were submitted.

<sup>1</sup> This text is to be found in A/CONF.97/C.2/18.

## C. PROCEEDINGS IN THE SECOND COMMITTEE

(i) *Meetings*

3. The Second Committee considered the testimony at its 7th meeting on 27 March 1980.

(ii) *Consideration*

4. The Committee removed the brackets and adopted the text prepared by the Secretary-General.

## IV. Consideration of the Report of the Drafting Committee to the Committee

At its 9th meeting on 1 April 1980, the Committee decided that the Drafting Committee should report directly to the Plenary Conference.

## V. Consideration of the Report of the Committee to the Plenary Conference

At its 9th meeting on 1 April 1980, the Committee considered and adopted the draft report submitted by the Rapporteur.

## I. REPORT OF THE DRAFTING COMMITTEE

*Document A/CONF.97/17*

[9 April 1980]

## A. ORGANIZATION OF THE COMMITTEE

1. The Conference at its fifth plenary meeting, on the recommendation of the General Committee, elected the following 15 States as members of the Drafting Committee: Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libyan Arab Jamahiriya, Republic of Korea, Singapore, Union of Soviet Socialist Republics, United Kingdom, United States of America and Zaire.

## B. ELECTION OF OFFICERS

2. At its first meeting on 21 March 1980 the Drafting Committee unanimously elected Mr. W. Khoo (Singapore) as Chairman of the Drafting Committee. Mr. L. Sevon (Finland) was elected Vice-Chairman and Mr. L. Kopač (Czechoslovakia) Rapporteur of the Drafting Committee.

## C. MEETINGS AND ORGANIZATION OF WORK

(i) *Meetings*

3. The Drafting Committee held 19 meetings, between 21 March and 9 April 1980.

(ii) *Organization of work*

4. At its first meeting on 21 March 1980, the Drafting Committee adopted as its agenda the provisional agenda contained in document A/CONF.97/DC/L.1.

5. The Drafting Committee proceeded mainly by way of an article-by-article discussion of the draft articles before it and of the amendments to these draft articles submitted to it by the First and Second Committees.

6. The Committee gratefully acknowledges the presence of revisers who assisted it in establishing texts in the six official languages of the Conference.

## D. REPORTS SUBMITTED

(i) *On the articles referred by the First Committee*

7. The Drafting Committee considered the draft articles referred to it by the First Committee during its first to fifteenth meetings from 21 March to 5 April 1980. The report of the Drafting Committee to the First Committee is contained in documents A/CONF.97/C.1/L.248 and Add. 1 to 3.

(ii) *On the articles referred by the Second Committee*

8. The Drafting Committee considered the draft Final Provisions referred to it by the Second Committee at its sixteenth to eighteenth meetings on 7 and 8 April 1980. At the request of the Second Committee the Drafting Committee submitted its report on the draft Final Provisions to the plenary. The report of the Drafting Committee is contained in document A/CONF.97/13/Rev.1.

(iii) *On the Protocol to the Limitation Convention*

9. The Drafting Committee considered the draft Protocol to the Convention on the Limitation Period in the International Sale of Goods referred to it by the Second Committee at its nineteenth meeting on 9 April 1980. At the request of the Second Committee the Drafting Committee submitted its report to the Plenary Committee. The report of the Drafting Committee is contained in document A/CONF.97/14.

(iv) *On the Preamble and the Final Act*

10. At the request of the General Committee, the Drafting Committee considered the Preamble and the Final Act at its nineteenth meeting on 9 April 1980. The report of the Drafting Committee is contained in documents A/CONF.97/15 and A/CONF.97/16.



# J. DRAFT ARTICLES OF THE CONVENTION SUBMITTED TO THE PLENARY CONFERENCE BY THE FIRST COMMITTEE

Document A/CONF.97/11/Add.1 and 2

[Original: Arabic, Chinese, English, French, Russian, Spanish]  
[4 April 1980]

## Convention on Contracts for the International Sale of Goods

### PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

#### CHAPTER I. SPHERE OF APPLICATION

##### Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

##### Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

##### Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the

party who furnishes the goods consists in the supply of labour or other services.

##### Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

##### Article 4 bis

This Convention does not apply to the liability of the seller for death or injury caused by the goods to any person.

##### Article 5

The parties may exclude the application of this Convention or, subject to article 11, derogate from or vary the effect of any of its provisions.

#### CHAPTER II. GENERAL PROVISIONS

##### Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

##### Article 7

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### Article 8

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### Article 9

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### Article 10

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

#### Article 11

Any provision of article 10, article 27 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this article.

#### Article 11 bis

For the purposes of this Convention "writing" includes telegram and telex.

### PART II. FORMATION OF THE CONTRACT

#### Article 12

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the

offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

#### Article 13

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### Article 14

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### Article 15

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

#### Article 16

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

*Article 17*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

*Article 18*

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday or non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

*Article 19*

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

*Article 20*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

*Article 21*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

*Article 22*

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

**PART III. SALE OF GOODS****CHAPTER I. GENERAL PROVISIONS***Article 23*

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

*Article 24*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

*Article 25*

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

*Article 26*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

*Article 27*

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be pre-

cluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

## CHAPTER II. OBLIGATIONS OF THE SELLER

### Article 28

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

#### SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

### Article 29

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;
- (c) in other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

### Article 30

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

### Article 31

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless

circumstances indicate that the buyer is to choose a date; or

- (c) in any other case, within a reasonable time after the conclusion of the contract.

### Article 32

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### SECTION II. CONFORMITY OF THE GOODS AND THIRD PARTY CLAIMS

### Article 33

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;
- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

### Article 34

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for

a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

#### Article 35

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### Article 36

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

#### Article 37

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

#### Article 38

The seller is not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### Article 39

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 40.

#### Article 40

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

- (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
- (b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

- (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
- (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### Article 40 bis

(1) The buyer loses the right to rely on the provisions of article 39 or article 40 if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 40 ter

Notwithstanding the provisions of paragraph (1) of article 37 and paragraph (1) of article 40 bis, the buyer may reduce the price in accordance with article 46 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### Article 41

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

- (a) exercise the rights provided in articles 42 to 48;
- (b) claim damages as provided in articles 70 to 73.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### Article 42

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 37 or within a reasonable time thereafter.

#### Article 43

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 44

(1) Subject to article 45, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### Article 45

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 43 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect of any breach other than late delivery, within a reasonable time:
  - (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 43, or after the seller has declared that he will not perform his obligations within such an additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 44, or after the buyer has declared that he will not accept performance.

#### Article 46

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 35 or article 44 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

#### Article 47

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 42 to 46 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

#### Article 48

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

### CHAPTER III. OBLIGATIONS OF THE BUYER

#### Article 49

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

#### SECTION I. PAYMENT OF THE PRICE

#### Article 50

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

#### Article 51

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

#### Article 52

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

#### Article 53

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

#### Article 54

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

#### Article 55

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

#### SECTION II. TAKING DELIVERY

#### Article 56

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

#### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE BUYER

#### Article 57

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

- (a) exercise the rights provided in articles 58 to 61;
- (b) claim damages as provided in articles 70 to 73.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

#### Article 58

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

#### Article 59

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not

deprived thereby of any right he may have to claim damages for delay in performance.

#### Article 60

- (1) The seller may declare the contract avoided:
- (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
  - (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 59, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

- (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
- (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
  - (i) after the seller knew or ought to have known of the breach; or
  - (ii) after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 59, or after the buyer has declared that he will not perform his obligations within such an additional period.

#### Article 61

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

### CHAPTER IV. PASSING OF RISK

#### Article 78

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

#### Article 79

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

#### Article 80

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. However, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

#### Article 81

(1) In cases not within articles 79 and 80, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

#### Article 82

If the seller has committed a fundamental breach of contract, articles 79, 80 and 81 do not impair the remedies available to the buyer on account of the breach.

### CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

#### SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

#### Article 62

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it



becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness, or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

#### Article 63

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

#### Article 64

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

## SECTION II. DAMAGES AND INTEREST

### Article 70

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

### Article 71

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 70.

### Article 72

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided as well as any further damages recoverable under article 70.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

### Article 73 bis

(1) If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it at the normal rate for a short-term commercial credit prevailing in the main financial centre in the State where the party in default has his place of business or, in the absence of such a rate, at another similar appropriate rate prevailing in that centre.

(2) However, if the other party's actual credit costs are higher, he is entitled to interest on the sum in arrears at a rate corresponding to such credit costs, but not in excess of the rate defined in the preceding paragraph prevailing in the main financial centre in the State where he has his place of business.

### Article 73

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to

mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

### SECTION III. EXEMPTIONS

#### Article 65

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph, and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

#### Article 65 bis

A party may not rely on a failure of the other party to perform to the extent that the first party by his own act or omission caused that failure to perform.

### SECTION IV. EFFECTS OF AVOIDANCE

#### Article 66

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

#### Article 67

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

- (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
- (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 36; or
- (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

#### Article 68

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 67 retains all other remedies under the contract and this Convention.

#### Article 69

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid, at the rate defined in paragraph (1) of article 73 *bis* prevailing in the main financial centre in the State where the seller has his place of business.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

### SECTION V. PRESERVATION OF THE GOODS

#### Article 74

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

*Article 75*

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

*Article 76*

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person

at the expense of the other party provided that the expense incurred is not unreasonable.

*Article 77*

(1) A party who is bound to preserve the goods in accordance with article 74 or 75 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 74 or 75 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

# **K. DRAFT FINAL PROVISIONS SUBMITTED TO THE PLENARY CONFERENCE BY THE DRAFTING COMMITTEE**

*Document A/CONF.97/13/Rev.1*

*[Original: Arabic, Chinese, English, French, Russian, Spanish]  
[9 April 1980]*

**PART IV. FINAL PROVISIONS***Article A*

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

*Article D*

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

*Article F*

(1) This Convention is open for signature at the concluding meeting of the Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

*Article G*

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III if this Convention is not to be considered a Contracting State within article 1 (1) of this Convention in respect of matters governed by the Part to which the declaration applies.

*Article B*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

#### *Article C*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

#### *Article (X)*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration in accordance with article 11 that any provision of article 10, article 27, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

#### *Article H*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article C take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article C renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

#### *Article Y*

No reservations are permitted except those expressly authorized in this Convention.

#### *Article J*

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article G.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under ar-

article G that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article G that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Government of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

#### Article E

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract

is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

#### Article K

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of . . . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

### L. DRAFT PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS SUBMITTED TO THE PLENARY CONFERENCE BY THE DRAFTING COMMITTEE

#### Document A/CONF.97/14

[Original: Arabic, Chinese, English, French, Russian, Spanish]  
[9 April 1980]

### PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

#### PREAMBLE

The States parties to this Protocol,

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Considering that amending the Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974 (the 1974 Limitation Convention) to conform to the Convention on Contracts for the International Sale of Goods, concluded at Vienna on . . . April 1980 (the 1980 Sales Convention),

would promote the adoption of the uniform rules governing the limitation period contained in the 1974 Limitation Convention,

Have agreed to amend the 1974 Limitation Convention as follows:

#### Article I

(1) Paragraph 1 of article 3 is replaced by the following provisions:

"1. This Convention shall apply only

"(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

"(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale."

(2) Paragraph 2 of article 3 is deleted.

(3) Paragraph 3 of article 3 is renumbered as paragraph 2.

### Article II

(1) Subparagraph (a) of article 4 is deleted and replaced by the following provision:

"(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;"

(2) Subparagraph (e) of article 4 is deleted and is replaced by the following provision:

"(e) of ships, vessels, hovercraft or aircraft;"

### Article III

A new paragraph 4 is added to article 31 reading as follows:

"4. If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends."

### Article IV

The provisions of article 34 are deleted and are replaced by the following provisions:

"1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

"2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

"3. If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration."

### Article V

The provisions of article 37 are deleted and are replaced by the following provisions:

"This Convention shall not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement."

### Article VI

At the end of paragraph 1 of article 40, the following provision is added:

"Reciprocal unilateral declarations under article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations."

## FINAL PROVISIONS

### Article VII

The Secretary-General of the United Nations is hereby designated as the depositary for this Protocol.

### Article VIII

(1) This Protocol shall be open for accession by all States.

(2) Accession to this Protocol by any State which is not a Contracting Party to the 1974 Limitation Convention shall have the effect of accession to that Convention as amended by this Protocol, subject to the provisions of article XI.

(3) Instruments of accession shall be deposited with the Secretary-General of the United Nations.

### Article IX

(1) This Protocol shall enter into force on the first day of the sixth month following the deposit of the second instrument of accession, provided that on that date:

(a) The 1974 Limitation Convention is itself in force; and

(b) the 1980 Sales Convention is also in force.

If these Conventions are not both in force on that date, this Protocol shall enter into force on the first day on which both conventions are in force.

(2) For each State acceding to this Protocol after the second instrument of accession has been deposited, this Protocol shall enter into force on the first day of the sixth month following the deposit of its instrument of accession, if by that date the Protocol is itself in force. If by that date the Protocol itself is not yet in force, the Protocol shall enter into force for that State on the date the Protocol itself enters into force.

*Article X*

If a State ratifies or accedes to the 1974 Limitation Convention after the entry into force of this Protocol, the ratification or accession shall also constitute an accession to this Protocol if the State notifies the depositary accordingly.

*Article XI*

Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by this Protocol, by virtue of articles VIII, IX or X of this Protocol shall, unless it notifies the depositary to the contrary, be considered to be also a Contracting Party to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

*Article XII*

(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary.

(3) Any Contracting State in respect of which this Protocol ceases to have effect by the application of paragraphs (1) and (2) of this article shall remain a Contracting Party to the 1974 Limitation Convention, unamended, unless it denounces the unamended Convention in accordance with article 45 of that Convention.

*Article XIII*

(1) The depositary shall transmit certified true copies of this Protocol to all States.

(2) When this Protocol enters into force in accordance with article IX, the depositary shall prepare a text of the 1974 Limitation Convention, as amended by this Protocol, and shall transmit certified true copies to all States Parties to that Convention, as amended by this protocol.

DONE at Vienna this day of . . . . . in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

## M. PROPOSALS AND AMENDMENTS SUBMITTED TO THE PLENARY CONFERENCE

**Norway**

*Document A/CONF.97/L.1*

[Original: English]  
[7 April 1980]

*Article 4 bis*

Revise article 4 *bis* to read as follows:

"This Convention does not apply to the liability of the seller for death or *personal* injury caused by the goods to any person."

NOTE DRAFTING: Compare the French version "lésions corporelles" and the Prescription Convention article 5 (a).

**Finland**

*Document A/CONF.97/L.2*

[Original: English]  
[7 April 1980]

*Article 65 bis*

Delete the word "own".

**Argentina, Belgium**

*Document A/CONF.97/L.3*

[Original: English/French]  
[7 April 1980]

*Article 9*

It is proposed that a new paragraph be added to article 9:

"( ) a place of business is a place where the party maintains a business organization having power to negotiate or conclude contracts of sale or purchase in the name of the party."

## Czechoslovakia

## Document A/CONF.97/L.4

[Original: English]

[7 April 1980]

## New article C bis

Insert a new article C bis following article C in Part IV of the draft Convention as follows:

## Alternative I:

"(1) Any State may declare at the time of the deposit of its instrument of ratification or accession that it will not apply subparagraph (b) of paragraph (1) of article 1 of this Convention.

(2) This Convention does not apply if the rules of private international law lead to the application of the law of a State making a declaration under the preceding paragraph unless places of business of the parties to the contract are in different Contracting States."

## Alternative II:

Paragraph (1) only.

## Norway

## Document A/CONF.97/L.5

[Original: English]

[7 April 1980]

## Article 33

## Paragraph (3)

Redraft paragraph (3) as follows:

"(3) The seller is not liable *under the preceding paragraph* for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity."

NOTE: This amendment is intended as a drafting amendment.

## Norway

## Document A/CONF.97/L.6

[Original: English]

[7 April 1980]

## Article 40 ter

Revise article 40 *ter* to read as follows:

"*Notwithstanding paragraph (1) of article 37 and paragraph (1) of article 40 bis*, the buyer may reduce the price in accordance with article 46 or claim damages except for loss of profit *in accordance with articles 70 through 73*, if he *could not reasonably be expected to give the required notice because of a circumstance beyond his control or another good ground*."

## Norway

## Document A/CONF.97/L.7

[Original: English]

[7 April 1980]

## Article 60

## Paragraph (2) (a)

Revise paragraph (2) (a) as follows:



"(a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered *by payment or taking delivery, as the case may be*;"

NOTE: This amendment is intended to indicate in express terms the interpretation preferred by Committee 1.

#### Sweden

##### *Document A/CONF.97/L.8*

*[Original: English]  
[7 April 1980]*

#### Article 8

##### *Paragraph (2)*

Insert in the second paragraph after "a usage" the words: "*or a general understanding*"

NOTE: Doubts may arise whether a specific expression as a trade-term which is widely understood in a particular sense also is covered by "usage". The interpretation or understanding thereof should, however, follow the same rules as set out for usages in article 8, paragraph (2).

#### Denmark, Sweden

##### *Document A/CONF.97/L.9*

*[Original: English]  
[7 April 1980]*

#### Article 27

Paragraphs (1) and (2) should be voted upon separately (rule 38). Paragraph (2) (= agreed written form) should be *either* moved to Part II of the Convention (as article 22 *bis*) *or* (if not moved) not to be adopted.

NOTE: Paragraph (1) deals with the doctrine of frustration, paragraph (2) with written form as agreed between parties for modifications of a contract. Provisions of the latter type—often appearing as small print in General Conditions issued by the stronger party—may easily be abused and should not be encouraged.

#### Norway

##### *Document A/CONF.97/L.10*

*[Original: English]  
[7 April 1980]*

#### Article 65 bis

Revise article 65 *bis* as follows:

A party may not rely on a failure of the other party to perform, to the extent *that such* failure was caused by the first party's act or omission.

NOTE: This amendment is intended as a drafting amendment.

## Australia, Greece, Mexico, Norway, Turkey

*Document A/CONF.97/L.11**[Original: English]**[7 April 1980]**Article 72**Paragraph (1)*

Revise paragraph (1) of article 72 to read as follows:

"(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 71, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 70. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance."

## Ghana

*Document A/CONF.97/L.12**[Original: English]**[7 April 1980]**Article 62**Paragraph (1)*

Revise article 62, paragraph (1) to read as follows:

"(1) A party may, if it is reasonable to do so, suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

"(a) a serious deficiency in his ability to perform or in his credit-worthiness, or

"(b) his conduct in preparing to perform or in performing the contract."

## Norway

*Document A/CONF.97/L.13**[Original: English]**[7 April 1980]**Article 48**Paragraph (1)*

Redraft paragraph (1) to read as follows:

"(1) If the seller delivers the goods before the date fixed by or determinable from the contract, the buyer may take delivery or refuse to take delivery."

NOTE: This amendment is intended to achieve consistency with the corresponding expression in articles 12 (1), 31 (a) and 55.

**Argentina, Egypt, Finland, Pakistan, Turkey****Document A/CONF.97/L.14***[Original: English]**[7 April 1980]***Article 79**

The words "*in accordance with the contract of sale*" to be added after the words "*the first carrier*".

**Argentina, Egypt, Pakistan, Republic of Korea, Turkey****Document A/CONF.97/L.15***[Original: English]**[7 April 1980]***Article 80**

The first sentence of article 80 may be amended to read as follows:

*"Unless otherwise indicated, the risk in respect of goods sold in transit is assumed by the buyer from the time the contract is concluded".*

**United Kingdom****Document A/CONF.97/L.16***[Original: English]**[8 April 1980]***New article in Part I**

Insert in Part I, chapter I (sphere of application) a new article to read as follows:

*"This Convention is not concerned with the payment of interest."*

**United Kingdom****Document A/CONF.97/L.17***[Original: English]**[8 April 1980]***Article 69****Paragraph (1)**

Delete paragraph (1) of article 69.

**United Kingdom****Document A/CONF.97/L.18***[Original: English]**[8 April 1980]***Article 73 bis**

Delete article 73 bis.

**Mexico, Panama, Peru****Document A/CONF.97/L.19***[Original: English]**[8 April 1980]***New article on dispute settlement**

Add a new article (on dispute settlement) as follows, to be placed at the end of the substantive provisions of the Convention:

"The parties to a contract of sale under this Convention may submit any dispute arising out of the interpretation or application of this Convention to ordinary or arbitration courts established in territories of any of the States being Parties to the present Convention: parties may agree on their own rules to resolve disputes, including provisions on the appointment of arbitrators."

**Egypt****Document A/CONF.97/L.20***[Original: French]**[9 April 1980]***Article 63****Paragraph 2**

Delete the words "if time allows".

**Norway****Document A/CONF.97/L.21***[Original: English]**[9 April 1980]***Draft Protocol, article VI**

Revise article VI of the draft Protocol as follows:

**Article VI**

In paragraph (1) of article 40 add the following new sentences at the end:

"Nevertheless, reciprocal unilateral declarations under paragraph (1) of article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations. A declaration made by a new Contracting State under paragraph (3) of article 34 shall take effect as from the date on which the Convention enters into force in respect of such State, provided that its declaration is received by the Secretary-General of the United Nations before that date."

**Singapore****Document A/CONF.97/L.22***[Original: English]**[9 April 1980]***Article 77****Paragraph (2)**

Revise the first sentence of paragraph (2) to read as follows:

"(2) If the goods are *perishable or their preservation would involve unreasonable expense*, a party who is bound to preserve the goods in accordance with article 74 or 75 must take reasonable measures to sell them."

or

"(2) If the goods are *subject to rapid deterioration* or their preservation

would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 74 or 75 must take reasonable measures to sell them."

**Drafting Committee**

*Document A/CONF.97/L.23*

*[Arabic, Chinese, English, French, Russian, Spanish]  
[9 April 1980]*

*Articles 62 and 80*

*Article 62*

(Applies to French text only)

*Article 80*

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

# FINAL ACT OF THE UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

(Document A/CONF.97/18)

1. The General Assembly of the United Nations, having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its eleventh session in 1978, which contained a draft Convention on Contracts for the International Sale of Goods, decided, by resolution 33/93 of 16 December 1978, that an international conference of plenipotentiaries should be convened in 1980 at the location of the International Trade Law Branch of the Office of Legal Affairs of the United Nations, or at any other suitable place for which the Secretary-General might receive an invitation, to consider the draft Convention on Contracts for the International Sale of Goods prepared by the United Nations Commission on International Trade Law and to embody the results of its work in an international convention and such other instruments as the conference might deem appropriate. The General Assembly also decided that the conference should consider the desirability of preparing a Protocol to the Convention on the Limitation Period in the International Sale of Goods, adopted at New York on 14 June 1974, which would harmonize the provisions of that Convention with those of the Convention on Contracts for the International Sale of Goods as it might be adopted by the Conference.

2. The United Nations Conference on Contracts for the International Sale of Goods was held at Vienna, Austria, from 10 March to 11 April 1980.

3. Representatives of sixty-two States participated in the Conference, namely, representatives of: Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Costa Rica, Cyprus, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Iran, Iraq, Ireland, Israel, Italy, Japan, Kenya, Libyan Arab Jamahiriya, Luxembourg, Mexico, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Yugoslavia and Zaire.

4. One State, Venezuela, sent an observer to the Conference.

5. The General Assembly requested the Secretary-General to invite representatives of organizations that have received a standing invitation from the General

Assembly to participate in the sessions and the work of all international conferences convened under its auspices, in the capacity of observers, to participate in the Conference in that capacity in accordance with General Assembly resolutions 3237 (XXIX) of 22 November 1974 and 31/152 of 20 December 1976; to invite representatives of the national liberation movements recognized in its region by the Organization of African Unity to participate in the Conference in the capacity of observers in accordance with General Assembly resolution 3280 (XXIX) of 10 December 1974; to invite the United Nations Council for Namibia to participate in the Conference in accordance with paragraph 3 of General Assembly resolution 32/9 E of 4 November 1977, and to invite the specialized agencies and the International Atomic Energy Agency, as well as interested organs of the United Nations and interested international organizations, to be represented at the Conference by observers. The following intergovernmental and non-governmental organizations accepted this invitation and were represented by observers at the Conference:

## *Specialized agencies*

World Bank

## *Other intergovernmental organizations*

Bank for International Settlements

Central Office for International Railway Transport

Council of Europe

European Economic Community

Hague Conference on Private International Law

International Institute for the Unification of Private Law

## *Non-governmental organizations*

International Chamber of Commerce

6. The Conference elected Mr. Gyula Eörsi (Hungary) as President.

7. The Conference elected as Vice-Presidents the representatives of the following States: Argentina, Belgium, Brazil, Bulgaria, Canada, China, Colombia, Egypt, German Democratic Republic, Germany, Federal Republic of, Greece, Kenya, Libyan Arab Jamahiriya, Pakistan, Peru, Philippines, Republic of Korea, Romania, Spain, Sweden, Union of Soviet Socialist Republics and Zaire.

8. The following Committees were set up by the Conference:

## *General Committee*

*Chairman:* The President of the Conference

*Members:* The President and Vice-Presidents of the

Conference, and the Chairmen of the First and Second Committees

*First Committee*

*Chairman:* Mr. Roland Loewe (Austria)

*Vice-Chairman:* Mr. Peter K. Mathanjuki (Kenya)

*Rapporteur:* Mr. Shinichiro Michida (Japan)

*Second Committee*

*Chairman:* Mr. Roberto Luis Mantilla-Molina (Mexico)

*Vice-Chairman:* Mr. Mikola P. Makarevitch (Ukrainian Soviet Socialist Republic)

*Rapporteur:* Mr. Venkataramiah Kuchibhotla (India)

*Drafting Committee*

*Chairman:* Mr. Warren Khoo Leang Huat (Singapore)

*Vice-Chairman:* Mr. Leif Sevon (Finland)

*Rapporteur:* Mr. Ludvik Kopač (Czechoslovakia)

*Members:* Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libyan Arab Jamahiriya, Republic of Korea, Singapore, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Zaire

*Credentials Committee*

*Chairman:* Mr. Peter K. Mathanjuki (Kenya)

*Members:* Belgium, China, Ecuador, Libyan Arab Jamahiriya, Kenya, Mexico, Pakistan, Union of Soviet Socialist Republics and United States of America

9. The Secretary-General of the United Nations was represented by Mr. Erik Suy, The Legal Counsel. Mr. Willem Vis, Chief of the International Trade Law Branch, Office of Legal Affairs of the United Nations, was Executive Secretary.

10. The General Assembly, by resolution 33/93 of 16 December 1978 convening the Conference, referred to the Conference, as the basis for its considerations, the draft Convention on Contracts for the International Sale of Goods approved by the United Nations Commission on International Trade Law, together with a commentary (A/CONF.97/5), the text of draft provisions concerning implementation, declarations, reservations and other final clauses prepared by the Secretary-General (A/CONF.97/6), a report on the relationship of the draft Convention on Contracts for the International Sale of Goods to the Convention on the Limitation Period in the International Sale of Goods prepared by the Secretary-General (A/CONF.97/7), the comments and proposals by Governments and international organizations on the draft Convention on Contracts for the International Sale of Goods (A/CONF.97/8 and Add.1-7) and an analysis of these comments and proposals prepared by the Secretary-General (A/CONF.97/9).

11. The Conference assigned to the First Committee articles 1 to 82 of the draft Convention on Contracts for

the International Sale of Goods and the article "Declarations relating to contracts in writing" of the draft provisions concerning implementation, declarations, reservations and other final clauses of the draft Convention prepared by the Secretary-General. The Conference assigned to the Second Committee the other draft provisions concerning implementation, declarations, reservations and other final clauses of the draft Convention prepared by the Secretary-General and entrusted the Second Committee with the consideration of the draft Protocol to the Convention on the Limitation Period in the International Sale of Goods prepared by the Secretary-General.

12. On the basis of the deliberations recorded in the summary records of the Conference ((A/CONF.97/SR.1 to 11), the summary records of the First Committee (A/CONF.97/C.1/SR.1 to 38) and its report (A/CONF.97/11 and Add.1-2), and the summary records of the Second Committee (A/CONF.97/C.2/SR.1-9) and its report (A/CONF.97/12), the Conference drew up the UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS and the PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS.

13. The United Nations Convention on Contracts for the International Sale of Goods, the text of which is annexed to this Final Act (Annex I), was adopted by the Conference on 10 April 1980 and was opened for signature at the concluding meeting of the Conference on 11 April 1980. It will remain open for signature at United Nations Headquarters in New York until 30 September 1981. It was also opened for accession on 11 April 1980.

14. The Convention is deposited with the Secretary-General of the United Nations.

15. The Protocol amending the Convention on the Limitation Period in the International Sale of Goods, the text of which is annexed to this Final Act (Annex II), was adopted by the Conference on 10 April 1980 and was opened for accession at the concluding meeting of the Conference on 11 April 1980, in accordance with its provisions.

16. The Protocol is deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE at Vienna, Austria, this eleventh day of April, one thousand nine hundred and eighty, in a single copy in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

*President*

*Executive Secretary*

# UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

(Document A/CONF.97/18, Annex I)

*The States Parties to this Convention,*

*Bearing in mind* the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

*Considering* that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

*Being of the opinion* that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

*Have agreed* as follows:

## PART I. SPHERE OF APPLICATION AND GENERAL PROVISIONS

### CHAPTER I. SPHERE OF APPLICATION

#### Article 1

(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

- (a) when the States are Contracting States; or
- (b) when the rules of private international law lead to the application of the law of a Contracting State.

(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

#### Article 2

This Convention does not apply to sales:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought

to have known that the goods were bought for any such use;

- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels, hovercraft or aircraft;
- (f) of electricity.

#### Article 3

(1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services.

#### Article 4

This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:

- (a) the validity of the contract or of any of its provisions or of any usage;
- (b) the effect which the contract may have on the property in the goods sold.

#### Article 5

This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.

#### Article 6

The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

### CHAPTER II. GENERAL PROVISIONS

#### Article 7

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to



promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

#### Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was.

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances.

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

#### Article 9

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

#### Article 10

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

#### Article 11

A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

#### Article 12

Any provision of article 11, article 29 or Part II of this Convention that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

#### Article 13

For the purposes of this Convention "writing" includes telegram and telex.

### PART II. FORMATION OF THE CONTRACT

#### Article 14

(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.

(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

#### Article 15

(1) An offer becomes effective when it reaches the offeree.

(2) An offer, even if it is irrevocable, may be withdrawn if the withdrawal reaches the offeree before or at the same time as the offer.

#### Article 16

(1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.

(2) However, an offer cannot be revoked:

- (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
- (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

#### Article 17

An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror.

*Article 18*

(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph.

*Article 19*

(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

*Article 20*

(1) A period of time for acceptance fixed by the offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by the offeror by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

(2) Official holidays or non-business days occurring during the period for acceptance are included in calculating the period. However, if a notice of acceptance cannot be delivered at the address of the offeror on the last day of the period because that day falls on an official holiday

or a non-business day at the place of business of the offeror, the period is extended until the first business day which follows.

*Article 21*

(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror orally so informs the offeree or dispatches a notice to that effect.

(2) If a letter or other writing containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror orally informs the offeree that he considers his offer as having lapsed or dispatches a notice to that effect.

*Article 22*

An acceptance may be withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective.

*Article 23*

A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention.

*Article 24*

For the purposes of this Part of the Convention, an offer, declaration of acceptance or any other indication of intention "reaches" the addressee when it is made orally to him or delivered by any other means to him personally, to his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

**PART III. SALE OF GOODS****CHAPTER I. GENERAL PROVISIONS***Article 25*

A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.

*Article 26*

A declaration of avoidance of the contract is effective only if made by notice to the other party.

*Article 27*

Unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

*Article 28*

If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention.

*Article 29*

(1) A contract may be modified or terminated by the mere agreement of the parties.

(2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

## CHAPTER II. OBLIGATIONS OF THE SELLER

*Article 30*

The seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention.

## SECTION I. DELIVERY OF THE GOODS AND HANDING OVER OF DOCUMENTS

*Article 31*

If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

- (a) if the contract of sale involves carriage of the goods — in handing the goods over to the first carrier for transmission to the buyer;
- (b) if, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place — in placing the goods at the buyer's disposal at that place;
- (c) in other cases — in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

*Article 32*

(1) If the seller, in accordance with the contract or this Convention, hands the goods over to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods.

(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and according to the usual terms for such transportation.

(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must, at the buyer's request, provide him with all available information necessary to enable him to effect such insurance.

*Article 33*

The seller must deliver the goods:

- (a) if a date is fixed by or determinable from the contract, on that date;
- (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
- (c) in any other case, within a reasonable time after the conclusion of the contract.

*Article 34*

If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract. If the seller has handed over documents before that time, he may, up to that time, cure any lack of conformity in the documents, if the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

## SECTION II. CONFORMITY OF THE GOODS AND THIRD PARTY CLAIMS

*Article 35*

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract.

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

- (a) are fit for the purposes for which goods of the same description would ordinarily be used;
- (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or

that it was unreasonable for him to rely, on the seller's skill and judgement;

- (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;
- (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

(3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.

#### Article 36

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in the preceding paragraph and which is due to a breach of any of his obligations, including a breach of any guarantee that for a period of time the goods will remain fit for their ordinary purpose or for some particular purpose or will retain specified qualities or characteristics.

#### Article 37

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided for in this Convention.

#### Article 38

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redirected in transit or redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redirection or redispach, examination may be deferred until after the goods have arrived at the new destination.

#### Article 39

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee.

#### Article 40

The seller is not entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

#### Article 41

The seller must deliver goods which are free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim. However, if such right or claim is based on industrial property or other intellectual property, the seller's obligation is governed by article 42.

#### Article 42

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that the right or claim is based on industrial property or other intellectual property:

- (a) under the law of the State where the goods will be resold or otherwise used, if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or
- (b) in any other case, under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under the preceding paragraph does not extend to cases where:

- (a) at the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or
- (b) the right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

#### Article 43

(1) The buyer loses the right to rely on the provisions of article 41 or article 42 if he does not give notice to the

seller specifying the nature of the right or claim of the third party within a reasonable time after he has become aware or ought to have become aware of the right or claim.

(2) The seller is not entitled to rely on the provisions of the preceding paragraph if he knew of the right or claim of the third party and the nature of it.

#### Article 44

Notwithstanding the provisions of paragraph (1) of article 39 and paragraph (1) of article 43, the buyer may reduce the price in accordance with article 50 or claim damages, except for loss of profit, if he has a reasonable excuse for his failure to give the required notice.

### SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

#### Article 45

(1) If the seller fails to perform any of his obligations under the contract or this Convention, the buyer may:

- (a) exercise the rights provided in articles 46 to 52;
- (b) claim damages as provided in articles 74 to 77.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

#### Article 46

(1) The buyer may require performance by the seller of this obligations unless the buyer has resorted to a remedy which is inconsistent with this requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

(3) If the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances. A request for repair must be made either in conjunction with notice given under article 39 or within a reasonable time thereafter.

#### Article 47

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not de-

prived thereby of any right he may have to claim damages for delay in performance.

#### Article 48

(1) Subject to article 49, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without unreasonable delay and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. However, the buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under the preceding paragraph, that the buyer make known his decision.

(4) A request or notice by the seller under paragraph (2) or (3) of this article is not effective unless received by the buyer.

#### Article 49

(1) The buyer may declare the contract avoided:

- (a) if the failure by the seller to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- (b) in case of non-delivery, if the seller does not deliver the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 47 or declares that he will not deliver within the period so fixed.

(2) However, in cases where the seller has delivered the goods, the buyer loses the right to declare the contract avoided unless he does so:

- (a) in respect of late delivery, within a reasonable time after he has become aware that delivery has been made;
- (b) in respect of any breach other than late delivery, within a reasonable time:
  - (i) after he knew or ought to have known of the breach;
  - (ii) after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 47, or after the seller has declared that he will not perform his obligations within such an additional period; or
  - (iii) after the expiration of any additional period of time indicated by the seller in accordance with paragraph (2) of article 48, or after the buyer has declared that he will not accept performance.

*Article 50*

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may reduce the price in the same proportion as the value that the goods actually delivered had at the time of the delivery bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 37 or article 48 or if the buyer refuses to accept performance by the seller in accordance with those articles, the buyer may not reduce the price.

*Article 51*

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, articles 46 to 50 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

*Article 52*

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate.

## CHAPTER III. OBLIGATIONS OF THE BUYER

*Article 53*

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

## SECTION I. PAYMENT OF THE PRICE

*Article 54*

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made.

*Article 55*

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

*Article 56*

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

*Article 57*

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:

- (a) at the seller's place of business; or
- (b) if the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in his place of business subsequent to the conclusion of the contract.

*Article 58*

(1) If the buyer is not bound to pay the price at any other specific time, he must pay it when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

*Article 59*

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller.

## SECTION II. TAKING DELIVERY

*Article 60*

The buyer's obligation to take delivery consists:

- (a) in doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and
- (b) in taking over the goods.

SECTION III. REMEDIES FOR BREACH OF CONTRACT  
BY THE BUYER*Article 61*

(1) If the buyer fails to perform any of his obligations under the contract or this Convention, the seller may:

- (a) exercise the rights provided in articles 62 to 65;
- (b) claim damages as provided in articles 74 to 77.

(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

*Article 62*

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with this requirement.

*Article 63*

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance.

*Article 64*

(1) The seller may declare the contract avoided:

- (a) if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract; or
- (b) if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price or take delivery of the goods, or if he declares that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses the right to declare the contract avoided unless he does so:

- (a) in respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
- (b) in respect of any breach other than late performance by the buyer, within a reasonable time:
  - (i) after the seller knew or ought to have known of the breach; or
  - (ii) after the expiration of any additional period of time fixed by the seller in accordance with

paragraph (1) of article 63, or after the buyer has declared that he will not perform his obligations within such an additional period.

*Article 65*

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with the requirements of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If, after receipt of such a communication, the buyer fails to do so within the time so fixed, the specification made by the seller is binding.

## CHAPTER IV. PASSING OF RISK

*Article 66*

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

*Article 67*

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

*Article 68*

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.



*Article 69*

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

*Article 70*

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies available to the buyer on account of the breach.

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS  
OF THE SELLER AND OF THE BUYER

SECTION I. ANTICIPATORY BREACH AND INSTALMENT CONTRACTS

*Article 71*

(1) A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

- (a) a serious deficiency in his ability to perform or in his creditworthiness; or
- (b) his conduct in preparing to perform or in performing the contract.

(2) If the seller has already dispatched the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance.

*Article 72*

(1) If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

(2) If time allows, the party intending to declare the contract avoided must give reasonable notice to the other

party in order to permit him to provide adequate assurance of his performance.

(3) The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations.

*Article 73*

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

(3) A buyer who declares the contract avoided in respect of any delivery may, at the same time, declare it avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

SECTION II. DAMAGES

*Article 74*

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

*Article 75*

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

*Article 76*

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74.



If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

(2) For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

#### Article 77

A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

### SECTION III. INTEREST

#### Article 78

If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 74.

### SECTION IV. EXEMPTIONS

#### Article 79

(1) A party is not liable for a failure to perform any of his obligations if he proved that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

- (a) he is exempt under the preceding paragraph; and
- (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

#### Article 80

A party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission.

### SECTION V. EFFECTS OF AVOIDANCE

#### Article 81

(1) Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract.

(2) A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

#### Article 82

(1) The buyer loses the right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) The preceding paragraph does not apply:

- (a) if the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which the buyer received them is not due to his act or omission;
- (b) if the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 38; or
- (c) if the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered or ought to have discovered the lack of conformity.

#### Article 83

A buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 82 retains all other remedies under the contract and this Convention.

#### Article 84

(1) If the seller is bound to refund the price, he must also pay interest on it, from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:

- (a) if he must make restitution of the goods or part of them; or
- (b) if it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

#### SECTION VI. PRESERVATION OF THE GOODS

##### Article 85

If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer.

##### Article 86

(1) If the buyer has received the goods and intends to exercise any right under the contract or this Convention to reject them, he must take such steps to preserve them as are reasonable in the circumstances. He is entitled to retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that this can be done without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination. If the buyer takes possession of the goods under this paragraph, his rights and obligations are governed by the preceding paragraph.

##### Article 87

A party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

##### Article 88

(1) A party who is bound to preserve the goods in accordance with article 85 or 86 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party.

(2) If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods in accordance with article 85 or 86 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

(3) A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

#### PART IV. FINAL PROVISIONS

##### Article 89

The Secretary-General of the United Nations is hereby designated as the depositary for this Convention.

##### Article 90

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties to such agreement.

##### Article 91

(1) This Convention is open for signature at the concluding meeting of the United Nations Conference on Contracts for the International Sale of Goods and will remain open for signature by all States at the Headquarters of the United Nations, New York until 30 September 1981.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Secretary-General of the United Nations.

##### Article 92

(1) A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Part II of this Convention or that it will not be bound by Part III of this Convention.

(2) A Contracting State which makes a declaration in accordance with the preceding paragraph in respect of Part II or Part III of this Convention is not to be considered a Contracting State within paragraph (1) of article 1 of this Convention in respect of matters governed by the Part to which the declaration applies.

*Article 93*

(1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.

*Article 94*

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

*Article 95*

Any State may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by subparagraph (1) (b) of article 1 of this Convention.

*Article 96*

A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing

may at any time make a declaration in accordance with article 12 that any provision of article 11, article 29, or Part II of this Convention, that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

*Article 97*

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under article 94 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under article 94 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

*Article 98*

No reservations are permitted except those expressly authorized in this Convention.

*Article 99*

(1) This Convention enters into force, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, including an instrument which contains a declaration made under article 92.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention, with the exception of the Part excluded, enters into force in respect of that State, subject to the provisions of paragraph (6) of this article, on the first day of the month following the expiration of twelve

months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

(3) A State which ratifies, accepts, approves or accedes to this Convention and is a party to either or both the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Formation Convention) and the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964 (1964 Hague Sales Convention) shall at the same time denounce, as the case may be, either or both the 1964 Hague Sales Convention and the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(4) A State party to the 1964 Hague Sales Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part II of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Sales Convention by notifying the Government of the Netherlands to that effect.

(5) A State party to the 1964 Hague Formation Convention which ratifies, accepts, approves or accedes to the present Convention and declares or has declared under article 92 that it will not be bound by Part III of this Convention shall at the time of ratification, acceptance, approval or accession denounce the 1964 Hague Formation Convention by notifying the Government of the Netherlands to that effect.

(6) For the purpose of this article, ratifications, acceptances, approvals and accessions in respect of this Convention by States parties to the 1964 Hague Formation Convention or to the 1964 Hague Sales Convention shall not be effective until such denunciations as may be required on the part of those States in respect of the latter two Conventions have themselves become effective. The depositary of this Convention shall consult with the Gov-

ernment of the Netherlands, as the depositary of the 1964 Conventions, so as to ensure necessary co-ordination in this respect.

#### *Article 100*

(1) This Convention applies to the formation of a contract only when the proposal for concluding the contract is made on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

(2) This Convention applies only to contracts concluded on or after the date when the Convention enters into force in respect of the Contracting States referred to in subparagraph (1) (a) or the Contracting State referred to in subparagraph (1) (b) of article 1.

#### *Article 101*

(1) A Contracting State may denounce this Convention, or Part II or Part III of the Convention, by a formal notification in writing addressed to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE at Vienna, this day of eleventh day of April, one thousand nine hundred and eighty, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized by their respective Governments, have signed this Convention.

# PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS

(Document A/CONF.97/18, Annex II)

## *The States Parties to this Protocol,*

Considering that international trade is an important factor in the promotion of friendly relations amongst States,

Believing that the adoption of uniform rules governing the limitation period in the international sale of goods would facilitate the development of world trade,

Considering that amending the Convention on the Limitation Period in the International Sale of Goods, concluded at New York on 14 June 1974 (the 1974 Limitation Convention), to conform to the United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna on 11 April 1980 (the 1980 Sales Convention), would promote the adoption of the uniform rules governing the limitation period contained in the 1974 Limitation Convention,

Have agreed to amend the 1974 Limitation Convention as follows:

### *Article I*

(1) Paragraph 1 of article 3 is replaced by the following provisions:

"1. This Convention shall apply only

"(a) if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States; or

"(b) if the rules of private international law make the law of a Contracting State applicable to the contract of sale."

(2) Paragraph 2 of article 3 is deleted.

(3) Paragraph 3 of article 3 is renumbered as paragraph 2.

### *Article II*

(1) Subparagraph (a) of article 4 is deleted and replaced by the following provision:

"(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use;"

(2) Subparagraph (e) of article 4 is deleted and is replaced by the following provision:

"(e) of ships, vessels, hovercraft or aircraft;"

### *Article III*

A new paragraph 4 is added to article 31 reading as follows:

"(4) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party to a contract is located in that State, this place of business shall, for the purposes of this Convention, be considered not to be in a Contracting State unless it is in a territorial unit to which the Convention extends."

### *Article IV*

The provisions of article 34 are deleted and are replaced by the following provisions:

"1. Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

"2. A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention shall not apply to contracts of international sale of goods where the parties have their places of business in those States.

"3. If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made shall, as from the date on which this Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration."

### *Article V*

The provisions of article 37 are deleted and are replaced by the following provisions:

"This Convention shall not prevail over any international agreement which has already been or may be

entered into and which contains provisions concerning the matters governed by this Convention, provided that the seller and buyer have their places of business in States parties to such agreement."

#### *Article VI*

At the end of paragraph 1 of article 40, the following provision is added:

"Reciprocal unilateral declarations under article 34 shall take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the Secretary-General of the United Nations."

### FINAL PROVISIONS

#### *Article VII*

The Secretary-General of the United Nations is hereby designated as the depositary for this Protocol.

#### *Article VIII*

(1) This Protocol shall be open for accession by all States.

(2) Accession to this Protocol by any State which is not a Contracting Party to the 1974 Limitation Convention shall have the effect of accession to that Convention as amended by this Protocol, subject to the provisions of article XI.

(3) Instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### *Article IX*

(1) This Protocol shall enter into force on the first day of the sixth month following the deposit of the second instrument of accession, provided that on that date:

- (a) the 1974 Limitation Convention is itself in force; and
- (b) the 1980 Sales Convention is also in force.

If these Conventions are not both in force on that date, this Protocol shall enter into force on the first day on which both Conventions are in force.

(2) For each State acceding to this Protocol after the second instrument of accession has been deposited, this Protocol shall enter into force on the first day of the sixth month following the deposit of its instrument of accession, if by that date the Protocol is itself in force. If by that date the Protocol itself is not yet in force, the Protocol shall enter into force for that State on the date the Protocol itself enters into force.

#### *Article X*

If a State ratifies or accedes to the 1974 Limitation Convention after the entry into force of this Protocol, the ratification or accession shall also constitute an accession to this Protocol if the State notifies the depositary accordingly.

#### *Article XI*

Any State which becomes a Contracting Party to the 1974 Limitation Convention, as amended by this Protocol, by virtue of articles VIII, IX or X of this Protocol shall, unless it notifies the depositary to the contrary, be considered to be also a Contracting Party to the Convention, unamended, in relation to any Contracting Party to the Convention not yet a Contracting Party to this Protocol.

#### *Article XII*

Any State may declare at the time of the deposit of its instrument of accession or its notification under article X that it will not be bound by article I of the Protocol. A declaration made under this article shall be in writing and be formally notified to the depositary.

#### *Article XIII*

(1) A Contracting State may denounce this Protocol by notifying the depositary to that effect.

(2) The denunciation shall take effect on the first day of the month following the expiration of twelve months after receipt of the notification by the depositary.

(3) Any Contracting State in respect of which this Protocol ceases to have effect by the application of paragraphs (1) and (2) of this article shall remain a Contracting Party to the 1974 Limitation Convention, unamended, unless it denounces the unamended Convention in accordance with article 45 of that Convention.

#### *Article XIV*

(1) The depositary shall transmit certified true copies of this Protocol to all States.

(2) When this Protocol enters into force in accordance with article IX, the depositary shall prepare a text of the 1974 Limitation Convention, as amended by this Protocol, and shall transmit certified true copies to all States Parties to that Convention, as amended by this Protocol.

DONE at Vienna, this day of 11 April 1980, in a single original, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic.

*Part Two*  
**SUMMARY RECORDS**





## SUMMARY RECORDS OF THE PLENARY MEETINGS

### 1st plenary meeting

Monday, 10 March 1980, at 11.30 a.m.

*Temporary President: Mr. SUY*

(Legal Counsel of the United Nations, representing the Secretary-General)

*President: Mr. EÖRSI (Hungary).*

A/CONF.97/SR.1

#### OPENING OF THE CONFERENCE (item 1 of the provisional agenda)

1. The TEMPORARY PRESIDENT declared open the United Nations Conference on Contracts for the International Sale of Goods. He stressed the importance of the Conference which, in troubled times, showed that all countries had common interests which transcended their differences.

2. Briefly outlining the background of the Conference, he recalled that, 12 years previously, the United Nations Commission on International Trade Law had embarked on the work of harmonizing and unifying international trade law; in that area it had earned a reputation for competence which had fully justified the hopes of its founders. The task of the present Conference was to reach agreement on a convention on the particularly complex subject of the international sale of goods, which touched immediately on the domestic law of States and the myriad day-to-day commercial transactions of the world. The Conference had before it, as the basis for its work, a draft convention which was the culmination of long years of work by UNCITRAL and which bore the stamp of that organization's objectivity and profound knowledge of trade practices.

If the Conference attained its objective—and there was no reason why it should not do so—another important step would have been taken towards the elimination of legal obstacles to the development of international trade, which should be promoted to the benefit of developing and developed countries alike. For the former countries, in particular, the expansion of international trade on equitable conditions clearly defined at the legal level was extremely important if their efforts to enhance the well-being of their peoples were to be successful.

3. The preliminary comments made by States and organizations on the UNCITRAL draft convention already showed that the approach adopted in that draft and its underlying principles were deserving of praise, that the balance established between the rights and duties of the seller and buyer was, in general, acceptable, and that the provisions of the draft were suited, on the whole, to the needs of international trade. Moreover, when the proposed rules were being drafted care had been taken to

avoid using expressions which were too technical, so as to permit their application in all legal systems.

4. The draft convention owed a good deal to the work done before and after the Second World War by the International Institute for the Unification of Private Law (UNIDROIT) which had led, in 1964, to the adoption of the Hague Convention relating to a Uniform Law on the International Sale of Goods and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. Nevertheless, in the view of UNCITRAL, those texts had reflected too exclusively the practices and concerns of Europe. For example, they had not contained any adequate provisions on the transport of goods by sea or on the particular questions and problems connected with that mode of transport, nor had they taken sufficient account of legal systems other than those deriving from Roman Law. Compared with the 1964 Hague Conventions, the draft before the Conference contained innovations which enabled its provisions to be extended to a greater number of legal and economic systems. UNCITRAL had also managed to simplify the text of the Hague Conventions considerably, the number of articles having been reduced from 114 to 82. Particularly noteworthy was the simplification of the systems of remedies for breach of contract and of procedures for determining the risk of loss.

5. In short, the UNCITRAL draft constituted an excellent basis for the work of the Conference. Nevertheless, its consideration called for a special effort from participants; the work of the Conference would be successful only if countries were prepared to look beyond the confines of their domestic laws and search for a consensus on rules that were just, workable and generally acceptable. The Office of Legal Affairs for its part, would do its utmost to ensure the success of the Conference.

6. In conclusion, he thanked the Austrian Government for acting as host to the Conference at Vienna and for having placed the historic premises of the Hofburg at its disposal.

7. Mr. PAHR (Minister for Foreign Affairs of the Federal Republic of Austria), speaking on behalf of his Government, welcomed the participants to the Conference. The occasion was a particularly important one,

for two reasons: firstly, because the Conference represented a milestone in the development of the codification of international trade law, and secondly, because it was the first big conference to be held at the new headquarters of UNCITRAL, which his Government had been proud to welcome to Austria. He wished to take that opportunity to thank the members of the International Trade Law Branch for their indefatigable efforts to provide the Commission with the necessary secretariat services, thanks to which the task of the Conference would also be made easier.

8. In view of the importance of contracts for the international sale of goods, a convention on the subject should have been concluded long before. The fact that, at long last, it was about to see the light of day, at a time of growing commercial interdependence among the nations, must be regarded as a major event in the process of codifying international law. That convention would undoubtedly be followed by other codification instruments, in the preparation of which UNCITRAL would play a major role.

9. The convention had not yet been adopted, of course; considerable efforts had still to be made before that stage was reached. Nevertheless, he was convinced that the goodwill and spirit of conciliation of the participants would triumph over all difficulties and that the Conference would adopt a legal instrument satisfactory to all nations. The great competence of the international law experts currently assembled gave every reason for optimism. Moreover, the Conference's task would be facilitated by the in-depth work carried out by UNCITRAL over the past 10 years and in which Austria was proud to have played its part.

10. Lastly, he wished participants in the Conference every success in their work and hoped that they would have a pleasant stay in Vienna.

*The meeting was suspended at 11.45 a.m. and resumed at 11.55 a.m.*

#### **ELECTION OF THE PRESIDENT** (item 2 of the provisional agenda)

11. Mr. FARNSWORTH (United States of America) nominated Mr. Eörsi (Hungary) for the office of President of the Conference.

12. Mr. MICHIDA (Japan), Mr. MEDVEDEV (Union of Soviet Socialist Republics), Mr. MANTILLA-MOLINA (Mexico) and Mr. LOEWE (Austria) supported the nomination.

13. *Mr. Eörsi (Hungary) was elected President by acclamation.*

14. *Mr. Eörsi (Hungary) took the Chair.*

15. The PRESIDENT thanked the delegations which had nominated him and the members of the Conference in general for having done him the honour of electing him President. He was aware that the honour was accompanied by heavy responsibilities, and he undertook

to do his best, with the co-operation of all delegations, to ensure the success of the Conference.

16. The Conference was a very important event in the history of the unification of the law on the international sale of goods. That law had evolved considerably over the past 50 years. The great increase in trade, the intensification of economic interdependence and the growing complexity of economic processes had led countries to undertake efforts towards unifying the legal rules which governed international trade and those efforts were beginning to bear fruit. At the current stage, the adoption of a type of international sales code which supplied viable practical solutions would considerably facilitate world trade. Such a code could not, of course, provide answers to all problems but it could serve as a foundation for legal policy and supply a framework for a set of general rules. The preparation of such a code was an undertaking requiring a great deal of technical competence in a very specific field where there were numerous points of divergence between common law countries and civil law countries and where it was necessary to find compromise solutions which would be acceptable to both legal systems. The draft convention drawn up by UNCITRAL, which was before the Conference, was an attempt to do so.

#### **ADOPTION OF THE AGENDA** (item 3 of the provisional agenda) (A/CONF.97/2)

17. *The provisional agenda was adopted.*

#### **ADOPTION OF THE RULES OF PROCEDURE** (agenda item 4) (A/CONF.97/3)

18. *The provisional rules of procedure were adopted.*

#### **ORGANIZATION OF WORK** (agenda item 8) (A/CONF.97/4)

19. Mr. VIS (Executive Secretary of the Conference) drew the attention of delegations to the tentative schedule of meetings for the Conference, contained in the annex to document A/CONF.97/4. That schedule had been drawn up on the assumption that the Conference would last for five weeks. It could be prolonged for a further week if necessary but, with the consent of the participants and the President, the Secretariat would like to arrange meetings in such a way that work could be completed in five weeks.

20. Mr. SHAFIK (Egypt) asked whether instead of beginning immediately its consideration of the articles of the draft convention, it would not be better for the Conference to devote one or two plenary meetings to a general debate which would make it possible to sketch out the main lines of the draft convention.

21. Mr. LOEWE (Austria) said he agreed that it would be useful to provide for a general debate on the draft Convention as a whole but such a debate might perhaps take place in Committee I, as it would probably relate to

the *corpus* of the future Convention rather than to the final clauses.

22. As for the tentative schedule, it was of course understood that it was not binding and that the Committees—and particularly Committee I—might not be able to follow it exactly. A certain flexibility should therefore be retained while at the same time every effort should be made to advance the work as speedily as possible and to bear in mind the tentative schedule.

23. The PRESIDENT agreed that it might be useful to have a general debate in Committee I but thought that too much time should not be spent on it as the comments made during any general consideration of a draft were frequently taken up again when specific matters were considered. If the Conference devoted too much time to a general debate at the beginning of its work, there was the risk that it would not be able to give sufficient attention to the examination of the last few articles of the draft.

24. It was true that the tentative schedule did not necessarily have to be strictly followed, but it nevertheless provided a very useful point of reference to measure the rate at which the work of the Conference was progressing.

25. Mr. VIS (Executive Secretary of the Conference)

informed the delegations that, as a general rule, amendments should be submitted 24 hours prior to the consideration of the relevant article.

26. States which had sent written comments which contained proposed amendments were requested to inform the Secretariat which amendments they wished to be considered, since it was not always easy for the Secretariat to determine whether or not a comment constituted a proposed amendment.

27. Concerning credentials, Mr. Vis said that, in accordance with rule 3 of the rules of procedure, the credentials of representatives and the names of alternate representatives and advisers should be submitted to the secretariat of the Conference if possible not later than 24 hours after the opening of the Conference. The Credentials Committee had to meet during the second or third week of the Conference and the secretariat was therefore prepared to accept credentials submitted during the current week or at the beginning of the following week. In accordance with rule 3 of the rules of procedure, credentials should be issued either by the Head of State or Government or by the Minister for Foreign Affairs.

*The meeting rose at 12.30 p.m.*

## 2nd plenary meeting

Monday, 10 March 1980, at 3 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.2

*The meeting was called to order at 3.25 p.m.*

### ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (item 5 of the agenda)

#### *Election of the Chairman of the First Committee*

The PRESIDENT called for nominations for the office of Chairman of the First Committee, which would be called upon to consider Parts I to III and article X of the draft Convention, i.e. all the substantive articles of the draft before the Conference.

Mr. MEDVEDEV (Union of Soviet Socialist Republics) nominated Mr. Loewe (Austria) for the office of Chairman of the First Committee.

Mr. PONTOPPIDAN (Denmark) seconded the nomination.

Mr. SZÁSZ (Hungary), Mr. KHOO (Singapore), Mr. HERBER (Federal Republic of Germany), Mr. PLANTARD (France), Mr. MANTILLA-MOLINA (Mexico), Mr. SHAFIK (Egypt), Mr. PREVEDOURAKIS (Greece), Mr. DE SA DA BANDEIRA (Portugal), Mr. BOGGIANO (Argentina) and Mr. SHAMIR (Israel) supported the nomination.

*Mr. Loewe (Austria) was elected Chairman of the First Committee by acclamation.*

*The meeting rose at 3.50 p.m.*

### 3rd plenary meeting

Tuesday, 11 March 1980, at 11 a.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.3

*The meeting was called to order at 11.55 a.m.*

#### ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (agenda item 5) (A/CONF.97/3) (continued)

1. The PRESIDENT, noting that the representatives of the African, Latin American and Asian States were not yet in a position to submit their candidates for the posts of Vice-President, proposed that the election of vice-presidents should be postponed to a later meeting.

2. Mr. SILVA (Peru) nominated Mr. Mantilla-Molina (Mexico) for the office of Chairman of the Second Committee.

3. Mr. HERBER (Federal Republic of Germany), Mr. KHOO (Singapore), Mr. STALEV (Bulgaria), Mr. MI-CHIDA (Japan) and Mr. FRANCHINI-NETTO (Brazil) supported the nomination.

4. Mr. Mantilla-Molina (Mexico) was elected Chairman of the Second Committee by acclamation.

#### CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (agenda item 6) (A/CONF.97/3)

##### (a) Appointment of the Credentials Committee

5. The PRESIDENT said that it was customary for the composition of the Credentials Committee, made up of nine members, to be the same as that of the Credentials Committee of the most recent United Nations General Assembly. In the present case that would be the representatives of Belgium, China, the Congo, Ecuador, Pakistan, Panama, Senegal, the Union of Soviet Socialist Republics, and the United States of America. As the Congo, Panama and Senegal were not participating in the Conference, he proposed, in accordance with rule 4 of the rules of procedure (A/CONF.97/3), to nominate representatives of States from the same region to replace them, i.e. Kenya, Mexico and the Libyan Arab Jamahiriya respectively. The Credentials Committee would therefore be made up as follows: Belgium, China, Ecuador, Kenya, Libyan Arab Jamahiriya, Mexico, Pakistan, the Union of Soviet Socialist Republics and the United States of America.

6. *It was so decided.*

*The meeting rose at 12.10 p.m.*

### 4th plenary meeting

Wednesday, 12 March 1980, at 10.30 a.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.4

*The meeting was called to order at 11.55 a.m.*

#### ELECTION OF VICE-PRESIDENTS OF THE CONFERENCE AND OF A CHAIRMAN OF EACH OF THE MAIN COMMITTEES (agenda item 5) (A/CONF.97/3) (continued)

1. The PRESIDENT reminded the meeting that, under rule 6 of the rules of procedure (A/CONF.97/3), the Conference had to elect 22 Vice-Presidents. To ensure the representativity of the General Committee, as provided for in rule 10 of the rules of procedure, it was customary to apportion the offices of Vice-President on the basis of the membership of UNCITRAL; accordingly, the African countries would be entitled to 5 Vice-Presidents, the Asian countries to 4, the East European

countries to 3, the West European and other countries to 6 and the Latin American countries to 4. Since the African, Asian and Latin American countries were associated in the Group of 77, that Group would have to designate 13 candidates in all. Since consultations had been held in the regional groups, they were undoubtedly already in a position to indicate the names of the countries and candidates they proposed. He asked the Group of 77, first of all, to give the names of the candidates it had designated for the 13 offices of Vice-President to which it was entitled.

2. Mr. SILVA (Peru) said that, although he did not yet have all the names of the candidates, he was already in a position to announce the names of the countries proposed by the Group of 77; namely, Argentina, Brazil,

Colombia, Peru, China, Republic of Korea, Philippines, Pakistan, Kenya, Libyan Arab Jamahiriya, Egypt, Zaire and Romania.

3. Mr. SZÁSZ (Hungary) read out, at the invitation of the President, the list of representatives designated by the East European countries as candidates for the offices of Vice-President, namely, Mr. Medvedev (Union of Soviet Socialist Republics), Mr. Wagner (German Democratic Republic) and Mr. Stalev (Bulgaria).

4. Mr. PLANTARD (France) announced the names of the representatives appointed by West European and other countries as candidates for the offices of Vice-

President, namely, Mr. Dabin (Belgium), Mr. Krispis (Greece), Mr. Garrigues (Spain), Mr. Herber (Federal Republic of Germany), Mr. Hjermer (Sweden) and Mr. Shore (Canada).

5. The PRESIDENT said that, if there were no objections, he would take it that the candidates proposed by the three groups had been elected Vice-Presidents of the Conference.

6. *It was so decided.*

*The meeting rose at 12.05 p.m.*

## 5th plenary meeting

Thursday, 13 March 1980, at 3 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.5

*The meeting was called to order at 3.10 p.m.*

### APPOINTMENT OF MEMBERS OF THE DRAFTING COMMITTEE (agenda item 7)

1. The PRESIDENT said that the General Committee had decided to propose to the plenary Conference the following States as members of the Drafting Committee: Brazil, Chile, China, Czechoslovakia, Ecuador, Egypt, Finland, France, Libyan Arab Jamahiriya, Republic of

Korea, Singapore, Union of Soviet Socialist Republics, United Kingdom, United States of America and Zaire.

2. If there was no objection, he would consider that the Conference agreed to appoint those 15 States as members of the Drafting Committee.

3. *It was so agreed.*

*The meeting rose at 3.15 p.m.*

## 6th plenary meeting

Tuesday, 8 April 1980, at 10 a.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.6

*The meeting was called to order at 10.10 a.m.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 9) (continued)

REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (A/CONF.97/11/Add.1 and 2) (continued)

1. The PRESIDENT invited the members of the Conference to move on from the first phase of their proceedings, that of debate, to the second, the adoption of decisions. In the interests of the unification of international

trade law, and in the belief that the participants in the Conference all wished to arrive at a better version of the Uniform Law on the International Sale of Goods (ULIS), he would urge delegations to exercise self-discipline and not argue again in plenary causes which had been lost in committee. The compromises that had been reached should not now be called in question. The best was often the enemy of the good, and an over-diligent quest for perfection could place the desired objective at risk.

2. The Conference would have to come to a decision on each of the articles adopted by the First Committee (A/CONF.97/11/Add. 1 and 2). The decisions would require a two-thirds majority, with the understanding

that representatives who abstained would count as not voting, in accordance with rule 34 of the rules of procedure. Roll-call votes would only be taken at the specific request of a delegation. All proposals concerning matters of substance would be considered as amendments or sub-amendments within the meaning of rule 40 of the rules of procedure; they would have to be submitted in writing, unless the Conference specifically allowed an exception. He would adhere scrupulously to the rules of procedure, which were, however, sufficiently flexible to permit indicative votes or the establishment of working groups if the occasion demanded.

3. In order to expedite its work, for every effort should be made to finish by the deadline of 11 April, even at the cost of night meetings, the Conference should refrain from abstract debate. It went without saying that in accordance with rule 21 of the rules of procedure, any delegation could appeal against the President's ruling.

4. Mr. GARRIGUES (Spain) said he wished to state, even before the Conference began its consideration of the draft Convention submitted by the First Committee, that he considered the outcome of more than 40 years of effort to be quite admirable. Since its establishment in 1968, the United Nations Commission on International Trade Law (UNCITRAL) had undoubtedly done much to improve the uniform law established in 1964, to secure increased participation in its activities, to promote a stronger spirit of conciliation among its members and to strike a better balance between the different interests involved. Such positive results were praiseworthy. Doubtless the opposition which existed between the Roman-law tradition, which tended to be theoretical, and the more pragmatic tradition of common law, which was reluctant to spell out general principles, explained certain imperfections in the final product. His country, for its part, would have wished the draft Convention to go further in regulating issues where the interests of the parties could be considerably at variance, and for that reason would have wished to place greater restrictions on the freedom allowed the parties under article 5. It would also have preferred the draft Convention to take over the principles of Roman law as they applied to contracts of sale, and more specifically those concerning the identity and integrality of payment. His delegation would, moreover, have wished the draft Convention to be more general in nature and to give less attention to specific or individual cases. It also regretted that the draft Convention did not more systematically take the rational approach of laying down positive rather than negative rules; article 33, for example, on the conformity of goods, in fact defined lack of conformity. Again, his delegation deplored the obscurity of certain articles; was not clarity the courtesy of lawyers? In that connection, he could not but express his delegation's regret at not having participated in the Drafting Committee. Another fault of the draft Convention was that it referred too often to its own provisions, which made it too cumbersome. In addition, the word "reasonable" was much abused; he could only hope that the courts would always be able to make a

"reasonable" interpretation of that term. But despite all those shortcomings, his delegation found much to respect in provisions which were more representative of a legal system other than of the one with which Spain was familiar and believed that the draft Convention well deserved to be ratified to enter into force and to stay in force for a long time.

5. Mr. MICHIDA (Japan), Rapporteur of the First Committee, introduced the report of the Committee (A/CONF.97/11/Add.1 and 2) containing the provisions which it had formulated on the basis of the articles drafted by UNCITRAL, after referring them whenever necessary to the Drafting Committee, together with the various amendments it had considered. The new provisions were now submitted for adoption by the Conference.

#### *Titles of the Convention, of part I and of chapter I*

6. The PRESIDENT invited the Conference to vote on the title of the Convention and on the headings of part I and chapter I.

7. *The titles of the Convention, of part I and of chapter I were adopted by 45 votes to 1.*

#### *Article 1*

8. Mr. KOPAČ (Czechoslovakia) said that during the discussion in the First Committee, many delegations had shown themselves to be unhappy with the implications of article 1 (1) (b). The linking of the Convention on Contracts for the International Sale of Goods with the Prescription Convention would make article 1 even more difficult to accept. The article was particularly important in that it defined the scope of the Contracts Convention. He would therefore ask for a separate vote on each of its paragraphs and on each of the subparagraphs of paragraph 1.

9. *The Czechoslovak motion for division was rejected.*

10. *Article 1 (A/CONF.97/11/Add.1, page 3) was adopted by 42 votes to none, with 1 abstention.*

#### *Article 2*

11. Mr. SAMI (Iraq) considered that the international oil trade was too important a matter to be covered by the Convention and that article 2 should be amended by the addition of a new subparagraph, to read: "(g) of oil". If that amendment was not accepted, certain OPEC countries would not be able to accede to the Convention.

12. The PRESIDENT pointed out that UNCITRAL had examined the question of the oil trade in detail and had concluded that it was extremely difficult to regulate.

13. Mr. ROGNLIEN (Norway) asked the representative of Iraq whether his amendment was intended to deprive the buyer of the benefits of the Convention.

14. Mr. SAMI (Iraq) replied that the intention was quite the reverse. As the discussions had shown, his dele-

gation was always anxious to establish a proper balance between the interests of the buyer and the seller. Oil, however, was not comparable with any other kind of goods; there were certain organizations that specialized in the formation of contracts for the sale of oil, which were drawn up on the basis of criteria not applicable to other goods; international oil sales, moreover, were subject to certain aspects of international relations. For all those reasons, oil should be excluded from the sphere of application of the Convention.

15. Mr. DABIN (Belgium) wondered whether, for the same reasons, natural gas should not also be excluded from the sphere of application of the Convention.

16. Mr. HERBER (Federal Republic of Germany) asked the representative of Iraq whether it was not enough for the oil trade to be governed by special rules, which would take precedence over the provisions of the Convention, the latter being in no way mandatory. Moreover, it would be difficult to exclude oil as such from the sphere of application of the Convention; as many debates in the Intergovernmental Maritime Consultative Organization (IMCO) had shown, it was extremely difficult to define that term precisely.

17. Mr. SAMI (Iraq) considered that it was just because contracts for the sale of oil were governed by special rules that it would be logical to exclude oil from the sphere of application of the Convention. Matters relating to the transport of oil and the definition of its quality could be dealt with under provisions other than those of the Convention, that whole area being an extremely complex one. If the Convention were to remain applicable to the sale of oil, the OPEC countries would thus require a lengthy period of reflection before they would be able to ratify it.

18. *The Iraqi proposal for the addition of a new subparagraph (g) to article 2 was rejected by 19 votes to 4, with 20 abstentions.*

19. Mr. OSAH (Nigeria) said that although his country was a member of OPEC and an oil producer, it had abstained in the vote, believing that the matter should be left to OPEC to decide.

20. Mr. ZIEGEL (Canada) stressed that his vote should not be interpreted as a sign of hostility either to oil-exporting or to oil-importing countries. He believed that by virtue of article 5, the Convention was sufficiently flexible to meet everyone's needs. Each country would be free to exclude from its application any commodity it considered particularly important.

21. *Article 2 was adopted by 43 votes to none, with 2 abstentions.*

### Article 3

22. *Article 3 was adopted by 45 votes to none.*

### Article 4

23. *Article 4 was adopted by 45 votes to none.*

### Article 4 bis (A/CONF.97/L.1)

24. Mr. ROGNLIEN (Norway) explained that the purpose of his amendment (A/CONF.97/L.1) was to bring the English text into line with the French version and with the corresponding provisions of the Prescription Convention. The expression "personal injury" would cover bodily and mental injury as well as pain and suffering "dommage moral", but not material damage.

25. Mr. KRISPIS (Greece) fully supported the amendment proposed by the representative of Norway.

26. *The Norwegian amendment was adopted by 19 votes to 5, with 22 abstentions.*

27. Mr. PLANTARD (France) pointed out that the French text of document A/CONF.97/L.1 differed from the original, on which the Norwegian amendment was based, and which rightly used the phrase "lésions corporelles". For that reason, his delegation had preferred to abstain in the vote.

28. The PRESIDENT confirmed that the French text should read "lésions corporelles", and not "dommages corporels". After amendment the English text would be in line with the French.

29. Mr. MEDVEDEV (Union of Soviet Socialist Republics) explained that his delegation had abstained, as the Norwegian amendment did not apply to the Russian text.

30. *Article 4 bis, as amended by Norway, was adopted by 37 votes to none, with 5 abstentions.*

### Article 5

31. *Article 5 was adopted by 42 votes to none, with 2 abstentions.*

32. Mr. BONELL (Italy) reminded the Conference that his delegation had submitted a proposal to establish clearly that, although the parties would have every right to exclude the application of the Convention, they would have to say so explicitly. His delegation had none the less voted for the present wording of article 5 on the understanding that if the parties were to opt for the national law of a Contracting State, that would not be considered as implicitly excluding the Convention.

33. Mr. MEHDI (Pakistan) felt that if article 5 was taken in conjunction with article 7, which set forth the subjective and objective criteria for interpreting the conduct of a party, it could lead to disputes over the exclusion of application of the Convention, derogation from its provisions, or the varying of its effects. It would have been better for article 5 to stipulate that exclusion of the Convention must be expressly stated. For that reason, his delegation had abstained in the vote.

34. Mr. PLUNKETT (Ireland) and Mr. NICHOLAS (United Kingdom) both wished to make it clear that their votes in favour in no way implied that they shared the views of the representatives of Pakistan and Italy.

35. Mr. GARRIGUES (Spain) regretted that article 5



had been couched in such broad terms; in positive law, the provisions of the contract were obviously left to the discretion of the parties, but a contract of sale should not be capable of being altered into a contract for the exchange or performance of services.

#### *Title of chapter II*

36. *The title of chapter II was adopted by 44 votes to none.*

#### *Article 6*

37. Mr. PLANTARD (France) asked for the two paragraphs in article 6 to be voted on separately.

38. Mr. BONELL (Italy) was against the French motion for division, as he considered the two paragraphs of article 6 to be closely linked with one another in substance.

39. Mr. HJERNER (Sweden) supported the representative of Italy.

40. The PRESIDENT called on the Conference, under rule 38 of the rules of procedure, to vote on the motion for division as the representative of Italy had opposed it.

41. *The motion for division was rejected by 27 votes to 2, with 11 abstentions.*

42. *Article 6 was adopted by 45 votes to none.*

43. Mr. KRISPIS (Greece) said that in his opinion the first two sentences of paragraph 1 were unnecessary and of no practical use; a better place for them would be in the preamble. His delegation had none the less voted in favour because it approved of article 6 as a whole and considered the provision in paragraph 1 on good faith in international trade to be essential.

44. Mr. BONELL (Italy) thought that article 6 was particularly important for the Convention as a whole as it stated that uniform interpretation of the Convention was to be sought by all those called on to apply it, whether parties, arbitrators or courts of law. He hoped that paragraph 1 and above all the first portion of paragraph 2 would help such an interpretation in practice.

#### *Article 7*

45. *Article 7 was adopted by 41 votes to none, with 5 abstentions.*

#### *Article 8 (A/CONF.97/L.8)*

46. Mr. HJERNER (Sweden), introducing his delegation's amendment to article 8 (A/CONF.97/L.8), said that by inserting the words "or a general understanding" in article 8 (2), after "a usage", it would be possible to extend the article to cover trade terms generally used with a single specific meaning. The interpretation of trade terms commonly encountered in international commerce on usages such as "FOB", "CIF" and "waybills", would thus follow the rules set out in paragraph 2. He was not sure whether the French translation, "*ou toute interpré-*

*tation généralement admise*" corresponded very well to the English wording "or a general understanding".

47. Mr. BONELL (Italy) strongly supported the Swedish amendment. In the First Committee his delegation had argued for the insertion of a new paragraph in article 8 to deal with trade terms. He shared the Swedish representative's reservations about the French translation of his proposed wording.

48. Mr. MONACO (International Institute for the Unification of Private Law) (UNIDROIT) said that while it would be useful for the Convention to contain a provision on the interpretation of certain trade terms, he doubted whether the wording proposed by the Swedish representative would be satisfactory for the purpose, as it was too vague.

49. Mr. POPESCU (Romania) was against the Swedish amendment, which seemed to him dangerous, since it did not refer explicitly to trade terms in general usage.

50. Mr. SAM (Ghana) was also against the amendment, which he felt was liable to cause confusion.

51. Mr. SHAFIK (Egypt) said that he too had submitted an amendment in the First Committee on the interpretation of trade terms such as the INCOTERMS. Although the Swedish amendment went a long way to deal with the problem, its wording was not wholly satisfactory. He proposed that the Conference should decide on the principle of inserting a provision in article 8 on the interpretation of trade terms and then, if the principle was accepted, that a working group should be set up to draft the provision.

52. Mr. KRISPIS (Greece) agreed with the views expressed by the representative of UNIDROIT. If the Swedish amendment were adopted, there were grounds for fearing that because of its vagueness the interpretation put upon it would go much further than the Swedish representative himself desired. For that reason he was against the amendment.

53. Mr. GARRIGUES (Spain) saw no reason to upset the present structure of article 8, which was totally logical, by adding to it a provision that would be a source of confusion.

54. Mr. KUCHIBHOTLA (India) was not against the principle underlying the Swedish amendment, but wanted a working group to be set up to draft an acceptable wording as had been proposed by the representative of Egypt.

55. Mr. LANDO (International Chamber of Commerce) said that the International Chamber of Commerce regarded it as very important that trade terms such as the INCOTERMS should be interpreted in a uniform way. He therefore supported the Swedish proposal in principle, but thought that it would be best to give a working group the task of finding the exact wording of the provision.

56. Mr. HJERNER (Sweden) withdrew his amendment in favour of the proposal by Egypt.



57. Mr. BLAGOJEVIĆ (Yugoslavia) considered that the problem posed by trade terms was not one of interpretation but one of application. Usages, which were in fact an exception, should be interpreted restrictively. His delegation was therefore against the Swedish amendment.

58. Mr. MANTILLA-MOLINA (Mexico) said that the Conference should decide on the principle of a reference to trade terms in article 8.

59. The CHAIRMAN invited the Conference to vote on the principle of inserting a provision in article 8 on the interpretation of trade terms.

60. *The principle was rejected by 22 votes to 12, with 11 abstentions.*

61. Mr. KOPÁČ (Czechoslovakia) said that during the discussion on article 8 in the First Committee it had been decided to insert a reference to formation of the contract in paragraph 2. He was afraid it would cause difficulties when a State was not in a position to accept part II of the Convention, on formation of the contract, because it could be considered that the usages referred to in article 8 none the less applied to formation of the contract. He therefore proposed that the reference to formation of the contract in article 8 should be deleted.

62. The CHAIRMAN noted that a State acceding only to part III of the Convention would in no way be bound by those provisions of the Convention relating to formation of the contract. He proposed that the problem raised by the representative of Czechoslovakia should be noted in the report of the Conference.

63. The CHAIRMAN put article 8 to the vote.

64. *Article 8 was adopted by 42 votes to none, with 4 abstentions.*

*The meeting was suspended at 11.45 a.m. and resumed at 12.05 p.m.*

#### Article 9 (A/CONF.97/L.3)

65. The CHAIRMAN invited members to consider the amendment proposed jointly by the Argentine and Belgian delegations (A/CONF.97/L.3). There was an omission in the English version: the word "permanent" should be added at the end of the first line.

66. Mr. DABIN (Belgium) explained that the purpose of the joint amendment by Argentina and Belgium was to define the term "place of business". It was an idea used very frequently in contracts for the international sale of goods and the new article 73 *bis* of the Convention made explicit reference to it. In business practice there was no general definition of the phrase "place of business", but only individual definitions in such places as conventions on matters of taxation and exchange or on the effects of bankruptcy. The two delegations had therefore tried to draft a definition of the term for the Convention under consideration.

67. The proposed definition introduced a double crite-

rium. On the one hand, a place of business had to be an active and permanent business organization established in a given State. On the other hand, in addition to the physical element, there would have to be external evidence of its having the power to negotiate or undertake buying or selling operations. By requiring the place of business to be a permanent organization, it ruled out an agent merely having powers of representation, or a production unit whose management did not have the power to negotiate contracts on the party's behalf. Similarly, under the definition, a sole agent could not be considered as a place of business of a party, because he was an independent middleman, buying or selling on his own behalf and in his own name and not on behalf of a party. Subsidiaries with separate corporate status were also excluded from the definition.

68. He was aware of the shortcomings of the definition but believed that it was nevertheless likely to make the Convention easier to apply.

69. Mr. POPESCU (Romania) agreed that it was necessary to define the term "place of business" but considered that the text proposed by the Argentine and Belgian delegations did not deal with the problem of undertakings, such as the transnational corporations, having a great many places of business. He suggested that a working group should be set up to draft a more comprehensive and flexible definition and thought the Conference might take a decision on the principle of including such a definition in article 9.

70. Mr. HJERNER (Sweden) warmly supported the joint amendment by Argentina and Belgium, which in his view provided a sufficiently precise definition. With regard to the problem of transnational corporations, to which the Romanian representative had referred, he pointed out that the proposed definition did not seek to determine the place of business that was to be regarded as such for the purposes of the Convention where a party had more than one place of business. The Convention was not in fact required to decide that question.

71. Mr. LOEWE (Austria) drew attention to a discrepancy between the French and English texts of the proposal. The French text used the words "*l'établissement est au lieu où . . .*" whereas the corresponding English text read "a place of business is a place where . . .". He would find it hard to accept the wording in the French text.

72. Mr. ROGNLIEN (Norway) said that most delegations could agree in recognizing that in principle it would be desirable to define the term "place of business" in order to ensure uniformity in the Convention on that point. The question of including such a definition in the Convention had been discussed on several occasions in UNCITRAL but it had not been able to agree on a concrete text.

73. The definition proposed by the delegations of Argentina and Belgium was acceptable to him. He believed that the definition of the term "place of business" should not be unduly restrictive. He wondered whether

the word "permanent" did not lay down too stringent a requirement, the more so as the word "maintain" at the end of the first line in itself implied a degree of permanence. He was particularly pleased to see that the definition was based on the power to negotiate "or" conclude contracts. It would be going too far to insist that the place of business should be empowered both to negotiate and conclude formal contracts. That would exclude many trade branches of transnational corporations from the definition and thus have the effect of bringing local sales negotiated by such branches under the Convention. The places of business of such corporations in certain States were frequently empowered only to negotiate contracts, the contracts being subject to formal confirmation by the central management. If the content and terms of such contracts were in fact completed and for practical purposes more or less finalized by a sales branch in a State where they were negotiated, they should rather be regarded as domestic sales, unless the parties had agreed to apply the Convention.

74. Mr. MASKOW (German Democratic Republic) thought there was no point in defining the term "place of business" in the Convention. Article 9 already gave some indication of the meaning to be attached to the term which might be used by courts in interpreting the provision. The proposal under consideration showed that it would be very difficult to arrive at a satisfactory definition.

75. Unlike the Norwegian representative, he believed that a definition, if one was necessary, would have to be somewhat restrictive. An unduly general definition would have the effect of limiting the application of the Convention, particularly if it also covered places of business with only the power to negotiate. In such cases, when preliminary negotiations took place in one country and the contract was concluded in another, it would be necessary to determine which was the place of business. A definition of that kind would merely complicate the present situation, in which it was generally easy in practice to determine the place to be considered the place of business.

76. He could not support the joint proposal.

77. Mr. BLAGOJEVIĆ (Yugoslavia) did not see why the term "place of business" should be defined in the Convention. Except in article 11 *bis*, the Convention contained no definitions, even of terms that were more frequently used than the term "place of business".

78. It should be remembered that the problem of transnational corporations and particularly of their places of business was one of the most hotly debated questions of the day. It would be unwise to settle the problem restrictively, for example by excluding a company's factories which regularly concluded contracts although they were not formally empowered to do so.

79. He therefore opposed the joint proposal.

80. Mr. INAAMULLAH (Pakistan) was in favour of the proposal. It was important that the Convention

should include a precise definition of the term "place of business".

81. He reminded members that the definition of the word "party" had been discussed in the First Committee in connection not only with transnational corporations but also with State trading bodies, which were becoming increasingly numerous in developing countries. It had been his impression at the time that the Committee understood the term "party" also to apply to State undertakings.

82. If the Conference decided to appoint a working group to consider the definition of the term "place of business" more thoroughly, it might be useful to ask it also to consider the definition of the term "party".

83. Mr. SHAFIK (Egypt) considered that the absence of definitions was one of the great shortcomings of the Convention, especially in the case of the term "place of business", on which the application of the Convention depended. In his view the joint proposal was highly satisfactory and contained elements that could provide the starting point for a working group appointed to draft an acceptable text. He suggested that a vote should be taken on the principle of including a definition of the term "place of business" in the Convention. If the principle was adopted a working group should be set up.

84. Mr. NICHOLAS (United Kingdom) said that the discussion merely brought out the difficulties involved in defining the term "place of business". He was not opposed in principle to working out a definition, although he had doubts about the possibility of doing so at such a late stage in the Conference's deliberations. The wisest course would, as several delegations had suggested, be to set up a working group. In any event his delegation could not support the joint proposal in its present form.

85. Mr. HONNOLD (United States of America) thought that the proposal under discussion was much clearer than the corresponding ULIS provision and should be helpful in defining the field of application of the Convention. It might be asked, for instance, whether a hotel where negotiations took place would be considered a place of business. If so, the Convention would not apply, as the transaction would not be considered an international sale within the meaning of article 1 (1). Situations of that kind, which were not uncommon, might result in disputes. He was in favour of voting on the principle of including a definition and of setting up a working group.

86. Mr. MICHIDA (Japan) said he appreciated the efforts of the Argentine and Belgian delegations but would be unable to support their proposal, which would simply have the effect of limiting the field of application of the Convention. If the proposal was adopted it would always be necessary to decide whether a place of business was or was not empowered to conclude a contract before determining whether the Convention applied. That would be an undesirable state of affairs. In any case difficulties might arise since many contracts were concluded by telex or telegram, outside any place of busi-

ness. Such a proposal might have its place in other instruments such as double taxation agreements but the situation was different in the case of the Convention under discussion.

87. The PRESIDENT invited the Conference to vote on the proposal to define "place of business" in the Convention. He would then put to the vote the proposal by the representative of Pakistan that the working group, if one was set up, should draft a definition of the term "party".

88. *The proposal to include a definition of the term "place of business" in the Convention was rejected by 23 votes to 17, with 5 abstentions.*

89. Mr. INAAMULLAH (Pakistan) said that in view of the result of the vote he would withdraw his proposal.

90. *Article 9 was adopted by 42 votes to none, with 2 abstentions.*

#### Article 10

91. *Article 10 was adopted by 45 votes to none, with 1 abstention.*

#### Article 11

92. *Article 11 was adopted by 45 votes to none.*

#### Article 11 bis

93. *Article 11 bis was adopted by 42 votes to none, with 3 abstentions.*

#### Title of part II

94. *The title of part II was adopted by 43 votes to none.*

#### Article 12

95. *Article 12 was adopted by 41 votes to none, with 5 abstentions.*

96. Mr. FOKKEMA (Netherlands) explained that he had abstained on article 12 for the reasons he had stated earlier in the First Committee.

#### Article 13

97. *Article 13 was adopted by 46 votes to none.*

#### Article 14

98. *Article 14 was adopted by 44 votes to none, with 2 abstentions.*

#### Article 15

99. *Article 15 was adopted by 45 votes to none.*

*The meeting rose at 1 p.m.*

## 7th plenary meeting

Tuesday, 8 April 1980, at 3 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.7

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 9) (continued)

REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (A/CONF.97/11 and Add.1 and 2) (continued)

#### Article 16

1. *Article 16 was adopted by 40 votes to none.*

#### Article 17

2. Mr. ROGNLIEN (Norway) asked for a separate vote on article 17 (3).

3. Mr. STALEV (Bulgaria) opposed that request.

4. Mr. ROGNLIEN (Norway) withdrew the request.

5. *Article 17 was adopted by 40 votes to none.*

#### Article 18

6. *Article 18 was adopted by 41 votes to none.*

#### Article 19

7. *Article 19 was adopted by 45 votes to none.*

#### Article 20

8. *Article 20 was adopted by 44 votes to none.*

#### Article 21

9. *Article 21 was adopted by 42 votes to none.*

#### Article 22

10. *Article 22 was adopted by 46 votes to none.*

*Titles of Part III (Sale of Goods) and Part III, Chapter I (General Provisions)*

11. *The titles were adopted by 44 votes to none.*

*Article 23*

12. Mr. ZIEGEL (Canada) said his delegation would abstain from voting on article 23 because the new definition of fundamental breach imposed an unduly heavy onus on the party invoking the breach. In a great many cases it would be extremely difficult for the aggrieved party to establish whether the default of the other party really amounted to fundamental breach, particularly in the case of delivery of defective goods, especially where durable goods were concerned. On the basis of the experience of the Canadian courts with the interpretation of the concept of fundamental breach, his delegation firmly believed that the application of the definition in article 23 would give rise to a great many difficulties. His delegation greatly preferred the earlier definition because it was more flexible.

13. Mr. HJERNER (Sweden) said that his delegation would vote against article 23 because it firmly believed that the new formulation did not offer any advantage when compared to the previous one. On the contrary, it could lend itself to several different interpretations and lead to confusion. The fact was that fundamental breach, like good faith, was one of those concepts which did not lend themselves to definition. In any case, his delegation could well accept a Convention which did not contain any definition of fundamental breach and would prefer that to the inclusion of the definition embodied in article 23 as it now stood.

14. *Article 23 was adopted by 42 votes to 2, with 2 abstentions.*

15. Mr. GARRIGUES (Spain), explaining his vote against article 23, said that the whole concept of "fundamental breach" was unacceptable to most legal systems of the "continental" type. In his country and in most countries of Latin America, any breach of contract—regardless of its character—justified a claim for damages on the part of the aggrieved party against the party in breach, on the understanding that the breach in question was due to the fault of that party, or that the party in breach was on notice. Due regard should be had, of course, for the exception of *force majeure*, i.e. the case where the party in breach could invoke circumstances entirely beyond its control. From that standpoint, the idea embodied in article 23 that a breach would be taken into account only if it were "fundamental" was totally unacceptable.

16. Article 23 would create two major difficulties for any judge trying to apply it. The first was that of determining whether the detriment resulting from the breach was of sufficiently substantial character. The second was that of determining whether the detrimental result in question was foreseeable or not.

17. Mr. HERBER (Federal Republic of Germany) said

that his delegation had voted in favour of article 23 because the text represented a considerable improvement by comparison with the original draft. The text adopted might give rise to certain difficulties of interpretation, but those difficulties could be easily overcome.

*Article 24*

18. *Article 24 was adopted by 47 votes to none.*

*Article 25*

19. Mr. KRISPIS (Greece) said that his delegation would abstain from voting on article 25 because it embodied the so-called "dispatch theory", which was not the appropriate one, and it would apply in all cases under that article.

20. *Article 25 was adopted by 39 votes to 1, with 7 abstentions.*

*Article 26*

21. *Article 26 was adopted by 44 votes to none, with 1 abstention.*

*Article 27 (A/CONF.97/L.9)*

22. Mr. HJERNER (Sweden), introducing the proposal (A/CONF.97/L.9) submitted by Denmark and Sweden, said that the sponsors asked that paragraphs 1 and 2 should be voted on separately. Article 27 incorporated two totally distinct provisions which had been placed together in the same article quite accidentally, and the sponsors considered that paragraph 2 should either be moved to Part II of the Convention or not adopted.

23. *The joint proposal was rejected by 18 votes to 12, with 15 abstentions.*

24. Mr. BONELL (Italy) said that his delegation voted in favour of the proposal because the article dealt with two entirely different questions.

25. Mr. ZIEGEL (Canada) said that he had been unable to support the joint proposal because it was in effect an expression of the general doctrine of unconscionability. That doctrine was out of place in the Convention, which was based squarely on the doctrine of the autonomy of the will of the parties.

26. *Article 27 was adopted by 40 votes to 4, with 3 abstentions.*

27. Mr. BONELL (Italy) said that his delegation could not accept the view that the doctrine of unconscionability had no place in the Convention. He hoped that if differences in the bargaining power of the parties led to abuse, the courts would use the second sentence of paragraph 2 to correct the abuses as far as possible.

27(a). Mr. ZIEGEL (Canada) said that he wished to make it clear that his delegation was not opposed to a doctrine of unconscionability. They simply felt that the draft Convention conferred no power on the courts to police the fairness of bargains. It was an open question

as to whether the same goals could be achieved by impeaching the validity of a contract under the applicable national law.

28. Mr. GARRIGUES (Spain) considered that article 27 was in its appropriate place in the Convention and should not be moved to part II, which dealt with the formation of the contract. His delegation considered, however, that the second sentence of paragraph 2 was very confused and likely to lead to difficulties of interpretation.

*Title of Chapter II (Obligations of the seller)*

29. *The title was adopted by 45 votes to none.*

*Article 28*

30. *Article 28 was adopted by 45 votes to none.*

*Title of Section I (Delivery of the goods and handing over of documents)*

31. *The title was adopted by 43 votes to none.*

*Article 29*

32. *Article 29 was adopted by 48 votes to none.*

*Article 30*

33. *Article 30 was adopted by 48 votes to none.*

*Article 31*

34. *Article 31 was adopted by 45 votes to none, with 1 abstention.*

*Article 32*

35. *Article 32 was adopted by 47 votes to none.*

*Title of Section II (Conformity of the goods and third party claims)*

36. *The title was adopted by 44 votes to none.*

*Article 33 (A/CONF.97/L.5)*

37. Mr. ROGNLIEN (Norway), introducing his delegation's amendment, explained that the proposal was intended as a drafting amendment to paragraph 3. It would be better and simpler to refer to the preceding paragraph 2 as a whole rather than to the four subparagraphs excluding the introductory sentence. The introductory words of paragraph 2 "Except where otherwise agreed" contained an exception to the requirements of quality as indicated in the subsequent subparagraphs (a) to (d). Where the exception implied no liability or less liability than indicated in the above-mentioned subparagraphs, paragraph 3 should apply to the extent that a degree of liability under paragraph 2 (a) to (d) remained. Where further conditions as to quality and liability were agreed, such liability would be subject to paragraph 1, to which paragraph 3 did not refer. Paragraph 3 thus

excluded liability for inferior quality as indicated in paragraph 2, even if quality requirements were reduced by agreement. That meaning might not be clear from the text under study.

38. Mr. KRISPIS (Greece) supported the proposal.

39. Mr. PLANTARD (France) suggested that it would be clearer to refer to "paragraph 2" rather than to the "preceding paragraph".

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the inclusion of a reference to the whole paragraph rather than to the subparagraph might be interpreted as meaning that the provision in paragraph 3 applied even in cases where stipulations about the quality of the goods had been agreed by the parties.

41. Mr. SEVON (Finland) said that the existing text caused no confusion and should be kept.

42. Mr. STALEV (Bulgaria) said that his delegation therefore preferred the existing text.

43. Mr. HJERNER (Sweden) considered that any departure from the existing text would involve questions of substance.

44. Mr. KHOO (Singapore) pointed out that in other articles such as article 40, the words "preceding paragraph" were always understood to mean the main paragraph, including subparagraphs. Making an exception for the article under discussion might therefore cause confusion.

45. *The amendment was rejected by 23 votes to 9, with 12 abstentions.*

46. Mr. ZIEGEL (Canada) said that his delegation would abstain because the article applied to every type of seller whereas his delegation still considered that paragraph 2 should be restricted to commercial sellers dealing in the type of goods concerned, as had been proposed in the Canadian amendment rejected by the First Committee (A/CONF.97/C.1/L.115). That represented a substantial change for common law countries and, he believed, for civil law countries also. During the discussion in the Committee, it had been explained that it was not expected that many international sales transactions would involve merchant sellers. It was, however, common in North America for owners of used goods, for example machinery, to sell them, possibly on the international market, even if the goods were not those dealt with in their usual line of business.

47. Mr. GARRIGUES (Spain) pointed out that the assumption in the article that non-conforming goods were the rule rather than the exception was contrary to the corresponding ULIS article of 1964, which was worded in such a way that non-conformity was the exception. He wondered if it was possible to submit an amendment to that effect at so late a stage in the work of the Conference. His delegation also thought that the Australian amendment (A/CONF.97/C.1/L.74) expressly excluding insignificant non-conformity should be taken into account.

48. The PRESIDENT regretted that it was too late to submit any further amendments.

49. Mr. BENNETT (Australia) said that his delegation was able to agree to the revised text of the article, on the understanding that the exclusion of insignificant non-conformity was implicit.

50. Mr. LEBEDEV (Union of Soviet Socialist Republics) pointed out that in article 33 (1) the English and Russian texts referred to the description required by the contract whereas the French text referred to the "type" of the goods.

51. Mr. PLANTARD (France) replied that the word would cause no confusion in French and was the correct translation of the English word in the context.

52. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that explanation but wished his comment to be included in the summary record.

53. *Article 33 was adopted by 45 votes to 1, with 1 abstention.*

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

#### *Article 34*

54. *Article 34 was adopted by 48 votes to none.*

#### *Article 35*

55. *Article 35 was adopted by 47 votes to none.*

#### *Article 36*

56. *Article 36 was adopted by 45 votes to none.*

#### *Articles 37 and 40 ter*

57. Mr. SEVON (Finland) proposed that articles 37 and 40 *ter* should be discussed and voted upon jointly since together they represented a compromise solution which had been agreed upon after long discussion.

58. Mr. HERBER (Federal Republic of Germany) and Mr. DATE-BAH (Ghana) supported the proposal.

59. Mr. BONELL (Italy) also supporting the proposal, observed that the Convention as a whole constituted a compromise and the remaining articles should also be adopted without modification.

60. *It was decided to discuss and vote upon articles 37 and 40 ter jointly.*

61. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/L.6), said that he had considered that the term "reasonable excuse" was too vague and would give rise to differing interpretations. However, he understood that his proposal was not acceptable to Nigeria and other developing countries and he therefore withdrew it.

62. Mr. PLUNKETT (Ireland) proposed the replacement of the word "excuse" by "justification". The latter word was more objective.

63. Mr. DABIN (Belgium) supported the Irish representative's oral amendment and suggested that the appropriate word in French would be "motif".

64. Mr. HERBER (Federal Republic of Germany) deplored last minute changes in a compromise text. The use of the word "excuse" showed that an exceptional situation was envisaged.

65. Mr. HJERNER (Sweden), Mr. DATE-BAH (Ghana) and Mr. MEHDI (Pakistan) agreed.

66. Mr. PLUNKETT (Ireland) withdrew his oral amendment.

67. Mr. LASTRES (Peru) said that the period of notice of two years specified in article 37, paragraph 2, was excessive and might lead to a conflict of rules between the Convention and the Brussels Convention on the responsibility of the carrier, in which the period was one year from the date of discharge of the goods. It should be borne in mind that most of the goods to which the present Convention related would be carried by sea.

68. Mr. GARRIGUES (Spain) said that the paragraph was particularly relevant to developing countries where buyers naturally wanted to have a long period in which to give notice of defective goods. However, two years seemed an unduly long period from the viewpoint of the seller, who naturally wished to discharge his obligations. In Spanish legislation, which had influenced the legislation in Latin American countries, the period of notice for hidden defects was two months.

69. Mr. LASTRES (Peru) proposed that the period of notification in article 37, paragraph 2, should be reduced to one year.

70. *The Peruvian oral amendment was rejected by 27 votes to 2, with 15 abstentions.*

71. *Articles 37 and 40 ter were adopted by 43 votes to none, with 4 abstentions.*

#### *Article 38*

72. *Article 38 was adopted by 48 votes to none.*

#### *Article 39*

73. *Article 39 was adopted by 41 votes to none, with 2 abstentions.*

#### *Article 40*

74. *Article 40 was adopted by 42 votes to none, with 3 abstentions.*

75. Mr. KRISPIS (Greece) said that his delegation had abstained because it believed that the subject matter dealt with in the article should be excluded from the Convention.

76. Mr. WANG Tian ming (China) said that his delegation had abstained in the voting on articles 39 and 40 because they were mainly concerned with industrial property or other intellectual property which were subjects that should be dealt with in a specialized inter-

national conference. The subjects were very complex and specific provisions relating to them in the present Convention were likely to lead to disputes.

#### Article 40 bis

77. Article 40 bis was adopted by 45 votes to none, with 2 abstentions.

#### Title of Section III (Remedies for breach of contract by the seller)

78. The title was adopted by 43 votes to none.

#### Article 41

79. Article 41 was adopted by 45 votes to none, with 1 abstention.

80. Mr. KHOO (Singapore) pointed out that paragraph 1 (b) of the article just adopted (article 41) referred to damages as provided in articles 70 to 73. Since article 73 bis under the same heading "Damages and interest" dealt with interest, he wondered whether the vote just taken had implied that there would need to be a consequential amendment to paragraph 1 (b) whereby the words "and interest" would be added after "damages".

81. The PRESIDENT said it was his understanding that article 73 bis should not be included among those referred to in article 41 (1) (b), because it dealt with different conditions.

82. Mr. ROGNLIEN (Norway) believed that, on the contrary, it would be logical to include a reference to article 73 bis under article 41, which was a complete informative list of remedies available to the buyer under the Convention. That reference might perhaps take the form of a new subparagraph (c) reading: "claim interest as provided in article 73 bis". A complete list should be given, both in article 41, which concerned the buyer, and in article 57, which concerned the seller.

83. Mr. ZIEGEL (Canada) said it was difficult to follow the President's reasoning that entitlement to interest under what was now article 73 bis did not follow in consequence of breach of an obligation. It seemed to him it might well do so, particularly in a case where a buyer had failed to pay the price, because entitlement to interest was a *prima facie* measure of damages suffered by the seller in being deprived of the use of the monies which he would have had, had the buyer met his obligations. He pointed out that article 41 (1) referred not only to obligations under the contract, but also to obligations under the Convention. Under article 66, the buyer and seller respectively were obliged to make restitution where the contract had been avoided: that was a pecuniary obligation under the Convention. He was sympathetic to the comments made by the representative of Singapore, and felt that rather than leave the matter in doubt article 41 (1) (b) should be amended to include a reference to the article on interest. It was important to make clear that the entitlements of a buyer under article 41 included an entitlement to interest in appropriate cases.

84. The PRESIDENT considered that article 41 (1) (b) was correct as it stood. He did not think the inclusion of such a reference would be appropriate in an article dealing with the remedies of the buyer: it would be better placed under article 57, which dealt with the remedies of the seller.

85. Mr. PLANTARD (France) remarked that the Drafting Committee had considered the provisions of article 73 bis at length and had endeavoured to make clear that it was not simply the payment of the price that was at issue but the payment of any other sum due, whether on the part of the buyer or seller. The Drafting Committee had also debated whether article 73 bis should rightly be included under Chapter V section II ("Damages and interest") and had finally concluded that it should be.

86. Mr. KRISPIS (Greece) said that if it were to be decided not to refer in article 41 to article 73 bis, it would be necessary to amend the wording of paragraph 1 of the latter article to read "If a buyer fails to pay." Since article 41 referred to "any of the obligations" of the seller, he wondered whether it should not also make reference to article 69 (1), which concerned interest to be paid by the seller in case he was required to refund the price.

87. Mr. HJERNER (Sweden) suggested that a decision should be deferred until the plenary came to consider article 73 bis itself.

88. Mr. VINDING KRUSE (Denmark) shared the view that article 41 (1) (b) should include a reference to article 73 bis, since the remedies of the buyer would include the right to interest after the time at which damages became due. He could agree that consideration of the point be deferred until article 73 bis was discussed.

89. Mr. MASKOW (German Democratic Republic) did not regard the list of remedies in article 41 as exhaustive; it contained only the most important and primary rights of the buyer. Secondary rights of the buyer would be available in two main cases, first if the damages to which he was entitled were delayed, and secondly if the contract was avoided and goods were restituted, and he had to pay interest on the price already received. As he saw it, it was unnecessary to refer to secondary rights in article 41, and the text could remain as it stood.

90. Mr. HONNOLD (United States of America) considered that the buyer might have rights to interest under article 73 bis; his rights would not be limited to the very special case described in article 69 (1). The Drafting Committee's view of the matter was clearly indicated in the title of Chapter V "Provisions common to the obligations of the seller and of the buyer", and article 73 bis fell within that Chapter. However, consideration of how best to express that point in article 41 could be deferred until a later stage.

91. The PRESIDENT shared the view expressed by the representative of the German Democratic Republic that the list of remedies in article 41 was not intended to be exhaustive. He suggested that the plenary should vote on



article 41 on the understanding that arrears of interest would be covered in a separate article. As he saw it, article 41 dealt exclusively with the remedies available to the buyer should the seller fail to perform.

92. Mr. HONNOLD (United States of America) did not think it right to assume that the article referred only to remedies available to the buyer, since paragraph 1 (b) referred to articles 70 to 73, covering rights available to both seller and buyer.

93. The PRESIDENT invited the Conference to vote

on whether the scope of article 41 (1) (b) should be interpreted as including also article 73 bis.

94. *The result of the voting was 20 in favour, 14 against, with 12 abstentions.*

95. The PRESIDENT noted that as the required two-thirds majority had not been obtained, the interpretation had not been adopted. It remained to be considered whether the Conference would adopt the contrary interpretation.

*The meeting rose at 6.10 p.m.*

## 8th plenary meeting

Wednesday, 9 April 1980, at 3 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.8

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 9) (continued)

REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (A/CONF.97/11 and Add.1, 2 and 3) (continued)

#### *Title of the Convention*

1. The PRESIDENT pointed out that the title of the Convention adopted earlier should in fact read "United Nations Convention on Contracts for the International Sale of Goods". He saw no need to put that amended title to the vote.

#### *Article 41 (continued)*

2. The PRESIDENT said that during the discussion of the interpretation to be placed on article 41 the previous day he had spoken somewhat prematurely. As he now understood the position, article 41 was in fact to be interpreted as including reference to article 73 bis because in the present sequence of articles article 73 bis would come before article 73. The same interpretation was to be placed on article 57, which dealt with the consequences of the buyer's failure to perform. However, he did not consider that it was of any legal consequence whether or not article 73 bis was explicitly referred to in article 41; that article, like article 57, was not intended to provide an exhaustive list of remedies.

3. Mr. LOEWE (Austria) agreed with the President that it was of no importance whether or not a reference

to article 73 bis was included in article 41. He himself believed that article 73 bis was out of place in Chapter V, section II (damages and interest) and should be included in a different section; however, he would raise that point when the Conference came to discuss article 73 bis itself.

4. Mr. LEBEDEV (Union of Soviet Socialist Republics) said the Conference should not consider itself bound by decisions which had been reached as a result of a misunderstanding. Article 41, paragraph 1 (b) was concerned only with damages, not with interest, whereas article 73 bis dealt solely with interest. His own view was that interest should not be considered as a form of damages, since if it were so considered serious consequences might ensue.

5. Mr. NICHOLAS (United Kingdom) suggested that the question of whether or not to reopen a discussion on article 41 should be deferred until the Conference came to consider article 73 bis. His own delegation had a proposal for the deletion of article 73 bis, and if that proposal were adopted it would waste time to have to return to article 41 in order to decide whether or not it was to be understood as covering that article.

6. Mr. KRISPIS (Greece), speaking in explanation of vote, said that he had voted in favour of article 41 on the understanding that the remedies listed under paragraph 1 were not exhaustive, but merely indicative.

7. Mr. DABIN (Belgium) recalled that the previous day a vote had been taken on the interpretation of article 41. He urged that in future votes of that kind should be avoided because they had no legal validity and might constitute a dangerous precedent.

#### *Article 42*

8. *Article 42 was adopted by 38 votes to none, with 1 abstention.*



*Article 43*

9. *Article 43 was adopted by 38 votes to none.*

*Article 44*

10. *Article 44 was adopted by 38 votes to none, with 2 abstentions.*

11. Mr. MEHDI (Pakistan), speaking in explanation of vote, said he had abstained from voting on article 44 since he believed that paragraph 2 of that article provided disproportionate penalties for the buyer who did not comply with the seller's request to make known whether he would accept performance within a reasonable time after the date of delivery.

*Article 45*

12. *Article 45 was adopted by 44 votes to none, with 1 abstention.*

13. Mr. FOKKEMA (Netherlands), speaking in explanation of vote, said he had abstained from voting on article 45. He recalled that in the Drafting Committee proposals had been put forward to extend the right of avoidance under article 45, paragraph 1 to cover important breaches of contract other than non-delivery. He regretted that those proposals had been rejected, since the Convention might now be seen to condone wilful and intentional breaches of contract by the seller.

*Article 46*

14. *Article 46 was adopted by 43 votes to 1.*

15. Mr. SAMI (Iraq), speaking in explanation of vote, said he had voted against the article since he believed it would be more equitable for the buyer to be able to calculate the reduction of price on the basis of the value that the goods would have had at the time of the signing of the contract.

16. Mr. SEVON (Finland), speaking in explanation of vote, said that he had voted in favour of article 46, on the assumption that the reduction of price was to be calculated on the basis of the price agreed upon in the contract. The point raised by the representative of Iraq had been discussed in the Drafting Committee, and it had been considered that the text was clear in that respect.

*Article 47*

17. *Article 47 was adopted by 42 votes to none.*

*Article 48 (A/CONF.97/L.13)*

18. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/L.13), said the Convention made a distinction between what was fixed by the contract and what was determinable from the contract. In that connection, he referred to articles 12 (1), 31 (a) and 55. The text of article 48 should reflect that distinction, since otherwise, it might be thought that the buyer

did not have the right to refuse delivery if goods were delivered before the date determinable from the contract.

19. Mr. HONNOLD (United States of America) supported that proposal.

20. Mr. BONELL (Italy) considered that the proposed amendment should be expanded to take in all three cases covered by article 31, subparagraphs (a), (b) and (c). If the amendment was not so expanded, he would prefer the existing text.

21. The PRESIDENT invited the Conference to vote on the Norwegian amendment.

22. *The result of the voting was 18 in favour, 12 against, with 10 abstentions. Having failed to obtain the required two-thirds majority, the amendment was not adopted.*

23. Mr. BONELL (Italy) suggested that paragraph 1 might be amended to read "if the seller delivers the goods before the date provided for in article 31 . . .".

24. The PRESIDENT noted that there was little support for that proposal.

25. Mr. BONELL (Italy) said that in that case he would withdraw his proposal.

26. *Article 48 was adopted by 43 votes to 2.*

*Title of Part III, Chapter III (Obligations of the buyer)*

27. *The title was adopted by 33 votes to none.*

*Article 49*

28. *Article 49 was adopted by 43 votes to none.*

*Title of Part III, Chapter III, Section 1 (Payment of the price)*

29. *The title was adopted by 43 votes to none.*

*Article 50*

30. *Article 50 was adopted by 47 votes to none.*

*Article 51*

31. *Article 51 was adopted by 40 votes to 3, with 5 abstentions.*

*Article 52*

32. *Article 52 was adopted by 49 votes to none, with 1 abstention.*

*Article 53*

33. *Article 53 was adopted by 50 votes to none.*

*Article 54*

34. Mr. GARRIGUES (Spain) said that, while he had no specific proposal on article 54, he wished to place a statement on record. Article 54 dealt with the question of the time at which the price had to be paid by the buyer.

His delegation had no difficulty with the first sentence of paragraph 1, which equated to delivery the operation of placing the goods (or the documents representing them) at the buyer's disposal. His delegation had, however, doubts regarding the statement in the second sentence to the effect that the seller could make payment "a condition" for handing over the goods or documents. The use of the term "condition" was inappropriate. The situation was simply that payment of the price and handing over of the goods (or documents representing them) constituted the main obligations of the two parties to the contract of sale. Since that contract was of a bilateral character, the two sets of reciprocal obligations were complementary.

35. *Article 54 was adopted by 42 votes to none, with 5 abstentions.*

#### *Article 55*

36. *Article 55 was adopted by 47 votes to none.*

#### *Title of Chapter III, Section II (Taking delivery)*

37. *The title was adopted by 48 votes to none.*

#### *Article 56*

38. *Article 56 was adopted by 46 votes to none.*

#### *Title of Chapter III, Section III (Remedies for breach of contract by the buyer)*

39. *The title was adopted by 44 votes to none.*

#### *Article 57*

40. Mr. LEBEDEV (Union of Soviet Socialist Republics) suggested that in view of the decision taken by the Conference with regard to article 41, consideration of article 57 should be deferred until a decision was taken regarding article 73 bis.

41. Mr. ROGNLIEN (Norway) said that it would be preferable for the Conference to vote on article 57, while reserving the question of the place of article 73 bis.

42. The PRESIDENT pointed out that it would be necessary in that case to vote separately on paragraph 1 (b) of article 57.

43. Mr. ROGNLIEN (Norway) withdrew his suggestion.

44. *The motion to adjourn the discussion on article 57 was carried by 37 votes to 1, with 8 abstentions.*

#### *Article 58*

45. *Article 58 was adopted by 48 votes to none.*

46. Mr. de la CAMARA (Spain) said that his delegation had voted in favour of article 58 but was not satisfied with the wording of the concluding proviso "unless the seller has resorted to a remedy which is inconsistent with this requirement". That passage was not at all clear. As far as he could see, it could only refer to the case in

which the seller avoided the contract. If the seller had not avoided the contract, the obligations of both parties subsisted unchanged.

#### *Article 59*

47. *Article 59 was adopted by 49 votes to none.*

#### *Article 60 (A/CONF.97/L.7)*

48. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/L.7), said that paragraph 2 (a) of article 60 stated the consequences of late performance by the buyer, i.e. of late payment by him or of delay in taking delivery of the goods. In the discussions in the First Committee, the words "late performance by the buyer" in paragraph 2 (a) had been interpreted as referring to late payment by itself or to delay in taking delivery of the goods by itself. The purpose of his amendment (A/CONF.97/L.7) was to spell out that meaning by adding the words: "by payment or taking delivery, as the case may be". The change would not affect the substance of the text. It would simply make the interpretation clear and more certain.

49. The PRESIDENT noted that there appeared to be only limited support for the amendment.

50. Mr. ROGNLIEN (Norway) said that, in the circumstances, he would not press his amendment.

51. *Article 60 was adopted by 46 votes to none, with 1 abstention.*

#### *Article 61*

52. *Article 61 was adopted by 45 votes to 1, with 2 abstentions.*

53. Mr. MEHDI (Pakistan), explaining his delegation's vote against article 61, said that it had proposed the deletion of the article in the First Committee because it was neither reasonable nor fair to confer upon the seller—as was done in paragraph 1—the right to make the specification of the goods himself simply because the buyer had failed to do so. The seller's interests were fully safeguarded by other provisions of the draft. The drastic remedy embodied in article 61 was therefore totally unjustified.

#### *Title of Chapter IV (Passing of risk)*

54. *The title was adopted by 44 votes to none.*

#### *Article 78*

55. *Article 78 was adopted by 47 votes to none.*

#### *Article 79 (A/CONF.97/L.14)*

56. Mr. SEVON (Finland), introducing the amendment to article 79 submitted by Argentina, Egypt, Finland, Pakistan and Turkey (A/CONF.97/L.14), said that the sponsors felt that it would help to clarify the meaning of article 79.

57. Mr. KRISPIS (Greece) opposed the joint proposal, which in his view affected the substance of the article.
58. Mr. BENNETT (Australia) said that he had considerable difficulty with the proposal although he could appreciate the reasons for the proposed change.
59. Mr. STALEV (Bulgaria) urged that the existing text should be kept unchanged.
60. Mr. ZIEGEL (Canada) considered that the proposed addition might suggest that in some cases compliance with the contract was necessary in order to justify a transfer of risk and that, in other cases, where there was no similar reference to the terms of the contract, a contrary inference was to be drawn. Either of those inferences would lead to wrong conclusions. A provision already existed in article 82 dealing with the effects of a fundamental breach committed by the seller with respect to the provisions governing the transfer of risk and it might be misleading if other partial provisions were to be inserted in other articles. His delegation preferred the existing text.
61. Mr. HJERNER (Sweden) said that his delegation understood that the sponsors' concern was that the seller should not hand over goods to a carrier unless the contract of sale specifically stated that they had to be transported by him. However, the placing of the proposed additional phrase after "the first carrier" might be taken to restrain the seller's freedom to choose the carrier or the place of dispatch. He therefore proposed that it should be inserted at the end of the sentence after "for transmission to the buyer". If that change was made, his delegation could support the proposal.
62. Mr. NICHOLAS (United Kingdom) endorsed that proposal.
63. Mr. HONNOLD (United States of America) said that his delegation was not opposed to the thought behind the proposal but was afraid that the wording could lead to ambiguity and to difficulties in the relationship between articles 79 and 82.
64. Mr. MEHDI (Pakistan) explained that the amendment had been intended to remove ambiguities in the existing text and in no way to limit the seller's right to choose the carrier or the mode of dispatch. His delegation could accept the Swedish representative's sub-amendment.
65. Mr. SEVON (Finland), speaking also on behalf of the Egyptian delegation, Mr. BOGGIANO (Argentina) and Mr. OZERDEN (Turkey) also accepted the sub-amendment.
66. *The amendment (A/CONF.97/L.14), as orally amended, was adopted by 31 votes to 5, with 14 abstentions.*
67. Mr. HONNOLD (United States of America) said that his delegation had abstained for the reasons he had already given.
68. Mr. KHOO (Singapore) explained that his delegation had also abstained because the thought underlying

the amendment seemed to be adequately expressed in article 79, paragraph 1.

69. *Article 79, as amended, was adopted by 46 votes to none, with 3 abstentions.*

*The meeting was suspended at 4.45 p.m. and resumed at 5.05 p.m.*

#### *Article 80 (A/CONF.97/L.15)*

70. Mr. MEHDI (Pakistan), introducing the amendment submitted by Argentina, Egypt, Pakistan, Republic of Korea and Turkey, said that the sponsors considered the existing text of article 80 somewhat unreasonable in that risk was assumed by the buyer retroactively. The proposed changes would remove that difficulty and avoid possible conflict with article 81, paragraph 2.
71. Mr. SEVON (Finland) said that his delegation had no difficulty with the existing text but could support the amendment because it understood that the existing text might create problems in some jurisdictions.
72. Mr. ZIEGEL (Canada) said that his delegation could also support the amendment, first because there appeared to be no law in common law jurisdiction covering special rules for the transfer of risk, and second, because the existing text of article 80 might not cover cases where insurance was inadequate to protect the buyer.
73. Mr. KRISPIS (Greece) also supported the draft amendment.
74. Mr. HJERNER (Sweden) said that the matter was mainly one of trading and insurance techniques and was reflected in the rules governing them. Arguments had been advanced that many insurance companies refused to insure a risk before the date of conclusion of a contract or that a seller might load the goods on to a means of transport before selling them, and sell them in transit. The solution of such problems was a complex drafting matter and could not be done by the wording proposed in the amendment. It was difficult to pinpoint the exact time at which damage occurred, whereas it was simple to note if the goods were or were not damaged at the time of handing them over to the carrier. For those reasons, if the amendment was adopted, his delegation would be obliged to vote against the article as a whole.
75. Mr. KHOO (Singapore) said that the Convention as adopted so far showed a proper balance between the interests of the seller and the buyer and it would be regrettable for it to contain a completely unreasonable article. Article 80 had not been given due attention at previous UNCITRAL discussions and his delegation warmly welcomed the draft amendment.
76. Mr. POPESCU (Romania) said that the transfer of risks to the buyer should occur only when the goods were at his disposal. The suggestion that the risk should be assumed by the buyer from the time the contract was concluded seemed to him a step backwards, which his delegation was unable to accept.

77. Mr. DABIN (Belgium) said he could not support the joint proposal (A/CONF.97/L.15). The passing of risk should take place at a clearly defined point in time. It should not be subject to an abstract legal concept.

78. Mr. KHOO (Singapore) considered that the opening phrase of the proposed new first sentence of article 80 might make the proposal more acceptable since it would give parties freedom to derogate from the normal rule.

79. Mr. MEHDI (Pakistan) concurred.

80. Mr. LOEWE (Austria) observed that the proviso "unless otherwise indicated" applied to every article in the Convention.

81. Mr. SZÁSZ (Hungary) said that the inclusion of the phrase "unless otherwise indicated" in one article was likely to jeopardize the interpretation of all the other articles.

82. Mr. HJERNER (Sweden) said he did not interpret "unless otherwise indicated" as having the same meaning as "unless otherwise agreed". In his view, the phrase meant that after the conclusion of the contract, either party might indicate his intention of applying another régime for the passing of risk. It would be easier to reconcile the joint proposal with trading techniques if that view was taken.

83. The PRESIDENT put to the vote the joint proposal in document A/CONF.97/L.15.

84. *There were 22 votes in favour, 15 against and 13 abstentions. Having failed to obtain the required two-thirds majority, the proposal was not adopted.*

85. Mr. INAAMULLAH (Pakistan) asked whether it would not be advisable to set up a working group on the subject in accordance with the agreement reached in the General Committee.

86. The PRESIDENT said it was his understanding that the agreement to which the representative of Pakistan referred applied only in cases where otherwise a gap would be left in the Convention.

87. Mr. LOEWE (Austria) and Mr. DABIN (Belgium) supported the President.

88. The PRESIDENT put to the vote article 80.

89. *There were 23 votes in favour, 13 against and 14 abstentions. Having failed to obtain the required two-thirds majority, article 80 was not adopted.*

90. Mr. ROGNLIEN (Norway) said that omission of the article from the Convention would not constitute an important gap. He suggested that the Conference should accept its deletion. That indeed would, in the circumstances, be the best compromise.

91. Mr. KRISPIS (Greece) concurred.

92. Mr. BONELL (Italy) doubted whether a working group would be able to achieve a generally acceptable solution.

93. Mr. HONNOLD (United States of America) said that his delegation had voted against article 80 because it

did not consider the provisions satisfactory. In the pertinent case-law, retroactive transfer of risk in transit had been applied only when the seller had handed over to the buyer a negotiable insurance policy. In those circumstances, the courts had concluded that it was for the person in possession of the policy to make the claim against the insurer. The understanding of the parties, effective through article 5, appeared to solve the problem. He felt that the Convention would have a better chance of success if no attempt was made to find a formulation to deal with the subject.

94. Mr. WANG Tian ming (China) regretted that the joint proposal had not been sufficiently supported. In view of the evident divergence of opinions on the subject, he agreed that the best course was to delete the article.

95. Mr. PLANTARD (France) doubted whether it was so easy to dispense with article 80. If it was deleted, the circumstances it envisaged would have to be dealt with either under article 79 or article 81, neither of which would provide a clear answer.

96. Mr. HERBER (Federal Republic of Germany) said that article 80 covered an important subject which required a rule of its own. It did not seem that a working group would be useful since the only two possible formulations were already contained in the present text of article 80 and in the joint proposal, both of which had failed to obtain the necessary two-thirds majority. He therefore proposed that the conference should reconsider the matter.

97. Mr. LOEWE (Austria) endorsed the proposal of the representative of the Federal Republic of Germany. An article was required to deal with the matter of *res in transitu*, which was not adequately covered by articles 79 and 81. His delegation would have preferred article 80 because the date on which damage had occurred to goods in transit was almost impossible to ascertain. However, the joint proposal was more acceptable than total deletion on the understanding that it constituted the whole of the article and not merely the first sentence. The second sentence of article 80 would become pointless if the joint proposal was adopted. Furthermore, the opening phrase "unless otherwise indicated" should be omitted. He was unable to grasp the subtle distinction between that phrase and "unless otherwise agreed": it could not be taken to authorize a unilateral declaration of intention, as the Swedish representative had stated.

98. Mr. STALEV (Bulgaria) urged those delegations which had been strongly in favour of article 40 *ter*, which other delegations had agreed to adopt in a spirit of compromise, to show similar understanding in their turn and to vote for the adoption of article 80.

99. Mr. HJERNER (Sweden) said he was prepared to support the establishment of a working group or the deletion of the article.

100. Mr. SHAFIK (Egypt) said that deletion would leave a serious gap in the Convention as sales in transit were very frequent. He supported the proposal of the representative of the Federal Republic of Germany.

101. Mr. POPESCU (Romania) requested that the joint proposal should be voted on first, if the matter was reconsidered.

102. Mr. MEHDI (Pakistan) concurred.

103. The PRESIDENT put the proposal to reconsider article 80 to the vote.

104. *There were 35 votes in favour, 6 against and 10 abstentions. Having obtained the required two-thirds majority, the proposal to reconsider article 80 was adopted.*

*The meeting rose at 6 p.m.*

## 9th plenary meeting

Wednesday, 9 April 1980, at 7.30 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.9

*The meeting was called to order at 7.35 p.m.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 of 16 DECEMBER 1978 (agenda item 9) (continued)

REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (A/CONF.97/11 and Add.1 and 2) (continued)

#### Article 80 (A/CONF.97/L.15) (continued)

1. Mr. MEHDI (Pakistan) introduced a compromise text, proposed by the sponsors of document A/CONF.97/L.15 and other delegations, which read:

"The risk in respect of goods sold in transit is assumed by the buyer from the time the contract is concluded. However, if the circumstances indicate a contrary intention, the risk is assumed by the buyer from the time the goods were handed over the carrier who issued the documents embodying the contract of carriage, except that if, at the time of the conclusion of the contract of sale, the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller."

2. That text was an attempt to combine the elements of the draft amendment (A/CONF.97/L.15) with the major elements of existing article 80, so that, after stating the rule that the risk passed to the buyer from the time the contract was concluded, freedom was left to parties to arrange things otherwise if they so desired.

3. Mr. HJERNER (Sweden) said that his delegation, which had participated in the deliberations leading to the draft proposal under discussion, strongly supported a compromise along the lines proposed. It was an attempt to combine the two main elements of article 80 and draft amendment A/CONF.97/L.15. The expression "if the circumstances indicate a contrary intention", might be

considered by some delegations as being either rather vague or too novel in the circumstances. He felt, however, that it was necessary to retain some flexibility and the phrase covered such situations as those where the seller transferred an insurance policy to the buyer, a point which had caused some concern on the part of several delegations.

4. Mr. ROGNLIEN (Norway) said that, if the content of the new proposal was analysed, it would be found to be exactly the same as that of the proposal contained in A/CONF.97/L.15. The only part that was new was the phrase "if the circumstances indicate a contrary intention". It was, however, already clear that, in cases where there was such an intention, it would be covered by article 5 of the Convention or by an agreement between the parties. Consequently, it was self-evident that, in such cases, the intention would apply. The only difference that the proposed text would make would be to render the article longer and more complicated. The substance of the first sentence was unacceptable because it was impracticable. It might create uncertainty and mean additional insurance costs if the buyer were asked to assume the risk at a time when goods were in transit. Bad compromises might jeopardise the Convention, and that one would at least create difficulties of application.

5. No provision such as that contained in article 80 was to be found in Scandinavian law nor, as far as he knew, in English or French law. There would be specific documents in virtually every case concerned with the sale of goods in transit and thus an indication of the intention of the parties. He therefore doubted whether anything would be gained by including the provision in the Convention and was convinced that it would be better to delete the article in its entirety.

6. Mr. MICHIDA (Japan) said that, to date, article 80 was the one which had caused most difficulty to the Conference. His delegation, which had given serious thought to the question why the Conference was divided into two schools of thought over the matter, felt that it was due to the fact that there had been some confusion concerning

on the one hand the insurance problem and on the other the sales problem, i.e. the relationship between the buyer and the seller. A perfect solution to the problem would require a considerable amount of time but, pending such a solution, his delegation found the text proposed by the representative of Pakistan acceptable in principle. The first sentence covered the sales problem very well and the second sentence dealt with the insurance problem. His delegation was therefore able to support the proposal, subject to some drafting changes.

7. Mr. POPESCU (Romania) said that his delegation was convinced that there were difficulties involved in proving the moment at which damage or loss occurred, particularly where several sales transactions were involved. A reference point was thus essential and it felt that that had been satisfactorily found in the existing text of article 80. Consequently, his delegation was unable to support the proposed amendment.

8. Mr. PERROTT (International Chamber of Commerce) said that he wished to draw attention to the fact that, as it appeared in the new proposal, the phrase "... except that if, at the time ..." applied only to the second sentence of the article and not to the first. It would appear that the risk did not remain with the seller when he knew or ought to have known at the time of the conclusion of the contract that the goods were lost or damaged in transit, where there were no circumstances indicating that the intention was that the risk should pass at a time other than that of the conclusion of the contract.

9. He wondered if that was, in fact, the intention of the draft text and suggested that it might be better to make it clear that the phrase in question applied to both the situations mentioned in the text.

10. Mr. LANDO (International Chamber of Commerce) said that the provision as set out in article 80 had been the outcome of long deliberations and considerable experience. The rule laid down in that article, taken in conjunction with articles 79 and 81, was one that was embodied in many standard form contracts and was also a rule of thumb when the difficulties concerning proof of damage or loss in transit were under consideration. None of the cases in which the rule had been applied had resulted in injustice to the buyer.

11. However, as set out in the proposed text, the rule introduced ambiguities since it was by no means clear what was meant by the phrase "if the circumstances indicate a contrary intention" and it was also unclear what relation the rule bore to article 5 of the Convention. He thus urged the Conference to consider whether existing article 80 might not really be the best and most carefully thought out expression of the provision concerned.

12. Mr. HONNOLD (United States of America) said that his delegation was less concerned about the drafting of the phrase "if the circumstances indicate a contrary intention" than about the substantive relationship between the intention of the parties and the rule expressed

in article 80. The proposed draft would appear to state that, if the circumstances seemed to indicate that the risk should pass at the point of receipt, then risk should not pass at the place the parties had agreed upon but at a different place, i.e. the place of shipment.

13. While it was quite usual to have rules that could be superseded by the intention of the parties, it was a very different matter to introduce a rule stating that, although the circumstances indicated a specific intention, the result should in fact be a different one. The phrase might perhaps be intended to cover situations where there was a doubt concerning the relations between the parties, but it seemed to him to be a complex and unrealistic way of dealing with the intention of the parties. His delegation found it difficult to believe that the proposed compromise could bring any satisfaction or clarity to the problem.

14. His delegation was neutral on the question whether the basic rule, subject to the intention of the parties, should be that the risk would pass at the point of delivery to the carrier or at the point of receipt, both of which were places where damage or loss could be established. However, the basic premise of the proposed text seemed difficult to accept as there could be doubts as to when damage or loss had occurred. It was therefore difficult to conclude that the proposal provided a practical and clear solution in that respect also.

15. His delegation was of the opinion that the problem did not require the statement of a statutory rule. The United States of America was one of those countries which had not found it necessary to deal with the situation by statute, since it was a situation that was normally controlled by the intention of the parties and by the transmission of insurance policies. Consequently, his delegation believed that the Conference would better serve the unification of law by leaving the problem where in practice it resided, i.e. in the agreement between the parties involved.

16. Mr. SAMI (Iraq) said that the proposed text, which represented a commendable effort to reconcile different points of view, confirmed a rule to the effect that the risk was the seller's but included an exception to apply when the will of the parties provided otherwise and retained the last part of existing article 80, a point which had been much discussed. His delegation endorsed the new proposal, which, it felt, was both clear and realistic.

17. Mr. LOEWE (Austria) said that, although he too appreciated the efforts that had been made to find a compromise solution, he was unable to support the proposed new article 80 which, as it stood, lacked clarity and gave merely a fallacious impression of being a compromise. Its core was, in fact, its first sentence, which was identical with the former A/CONF.9/L.15. Of all the solutions proposed, his delegation would prefer the text of article 80 that had been adopted in the First Committee. It could, however, agree to the first sentence of the new proposal without the rest of the paragraph, in which case it would at any rate be clear.



18. Mr. ZIEGEL (Canada) said that his delegation had been one of those which had joined in the attempt to arrive at a formulation that would accommodate the divergent opinions. A situation had arisen in which a substantial number of delegations had felt that the concept stated in article 80 was significant, and that the deletion of the article would leave a gap in the Convention. His delegation had therefore taken the view that a reasonable effort should be made to achieve an article with a balanced content.

19. Those delegations which felt that an article was unnecessary should remember that article 80 was not mandatory in character. The proposed text, subject perhaps to further amendment, accommodated a reasonable spectrum of views and he hoped that it would receive wide support.

20. Mr. KIM (Korea) said that his delegation, as one of the sponsors of the joint proposal in A/CONF.97/L.15, appreciated the effort that had been made to arrive at a compromise text. However, a careful reading of the new text showed that the second sentence was not only ambiguous but offered a possibility of misuse, because a contrary intention might be construed as meaning a unilateral declaration, corresponding to the opting-out clause. In that way, the basic principle stated in the first sentence could be evaded.

21. His delegation's view of the whole situation which had been reflected in the joint proposal (A/CONF.97/L.15) was that the passage of risk in the sale of goods in transit was a very complicated question. Although article 80 appeared simple in itself, it related not only to parties concluding a contract for the international sale of goods but also to the international carriage of goods and to matters of international insurance.

22. His delegation had supported the joint proposal not because it was to the advantage of the developing countries or of the buyer, but from a purely technical and analytical point of view. There were many delegations that endorsed the principle that the risk passed at the time the goods were delivered, a principle that had perhaps been an effective one in the past. However, the terms of article 80 would appear to apply not only to contracts that were primarily between the seller and the buyer but also to contracts for the resale of goods in transit. In the case of goods sold CIF, for example, even though the insurance policy and shipping contract were provided by the seller, the risk passed at the point when the goods were effectively taken on board, and the buyer bore the risk from the point of departure. From that point on, the party selling the goods in transit was not the original seller but the buyer and, if that buyer resold to a third party, under article 36 of the Convention, the third party in question should be entitled to an opportunity to inspect the goods on arrival at their destination.

23. The passage of risk was, of course, intimately connected with the right of inspection but, in the case of resale, the matter became very complicated because,

under the Convention, there could be redirection or re-dispatch of goods after resale. Under article 36 (3), the right to inspect goods at the ultimate place of destination applied only where, at the time of the conclusion of the contract, the seller knew or ought to have known of the possibility of redirection or redispach. If the seller did not know of that possibility, the opportunity of the third party to make such an inspection was excluded. His delegation felt, therefore, that the time criterion must be as proposed in A/CONF.97/L.15 or else article 80 should be deleted altogether.

24. Mr. KRISPIS (Greece) said that the first of the two sentences in the text proposed by the delegation of Pakistan was virtually identical with the joint amendment (A/CONF.97/L.15), which his delegation had already supported. The second sentence stated an exception, followed by an exception to the exception, which meant a return to the rule in the first sentence, and was also acceptable. He felt, however, that there was some illogicality in referring to both intention and circumstances, and suggested therefore that the phrase "if the circumstances indicate a contrary intention" should be replaced by: "if the circumstances so indicate".

25. Mr. PLANTARD (France) said he regretted that he was unable to accept the compromise proposal. He agreed with the representative of Austria that possibly because it was a compromise, it was the most ambiguous of all the proposals made so far. While ready to accept the principle in the first sentence that the risk should be transferred at the time of the conclusion of the contract, his delegation found the second sentence unacceptable, since it would, as the representative of the United States had pointed out, deprive the will of the parties of its effect.

26. His delegation would thus vote against the proposal as a whole and, if it were rejected, would put forward another proposal, based on the text of the representative of Pakistan, which would run: "The risk in respect of goods sold in transit is assumed by the buyer from the time the contract is concluded, unless the circumstances indicate a contrary intention", and would stop there. The intention, whatever it might be, should be applied. His wording would convey the same essential message as the text proposed by the representative of Pakistan, but the ambiguity would be removed.

27. Mr. MEHDI (Pakistan) said he accepted the sub-amendment proposed by the representative of Greece.

28. The PRESIDENT invited the Conference to vote on article 80 as proposed by the representative of Pakistan, the second sentence being amended to start "However, if the circumstances so indicate, the risk, etc."

29. *The proposal was adopted by 26 votes to 12, with 9 abstentions.*

30. Mr. NICHOLAS (United Kingdom) proposed that the text that had just been adopted should be referred to the Drafting Committee.

31. Mr. KHOO (Singapore), Chairman of the Drafting Committee, said that, although he had voted in favour of the proposal as it stood, he felt that the wording might well be refined.

32. Mr. PLANTARD (France) said that, although his delegation had agreed to consider the proposal in English as it was drafted, it had to insist that an official French version be produced by the Drafting Committee.

33. Mr. VIS (Executive Secretary) said that, in the interest of the quality of the Convention, the wording of article 80 as adopted should go to the Drafting Committee to be polished. He suggested, therefore, that the meeting should close early, so that the Drafting Committee could start work at 10 p.m. and produce a text of article 80 which could be reproduced and distributed in time for adoption at the next plenary meeting.

34. *It was so decided.*

*The meeting was suspended at 8.55 p.m. and resumed at 9.15 p.m.*

#### Article 81

35. *Article 81 was adopted by 38 votes to none, with 1 abstention.*

#### Article 82

36. *Article 82 was adopted by 46 votes to none.*

*Title of chapter V (Provisions common to the obligations of the seller and of the buyer)*

37. *The title of chapter V was adopted by 43 votes to none.*

#### Article 62

38. Mr. SAM (Ghana), introducing his delegation's proposed amendment of article 62 (A/CONF.97/L.12), said that it was necessary to retain the phrase "if it is reasonable to do so" since its deletion would make the text less objective and enable one party to suspend performance of his obligations in an arbitrary manner.

39. He reminded delegations that, when the wording proposed by the *ad hoc* working group in A/CONF.97/C.1/L.252 had been submitted to the First Committee, it had been stressed that the phrase was one of the essential elements in the article.

40. Mr. MATHANJUKI (Kenya) said he supported the view of the Ghanaian delegation. The omission of the phrase in question would not only give one party an unfair advantage but would also make the text less objective and that would be unfortunate since subparagraph (a) was already based on subjective criteria namely, "serious deficiency" and "creditworthiness".

41. Mr. VINDING KRUSE (Denmark) said he wished to remind delegations that, in the First Committee, they had voted to delete the phrase in question, the inclusion of which was unnecessary since it would be difficult to

imagine any circumstances in which it would not be reasonable for one of the party to suspend performance of his obligations if it became apparent that the other party would not be performing a substantial part of his obligations.

42. Mr. NICHOLAS (United Kingdom), who agreed with the Danish representative that the phrase was unnecessary, said it would compel a party contemplating suspension to consider whether or not a court would subsequently decide that his action had been reasonable. Since it was difficult to see what criterion the court would apply in reaching such a decision, the phrase did not increase the protection afforded by the article while introducing a further element of uncertainty.

43. Mr. STALEV (Bulgaria) said that he too was of the opinion that the inclusion of such a requirement might be dangerous for a party wishing to suspend performance of his obligations, as he might be held liable if a court found he had not been entitled to do so under the terms of the article. Sufficient protection was already given by the article as it stood.

44. Mr. KRISPIS (Greece) said that two different expressions were used to convey the same meaning in paragraph 1 of the proposal by Ghana and in paragraph 2 of the text approved by the Drafting Committee, namely, "becomes apparent" and "become evident". He therefore proposed that the word "evident" in paragraph 2 should be amended to "apparent".

45. Mr. HARTKAMP (Netherlands) said that the same expression had been used in the French texts of articles 62 and 63 to translate both the English expressions in question. He suggested that one or other of the two language versions should be amended to align it more closely with the other.

46. Mr. ROGNLIEN (Norway) said he thought that the distinction in the English text should be maintained and that the term "*devient manifeste*" in the French text of article 62 (1), as proposed by the delegation of Ghana, should be amended to bring it closer to the English term "becomes apparent".

47. Mr. BONELLI (Italy) said he agreed that the French text should be amended to bring out the difference between the ideas underlying the two paragraphs.

48. Mr. SHORE (Canada) also agreed that the French text should be harmonized with the English text, in view of the discussion that had taken place in the First Committee on the reasons behind the choice of words in the paragraphs in question.

49. Mr. KHOO (Singapore) said that the harmonization of the different language versions of article 62 was a matter for the Drafting Committee. The same applied to article 63, on the assumption that it was agreed that the terms used had to indicate a distinction between the meanings in the two articles.

50. He recalled that the choice of the words "it is clear" for article 63 had been intentional.

51. Mr. NICHOLAS (United Kingdom) said that it was



useful to employ two different terms in order to indicate the difference between opinion and fact in paragraphs 1 and 2.

52. Mr. HARTKAMP (Netherlands) said he hoped that the Drafting Committee would not tamper with the English text, but would simply bring the French version into line with it.

53. *It was so agreed.*

54. The PRESIDENT put to the vote the proposal by the delegation of Ghana (A/CONF.97/L.12).

55. *The Ghanaian proposal (A/CONF.97/L.12) was rejected by 12 votes to 15, with 16 abstentions.*

56. The PRESIDENT put to the vote the oral amendment by the representative of Greece to replace the word "evident" in article 62 (2) by the word "apparent".

57. *The Greek amendment was rejected by 7 votes to 9, with 23 abstentions.*

58. Mr. PLANTARD (France) said that, while his delegation had no quarrel with the French text as it stood, various delegations had objected to it. Consequently, it should be referred to the Drafting Committee for harmonization with the English text.

59. Mr. HONNOLD (United States of America) said that the fact that articles 62 and 63 provided for very different remedies should be reflected in the wording of those articles. The discussion of the articles had taken place on the basis of the English text, and had resulted in the deliberate choice of a stricter wording for article 63. It would be quite wrong, therefore, to use the same term in both articles, whatever the language version concerned.

*The meeting rose at 9.50 p.m.*

## 10th plenary meeting

Thursday, 10 April 1980, at 10 a.m.

President: Mr. EÖRSI (Hungary).

*The meeting was called to order at 10.10 a.m.*

### CREDENTIALS OF REPRESENTATIVES TO THE CONFERENCE (agenda item 6) (continued)

#### (b) Report of the Credentials Committee (A/CONF.97/10)

1. Mr. MATHANJUKI (Kenya), Chairman of the Credentials Committee, introduced the Committee's report (A/CONF.97/10), pointing out that its work had been based on a memorandum submitted to it by the Secretariat. Since the circulation of the report, three States participating in the Conference had submitted credentials issued by the Head of State or Government or the Minister for Foreign Affairs, which brought the number of States mentioned in paragraph 3 (b) to 42. In addition, credentials in good and due form had been received in respect of two of the four States mentioned in paragraph 3 (e).

2. The PRESIDENT said that representatives with the necessary powers to sign the Final Act should give their credentials to the Executive Secretary of the Conference as soon as possible. He invited the Conference to take note of the report of the Credentials Committee.

3. *It was so decided.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 9) (continued)

#### DRAFT PREAMBLE (A/CONF.97/15)

4. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, introduced the draft preamble (A/CONF.97/15) drawn up by the Committee. The text had not been examined by the other committees. In preparing it, the Drafting Committee had taken account of the essential ideas in the two documents submitted to it.

5. The PRESIDENT invited the Conference to make two minor drafting alterations in the English text. The introductory phrase (underlined) should read "*The States Parties to this Convention*". The comma after the word "systems" in the third line of the third paragraph should be deleted.

6. Mr. NICHOLAS (United Kingdom) proposed, for the sake of clarity, the replacement of the word "governing" in the first line of the third paragraph by the words "which govern" and of the word "which" in the second line by the word "and".

7. Mr. MEHDI (Pakistan) said that it was customary to use initial capitals when referring to the new inter-

national economic order and proposed that the reference to it in the first paragraph should be modified accordingly.

8. Mr. PLANTARD (France) and Mr. MEDVEDEV (Union of Soviet Socialist Republics) said they had no objection to the use of capital letters in the English text; in French and Russian, however, it was more usual to use small letters.

9. *The draft preamble, as amended, was adopted by 41 votes to none.*

10. Mr. SZÁSZ (Hungary) said that he had voted in favour of the draft preamble on the understanding that while the principles of equality and mutual benefit were certainly applicable to the contractual relations between parties to a contract, relations among States were also governed by many other important principles, such as non-discrimination.

#### *Articles 62 and 80 (continued)*

##### *Article 62 submitted by the Drafting Committee (A/CONF.97/L.23)*

11. The PRESIDENT said that the changes made in article 62 concerned the French version only.

12. Mr. VIS (Executive Secretary of the Conference) explained that the purpose of those changes had been to bring the French text into line with the English text. In paragraph 1, the words "*lorsqu'il devient manifeste*" had been replaced by the words "*lorsqu'il apparaît*", and in paragraph 2, the words "*lorsque apparaissent les raisons prévues*" had been replaced by the words "*lorsque se relèvent les raisons prévues*".

13. Mr. GARRIGUES (Spain) considered article 62 unsatisfactory. The grounds entitling a party to suspend the performance of his obligations were set forth in a very obscure manner. Those referred to in paragraph 1 (a) and (b) of the article were merely examples and did not constitute an exhaustive list. A court called upon to give a decision in that type of situation would be forced to ask itself some highly subjective questions in order to assess the situation of the party whose conduct might be invoked by the other party to suspend the performance of his obligations. Far clearer, more precise and more satisfactory, in his view, was the text of the 1964 Convention, which stipulated that each party might suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appeared to have become so difficult that there was good reason to fear that he would not perform a material part of his obligations.

14. Mr. PLANTARD (France) said that he would vote against article 62. It would be quite improper to allow a party who had undertaken to provide goods not to do so by the prescribed date because he considered that the situation of his contracting partner entitled him to act in that manner. It was essential that the necessary steps should be taken to ensure fulfilment of the contract, particularly in a period of economic and political

instability. The provisions of article 62 were dangerous because they would jeopardize still further the situation of enterprises in difficulties.

15. *Article 62 was adopted by 29 votes to 5, with 12 abstentions.*

16. Mr. MEHDI (Pakistan) explained that he had abstained because he considered that article 62 placed too much emphasis on the assessment by one party of the other party's situation.

17. Mr. SAM (Ghana) said that he had abstained for the same reasons.

##### *Article 80 submitted by the Drafting Committee (A/CONF.97/L.23)*

18. Mr. KOPÁČ (Czechoslovakia), Rapporteur of the Drafting Committee, introduced the text of article 80 (A/CONF.97/L.23) prepared by the Drafting Committee, which had tried to improve the text referred to it by the Conference and to make it clearer. The first sentence remained unchanged. The second had been divided into two. By making what had become the third sentence begin with the word "Nevertheless", it had been intended to make it quite clear that that sentence related to exceptions to the situation envisaged in the second sentence only.

19. Mr. PLANTARD (France) said that the tense used in the French version of the third sentence was incorrect and that the words "*a connaissance*" should be replaced by the words "*avait connaissance*".

20. Mr. ZIEGEL (Canada) congratulated the Drafting Committee on its improvements to article 80. However, he would like to introduce a minor change which would clarify the text without affecting the substance, namely, to replace, in the penultimate line of the English text, the words "the loss or damage" by the words "that loss or damage". That would make it still clearer that the limitations provided for in the third sentence applied to the second sentence only, not the first. Moreover, that wording would be closer to the original draft article, where the word "such" had been used, and to the wording in ULIS.

21. Mr. HONNOLD (United States of America) said he could not agree that the change would be purely a drafting one. Whatever the wording used in the previous texts, the Drafting Committee had had to base itself on the text adopted by the Conference in plenary. It was not only the loss or damage which had occurred before the conclusion of the contract that should be at the risk of the seller, but any subsequent losses. If the amendment proposed by Canada were adopted, it would be necessary to determine what damage had occurred before and what after the conclusion of the contract in order to ascertain how much of it was at the risk of the seller. For him, that would be an important change of substance.

22. Mr. HJERNER (Sweden) supported the Canadian amendment and apologized for reopening the discussion of substantive matters in so doing; he was totally opposed to the interpretation given by the United States

to the amendment. With regard to the last part of article 80, the text accepted by the First Committee was the same as the UNCITRAL draft article (A/CONF.97/5), which was in clear contradiction to the United States interpretation. If the text submitted by the Drafting Committee (A/CONF.97/L.23) was to lend itself to such an interpretation, it would mean that the Drafting Committee had, in finalizing the wording of article 80, introduced into it a substantive amendment without receiving a mandate to do so from the First Committee.

23. Mr. ZIEGEL (Canada) said that he too was opposed to the interpretation of his draft amendment by the representative of the United States. Nevertheless, he withdrew it, so as not to delay the work of the Conference.

24. Mr. KHOO (Singapore), Chairman of the Drafting Committee, wished to inform the Swedish representative that, in working on the wording of article 80 as adopted by the Conference at its preceding meeting, no member of the Drafting Committee had felt that the substance of the provision was being altered. However, the Drafting Committee had found it difficult to grasp, in the wording adopted by the Conference, what was intended to be an exception to the case for which provision was made in the second sentence of article 80, as introduced by the words "except that". That was the sole reason why the Drafting Committee had thought the exception might best be qualified by introducing a third and separate sentence beginning with the word "Nevertheless . . .". The Drafting Committee had thus in no way exceeded its powers.

25. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, at its preceding meeting, the Conference had adopted for article 80 a text that had been distributed in English only. Nevertheless, his delegation thought that the wording submitted by the Drafting Committee (A/CONF.97/L.23) was closely in line with the Conference decision at the preceding meeting, as it had been interpreted by the Soviet delegation.

26. Mr. HJERNER (Sweden) said that he had not meant to say that the Drafting Committee had deviated from the decision taken by the Conference at the preceding meeting. The comments he had made related to the fact that, at an earlier stage, the words "*such loss or damage*", in the English version of the last sentence of article 80, had become "*the loss or damage*". The French text remained unchanged.

27. *Article 80, as submitted by the Drafting Committee was adopted, subject to the tenses in the third sentence in the French version being brought into line.*

28. Mr. ROGNLIEN (Norway) said that he regretted that article 80 had not been put to a final vote. If it had been put to a vote in that wording he would have voted against it. A provision on the passing of risk had to be based on purely practical considerations and, in particular, the passing of risk should not take place while goods were in transit. In such a case, the original seller would have to take out an insurance policy covering at least the

period in which he himself bore the risk. The cost of such insurance would be included in the cost to the buyer in the form of a corresponding increase in the price of the goods. It would therefore fall to the buyer—or successive buyers—to take out additional insurance because the risk would in fact pass while the goods were in transit. In short, the buyer would pay the cost of insurance twice over. He considered that the provision would hardly ever be used in practice, except perhaps by buyers who were unfamiliar with the type of trade to which the kind of provision in article 80 applied.

#### CONSIDERATION OF THE REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (*continued*)

##### *Article 63 (A/CONF.97/11/Add.2, p. 11, A/CONF.97/L.20)*

29. Mr. SHAFIK (Egypt) recalled that he had withdrawn the amendment to article 63, paragraph 2, submitted by him in document A/CONF.97/L.20.

30. *Article 63 (A/CONF.97/11/Add.2) was adopted by 44 votes to none, with 2 abstentions.*

##### *Article 64 (A/CONF.97/11/Add.2, p. 13)*

31. *Article 64 (A/CONF.97/11/Add.2) was adopted by 47 votes to none.*

#### *Section II. Damages and interest*

32. The PRESIDENT asked the Conference to decide on the heading of section II of chapter V: "Damages and interest".

33. Mr. LOEWE (Austria) said that he had previously had occasion to say that, in his opinion, the proper place for article 73 *bis* was not among the provisions relating to "damages" since the section heading, in French at least, covered only one type of debt by one party to another but not the interest to be paid on amounts due under any heading. The English heading: "Damages and interest" was complete however. Either the French title should be altered or, as he himself would prefer, article 73 *bis* should become a separate section which would follow article 73.

34. The PRESIDENT recalled that the Conference had received a proposal to delete article 73 *bis* (A/CONF.97/L.18). Consideration of the heading for section II could therefore be left until a decision had been taken on article 73 *bis*.

35. *It was so decided.*

##### *Article 70 (A/CONF.97/11/Add.2, p. 13)*

36. *Article 70 (A/CONF.97/11/Add.2) was adopted by 48 votes to none, with 2 abstentions.*

##### *Article 71 (A/CONF.97/11/Add.2, p. 13)*

37. *Article 71 (A/CONF.97/11/Add.2) was adopted by 46 votes to none, with 1 abstention.*

Article 72 (A/CONF.97/11/Add.2, p. 13;  
A/CONF.97/L.11)

38. Mr. BENNETT (Australia), introducing on behalf of the sponsors (Australia, Greece, Mexico, Norway and Turkey) an amendment to article 72 (1) (A/CONF.97/L.11), said that it was very similar to the amendment that had been submitted to the First Committee under the symbol A/CONF.97/C.1/L.245. The earlier proposal had referred to the time of receipt of payment, but there was no such reference in the new proposal, which was thus a simpler one.

39. The purpose of article 72 was to provide a formula for assessing the amount due if the contract was declared avoided, in addition to any further damages recoverable under article 70. The formula proposed (A/CONF.97/11/Add.2) was based on two factors: the price fixed by the contract, which did not create any difficulty, and the current price "at the time [the party] first had the right to declare the contract avoided". It was the second factor that was not satisfactory, first, because its application was uncertain and secondly because it would encourage the parties to be too precipitate in declaring the contract avoided. The formula envisaged in article 72 should undoubtedly be such as to prevent speculation on the price, but the need to do so did not arise until the goods had been taken over, and it was at that stage that the problem of speculation could be settled, in a more limited fashion than was done in the proposed text. It would be preferable to approach the problem in that more restrictive way and to refrain from establishing a generally applicable provision that was not wholly satisfactory. In the case of goods taken over before the contract was declared avoided, in order to reduce the risk of speculation that would then exist, the price applicable should be the current price at the time they were taken over. However, if the goods had not been delivered at the time the contract was declared avoided, it was not essential to reduce the risk of speculation and the most satisfactory method would then be to take the current price at the time of the actual declaration of avoidance. In such a situation, the application of that formula would be less uncertain and would not make for unduly hasty avoidance of the contract.

40. Mr. ROGNLIEN (Norway), speaking as a co-sponsor of the amendment to article 72 (1) (A/CONF.97/L.11), explained that its main purpose was to remedy the present provision under which the price to be assessed would be the price prevailing at the time when the party who declared the contract avoided had for the first time had the right to do so. That would be difficult to apply and would open the door to a great deal of litigation which it was the very purpose of article 72 to avoid by providing for abstract damages. A party would in many cases have the right to avoid the contract some time before it would have become clear that the right existed. Particular difficulties would arise in cases of anticipatory breach. It was important not to forget that, in practice, parties would not readily be precipitate in avoiding a contract which they had entered into in good faith, and

they should not be encouraged to do so. In the event of non-delivery of goods, for example, the buyer undoubtedly had the right to declare the contract avoided, but he would usually wait quite some time before doing so because he would be interested in obtaining the goods. In such a case, it was incumbent upon the seller to inform the buyer that he would not perform his obligations. After being so informed the buyer would under article 73 have the duty to mitigate the loss by taking appropriate measures, and would consequently have nothing to gain by speculating in price movements thereafter. In cases of non-delivery, therefore, it seemed reasonable, for the purposes of article 72, to take the time when the contract was actually avoided and not the time when the buyer had first had the right to declare it avoided. Where the goods delivered did not conform, it was proposed to assess the abstract damages in accordance with article 72 on the basis of the price prevailing at the time when the goods had been taken over. Any further loss would be covered by article 70, either as an alternative or additional remedy.

41. Mr. LOEWE (Austria) called attention to a typographical error in the second line of the French text of article 72 (1) (A/CONF.97/11/Add.2). There should be a comma rather than a hyphen between the words "*peut*" and "*si*".

42. Furthermore, he was not convinced that the amendment (A/CONF.97/L.11) would eliminate all possibility of speculation. Under the text prepared by the Drafting Committee, a dispute might in fact arise as to the date on which a party would be able to declare the contract avoided, but it would be settled by a tribunal. The amendment proposed, on the other hand, introduced a subjective criterion, and the date of taking over of goods, while an objective criterion, could be completely arbitrary.

43. Mr. HONNOLD (United States of America) said that he wished to congratulate the authors of the amendment, which it appeared to him would considerably improve the text of the Convention. The text would gain in clarity because the essential date was that of avoidance of the contract, of which the aggrieved party was compelled to notify the other party. It was also more equitable because it discouraged speculation. The worst abuse would be to allow a purchaser of raw materials, which were subject to sharp price fluctuations, to wait until prices had fallen before declaring the contract avoided.

44. Mr. FOKKEMA (Netherlands) said that he was opposed to the amendment. In ULIS, the decisive date was the time of avoidance of the contract. In addition, two methods were provided for to combat speculation. One was *ipso facto* avoidance, and the other the short period of time allowed a party to declare the contract avoided. With regard to the draft amendment, where there had actually been speculation, the court might consider that there had been no fundamental breach of the contract, and that the period of time allowed was not

reasonable. The period of time would then be shorter than the one provided for by ULIS.

45. Mr. PLANTARD (France) said that he was not convinced of the justification for the draft amendment, especially where avoidance of the contract was declared on the basis of lack of conformity arising out of an inherent defect. For example, in the case of spare parts supplied to the purchaser which, when installed, proved defective, the defect would constitute a fundamental breach of the contract, and the amount of damages to be paid would not be calculated on the basis of the price at the time of delivery, but on that at the time when the purchaser became aware of the inherent defect, and was therefore in a position to declare avoidance of the contract. Article 72 as submitted by the Drafting Committee thus appeared preferable.

46. Mr. ZIEGEL (Canada) explained that his delegation would abstain from voting on the draft amendment, which had already been submitted twice and rejected, because it considered that, at the current stage, the decision of the majority should be accepted. In addition, there was not a great difference between article 72 and the draft amendment. He recalled that articles 45 and 60 provided that the aggrieved party must act within a reasonable period of time, and that article 73 provided that measures must be taken to limit the loss. Taking into account all those provisions, the aggrieved party was not allowed much time to reach a decision.

47. Mr. KUCHIBHOTLA (India) said he supported the draft amendment, which limited the risk of speculation, fixed a precise date and reduced the number of sources of dispute.

48. The PRESIDENT put draft amendment A/CONF.97/L.11 to the vote.

49. *Draft amendment A/CONF.97/L.11 was adopted by 24 votes to 10, with 11 abstentions.*

50. *Article 72, as amended, was adopted by 39 votes to 2, with 8 abstentions.*

*Article 73 bis (A/CONF.97/11/Add.2, p. 13;  
A/CONF.97/L.16, L.17 and L.18)*

51. Mr. NICHOLAS (United Kingdom) recalled that his delegation had submitted three draft amendments (A/CONF.97/L.16, L.17 and L.18), all of which stemmed from the same idea, namely that the Convention should not deal with the payment of interest. In a spirit of conciliation, it had withdrawn its proposals to enable the other delegations to finalize a text. However, that text was neither satisfactory nor applicable. Its authors had indicated that one of its main qualities was its great flexibility. As regarded flexibility, however, the text contained such ambiguities that it would inevitably give rise to controversies and disputes, and thus to divergent interpretations, depending on national legislations. Any provision on that point had to be clear but many representatives had called attention to a number of expressions whose meaning required clarification. If

even legal experts had difficulty in grasping the meaning of the text, what could be expected of bankers and financial experts? He announced that he was withdrawing the draft amendment in document A/CONF.97/L.18, and requested that, if article 73 *bis* was not adopted, the draft amendments in documents A/CONF.97/L.16 and L.17 should be put to the vote.

52. Mr. MANTILLA-MOLINA (Mexico) said that he fully shared the point of view of the representative of the United Kingdom. In addition, the article, in its very principle, raised difficulties for the Islamic countries, and would therefore engender reservations, or even prevent some countries from acceding to the Convention. His delegation would thus vote in favour of deleting article 73 *bis*.

53. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that, in his opinion, the existing text of the article, and particularly paragraph 2, was incompatible with the objective sought, namely to develop, in clear and precise terms, a formula for the calculation of damages. The wording, instead of settling the situation in a uniform and clear manner, introduced uncertainties in the guise of flexibility. His delegation was favourable to paragraph 1 of the article, but could under no circumstances support the whole article.

54. Mr. SAM (Ghana) associated himself with the remarks by the two preceding speakers. Some of the expressions used, such as "main financial centre" or "interest . . . at a rate corresponding [to the actual credit costs]" required clarification. In view of the difficulties encountered at the preceding meeting in establishing a link between articles 41 and 75 and article 73, and those currently being encountered with regard to interpretation of the whole question of interest, it would appear preferable to endorse the proposal of the United Kingdom delegation, and he appealed to all the representatives to do so.

55. Mr. MONACO (International Institute for the Unification of Private Law [UNIDROIT]) said that he considered that paragraph 1 of article 73 *bis* should be retained because the rate to be applied should be the one generally applied in commercial relations. Paragraph 2, on the other hand, was unclear, and questions relating to the concept of actual costs, which was ambiguous and difficult to clarify, should be left aside.

56. Mr. SEVON (Finland) said that his delegation had already shown great flexibility and thought it unfortunate that the same spirit of conciliation did not prevail on so important a question. He recalled that the current text of article 73 *bis* had been adopted in the First Committee by a large majority, and said that, if a compromise could not be reached once more on that point, his delegation's position regarding the text as a whole would be affected.

57. Mr. DABIN (Belgium) said he thought it would be regrettable to delete the entire article, since the question of interest would be of fundamental concern to all who applied the Convention. Acknowledging that the text

had been drafted in great haste, and that it was rather late to envisage setting up a Working Group, he said that, while paragraph 2 was the less satisfactory of the two, paragraph 1—especially in its reference to short-term commercial credit—was also open to criticism. Why, indeed, was a notion as restrictive as that of commercial credit introduced, when the Convention would also cover goods to be manufactured or produced; and was not “short-term” a concept which was open to various interpretations, according to the financial centres or to the practice of the countries concerned? Again, why should the Convention, which would be an international instrument, refer to the rate “prevailing in the main financial centre in the State where the party in default has his place of business”, and not to the rate prevailing on international markets? He would suggest that paragraphs 1 and 2 of the article should be put to the vote separately.

58. Mr. LOEWE (Austria) proposed that the Belgian request for division be voted upon, since his own delegation would find it difficult to adopt only one or other of the paragraphs. If the motion for division was carried, and had that result, the Austrian delegation would be obliged to modify its position with regard to the draft Convention as a whole.

59. Mr. HJERNER (Sweden) observed that as far as paragraph 2 of article 73 *bis* was concerned, the previous speakers had been critical not so much of its substance as its drafting, which seemed to them to leave room for uncertainty. Most of those speakers appeared to consider that there was no place in the Convention for such an obscure text.

60. Expressing the view that to make no provision whatever in the Convention for the question of interest would be a great mistake, he said that such an omission would do nothing to facilitate its application, and would lead to a great amount of litigation by making it necessary in each case to refer to national legislations in order to determine which law was applicable to interest, and whether the problem posed was one of procedure or of substance. Some national legislations fixed a legal rate of interest whose application to contracts for the international sale of goods was not satisfactory. Article 73 *bis* would at least make it possible to avoid those difficulties. It was true that an element of uncertainty always remained wherever banking techniques were involved; but article 73 *bis* in its current form at least had the merit of bringing a certain element of uniformity into the question of interest rates. In that connection, it was not exactly true that financial circles had not been consulted as far as the provision was concerned. Article 73 *bis* as drafted was to a great extent inspired by the text proposed by the Working Group on International Negotiable Instruments, whose membership included financial and banking experts.

61. He was opposed to a separate vote on the two paragraphs of the article; its text struck a balance between the views of delegations which wished the rate prevailing

where the debtor had his place of business to be taken into account in the calculation of interest, and those of delegations which preferred that the rate where the creditor had his place of business should be taken into account. To adopt only one of the two paragraphs of the article would be to upset that compromise.

62. If the Conference rejected article 73 *bis*, there would be a significant gap in the Convention. In view of the fact that the problem was basically one of drafting as far as most delegations were concerned, it might, after all, be desirable to set up a working group with the task of preparing a clearer text.

63. Mr. LOEWE (Austria) said he thought that a vote should first be taken on the proposal for the deletion of article 73 *bis*; if that proposal failed to secure the required two-thirds majority, the motion for division should then be put to the vote.

64. The PRESIDENT pointed out that the representative of the United Kingdom had withdrawn his proposal (A/CONF.97/L.18) for the deletion of article 73 *bis*.

65. The PRESIDENT invited the Conference to vote on the motion for division.

66. *The motion for division was rejected by 35 votes to 4, with 7 abstentions.*

67. Mr. SHAFIK (Egypt), explaining his delegation's abstention from voting on the division motion, recalled the rejection by the First Committee of his proposal that the Convention should provide explicitly for the possibility of making reservations with regard to article 73 *bis*. Since that proposal had not been adopted, his delegation had been unable to take part in a vote which could lead to the retention of all or part of article 73 *bis*.

68. The PRESIDENT put article 73 *bis* to the vote.

69. *There were 24 votes in favour, 17 against and 10 abstentions. Having failed to obtain the required two-thirds majority, article 73 *bis* was not adopted.*

70. Mr. GARRIGUES (Spain) explained that his delegation had voted against article 73 *bis* because of what it saw as a contradiction between its two paragraphs. It believed that only actual credit costs should be taken into account in the calculation of interest rates.

71. Mr. MEHDI (Pakistan) said that his delegation had abstained because it could not accept paragraph 2 of the article, the effect of which would be to entitle one party to claim interest as a kind of penalty.

72. Mr. HJERNER (Sweden) noted that, although article 73 *bis* had not obtained the required two-thirds majority, a clear majority had pronounced in its favour. It therefore appeared to him indispensable to set up a working group in an attempt to remove the outstanding uncertainties in the text of paragraph 2. Pointing out that the matter was essential to the satisfactory application of the Convention, he required that his proposal for the creation of a working group be put to the vote.

73. Mr. SHORE (Canada) urged delegations to exercise



moderation in order to ensure the success of the Conference; he feared that a prolonged debate on article 73 *bis* might widen the gap between the different points of view.

74. The PRESIDENT put to the vote the Swedish proposal for the creation of a working group to draw up a new text for article 73 *bis*.

75. *The proposal was adopted by 16 votes to 12, with 16 abstentions.*

76. Mr. VIS (Executive Secretary of the Conference) said that, in view of the decision which had just been taken to establish a working group, the Conference might not be able to finish its work by the end of the current week. Delegations should thus make the necessary arrangements for the possible continuation of its work for a further week.

77. Mr. STALEV (Bulgaria) expressed the belief that if—as had not always been the case so far—all delegations exercised moderation, the Conference should be able to complete its work by the original deadline. He would therefore propose that the time allowed to each speaker, and the number of speeches on each question, be limited.

78. Mr. HERBER (Federal Republic of Germany) said he warmly supported the Bulgarian proposal. It was indeed essential at the current stage of the Conference for delegations to avoid reopening issues which had already been settled. He therefore suggested that three minutes be allowed to each speaker, and that the number of speeches concerning each proposal be limited to two in favour and two against.

79. Mr. DABIN (Belgium) said he strongly supported the Bulgarian proposal.

80. Mr. PLANTARD (France) said he doubted whether such a step would be effective. Experience had on many occasions shown that to limit the time allowed to each speaker and the number of speeches only led to difficulties at a later stage, and to a deterioration in the atmosphere of the discussion.

81. Mr. KHOO (Singapore) said that he could not support the Bulgarian proposal either. Any limitation of the number of speeches would inevitably be somewhat arbitrary, and would deprive delegations of the possibility of listening to what might be highly pertinent arguments.

82. The PRESIDENT put to the vote the proposal that each speaker be allowed three minutes.

83. *The proposal was adopted by 34 votes to 4, with 6 abstentions.*

84. The PRESIDENT put to the vote the proposal that the number of speeches on each question be limited to two in favour and two against.

85. *The proposal was rejected by 19 votes to 16, with 11 abstentions.*

86. The PRESIDENT announced that the working group set up to prepare a new text for article 73 *bis* would comprise the following countries: Canada, Egypt, Singapore, Sweden, United Kingdom and Union of Soviet Socialist Republics.

*The meeting rose at 12.55 p.m.*

## 11th plenary meeting

Thursday, 10 April 1980, at 3 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.11

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF THE QUESTION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 9) (continued)

REPORT OF THE FIRST COMMITTEE TO THE PLENARY CONFERENCE (A/CONF.97/11/Add.2) (continued)

Article 73 *bis* (continued), Title of chapter V, section II *bis*, Title of chapter V, section II, article 69 (continued)

1. Mr. VIS (Executive-Secretary of the Conference)

said that the working group set up at the previous meeting had agreed to submit the following proposals to the Conference:

The words "and interest" should be deleted from the title of section II, so that it would read: "Damages";

There should be a new section II *bis* entitled "Interest", consisting solely of article 73 *bis*;

Article 73 *bis* should read:

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under article 70.";

Article 69 (1) should read:

"(1) If the seller is bound to refund the price, he

must also pay interest on it from the date on which the price was paid."

2. Mr. SHAFIK (Egypt) said that he had not participated in the working group.

3. Mr. KHOO (Singapore), speaking as the Chairman of the working group set up at the previous meeting, said that it had initially tried to work on the basis of the text of article 73 *bis*, as it appeared in document A/CONF.97/11/Add.2, but had finally come to the conclusion that fundamental differences in the approach of different national legal systems to the question of interest rendered that task too difficult. A further difficulty arose from the attempt to treat damages and interest under the same heading. The working group had decided to recommend a provision based, as it were, on the highest common factor, so that the Convention might at least contain a clear statement on the question of interest. The text of article 73 *bis* just read out by the Secretary represented such a solution. The first part of the article established that a party which failed to pay the price or any other sum in due time was under obligation to pay interest on that sum to the other party. The second part of the article, intended to accommodate legal regulations under which interest was considered to be part of the damages recoverable in default situations, referred to the right of the second party to claim damages under article 70.

4. *Article 73 bis as proposed by the working group was adopted by 30 votes to 2, with 12 abstentions.*

5. *The title of chapter V, section II bis, proposed by the working group, "Section II bis: Interest", was adopted by 35 votes to 1, with 3 abstentions.*

6. Mr. BLAGOJEVIC (Yugoslavia) said that he had voted against article 73 *bis* and against the title of the new section II *bis* because there was no point in having an article on interest which failed to indicate the appropriate interest rate.

7. The PRESIDENT invited the Conference to vote on the title of chapter V, section II, as amended by the working group ("Section II: Damages").

8. Mr. PLANTARD (France) said that the French version of the title of section II should remain unchanged.

9. *The title of chapter V, section II, as amended, was adopted by 42 votes to none.*

#### *Article 69*

10. The PRESIDENT said that he understood that the United Kingdom proposals (A/CONF.97/L.16, L.17) had been withdrawn. He invited the Conference to vote on the text of article 69(1) proposed by the working group.

11. *The text was adopted by 38 votes to 9, with 6 abstentions.*

12. Mr. KRISPIS (Greece) said that he had voted in favour of articles 73 *bis* and 69(1) on the understanding

that the interest to be paid under those articles was not an interest found to be fair and just by any general criterion but the interest fixed by the law of the country concerned.

13. *Article 69, as amended, was adopted by 40 votes to none, with 4 abstentions.*

#### *Article 57 (continued)*

14. Mr. ZIEGEL (Canada), noting that article 73 *bis* had just been placed under a separate section heading, so that the question of interest was no longer bracketed with that of damages, wondered whether a separate reference to interest should not be included in article 57(1)(c).

15. The PRESIDENT said that, in his view, article 57 need not be thus amended. The Conference could, if it so desired, draw up an exhaustive list of possible remedies, but it would be sufficient to list only the most important ones.

16. Mr. ZIEGEL (Canada) said that he was satisfied to leave article 57 as it stood, provided that the Conference went on record as having no intention of making an exhaustive enumeration of remedies in the event of the buyer's failing to perform his obligations.

17. Mr. MASKOW (German Democratic Republic) said that a reference to interest in article 57 would not make the list of remedies exhaustive. Interest was, however, one of the seller's most important remedies. He suggested that a subparagraph (c) should be added to article 57(1), to read: "claim interest as provided in article 73 *bis*".

18. Mr. LOEWE (Austria) said he was inclined to think that it would be more logical to refer to interest in both article 41 and article 57 than in only one of those articles.

19. Mr. PLANTARD (France) and Mr. BONELL (Italy) supported the suggestion by the representative of the German Democratic Republic.

20. Mr. KUCHIBHOTLA (India), Mr. OSAH (Nigeria) and Mr. MICHIDA (Japan) opposed the suggestion.

21. Mr. MEHDI (Pakistan) said that he was in favour of leaving both article 41 and article 57 unchanged, on the understanding that the remedies mentioned in them were merely illustrative.

22. Mr. MASKOW (German Democratic Republic) withdrew his suggestion.

23. *Article 57 was adopted by 43 votes to none.*

#### *Article 73 (continued)*

24. *Article 73 was adopted by 48 votes to none.*

#### *Title of section III*

25. *The title of section III was adopted by 44 votes to none.*



*Article 65*

26. *Article 65 was adopted by 42 votes to none, with 5 abstentions.*

27. Mr. MEHDI (Pakistan) said, in explanation of his vote on article 65, that he considered exemptions from liability for failure to perform, such as were envisaged in paragraph 2 of the article, to be available to a party in the event of failure by a subcontractor only if the subcontracting was expressly or implicitly provided for in the original contract.

*Article 65 bis (A/CONF.97/L.2 and L.10)*

28. Mr. SEVON (Finland) said he withdrew his delegation's amendment (A/CONF.97/L.2) in favour of the Norwegian amendment (A/CONF.97/L.10). The latter amendment was essentially a drafting one, designed to make the meaning of the provision clearer.

29. Mr. WAGNER (German Democratic Republic) supported the Norwegian proposal.

30. *The Norwegian proposal (A/CONF.97/L.10) was adopted by 39 votes to none, with 7 abstentions.*

31. *Article 65 bis, as amended, was adopted.*

*Article 66*

32. *Article 66 was adopted by 46 votes to none.*

*Article 67*

33. *Article 67 was adopted by 45 votes to none, with 1 abstention.*

*Article 68*

34. *Article 68 was adopted by 47 votes to none.*

*Title of section V (Preservation of the goods)*

35. *The title was adopted by 46 votes to none.*

*Article 74*

36. *Article 74 was adopted by 47 votes to 1, with no abstentions.*

*Article 75*

37. *Article 75 was adopted by 48 votes to none.*

*Article 76*

38. *Article 76 was adopted by 45 votes to none.*

*Article 77 (A/CONF.97/L.22)*

39. Mr. KHOO (Singapore), introducing his delegation's amendment (A/CONF.97/L.22), said that it might be thought that the normal interpretation of article 77(2) would be that it referred to goods subject to physical loss or rapid deterioration. However, it seemed that that construction was not shared by everyone; some believed

that the word "loss" could also cover a situation where goods were subject to depreciation in price.

40. His amendment was intended to make it clear that what was at issue was the physical state of the goods and not any economic fluctuations to which they might be subject, an interpretation which, he thought, would place an undue burden on the party preserving the goods by exposing him to the risk of making a wrong commercial judgement.

41. Mr. VINDING KRUSE (Denmark) said he was unable to support the proposal. As he saw it, it would be unjust to the other party to have no provision which would also cover cases which involved a deterioration in price; grave losses could result from price fluctuations, for example in the case of fashion clothing, which lost all value if it was not sold within a short time.

42. Mr. HONNOLD (United States of America) said that his delegation could support the second alternative in the proposal by the representative of Singapore. It would seem unfair to make an innocent party liable if he failed to guess correctly whether a market which had gone down would continue to go down. However, his delegation would have difficulty in supporting the first alternative, which might be taken as implying that the mere fact that goods were perishable led to a requirement to sell where there was no threat of deterioration.

43. Mr. LEBEDEV (Union of Soviet Socialist Republics) said he too supported the proposal. As it stood, article 77(2) seemed to place an unreasonable burden on the buyer.

44. Mr. BOGGIANO (Argentina) also supported the proposal, since he thought it excessive to make the party concerned responsible for the vicissitudes of the market and other factors unconnected with the physical state of the goods.

45. Mr. ZIEGEL (Canada) supported the second alternative of the proposal by the delegation of Singapore. Had article 77 contained a provision entitling the party in breach to make a reasonable request to the innocent party to sell the goods on his behalf, then it would have met the concerns of both parties. Unfortunately, it contained no such provision. It seemed harsh to require the innocent party to sell the goods without even waiting for a request from the guilty party.

46. Mr. MATHANJUKI (Kenya) supported the first alternative in the Singaporean proposal. He agreed it was important to make clear that what was involved was the physical state of the goods and not what might or might not be their market value.

47. Mr. GARRIGUES (Spain) said that, in essence, he was able to support the proposal by the delegation of Singapore. However, the second variant did not seem to him to make it clear enough that loss as well as deterioration was involved.

48. Mr. KHOO (Singapore), replying to a question by the President, said that his own preference was for the first alternative but he realized that it might give rise to

difficulties such as that which had been raised by the United States representative. He suggested that a better wording might be "if the goods are liable to perish or subject to rapid deterioration".

49. The CHAIRMAN noted that there was little support for the amended version of the first alternative of the proposal by Singapore. He invited the Conference to vote on the second alternative.

50. *The second alternative was adopted by 36 votes to 4, with 4 abstentions.*

51. Mr. ZIEGEL (Canada) inquired why, in the second sentence of paragraph 2, the phrase "to the extent possible" had been used rather than the simpler "if possible".

52. Mr. NICHOLAS (United Kingdom) said it had been felt that the phrase "to the extent possible" would more effectively suggest the idea that the notice given should be as long as possible.

53. *Article 77, as amended, was adopted by 46 votes to none, with 2 abstentions.*

*Proposed new article on dispute settlement  
(A/CONF.97/L.19)*

54. Mr. LASTRES BERNINSON (Peru), introducing the joint proposal (A/CONF.97/L.19) on behalf of the three sponsors, said that his delegation considered it essential to introduce into the text of the Convention a provision recognizing the principle of arbitration for the settlement of disputes resulting from commercial operations which would be governed by the Convention.

55. The proposed new article set forth the universally accepted rule that disputes between the parties should be settled either through the ordinary judicial channels or by arbitration. With regard to the latter, there was also a further choice between permanent arbitral tribunals and arrangements for arbitration made by the parties themselves. Each of those types of arbitration could, in its turn, take the form either of arbitration in law or of an award *ex aequo et bono*. The proposed provision thus covered the whole range of possibilities generally accepted for the purpose of settling disputes between the parties.

56. The sponsors wished to stress that the new article they proposed was intended only for the purpose of acknowledging the foregoing principles, without entering into questions of jurisdiction, of *exequatur* or of rules of procedure—all of which pertained to branches of the law other than the one which was the subject of the Convention.

57. The sponsors also wished to stress that the proposed new article came within the scope of private international law.

58. The proposed new article, by recognizing the principle of arbitration, would have the added advantage of counteracting certain dangerous trends, which were becoming apparent, to attract disputes to the exclusive forum of one of the contracting parties.

59. Lastly, the proposed new article would have a wholesome effect on the understanding of the text of the whole Convention. Thus, an ambiguity was apparent in the texts of articles 26, 41 (3) and 57 (3) regarding the language used to designate the competent judge for the settlement of disputes.

60. Article 26 mentioned for the first time that competent judge, describing him as "the tribunal". Articles 41 (3) and 57 (3), for their part, referred to the "judge and arbitral tribunal".

61. With that wording, the articles in question lent themselves to conflicting constructions: if a restrictive approach were adopted, article 26 could be interpreted as meaning that any disputes arising from its provisions must be settled by a decision of an unspecified tribunal; articles 41 (3) and 57 (3), on the other hand, would offer a choice between courts of law and arbitral tribunals for the settlement of disputes arising from their provisions.

62. The proposed new article would, if adopted, thus serve to dispel completely the effect of all those inconsistencies of language while at the same time enshrining in the Convention the principle of arbitration for disputes arising from commercial operations.

63. The PRESIDENT drew attention to rule 30 of the rules of procedure which stated that any motion calling for a decision on the competence of the Convention to discuss any matter should be put to the vote before the matter itself was discussed. The decision on competence would be taken by simple majority.

64. Mr. BONELL (Italy) said that the joint proposal for a new article on arbitration should be rejected as outside the competence of the Conference.

65. Mr. SHORE (Canada) seconded that motion.

66. The PRESIDENT put to the vote the motion that the proposal in question was outside the competence of the Conference.

67. *The motion was carried by 24 votes to 9, with 18 abstentions.*

68. Mr. LASTRES BERNINSON (Peru) said that he had misgivings regarding the procedure which had been followed and which had resulted in an important matter being eliminated from the Convention.

*The meeting was adjourned at 4.30 p.m. and resumed at 5 p.m.*

*REPORT OF THE DRAFTING COMMITTEE ON THE ARTICLES OF  
THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL  
SALE OF GOODS REFERRED TO IT BY THE SECOND COMMITTEE  
(A/CONF.97/13/Rev.1); (A/CONF.97/L.4)*

69. The PRESIDENT invited the Conference to consider the report of the Drafting Committee containing the final provisions of the Convention (A/CONF.97/13/Rev.1) and the Czechoslovak amendment purporting to insert an additional article C *bis* therein (A/CONF.97/L.4).

70. He suggested that the Conference should vote on the final provisions, article by article, in the order in which they appeared in document A/CONF.97/13/Rev.1.

#### *Part IV (title)*

71. *The title of part IV was adopted by 32 votes to none, with no abstentions.*

#### *Article A*

72. *Article A was adopted by 38 votes to none, with no abstentions.*

#### *Article D*

73. *Article D was adopted by 38 votes to none, with no abstentions.*

#### *Article F*

74. *Article F was adopted by 41 votes to none, with no abstentions.*

#### *Article G*

75. *Article G was adopted by 41 votes to none, with 1 abstention.*

#### *Article B*

76. *Article B was adopted by 39 votes to none, with no abstentions.*

#### *Article C*

77. *Article C was adopted by 41 votes to none, with 1 abstention.*

#### *Proposed new article C bis (A/CONF.97/L.4)*

78. The PRESIDENT invited the Czechoslovak representative to introduce his proposal for a new article C bis (A/CONF.97/L.4).

79. Mr. KOPAČ (Czechoslovakia), introducing his delegation's proposal for a new article C bis (A/CONF.97/L.4), recalled that, under paragraph 1 (b) of its article 1, the Convention applied to contracts for the sale of goods between parties having their places of business in different countries when rules of private international law "lead to the application of the law of a contracting State". That provision would not give rise to any problem for countries where the ordinary rules of law merchant applied to international transactions.

80. An entirely different situation arose, however, in countries like his own or the German Democratic Republic where special legislation had been enacted to govern transactions pertaining to international trade. Similar legislation was under preparation in Poland and Romania. For countries with such a system, the rule in paragraph 1 (b) would mean the exclusion of whole areas of the special legislation enacted to govern international trade transactions.

81. The net result was that countries like Czechoslovakia would be unable to ratify the Convention because of the effect which article 1 (1) (b) would have on the application of their special legislation on international trade.

82. The only solution for those countries was to limit the application of the Convention to contracts concluded between parties having their places of business in different Contracting States. In that manner, the rules of the special code on international trade would continue to apply to trade transactions involving parties of which one at least did not have its place of business in a Contracting State.

83. It was thus not out of any lack of spirit of compromise that his delegation had decided to submit its amendment (A/CONF.97/L.4) to deal with that question. The amendment took the form of a proposed article C bis, the wording of which took into account certain criticisms which had been levelled at a similar provision in the 1964 ULIS.

84. Two alternatives were offered for the proposed new article. Alternative I consisted of two paragraphs. If that alternative were adopted, the provisions of its paragraph 2 would mean that the exclusion of the application of the Convention would be the same in all Contracting States. Alternative II consisted of only one paragraph, namely the first paragraph of article C bis as it appeared in document (A/CONF.97/L.4).

85. In conclusion, he urged all delegations to show understanding for the position of his delegation and a number of others, to which the issue at stake was of great importance.

86. Mr. WAGNER (German Democratic Republic) strongly supported the proposed new article C bis and recalled that his delegation had made a vain attempt in the First Committee to confine the effects of the Convention to contracts between parties having their places of business in different Contracting States.

87. Mr. MONACO (International Institute for the Unification of Private Law [UNIDROIT]) said that the representative of Czechoslovakia had explained very well why certain countries needed the possibility of a reservation such as that set forth in document A/CONF.97/L.4. Fortunately, he had offered the Conference a choice between two alternative texts. For his own part, he preferred alternative II since paragraph (2) was vague and somewhat repetitive.

88. Mr. SEVON (Finland) said that his delegation, which wished to make an effort to meet the needs of the countries interested in that proposal, was able to support the proposed new article C bis in its alternative II.

89. Mr. POPESCU (Romania) also supported the proposed new article in its variant II on the reasoning *eadem ratio eadem solutio*.

90. Mr. HJERNER (Sweden) said that he could accept both paragraphs of the proposed new article C bis,

although he found paragraph (2) somewhat difficult to grasp.

91. In reply to a question by the PRESIDENT, Mr. KOPAC (Czechoslovakia) said that, in view of the preference shown by delegations for that formula, he would confine his proposal to alternative II.

92. The PRESIDENT thereupon put to the vote the proposed new article C *bis* in its alternative II, i.e. consisting of paragraph 1 only.

93. *The proposed new article C bis was adopted by 24 votes to 7, with 16 abstentions.*

94. Mr. MINAMI (Japan) proposed, as a drafting amendment, that the words "instrument of ratification or accession" should be expanded to read "instrument of ratification, acceptance, approval or accession".

95. Mr. DE LA CAMARA HERMOSO (Spain) said that his delegation had voted against the proposed new article C *bis* because it considered that the provisions of paragraph (1)(b) of article 1 could affect adversely only States which had not ratified the Convention.

96. Mr. KOPAC (Czechoslovakia) suggested another useful drafting change, which would bring the wording of article C *bis* into line with that of article G, namely to replace the words "it will not apply" by the words "it will not be bound by".

97. The PRESIDENT put to the vote the two proposals for alterations in the wording of article C *bis* which had been proposed by the representatives of Japan and Czechoslovakia.

98. *The two amendments were adopted by 31 votes to none, with 8 abstentions.*

#### Article (X)

99. *Article (X) was adopted by 45 votes to none.*

100. Mr. MINAMI (Japan) said that his delegation had voted in favour of the article on the understanding that the derogation had no retroactive effect.

#### Article H

101. *Article H was adopted by 45 votes to none.*

#### Article Y

102. *Article Y was adopted by 42 votes to none, with 1 abstention.*

#### Article J

103. *Article J was adopted by 45 votes to none, with 1 abstention.*

#### Article E

104. *Article E was adopted by 45 votes to none.*

#### Article K

105. *Article K was adopted by 48 votes to none.*

#### Testimonium

106. *The testimonium, with the addition of the date: 11th day of April 1980, was adopted by 46 votes to none.*

#### ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE, AND OF THE FINAL ACT OF THE CONFERENCE (agenda item 11)

##### ADOPTION OF THE CONVENTION

107. Mr. MONACO (International Institute for the Unification of Private Law [UNIDROIT]) said he welcomed the adoption of the Convention and was pleased to feel that UNIDROIT's work had made some contribution to that achievement.

108. The PRESIDENT, having paid a tribute to the work of UNIDROIT, invited the Conference to vote on the Convention as a whole.

109. *The vote was taken by roll call.*

110. *Switzerland, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Ireland, Italy, Japan, Netherlands, Nigeria, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Spain, Sweden, Switzerland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

*Against:* None.

*Abstaining:* Burma, China, Colombia, Iraq, Kenya, Panama, Peru, Thailand, Turkey.

111. *The Convention was adopted by 42 votes to none, with 9 abstentions.*

112. Mr. TSHITAMBWE (Zaire) said that, had he been present at the time, he would have abstained from voting on the Convention as a whole.

**CONSIDERATION OF THE QUESTION OF A PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS; ADOPTED AT NEW YORK ON 12 JUNE 1974, TO HARMONIZE THE PROVISIONS OF THAT CONVENTION WITH THOSE OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS IT MAY BE ADOPTED BY THE CONFERENCE IN ACCORDANCE WITH GENERAL ASSEMBLY RESOLUTION 33/93 OF 16 DECEMBER 1978 (agenda item 10)**

## REPORT OF THE DRAFTING COMMITTEE (A/CONF.97/14)

113. Mr. KOPÁČ (Czechoslovakia), Rapporteur of the Drafting Committee, introducing its report on the Protocol, explained that the contents of the articles had been discussed by the Second Committee and that the Drafting Committee had dealt only with drafting problems and with bringing the provisions in the Protocol into line with those in the Limitation Convention to which they referred. Some new articles had also been introduced.

*Title*

114. *The title of the Protocol was adopted by 44 votes to none.*

*Preamble*

115. Mr. KHOO (Singapore) asked if the word "preamble" was necessary, since it did not appear in the Limitation Convention itself and was unusual in international instruments. He proposed that it be deleted.

116. Mr. MEDVEDEV (Union of Soviet Socialist Republics) seconded the proposal. The word "preamble" was not used in contract or treaty practice in his country.

117. The PRESIDENT invited the Conference to vote on the deletion of the word "preamble".

118. *The proposal was adopted by 30 votes to none, with 11 abstentions.*

*Text of the preamble*

119. *The text of the preamble was adopted by 41 votes to none.*

*Article I*

120. Mr. SEVON (Finland) reminded the Conference that, at the Prescription Conference, the scope of application of the Convention had been one of the most strongly debated and carefully elaborated parts of that instrument. Article I was a complete reversal of the decision reached at the Prescription Conference. His delegation would therefore be obliged to vote against it.

121. Mr. STENERSEN (Norway) said that his delegation supported the wording of article 1 (b) because it harmonized the scope of the Limitation Convention and the Convention that had just been adopted and made it easier for the parties involved, who might have difficulty in ascertaining the rules of another country on that point.

122. Mr. KRISPIS (Greece) said that he would abstain from voting on article I for the reasons stated by the representative of Finland.

123. Mr. HJERNER (Sweden) said that the sphere of application of the Limitation Convention had been the subject of extensive discussion at the United Nations Conference on Prescription (Limitation) in the International Sale of Goods. The participants had also been aware at the time of the probable form that the cor-

responding article in the Sales Convention would take. The change made by the Protocol would extend the law of Contracting States to non-Contracting States, conceivably causing them very great difficulties. The proposed Protocol had been discussed only briefly at the present Conference, and the change had been adopted by a vote of only 10 in favour to 7 against, with 3 abstentions. In the circumstances, his delegation would vote against article I.

124. Mr. HARTKAMP (Netherlands) said he thought that the problem might perhaps be solved by allowing States acceding to the Protocol to enter a reservation on the lines proposed by Czechoslovakia for the Sales Convention itself. States which objected to paragraph 1 (b) would then be able to make a reservation that would apply only to it.

125. Mr. LOEWE (Austria) said that his delegation deeply regretted the change made in the Sales Convention itself which, it felt, removed most of its applicability. However, since it had been decided to permit reservations to the Sales Convention, the same would have to be done for the Limitation Convention. Paragraph 1 (a) should therefore be left as it stood, and those States which had reservations regarding the Sales Convention should be enabled to make similar reservations in regard to the Prescription Convention. Otherwise, there was no point in seeking to harmonize the two. Moreover, he could not agree that the participants in the Prescription Conference had known what the sphere of application of the Sales Convention was to be.

126. The PRESIDENT invited delegations to vote on the proposal that the Final Provisions of the Protocol should include a new article providing for reservations on the lines of the new article C *bis* that had just been adopted.

127. *The proposal was adopted by 28 votes to 2, with 10 abstentions.*

128. Mr. HJERNER (Sweden), explaining his vote against the proposal, said that an opportunity to enter a reservation would not in any way solve the difficulties to which he had referred.

*Article I*

129. *Article I was adopted by 30 votes to 5, with 7 abstentions.*

*Article II*

130. *Article II was adopted by 42 votes to none.*

*Article III*

131. *Article III was adopted by 41 votes to none.*

*Article IV*

132. *Article IV was adopted by 40 votes to none.*

*Article V*

133. *Article V was adopted by 41 votes to none.*

*Article VI*

134. Mr. STENERSEN (Norway) withdrew his delegation's proposed amendment to article VI (A/CONF.97/L.21).

135. *Article VI was adopted by 39 votes to none.*

*Title (Final Provisions)*

136. *The title was adopted by 34 votes to 1.*

137. Mr. KHOO (Singapore) said that he had voted against the title because he did not think one was necessary in so short an instrument.

*Article VII*

138. *Article VII was adopted by 40 votes to none.*

*Article VIII*

139. *Article VIII was adopted by 41 votes to none, with 1 abstention.*

*Article IX*

140. *Article IX was adopted by 40 votes to none.*

*Article X*

141. *Article X was adopted by 42 votes to none.*

*Article XI*

142. *Article XI was adopted by 37 votes to none, with 2 abstentions.*

*Proposed new article XI bis*

143. The PRESIDENT invited delegations to consider the possibility of inserting a new article, article XI bis, on the lines of article C bis of the Sales Convention.

144. Mr. VIS (Executive Secretary of the Conference) suggested that the new article should read: "Any State may declare at the time of the deposit of its instrument of ratification or accession that it will not be bound by article I."

145. Mr. HARTKAMP (Netherlands) said he had understood that the reservation would apply only to subparagraph (b) of the proposed paragraph 1 of article 3 of the Limitation Convention, and wondered why the new article should refer to article I of the Protocol.

146. Mr. MINAMI (Japan) pointed out that, under article VIII (1) of the Protocol, the instrument would be open only for accession.

147. Mr. VIS (Executive Secretary of the Conference) agreed that that was the position. The reservation should thus refer only to the deposit of an instrument of accession.

148. Mr. LOEWE (Austria) said he wondered whether it might not be necessary to say that States were declaring themselves not to be bound by article 3, paragraph 1 (b) of the Limitation Convention.

149. Mr. VIS (Executive Secretary of the Conference) said that, in that case, it would be necessary to reinsert paragraph 2 of the original article 3.

150. Mr. ENDERLEIN (Secretary of the Second Committee) said that it would not be appropriate to make the reservation apply only to paragraph 1 (b) of the provision that was to replace paragraph 1 of article 3 of the Limitation Convention because, if a State wished to declare that it would not apply the law of a Contracting State under the rules of private international law, it might also wish to retain the provision in paragraph 2 of article 3 of the Limitation Convention. In that case, the reservation would have to apply to the whole of article I of the Protocol, since otherwise paragraph 2 of article 3 would be deleted.

151. Mr. KRISPIS (Greece) said he felt that the Austrian representative was correct, and that there should be a reference in the reservation to article 3 of the Limitation Convention.

152. Mr. KOPAČ (Czechoslovakia) said that the purpose of article I of the Protocol was to change the principle of reciprocity of the Limitation Convention, while the aim of the proposed reservation was to maintain that reciprocity. It would therefore be more logical to use the formula suggested by the Secretariat, which would exclude the whole of article I and leave the Limitation Convention to apply as originally worded.

153. The PRESIDENT said he would invite the Conference to vote first on the Japanese proposal for an article XI bis to read: "Any State may declare at the time of the deposit of its instrument of accession that it will not be bound by article I", and secondly on the Netherlands proposal to restrict the reference in article XI bis to article I, paragraph 1 (b).

154. Mr. HARTKAMP (Netherlands) said that, in the light of the Secretariat's comments, his delegation withdrew its proposal.

155. Mr. LOEWE (Austria) said that the proposal for a new article had already been voted on and adopted in principle. It was therefore solely a matter of drafting and a further vote was not required. While his delegation did not share the views of the Secretariat with regard to the drafting proposed, it felt it was merely an academic question to insist on the matter at that stage.

156. Mr. KOO (Singapore) said that his delegation felt that there was a need to describe the manner in which the declaration should be made, since there was no general provision on that matter elsewhere in the Protocol. It proposed that a sentence be added on the following lines: "A declaration made under this article shall be in writing and be formally notified to the depositary".

157. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that his delegation would wish to draw attention to the fact that article X of the Protocol as adopted referred to accession and notification and that therefore an addition should accordingly be made to article XI bis.

158. The PRESIDENT asked if that point was not already covered by the addition proposed by the delegation of Singapore.

159. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation proposed the text: "Any State may declare at the time of the deposit of its instrument of accession or its notification under article X that it will not . . .".

*The meeting was suspended at 7 p.m. and resumed at 7.10 p.m.*

160. Mr. VIS (Executive Secretary of the Conference) read out the complete text of article XI bis as proposed by the delegation of the Soviet Union:

"Any State may declare at the time of the deposit of its instrument of accession or its notification under article X that it will not be bound by article I of this Protocol. A declaration made under this article shall be in writing and be formally notified to the depositary."

161. The PRESIDENT put the proposal, as read out, to the vote.

162. *Article XI bis, as amended, was adopted by 34 votes to none, with 1 abstention.*

#### Article XII

163. *Article XII was adopted by 34 votes to none.*

#### Article XIII

164. *Article XIII was adopted by 32 votes to none.*

#### Testimonium

165. *The Testimonium was adopted by 31 votes to none.*

166. Mr. MINAMI (Japan) said that he wondered whether a provision for the withdrawal of a declaration was required.

167. Mr. WAGNER (German Democratic Republic) said that his delegation was of the opinion that such a provision was unnecessary in that such a situation was covered by a general rule of international law.

168. Mr. MINAMI (Japan) said that, if that was so, he withdrew his suggestion.

### ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE, AND OF THE FINAL ACT OF THE CONFERENCE (agenda item 11) (continued)

#### ADOPTION OF THE PROTOCOL (A/CONF.97/14)

169. The PRESIDENT invited the Conference to vote on the Protocol as a whole.

170. *The vote was taken by roll call.*

171. *Japan, having been drawn by lot by the President, was called upon to vote first.*

*In favour:* Australia, Austria, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Czechoslovakia, Ecuador, Egypt, France, German Democratic Republic, Germany, Federal Republic of, Ghana, Hungary, Ireland, Italy, Japan, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Republic of Korea, Romania, Singapore, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

*Against:* None.

*Abstaining:* Burma, Colombia, Denmark, Finland, Greece, India, Kenya, Nigeria, Sweden, Thailand, Zaire.

172. *The Protocol was adopted by 33 votes to none, with 11 abstentions.*

173. Mr. LI Chih-min (China) said that his delegation had abstained from voting on the Protocol for reasons that it had already explained in the Second Committee, namely that his Government had not taken part in the formulation of the Limitation Convention, nor had it ratified that Convention or acceded to it.

#### CONSIDERATION OF THE REPORT OF THE DRAFTING COMMITTEE (A/CONF.97/17)

174. The PRESIDENT invited the Conference to take note of the Report of the Drafting Committee.

175. Mr. KOPAC (Czechoslovakia), Rapporteur, introduced the Report (A/CONF.97/17).

176. *The Report of the Drafting Committee was approved.*

### ADOPTION OF A CONVENTION AND OTHER INSTRUMENTS DEEMED APPROPRIATE, AND OF THE FINAL ACT OF THE CONFERENCE (agenda item 11) (continued)

#### CONSIDERATION OF THE DRAFT FINAL ACT (A/CONF.97/16)

177. Mr. KOPAC (Czechoslovakia), Rapporteur, introducing the draft Final Act, drew the attention of the Conference to some minor errors of omission and some typographical errors on page 3 of the document.

178. The PRESIDENT said that, in the absence of any comments and subject to rectification by the Secretariat of the minor details that had been pointed out, he invited the Conference to adopt the draft Final Act.

179. *The Final Act of the Conference was adopted by acclamation.*

*The meeting rose at 7.35 p.m.*



## 12th plenary meeting

Friday, 11 April 1980, at 2.25 p.m.

President: Mr. EÖRSI (Hungary).

A/CONF.97/SR.12

*The meeting was called to order at 2.25 p.m.*

### SIGNATURE OF THE FINAL ACT AND OF THE CONVENTION (agenda item 12) (A/CONF.97/18)

1. The PRESIDENT announced that the Final Act of the United Nations Conference on Contracts for the International Sale of Goods and the United Nations Convention on Contracts for the International Sale of Goods (A/CONF.97/18) were open for signature. The Final Act could be signed by any representative, without his having special powers, but only duly authorized plenipotentiaries could sign the Convention.

2. *The Final Act was signed by representatives of the following States: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burma, Byelorussian Soviet Socialist Republic, Canada, Chile, China, Colombia, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of (3 representatives), Ghana, Greece, Hungary, India, Iraq, Ireland, Italy (2 representatives), Japan, Kenya, Mexico, Netherlands (2 representatives), Nigeria, Norway, Pakistan (2 representatives), Panama, Philippines, Poland, Portugal, Republic of Korea (3 representatives), Romania, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland (2 representatives), United States of America (2 representatives), Yugoslavia and Zaire (2 representatives).*

3. *The following countries signed the Convention also: Austria, Chile, Ghana, Hungary and Yugoslavia.*

### CLOSURE OF THE CONFERENCE (agenda item 13)

4. The PRESIDENT said that the instrument which had just been signed constituted an enrichment of international trade law. He summarized its antecedents, going back to the work of the International Institute for the Unification of Private Law (UNIDROIT) during the 1930s, which had reflected the concepts of comparative law prevailing at that time in the Western world. After the Second World War, decolonization and the appearance on the scene of a number of socialist States had given world-wide scope to the question of unified law, but the Western States had still played a predominant role in preparing the Uniform Law on the International Sale of Goods (ULIS), a noteworthy achievement and an excellent starting point for the improvement and extension of international law, in keeping with the needs of the developing world and the socialist countries, and also

with the necessity for a fair balance between buyers and sellers. The United Nations had continued this work by establishing UNCITRAL, which had achieved a great deal in a short time towards unifying international sales law, thus paving the way for the success of the present Conference. The Working Group set up by UNCITRAL had needed only nine sessions to prepare the draft convention adopted by UNCITRAL in Vienna in 1977. At the present Conference, four weeks of hard work had enabled the First and Second Committees and the Drafting Committee to draw up, on the basis of that draft, the Convention on Contracts for the International Sale of Goods. He paid tribute to the Chairmen of the First and Second Committees and the Drafting Committee, to the Executive Secretary and to the Secretariat. In conclusion, he expressed his satisfaction at the spirit of compromise which had reigned among participants and hoped that the Convention which had just been opened for signature would have great success.

5. Mr. GORBANOV (Bulgaria), speaking on behalf of the Group of socialist countries, paid tribute to UNCITRAL's efforts, which had culminated in the Convention just adopted by the Conference. He congratulated the officers of the Conference, the Executive Secretary and the Secretariat and thanked the Austrian Government and people for the welcome they had given the participants.

6. Mr. SHORE (Canada) thanked the officers of the Conference and the Secretariat.

7. Mr. HERBER (Federal Republic of Germany), after congratulating the President and the Secretariat, expressing the thanks of his Government for the work they had done and thanking the Austrian Government for its hospitality, noted that the Convention was the second important one to have been drawn up at world level on the basis of the work of UNCITRAL, the first being the United Nations Convention on the Carriage of Goods by Sea, 1978. He hoped that the two Conventions would enter into force as soon as possible. The Federal Republic of Germany had not yet signed the present Convention because its Government wished to study it together with other countries, especially with a view to its signature in common by all Common Market countries. Such an approach was in his view desirable. The course of the Conference gave reason to hope that all States could finally accept the Convention, which undoubtedly was an advance on ULIS and could encourage further the unification of international trade law. Whereas his country was one of the few States, Contracting Parties to ULIS, it was nevertheless ready to change to the new régime as soon as there was an indication that the new



Convention was acceptable to those States which saw difficulties in adhering to ULIS.

8. Mr. LI-Chih-min (China) expressed his satisfaction that five weeks of intensive work had culminated in the success of the Conference. The Convention, which was a step towards the harmonization of international trade law, would permit legal obstacles to international trade to be removed, facilitate trade and promote the establishment of an economic order founded on equality and mutual interest. His Government would examine the Convention carefully and take positive action, to the extent possible. He congratulated the participants at the Conference, the Austrian Government, all the officers of the Conference and the Secretariat. In particular, he thanked the representatives for the constructive approach they had adopted.

9. Mr. HONNOLD (United States of America) congratulated the President and expressed his pleasure that the Conference had chosen, to lead its debates, a representative of the country whose initiative had led to the establishment of UNCITRAL. He thanked the Secretariat for its hard work and hoped that the Convention would promote the unification of international trade law.

10. Mr. SAM (Ghana), speaking on behalf of the African Group, thanked the Austrian Government and the municipal authorities of Vienna for their warm welcome. He paid tribute to the representatives of participating Governments, to the President of the Conference and the other officers, and to the Secretariat.

11. He hoped that the Convention would be used for many years by businessmen and traders of all countries as well as by teachers and students of law. He also hoped that the enthusiasm shown during the Conference would be reflected among Governments. He noted, however, that many countries had not yet ratified the 1974 Con-

vention on the Limitation Period in the International Sale of Goods.

12. Mr. MEHDI (Pakistan) said that the Conference would bear the stamp of its President, who had succeeded in reconciling diverging views. The importance of the Convention which had been adopted could not be denied, but it should be noted that, although some of Pakistan's views had been taken into account, the views of the third world countries had not always been given sufficient consideration, although harmony between them and the other nations was a prerequisite for any progress. He could not foresee what attitude his Government would adopt, but hoped that the Convention would enable more rational relationships between buyers and sellers to be established and would contribute to the creation of a more just economic and social order. On behalf of the Asian countries, he thanked the Secretariat, the Austrian Government, the President of the Conference and its officers.

13. Mr. SAMI (Iraq), speaking on behalf of the Arab countries, thanked all those who had contributed to the success of the Conference, particularly its officers. The Convention which had just been adopted was the first step towards the establishment of an international economic order based on justice and equality. His Government would study it very carefully, and he would recommend that it should sign and implement the Convention. The Iraqi Government would bring the Convention to the attention of all participants in international trade and to law students in his country. He hoped that the Convention would be approved by all countries so that it could contribute to the unification of international trade law.

14. The PRESIDENT declared the Conference closed.

*The meeting rose at 3.45 p.m.*

## SUMMARY RECORDS OF THE FIRST COMMITTEE

### 1st meeting

Monday, 10 March 1980, at 3.50 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.1

*The meeting was called to order at 3.50 p.m.*

#### **ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.97/C.1/L.1)**

1. The CHAIRMAN invited the Committee to adopt its provisional agenda (A/CONF.97/C.1/L.1).
2. *The provisional agenda (A/CONF.97/C.1/L.1) was adopted.*

#### **CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5)**

##### **GENERAL DEBATE**

3. Mr. SHAFIK (Egypt) said that he wished to express the general position of his delegation on the draft Convention before the Conference. He commended the fruitful efforts of the drafters of that text and of the Secretariat to produce a document which met the requirements of the various different legal systems while safeguarding the general interests of international trade.
4. The wisdom and spirit of compromise shown by the drafters should make it possible to overcome many of the obstacles which explained the reluctance shown by many countries to ratify the Hague Convention of 1964.
5. The competence of the many eminent specialists present at the Conference, given a willingness to accommodate, would—he was convinced—enable the Conference to improve the draft even further and make it still more acceptable to Governments.
6. The draft before the Conference covered topics that had hitherto been dealt with in two separate Hague Conventions of 1964, namely the Convention relating to a Uniform Law on the International Sale of Goods (Sales Convention) and the Convention on the Formation of Contracts for the International Sale of Goods (Formation Convention). The new text would thus contain provisions not only on the conclusion of the contract of international sale of goods but also on the respective

rights and obligations of vendor and buyer, while maintaining a fair balance between the rights and duties of the two parties to the contract. That had been accomplished by the draft under discussion with due respect for the important principle of the autonomy of the will of the parties (*autonomie de la volonté*). At the same time, it introduced a welcome ethical ingredient, in the form of respect for such principles as that of good faith, into a subject matter in which self-interest and even greed often played a far too important part.

7. In view of the foregoing, the Egyptian delegation fully supported the draft as a whole, which offered a fair and sound basis for a convention to govern relations between traders in developing and developed countries and thus constituted a useful contribution to the building of the new international economic order.

8. While approving the spirit of the draft, however, his delegation reserved its right to submit amendments to certain articles on points regarding which it felt that improvements were called for.

##### *Article 1 (Scope of application)*

9. Mr. HERBER (Federal Republic of Germany) drew attention to his Government's comments on paragraph 1 of article 1 (A/CONF.97/8, pp. 6—7) and said that the proposed redraft therein contained for subparagraph (b) should be regarded as a subsidiary proposal, for the contingency that the Committee wished to retain the subparagraph. He proposed however that paragraph 1 (b) should be deleted altogether. Paragraph 1 would, of course, then have to be redrafted so as to incorporate in the main body of the text the idea contained in subparagraph (a), namely that the different States in which the parties had their places of business must be Contracting States.

10. The provision in subparagraph (b) introduced an unwelcome element of complication. It was contained—actually in a more complex form—in the provision on scope of application in the 1964 Sales Convention of the Hague and was, in fact, partly responsible for the reluctance of States to accede to that Convention.

11. The provision in question would involve serious problems of interpretation and application. It was not actually clear what rules were covered by the text. Moreover, it must be remembered that the present draft would

replace not only the Sales Convention but also the Formation Convention of the Hague. Now, the national law in question could (and in many cases did) refer to its own application for only part of the current text: a certain rule on conflict of laws might refer only to the conclusion of the contract, or to the rights and duties of the parties thereto, or indeed only to some particular rights and duties. That situation made the provision under discussion very difficult to apply.

12. Lastly, he stressed that it was most unusual in an instrument governed by international law to bind contracting States to apply the instrument to nationals of States not parties thereto. The inclusion of such an element would make national Parliaments reluctant to ratify the future Convention.

13. Mr. KOPÁČ (Czechoslovakia) said that article 1 provided a better solution to the problem of scope of application than the corresponding text in the Uniform Law on the International Sale of Goods of the 1964 Hague Convention.

14. Nevertheless, he was inclined to agree with much of what had been said by the previous speaker. Apart from the arguments already put forward by that speaker, he pointed out that in his country—and in some others as well—there existed special legal rules governing contracts exclusively in international trade, a fact which would create special difficulties in the application of subparagraph (b)—additional to those which would exist for other countries where internal and international contracts were governed by the same rules.

15. He therefore supported the proposal to delete the subparagraph. If, however, the Committee decided to retain it, he would reserve the position of his delegation.

16. Mr. HJERNER (Sweden) said he agreed with the representative of the Federal Republic of Germany that the deletion of paragraph 1 (b) would make the Convention simpler and increase the readiness of States to adhere to it.

17. Mr. STALEV (Bulgaria) said he thought that paragraph 1 (b) should be retained. Contracting States should regard the Convention as the general law to apply to the international sale of goods and not as a special law for sales between contracting States. If paragraph 1 (b) were deleted, it would not be possible to apply the Convention to sales to non-contracting States. The goal should be to have a unified law under which the regulations governing international sales were linked to those governing internal sales.

18. Mr. ROGNLIEN (Norway) agreed with the Bulgarian representative as to the undesirable effect of the deletion of paragraph 1 (b). The subsidiary proposal by the Federal Republic of Germany in document A/CONF.97/8 was a complicated one which would require further study in the small working group. It was not desirable to split up the Convention. However, if the rules of private international law would lead to the application of the law of a contracting State only in the case of formation of the contract (Part II of the Conven-

tion), it should not be permissible to apply the rest of the Convention. If, however, Part III of the Convention was applicable under those rules, it should be possible to apply the whole Convention.

19. Mr. PLANTARD (France) said that his delegation was satisfied with paragraph 1 as it stood. From the point of view of a ratifying State, the Convention would constitute the law governing international sales and its sphere of application should therefore be as wide as possible. Without paragraph 1 (b), a judge in a contracting State would be obliged to apply domestic legislation regarding internal sales in cases involving parties situated in a non-contracting State, instead of the Convention drafted specifically for international trade and hence more suitable for that purpose. Furthermore, parties in non-contracting States would have the benefit of dealing with a uniform law in all contracting States.

20. Mr. SHAFIK (Egypt) endorsed the arguments put forward by the Bulgarian and French representatives.

21. Mr. SZÁSZ (Hungary) said he was in favour of retaining paragraph 1 (b). Its deletion would limit the application of the Convention, which should be used as widely as possible to settle international trade disputes. It was a logical development of paragraph 1 (a). If it was deleted uncertainty would prevail in practical cases which could usefully be solved under it.

22. Mr. BOGGIANO (Argentina) said that his delegation was in favour of retaining paragraph 1 (b), which was based on one of the principles of the Convention, namely, co-ordination between uniform rules of law and private international law. Some further clarification might, however, be required. If it was understood that, in applying the Convention, a judge in a contracting State was applying the law currently in force in that country, it might be asked whether it was clear or just that the law might also be applied retrospectively. On the other hand, it would be detrimental to international harmony if a contracting State refused to apply the Convention when, according to the rules of private international law, it was competent to do so. The solution might perhaps lie in the interpretation suggested by the representative of the Federal Republic of Germany. Moreover, the allusion to the rules of private international law of the forum (A/CONF.97/5, commentary on article 1, paragraph 7) might not suffice to make the Convention applicable in cases where disputes were solved extra-judicially or were brought before an arbitration court.

23. Since, however, the Hague Conference on Private International Law had decided that a revision of the rules of that law relating to international sales should be undertaken, it was perhaps unnecessary for the present conference to be more specific and paragraph 1 (b) might be left as it stood, although some States wishing to become contracting parties to the Convention might have to enter reservations regarding the article in order to safeguard their positions.

24. Mr. WAGNER (German Democratic Republic)

said that his delegation's position was similar to that of the Czechoslovak delegation. Deletion of paragraph 1 (b) would avoid the same internal problems in his country. If the subparagraph were not deleted, reservations on the part of contracting States were likely.

25. Mr. BENNETT (Australia) said that paragraph 1 (b) should be retained. He agreed with the French representative that when a contracting State had a law specially designed for international trade, its right to apply it, in preference to less appropriate legislation, should be recognized.

26. Mr. HERBER (Federal Republic of Germany) said he agreed with the French representative that, generally speaking, it was desirable for a country to apply the same national legislation to all external sales. If it ratified the Convention, the Federal Republic would in fact apply its rules even to parties located in non-contracting States. Most contracting States would similarly extend the Convention's sphere of application. However, the discussion had shown that the inclusion in the text of a provision like paragraph 1 (b) was likely to cause Governments to enter reservations, as had happened in the case of the 1964 Hague Convention.

27. Mr. BLAGOJEVIĆ (Yugoslavia) said that it should be left to the individual contracting State to decide whether or not to apply the Convention to non-contracting States. It was not always true that international law, which necessarily involved compromises, was better than domestic law.

28. At the request of the representative of the Federal Republic of Germany, the CHAIRMAN put to the vote the proposal to delete paragraph 1 (b).

29. *The proposal was rejected by 25 votes to 7, with 10 abstentions.*

30. Mr. HERBER (Federal Republic of Germany) asked whether his delegation's subsidiary proposal (A/CONF.97/8) should be discussed in a small working group, as some delegations had suggested, or through informal contacts.

31. The CHAIRMAN said that there was no objection to the representative of the Federal Republic of Germany sounding out other delegations with a view to producing an alternative text to paragraph 1 (b). However, the proposal in document A/CONF.97/8, represented a limitation of paragraph 1 (b), which the majority had preferred to retain, since it related only to sales of goods and not to the formation of the contract.

#### *Article 1, paragraph 2*

32. Mr. SHAFIK (Egypt) proposed that paragraph 2 should be deleted on the grounds that it dealt with a question of fact which should be left to the judge or arbiter to determine.

33. Mr. ROGNLIEN (Norway) said that, if paragraph 2 were deleted, that would mean that the Convention would apply whenever the parties were located in

different States regardless of the awareness of the parties of the location of one another's places of business. If that was indeed the intention of the Egyptian representative, an expansion of the text of that paragraph would be preferable to its deletion.

34. Mr. BENNETT (Australia) said that it would be most undesirable to delete paragraph 2 since the seller should be protected against a situation in which he did not know whether or not the buyer came from another country and thus whether or not the Convention was applicable, since it was realistic to assume that not all countries would become contracting parties.

35. The CHAIRMAN said that the proposal to delete paragraph 2 did not appear to be supported.

#### *Article 1, paragraph 3*

36. The CHAIRMAN said that, in the absence of any comments, he took it that paragraph 3 was acceptable to the Committee.

37. He further assumed that the Committee wished to adopt article 1 as a whole, on the understanding that at a later stage, an alternative draft of paragraph 1 (b) might be proposed.

38. *It was so agreed.*

#### *Article 2, paragraph (a)*

39. Mr. KOPAČ (Czechoslovakia) said that he had no objection to the principle behind the paragraph but felt the wording could be improved. The crucial part of the provision was the clause beginning "unless the seller . . .", and in the form in which it was currently worded it implied that there was an obligation to prove an absence of knowledge that the goods were bought for personal, family or household use. Since it was difficult to furnish proof of the non-existence of knowledge, it would be better if the paragraph were worded more positively, along the lines: ". . . if the seller . . . knew or ought to have known that the goods were bought for any such use".

40. Mr. MATTEUCI (UNIDROIT) associated himself with that view. While it was right that the "shopping" or retail type of sales should be excluded from the application of the Convention, the existing wording might well give rise to difficulties. It would be simpler merely to refer to retail sales or sales in shops accessible to the public, and thus to avoid the implication that it was incumbent on the seller to ascertain the intentions of the buyer.

41. Mr. PLANTARD (France) said he, too, was concerned lest the double negative used in the paragraph should give rise to confusion. Since the problem was chiefly one of drafting, he suggested that it be referred to the Drafting Committee.

42. Mr. KOPAČ (Czechoslovakia) agreed that the matter could well be referred to the Drafting Committee, but did not agree that the problem was merely one of

wording; important legal issues were involved. The existing text implied that the burden of proof of the intentions of the buyer rested upon the seller, whereas it was his view that it should be for the party who wished to exclude application of the Convention to prove both the intended use of the goods and the knowledge of the seller as to that intended use.

43. Mr. FARNSWORTH (United States of America) supported that view. The issue was not merely one of wording but was a question of substance which ought to be decided by the Committee itself. The genesis of the paragraph had been the desire to make an exception for consumer goods, and to make it incumbent upon the seller to show that he did not know that the goods were bought for the purposes referred to. He did not think that the existing text would give rise to difficulties and would prefer to see it retained.

44. Mr. BOGGIANO (Argentina) agreed that the question was a substantive one and not merely one of drafting. It would be very difficult in practice for a seller to furnish proof as to the intentions of a buyer. It would be better to define in as objective a manner as possible what constituted consumer sales.

45. The CHAIRMAN pointed out that it was not the purpose of the provision under discussion to be more or less favourable to either of the parties involved than was the case under the relevant national legislation. The degree to which one or other of the parties would be favoured would vary from case to case.

46. Mr. ROGNLIEN (Norway) stressed that the aim should be to find a formula that was broad enough to be acceptable to those States which already had specific legislation on consumer sales. It would be possible simply to end the paragraph after the word "household use", but the clause beginning "unless the seller" had been introduced to avoid unduly penalizing the seller. The paragraph as currently drafted would be satisfactory in terms of his own country's legislation, but he was not sure whether it would be so if amended as proposed by the Czechoslovak representative.

47. Mr. PONTOPPIDAN (Denmark) and Mr. HJERNER (Sweden) also thought it important that the text should remain unchanged.

48. Mr. STALEV (Bulgaria) was also in favour of its retention, pointing out that if the object was to exclude consumer sales from application of the Convention, it would be better to have a negative formulation than a positive one.

49. Mr. MANTILLA-MOLINA (Mexico) said he agreed with the United States representative that the issue was a substantive one and should be decided by the Committee. The whole question of exclusion from the Convention needed to be considered with due regard for the point of view of the seller.

50. Mr. VISCHER (Switzerland) agreed with the representative of UNIDROIT that the introduction of a subjective element should be avoided. The solution would be

to find an objective definition of consumer sales rather than to imply that it was for the seller to ascertain the motives of the buyer.

51. The CHAIRMAN asked whether it was the wish of the Committee to have the Czechoslovak proposal put to the vote or to set up a working group to discuss the question and report the following day.

52. Mr. PLANTARD (France) said he feared that a working group would not be able to reconcile the two opposing views that had been put forward, the first in favour of simply re-wording the paragraph in a positive rather than a negative way, and the second in favour of defining objective criteria for consumer sales, irrespective of the knowledge or lack of knowledge of one or other of the parties.

53. Mr. SEVON (Finland) pointed out that the question of defining exceptions to be made for consumer sales had been debated for some considerable time. The difficulty was that each nation's legislation had slightly different definitions of such exceptions. He himself would prefer the existing wording.

54. Mr. ROGNLIEN (Norway) supported that view. Efforts had been made at the various sessions of UNCITRAL to find objective criteria for defining consumer sales, but they had not proved successful, because the various terms suggested had all been found to have different meanings in different countries. The chief criterion should be the use to which the buyer put the goods.

55. Mr. FOKKEMA (Netherlands) agreed. Although the text might not appear to be formulated in objective terms, it did in fact lend itself in practice to objective application.

56. The CHAIRMAN commented that there appeared to be a considerable majority in favour of retaining the existing text. He asked the Czechoslovak representative if he wished his proposal to be put to the vote.

57. Mr. KOPAČ (Czechoslovakia) said he would not press for a vote on his proposal.

58. *It was agreed that paragraph (a) should remain unchanged.*

#### *Paragraph (b)*

59. *Paragraph (b) was adopted.*

#### *Paragraph (c)*

60. Mr. ROGNLIEN (Norway) proposed that the Drafting Committee be asked to decide whether the phrase "authority of law" was appropriate, or whether it should be replaced by "operation of law".

#### *Paragraph (d)*

61. *Paragraph (d) was adopted.*

*Paragraph (e)*

62. Mr. SAMSON (Canada) proposed that the paragraph be deleted on the grounds that questions of registration did not fall within the law of contract. The arguments put forward in the commentary on that question seemed to him to be somewhat weak.

63. Mr. WAGNER (German Democratic Republic) supported that proposal. The registration requirements of ships did not constitute a sufficient reason for their exclusion from the Convention.

64. Mr. PLANTARD (France), Mr. HJERNER (Sweden), Mr. KOPAC (Czechoslovakia) and Mr. STALEV (Bulgaria) also supported the Canadian proposal.

65. Mr. PONTOPPIDAN (Denmark) and Miss O'FLYNN (United Kingdom) were in favour of retaining the text on the grounds that so many special considerations were involved in contracts for the sale of ships, vessels and aircraft that their inclusion was not justified.

*The meeting rose at 6.05 p.m.*

## 2nd meeting

Tuesday, 11 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.2

*The meeting was called to order at 3.15 p.m.*

### ELECTION OF A VICE-CHAIRMAN AND A RAP- PORTEUR (RULE 46 OF THE RULES OF PRO- CEDURE) (agenda item 2)

1. The CHAIRMAN invited nominations for the office of Rapporteur.

2. Mr. MEHDI (Pakistan) nominated Mr. Michida (Japan), whose candidature had the support of the Group of 77.

3. Mr. SHAFIK (Egypt), Mr. HJERNER (Sweden), Mr. MEDVEDEV (Union of Soviet Socialist Republics), Miss O'FLYNN (United Kingdom), Mr. ROGNLIEN (Norway) and Mr. EYZAGUIRRE (Chile) supported that proposal.

4. Mr. Michida (Japan) was elected Rapporteur by acclamation.

### CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELAT- ING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLI- CATIONS, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

*Article 2 (continued)*

*Paragraph (e) (continued) (A/CONF.97/C.1/L.11,  
L.12)*

5. Mr. OPALSKI (Poland) supported the Canadian proposal (A/CONF.97/C.1/L.11). The Convention was

general enough in scope to permit deletion of the paragraph.

6. Mr. SEVON (Finland) also supported the proposal. To exclude such sales from the scope of the Convention would not be to leave them free from regulation, but would merely mean that they were covered by national legislation. It had been objected that application of the provisions of the Convention would cause difficulties with sales of ships, but he could not see that the position would be any more difficult than that which existed under national legislation. The question of registration, which had been held to be an obstacle, was in any case completely outside the seller/buyer relationship. If sales of ships, vessels and aircraft were to be excluded, the problem would arise of defining what kind of craft constituted a ship or a vessel.

7. Mr. STALEV (Bulgaria) supported the Canadian proposal for the reasons advanced by the representative of Finland.

8. Mr. MICCIO (Italy) preferred to keep the paragraph unchanged. The inclusion of ships had not been envisaged during the process of drafting the Convention. They were, moreover, covered by highly specialized legislation which varied from country to country and would be difficult to co-ordinate. Unlike the representative of Finland, he considered that registration was a vital element in such sales.

9. Mr. PREVEDOURAKIS (Greece) was also opposed to the proposal.

10. Mr. HERBER (Federal Republic of Germany) pointed out that contracts for sales of ships, being of a very special nature, might not comply with article 10 of the Convention. In any event, sales of ships represented a fairly small category in comparison to the type of sale chiefly envisaged by the Convention. There was a danger

that if they were included, some States might not ratify the Convention because of possible difficulties that might arise. He would therefore prefer to keep the paragraph.

11. Mr. EYZAGUIRRE (Chile) supported that view. Ships, vessels and aircraft were subject to specific public legislation covering such matters as flag and classification and were thus outside the scope of ordinary regulations governing the sale of goods.

12. Mr. MINAMI (Japan) was in favour of keeping paragraph (e). An important element in the sale of ships was registration of ownership, and the laws governing such registration varied from country to country. Sales of ships should be considered a different category from sales of ordinary goods.

13. Mr. MANTILLA-MOLINA (Mexico) also wished the paragraph to be kept. To include ships in the Convention would be inconsistent with the Convention on the Limitation Period in the International Sale of Goods, which excluded them.

14. Miss O'FLYNN (United Kingdom) said she would not be happy to see the paragraph deleted. It was rather late to propose such a radical change in the scope of the Convention by introducing a category of sales which had not been envisaged at all up to now. Under article 5 parties to sales could exclude application of the Convention and in the view of her delegation the parties to a contract for the sale of ships would be likely to exclude the Convention. But in its view there was no reason why the Conference should seek to apply the Convention to such sales. Article 37 (2), in particular, would cause considerable difficulties where sales of ships were concerned.

15. Mr. SAMSON (Canada) said a number of speakers had objected to his proposal on grounds connected with national legislation. He felt, however, that those objections were met by articles 4 and 65 of the Convention.

16. The CHAIRMAN, noting that opinion was divided on the Canadian proposal (A/CONF.97/C.1/L.11), invited the Committee to vote on it.

17. *The Canadian proposal was rejected by 28 votes to 11, with 6 abstentions.*

18. The CHAIRMAN invited comments on the Indian proposal (A/CONF.97/C.1/L.12).

19. Mr. ROGNLIEN (Norway) asked whether there was any specific legislation in India on sales of hovercraft.

20. Mr. KUCHIBHOTLA (India) said that there were special regulations covering hovercraft in his country, which was why he felt it desirable that such sales should be excluded from the scope of the Convention.

21. Mr. KHOO (Singapore) did not think it was necessary to mention hovercraft specifically. There was a danger that the provision would become unwieldy if it included too much detail and new types of vessel were introduced in the course of time. It would be better to leave it couched in terms broad enough to cover any future technological innovations.

22. Mr. ROGNLIEN (Norway) said that a specific reference to hovercraft would cause legal difficulties. He was therefore opposed to the Indian proposal.

23. Mr. FARNSWORTH (United States of America) agreed with the representatives of Norway and Singapore.

24. Mr. HERBER (Federal Republic of Germany) said that hovercraft were becoming increasingly important, and that preparations were in fact at present under way for the drafting of a convention on the law governing transport by hovercraft. Among lawyers, however, there was much discussion as to whether hovercraft were ships or aircraft. He therefore supported the Indian proposal, which would help to make the meaning of article 2 (e) clearer.

25. Mr. PREVEDOURAKIS (Greece) said that he entirely endorsed the remarks of the previous speaker and supported the Indian amendment.

26. *The Indian amendment (A/CONF.97/C.1/L.12) was adopted by 15 votes to 12, with 17 abstentions.*

27. *Article 2 (e), as amended, was adopted.*

#### Paragraph (f)

28. *Article 2 (f) was adopted.*

29. *Article 2, as amended, was adopted.*

#### Article 3

30. Mr. KOPAC (Czechoslovakia) proposed that paragraph 1 should be deleted. In the everyday practice of international trade, a great many contracts contained stipulations for the supply of services and he saw no reason why contracts of that kind should be excluded from the scope of the Convention. Furthermore, the expression "preponderant part", as applied to the obligations of the "seller", was vague and might lead to differing interpretations in the application of the Convention. Lastly, it was perfectly clear that the draft Convention did not deal with the supply of labour or services but only with the sale of goods.

31. Miss O'FLYNN (United Kingdom) opposed the Czechoslovak proposal, considering that paragraph 1 embodied an exception which was desirable and should be kept.

32. Her delegation had proposed an amendment to paragraph 1 of article 3, which had not yet been circulated. It simply reproduced the proposal already contained in the comments by her Government (A/CONF.97/8/Add.3, p. 11, section 1). For the reasons given in those comments, she proposed that the expression "preponderant part" should be replaced by the more precise formula "the major part in value".

33. Mr. REISHOFER (Austria) opposed the proposal to delete paragraph 1. In the practice of international trade, a contract was often of a mixed character and covered not only the supply of goods but also the supply of labour or services. If the preponderant or major part



of the obligation of the "seller" was the supply of goods, then the whole contract should be covered by the future Convention. Contracts of that type would not, however, be covered if the Committee were to accept the proposal to drop paragraph 1.

34. Mr. ROGNLIEN (Norway) said that the significance of the proposed deletion would not be as drastic as the previous speaker had suggested. It would simply mean that the issue would be left to the national courts; it would be for the competent court in each case to decide whether a particular contract was to be designated a "sale of goods" or a "supply of labour (or services)".

35. In Norwegian law, there was no express provision to cover the mixed type of situation under discussion. It was felt, however, that a contract for the supply of services should be outside the scope of the Convention. He accordingly urged that paragraph 1 should be kept.

36. Mr. HERBER (Federal Republic of Germany) said that if paragraph 1 were omitted, there would be a risk of conflicting interpretations by the courts. He therefore urged that it should be kept with the clarification of language proposed by the United Kingdom.

37. Mr. FARNSWORTH (United States of America) said that he would not be in favour of referring the rewording proposed by the United Kingdom to the Drafting Committee, since he found it much too arbitrary. It would mean, for example, that a contract to paint a ceiling with gold leaf would be deemed to constitute a sale of goods, since at present prices the value of the gold would certainly be higher than the value of the labour or services.

38. Mr. SZÁSZ (Hungary) urged that paragraph 1 should be kept. Of course, even without it the courts would be able to decide whether a particular contract was preponderantly a sale of goods or not. The parties to the contract, however, would want to know the position at the time of concluding the contract itself rather than leave it to be decided, if need be, by the courts at a later stage.

39. Mr. DABIN (Belgium) said that he preferred to keep paragraph 1 but was not satisfied with its wording. In particular, he criticized the reference to the obligations of the "seller" in the context of a provision which specified that the contract in question was precisely not a contract of "sale". He accordingly suggested that the paragraph should be reworded so as to specify the draft Convention did not apply to contracts in which the supply of goods was accessory to other services of the party upon which that obligation fell.

40. Mr. MANTILLA-MOLINA (Mexico) felt that it was essential to keep paragraph 1. He agreed, however, on the need to improve the wording; for that purpose, the United Kingdom proposal would be useful, but it would also be necessary to remove the reference to the obligations of the "seller" from a text which specifically excluded the contracts under reference from the scope of the term "contract of sale".

41. The CHAIRMAN noted that there was a majority in favour of keeping paragraph 1. If there were no objections, he would therefore take it that the Committee rejected the Czechoslovak proposal.

42. *It was so agreed.*

43. *The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

44. Mr. PLANTARD (France), introducing his delegation's amendment to paragraph 2 (A/CONF.97/C.1/L.9), said that it was of a purely drafting character and suggested that, if there was no objection, it should be referred to the Drafting Committee without discussion.

45. Mr. FARNSWORTH (United States of America) reiterated his delegation's opposition to the United Kingdom amendment to paragraph 1. His delegation was also unhappy with the Belgian proposal, with its reference to an "accessory" part of the obligations of the seller, which was not quite clear in English and would broaden the scope of the law. Under that proposal, as under the United Kingdom proposal, some contracts for the supply of services would be treated as a sale of goods simply because the materials used in the process were very expensive.

46. Before any proposals were referred to the Drafting Committee, the First Committee itself should decide whether it wished to broaden, or else to narrow down, the scope of the provision under discussion. In the absence of any clear instructions from the Committee on that point, the Drafting Committee would be unable to take any constructive action.

47. Mr. MATHANJUKI (Kenya) said that he found a difference of substance, and not merely of form, between the original text of paragraph 2 and the French amendment, which placed emphasis on performance rather than on the undertaking to perform. He did not believe that the Drafting Committee was empowered to deal with such a question of substance, which should be settled by the First Committee itself.

48. Mr. SEVON (Finland) opposed the United Kingdom proposal, which raised an issue of substance and not merely of drafting. Under that proposal 51 per cent of the value of a contract would decide the nature of that contract. The existing text was not so rigid.

49. Mr. SHAFIK (Egypt) supported the French proposal (A/CONF.97/C.1/L.9), which would improve the wording without affecting the substance in any way.

50. Mr. HJERNER (Sweden) said that his delegation was not altogether satisfied with the wording of paragraph 1, particularly with the adjective "preponderant". He could not, however, support the United Kingdom proposal because it made value the decisive factor.

51. Mr. PLUNKETT (Ireland) felt that the Committee ought to be clear as to the purpose of paragraph 1. As he saw it, the intention was to say that if the substantial purpose of a contract was to sell goods, then the contract would be covered by the Convention. If the Committee



could agree on that, the article could be referred to the Drafting Committee.

52. Mr. PLANTARD (France) said that he would strongly favour referring paragraph 1 to the Drafting Committee for redrafting, particularly on the lines suggested by the Belgian delegation.

53. Mr. TRÖNNING (Denmark) was in favour of keeping the wording "preponderant part", which made for flexibility.

54. Miss O'FLYNN (United Kingdom) said that in view of the lack of support for her delegation's proposal, she would withdraw it.

55. Mr. EYZAGUIRRE (Chile), noting that the French amendment to paragraph 2 (A/CONF.97/C.1/L.9) was merely a matter of drafting, said that in Spanish he preferred the original text.

56. Mr. ROGNLIEN (Norway), introducing his delegation's amendment to paragraph 2 (A/CONF.97/C.1/L.13), said that there might be considerable differences of opinion as to the exact proportion which would constitute "a substantial part" of the materials the prospective buyer undertook to supply. The paragraph should be made more precise. The easiest way was to consider instead what the prospective seller, the party who took the order, undertook to do. The word "substantial" in his amendment might be replaced by "major", indicating that the proportion must be over 50 per cent.

57. Mr. HJERNER (Sweden) said that the French proposal was a drafting matter.

58. The Norwegian proposal appeared to be a slight improvement on the original text. Whether or not it involved a change of substance depended upon the intended meaning of the word "substantial" in the original text. A small part might well be "substantial" in the sense of essential, and the transaction involving it would therefore constitute a sale of goods under the Convention. He could support the Norwegian amendment without the change the Norwegian representative had proposed orally.

59. Mr. MEYER (Netherlands) said that although it was difficult to foresee what the practical effect of the Norwegian proposal might be, it was clear that in theory the difference of approach constituted a substantive change. In his view, the transaction would remain a contract for the sale of goods if a small part was supplied which was a key part.

60. Miss O'FLYNN (United Kingdom) said that her delegation could support both the French proposal and the Norwegian proposal as orally revised.

61. Mr. ROGNLIEN (Norway) said that whether or not his amendment constituted a change in substance depended upon the interpretation of the original text, which was ambiguous.

62. Mr. BENNETT (Australia) expressed his concern at the Norwegian proposal, particularly the change from "a substantial part" to "the substantial part", which

raised the question of the exact proportion involved. Basically, the problem was the same as in paragraph 1.

63. Mr. TRÖNNING (Denmark) agreed that paragraph 2 should be precise, although he had expressed the opposite view with regard to paragraph 1. The difference was that paragraph 1 was concerned with the proportion between labour and goods; that was difficult to determine and the text should therefore be flexible. Paragraph 2, on the other hand, dealt solely with goods, for which the comparison was easier.

64. Mr. HERBER (Federal Republic of Germany) said that the main problem appeared to be differences of interpretation of the term "substantial part", which appeared in both the original text and the Norwegian proposal. His delegation had not previously held the view that it must necessarily imply over 50 per cent. If the original text was unclear, his delegation could support the Norwegian proposal.

65. The French proposal did not appear to differ greatly from the original text, except for the change from "undertakes to supply" to "supplies". "Undertakes" suggested a commitment at the time of entering into the contract or under the terms of the contract. It might be useful if a small group looked into the matter.

66. The CHAIRMAN suggested that a working group should be set up, composed of the representatives of Belgium, France, Hungary, Kenya, Mexico, Norway and the United States of America, to consider whether the Belgian proposal for paragraph 1 was a matter of drafting; whether in paragraph 2 an "essential part" was the same as a "substantial part"; whether that paragraph should be re-formulated along the lines of the Norwegian proposal or whether the original draft should be kept, perhaps improved by the French proposal; and what was the most appropriate order of the paragraphs.

67. *It was so agreed.*

68. Miss O'FLYNN (United Kingdom), introducing her delegation's amendment to paragraph 2 (A/CONF.97/C.1/L.26), said that the effect would be to exclude contracts for the supply of goods from the scope of the Convention if the party who ordered them undertook to provide the "knowhow" necessary for their production or manufacture.

69. The CHAIRMAN inquired whether the working group should be requested to consider the United Kingdom proposal.

70. Mr. SHAFIK (Egypt) suggested that the representative of the United Kingdom should be added to the working group.

71. Mr. PLANTARD (France) said that, as a member of the working group, he would be reluctant to see it consider the United Kingdom proposal, which would exclude from the scope of the Convention a category of contracts which were economically important, particularly to developing countries. The French proposal, by referring to "materials", made it clear that a party supplying expertise would still be subject to the Convention. In general,

his country's attitude was that the scope of the Convention should be as wide as possible. The United Kingdom's proposal required more thought, but his first reaction was unfavourable.

72. Mr. HJERNER (Sweden) said there was merit in the United Kingdom proposal, although perhaps it went too far. It was doubtful, however, whether its proper place was in paragraph 2 of article 3 rather than in an enlarged paragraph 1. The working group might consider the point.

73. Mr. SEVON (Finland) said he was not aware of any national legislation which restricted the definition of contracts for the sale of goods on the basis proposed by the United Kingdom. The amendment would remove from the scope of the Convention transactions involving, for example, instructions for making chemicals, specifications for machinery and designs for clothes. There would be very little left, and he was completely opposed to the idea.

74. Mr. SZÁSZ (Hungary), endorsing the views expressed by the Finnish and French representatives, said that he was against the proposal, which would narrow down the scope of the Convention very greatly, but that he would be prepared to discuss it in the working group.

75. Mr. MICCIO (Italy) said that he was in favour of setting up the working group, but that it should not attempt to discuss substantive proposals such as that of the United Kingdom.

76. Mr. HERBER (Federal Republic of Germany) said that it would be difficult to judge the merits of the United Kingdom proposal without considerable reflection, so that it could not be dealt with by the working group. If the buyer of the goods provided "knowhow" for their manufacture which subsequently turned out to be incorrect or inadequate, that might well alter the respective rights and duties of parties under the Convention, but the

conclusion should not necessarily be that the entire Convention was inapplicable. Furthermore, he would ask the United Kingdom delegation how its proposal would affect the common case in which both parties to the contract provided technical knowhow.

77. With regard to the Norwegian proposal, he thought that the change in standpoint from buyer to seller made a considerable difference.

78. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that proposals could be referred to the working group only if there were no questions of substance involved. Such was not the case with the United Kingdom proposal, to which his first reaction was negative. If parties to a contract considered that the supply of specific information or other conditions made it impossible to apply the rules of the Convention, it was open to them to come to an agreement to that effect. There was no need to modify the Convention itself.

79. Mr. FOKKEMA (Netherlands) said he was against the United Kingdom proposal because it narrowed down the Convention's field of application. However, the Norwegian proposal might have the same effect because the change in approach made the rule the exception and the exception the rule. It would be better to keep the approach of the original draft.

80. Mr. KUCHIBHOTLA (India), opposing the United Kingdom amendment, said it dealt with an issue unconnected with article 3. The original text should be kept.

81. The CHAIRMAN suggested that the working group should keep to its original mandate and that after it had completed its work, the Committee should take a decision on the United Kingdom proposal.

82. *It was so agreed.*

*The meeting rose at 6.15 p.m.*

### 3rd meeting

Wednesday, 12 March 1980, at 3 p.m.

*Chairman:* Mr. LOEWE (Austria).

*The meeting was called to order at 3.05 p.m.*

#### **ELECTION OF A VICE-CHAIRMAN AND A RAP- PORTEUR (RULE 46 OF THE RULES OF PRO- CEDURE) (agenda item 2) (continued)**

1. Mr. INAAMULLAH (Pakistan), speaking on behalf of the Group of 77, nominated Mr. Mathanjuki (Kenya) for the office of Vice-Chairman.

2. Mr. SHAFIK (Egypt) seconded the nomination.

3. *Mr. Mathanjuki (Kenya) was elected Vice-Chairman by acclamation.*

A/CONF.97/C.1/SR.3

**CONSIDERATION OF ARTICLES 1-82 OF THE  
DRAFT CONVENTION ON CONTRACTS FOR  
THE INTERNATIONAL SALE OF GOODS AND  
OF DRAFT ARTICLE "DECLARATIONS RELAT-  
ING TO CONTRACTS IN WRITING" IN THE  
DRAFT PROVISIONS PREPARED BY THE  
SECRETARY-GENERAL CONCERNING IMPL-  
EMENTATION, DECLARATIONS, RESERVATIONS  
AND OTHER FINAL CLAUSES FOR THE DRAFT  
CONVENTION (agenda item 3) (A/CONF.97/5)  
(continued)**

Article 3 (continued) (A/CONF.97/C.1/L.9, L.13, L.25, L.26)

4. The CHAIRMAN asked the Working Group to report on the results of its work.

5. Mr. FARNSWORTH (United States of America), reporting on changes in article 3 other than those only affecting the French text, said that the working group recommended two amendments: in paragraph 1, the term "seller" should be replaced by "party who furnishes the goods", which was parallel to the term used in paragraph 2, and the order of the paragraphs should be reversed. Otherwise the original text should remain unchanged.

6. Mr. PLANTARD (France), reporting on changes only affecting the French text, said that the working group had accepted the French proposal (A/CONF.97/C.1/L.9) for the present paragraph 2. However, it had been decided to reinstate the words "*n'aît à fournir*" from the original text in place of "*ne fournisse*" in the third line.

7. Mr. GORBANOV (Bulgaria) suggested that the term recommended by the working group for paragraph 1 was still too close to "seller" and that it should be replaced by the phrase "one of the parties to the contract".

8. Miss O'FLYNN (United Kingdom) said that her delegation withdrew its amendment to paragraph 2 (A/CONF.97/C.1/L.26), in view of the adverse views which had been expressed at the previous meeting (A/CONF.97/C.1/SR.2).

9. The CHAIRMAN asked if the Committee wished to adopt article 3, as amended by the working group, and refer it to the Drafting Committee, together with the suggestion made by the Bulgarian representative.

10. *It was so agreed.*

Article 4 (A/CONF.97/C.1/L.4, L.14, L.20, L.21)

11. Mr. PLANTARD (France) speaking on behalf of the delegations of Finland, the United States and his own country, said that they were withdrawing their individual amendments (A/CONF.97/L.21, L.4, L.20) in favour of a joint proposal, based on the French text (A/CONF.97/C.1/L.20), with the last part of the sentence amended to read "... of the seller for death or injury caused by the goods to any person".

12. Although the joint amendment (A/CONF.97/C.1/L.51) was relevant only to certain legal systems, the matter was of importance to the countries affected. A full explanation of the problems arising in countries which based liability for defective products on the seller's latent defects guarantee was set out in document A/CONF.97/8/Add.4, page 6. In such countries, it was not possible for a buyer who suffered personal injury to bring an action of tort against the seller of defective goods. National legislation relating to personal injury from, for example, defective food or pharmaceutical products offered greater protection than the draft Convention,

which was not designed for that purpose, but applied rather to commercial loss.

13. Mr. REISHOFER (Austria) said that his delegation could support the joint amendment, since it appeared to exclude from the scope of the Convention all problems relating to product liability, which the work of UNCITRAL was not intended to cover.

14. Mr. TRÖNNING (Denmark) said that he supported the joint amendment but thought it did not go far enough. It should be extended to include all cases of product liability, such as liability of the seller for damage to goods other than those sold. The rules of the draft Convention were not satisfactory in such cases, the main drawback being the time limit of only two years. The issue was a complicated one which had not been sufficiently studied, and it would therefore be preferable to exclude all such cases from the scope of the Convention.

15. The European Economic Community was working on rules to govern product liability, in which the time limit would be longer. As the seller of the goods could also be the producer, there was likely to be conflict between the EEC rules and the draft Convention.

16. Mr. MASKOW (German Democratic Republic) welcomed the proposal, which would facilitate claims for personal injury in his country, where product liability was construed as contractual law. However, it would be better to exclude damage to goods as well, since that was not specifically dealt with in the draft Convention.

17. Mr. KOPAČ (Czechoslovakia) drew attention to the first sentence of article 4, which made it clear that the draft Convention did not cover liability for defective goods under national law. The joint amendment was satisfactory as it stood.

18. Miss O'FLYNN (United Kingdom) said that her delegation supported the joint amendment as far as it went, but would also be prepared to consider a more extensive proposal, as suggested by the Danish representative.

19. Mr. ROGNLIEN (Norway) said that his delegation agreed that personal injury should be excluded from the scope of the Convention. But difficulties would arise if material damage (damage to property) remained within its scope without any modification. That would cause problems in Norway, where the sales law currently in force only partially covered product liability, a large part remaining under the law of tort; the victim had to choose the grounds on which to base his claim. There would be no difficulty with the joint amendment if it was not to be interpreted *a contrario* in relation to material damage, but permitting the interpretation that claims for such damage grounded on tort and not on contracts of sale fell outside the scope of the Convention. Otherwise, a wider exclusion, covering property, was required.

20. Mr. HJERNER (Sweden) expressed concern at the possibility of excluding from the scope of the Convention the greater part of the relationship between buyer and seller by unqualified references to product liability, a

concept which had not as yet been defined. It was usually taken to refer to claims by consumers against distributors or manufacturers, which fell outside the contractual buyer/seller relationship. In that sense, it had nothing to do with the draft Convention, since consumer transactions were by definition outside its scope. If, however, the Committee were to go so far as to accept the Danish suggestion to exclude damage to property, it would remove from the purview of the draft Convention such cases as the supply of defective spare parts for aircraft or defective raw materials which damaged the final product. It would then not be clear which rules prevailed in those cases. Problems of the choice of law would arise and parties to contracts of sale would have to inform themselves about unfamiliar systems. That would be a setback for efforts at legal unification. He would prefer the original draft of article 4. If necessary, as a compromise, he could agree to the joint amendment, but he could go no further.

21. Mr. HERBER (Federal Republic of Germany) shared that view. There was as yet no exact definition of product liability. The idea existed in national legislation based on tort, but the way in which it was dealt with differed from country to country. He would have liked the working group to study the question, with a view to establishing more precisely what was to be understood by product liability. However, his delegation could agree to the joint amendment.

22. Mr. MANTILLA-MOLINA (Mexico) said that product liability was a matter of considerable importance and deserved careful consideration; simply to exclude it from the Convention would not solve the problem. In cases where, for example, a child was harmed by a certain drug, the family might wish to sue the seller, who would not be the pharmacist, but the producer of the drug. He was inclined to feel that the proposed new article 4 *bis* was out of place in the Convention and wished to reserve his position on it.

23. Mr. KUCHIBHOTLA (India) said he could not support the joint amendment, which he saw as a severe restriction on the scope of the Convention.

24. Mr. SHAFIK (Egypt) agreed that the question of product liability was important, particularly for developing countries, which imported large amounts of both food and pharmaceutical products. He did not feel, however, that it should be dealt with under the Convention. It was a separate question, which came rather within the field of tort. The new article should cover not just damage to goods but damage to property in general.

25. Mr. FRANCHINI-NETTO (Brazil) supported the views expressed by the Mexican representative.

26. Mr. PLANTARD (France) said that if the joint amendment made no reference to damage to property, that was because it was the sponsors' opinion that such damage was included in commercial or economic loss and not a failure on their part to recognize its importance. If damage to property were to be excluded there would be a conflict with other provisions of the Conven-

tion including those which covered the conformity of goods.

27. Mr. FOKKEMA (Netherlands) proposed a compromise formula which would distinguish between cases where the relation was simply between buyer and seller and cases where action was taken by a buyer against a previous seller. The text would read "The Convention does not affect the rights which, according to the applicable national law, a buyer can invoke as against a previous seller, for damage caused to persons or to other goods by a product sold."

28. The CHAIRMAN did not think that proposal would be acceptable. It was clear that the Convention did not cover relations between the buyer and a previous seller; it was concerned with contracts of sale.

29. The joint amendment appeared to command the largest measure of support. He suggested that it should be forwarded to the Drafting Committee.

30. *It was so agreed.*

31. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.14), said that it was intended to deal with the problem that arose when the seller, having reserved property rights in the goods, wished to take them back. The background to the proposal was explained on pages 15 and 16 of document A/CONF.97/8. If a contractual clause existed reserving the right of property in goods for the purpose of securing payment due under the contract, and the seller wished to take back the goods because the buyer had not paid the full price (all instalments), the question to be decided was whether or not that constituted avoidance of contract. If it did not, there was no provision in the Convention to deal with the problem. If it did, then settlement between the parties would be covered by articles 66 *et seq.* While article 69 covered the refunding by the seller of the price of the goods and the accounting by the buyer for benefits derived from the goods, no reference was made in it to the valuation of the used goods to be restituted. The rules of the Convention were unsatisfactory for regulating the settlement of accounts between the parties in such cases, while most national laws had special provisions for instalment sales and the settlement between the parties where the seller exercised his reserved property rights. He also referred to ULIS 1964 article 5, paragraph 2 and article 4 (a) and (b) of the present draft Convention.

32. The CHAIRMAN asked whether there was any support for the Norwegian amendment.

33. Mr. PLANTARD (France) said that although the Norwegian amendment was a reasonable one, he considered the question was already covered by article 5 of the Convention. The proposed addition to article 4 was therefore not necessary.

34. Mr. ROGNLIEN (Norway) said that on that understanding and with reference to article 4 (a) and (b) he would withdraw his proposal.

Article 5 (A/CONF.97/L.10, L.18, L.30, L.32, L.41)

35. The CHAIRMAN suggested that since the Indian amendment (A/CONF.97/C.1/L.30) was of a drafting character, it should be referred to the Drafting Committee.

36. *It was so decided.*

37. Mr. SHORE (Canada) proposed that his delegation's amendment (A/CONF.97/C.1/L.10) should be referred to the Second Committee for discussion before it was considered by the First Committee. Although his delegation preferred the "opting-in" approach to the "opting-out" method, it had decided in a spirit of compromise to support the text proposed by Australia in document A/CONF.97/C.2/L.3, which would be considered by the Second Committee. In any event, however, it would not be possible for the Committee to discuss the Canadian "opting-out" proposal until it knew what action the Second Committee was going to take on the "opting-in" proposal.

38. Mr. INAAMULLAH (Pakistan) announced that his delegation had submitted an amendment to article 5.

39. Mr. DABIN (Belgium) said that, in view of the considerable importance of article 5 and hence of the Canadian proposal, it might be wiser for the Committee to have an exchange of views on the matter without attempting to reach an immediate conclusion. A discussion of the same kind could take place in the Second Committee.

40. Mr. HJERNER (Sweden) said that the "opting-in" formula had been discussed in competent circles for many years; on every occasion, however, a solid majority had emerged against it. He did not believe it was possible to wait for the outcome of the Second Committee's discussion on the Australian proposal (A/CONF.97/C.2/L.3). The whole problem of "opting-out" and "opting-in" should be discussed by the First Committee forthwith.

41. Mr. KIM (Republic of Korea) urged that the issue should be discussed by the Committee immediately.

42. Mr. MICCIO (Italy) said that article 5 dealt with very general questions, which required a thorough understanding of all the provisions of the draft Convention. While he would oppose any suggestion to transfer the article to the final clauses, he believed that, for methodological reasons, it should only be dealt with after all the other articles had been discussed.

43. Mr. HERBER (Federal Republic of Germany) noted that the Australian proposal (A/CONF.97/C.2/L.3) was being construed as an "opting-in" clause in the sense of the United Kingdom reservation to the 1964 Hague Convention. The proposal thus constituted a reservation clause, and hence, even if it were adopted by the Conference, only some of the contracting States would avail themselves of it. Article 5 would then be of no use to those contracting States, but was nevertheless a very important provision for all other States.

44. Miss O'FLYNN (United Kingdom) said that she agreed with the previous speaker's arguments but arrived at a somewhat different conclusion. Article 5 would always be required for those contracting States that did not avail themselves of the reservation embodied in the Australian proposal.

45. On the procedural issue, she felt it would be more profitable for the Canadian proposal (A/CONF.97/C.1/L.10) and the Australian proposal (A/CONF.97/C.2/L.3) to be discussed together.

46. Mr. WAGNER (German Democratic Republic) said that, for the reasons given by previous speakers, he strongly favoured an immediate discussion of article 5.

47. Mr. SEVON (Finland) said that even if a State made the reservation in question, it would still allow its commercial circles to include in their contracts clauses whereby alterations were made to certain provisions of the Convention. There would therefore always be a need for article 5, regardless of the outcome of the Second Committee's discussion on the Australian proposal. He accordingly saw no reason for deferring the discussion of the article.

48. Mr. PLUNKETT (Ireland) supported the idea of discussing the Australian proposal and the Canadian amendment together.

49. Mr. BOGGIANO (Argentina) said it was essential that article 5 should be dealt with in the First Committee.

50. The CHAIRMAN asked whether the Committee wished to defer discussion on the Canadian proposal (A/CONF.97/C.1/L.10) until the Second Committee had dealt with the Australian proposal for a new article (A/CONF.97/C.2/L.3).

51. Noting that only a minority favoured that proposal, he said that, if there were no objections, he would consider that it had been rejected.

52. *It was so agreed.*

53. The CHAIRMAN invited the Committee to discuss paragraph (1) of the Canadian amendment to article 5 (A/CONF.97/C.1/L.10).

54. Mr. WAGNER (German Democratic Republic) said that he welcomed the idea contained in the proposed paragraph (1) but found the formulation unduly complicated. In order to simplify it, he proposed the deletion of the concluding phrase, beginning with the words "but the parties may . . ." and ending with the words "manifestly unreasonable".

55. Mr. SHORE (Canada) accepted that proposal.

56. Mr. WAITITU (Kenya) fully supported the Canadian proposal for article 5, paragraph (1).

57. Mr. ROGNLIEN (Norway) said that he was not altogether satisfied with the proposed paragraph (1). The second sentence appeared to suggest that parties who agreed to exclude the Convention wholly might thereby be able to exclude "the obligations of good faith, diligence and reasonable care" prescribed by the Con-

vention, even if such principles were to be contained in article 7 or part II of the Convention.

58. Mr. HJERNER (Sweden) said that he could not support the Canadian proposal precisely because of the reference it made to the three principles mentioned by the previous speaker. He saw no mention anywhere in the draft of the principles of "diligence and reasonable care"; as for the principle of "good faith", it was mentioned only once, in article 6, but in a totally different context.

59. Mr. SHORE (Canada) explained that the present text of article 5 would enable the parties to a contract to exclude any provision of the Convention whatsoever. They ought not, however, to be able to exclude a provision such as that contained in article 6, which required the parties to perform their contractual obligations in good faith. The same was true of the other two principles mentioned in the second sentence of the Canadian text.

60. Mr. FARNSWORTH (United States of America) said that, like the Swedish representative, he could not support the Canadian amendment. An *a contrario* interpretation would suggest a general obligation of good faith.

61. Mr. KIM (Republic of Korea) said that the Canadian proposal was unacceptable as a matter of principle. The exclusions covered by article 5 were confined to the contractual obligations between the parties. There could be no question, for example, of excluding article 2 on the scope of application of the Convention, or the principle of good faith.

62. Mr. DABIN (Belgium) said that there were many provisions besides those of good faith, diligence and reasonable care that were fundamental. They included article 23 on fundamental breach, article 37, paragraph (2), on the obligation to give notice, article 44 on the right to remedy failure to perform and article 66 on exemptions.

63. The CHAIRMAN asked if the Committee wished to adopt paragraph 1 of the Canadian amendment (A/CONF.97/C.1/L.10) as sub-amended by the German Democratic Republic.

64. Noting that a substantial majority was against the proposal, he said that if there were no objections, he would take it that the Committee rejected it.

65. *It was so agreed.*

*The meeting rose at 6.10 p.m.*

## 4th meeting

Thursday, 13 March 1980, at 10 a.m.

*Chairman:* Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.4

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 5 (continued) (A/CONF.97/C.1/L.8, L.41, L.45)*

1. The CHAIRMAN said, in reply to questions put to him by delegations the previous day, that the Drafting Committee would consider only those texts which had been specifically sent to it by the Committee and that it was not the Drafting Committee's task to draw up any new text, which might give rise to discussions within the Committee and delay its work. It would be clearly indicated in the summary records which texts had been sent to the Drafting Committee.

2. Mr. ROGNLIEN (Norway) said that his country had proposed some substantive changes as well as purely drafting amendments. In view of the Chairman's explanations, he wondered whether his proposal should in fact be sent to the Drafting Committee.

3. The CHAIRMAN said that the Norwegian proposal should be sent to the Drafting Committee, which would then be entitled to resubmit it to Committee I if the text should give rise to questions outside its mandate.

4. He recalled that there were three draft amendments to article 5 of the draft Convention submitted by the United Kingdom (A/CONF.97/C.1/L.8), Belgium (A/CONF.97/C.1/L.41) and Pakistan (A/CONF.97/C.1/L.45) respectively. For his own part he considered that exclusion of the application of the Convention, derogation from its provisions or variation of their effect could be either express or implied, that was also apparently the conclusion which had emerged from the preparatory work. The United Kingdom and Belgian proposals tended in that direction, while the Pakistani proposal envisaged express exclusion only. Since the Belgian and United Kingdom proposals both started from the



same viewpoint, he wondered if it would not be possible to merge them.

5. Mr. DABIN (Belgium) pointed out that there was a slight difference of approach between the Belgian proposal and that of the United Kingdom. The existing text of article 5 did not specify how the will of the parties was to be made known, but the Secretariat's commentary explained why the second sentence of ULIS, article 3, providing that "such exclusion may be express or implied", had not been reproduced in the draft Convention under consideration. The Belgian proposal also excluded the use of the word "implied" but, like the draft EEC Convention on legislation governing contractual obligations, provided that exclusion, derogation or variation must definitely result from the circumstances of the case, unless such measures were specifically provided for in writing, in order that the judge or arbitrator might be precluded from attributing to the parties an intention they did not have. Recourse to a standard contract or general conditions drawn up by reference to one or more specific legal systems would leave no doubt as to the choice made previously by the parties and would constitute an indisputable criterion. The principle of autonomy of the parties was thus maintained.

6. The CHAIRMAN asked the representative of the United Kingdom if she was able to concur in the Belgian proposal.

7. Miss O'FLYNN (United Kingdom) said she agreed that the United Kingdom and the Belgian proposals had a number of points in common but that did not mean that they were identical. The existing text did not indicate how the parties might exclude the application of the Convention or derogate from or vary the effect of any of its provisions, and her delegation felt that the matter must be clarified since, in the absence of specific provisions it might be assumed that exclusion, derogation or variation must necessarily be express. Her delegation had submitted its amendment, based on the ULIS provisions, in order to eliminate any uncertainty on that point and would like to maintain it.

8. Mr. INAAMULLAH (Pakistan) explained that his delegation had submitted amendment A/CONF.97/C.1/L.47 because it felt that the existing text of article 5 allowed the parties too much freedom, particularly if it was taken in conjunction with articles 7 and 11, which provided for subjective as well as objective criteria, the result of which might be disagreements as to whether the provisions of the Convention were in fact applicable or whether there had been derogation from any of its provisions. Such uncertainty could be avoided only by specifying that exclusion or variation should be the result of an express agreement between the parties.

9. Mr. BENNETT (Australia) endorsed the comments made by the representative of the United Kingdom, whose proposal would make it possible to avoid too restrictive an interpretation of the text.

10. Mr. FARNSWORTH (United States of America)

said that, for his part, he could see no reason why the existing text of article 5 should not be retained, although he would be able to support the United Kingdom proposal which added a useful degree of precision to the text.

11. Mr. ROGNLIEN (Norway) said that he was in favour of retaining the existing text which, in his view, meant that derogation might be express or tacit. If one or other of the additions to article 5 proposed by the United Kingdom or Belgium were adopted, it might be deduced *a contrario* that other provisions of the Convention were to be interpreted in a restrictive sense. The determining factor must always be the intention of the parties at the moment of concluding the contract, whether or not such intention had been express or implied in article 7.

12. Mr. KHOO LEANG HUAT (Singapore) said he too was in favour of keeping the existing text.

13. Mr. PLANTARD (France) said that he preferred the new paragraph 2 proposed by Belgium.

14. Mr. REISHOFER (Austria) supported the United Kingdom proposal. In his opinion, it should be specified how parties might exclude application of the Convention or derogate from any of its provisions.

15. Mr. WAGNER (German Democratic Republic) said that parties should not be encouraged to derogate from the provisions of the Convention. Parties might exclude application of the Convention in two ways: they could agree not to apply certain provisions or they could choose a different law for the contract, but in either case there must be an express agreement. That was why his delegation was strongly opposed to the United Kingdom proposal, which left the matter too uncertain. The Belgian proposal seemed capable of providing a clearer solution, but it was not entirely satisfactory to his delegation, which was against implied derogations and in favour of keeping the existing text.

16. Mr. HERBER (Federal Republic of Germany) said that it should be specifically stated whether exclusion of provisions of the Convention must be express or could be implied. He was unable to support the proposal by the representative of Pakistan because he considered it to be too rigid and thought it did not allow for the fact that business practice did not always take legal considerations into account at the time of concluding contracts. The United Kingdom proposal left too wide a latitude to the courts in determining what had been the will of the parties and did not attach sufficient importance to the circumstance of the case.

17. Mr. HJERNER (Sweden) said he agreed with the representative of the United States that the existing text was acceptable but was able to support the United Kingdom proposal.

18. Mr. MICHIDA (Japan) recalled that the UNCITRAL Working Group responsible for preparing the draft Convention had decided to remove the words "such exclusion may be express or implied", which appeared in article 3 of ULIS, since it feared that refe-

rence to implied exclusion might encourage courts to conclude, on insufficient grounds, that application of the Convention had been entirely excluded. That had been the prevailing opinion for 10 years and he could see no reason to change the existing text of article 5 along the lines proposed by the United Kingdom or Belgium.

19. Mr. EYZAGUIRRE (Chile) endorsed the views expressed by the representative of Japan. Article 5 of the draft Convention seemed to him to be sufficiently explicit. In his view, the proposals of the United Kingdom and Belgium were reviving a dead debate.

20. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that he associated himself with the comments made by the representative of Japan. The United Kingdom proposal changed the very basis of the provisions of the Convention. The existing text was sufficiently clear and did not require any modification.

21. Mr. PLUNKETT (Ireland) said that the existing text of article 5 could be interpreted in different ways. In his opinion, it should be transmitted to the Drafting Committee since, if retained in its existing form, it could well give rise to legal disputes. He supported the United Kingdom amendment which made it quite clear that implied derogations were permitted.

22. Mr. BOGGIANO (Argentina) said that the principle of autonomy of the parties, which should be respected, would be weakened if there was reference to express agreement only. From that standpoint the Belgian proposal, which authorized implied derogations while specifying that they must result from the circumstances of the case, seemed to him to be satisfactory.

23. Miss O'FLYNN (United Kingdom) said she was surprised that her amendment had triggered off such a wide-ranging debate. With regard to the concern expressed by the Norwegian representative that the amendment might indirectly lead to a restrictive interpretation of the other provisions of the Convention, she thought that a provision might be inserted at the end of the Convention stating that, whenever there was an agreement on a particular point between the parties, such agreement might be express or implied.

24. As for the objection raised by the representative of the German Democratic Republic that her delegation's proposal was too uncertain, she considered that the comments which had been made indicated that the existing text of article 5 was open to more than one interpretation; her delegation's proposal was intended to make the position more certain.

25. Lastly, with regard to the points raised by the representative of Japan, her delegation had borne in mind the Secretariat's commentary on article 5 and the possibility that the reference to implied exclusion might encourage courts to be too hasty in concluding that the application of the Convention had been excluded. However, courts would not come to that conclusion in the absence of a clear indication that the parties had wished to exclude the Convention. On the other hand, it was not necessary for

the parties to indicate expressly that they had decided to exclude the provisions of the Convention and to apply another legal régime, as the existing text of article 5 might lead one to believe. To avoid any misunderstanding on that point it was essential that the existing text of article 5 should be changed.

26. Mr. DABIN (Belgium) said that it was a question not of a purely drafting matter but of a very important substantive matter. It was not in fact possible to hold to an express exclusion because a glance at what actually happened in day-to-day business revealed that, in trade negotiations, legal clauses were often the last thing that the parties were concerned about. Moreover, it was not always possible to provide for an express exclusion.

27. The United Kingdom proposal would have the effect of making the meaning of article 5 clearer but it also introduced a degree of wooliness in that, as could be seen from national case law, judges were often tempted to give a purely hypothetical interpretation of the will of the parties.

28. The Belgian proposal was an attempt to add an element of security by providing that, where the will of the parties was not expressly declared in writing, it must be clearly apparent from all the circumstances of the case.

29. Mr. KIM (Republic of Korea) said that, if the parties chose the law of one of the contracting States, it was possible that the implied exclusion might be contrary to the provisions of article 1, paragraph 1 (b) of the Convention.

30. The CHAIRMAN put to the vote the proposals by Pakistan (A/CONF.97/C.1/L.45), Belgium (A/CONF.97/C.1/L.41) and the United Kingdom (A/CONF.97/C.1/L.8).

31. *All three proposals were rejected.*

32. The CHAIRMAN drew the attention of the members of the Committee to the amendments proposed by Belgium (A/CONF.97/C.1/L.41, second part) and Canada (A/CONF.97/C.1/L.10, paragraph 2), which had some points in common.

33. Mr. VISCHER (Switzerland) said he wondered whether those amendments were not contrary to the provisions in article 1, paragraph 1 (b) and whether there might not be a danger of confusion in interpreting those articles.

34. Mr. GORBANOV (Bulgaria) said that his delegation was unable to accept those proposals because, if the parties had chosen the law of a contracting State, the proposed provisions would be contrary to article 1, paragraph 1 (b) while, on the other hand, if the parties had chosen the law of a non-contracting State, the proposed amendment was unnecessary because the question was already covered by the provisions of article 5, paragraph 1.

35. Mr. SHAFIK (Egypt) said that he too thought that the proposed texts were contrary to article 1, paragraph



(1)(b), because the provisions of the Convention were incorporated in the national law of a contracting State.

36. Mr. DABIN (Belgium) said that he did not agree that the paragraph proposed by his delegation was contrary to article 1, paragraph (1)(b). Although the rules of private international law might lead to the application of a national law, there was still some uncertainty. In that connection, he reminded the Committee that the ULIS clause on the application of a specific national law had given rise to different interpretations, some people maintaining that the applicable national law was the original domestic law and others considering that it was the Uniform Law incorporated in that domestic law. In private international law, it was normal, if the law in question was that of the State ratifying the Convention, for the latter to apply, at least if it was considered better than the earlier legislation. However, a degree of caution was necessary. The ignorance of the parties, who could belong to different non-contracting States was, at the international level, entirely excusable. Their good faith could not be questioned. No one could boast of being conversant, at every turn, with the list of ratifications of an international convention. He also reminded the Committee that a reference to national law was often the result of traditions which were difficult to overcome and that the aim of the Belgian amendment was precisely to remove those uncertainties. Its wording could, however, be improved, in particular by incorporating the amendment proposed by Canada.

37. Mr. MAKAREVITCH (Ukrainian Soviet Socialist Republic) said that his delegation was unable to support the Belgian and Canadian amendments and that it considered the existing wording of article 5 to be satisfactory.

38. Mr. ROGNLIEN (Norway) said that it was obvious that the parties could derogate from the application of article 1(1), and that would be in keeping with article 5. In this view, therefore, there was no contradiction between the Belgian proposal and article 1, but the proposal seemed a superfluous one. That was on the understanding that the parties had chosen the municipal law of a contracting State, e.g. by referring to the title of such a law.

39. However the Canadian proposal was in fact contrary to article 1 in that it assumed that, if the parties chose the law of a particular State, the application of the Convention was automatically excluded even if that was not the intention of the parties.

40. Mr. PLANTARD (France) said he regretted that he was unable to support the Belgian proposal. Any State which had become a party to the Convention had introduced into its law, in addition to its traditional law governing domestic sales, a second specific and parallel law for international sales, namely, the Convention. That solution was both logical and sound because when a State had the Convention ratified by its Parliament, it decided by the same action to incorporate the rules into its legal system. It could not be otherwise, unless the par-

ties clearly wished to refer to the law governing domestic sales. Moreover, when the parties selected a legal system, they usually meant an entire legislation and only rarely a particular set of rules.

41. The current wording of article 5 was perhaps ambiguous, and his delegation was prepared to support any proposal diametrically opposed to the tenor of the amendment proposed by the Belgian delegation.

42. Mr. BOGGIANO (Argentina) said that, when the parties subjected their contract to a national law, the application of the Convention should be excluded only if they referred explicitly to the law on domestic sales. The proposed provisions were therefore useless in practice.

43. Mr. WAGNER (German Democratic Republic) said that his delegation interpreted article 1, paragraph (1)(b) to mean that the contracts of parties whose places of business were in contracting State were in all cases subject to the Convention. It was therefore not in favour of the Belgian and Canadian proposals. On the other hand, it considered that, if one of the parties did not belong to a contracting State, the Convention would apply only if the rules of private international law so provided, including cases where the parties had decided to apply the law of a contracting State. He recognized that the application of that rule could cause difficulties, and was able to accept the Canadian proposal if it applied to cases in which the partners belonged to non-contracting States. In that case it would be necessary to add to that proposal the phrase: "unless the parties to the contract have their places of business exclusively in contracting States", or any other similar formula which could be refined by the Drafting Committee.

44. The CHAIRMAN asked the Canadian delegation if it was prepared to accept the subamendment proposed by the delegation of the German Democratic Republic.

45. Mr. SHORE (Canada) replied that, while his delegation did not insist on the wording of its amendment being maintained unchanged, it would prefer that it should retain the original content.

46. Mr. SEVON (Finland) said that both amendments had their merits in that they assumed that, when the parties referred to a national law, they probably meant the part of that law which was not constituted by the Convention. However, the proposals raised certain difficulties in that, for instance, some legislations provided for the application of non-mandatory law. However, his delegation did not think it necessary to raise that problem, and was in favour of maintaining article 5 in its existing form.

47. Mr. FOKKEMA (Netherlands) said that, in short, the parties could decide that the contract should be subject to a national law or to the Convention if it had been incorporated in the law of a State. If they decided that the law applicable was that of a specific State which had ratified the Convention, that would be ambiguous and the judge would have to take a decision. In most cases the solution proposed by Belgium would be chosen, but it was preferable to leave it for the judge to decide.

48. The CHAIRMAN asked the Belgian and Canadian delegations if they wished their amendments to be put to the vote.

49. Mr. SHORE (Canada) said that he would like his delegation's proposal to be put to the vote, because the existing wording of article 5 was not sufficiently precise. In any case, he would like the article to be submitted to the Drafting Committee.

50. The CHAIRMAN pointed out that if none of the proposed amendments was accepted, it would not be possible to submit the text to the Drafting Committee.

51. *The Canadian draft amendment was rejected.*

52. Mr. SHORE (Canada) said that, at very least, he would like the Committee to express its opinion on the need to clarify the wording of article 5.

53. Mr. WAITITU (Kenya) said that he too considered it would be useful to ask the Drafting Committee to study the draft article and give its opinion on what clarifications should be made.

54. Mr. HERBER (Federal Republic of Germany) said he was against postponing a decision on the subject and sending the text to the Drafting Committee for study. That Committee was not a working group and could not be asked to do such work. Two draft amendments had already been rejected and, if some delegations considered it useful, they could submit further amendments.

55. Mr. VISCHER (Switzerland) said that it would be enough to clear up the uncertainties concerning article 5 in the Committee's report.

56. Mr. DABIN (Belgium) said that, while he shared the opinion of the representative of the Federal Republic of Germany, he noted that the discussion had shown that the meaning of article 5 in its present wording was not clear. Since it was a substantive question, the Committee should make it clear how the parties could exclude application of the Convention in whole or in part, so that any subsequent litigation could be avoided.

57. The CHAIRMAN agreed that a delegation or group of delegations could submit new proposals to clarify the meaning of article 5, but he refused to submit the present text to the Drafting Committee without further explanation.

58. He then drew the attention of members of the Committee to the draft amendments submitted by the German Democratic Republic (A/CONF.97/C.1/L.32).

59. Mr. WAGNER (German Democratic Republic) said that he had noted that not all delegations were agreed as to the scope of the Convention. Divergences of views had arisen in particular with regard to article 2 (e) and article 3. The aim of his delegation's proposal was to enable the parties to broaden the scope of the Convention. He reminded the Committee that the Convention was just as important as a law and did not consist of mere general provisions.

60. Mr. SHAFIK (Egypt) said that the draft amendment was an attractive one but was unnecessary because

of the principle of the autonomy of the will of the parties. If the latter agreed to apply the Convention, even in cases where it would not normally apply, their wish should be respected. Naturally, if the applicable law did not admit certain provisions of the Convention, that law would prevail. But it was not for the Convention to settle that question.

61. Mr. KIM (Republic of Korea) said he agreed that the provision proposed by the German Democratic Republic was not necessary because of the principle of the autonomy of the will of the parties. It was thus always permissible for the parties to decide to apply the Convention, even in the cases covered by articles 2 and 3.

62. Mr. TARKO (Austria) said that he was in favour of the proposal by the German Democratic Republic, which expressly stated that it was always possible to apply the Convention, even if the parties lived in non-contracting States. Consequently, that proposal would enable possible conflicts of laws to be avoided.

63. Mr. BONELL (Italy) said that he too could accept in principle the proposal submitted by the German Democratic Republic, even though he considered that the principle of the autonomy of will of the parties was sufficiently clear. The provisions of articles 2 and 3 did, however, raise problems. If the parties chose to apply the Convention to the cases referred to in those articles, it should be clearly stated that the mandatory provisions of national law should be respected and could not be excluded by the parties. He therefore proposed that the following provision, based on article 4 of the annex to ULIS, should be added to the wording proposed by the German Democratic Republic: "Even if this Convention is not applicable in accordance with articles 2 and 3, it shall apply if it has been validly chosen by the parties, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen this Convention".

*The meeting was suspended at 11.45 a.m. and resumed at 12.10 p.m.*

64. Mr. HJERNER (Sweden) said that, while the draft amendment by the German Democratic Republic was not without interest, its wording was unsatisfactory. For example, he would prefer the text drafted by the Working Group on the International Sale of Goods at the sixth session of UNCITRAL (A/36/17, annex I, paragraph 44), which had not, however, been adopted.

65. Mr. PLANTARD (France) said that he could agree to the text submitted by the German Democratic Republic, provided that it did not apply to article 2 (a). If the Convention applied to sales to consumers, it would then be possible to evade the rules designed to protect them.

66. Mr. BOGGIANO (Argentina) said that the proposal by the German Democratic Republic was a reasonable one but that he did not think it could be accepted, because it would cast doubt on the application of manda-

tory national laws, such as those concerning sales to consumers or the sales covered by article 2 (e) and (f). The Italian proposal, although interesting, also posed problems because it was difficult to specify what mandatory law should be maintained if the Convention could also be applied to the sales covered by articles 2 and 3. In the other cases, the principle of the autonomy of will of the parties seemed adequate. He thus did not support either of the proposals.

67. Mr. HERBER (Federal Republic of Germany) said that the parties were free to agree whether or not to apply the provisions of the Convention. If the proposal by the German Democratic Republic was to make the Convention prevail over mandatory law, he did not approve it and would prefer to leave the text as it stood. The Italian amendment also seemed to him superfluous.

68. The CHAIRMAN asked the representative of the German Democratic Republic if he would be prepared to exclude article 2 (a) from the scope of his proposed amendment, as requested by the representative of France. He would also like the Committee to decide, if that proposal was adopted, whether or not the text of article 5 should be sent to the Drafting Committee.

69. Mr. WAGNER (German Democratic Republic) said he accepted the suggestion by the representative of France. His proposal was intended to apply only to subparagraphs (b), (d), (e) and (f) of article 2; he also had no objection to adopting the wording drafted by the Working Group on the International Sale of Goods at the sixth session of UNCITRAL. On the other hand, the limitations imposed by the Italian proposal appeared excessive. What was important to his delegation was not the wording of the proposal but the idea it expressed, and it was quite prepared to submit the text of the article to the Drafting Committee.

70. Mr. FOKKEMA (Netherlands) said that he could support the proposal of the German Democratic Republic, supplemented by that of the Italian delegation. On the other hand, the French representative's proposal seemed dangerous, because there were other mandatory provisions relating to other cases which should likewise be respected.

71. Mr. HJERNER (Sweden), speaking on a point of order, requested that the Italian amendment should be voted on separately, since it related to the substance of the article.

72. Mr. BONELL (Italy) said that he had submitted his proposal because that by the German Democratic Republic could make it possible to derogate from the mandatory provisions of a national law.

73. Mr. WAGNER (German Democratic Republic) reiterated that he could accept the subamendment proposed by the French delegation, but not that proposed by the Italian delegation.

74. Mr. EYZAGUIRRE (Chile) said he considered that the proposal by the German Democratic Republic was superfluous. Whether or not it was accepted, the auto-

nomy of the parties would remain the same. However, if it was accepted, he would like it to be supplemented by the Italian amendment.

75. The CHAIRMAN invited the Committee to vote on the amendment proposed by the German Democratic Republic (A/CONF.97/C.1/L.32), with the subamendment proposed by France.

76. *The amendment (A/CONF.97/C.1/L.32), as amended, was rejected.*

77. Mr. MICCIO (Italy) withdrew his proposal, which had become pointless since the amendment proposed by the German Democratic Republic had been rejected.

78. The CHAIRMAN requested the representative of the Netherlands to submit his draft amendment, which had the same purport as that proposed by the Italian delegation but went less far.

79. Mr. FOKKEMA (Netherlands) read out his draft amendment to article 5, which took into account the French proposal: "Even if this Convention is not applicable in accordance with the provisions of subparagraphs (b), (c), (d), (e) and (f) of article 2 or those of article 3 it shall apply if it has been validly chosen by the parties, to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen this Convention."

80. The CHAIRMAN invited the Committee to vote on the Netherlands draft amendment.

81. *The Netherlands draft amendment was rejected.*

82. The CHAIRMAN said that as a result of those votes, he understood that the Committee wished to retain the original text of article 5.

83. Mr. DABIN (Belgium) proposed that a working group should be established to decide how article 5 should be interpreted.

84. Mr. KOPAC (Czechoslovakia) said that the wording of article 5 was acceptable, but the exceptions given in article 11 were inadequate. Attention might subsequently be drawn to other mandatory provisions, in which case it would be necessary to revert to article 5 at the end of the discussion.

85. The CHAIRMAN pointed out that the Belgian proposal raised a procedural question. It also assumed that only a minority of delegations was satisfied with the present text of article 5; and that did not seem to be the case, since all the amendments submitted had been rejected.

86. It was also possible, as the representative of Czechoslovakia had suggested, that other mandatory provisions might arise from the discussion, but there would still be time to take account of them in article 5. Anything was possible with regard to article 11, since it had not yet been considered.

87. Miss O'FLYNN (United Kingdom), Mr. SHAFIK

(Egypt) and Mr. SHORE (Canada) supported the Belgian representative's proposal.

88. Mr. HJERNER (Sweden) and Mr. MASKOW (German Democratic Republic) said they opposed the idea of establishing a working group, because the discussion on article 5 was closed and, if such a working group was established, it could not revert to amendments which had already been rejected.

89. Mr. PLANTARD (France) endorsed the opinion of the two preceding speakers but suggested that the delegations for which article 5 posed problems should meet to draft proposals which they could submit, if they saw fit, in a plenary meeting and which would be put to the vote during the second reading of article 5.

90. The CHAIRMAN said that delegations were indeed free to submit amendments in a plenary meeting, but that it was not possible to set up an official working group to study an article, the wording of which had been maintained despite several draft amendments.

91. Mr. WANG Tian ming (China) said that he was in favour of the Belgian proposal, but would not insist on its adoption.

92. Mr. DABIN (Belgium) explained that, in his opinion, it was not a question of rediscussing the amendments but of deciding on the meaning of article 5 and the interpretation to be given to it.

93. The CHAIRMAN suggested that even though the discussion was closed, all those who were not satisfied with article 5 should meet to draft a clearer wording which would be considered at a later stage.

94. Mr. GORBANOV (Bulgaria) said that that suggestion was tantamount to reconsidering a matter on which the Committee had already taken a decision.

95. Mr. SHAFIK (Egypt) pointed out that, although the amendments had been rejected, the article had not yet been adopted, and that left delegations which wished to do so free to draft new proposals.

*The meeting rose at 1.05 p.m.*

## 5th meeting

Thursday, 13 March 1980, at 3 p.m.

*Chairman:* Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.5

*The meeting was called to order at 3.15 p.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5)**  
(continued)

### GENERAL DEBATE (continued)

1. Mr. LI Chih-min (China) expressed his delegation's gratification at its participation for the first time in a conference such as the United Nations Conference on Contracts for the International Sale of Goods. He commended the Chairman and the Committee for the progress being made with the consideration of the draft. He was glad to note that decisions were being taken essentially by consensus and that only occasionally had it become necessary to take a vote in the consideration of the five articles so far discussed.

2. His delegation found it desirable to convene, pur-

suant to General Assembly resolution 33/93, an international conference on plenipotentiaries to consider the draft Convention on Contracts for the International Sale of Goods, and to formulate a convention acceptable to all, in accordance with the basic objectives and principles of equality and mutual benefit set forth in the Declaration and Programme of Action on the Establishment of a New International Economic Order adopted by the General Assembly at its Sixth Special Session. Such a convention would be of great importance in the gradual removal and final elimination of the barriers to international trade, especially as they affected the developing countries, the elimination of certain inequitable and unjust situations in international trade and its promotion on the basis of equality and mutual benefit.

3. His delegation found the five articles already considered basically acceptable, although it would of course, suggest or support some amendments. It pledged its full co-operation in the efforts of all the participants and hoped that agreement would be reached on the text of a Convention which would attract the maximum number of ratifications by States.

*Articles 6 and 7 (A/CONF.97/C.1/L.5, L.15, L.16, L.22, L.28, L.49, L.52 and L.59)*

4. The CHAIRMAN invited the Committee to consider

article 6, dealing with the interpretation of the future convention, together with the amendments thereto proposed by Bulgaria (A/CONF.97/C.1/L.16), Czechoslovakia (A/CONF.97/C.1/L.15), France (A/CONF.97/C.1/L.22), Italy (A/CONF.97/C.1/L.49 and L.59), Norway (A/CONF.97/C.1/L.28) and the United States of America (A/CONF.97/C.1/L.5).

5. After a brief discussion in which Mr. ROGNLIEN (Norway), Mr. FARNSWORTH (United States of America) and Mr. BUHOARA (Romania) took part, the CHAIRMAN noted that there appeared to be a consensus in favour of considering as drafting amendments the proposals submitted by France (A/CONF.97/C.1/L.22) and the United States of America (A/CONF.97/C.1/L.5). If there were no objection, he would therefore take it that the Committee wished to refer those two amendments to the Drafting Committee.

*It was so decided.*

6. In reply to a question by the CHAIRMAN, Mr. ROGNLIEN (Norway) explained that his delegation's proposal (A/CONF.97/C.1/L.28) differed materially from the United States amendment (A/CONF.97/C.1/L.5); it was in fact more akin to the Italian proposal for a new article 6 *ter* (A/CONF.97/C.1/L.59). The Norwegian proposal that the reference to the "observance of good faith in international trade" should be deleted from article 6 and transferred to article 7 was designed to make it clear that the principle of good faith was relevant to the interpretation of the contract of sale, but not to the interpretation of the future convention as such.

7. Mr. GORBANOV (Bulgaria), introducing his delegation's proposal to insert in article 6 a new paragraph (2) (A/CONF.97/C.1/L.16), said that its purpose was to avoid the danger that the existing single paragraph might be interpreted in the sense of articles 2 and 17 of the Uniform Law of 1964 (ULIS) i.e. as ruling out the possibility of using the conflict-of-law rules of the *lex fori* to remedy gaps in the uniform rules on international sales, a solution that his delegation could not accept.

8. In the view of most specialists, the experience gained with articles 2 and 17 of ULIS had shown that it was a costly illusion to imagine that all gaps in an international legal instrument could be filled solely by means of the interpretation of its own provisions and without the help of private international law and that the conflict rules were necessary for the purpose of finding alternative substantive rules.

9. He stressed that the formula in the Bulgarian proposal—namely, resort to the law of the seller's place of business—was offered as a remedy of last resort. It offered an element of security in that the applicable law was thereby predictable. The *lex venditori* rule was embodied in many important agreements among countries members of CMEA and was steadily gaining ground in international trade practice. His delegation had therefore decided to incorporate that rule into its proposed new paragraph (2).

10. Mr. KOPAC (Czechoslovakia), introducing his delegation's amendment (A/CONF.97/C.1/L.15) said that it represented a compromise formula. It was offered to meet the contingency that the Bulgarian proposal (A/CONF.97/C.1/L.16)—which his delegation supported—did not gain acceptance.

11. Like the Bulgarian amendment, his delegation's proposal entailed the insertion of a new paragraph (2) to deal with the matter of the law applicable in the event of a gap in the Convention but, instead of specifying that it would be the *lex venditori*, it stated that the law applicable would be determined by the rules of private international law (i.e. the conflict-of-law rules).

12. Turning to the Italian proposal (A/CONF.97/C.1/L.59) that the problem of gaps should be "settled in conformity with the general principles on which this Convention is based", he said that the proposed wording was very dangerous. The questions to be settled were bound to be concrete in character and it was totally unrealistic to try and solve them solely with the aid of general principles.

13. The Italian amendment went on to state that, in the absence of such principles, the matters in question would be settled by "taking account of the national law of each of the parties". That formula for the distributive application of two different and possibly conflicting legal systems would be very difficult to apply in practice.

14. Mr. BONELL (Italy), introducing his delegation's two amendments (A/CONF.97/C.1/L.49 and L.59), said that their thrust was twofold. The first aim was to remove the reference to the principle of good faith from its existing place and transfer it to a new article 6 *ter* whereby it would clearly apply to the interpretation and performance of the contract of sale itself, and not to the application and interpretation of the Convention. The second aim was to deal with the problem of gaps, a problem which—as already indicated by the Bulgarian and Czechoslovak delegations—could not be settled by means of the provisions of article 6 alone but needed to be dealt with much more specifically.

15. However, in respect of the substance of the matter, the Italian proposal was diametrically opposed to both the Bulgarian and Czechoslovakian proposals.

16. As a matter of fact, according to them when a judge found a gap in the Convention he would have to refer to the relevant rule of conflict to determine the applicable national law. Such an approach doubtless had the advantage of being backed by a long tradition. Nevertheless his delegation would prefer the opposite approach, one more or less similar to that adopted in ULIS (articles 2 and 17), according to which the Convention, it being a step towards the creation of a new *jus commune*, should be interpreted. If necessary its gaps should be filled not on the basis of the rules taken from a particular national law, but on the basis of those principles and criteria which reflected the letter and spirit of the Convention itself.

17. Admittedly, reference to those principles might not solve the problem in a number of cases, since the general principles in question would often be difficult to determine. Accordingly, his delegation proposed, as a fall-back alternative, the reference to the "national law of each of the parties". That comparatively novel formula would, he believed, help to solve the difficulty. If there were no such formula, in the event of a gap in the Convention and of no relevant general principle being found therein, the result would be that the law of the stronger party to the contract would prevail. Under the Bulgarian proposal (A/CONF.97/L.16), it would be the law of the seller's place of business (*lex venditori*) and that was precisely the kind of solution which his own delegation was attempting to avoid.

18. The point he was making could be demonstrated by a reference to the "letter of confirmation" principle familiar in the practice of the Federal Republic of Germany: a buyer who received from the seller a letter of confirmation containing new claims found that his silence was construed as an acceptance of those claims, a principle that was virtually unknown in most other legal systems. Under the Bulgarian proposal, the *lex venditori* would be applied and a buyer would have no protection against that unfavourable solution, an injustice that would be prevented by the Italian proposal.

19. It had been objected that the formula "the national law of each of the parties" could be a source of difficulty because of the differences existing between the two national legislations concerned. In that type of situation, however, it was preferable—in the interests of international co-operation—that the solution should be drawn from both national laws involved, to the extent that there was common ground between them. Ultimately, the problem was always that of maintaining a proper balance of expectations as between the two parties to a contract of sale.

20. The CHAIRMAN said that many unification conventions made no mention of the gaps in their provisions since it was generally understood that national law should be applied to fill them, the answer to the question which national law was applicable being usually that designated by the rules of private international law.

21. In the case of uniform law on the international sale of goods, there were several possible solutions. At one extreme, there was article 17 of ULIS which laid down that questions not expressly settled therein were to be settled in conformity with the general principles on which the Convention was based. There was an echo of that idea in article 6 of the current draft Convention but it did not specifically mention gaps. The Italian proposal (A/CONF.97/C.1/L.59) was intermediate between the ULIS article and article 6, but it raised a number of questions. It was unclear whether the reference to taking account of the national law of each of the parties was intended to exclude the rules of private international law or to formulate a new rule of that law. Furthermore, it was by no means obvious how the term "national law"

was to be interpreted and whether it was to be determined by the habitual place of residence or nationality of the parties concerned or according to their status under private international law. The Czechoslovak proposal (A/CONF.97/C.1/L.15) rendered more explicit the interpretation which underlay article 6. The Bulgarian proposal (A/CONF.97/C.1/L.16) sought to unify private international law by making the law of the seller's place of business prevail. In connection with that proposal, it should be borne in mind that the 1955 Hague Convention on the law applicable to international sales of goods was due to be revised.

22. Mr. SEVON (Finland) said that the aim of the Czechoslovak proposal was to rule out the idea underlying ULIS articles 2 and 17, an idea which was unacceptable to his delegation also. However, that purpose would be achieved merely by rejecting the Italian proposal. The Bulgarian proposal conflicted with the provisions of the 1955 Hague Convention, which did not provide for all questions to be settled according to the law of the seller's place of business. There was no need to add anything to the existing text of article 6.

23. Mr. REISHOFER (Austria) said that the Bulgarian proposal had the merit of attempting to establish a definite rule, but experience had shown that it would not be appropriate in all cases. The Czechoslovak proposal was flexible but perhaps superfluous, since the same solution would be adopted under the existing text of article 6. It would be better not to include any rules on private international law in the draft Convention.

24. Mr. VISCHER (Switzerland) said that the Bulgarian proposal also referred to article 4(a). It would be difficult to find a rule that could appropriately be applied in all cases. He favoured the international spirit of the Italian proposal, but suggested that the last line should be changed to read "by taking into account the law designated by the conflict of law".

25. Mr. WAGNER (German Democratic Republic) thought it definitely advisable to indicate what was to be done if a question was not explicitly covered by the draft Convention.

26. He supported the Italian proposal in its reference to general principles, but thought that the last part of the proposal would cause problems in practice. The alternative to settlement in conformity with general principles should be the Czechoslovak proposal of settlement in conformity with the law applicable by virtue of the rules of private international law. As a compromise, his delegation could support the addition to the existing article 6 of a new paragraph 2 consisting of the first part of the Italian proposal as far as "in the absence of such principles" and the second part of the Czechoslovak proposal, starting with the words "shall be settled . . .".

27. Mr. BOGGIANO (Argentina) said that the Bulgarian proposal indeed contained the most precise rule but that what was needed in a draft convention on such a delicate matter was rather a very general rule. Further-



more, it would be inadvisable to introduce a rule which prejudged the revision of the 1955 Hague Convention.

28. He had some sympathy with the Italian proposal, but settlement in conformity with the general principles of the Convention might lead in practice to excessive freedom on the part of national courts in interpreting what those principles were and would be tantamount to handing questions over to the *lex fori*. Moreover, having regard to the national law of both parties, if their positions were irreconcilable, could lead to the adaptation of rules to meet the circumstances of particular cases and that would not be conducive to certainty at the international level.

29. His delegation had always assumed that gaps in a unification convention could be filled only by the traditional methods of private international law, but it now recognized that other possibilities did exist. The Czechoslovak proposal left undefined which private international law was to determine the applicable domestic law, though presumably that of a court or arbitration tribunal was meant. Apart from that doubt, his delegation was disposed to favour the Czechoslovak proposal.

30. Mr. HJERNER (Sweden) said that, in common with the other Scandinavian States, Sweden had adhered to the 1955 Hague Convention on the law applicable to international sales of goods. Its obligations under that Convention could not be reconciled with the current draft Convention if the Bulgarian proposal were adopted. The same objection applied to the latter part of the Italian proposal. There was, however, no such objection to the first part of that proposal or to the Czechoslovak proposal. His delegation was satisfied with the existing text of article 6 but it would be able to accept the suggested combination of the Italian and Czechoslovak proposals.

31. Mr. HERBER (Federal Republic of Germany) said there were merits in all the proposals. In his delegation's view, it was clear from article 6 that courts should not fall back on national law but should endeavour to solve questions not expressly dealt with in the draft Convention according to the general principles of that Convention, as prescribed by article 17 of ULIS. However, there were limits beyond which national law would have to be applied. It was then naturally desirable to specify, as the Bulgarian proposal did, which national law was applicable. Nevertheless, the Bulgarian proposal raised the problem of encroachment on the 1955 Hague Convention and also that of what limit should be placed on the principle of applying the law of the seller, which was defined in negative terms. His delegation could accept the compromise proposal put forward by the German Democratic Republic, but it felt that the same result could more easily be achieved by leaving the existing article 6 as it stood.

32. Mr. FOKKEMA (Netherlands) said that he would prefer to retain the text of article 6 unchanged, but could also support the proposal by the German Democratic Republic. The Bulgarian proposal was quite unacceptable.

33. The CHAIRMAN said that it appeared from the discussion that there was no support for the Bulgarian proposal or for the Italian proposal in its entirety. He therefore invited the Committee to vote on the original Czechoslovak proposal and on the combination of the Italian and Czechoslovak proposals suggested by the representative of the German Democratic Republic.

34. *The Czechoslovak proposal (A/CONF.97/C.1/L.15) was rejected by 20 votes to 7.*

35. *The combination of the Italian and Czechoslovak proposals, suggested by the representative of the German Democratic Republic, was adopted by 17 votes to 14, with 11 abstentions.*

36. The CHAIRMAN said that he took it that the Committee wished to send the amended text of article 6 to the Drafting Committee.

37. *It was so agreed.*

38. *The meeting was suspended at 4.45 p.m. and resumed at 5.05 p.m.*

39. Mr. DE LA CAMARA (Spain), speaking in explanation of vote, said that his delegation had voted in favour of the combined Italian-Czechoslovak proposal. It was preferable to have a rule for guidance where there were gaps in the draft Convention, but it should not be of a rigid nature. The proposal adopted by the Committee directed the judge to endeavour first of all to settle questions in accordance with the general principles underlying the draft Convention and not to resort immediately to the rules of conflict. Such a position was helpful to the Convention. He hoped that the Drafting Committee would see to it that due weight was given to the relative importance of the two criteria and that they were not put forward as simple alternatives.

40. Mr. BONELL (Italy), introducing his delegation's proposal for a new article 6 *ter* (A/CONF.97/C.1/L.59), said that there had been an exhaustive discussion in the UNCITRAL Working Group as to whether a reference should be included in the Convention to the principle of good faith which, in the view of some delegations, was liable to misinterpretation in an international instrument. His delegation had therefore added a reference to international co-operation to make it clear that only those aspects of the principle of good faith which were internationally acceptable would apply. The exact wording was open to discussion and a formula such as that proposed by the Norwegian delegation (A/CONF.97/C.1/L.28), might serve the purpose. In any case, article 6 was not the appropriate place for a reference to a principle of major importance in international trade relations. A separate article was required.

41. Mr. ROGNLIEN (Norway) said that his proposal A/CONF.97/C.1/L.28 was that the reference to the observance of good faith should be transferred from article 6 to article 7. He was not opposed in principle to the inclusion of such a reference, but it was not clear from the existing text of article 6 how good faith was to be interpreted in practice to general rules of law. It might

possibly mean, for example, that if a court were to find that one of the provisions of the Convention ran counter to the observance of good faith in international trade, it need not require it to be applied. As he saw it, the observance of good faith related not to the interpretation of the provisions of the Convention but rather to the contract between the parties, and its proper place was therefore under article 7 (3), which concerned intent. His proposal was similar to that of Italy (A/CONF.97/C.1/L.59), which also proposed the transfer of the reference to good faith to a separate article, but he was opposed to the reference in that proposal to the principle of international co-operation. Parties to a contract were not bound to further international co-operation, at least in their contracts of sale.

42. The CHAIRMAN pointed out that there was a proposal by Sweden (A/CONF.97/C.1/L.52) that article 7 should be deleted. He asked representatives who were in favour of the proposal by Italy and Norway to indicate their support, so that a long discussion could be avoided.

43. Mr. KIM (Republic of Korea) said that, as far as the principle of the observance of good faith in international trade was concerned, a distinction should be made between three possible areas of application. The first area was the interpretation and application of the provisions of the Convention, the second (as in the Italian proposal) was the relationship between the parties to a contract of sale, and the third was the determination of the intent of such parties. He believed that the application of the principle of good faith should be restricted to the second area, namely, the relationship between the parties to a contract.

44. Mr. SAMI (Iraq) said he supported the Norwegian proposal, since he shared the view that the principle of observance of good faith should be applied not to the interpretation of the Convention but rather to the contract between the parties.

45. Mr. HJERNER (Sweden) said that the problem of wording the provision dealing with the need to observe good faith had been under discussion in the UNCITRAL Working Group for some considerable time, and the present text represented a delicately-balanced compromise. He did not think that the proposals by Italy and Norway added very much to the original formulation. In his view it was not really necessary to have any provision on the subject of observance of good faith, but if it were decided to include it he would prefer the existing text.

46. Mr. BUHOARA (Romania) said he had substantial difficulties with the Norwegian proposal. Although he could see some merit in the Italian proposal, he would prefer to see the existing text retained.

47. Miss O'FLYNN (United Kingdom) said that, although it was desirable that parties to a contract of sale should act in good faith towards one another in the formation and performance of their contract, she did not think it appropriate to add to the Convention a new article of uncertain meaning such as that proposed by Italy. The principles of good faith which the parties were called

upon to observe were not defined; were they to be understood to be principles operating in all contracting States, or only in those States where the buyer and seller had their places of business? What would happen if the two sets of principles were found to be mutually conflicting? In addition, the legal effect of the Italian proposal was unclear; although it was couched in mandatory terms, there was no provision for the application of sanctions in the event of failure by one of the parties to observe good faith. It was true that article 6 made no provision for sanctions, either, but that article was directed towards the courts in the interpretation of the Convention, and not towards the parties to a contract. She was unable, therefore to support the Italian proposal.

48. If the Committee should decide to delete or modify article 6, she could support the Norwegian proposal, but would prefer to see the existing text retained.

49. Mr. MATHANJUKI (Kenya) said that he had serious doubts as to the possible effect of transferring the reference to the principle of good faith from article 6 to article 7. There had already been a lengthy discussion on how the provision on that principle was to be formulated, and the wording of the existing article 6 represented a compromise between various proposals. He did not think the Italian proposal expressed the concept as clearly as the original wording, and it referred only to the contract of sale, whereas article 6 referred to the need to observe good faith in interpreting the Convention. He would prefer the original wording.

50. Mr. FARNSWORTH (United States of America) said he too preferred the existing text, which, while not perfect, represented a useful compromise. As had been pointed out, there was some degree of uncertainty as to how the concept of good faith was to be interpreted in an international context. In the discussion in the UNCITRAL Working Group, it had been found difficult to produce concrete examples of how the principle would be applied when proposals similar to the Italian one had been put forward. Although all would agree that, in theory, it was desirable to behave in good faith, he felt that a provision such as the one proposed would be uncertain and dangerous in practice.

51. Mr. EYZAGUIRRE (Chile) said he too preferred the existing compromise text. With regard to the Norwegian proposal, the interpretation of the Convention and the law of contract were two completely different issues, and with regard to the Italian proposal, the existing text of article 6 already made explicit the general principles on which the Convention was based.

52. Mr. MASKOW (German Democratic Republic) said he agreed that article 6 should remain unchanged. Some reference to the need to observe the principles of good faith should be included in the Convention, in order to allow some flexibility in interpreting its provisions in the interests of furthering international trade.

53. Mr. FRANCHINI-NETTO (Brazil) pointed out that good faith was already understood to be one of the underlying principles of law and was implicit in any legal



transaction. He thought it unnecessary, therefore, to mention the principle in article 7. In view of the complexity of the two proposals that had been put forward, he would prefer to see the text of article 6 remain unchanged.

54. The CHAIRMAN said that there appeared to be little support for the Norwegian proposal.

55. Mr. ROGNLIEN (Norway) said that, under those circumstances, he would withdraw his proposal.

56. The CHAIRMAN said that the Committee now had before it only the Italian proposal. In the absence of any objections, he would take it that there was a consensus, first, against the adoption of that proposal, and secondly, in favour of the retention of the existing reference to good faith in article 6.

57. *It was so agreed.*

58. The CHAIRMAN invited comments on the Italian proposal for the insertion of a new article 6 bis (A/CONF.97/C.1/L.49).

59. Mr. MICCIO (Italy), introducing his proposal, said that the whole concept of interpretation of statements regarding the contract of sale dealt with under article 7 was of great importance. That concept contained three distinct elements: first, the common will of the parties involved in the contract, second the actual conduct of

those parties following upon the conclusion of the contract, and third (to cover cases where the first two elements were not sufficient) the understanding that a reasonable person would have had of statements on the conduct of the parties. He believed that the element of the common will of the parties was the one which should be most generally applied and which should thus be placed first.

60. Mr. PLANTARD (France) supported the Italian proposal. It would be useful to have a reference to the common will of the parties in the context of article 7.

61. Mr. KHOO (Singapore) said he did not find the proposal acceptable. It implied that a court would be compelled to ascertain the state of mind of the parties to the contract, and that would introduce an element of uncertainty into the interpretation and application of the Convention. The court should rather direct its attention to the actual provisions of the contract which the parties had concluded. The conduct of the parties was already mentioned under article 7.

62. The CHAIRMAN said he noted that there was little support for the Italian proposal. If there were no objection, he would therefore consider that proposal rejected.

63. *It was so agreed.*

*The meeting rose at 6 p.m.*

## 6th meeting

Friday, 14 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.6

*The meeting was called to order at 10 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

Article 7 (A/CONF.97/C.1/L.31, L.33, L.43, L.50, L.52, L.53)

Paragraph 1

1. The CHAIRMAN said that as article 7 was to be discussed paragraph by paragraph, the Swedish amendment

(A/CONF.97/C.1/L.52) proposing that the article as a whole should be deleted, would be left till last. He suggested that the Italian proposal (A/CONF.97/C.1/L.50) to delete paragraph 1 should be considered first.

2. Mr. MICCIO (Italy) said his proposal was linked to the proposal submitted by his delegation the previous day to add an article 6 bis to the Convention. As the latter proposal had been rejected, he withdrew his amendment to article 7.

3. The CHAIRMAN then suggested that the Committee should take up the amendments proposed by India and the United Kingdom (A/CONF.97/C.1/L.31, L.33).

4. Miss O'FLYNN (United Kingdom) reminded the meeting that her country had already indicated the reasons for the amendment in its written comments (A/CONF.97/8/Add.3); it seemed to her that to say that a party "could not have been unaware" of the other party's intent was to say that the party must have known what it was.

5. Mr. KUCHIBHOTLA (India) said that the expression "or could not have been unaware" in article 7 was not well chosen. Article 8 contained the expression "of which the parties . . . ought to have known", which was more objective. His delegation proposed that a similar expression should be used in article 7, which would give the judge a better criterion for determining the parties' intent.

6. Mr. ROGNLIEN (Norway) commented that it was more difficult for a judge to determine what a party knew than to establish what a party "could not have been unaware of". The latter wording meant that a judge could not believe or accept, having regard for the circumstances which were in practice mostly external, that a party had not been aware of the other party's intent. It contained a stricter criterion than "ought to have known" but one that was hardly less objective. He supported the present text.

7. Mr. FARNSWORTH (United States of America) said that there was a big difference between the text of the draft Convention and the United Kingdom proposal. It was difficult to determine whether a party was aware or not of the other party's intent. The text of the draft Convention seemed clearer. The Indian proposal, however, seemed to him to improve the text and his delegation was prepared to support it.

8. Mr. BENNETT (Australia) was in favour of the United Kingdom proposal. It seemed to him that the Indian proposal would be difficult to accept, as the expression "ought to have known" implied a certain norm, i.e. an obligation. Other articles imposed obligations, but not articles relating to general interpretation.

9. Mr. WAITITU (Kenya) said that the Indian proposal went too far. It seemed to impose on one party the obligation to be aware of the other party's intent. His delegation did not wish the existing text of the draft to be changed.

10. Mr. HJERNER (Sweden) also found that the Indian proposal went too far. It seemed to him that the United Kingdom proposal was more easily acceptable, but he felt that interpretation should start from the ordinary sense of the terms and not from what one party felt or thought. The Conference might be guided by the example of the Vienna Convention on the Law of Treaties, which stated that a treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

11. Mr. INAAMULLAH (Pakistan) noted that the discussion was turning on a question of the choice between the ideas expressed by the words "ought" and "can". The word "ought" had moral connotations which needed to be understood in the context of critical ethical philosophy. In Kantian philosophy "ought" had an absolute connotation as the categorical imperative. Later Kantian interpretation pointed out that an absolute "ought" was meaningless unless it involved a realistic and material possibility! As such, any meaningful inter-

pretation of "ought" always implied "can". He asked the delegates to keep in mind the philosophical background of those two words when using them in a legal text. His delegation did not support either of the proposals submitted by the United Kingdom and India; it was in favour of the existing text of the draft.

12. Mr. SAMI (Iraq) said that both the terms used in article 7 of the draft Convention and those used in the Indian proposal could lead to numerous problems of interpretation. The United Kingdom proposal seemed to him to be easier to apply, and his delegation therefore supported it.

13. Mr. MICHIDA (Japan), observing that representatives were divided over the United Kingdom proposal, reminded the meeting of the famous *Peerless* case. That had been the name of two different vessels and the purchaser of the cargo of the *Peerless* had relied on possible confusion between the two. With the existing text of article 7, any confusion would have been impossible, as the purchaser "could not have been unaware" of the existence of two vessels of the same name. If the United Kingdom proposal was accepted, there would no longer be an objective criterion for settling such cases. For that reason his delegation could not support that proposal.

14. Miss O'FLYNN (United Kingdom) replied that the objective criterion was stated in article 7, paragraph 2, and that if paragraph 1 was not applicable, paragraph 2 would be.

15. The CHAIRMAN invited the Committee to vote on the United Kingdom proposal (A/CONF.97/C.1/L.33).

16. *The proposal was rejected.*

17. The CHAIRMAN invited the Committee to vote on the Indian proposal (A/CONF.97/C.1/L.31).

18. *The proposal was rejected.*

19. *Article 7, paragraph 1, was adopted.*

#### Paragraph 2

20. Mr. SHAFIK (Egypt) explained that his amendment (A/CONF.97/C.1/L.43) was not a purely drafting one but was intended to make clear what interpretation was to be given to the expression "that a reasonable person would have had in the same circumstances", which did not seem to be sufficiently defined by the criteria given in paragraphs 2 and 3.

21. Mr. STALEV (Bulgaria) said that his delegation appreciated the reasons for the Egyptian amendment and supported it.

22. Mr. ROGNLIEN (Norway) and Mr. SHORE (Canada) also supported the Egyptian amendment.

23. Mr. HERBER (Federal Republic of Germany) said that the Egyptian amendment was useful, even though he had some reservations as to the validity of the expression "acting in the same capacity" in the English text of the amendment.

24. Mr. FARNSWORTH (United States of America)

said that he did not see the practical utility of the Egyptian amendment and would like clarification on the subject.

25. Mr. LI Chih-min (China) said that the Egyptian amendment defined the concept of a "reasonable person" better.

26. Mr. DABIN (Belgium) supported the Egyptian amendment, which was in line with the interpretation criteria of civil law systems. He explained for the benefit of the United States representative that if the qualification proposed in the Egyptian amendment was not added to the text, it would be the judge or arbitrator himself who would interpret the conduct of the party concerned.

27. Mr. PLUNKETT (Ireland) said that the existing text of paragraph 2 was sufficiently clear and that the expression "in the same circumstances" already met the concern expressed by the Belgian representative.

28. Mr. MANTILLA-MOLINA (Mexico) said that the wording proposed in the Egyptian amendment was nevertheless less abstract and more explicit.

29. Mr. FARNSWORTH (United States) said that he was not convinced by the arguments put forward by delegations supporting the Egyptian proposal. He did not see the utility of an amendment whose effect would be to base the interpretation of one party's conduct on a subjective element.

30. Mr. SHAFIK (Egypt) pointed out that his amendment had been submitted in French and that the English wording "acting in the same capacity" did not perhaps have quite the same meaning as the French wording "*de même qualité*". The latter phrase, which had a precise, not a general, meaning, referred to a person from the same background as the person concerned and engaged in the same occupation, the same trade activities for example.

31. The CHAIRMAN said that, if there was any divergence between the different language versions of the Egyptian proposal, the text of that proposal could be sent to the Drafting Committee to be brought in line with the original French text.

32. Mr. HJERNER (Sweden) said that the Egyptian amendment left some doubts as to who the reasonable person was who should serve as a criterion. Which party should be taken into account, the buyer or the seller? Furthermore, as had been pointed out by the Japanese representative, what was considered reasonable, for example, by an Indian trader, was perhaps not so considered by a trader from Liverpool. Bearing in mind those considerations, he himself preferred the existing text.

33. Mr. ROGNLIEN (Norway) said that, as he understood it, it was clear that the reasonable party was the second party who could not be unaware of the intent of the party concerned. In any case, what was important was that the text should be precise, and the Egyptian amendment was precise in that it referred to a reasonable person in the same situation and of the same occupation

engaged in the same particular trade as the party concerned.

34. Miss O'FLYNN (United Kingdom) said that, for the reasons already given by the United States and Irish representatives, the Egyptian amendment was not expedient. She shared the doubts of the United States representative concerning the English text and emphasized that English law had no concept analogous to that contained in the Egyptian amendment.

35. Mr. KHOO (Singapore) said that article 7 was simple in structure. The first paragraph gave the criteria by which a party's conduct was to be interpreted when the other party was aware of the intent of the party concerned. The personal element thus played an important role in that paragraph. Paragraph 2, on the other hand, was applicable when there was any doubt about the conduct of the party concerned and introduced an objective element of appreciation. The Egyptian amendment destroyed the balance between the subjective and the objective elements and was consequently unacceptable to the delegation of Singapore.

36. Mr. EYZAGUIRRE (Chile) said that, in principle, the existing text was sufficient to permit the judge to interpret the conduct of the party concerned. However, the Egyptian amendment added useful information by specifying that it was a matter of parties having the same background and the same occupation or field of trade, and it deserved to be supported.

37. Mr. ADAL (Turkey) said that the Egyptian amendment was useful but that the English version of the text was not clear from the legal point of view and should be referred to the Drafting Committee.

38. Mr. SHORE (Canada) also pointed to a legal divergence in the English and French versions of the Egyptian proposal.

39. Professor MATTEUCCI (UNIDROIT) said that a well-known legal author had criticized ULIS for having abused the word "reasonable". According to that author, the adjective could be applied to a period of time or to behaviour but not to a person, who had always to be assumed to be reasonable.

40. Mr. TRÖNNING (Denmark) said he could support the Egyptian amendment if, after the words "acting in the same capacity", the words "as the other party" were added.

41. The CHAIRMAN put the Egyptian proposal to the vote on the understanding that, if it were adopted, the text would be sent to the Drafting Committee for it to find a satisfactory wording in English, with due regard for the Danish representative's proposal.

42. *The Egyptian proposal (A/CONF.97/C.1/L.43) was rejected.*

43. Mr. MEHDI (Pakistan) submitted his delegation's amendment to paragraph 2 of article 7 (A/CONF.97/C.1/L.53) and explained that he proposed to add the word "unavoidably" to that paragraph in order to nar-

row down the subjective criteria for interpretation which were given therein and to facilitate the task of the arbitrator or judge. If his proposition was adopted, there was no reason why it should not be sent to the Drafting Committee so that the texts could be harmonized in the different languages.

44. *The Pakistani proposal was rejected.*

45. *Article 7, paragraph 2 was adopted.*

### Paragraph 3

46. Mr. HJERNER (Sweden), introducing his delegation's amendment (A/CONF.97/C.1/L.52), said that the discussion had shown that there were wide differences of view on the question dealt with in the article. In his opinion, it was neither necessary nor useful to set forth new rules for the interpretation of contracts, which might be contrary to those established in section 3 of the Vienna Convention on the Law of Treaties. That was why his delegation had proposed that article 7 should simply be deleted.

47. Mr. DABIN (Belgium) said that the International Chamber of Commerce in Paris had expressed an opinion similar to that of the representative of Sweden. The discussion had shown that it was difficult to set out in the Convention rules for the objective interpretation of the conduct of the parties. In that respect, the criteria depended mainly on the concepts contained in the general law of contracts and not only on the law relating to international sales. Those concepts were expressed in different terms depending on the legal formulas: in French, it was the notion of "in good faith (*de bonne foi*)"; in German law, the terms "*kennen*" and "*kennen müssen*" were to be found, and so forth. The expression "*personne de même qualité*", which had been translated into English as "person acting in the same capacity", had meant different things to the representatives of different States. Consequently, he thought it useless to try to find a formula to cover all legal systems in the Convention.

48. Mr. FARNSWORTH (United States of America) explained that the objections he had raised to the Egyptian amendment to paragraph 2 did not mean that he was generally opposed to article 7 and, in fact, they were aimed solely at the English version of the text. He thought that article 7 should be retained, because it was of practical use in solving the particularly complex problems posed by contracts.

49. Miss O'FLYNN (United Kingdom) agreed with the representative of Sweden that it was not useful to introduce rules of interpretation of the conduct of parties into the draft Convention. Article 7 raised substantive problems and her delegation was concerned that the more subjective tests in paragraph 1 might take precedence over more objective tests in paragraph 2. She therefore supported the Swedish proposal to delete article 7.

50. Mr. WAGNER (German Democratic Republic) said that the existing text of article 7 did not give rise to major differences of views on the interpretation of con-

tracts. It was a balanced compromise and deserved to be retained.

51. Mr. BENNETT (Australia) said he agreed with the representative of the United States that article 7 was a useful one because it would be of material help in interpreting the Convention and provided a number of elements which could be used as a basis for defining the intentions of the parties. However, no similar provision existed in the common law countries, due to the prohibition of "parol evidence", a rule which should be amended in respect of international trade.

52. Mr. BLAGOJEVIĆ (Yugoslavia) said that he too considered that article 7 was useful and should be included in the general conditions for contracts of sale because it made it possible to introduce a certain degree of uniformity.

53. Mr. SAMI (Iraq) said that article 7, as a whole, established a set of rules for interpretation, and that the third paragraph rounded off the set. It should not therefore be deleted; its maintenance would introduce a unifying element in the rules of trade law.

54. Mr. HERBER (Federal Republic of Germany) said that the deletion of article 7 would leave a gap in the Convention which would have to be filled by reference to national law. His delegation was thus strongly opposed to its deletion.

55. *The Swedish proposal (A/CONF.97/C.1/L.52) to delete article 7 was rejected.*

*The meeting was suspended at 11.25 a.m. and resumed at 11.50 a.m.*

*Article 8 (A/CONF.97/C.1/L.6, L.19, L.23, L.24, L.34, L.40, L.44 and L.64)*

### Paragraph 1

56. The CHAIRMAN pointed out that the draft amendments to article 8 all referred to paragraph 2, except for that of Egypt, which proposed the addition of a new paragraph.

57. *Article 8, paragraph 1, was adopted.*

### Paragraph 2

58. Mr. LI Chih-min (China), introducing his delegation's draft amendment (A/CONF.97/C.1/L.24), said that its purpose was to make the text more precise by adding the word "reasonable" before "usage".

59. Mr. ROGNLIEN (Norway) pointed out that subparagraph (a) of article 4 should not be overlooked in that connection. If a usage was not reasonable, it might not be valid under the applicable law. The point was whether or not a usage was valid. If it was not, it was unnecessary to ask whether it was reasonable.

60. Mr. BENNETT (Australia) said he admitted that, when the parties had agreed to be bound by a usage, that usage was applicable to the contract. However, care

should perhaps be taken not to widen the scope of that provision in the absence of agreement by the parties. A party unfamiliar with a law might be regarded as bound by a usage of which he was quite unaware. Paragraph 2 already laid down certain conditions for the application of usages, but the qualification proposed by the Chinese delegation made the text more consistent with the principles of common law. His delegation thus supported the proposal.

61. Mr. HERBER (Federal Republic of Germany) said he recognized that the usage applicable to the contract should of course be reasonable, but was reluctant to admit that that idea should be expressed explicitly. For a usage to be applicable, it should exist and be recognized as being valid. If it was not reasonable, or if, for example, it was contrary to public order, it would not be a usage. However, the existence of such a provision in the Convention might give a free rein to interpretations and create difficulties. His delegation was thus unable to support the Chinese draft amendment.

62. Mr. BOGGIANO (Argentina) said he had some doubts as to the advisability of tackling the question of the validity of usages, in view of the first paragraph of article 4. He also found it difficult to imagine an unreasonable usage. If the conditions set forth in article 8 (2) were fulfilled, there would be no reason to consider the case of a usage which was not reasonable. His delegation was thus unable to support the Chinese proposal.

63. Mr. SAMI (Iraq) said he noted that article 8 tended to clarify the presumed will of the contracting parties. Failing express agreement to the application of a usage, paragraph 2 merely set forth the conditions under which it could be assumed that that usage should be followed. His delegation had difficulty in imagining an unreasonable usage and wondered if it would be the duty of judges or arbitrators to take a decision on that point. In view of those difficulties, it was unable to support the Chinese proposal.

64. Mr. GOLDSTAJN (Yugoslavia) said he supported the Chinese proposal despite the fact that the existing text was already clear on the point. It should not, however, be forgotten that there would be new countries and enterprises entering the international market which would not be familiar with the usages of international trade. It should also be remembered that international arbitrators were often laymen or professional persons belonging to certain associations and that the sole remedy was, as a last resort, supervision by the national courts, which also supervised international arbitration.

65. Mr. DABIN (Belgium) said that the matter would perhaps be clearer if the Chinese delegation could quote one or more examples of unreasonable usages.

66. Mr. LI Chih-min (China) said, in connection with the relationship between articles 4 and 8, that article 4 drew attention to the question of the validity of usages, which was justifiable in chapter I which defined the scope of the Convention, whereas article 8 covered usages themselves, whether reasonable or not. In reply to

the question by the Belgian representative, he reminded him that meetings of UNCTAD were being held at Geneva on the elimination of restrictive trade practices. Trade restrictions imposed by certain trade practices could be called unreasonable.

67. Mr. INAAMULLAH (Pakistan) said he agreed that the very existence of a usage implied recognition of its reasonableness. However, he could see no reason why it should not be stated in the text that the usage should be reasonable, in order to protect the seller and the buyer.

68. Mr. TRÖNNING (Denmark) supported the Chinese draft amendment.

69. The CHAIRMAN invited the Committee to vote on the Chinese amendment.

70. *The Chinese amendment (A/CONF.97/C.1/L.24) was rejected.*

71. Mr. BLAGOJEVIĆ (Yugoslavia) explained that he had voted in favour of the Chinese amendment since, in his view, it should constitute a step forward towards the recognition of usages established with the consent of all peoples, whereas commercial usages to date had been formed by a restricted group of countries only whose position did not express worldwide opinion.

72. Mr. ANDRUSCHIN (Byelorussian Soviet Socialist Republic) said that he approved the draft Convention as a whole, because he was convinced that, when adopted, it would contribute to the establishment of the new economic order and the improvement of international economic relations. The Czechoslovak draft amendment to article 8 (2) would provide a useful clarification, since the usages referred to concerned questions which were not governed by the Convention.

73. Mr. KOPAC (Czechoslovakia) said that, although he was well aware that article 8 was regarded as being the result of a compromise, he had grave doubts about its content and the principles it set forth. The wording of the article implied that in all cases, usages had precedence over the Convention. That principle was valid when it was a question of usages which the parties had agreed to apply in accordance with paragraph 1 of the article, but that was not the case when it was merely a question of usages to which they were considered to have impliedly referred, as set forth in paragraph 2. To give precedence to usages in the latter case would be tantamount to reducing the scope of the Convention. If the existing text of paragraph 2 were retained, a party which noted that certain provisions of the Convention were contrary to its interests would be tempted to substitute a usage which was unknown to the other party. Usages were often vague and their existence could be proved only by experts, whose opinions often differed. It should not be forgotten also that the buyers and sellers from some countries, particularly those from the developing countries, had not participated in the establishment of usages and would yet be bound by them, even if those usages were contrary to the Convention. It therefore seemed logical to limit the usages covered by paragraph 2 to

those which were not contrary to the Convention, unless the parties decided otherwise.

74. He also hoped that trade terms would be the subject of a special provision and in that connection thought that the Egyptian draft amendment (A/CONF.97/C.1/L.44) might serve as a basis for discussion.

75. Mr. MANTILLA-MOLINA (Mexico) expressed serious doubts as to the advisability of the Czechoslovak proposal. Any specific usage known to the parties should override the Convention because, if the parties decided to conform to a usage, it was because it responded to their needs with respect to a given contract. The problem was slightly more delicate when the usage was not known, but the solution should be the same because knowledge and consequently agreement by parties with regard to that usage was presumed.

76. He also thought that the use of the word "and" in the second paragraph of article 8 in the phrase "widely known to, and regularly observed by" was excessive and should be replaced by "or".

77. Mr. BOGGIANO (Argentina) said that, in his view, the Convention undoubtedly gave precedence to the principle of the autonomy of the will of the parties. If that principle was fully applied, the parties could decide, expressly or even impliedly, to apply a usage to a contract, all the more so because article 8 (2) admitted agreement to the contrary by the parties, which exactly corresponded, at least in the understanding of his delegation, to the provisions of article 5 which permitted the parties to derogate from the Convention both expressly and impliedly. The protection given in the Convention to the principle of autonomy led him to think that the Czechoslovak proposal was unacceptable.

78. He preferred not to express an opinion on the last comment by the representative of Mexico for the moment, because he did not yet understand whether it was a drafting or a substantive amendment.

79. Miss O'FLYNN (United Kingdom) said that she could not support the Czechoslovak proposal because her delegation considered that the parties should be bound by any usage which complied with the provisions of article 8 (2), even if it was not compatible with the Convention. The conditions set forth in that paragraph were strict enough to protect parties which did not know of a given usage.

80. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that since the Convention was to govern the relations between buyer and seller, it should be clear and precise and in that respect the Czechoslovak proposal was an improvement. It concerned usages which were not covered by the Convention and over which the Convention should prevail. The Soviet delegation thus supported the Czechoslovak proposal.

81. The CHAIRMAN invited the Committee to vote on the Czechoslovak amendment.

82. *The Czechoslovak amendment (A/CONF.97/C.1/L.40) was rejected.*

83. The CHAIRMAN requested the representative of France to introduce his draft amendment (A/CONF.97/C.1/L.23) which would not be discussed or put to the vote because it was merely a drafting amendment to article 8 (2).

84. Mr. PLANTARD (France) said that in fact it proposed to delete a repetition in the French text, which would bring it closer to the English text.

85. Mr. ROGNLIEN (Norway) and Mr. SEVON (Finland) said that the French draft amendment should be sent to the Drafting Committee where such questions should be resolved.

86. The CHAIRMAN invited the Committee to vote on the French amendment.

87. *The French amendment (A/CONF.97/C.1/L.23) was adopted.*

88. Mr. FARNSWORTH (United States of America) said that his draft amendment (A/CONF.97/C.1/L.6) did not call for any special comment. It stipulated that usages concerning the formation of contracts could also vary the provisions of the Convention. Examples might arise under article 14, because it was conceivable that an offer might not be revocable, and under article 16 (1) because silence could, in certain cases, amount to acceptance.

89. Miss O'FLYNN (United Kingdom) and Mr. SHAFIK (Egypt) supported the United States proposal.

90. Mr. KIM (Republic of Korea) said it was unnecessary to speak of formation in article 8 because the Convention covered contracts for international sales and the word "contract" could be taken to include its formation.

91. Mr. PLANTARD (France) pointed out that the United States proposal would remove the French text still further from the English one, which he thought was a nuisance although he was not yet in a position to assess the consequences. The French text made no mention of the contract or its formation. He was quite satisfied with the general wording of the text and would prefer that it were not changed. To satisfy the United States, it might perhaps be better to bring the existing English text into line with the French text, which was a matter of drafting.

92. The CHAIRMAN said he wondered if it was merely a question of drafting, because it was necessary to decide which text was the right one.

93. Mr. FARNSWORTH (United States of America) said that he personally could quite easily agree to give the English text a more general character and to delete the reference to the contract.

94. Mr. MICHIDA (Japan) supported that proposal.

95. Mr. ROGNLIEN (Norway) said that he was not in favour of the idea of simplifying the text of article 8 (2), because it was very important for the text to be precise. Usage was now considered to be part of the contract and that wording implied that usages were included whenever



the provisions of the Convention referred to the contract.

96. Mr. HERBER (Federal Republic of Germany) pointed out that, logically, usage could be involved in the formation of contracts, even at the very beginning of the relations between the seller and the buyer. He would

prefer the French text to be brought into line with the English text and requested that the idea of the formation of contracts should be maintained in the United States draft amendment. It was for the Drafting Committee to find a satisfactory formula.

*The meeting rose at 1 p.m.*

## 7th meeting

Friday, 14 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.7

*The meeting was called to order at 3.10 p.m.*

### CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

Article 8 (continued) (A/CONF.97/C.1/L.6, L.24, L.34, L.40, L.44, L.64)

1. The CHAIRMAN, inviting the Committee to consider the United States proposal (A/CONF.97/C.1/L.6), pointed out that there was a considerable discrepancy between the existing English and French texts of article 8 (2). Whereas the English text referred specifically to usage being made applicable to the contract, the French text merely mentioned usage without reference either to the contract or to its formation. The French representative had asked the United States representative whether he could agree to bring his proposal into line with the French text by deleting the reference to the contract.

2. Mr. FARNSWORTH (United States of America) confirmed that his proposal was now to bring the English text into line with the French. It might be envisaged that there would eventually be one law on formation, one on sales and one covering both; the new text would be applicable to all three possibilities.

3. Mr. KHOO (Singapore) could not agree to the United States proposal. The question was not merely one of aligning two texts, but involved an issue of substance, namely, whether or not the principle established in article 8 (2) should apply to the formation of the contract as well as to the contract itself. Article 8 was designed to cover a situation in which a contract had already come

into existence. It was the fruit of extensive discussions in the UNCITRAL Working Group and represented a compromise solution. To extend it to cover also the formation of a contract would have very serious implications and would introduce an element of uncertainty, since it would mean that parties to an international sales contract could never be certain whether a contract had in fact come into existence. He was therefore strongly opposed to the extension of article 8 (2) proposed by the United States.

4. Mr. MANTILLA-MOLINA (Mexico) said his position was the opposite to that of the previous speaker. The existing French version appeared to him to give rise to uncertainty since it mentioned only parties but no contract, and if no contract existed there could be no parties. He favoured the original United States proposal, which made it clear that the provision was to be applicable also to formation.

5. Mr. KUCHIBHOTLA (India) said that the history of the provision showed that it was a compromise solution designed to apply solely to the contract. He could not support either the United States or the Mexican arguments.

6. Mr. ROGNLIEN (Norway) shared the views of the Mexican representative. It was necessary to refer to the contract, since it had already been decided that usage could derogate from the provisions of the Convention without adopting an express provision to that effect. If the reference to the contract was not included, that important point would not be made clear in article 5.

7. The CHAIRMAN invited the Committee to vote on whether article 8 (2) should be applicable both to the contract and to its formation. A vote against would be equivalent to a vote in favour of the view that it should be applicable only to contract.

8. *The result of the vote was 19 in favour and 17 against, with 3 abstentions.*

9. The CHAIRMAN said that text based on the first

formulation would accordingly be forwarded to the Drafting Committee.

10. Mr. DABIN (Belgium) pointed out that in the French text as it stood, the equivalent of the words "unless otherwise agreed" now made little sense.

11. The CHAIRMAN said that that point could be taken up in the plenary.

12. Mr. KUCHIBHOTLA (India), introducing his delegation's amendment (A/CONF.97/C.1/L.34), said that as it stood article 8 (2) contained two criteria for the implied application of usage to a contract; first, the knowledge of the usage on the part of the parties, and secondly, the fact that the usage was widely known and regularly observed. In his view, the second criterion was contradictory; if a usage was widely known but nevertheless not regularly observed, it would not be binding. The words "or ought to have known" already covered the phrase "which in international trade is widely known . . . etc.", and that phrase could accordingly be deleted.

13. Mr. BENNETT (Australia) could not agree to the Indian proposal. It was true that to some extent the words which it was proposed to delete performed the same task as "ought to have known", but he felt that without them the provision did not adequately indicate the nature of the usage that was impliedly made applicable. He preferred to keep the existing wording.

14. Mr. HERBER (Federal Republic of Germany) supported the Indian proposal, which had the merit of simplicity and would avoid misunderstandings.

15. Mr. MANTILLA-MOLINA (Mexico) also supported the Indian proposal. The existing text seemed to him excessive in requiring that usage should both be known to the parties and regularly observed; it implied that a usage which was known, but not necessarily observed, would be invalid.

16. Mr. ROGNLIEN (Norway) thought, on the contrary, that mere knowledge of a usage was not enough to make it applicable. He preferred the existing text.

17. Mr. BONELL (Italy) also found the proposal unacceptable. If the intent was to simplify the text, it would be better to adopt the formula agreed in ULIS, which had been more precise. Furthermore, it did not seem appropriate to adopt the proposed wording in view of what had already been decided in regard to the United States proposal. Finally, the phrase "at the time of the contract" seemed to him too vague and liable to cause misunderstandings. He preferred the existing text.

18. Mr. SZÁSZ (Hungary) was also opposed to the proposal. The existing text was more specific and would thus avoid possible misunderstandings.

19. Mr. LEBEDEV (Union of Soviet Socialist Republics) noted that during the preparatory discussions the question of usage had been one of the issues that had been most fiercely debated. The present formulation of article 8 (2) represented a hard-won compromise which it

would be undesirable to change at this stage. However, the Indian proposal was useful in that it used as a point of reference the time of conclusion of the contract, and that was perhaps an element which could be taken into account in drafting the final version.

20. Mr. HJERNER (Sweden) and Mr. PONTOPPIDAN (Denmark) supported the Indian proposal.

21. Miss O'FLYNN (United Kingdom) said she could agree to the Indian proposal to the extent that if parties knew of a usage, it was not necessary that that usage should also be generally known. However, she had some hesitation when it came to parties who were not aware of a usage but ought to have known of it; in such a case, it would be better if usage were to be defined as widely known and regularly observed. The article was therefore clearer as it stood.

22. Mr. WAGNER (German Democratic Republic) could support the extension of the scope of article 8 (2) on the understanding that it was qualified along the lines of the present text. It was important, particularly for the developing countries, that usage should be of the kind observed in the same regional area and in the same trade as that of the parties.

23. Mr. MINAMI (Japan) could not support the Indian proposal, considering that the last phrase of article 8 (2) constituted an important protection for parties who did not actually know the usage concerned.

24. The CHAIRMAN, noting that there seemed to be a substantial majority against the Indian proposal (A/CONF.97/C.1/L.34), said that if there were no objection he would consider it rejected.

25. *It was so decided.*

26. Mr. MEHDI (Pakistan), introducing his delegation's amendment (A/CONF.97/C.1/L.64), pointed out a drafting error: the phrase proposed was in fact to be added to the existing text, not to be substituted for the words "unless otherwise agreed". His aim in attempting to widen the scope of the clause had been to take into account the need to protect the interests of new entrants into international trade who might not be fully aware of existing trade practices.

27. Mr. ADAL (Turkey) and Mr. MATHANJUKI (Kenya) supported the Pakistan proposal.

28. Mr. HJERNER (Sweden) said that the Pakistan amendment (A/CONF.97/C.1/L.64) seemed attractive at first sight but raised the question of what conduct was relevant for purposes of interpretation, especially in regard to implied acceptance. Doubts came immediately to mind regarding the relevant time: was the conduct in question the conduct at the time of conclusion of the contract or that of a later time, when a reluctant party failed to comply with the custom in question? He accordingly urged that the text should be left as it stood.

29. Mr. WAGNER (German Democratic Republic) said that the Pakistan amendment was unnecessary; the



problem with which it attempted to deal was already settled by article 7, paragraph (3).

30. Mr. MEHDI (Pakistan), replying to the Swedish representative, explained that in his amendment "conduct" meant conduct at the time when the contract came into being, i.e. on its formation or conclusion. Conduct at a time when the contract was already in existence could no longer be taken as implying acceptance of a usage.

31. As for the comment by the representative of the German Democratic Republic, he felt that the inclusion of the reference in article 7, paragraph (3) was all the more reason for reiterating the point in article 8, paragraph (2).

32. Mr. WANG Tian ming (China) said that, for the reasons stated by other speakers during the discussion, his delegation supported the amendment by Pakistan (A/CONF.97/C.1/L.64).

33. *The Pakistan amendment (A/CONF.97/C.1/L.64) was rejected by 18 votes to 15.*

34. The CHAIRMAN invited the Committee to consider together the amendments to article 8 submitted by Egypt (A/CONF.97/C.1/L.44) and Sweden (A/CONF.97/C.1/L.19), since they had the same purpose.

35. Mr. HJERNER (Sweden) said that he would support the Egyptian proposal (A/CONF.97/C.1/L.44) in preference to his own delegation's proposal (A/CONF.97/C.1/L.19); the latter should therefore be treated as an alternative to fall back on if the Egyptian proposal was rejected.

36. The aim of the sponsors of those two proposals had been to cover the question of the interpretation of trade terms, such as "FOB", "CIF", "landed" and "net weight". The 1964 ULIS—and also the first draft of the present Convention—had contained a provision such as the one in the Egyptian proposal, which had been dropped in the present draft, not because it was controversial but merely because the point was felt to be already covered by other provisions, especially those on usage. But in fact that reason was not a good one. The interpretation of a trade term could well lead to its being assigned a particular meaning without reference to any usage. For those reasons, he urged the Committee to adopt the Egyptian proposal (A/CONF.97/C.1/L.44), or failing that, the proposal of his own delegation (A/CONF.97/C.1/L.19).

37. Mr. DABIN (Belgium) shared the views of the representative of Sweden. He saw no reason why the draft should make no reference to INCOTERMS; those terms did not really come under the heading of "usages". He therefore supported the Egyptian proposal to include in the draft the excellent ULIS provision on trade terms. Failure to incorporate such a provision would involve the risk that the Convention might serve to change the customary manner of interpreting INCOTERMS.

38. Mr. SHAFIK (Egypt) said that his delegation's

amendment (A/CONF.97/C.1/L.44) was likewise intended to reintroduce the reference to trade terms. The wording had been taken literally from article 9, paragraph 3, of ULIS in order to avoid all drafting problems. The problems connected with the interpretation of trade terms were not necessarily the same as those involved in the interpretation of usage. The former problems should therefore have their special place in the draft; they could not be considered to be covered by the provisions on usage.

39. Mr. BONELL (Italy) expressed his warm support for the Egyptian and Swedish proposals. Considering the great frequency with which trade terms were used in international transactions and the difficulties which daily arose because of the differences in the meanings attached to them by the various national legislations, it was obvious that much of the litigation arising out of sales contracts was bound to be concerned precisely with the interpretation of trade terms. Accordingly, in order to avoid differing interpretations of those terms by judges (and especially arbitrators) in different countries, it was essential for the future Convention to deal with the problem in the manner proposed by the Egyptian delegation.

40. Mr. GOLDSTAJN (Yugoslavia) said that he would support the Egyptian amendment (A/CONF.97/C.1/L.44), or, if it was not adopted, the Swedish amendment (A/CONF.97/C.1/L.19), both of which were identical in purpose with the proposal made by the Yugoslav Government in its comments (A/CONF.97/8/Add.3, p. 20, para. 11). In the various countries, trade terms were not always treated as a matter of usage.

41. Mr. BENNETT (Australia) said that, while he sympathized with the Swedish proposal (A/CONF.97/C.1/L.19), he feared it would involve drafting difficulties, especially with regard to the interrelationship between paragraphs (1) and (2). As he read it, paragraph (2) was subsidiary to paragraph (1), which referred to agreed usage and to established practice. Paragraph (2) dealt with a situation in which the parties to a contract implicitly made a usage applicable to their contract. That immediately raised the question whether the interpretation of a trade term was a matter of usage or of practice. Since it could not be a usage, it would have to be deemed to be a practice.

42. As for the Egyptian proposal (A/CONF.97/C.1/L.44), its disadvantages were even more serious. Unlike the Swedish proposal, the Egyptian text did not require that the parties should necessarily have knowledge of the trade terms.

43. Mr. SZÁSZ (Hungary) pointed out that there was a difference in approach in the two proposals under consideration. The Swedish amendment was concerned with implied applicability, the Egyptian one with interpretation.

44. Mr. PLANTARD (France) said that while he had great respect for the INCOTERMS, which were widely used in trade practice, it did not follow that the Conven-

tion should deal with them. The inclusion of the proposed reference in article 8, at any rate, would be a source of confusion, since the article dealt with usages to which the parties expressly referred and the Swedish and Egyptian proposals dealt with a rule of interpretation for trade terms. It should be remembered that there was already a provision on interpretation, namely, article 7. In the amended form in which it had been adopted, that article afforded ample basis for the interpretation of trade terms.

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

45. Mr. EYZAGUIRRE (Chile) said that his delegation enthusiastically supported the Egyptian proposal, which would introduce a very useful provision to supplement the system of interpretation of the will of the parties to a contract. It would provide a very effective tool of interpretation and thereby contribute materially to uniformity in the application of the Convention.

46. Mr. FARNSWORTH (United States of America) said that he shared many of the misgivings which had been expressed regarding the Egyptian proposal. The decision to drop the provision in article 9, paragraph 3, of ULIS had been taken after a long and thorough discussion, and not purely because it had been felt to be superfluous. There was a well-justified fear that, with a provision of that kind, a party to a contract could be caught by an interpretation unknown to it. Paragraph (2), when it spoke of usage, required that it should be known to the parties—or that the parties “ought to have known it”—and that in international trade it must be widely known to, and regularly observed by, the parties to contracts of the type concerned. The new paragraph (3) proposed by Egypt, however, contained none of those safeguards. He could not, therefore, support it.

47. His delegation might be prepared, however, to accept the Swedish proposal to insert a reference to trade terms in article 8(2). Nevertheless, since the proposed addition dealt with interpretation, it should preferably be inserted in article 7(2).

48. Mr. HJERNER (Sweden), replying to a question by the CHAIRMAN, said that he could not agree to his proposed insertion being made in article 7 instead of in its proper place in article 8; that would result in a text much too vague to be voted upon.

49. Mr. SHAFIK (Egypt) noted that work on the unification of trade terms had been under way in the competent international bodies over a period of many years. The introduction of an appropriate reference in the present draft would serve to emphasize the importance of those terms, which were now in constant daily use throughout the world. It was essential to specify that trade terms must be interpreted “according to the meaning usually given to them in the trade concerned”, as his delegation proposed (A/CONF.97/C.1/L.44). His proposal did not relate exclusively to INCOTERMS. It

covered all terms currently used in trade, INCOTERMS, United States commercial terms etc.

50. Miss O'FLYNN (United Kingdom) supported the Egyptian proposal. The omission of a reference to the interpretation of trade terms could not but lead to disputes and foster unnecessary litigation. Article 7 could of course be modified to cover the interpretation of trade terms, but her delegation preferred a separate provision—as proposed by the Egyptian delegation—in view of the importance of the matter.

51. Mr. KIM (Republic of Korea) said that he opposed the Egyptian proposal, not on grounds of substance, but on grounds of simplicity. It would be a source of complication to introduce a reference to trade terms in article 8; the amendment would make it difficult to distinguish between questions of usage and questions of trade terms.

52. Mr. LEBEDEV (Union of Soviet Socialist Republics) opposed the Egyptian proposal. He found the proposed new paragraph (3) objectionable in that it departed completely from the subject of article 8, which was concerned with the binding character of usage in the relations between the parties to the contract. It would be incongruous to add to it a provision on the interpretation of trade terms. He feared that the adoption of the Egyptian proposal would make the future Convention less attractive to Governments and deprive it of the wide acceptance desired by all.

53. Furthermore, the language of the proposed provision was unduly vague. He failed to see the precise meaning of the expression “commonly used”. The term “FOB”, for example, was very differently interpreted in the common-law countries and in INCOTERM practice. The question would immediately arise of which of the two meanings should be attached to the term.

54. The problem of the interpretation of INCOTERMS was a separate question and one with which UNCITRAL would be dealing. Accordingly, it was highly preferable to leave the subject outside the present Convention. After all, it must be remembered that the decision to omit the subject from the draft had been taken by UNCITRAL after long and careful consideration.

55. Mr. MICHIDA (Japan) agreed with the representatives of France and the Union of Soviet Socialist Republics. To illustrate the dangers of the Egyptian proposal, he pointed out that the term “shipment” meant different things in the United States of America and the United Kingdom. The INCOTERMS were not well known everywhere. In Japan, they had been translated with considerable difficulty: the Japanese version had, for example, two pages of explanations on the term “FOB” alone. The problem should be dealt with in article 7, which concerned interpretation.

56. Mr. FOKKEMA (Netherlands) said that initially he had had much sympathy for the Swedish and Egyptian proposals but that the statement by the United States representative had convinced him of their dangers.

57. To take the example of FOB, one would be tempted to interpret it as was done in INCOTERMS. It could happen, however, that one of the parties to the contract was not aware of that INCOTERM meaning and that the other party knew of that ignorance. The Egyptian proposal would not provide a satisfactory solution in a case of that kind.

58. He felt that the rule in article 7 would provide a better solution. In the form in which it had been adopted, the language of that article would ensure that INCOTERMS were interpreted in accordance with their own definitions.

59. Mr. SHAFIK (Egypt), replying to a question by Mr. FARNSWORTH (United States of America), said that he could agree that his proposed new paragraph, if adopted, should be added to article 7 as a new paragraph (4) instead of to article 8 as paragraph (3).

60. The CHAIRMAN put to the vote the text of the new paragraph proposed by Egypt (A/CONF.97/C.1/L.44), the question of its place being left to the Drafting Committee.

61. *The Egyptian amendment to article 8 (A/CONF.97/C.1/L.44) was rejected by 21 votes to 16.*

62. The CHAIRMAN put to the vote the Swedish proposal (A/CONF.97/C.1/L.19).

63. *The Swedish amendment (A/CONF.97/C.1/L.19) was rejected by 23 votes to 13.*

64. The CHAIRMAN reminded the Committee that only one amendment to article 8 had been adopted, to the effect that the provisions of paragraph (2) should be extended to the formation of the contract. Solely for purposes of that amendment, the article would be referred to the Drafting Committee. If there were no further comments, he would consider that the Committee agreed to adopt that course of action.

65. *It was so agreed.*

#### *Article 9 (A/CONF.97/C.1/L.18, L.67)*

66. Mr. DABIN (Belgium) observed that the draft Convention nowhere defined the term "place of business". If the place of habitual residence of a party was not a criterion of his place of business, was it to be defined with reference to a material factor, such as the location of a factory, an economic factor, such as investment, or a legal factor, such as powers of proxy? The term appeared in many articles other than article 9. It would be desirable to define it in view of its practical importance, as experience in the European Economic Community had shown. For guidance, reference might have been had to the definitions appearing in other conventions, such as those relating to double taxation. Short of submitting an amendment in that connexion, he would like the delegates present, who had made a substantial contribution to the scientific preparation of the Conference and had repeatedly declared that every aspect had been discussed at length, to explain why article 9 went no further than to

provide for the choice of the place of business when there were several, without first specifying what that concept meant.

67. The CHAIRMAN said that at the committee stage of discussion on the draft Convention, delegations should submit their observations in the form of specific proposals.

68. Mr. INAAMULLAH (Pakistan), introducing his proposal (A/CONF.97/C.1/L.67), said that it was in the nature of a suggestion. There was no definition in the draft Convention of the term "party" and in view of the increasing part played by State agencies in international trade, it would be relevant to ascertain how it was understood by the Committee. It was his understanding that in the work of UNCITRAL the term "party" was considered to include State organs when they were engaged in commercial transactions.

69. Mr. SEVON (Finland) suggested that the point raised would be met if the summary record recorded the Pakistan representative's view that he understood the term "party" to include State agencies and that no delegation had opposed it.

70. *It was so agreed.*

71. Mr. KLINGSPORN (Federal Republic of Germany), introducing his delegation's amendment (A/CONF.97/C.1/L.18), said that a definition of the term "writing" was of importance in the application of some provisions of the draft Convention, such as article 27, paragraph 2. It would avoid dispute if it was made clear in that instance that if one party submitted a proposal for modification of a contract by a telegram which the other accepted by the same means, the requirement for any modification to be in writing had been complied with. His delegation's amendment followed the definition of "writing" which appeared in article 1, paragraph 3 (g), of the Convention on the Limitation Period in the International Sale of Goods (A/CONF.63/15).

72. Mr. SAMSON (Canada) supported the amendment.

73. Mr. LEBEDEV (Union of Soviet Socialist Republics), supporting the amendment, said that a new domestic law adopted by his country in 1977, whereby written agreements had become mandatory for foreign trade transactions, included telegrams or telex under the definition of "written".

74. Mr. FOKKEMA (Netherlands), said that he supported the amendment but wondered whether it was most appropriately placed in article 9. Perhaps the Drafting Committee should consider that matter.

75. Mr. KHOO (Singapore) said he had sympathy with the amendment but wondered whether a more general formulation should be devised to include notices and other communications.

76. The CHAIRMAN said that if the form of communication was not specified, subject to articles 11 and (X), any form, including oral communication, could be used.

The amendment referred only to cases in which communication in writing was compulsory.

77. *The amendment of the Federal Republic of Germany (A/CONF.97/C.1/L.18) was adopted.*

78. Mr. SHAFIK (Egypt) inquired what the exact significance of the conjunction "and" was in the third line of article 9. If a party had several places of business in a country, which one would be taken into consideration for the purposes of that article?

79. The CHAIRMAN pointed out that the UNCITRAL Working Group had appreciated that a number of operations were involved in the conclusion and performance of a contract and had decided that they should be considered as a whole in determining the relationship to the place of business. The term "closest relationship" always admitted of a certain degree of doubt.

80. He took it that the Committee wished to send article 9 to the Drafting Committee, with a request to consider the most appropriate place for the amendment by the Federal Republic of Germany.

81. *It was so agreed.*

#### *Article 10 (A/CONF.97/C.1/L.54/Rev.1)*

82. Mr. SAMSON (Canada), introducing his delegation's amendment (A/CONF.97/C.1/L.54/Rev.1), said that the aim was to introduce a limitation on admissible evidence in cases where contracting parties had freely chosen to have a written contract. In the international context, it was important to ensure a minimum of protection for parties who had made such a choice. The amendment sought to exclude evidence by witnesses unless it was supported by other evidence resulting from a written

document from the opposing party or circumstantial evidence. The amendment called for some degree of certainty as to facts which could be used to establish a *prima facie* case: for example, a clearly established material fact could be adduced as evidence of the existence of an agreement.

83. Mr. REISHOFER (Austria) said that the proposal was aimed at limiting the free appreciation of evidence. His delegation could not accept such a strict rule, which was in contradiction to a fundamental principle of Austrian law, namely, the free appreciation of evidence by the judge.

84. Mr. MICHIDA (Japan) said that the principle was a restatement of the rule on extrinsic evidence which prevailed in English-speaking common law countries. It should be noted that the amendment referred to a contract of sale evidenced only by a written document, not by a final and formal written agreement. It was a rigid rule and its application had not been found to be easy in many common-law countries, where the relevant case-law was confused. Representatives of those countries who had participated in previous discussions had never hitherto made such a proposal, which he was unable to support.

85. Mr. SAMI (Iraq) supported the Canadian proposal as providing a minimum protection with regard to admissibility of evidence.

86. The CHAIRMAN said that the Canadian proposal did not seem to command wide support. In the absence of further comment, he would take it that the Committee wished to adopt the original text of article 10.

87. *It was so agreed.*

*The meeting rose at 6 p.m.*

## 8th meeting

Monday, 17 March 1980, at 10 a.m.

*Chairman:* Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.8

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

#### *Article 3 (continued) (A/CONF.97/C.1/L.72)*

1. The CHAIRMAN invited the Committee to consider a new text for article 3 drawn up by a working group consisting of several delegations representing different legal systems. He reminded the meeting that, during the preceding week, the Committee had rejected in principle all the draft amendments to article 3 but had agreed that delegations who thought they could submit a more satisfactory text might do so.

2. Mr. FARNSWORTH (United States of America) said that the new text was not very different from the existing text. In view of the proposal made by Norway

when the article was under consideration, the working group had inverted the order of the paragraphs as it seemed desirable to indicate in the first paragraph those contracts which fell within the scope of the Convention, and in the second those which were excluded. The working group had then made a slight formal change to paragraph 1 of the existing text in order to establish a parallel with the wording in paragraph 2, particularly since the reference to the "seller" was not very clear in that his obligations consisted essentially of providing services.

3. The CHAIRMAN, noting that the working group was comprised of delegations representing practically every region of the world, said he felt that the new text might be regarded as the result of a compromise and accepted without new discussion.

4. Mr. HERBER (Federal Republic of Germany) said he noted that the wording of paragraph 1 of the new article was not completely in line with that of paragraph 2 and he wondered if it would not be appropriate to replace the word "furnishes" by the words "is to furnish" in the second line of paragraph 2 in order to make it clear that the reference was to the obligation under the contract.

5. Mr. FARNSWORTH (United States of America) said that the parallel was in the substance of the article and not in the terms employed. "Substantial part" in paragraph 1 corresponded to "preponderant part" in paragraph 2.

6. Mr. ROGNLIEN (Norway) said that he feared that, if the Committee delayed over matters of form, it would not have sufficient time to consider all the matters of substance. It should, in principle, send all formal matters to the Drafting Committee. He urged the Committee to abide by that principle.

7. The CHAIRMAN said that, in the absence of any objection, he would take it that the Committee wished to refer the new text of article 3 to the Drafting Committee.

8. *It was so decided.*

*Article 11 and article (X) (A/CONF.97/C.1/L.35, L.42, L.71 and L.76)*

9. The CHAIRMAN invited the Secretariat to outline what had been decided concerning article (X), which was theoretically included among the articles to be considered by the Second Committee but which was closely related to articles 10 and 11.

10. Mr. VIS (Executive Secretary of the Conference) said that, at the plenary meeting, article (X) had been referred to the First Committee but that if, in the course of the discussion, the Committee concluded that the article formed part of the work of the Second Committee, it should propose at a plenary meeting that its mandate be modified accordingly.

11. Mr. REISHOFER (Austria) said that his country's draft amendment (A/CONF.97/C.1/L.42) related to both the form and substance of article 11. On the ques-

tion of form, his delegation proposed that article 11 be deleted and its provisions incorporated in article (X), since it did not think it necessary to retain in the Convention two separate articles relating to the same question.

12. On the question of substance, under the existing article, reservations made by one State bound all other States, which was not justified. In the event that a contract concluded verbally between two States, one of which had entered a reservation and the other had not, gave rise to litigation and the litigation in question came under the jurisdiction of the second State, the judge would be required to respect the reservation and declare that the contract was not valid. Certainly, there were States whose legislation imposed reservations but, in such a case, the application of those reservations should be limited to the territory coming under the jurisdiction of the State concerned, to the exclusion of others.

13. Nonetheless, he preferred to leave the parties completely free to define the form of their contracts of sale and consequently he was proposing as an alternative possibility the deletion of articles 11 and (X).

14. Mr. SEVON (Finland) said he could not support the Austrian draft amendment.

15. Mr. FELTHAM (United Kingdom) said he was not satisfied with the compromise represented by articles 11 and (X), essentially because of uncertainties which might give rise to situations such as that just mentioned by the representative of Austria which showed that States which had not entered a reservation might find themselves in difficulties. Furthermore, his delegation was not sure that, faced with a situation of that kind, the judge in a State which had not entered a reservation would necessarily declare that the contract was not valid since, while article 11 excluded the application of certain provisions of the Convention, it did not provide for a positive replacement formula such as an obligation to conclude a contract in writing. His delegation could not take up a stronger position on those articles because it did not wish thereby to prevent States from acceding to the Convention.

16. Mr. HJERNER (Sweden) and Mr. MEIJER (Netherlands) said that they could not support the Austrian proposal either.

17. The CHAIRMAN, noting that no delegation had supported the Austrian draft amendment, said that he would take it that the Committee wished to reject it.

18. *It was so decided.*

19. Mr. MEIJER (Netherlands) said that his delegation had submitted two separate draft amendments (A/CONF.97/C.1/L.71 and L.76) because it had thought that article (X) and article 11 would be considered separately. Bearing in mind the fact that article 11 was the result of compromise, it had been concerned lest its proposals might jeopardize that compromise but was now sure that such was not the case.

20. He noted that there was a difference between the English and the French texts of article (X): the English

text referred to "a contract of sale" in the singular, while the French text had "*les contrats de vente*" in the plural. The French text gave the impression that only a country whose legislation required that all contracts of sale had to be concluded or evidenced in writing could make a declaration, whereas the English text permitted the interpretation that, if a particular category of contract had to be concluded in writing, the State concerned could make a declaration which would relate to all contracts in that category. His delegation's draft amendment was first of all designed to remove that difference in order to make it clear that a State whose legislation had requirements as to the form of only some types of contracts of sale could not make a declaration with respect to all types of contracts. Secondly it proposed to settle the matter in a more flexible manner. A State whose legislation required a certain category of contracts of sale to be in writing would have the right to make a declaration under that article, but only as regards contracts in the same category. That would not affect the right of States having a general requirement to make a general declaration.

21. Concerning article 11, the Netherlands was proposing a formal change which would come into effect if its draft amendment to article (X) were accepted.

22. Mr. MEDVEDEV (Union of Soviet Socialist Republics) and Mr. HJERNER (Sweden) said that the Netherlands proposal concerning the first sentence of article 11 (A/CONF.97/C.1/L.71) was not only a question of drafting but also a matter of substance. They were prepared to support it or to agree that it should be sent to the Drafting Committee.

23. The CHAIRMAN suggested that, if there were no objection, the Netherlands proposal relating to the first sentence of article 11 should be referred to the Drafting Committee.

24. *It was so decided.*

25. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that his delegation had submitted an amendment (A/CONF.97/C.1/L.35) that a reference to article 24 should be added to both article 11 and article (X) because the meaning of the English word "abrogation" in article 11 did not seem to be very clear and it would like to see it clarified.

26. Mr. FARNSWORTH (United States of America) said that the word "abrogation" did not correspond to a precise legal concept in the United States. It could apply either to termination by mutual agreement or to unilateral termination. However the term was used several times in article 27 in the sense of termination by mutual agreement. It could therefore be considered to have the same meaning throughout the text of the Convention. Therefore, it would perhaps be preferable to replace it by the expression "termination by mutual agreement", which would be less ambiguous.

27. Mr. SEVON (Finland) supported the proposal by the United States representative.

28. Mr. SHAFIK (Egypt) said he noted that the word

"*résiliation*" had been used in the French text. It seemed to him that it was rather a question of "*résolution*" and he would like to have the opinion of the French-speaking delegations on that point.

29. The CHAIRMAN suggested that a small committee or working group should be formed to study that question of terminology.

30. Mr. HJERNER (Sweden) said he was not opposed to the formation of a working group but felt that it was not simply a question of drafting. It was very important that the requirement for the written form should not apply to the declaration of avoidance. If the word "abrogation" was interpreted as meaning "termination by mutual agreement", the Soviet delegation's problem would be solved.

31. Mr. SEVON (Finland) said that, in order to gain time, he hoped that the Chairman would ask the members of the Committee if they agreed that the word "abrogation" should be replaced by the expression "termination by mutual agreement" in the English text.

32. Mr. FELTHAM (United Kingdom) said that if the word "abrogation" were replaced by "termination by mutual agreement", it would no longer be necessary to refer to article 24, which referred to a type of unilateral declaration. He did not wish to jeopardize the compromise that had been arrived at, but it would be difficult for him to agree that its scope should be broadened to take in unilateral declarations of termination.

33. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that, if the Committee considered that the word "abrogation" in articles 11 and (X) meant termination by mutual agreement, he would not insist that a reference to article 24 be included in article 11.

34. Mr. KRISPIS (Greece) said that he understood that the term "abrogation" could be applied to both unilateral termination and termination by mutual agreement and that it had both those meanings in article 11. If such was the case, there was no need to refer to article 24.

35. Mr. BOGGIANO (Argentina) said that, in the Spanish text of article (X), the term "*rescisión*" was used, which also meant unilateral termination. The different language versions of articles 11 and (X) should therefore be brought into line with the English text, in order to take account of the Soviet proposal.

36. Mr. HJERNER (Sweden) said that the question of deciding whether the term "abrogation" included declarations of avoidance had already been considered at the time the compromise was reached. At that stage, English had been more or less the working language of the representatives concerned. He thought that the United States representative had given a sound interpretation of the word "abrogation" and that the Soviet proposal (A/CONF.97/C.1/L.35) was no longer called for. The different language versions of article 11 and (X) would, of course, have to be harmonized.

37. Mr. HERBER (Federal Republic of Germany) said



that it seemed from the words "or other indication of intention" in article 11, that the USSR interpretation on that point was correct and that all unilateral declarations were meant, including declarations of avoidance.

38. The CHAIRMAN, noting that the members of the Committee seemed to agree that the term "abrogation" meant termination by mutual agreement and not unilateral termination, suggested that, if the Soviet Union agreed to withdraw its amendment, the Drafting Committee should be given the task of deciding on the expression to be used in all languages and that the Committee should consider the Netherlands proposal (A/CONF.97/C.1/L.71).

39. *It was so agreed.*

40. Mr. HERBER (Federal Republic of Germany) said that the Netherlands proposal to include in article (X) the expression "all or certain types of contracts of sale" raised a number of problems. Some national legislations specified that contracts should be made in writing in only a very few cases, whereas, when the Soviet reservation was being considered, the case envisaged had been that where a national legislation specified that, in principle, contracts should be made in writing. If a national legislation provided that the written form should be used in certain specific cases only, should the State in question declare that it reserved the right to impose the written form in certain cases without specifying which, or should it rather state in which specific cases the written form was required? Should States whose legislation required the written form in exceptional cases only enter an express written reservation and give notice of the fact? In any case, he thought that certain clarifications of a technical nature should be added to the provision in order to facilitate its application. First, it should be stated in the final clauses that the other States must be informed by the depositary of the reservations of a State on the subject. Secondly, since it seemed clear that cases where the written form was required only exceptionally were also covered, it would have to be possible to enter a reservation, not only at the time of signature, ratification or accession, but also at any subsequent time, in order to ensure that a country which adopted the written form for any type of contract after it had signed the Convention would not be obliged to denounce the Convention. Thirdly, the same should apply to cases in which a country wished to withdraw its reservation.

41. He approved of the Netherlands proposal but thought that it might be as well, in order to save time, to submit the technical amendments he had proposed to the Second Committee.

42. The CHAIRMAN said that it was a matter of deciding if the provision in question applied to cases where certain contracts only had to be made in writing or to cases where all contracts had to be made in writing. That question did not seem to be a substantive one. Any country could always make a partial reservation. The technical questions raised by the Federal Republic of Germany were completely logical and should be submitted to the Second Committee.

43. Mr. FARNSWORTH (United States of America) said that he found it difficult to agree to the Netherlands proposal. At the tenth session of UNCITRAL at Vienna, it had been decided that the written form would not be compulsory, although many countries such as the United States required it for most contracts. The USSR had considered it important to add a reservation similar to that contained in article (X). Most countries had agreed to that proposal but their intention was not to allow too many countries to make reservations, either partial or total. The aim was merely to remove the difficulties which might be encountered by the USSR or perhaps by other countries where the State was responsible for international trade. The greater the number of reservations under article (X) the less useful would the Convention be. Consequently he could not agree to the proposals by the Netherlands and the Federal Republic of Germany.

44. Mr. MEIJER (Netherlands), referring to the technical problems raised by the representative of the Federal Republic of Germany, said that the last of them, on the withdrawal of reservations, was dealt with in article H (6). He saw no reason to oppose the other amendments proposed by that representative. In reply to the representative of the United States, he said that it was not his delegation's intention to encourage a large number of contracting States to make reservations; there was however, one difficulty, arising from the differences between the French and English texts of article (X), which would have to be dealt with, first by the First Committee and then by the Drafting Committee. If a reservation could be made by a State whose law simply required that a given type of contract of sale should be concluded in writing, as seemed to be the case from the English text of article (X), it would be difficult for his delegation to agree to that provision. The French text of the article, which referred to "contracts of sale", seemed to him more satisfactory, because in that case, reservations would only be made by States whose law required the written form for "contracts of sale" in general, i.e. all or most of them. Nevertheless, his delegation would favour the possibility of partial and specific declarations if that would make the Convention more attractive for other States which wished to extend their formal requirements of a partial nature to the international contracts of sale concerned.

45. Mr. KRISPIS (Greece) said that he did not share the concern of the United States representative over the declarations referred to in article 11. Procedural questions were very important to the courts and in many countries the question of evidence was a procedural problem governed by the *lex fori*. If the Convention did not settle procedural questions, it would be the *lex fori* which did so and in most countries that law accepted only written evidence.

46. He supported the technical proposals made by the representative of the Federal Republic of Germany, but would like the expression "certain types of contracts" in the text proposed by the Netherlands to be replaced by "contracts of sale for certain kinds of goods".

47. Mr. DATE-BAH (Ghana) said that like the representative of the United States he thought that the agreement reached on article 11 was designed merely to eliminate the obstacles which might be encountered by the Soviet Union. It did not seem to him possible under the original text to make a partial reservation. He would even propose that it should be decided that it would not be possible for a country to make a reservation unless its law required the written form for all contracts. A number of countries had shown themselves ready to sacrifice their national law in the interests of making the law uniform. In any case, he could not support the proposal by the representative of the Netherlands.

48. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that the members of the First Committee had already taken a positive position on article 11, which had been sent to the Drafting Committee. Article (X) was a logical follow-up to article 11.

49. With regard to the specific proposals by the Federal Republic of Germany, it appeared from the explanations given by the Executive Secretary concerning the terms of reference given by the plenary Conference to the First Committee that the latter was empowered to consider them, after possible revision by the Drafting Committee.

50. Mr. VISCHER (Switzerland) said that there was a contradiction between article 11 and article (X). Obviously, the aim of article 11 was to impose the written form when one of the parties had its place of business in a State which had made a reservation; but that aim was not clearly expressed in the text of the article, which merely indicated that certain provisions did not apply, but did not state legal criteria applicable in the cases where a form other than writing had been used in a country which had not made a declaration. The lack of precision in the texts of articles 11 and (X) gave rise to different interpretations, and they should be redrafted.

51. The CHAIRMAN said that the points of view of some delegations were similar and could be reconciled.

52. Mr. SAMI (Iraq) said that he was in favour of the proposals by the Federal Republic of Germany which would render possible a more flexible interpretation of article 11. That was a very important consideration for the developing countries whose law was in constant evolution and generally offered the possibility of concluding contracts both orally and in writing. The proposals by the Federal Republic of Germany would make it easier for those countries to accede to the Convention and, if necessary, to enter reservations after signature, ratification or accession. He thought that the proposals by the Federal Republic of Germany should be forwarded to the Second Committee without delay, so that it could take them into account for the final drafting of article (X).

53. Mr. BOGGIANO (Argentina) said that the Netherlands proposal would give rise to uncertainties as to the categories of contracts of sale for which contracting States could make reservations. The text of the draft amendment said that they were contracts for international

sale but there could be types of subcontracts for which the situation would be less clear. It might be wondered what criteria and methods would then be used to determine those subcontracts, and whether there would not be serious risks of conflict between various legal systems. Consequently, he was in favour of maintaining the existing text of article 11.

54. Mr. GHESTIN (France) said that he did not consider the Netherlands proposal to be a purely drafting amendment but an important substantive amendment. The existing text of draft article 11 took into account the fact that some States considered it to be an important element of public policy that the modification or abrogation of all contracts of sale should be in writing. The Netherlands proposal substantially increased the number of States authorized to enter a reservation by offering that possibility to those for whom only certain contracts had to be in writing. Moreover, since such contracts varied from State to State that would constitute a serious complication. The purpose of the Convention was to bring uniformity to contracts for the international sale of goods and it was certain that, as the representative of the United States had said, too many reservations would lessen the usefulness of the Convention. Consequently, the existing text, which seemed to establish a satisfactory balance for all systems, should be maintained.

55. The CHAIRMAN said that the discussion had shown that there were two principal tendencies: some delegations were in favour of the indivisibility of reservations expressed by a State, which could be made only if a provision that contracts should be concluded in or evidenced by writing existed in the national law; other delegations considered that it should be possible for reservations to be divisible, i.e. that it should be possible to make a distinction for certain trade operations, for the trade operations of certain persons or for certain goods.

56. He proposed that the Committee should take a decision on the Netherlands amendment.

57. Mr. FARNSWORTH (United States of America), speaking on a point of order, asked if the Chairman intended to put to the vote the suggestions made by the representative of the Federal Republic of Germany.

58. The CHAIRMAN said he thought that the Netherlands amendment should be voted on first. It was important to decide whether the reservation could be used for all sales transactions or only in specific cases, which would enable States to make partial reservations.

59. *The Netherlands amendment (A/CONF.97/C.1/L.76) was rejected.*

60. The CHAIRMAN invited the members of the Committee to express their views on the suggestions submitted orally by the representative of the Federal Republic of Germany (see paragraph 40).

61. Mr. HERBER (Federal Republic of Germany) said he proposed, more precisely, that the words "or at any time thereafter" should be added after "ratification or



accession" in article (X).<sup>\*</sup> If the members of the First Committee managed to reach agreement on that amendment, it would facilitate the work of the Second Committee.

62. The CHAIRMAN, noting that there was no objection to the amendment, said that it would be transmitted to the Second Committee with article (X).

63. The first sentence of article 11 would also be transmitted to the Second Committee, which would consider it at the same time as article (X). The Drafting Committee would then be asked to review the text in the light of the results of the discussion in the Committees.

64. Lastly, since it was understood that a declaration of abrogation of contract was valid only if it was made by means of notification to the other party, the USSR proposal (A/CONF.97/C.1/L.35) had no further purpose.

65. Mr. FELTHAM (United Kingdom) asked if the two proposals submitted by the United Kingdom concerning article (X) would be forwarded to the Second Committee.

66. The CHAIRMAN replied in the affirmative.

*The meeting was suspended at 11.45 a.m. and resumed at 12 noon.*

*Article 12 (A/CONF.97/C.1/L.29, L.36, L.37, L.38, L.46, L.55 and L.69)*

67. The CHAIRMAN pointed out that several amendments to the article, in particular those of the United Kingdom (L.36), Norway (L.38), Austria (L.46) and United States (L.55) had the same purpose, namely to delete the second sentence of paragraph 1.

68. Mr. FELTHAM (United Kingdom), introducing his delegation's proposal (A/CONF.97/C.1/L.36), explained that in view of the fact that article 51 included a provision indicating the method of determining the price when that was not expressly or impliedly indicated in the contract, his delegation saw no need to maintain the second sentence of article 12, according to which a proposal for a contract should fix the price expressly or implicitly. The commentary on article 51 implied that if a State had ratified parts II and III of the Convention, the contract might not be valid if the price had not been determined. To avoid any difficulty it was preferable therefore to delete the second sentence and leave it to article 51 to settle situations in which the contract offer did not contain a provision fixing the price to be paid.

69. Moreover, the first sentence of paragraph 1 gave an adequate definition of an offer, by stating that it should be sufficiently definite and should indicate the intention of the offerer to be bound in case of acceptance, and his delegation could see no need to add provisions which might lead to controversy.

70. Mr. SHAFIK (Egypt) said he fully supported the United Kingdom proposal to delete the last sentence of paragraph 1. That sentence was given more as an example than as a rule and it would be preferable to delete it.

71. Mr. ROGNLIEN (Norway) explained that the Norwegian proposal (A/CONF.97/C.1/L.38) was either to delete the sentence or redraft it. If the First Committee decided to maintain the second sentence of paragraph 1, his delegation could accept a formula similar to that in the Finnish proposal (A/CONF.97/C.1/L.29).

72. Mr. DABIN (Belgium) said that he was reluctant to delete the second sentence of paragraph 1 and would prefer the formula proposed by the Austrian delegation in document A/CONF.97/C.1/L.46, which consisted in maintaining the second sentence but adding the words "in particular" to show that it was merely given as an example.

73. If, however, it were decided that the second sentence should be deleted, thought should be given to the full implications of the text of article 17 (3) on modifications to the offer.

74. Mr. SZÁSZ (Hungary) said that he too was afraid that the deletion of the second sentence of paragraph 1 would make the paragraph more obscure, while it was important to state what could make an offer valid. It would then be necessary, in practice, to have recourse to article 6, but it would be preferable to retain the second sentence and base it on the Austrian proposal.

75. Mr. KRISPIS (Greece) said that he shared the doubts of the preceding speakers. He emphasized the need for a proposal for a contract to be definite and the elements mentioned in the second sentence (indication of the goods, determination of price) were essential elements without which paragraph 1 would lose its meaning. Reference to quantity might be deleted.

76. Mr. KHOO (Singapore) said that his delegation was in favour of the United Kingdom proposal to delete the second sentence of article 12 (1), because it was impossible to define satisfactorily the elements which had to be present to make a proposal sufficiently definite. As currently worded, the sentence implied that the conditions given were adequate whereas it was obvious that they could be met without there necessarily being a definite proposal. The other elements listed in article 17 (3) were just as important.

77. The Austrian proposal (A/CONF.97/C.1/L.46) also implied that the conditions set forth were sufficient to make a proposal definite, and that was unacceptable.

78. Mr. SEVON (Finland) said that the representative of Singapore had just drawn attention to the essential point. Article 12 did not deal with the question of determining when there was a contract, but indicated the provisions that determined it. Since it was very difficult to draft a wording which was acceptable to all, his delegation would be in favour of the deletion of that sentence.

<sup>\*</sup> The amendment by the Federal Republic of Germany was subsequently issued as document A/CONF.97/C.1/L.96.

79. Mr. GARRIGUES (Spain) said he was in favour of retaining the sentence since, in his view, a proposal could not constitute an offer unless it contained the essential terms of a contract (indication of the goods, quantity and price). Article 51 by itself would not be enough.

80. Mr. WANG Tian ming (China) also advocated that the sentence should be retained since it implied that the three basic terms of a sales contract (indication of the goods, quantity and price) should be definite in order to constitute an offer. If the second sentence was deleted, the meaning of the article was incomplete.

81. Mr. PLUNKETT (Ireland) supported the United Kingdom proposal, which was in his view the only satisfactory way of solving the problem. The second sentence of article 12, paragraph 1 was either a rule or an example. If it was a rule, it was unsatisfactory and could not provide a valid definition. If it was an example, it was unnecessary in a convention of the kind under discussion. It should be left to the courts to determine whether an offer was valid.

82. Mr. GHESTIN (France) said it was important to retain the sentence as the essential terms of a sale were quality, quantity and price, the main difficulty being the question of the price. The issue was one of balance and fairness. It should be borne in mind that contracts frequently covered raw materials that were to be delivered over a period of years at prices that were difficult to fix (e.g. petroleum products). The choice was an important one since the weaker partner might be caught in a trap in the form of a firm sale at prices over which he had no further control.

83. It should also be remembered that article 12 was in itself a compromise since its sole requirement was that the offer should contain the information that must be available to the courts with respect to the price of the goods.

84. Mr. FARNSWORTH (United States of America) endorsed the arguments of the representatives of Singapore, Finland and Ireland in support of the United Kingdom proposal. The second sentence of article 12, paragraph 1, was neither desirable as a rule nor valid as an example. Some proposals might be offers although they did not specify the goods. In any event it would be difficult to find an acceptable definition.

85. Mr. STALEV (Bulgaria) considered that the second sentence of article 12, paragraph 1, should be retained.

86. Mr. SAMI (Iraq) associated himself with the arguments of the French and Chinese delegations in favour of retaining the sentence. The retention of the sentence was justified by article 17, paragraph 3.

87. Mr. MEDVEDEV (Union of Soviet Socialist Republics) noted that article 12 was the outcome of a compromise that had been arrived at after considerable effort and should not be reopened. Deletion of the second sentence would destroy the balance of the text and make it less precise.

88. Mr. KUCHIBHOTLA (India) remarked that the second sentence of article 12, paragraph 1, complemented the first and that the text would be incomplete if it were deleted. The text was a compromise worked out during the eleventh session of UNCITRAL and his delegation could not assent to its deletion.

89. Mr. EYZAGUIRRE (Chile) said that he understood the difficulties the second sentence of article 12, paragraph 1, created for some members of the Committee, particularly in the light of the provisions of article 51 concerning the price of goods. Nevertheless he would prefer to retain the sentence as it indicated the essential terms of any sale, namely, the goods proposed, the quantities and the prices, which must be expressly or implicitly specified.

90. The Austrian proposal would weaken the text and was therefore unacceptable.

91. Mr. KIM (Republic of Korea) supported the United Kingdom proposal. In the case of long-term contracts in particular, some gaps were inevitable and although there might be some difficulties in filling them, it was better to retain a degree of flexibility.

92. Mr. BECK-FRIIS (Sweden) supported the United Kingdom proposal although he recognized that the deletion of the sentence might be considered a compromise. Although in most cases prices were indicated, contracts were often concluded without any specification of prices, more attention being paid to other important conditions, such as, for example, speedy delivery in the case of inexpensive spare parts.

93. The CHAIRMAN put the United Kingdom amendment (A/CONF.97/C.1/L.36) to the vote.

94. *The amendment was rejected.*

95. The CHAIRMAN pointed out that a great many subsidiary amendments to article 12 remained to be considered and suggested that the delegations which had voted for the deletion of the second sentence of paragraph 1 should enter into consultations with a view to formulating one or, if they preferred, two proposals on the matter. The delegations in question were those of Austria, Egypt, Finland, the Republic of Korea, Singapore, the United Kingdom and the United States.

96. Mr. MEDVEDEV (Union of Soviet Socialist Republics), introducing his delegation's amendment (A/CONF.97/C.1/L.37), said that its purpose was self-evident. The deletion of the words "expressly or implicitly" would avoid complications in interpreting the idea of the implicit fixing of quantity and price.

97. The CHAIRMAN said that the Soviet proposal would be taken up after the amendments to be prepared by the small group of delegations that wished to delete the second sentence of paragraph 1.

98. He invited the Australian delegation to introduce its amendment to article 12, paragraph 2 (A/CONF.97/C.1/L.69).

99. Mrs. KAMARUL (Australia) explained that her

delegation noted with concern that in contrast to the provisions concerning offers in paragraph 1 of article 12, paragraph 2 did not stipulate that a proposal addressed to one or more specific persons did not constitute an offer unless, in addition to the other conditions, it was "sufficiently definite".

100. Under paragraph 1, a proposal constituted an offer if it was sufficiently definite and indicated the intention of the offeror to be bound in case of acceptance. The second requirement was made applicable to paragraph 2 by the words "unless the contrary is clearly indicated by the person making the proposal", but that did not necessarily mean that an offer had to be "sufficiently definite". Her delegation accordingly thought that the text should be amended to make the requirement

that the offer should be sufficiently definite applicable to paragraph 2.

101. The CHAIRMAN suggested that the Australian amendment was concerned with a purely drafting change. It was understood that the proposal in paragraph 2 was a proposal within the meaning of paragraph 1.

102. Mr. KRISPIS (Greece) supported the Australian proposal but thought it should be referred to the Drafting Committee.

103. Mrs. KAMARUL (Australia) believed that her amendment raised a substantive issue. She would however agree to its being referred to the Drafting Committee.

*The meeting rose at 1 p.m.*

## 9th meeting

Monday, 17 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.9

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3)**  
(A/CONF.97/5) (continued)

### Article 13 (A/CONF.97/C.1/L.46)

1. Mr. GHESTIN (France), introducing his delegation's amendment to article 13, paragraph 2, said that it was merely a drafting amendment: it seemed clearer and simpler to convey the meaning in one sentence rather than two.

2. The CHAIRMAN said that in the absence of comment, he would take it that the Committee wished to adopt article 13 and send it to the Drafting Committee together with the French proposal.

3. *It was so agreed.*

*Renumbering of articles in parts II and III of the draft Convention (A/CONF.97/C.1/L.39)*

4. The CHAIRMAN said he took it that the effect of the Norwegian proposal (A/CONF.97/C.1/L.39) would

be to renumber the articles consecutively within the separate parts, so that in the Convention as a whole there would be several articles with the same number. He asked whether the Committee wished to send the proposal to the Drafting Committee.

5. Mr. HERBER (Federal Republic of Germany) said that his delegation had doubts about the wisdom of renumbering the articles. It might facilitate matters for those States which intended to ratify only part of the Convention, but it would make reference to it more difficult for those States which ratified most of it.

6. Mr. ROGNLIEN (Norway) said that the intention of his proposal was precisely the opposite, namely, to assist the private parties in those States which ratified both parts II and III of the Convention to compare and compile the corresponding articles in the law of other parties whose States had ratified only Part III. The latter could make the corresponding compilation easily enough by reference to the Convention as a whole. The problem was that the corresponding articles would otherwise be differently numbered in different States which would be inconvenient for parties to the contract.

7. Mr. GHESTIN (France) said that continuous consecutive numbering of the articles was preferable.

8. Mr. ROGNLIEN (Norway) withdrew his proposal.

### Article 14 (A/CONF.97/C.1/L.48, L.84)

#### Paragraph 1

9. Miss O'FLYNN (United Kingdom), introducing her

delegation's amendment to paragraph 1 of article 14 (A/CONF.97/C.1/L.48), said that paragraph 2 of article 12 envisaged the possibility of public offers being subject to the Convention but that no provision had been made in the draft for the revocation of such offers. The purpose of the amendment was to provide for their revocation in the same way as for the offers.

10. Mr. SZÁSZ (Hungary) said it was his understanding that public offers were excluded from the articles subsequent to article 12. He preferred the original text of article 14, paragraph 1.

11. Mr. HERBER (Federal Republic of Germany) and Mr. BENNETT (Australia) supported the United Kingdom amendment.

12. The CHAIRMAN said that the United Kingdom amendment did not seem to command wide support. In the absence of further comment, he would take it that the Committee wished to adopt the original text of paragraph 1 and send it to the Drafting Committee with the amendment proposed by the German Democratic Republic (A/CONF.97/C.1/L.84), which was a drafting amendment.

13. *It was so agreed.*

#### Paragraph 2

14. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment to paragraph 2 of article 14 (A/CONF.97/C.1/L.48), said that it was not linked to the United Kingdom amendment to paragraph 1. It was intended to take account of the legal effect in most common law countries of stating a fixed time for acceptance of an offer. Such a step, unless there were other considerations which made for irrevocability, merely indicated a period during which the offer might remain open and after which it lapsed. Traders in common law countries would be exposed to a trap if, under the Convention, indicating a fixed period without any mention of irrevocability, brought about a situation where an offer was deemed to be irrevocable. They should be protected by a provision stating that such was not the case unless there was some other clear indication that the offer was intended to be irrevocable.

15. Mr. AOYAMA (Japan) said his delegation supported the original text of paragraph 2 on the understanding that when the offeror fixed a time for acceptance, the offer was irrevocable during that time. It could not accept an amendment.

16. Mr. ROGNLIEN (Norway) suggested that there were two possible solutions. It might be left to the courts to decide what the offeror's intention with regard to the irrevocability of the offer had been when he fixed a time for acceptance. Alternatively, there might be a presumption one way or the other. In his delegation's view, the presumption should be that the offer was irrevocable, but alternatively it could be the other way, as the United Kingdom amendment proposed.

17. Mr. BENNETT (Australia) said he supported the United Kingdom amendment for the reasons already given by the United Kingdom representative.

18. Mr. SAMI (Iraq) supported the United Kingdom amendment; the offeror should be given an opportunity to withdraw.

19. Mr. FARNSWORTH (United States of America) expressed his delegation's concern at the Japanese interpretation of the original text of paragraph 2. If the United Kingdom amendment was rejected, it should be left to the courts to interpret the original text.

20. Mr. SZÁSZ (Hungary) said that his delegation was satisfied with the original text, which included an element of compromise.

21. Mr. DATE-BAH (Ghana) supported the United Kingdom amendment. In general, the Convention had chosen the principle of revocability and it would make the task of traders easier if that principle was consistently adopted. Where an offeror in a common law jurisdiction sets a time period for the lapse of the offer, without promising to keep the offer open, it would be a trap for him if he were held to have made an irrevocable offer.

22. Mr. GHESTIN (France) considered that the offer should be irrevocable since the offeree might otherwise be put to unwarrantable expense and trouble. The offeror fixed the period for acceptance and should be prepared to abide by it.

23. Mr. GORBANOV (Bulgaria) said that his delegation opposed the United Kingdom amendment for the reasons given by the French representative.

24. Mr. HERBER (Federal Republic of Germany) wondered whether a vote on the United Kingdom amendment would solve the problem. The discussion had shown that the original text was capable of different interpretations. His delegation's view, based on the English text, was the same as that of the Japanese delegation, but the United States delegation had suggested that paragraph 2(a) might be interpreted differently. If the United Kingdom amendment was rejected, the Drafting Committee should be asked to revise the text to make it perfectly clear that the offer was irrevocable in the case in question.

25. The CHAIRMAN put to the vote the United Kingdom amendment to paragraph 2 (A/CONF.97/C.1/L.48).

26. *The amendment was rejected by 31 votes to 7.*

27. The CHAIRMAN invited the Committee to consider the proposal of the Federal Republic of Germany that the text should be redrafted to state unambiguously that fixing a time for acceptance of itself made the offer irrevocable.

28. Mr. KHOO (Singapore) said that the statements of delegations, confirmed by their votes, showed that the majority preferred that offers be irrevocable during the time fixed for their acceptance. Such being the case, he agreed with the representative of the Federal Republic of

Germany that paragraph 2 (a) was ambiguous. The formulation in article 5, paragraph 2 of ULF was much clearer.

29. Mr. DATE-BAH (Ghana) was in favour of the present text being retained as a compromise. It gave some flexibility to the courts. It would be undesirable to have irrevocability of offer imposed on two common law parties.

30. Mr. FARNSWORTH (United States of America) said it would be unfortunate to pursue any proposals which resulted in a change in the compromise which had been reached in UNCITRAL. An inflexible wording which imposed on two English-speaking common law parties an interpretation which belonged to another legal system would be unacceptable in the United States and his delegation would strongly oppose it.

31. Mr. MASKOW (German Democratic Republic) observed that the original text did not constitute a genuine compromise and was clearly open to different interpretations.

32. Mr. GHESTIN (France) said that a compromise grounded in ambiguity was undesirable. The French text was also somewhat unclear and he was disposed to support the proposal of the Federal Republic of Germany that the precise sense should be established along the lines that the majority of the Committee had approved by its vote.

33. Mr. HJERNER (Sweden) agreed that the original text represented a compromise but said he could not understand how it could be interpreted other than meaning that the offer was irrevocable for the period fixed for acceptance. However, two common law traders could avail themselves of article 7 to agree upon another interpretation having regard to subjective intention. The paragraph could not be so interpreted in the case of one common law party and one civil law party. He was prepared to accept the text as it stood because he was confident that the courts could not fail to interpret it as supporting the irrevocability of the offer.

34. Mr. KRISPIS (Greece) considered that only one interpretation should be possible. It was not acceptable that one interpretation would apply when the parties to a contract were nationals of a common law country and another when those parties were nationals of a civil law country. Something of the kind could only be achieved by way of a reservation to the Convention. In the circumstances he fully supported the proposal of the representative of the Federal Republic of Germany.

35. Mr. FOKKEMA (Netherlands) said his country like others accepted the view that stating a fixed time for acceptance indicated that the offer was irrevocable. On the other hand, he could appreciate the position in the common law countries, and thought that efforts should be made to harmonize the law on that point. The essential principle was enshrined in article 7, which indicated how the intent of the parties was to be determined. It was understandable that traders in a common law country

would understand the situation differently from traders in a civil law country. He did not think it appropriate to lay down a hard-and-fast rule. It would be better for the courts to decide in individual cases how the provisions of article 7 were to be interpreted in relation to the fixing of a time limit. All the Drafting Committee could usefully do would be to indicate a presumption in cases where the two parties belonged to different systems of law. He personally would prefer presumption of irrevocability, but would not favour a hard and fast rule.

36. Mr. POPESCU (Romania) said that under his country's system there was a fixed period of time for acceptance. He would interpret the provision in terms of a fixed time period, and would therefore prefer to retain the existing text.

37. Mr. FELTHAM (United Kingdom) explained that his delegation's purpose in proposing its earlier amendment had been to protect its traders when they were dealing with traders in civil law systems. He agreed with the United States representative that the existing text did allow for a situation in which, in dealings between traders in two common law countries, the stating of a fixed time limit did not necessarily indicate irrevocability. It would be unfortunate if the present text was so amended as to introduce the idea of an irrebuttable presumption of irrevocability, even between two parties who did not themselves intend it.

38. Mr. KHOO (Singapore) commented that the provisions of article 7 were somewhat general, and that courts might have difficulty in reconciling them with the very explicit language of article 14. He considered it would be advisable to work out some provision for reservations and also to improve the text of paragraph 2 (a) so as to make clear that when a fixed time was stated for acceptance, the offer was to be considered irrevocable.

39. Mr. BONELL (Italy) could not agree that the provision should be subject to reservations. It would be a strange state of affairs if traders had to find out whether the State of which the other party was a national had made a reservation in order to ascertain the implications of offers. He could not see any difficulty in applying the provision as it now stood.

40. The CHAIRMAN remarked there were two possible courses of action. The Committee could either accept the existing text, in which case the representative of the Federal Republic of Germany and other representatives would still be able to propose amendments in plenary, or it could continue the discussion, and refer the text to the Drafting Committee.

41. Mr. HERBER (Federal Republic of Germany) said that in the light of the discussion he would not press his proposal. It would be best to rely on the courts to find some reasonable common interpretation in cases of difficulty. Although he agreed with the representative of Singapore that article 5, paragraph 2 of ULF dealt with the same point more clearly, he would prefer for the present to leave the text unchanged and not refer it to the Drafting Committee, since there was a danger that that

Committee would not simply clarify the text but would try to seek a further compromise, thereby wasting time.

42. Mr. KOPAČ (Czechoslovakia) pointed out that article 13 referred to the withdrawal of offers while article 14 spoke of their revocation. He suggested that the Drafting Committee be asked to find a common term to avoid problems of interpretation.

43. The CHAIRMAN noted in article 13 the term "withdrawal" was used to apply to cases where offers had not reached the stage of becoming effective, whereas in article 14, "revocation" covered cases where offers had become effective but were subsequently revoked.

44. Mr. KOPAČ (Czechoslovakia) said he was satisfied with that explanation and could accept the text as it stood.

45. *Article 14 was adopted.*

#### *Article 15 (A/CONF.97/C.1/L.85)*

46. The CHAIRMAN proposed that the Belgian proposal, which was applicable to the French text only (A/CONF.97/C.1/L.85) be forwarded to the Drafting Committee.

47. *It was so agreed.*

*The meeting was suspended at 4.15 p.m. and resumed at 4.40 p.m.*

#### *Article 16 (A/CONF.97/C.1/L.56, L.57, L.86, L.90)*

##### *Paragraph 1*

48. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.56) to article 16, paragraph 1, suggested that the first of the two changes proposed, the insertion of the word "unqualified" before the word "assent", was related to the United Kingdom proposal with regard to article 17, and should perhaps be left aside until article 17 was dealt with. The second change, to insert the words "or inactivity" after the word "silence" did not affect the basic meaning.

49. Mr. KRISPIS (Greece) supported both points in the United Kingdom proposal. The word "unqualified" was important, because without it there was some danger of confusion between acceptance of an offer and the final stage of negotiations. The word "inactivity" was also a useful addition since acceptance might result from certain acts on the part of the offeree.

50. Mr. FELTHAM (United Kingdom) pointed out that his proposed addition of the word "unqualified" would only stand if the United Kingdom proposals for the deletion of paragraphs 2 and 3 of article 17 were accepted. If those proposals were not accepted, his amendment would result in an inconsistency between articles 16 and 17.

51. The CHAIRMAN suggested that discussion of the

first point in the United Kingdom proposed amendment be deferred until article 17 was discussed and invited comments on the second proposed change.

52. Mr. ROGNLIEN (Norway) said he could not see the need for the proposed addition. The meaning of the words proposed was not clear to him. Were words which were put verbally or in writing considered activity or inactivity? What about a statement of acceptance? If it was regarded as inactivity, it would not, under the amended section, amount to acceptance.

53. Mr. DATE-BAH (Ghana) thought that addition of the words "or inactivity" might be useful in situations where, for example, the offeree had not been silent, but had failed to follow up his earlier expression of interest.

54. Mr. VISCHER (Switzerland) supported the United Kingdom proposal.

55. The CHAIRMAN put to the vote the United Kingdom amendment to the second sentence in article 16, paragraph 1.

56. *The amendment was adopted by 16 votes to 15.*

##### *Paragraph 3*

57. Mr. FARNSWORTH (United States of America), introducing his delegation's amendment (A/CONF.97/C.1/L.57), explained that it was intended to make clear that, while an offeree might indicate assent by an act, notice must be given of that act, or the offer did not stand. A substantial change introduced in his amendment as compared to the original text was to make it a condition of the continued existence of the contract that notice should be given within a reasonable time.

58. Mr. WAGNER (German Democratic Republic) said that the provisions of article 16, paragraph 3, as they stood, involved a risk that a contract might be deemed to have been concluded without the knowledge of the offeror. He was not, however, altogether satisfied with the wording of the United States amendment (A/CONF.97/C.1/L.57), which did not make the intended meaning clear enough. The amendment should stress that the notification must relate to the acts which had the effect of bringing the contract into being.

59. Mr. FELTHAM (United Kingdom) observed that it was essential to preserve the important principle enshrined in article 16, paragraph 2 that, if an offeror made an offer that could be accepted by means of an act without notice, there could still be a contract even if paragraph 3 of the same article were to be amended in the manner proposed by the United States delegation.

60. Mr. SZÁSZ (Hungary) said that he had considerable difficulty in conceiving of a practice or usage whereby a mere act was enough to form a contract without any notice being given to the offeror. Normally the act involved would be directed towards the other party and the act in itself would serve as a notice. As he saw it, the United States amendment appeared to be intended to cover the case where the act in question was



directed at a third party. He also had serious misgivings regarding the effects of the provision contained in the last sentence of the text proposed by the United States for article 16, paragraph 3.

61. Mr. KHOO (Singapore) wholeheartedly associated himself with the remarks of the United Kingdom and Hungarian representatives. He felt the United States amendment entirely inappropriate in the context of paragraph 3 of the article, which dealt with a situation in which a certain usage existed among the parties whereby a contract could be concluded by the performance of an act. It was too late to attempt to go back on the main provision of that paragraph as the United States amendment appeared to do.

62. Mr. SEVON (Finland) had misgivings regarding two aspects of the United States amendment. The first was the effect of the expression "within a reasonable time", which was used in the last sentence and presumably referred to the reasonable time for sending notice. The previous sentence, however, referred to the act being performed "within the period of time laid down in paragraph 2" which paragraph itself used the expression "within a reasonable time". He feared that difficulties of interpretation would arise from the combination of those two provisions.

63. The second point was that it seemed to him difficult to compel the offeror to send a notice when—under the terms of paragraph 3—it was the established practice among the parties not to require any such notice.

64. Mr. KRISPIS (Greece) said that he supported the United States amendment but shared some of the views of the United Kingdom and Hungarian representatives.

65. Mr. GOLDSTAJN (Yugoslavia) favoured retaining paragraph 3 in its existing form, which corresponded to the practice in his country. He felt that the acceptance of the United States amendment was likely to lead to difficulties and complications.

66. Mr. DATE-BAH (Ghana) associated himself with the remarks of the United Kingdom and other delegations. As he read it, paragraph 3 was based on a presumed waiver of the need to notify.

67. Mr. FARNSWORTH (United States of America) emphasized that his amendment to paragraph 3 was not intended to restrict the effect of the provision as it stood.

68. Mr. SAMSON (Canada) said that, for the reasons given by the representatives of Hungary and the United Kingdom, he was opposed to the United States amendment in the form in which it had been submitted. It would render the acceptance rule embodied in paragraph 3 somewhat ambiguous and much more uncertain of application.

69. Mr. MATHANJUKI (Kenya) said that it would be extremely difficult for him to support the United States amendment because under its terms an offeror could find that he had no contract at a moment when he had already performed it.

70. Mr. BENNETT (Australia) considered that paragraph 3 constituted an exception to the rule embodied in paragraph 2. He could not support the United States amendment which would detract from the whole purpose of paragraph 3.

71. Mr. FARNSWORTH (United States) said that, in view of the scant support for his amendment (A/CONF.97/C.1/L.57), his delegation withdrew it.

#### *Paragraph 1*

72. The CHAIRMAN invited the Committee to consider the Belgian amendment to article 16, paragraph 1 (A/CONF.97/C.1/L.86).

73. Mr. DABIN (Belgium) said that his delegation's amendment (A/CONF.97/C.1/L.86) was not intended to upset the balance of the substantive provision in paragraph 1 but to make the definition of acceptance more precise. The terms of the proposal were not inspired by the provisions of Belgian law but rather by the dictates of practice.

74. His amendment would serve to clarify the subject-matter to which the acceptance must relate in order to be deemed an acceptance for purposes of article 16. His proposed text placed the emphasis on conduct which implied assent to terms considered by the parties themselves as material. In that context the term "conduct" covered not only acts but also inaction.

75. Mr. WAITITU (Kenya) considered that the essence of the matter was the acceptance of the offer and an offer constituted a package which could not be selectively accepted by the offeree as desired by him. He therefore opposed the Belgian amendment which would broaden article 16 so much that in many cases a party would be in doubt as to whether it was in contract or not.

76. Mr. KRISPIS (Greece) said that he had considerable difficulty with the Belgian amendment. Article 12 gave the definition of an offer and article 16 referred to the acceptance of an offer as so defined. As he saw it, acceptance of the Belgian amendment would affect the provisions of article 12 because it would treat as an offer actions which did not come within the ambit of article 12.

77. Mr. STALEV (Bulgaria) noted the Belgian representative's explanation that under the Belgian amendment (A/CONF.97/C.1/L.86) conduct included inaction. Since the last sentence—like that of the text as it stood—specified that silence alone did not amount to acceptance, he wished to know what distinction was being made between "inaction" and "silence".

78. Mr. BONELL (Italy) said that he was attracted by the idea contained in the Belgian proposal but would prefer the text to be shortened. As it now stood, he felt that it could lead to difficulties of interpretation and application.

79. The substance of the Belgian proposal could provide a means of solving the problems that arose when



the conclusion of a contract did not take the simple form of an offer followed by an acceptance. More and more often the conclusion of a contract constituted a complex process in which agreement was reached after a series of prolonged conversations and discussions.

80. Mr. DABIN (Belgium) announced that he would not press his amendment in view of the limited support it had attracted.

#### *Paragraph 2*

81. The CHAIRMAN invited the Committee to consider the Egyptian delegation's proposal (A/CONF.97/C.1/L.90) to delete from the second sentence of article 16, paragraph 2, the concluding proviso reading: "including the rapidity of the means of communication employed by the offeror".

82. Mr. SHAFIK (Egypt) said that the words to be deleted were superfluous and dangerous. It was pointless to single out for special reference the rapidity of the means of communication when the sentence referred broadly to all "the circumstances of the transaction". The latter phrase would naturally include problems arising out of the means of communication used.

83. There was also a danger that the special reference to the particular circumstance of rapidity of means of communication might be taken to mean that the offeree must reply to the offer by using a means of communication as rapid as that used by the offeror himself. That could create difficulties for an offeree in a developing country, who might well not have access to means of communication as rapid as those used by the offeror. In many developing countries, for example, telex facilities were not available outside the capital and other large cities so that an offeree whose place of business was in the provinces would be faced with an obligation to reply by telex with which it was beyond his means to comply.

84. Mr. SANCHEZ CORDERO (Mexico) strongly supported the Egyptian proposal.

85. Mr. OLIVENCIA RUIZ (Spain) also welcomed the Egyptian amendment. He could see no reason for singling out the particular circumstance of rapidity of means of communication.

86. Mr. HERBER (Federal Republic of Germany) noted that the proviso under discussion had been taken bodily from the corresponding ULIS text and had not hitherto attracted any criticism. While it was true that the scope of application of the ULIS convention was limited, the fact remained that no difficulty had emerged in the application of the proviso under discussion. He was therefore unable to support the Egyptian proposal.

87. Mr. SHAFIK (Egypt) stressed that in his own country many of the distant provinces were short of good means of communication. It would be very difficult for an Egyptian trader in such a province to reply to an offer with the same speed as that used by the offeror.

88. Mr. ROGNLIEN (Norway) considered that something useful might be lost by eliminating the proviso entirely and suggested that the intention of the Egyptian proposal should be met by amending the original text to refer not only to the speed of the means of communication but also to the possibilities of communication available to the offeree.

89. Mr. FOKKEMA (Netherlands) said that he had some difficulty in visualizing the situation the Egyptian representative was trying to cover. To take the example of an offer made by telex, it seemed logical to assume that if the telex service was available to transmit the offer, it would likewise be available to enable the offeree to notify the offeror of his acceptance.

90. The CHAIRMAN pointed out that in practice that parallelism did not exist with respect to many means of communication. In the place where he usually spent his holidays, he could easily receive telephone calls from Austria but, if he wanted to telephone back to Vienna, he experienced the greatest difficulties.

91. Mr. KRISPIS (Greece) favoured the Egyptian proposal because it was undesirable as well as unreasonable to single out for special mention the particular circumstance of speed of communication.

92. Mr. SANCHEZ CORDERO (Mexico) reiterated his support for the Egyptian amendment.

93. Mr. MATHANJUKI (Kenya) warmly supported the Egyptian proposal to drop a proviso which, by singling out the particular circumstance of rapidity of communication, would make it difficult for the offeree to respond to the offeror.

94. Mr. BOGGIANO (Argentina) urged that the second sentence of paragraph (2) should be left unchanged. The proviso which the Egyptian amendment proposed to delete would deal with not only the case where communications were fast but also the case where they were slow. Both situations were clearly covered by the term "rapidity".

95. Mr. POPESCU (Romania) supported the Egyptian proposal to delete the proviso in question which was not only totally superfluous but also dangerous because of its unilateral character in favour of the offeror.

*The meeting rose at 6 p.m.*

# 10th meeting

Tuesday, 18 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.10

*The meeting was called to order at 10.05 a.m.*

## CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

### Article 16 (continued) (A/CONF.97/C.1/L.90)

1. The CHAIRMAN invited the Committee to continue its consideration of the amendment submitted by Egypt (A/CONF.97/C.1/L.90).
2. Mr. DABIN (Belgium) proposed that at the end of the second sentence of article 16 (2), there should be added the words “and usage”, which appeared in ULF article 8, from which the sentence in question had been taken. He wished to know whether the Egyptian delegation could accept that change.
3. Mr. SHAFIK (Egypt) said that should the Egyptian amendment be rejected he could accept the change proposed by the Belgian representative.
4. Mr. DATE-BAH (Ghana) said that he was in favour of the amendment, but if it were not adopted he would recommend that the word “and the means of communication available to the offeree” should be added at the end of the second sentence of paragraph 2.
5. Mr. SAMSON (Canada) said that his delegation was against the Egyptian amendment, in the interest of compromise. Whilst civil courts in Quebec took into account the rapidity of the means of communication used, that was not so in regions where the common law system was applied. It was therefore preferable to give some criteria as a basis on which to appreciate whether a period of time was reasonable.
6. Mr. SAMI (Iraq) said that although he appreciated the reasons for the amendment, he feared that it would permit the offeree to respond with less rapidity. In a case where an offer was made by telex the offeree might, in the absence of provisions concerning means of communication, choose to reply by a less rapid means—for example, by letter; that was likely to give rise to litigation, which would have to be settled at the discretion of the judge. A compromise solution would be to refer to

“available” means of communication without further precision.

7. Mr. EYZAGUIRRE (Chile) said that he regretted that he could not support the Egyptian proposal. He considered that in the event of litigation the court or arbitrator ought to take the means of communication used into account.

8. Mr. MASKOW (German Democratic Republic) pointed out that the period of time in question could be divided into two: the time required to consider the offer and the time taken to transmit the reply. If the Egyptian amendment were adopted, there would no longer be any indication relating to the latter period. Moreover, if developing countries did not have the same means of communication (telex or data processing facilities) as their trade partners, those means could not be used in relation to them. The existing wording took into account the case where one country had the same means of communication available as the other but could not use them with the same rapidity. For all those reasons his delegation was in favour of keeping the existing text.

9. Mr. VISCHER (Switzerland) asked whether, in the event of the Egyptian proposal not being adopted, the text was to be sent to the Drafting Committee in the French or in the English version, the latter being the clearer.

10. The CHAIRMAN said that if members of the Committee considered that there were differences between the different language versions, which seemed to be the case, the text would in any case be sent to the Drafting Committee.

11. Mr. GOLDSTAJN (Yugoslavia) supported the text in its existing form, since it corresponded to existing trade practices and would be all the more useful as many new countries and bodies were making their appearance on the international trade scene. Moreover, it did not raise any practical problems, because it only concerned means of communication.

12. The CHAIRMAN put the Egyptian amendment (A/CONF.97/C.1/L.90) to the vote.

13. *The Egyptian amendment was rejected.*

14. The CHAIRMAN invited the Committee to take a decision on the amendment proposed orally by the Belgian representative.

15. Mr. DABIN (Belgium), stating that he had abstained in the vote on the Egyptian amendment, reminded the Committee that his proposal was to add at the end of the second sentence of article 16 (2), the words “and usage” contained in ULF, article 8.

16. Mr. DATE-BAH (Ghana) reminded the Committee that he had proposed that the words "and the means of communication available to the offeree" should be added at the end of the same sentence.

17. Mr. SHAFIK (Egypt) said that he had no objection to that proposal.

18. The CHAIRMAN put the Belgian amendment to the vote.

19. *The Belgian amendment was rejected.*

20. The CHAIRMAN put the Ghanaian amendment to the vote.

21. *The Ghanaian amendment was rejected.*

22. Mr. KRISPIS (Greece) pointed out, also in connection with article 16, that the last sentence of paragraph 2 stated a rule and an exception, and his delegation would prefer to lay the emphasis on the rule. Bearing in mind that at the current time acceptance of an offer was often made by telephone, it would be preferable to say that an oral offer ought to be accepted immediately if the circumstances so indicated.

*Article 17 (A/CONF.97/C.1/L.60, L.61, L.87, L.91, L.92, L.97, L.98)*

23. The CHAIRMAN, having listed the amendments to article 17, noted that there were two proposals, one from the United Kingdom (A/CONF.97/C.1/L.61) and one from Bulgaria (A/CONF.97/C.1/L.91), to delete paragraphs 2 and 3 and that Egypt was also proposing the deletion of paragraph 3 (A/CONF.97/C.1/L.92). He suggested that the first two proposals should be considered first.

24. Mr. FELTHAM (United Kingdom) said that, as explained in its written comments (A/CONF.97/8/Add. 3), his country wished to delete paragraphs 2 and 3 because they would cause uncertainty as to whether a contract had actually been concluded. It was preferable that the rule to be applied in all cases should be that contained in paragraph 1.

25. Mr. STALEV (Bulgaria), introducing his delegation's amendment (A/CONF.97/C.1/L.91), explained that article 16(1) and article 17(1) established a fundamental rule and a rational principle, i.e. that there could be no contract without agreement by the parties on all points. However, that fundamental rule was almost nullified by the exceptions given in paragraphs 2 and 3: paragraph 2 gave an exception to paragraph 1, the first sentence of paragraph 3 an exception to paragraph 2, and the second sentence of paragraph 3 an exception to the first sentence, the result being that a contract could be concluded implicitly when there had been no agreement on the essential elements of sale as stated in the first sentence of paragraph 3. That solution sacrificed the fundamental considerations of international trade relations—certainty and security—to less important considerations, such as the flexibility of rules and equity in individual cases. It also jeopardized the interests of

less experienced enterprises, which might not refuse an offer in good time.

26. His delegation therefore proposed that paragraphs 2 and 3 should be deleted and, if that proposal were not accepted, recommended that at least the last part of paragraph 3 from "unless the offeree . . ." should be deleted.

27. Mrs. KAMARUL (Australia) said that she supported the United Kingdom and Bulgarian proposals since the provisions of paragraphs 2 and 3 were too radically different from Australian law. They diverged further from it than did any other article in Part II of the Convention.

28. Mr. SEVON (Finland) said that he could not agree to either of the proposals, since trade nowadays largely took place in the manner described in paragraphs 2 and 3.

29. Mr. MASKOW (German Democratic Republic) regretted that he could not support the United Kingdom and Bulgarian proposals since experience had shown that in trade practice minor changes were often made to the offer and that contracts were nevertheless considered as having been concluded and were performed. The only effect that the deletion of the paragraphs would have would be to make some contracts void which would none the less be executed, and that would cause serious difficulties. It would therefore be preferable to keep the existing text, even if it was not perfect. In any event, the problems which those provisions might give rise to were less serious than those which might arise if the provisions were deleted.

30. Mr. STALEV (Bulgaria) said that there was a presumption of contract as soon as there had been performance by the party which had received the acceptance together with the alterations.

31. Mr. LANDFERMANN (Federal Republic of Germany) said that he had no definite position on the matter because his country's legislation provided for both possibilities, either of which could be applied according to whether paragraph 2 was kept or deleted. However, he would perhaps be inclined to give preference to the United Kingdom proposal because of the uncertainties which might be caused by the application of paragraph 2. It was indeed difficult to say what was to be understood by a material alteration and to know who could decide on the matter.

32. Mr. BOGGIANO (Argentina) said the most tricky problem was raised by the last part of paragraph 3, since it introduced a subjective element which was difficult to govern by rules and which, for that reason, caused uncertainty about the application of paragraph 2 and the first part of paragraph 3. His impression was that the two provisions were mutually exclusive, which brought into question the consensual basis of the contract. He was therefore in favour of the proposals to delete the two paragraphs.

33. Mr. FARNSWORTH (United States of America)

was in favour of keeping the existing text of article 17, and particularly of paragraph 2, but if paragraph 3 presented difficulties to some delegations he would not oppose its deletion. It was important to bear in mind that the deletion of paragraph 2 would have serious consequences in the event of a dispute. It would allow one or other of the parties to a given contract to take refuge behind to so-called "mirror-image rule" (principle of exact concordance between the terms of the offer and the acceptance), should that party no longer have an interest in performing the contract for reasons other than those hinging on material alterations—for example, in the event of a rise or drop in the price of the goods for which the contract was made. The deletion of paragraph 2 would jeopardize the rule of good faith, of which it was in a sense a specific application.

34. Mr. KRISPIS (Greece) supported the proposals to delete paragraphs 2 and 3. Paragraph 2, which gave first a rule then an exception, presented difficulties in the sense that it made it necessary to distinguish between alterations which were material and those which were not, and raised the problem of knowing who was to make that distinction. Paragraph 3 provided for an exception to an exception, which further increased the difficulties. If the Committee decided to keep paragraphs 2 and 3, he would support the idea of deleting the last part of the sentence in paragraph 3 mentioned in the second part of the Bulgarian amendment (A/CONF.97/C.1/L.91).

35. Mr. WANG Tian ming (China) said that he very much wished article 17 to be kept in its existing form. Paragraph 1 contained the basic principle, which was complemented and explained by paragraphs 2 and 3. The three paragraphs formed a whole and the balance would be destroyed if paragraphs 2 and 3 were deleted.

36. Mr. GHESTIN (France) said that, whilst he saw the point of the amendments, as an attempt to simplify a complex text, he regretted that he could not support them since the realities of international trade were not taken into account. In practice, general conditions of sales and purchase, which concerned particularly the questions of guarantee, liability and jurisdiction, were never in perfect harmony. It was, however, customarily admitted that a contract was concluded at the time when agreement was reached on price, quantity and quality, but not necessarily on all the elements of the contract. If paragraphs 2 and 3 were deleted, it would be impossible to conclude an international contract without requiring the parties to set aside their general conditions, which they were hardly likely to do since it would mean giving the international uniform law precedence over their own terms. Consequently, his delegation could not agree to delete those paragraphs, but it recognized that their wording must be improved and, that the last phrase of paragraph 3 should, perhaps, be deleted. In that connection, he drew attention to the draft amendment submitted by his delegation (A/CONF.97/C.1/L.60).

37. Mr. DABIN (Belgium) said he endorsed the essen-

tial points of the statement by the representative of Bulgaria and supported the idea of deleting paragraphs 2 and 3. The text of article 17, which was based on the corresponding article of the United States Uniform Commercial Code, was very complex and the desire of the drafters of that article to avoid too strict an application of the Rule of the Mirror was understandable. That article had however given rise to severe criticism because it could create a vicious circle. Interplay between the attitudes of parties could theoretically lead to substantial changes without any definite result. The representative of France was no doubt right in insisting on the importance of general conditions but, contrary to what he thought, it was precisely because practical circumstances did not correspond to the successive hypotheses set forth in the text that the Belgian delegation would like to delete paragraphs 2 and 3, or at least delete paragraph 3 while retaining paragraph 2 which could be useful because the parties should agree not on all the terms but on those which were really essential.

38. Mr. KOPAC (Czechoslovakia) pointed out that the interpretation of the word "materially" might lead to misunderstandings between the parties and give rise to legal difficulties. It would be unwise to accept a principle that was contrary to article 16, where it was stipulated that silence should not amount to acceptance. His delegation supported the Bulgarian proposal, but considered that, if that proposal was rejected, paragraph 3 should be retained because it was very important for the interpretation of paragraph 2, even though the reservation contained in the last phrase was a source of uncertainty.

39. Mr. OLIVENCIA RUIZ (Spain) said that he was in favour of the deletion of paragraphs 2 and 3 for the reasons already given by preceding speakers. The text should be clear and intelligible to trading partners and jurists alike. It was rightly based on the principle of concordance between offer and acceptance but, as the representative of Czechoslovakia had pointed out, paragraph 2 was in contradiction with the rule set forth in article 16, namely that silence did not amount to acceptance. If that paragraph was retained, paragraph 3 should also be retained, provided that the wording was improved and the last phrase deleted.

40. Mr. ROGNLIEN (Norway) said that he was opposed to the idea of deleting paragraph 2. That paragraph contained an important principle which could be linked with the notion of good faith, as the representative of the United States had pointed out. That was not the case for paragraph 3, which was supposed to make the rules even stricter, but did not achieve its objective because it was qualified by an exception, which was in fact needed if paragraph 3 was to be retained since otherwise the paragraph would be too difficult to apply. In any case, paragraph 3 seemed to him to be nothing but a source of confusion and difficulties. He therefore requested that the paragraph be deleted.

41. Mr. MICHIDA (Japan) said he thought that the delegations which had advocated the deletion of para-

graphs 2 and 3, because of the uncertainty to which the word "materially" might give rise, had in fact considered only one aspect of the question. The other aspect was that, at the present time, transactions were usually carried out by an exchange of documents such as telegrams and printed forms and that exchange gave rise to numerous additions. The Convention could not oblige the parties to reply to all those additions individually. Neither the retaining nor the deletion of paragraphs 2 and 3 would be completely satisfactory but, in the light of commercial realities, his delegation was inclined to favour their retention.

42. Mr. DATE-BAH (Ghana) said that, in view of the law in force in Ghana, the judges in his country would probably choose the solution proposed by the representative of the United Kingdom; but, like the representatives of the United States and Japan, he was convinced that the rules set forth in article 17 were necessary. He therefore supported that article, provided that paragraph 3 was retained.

43. Mr. DE ANDRADE (Brazil) supported the Bulgarian proposal to delete paragraphs 2 and 3 of article 17 for the reasons already given by the previous speakers, who had emphasized the uncertainty to which the excessive number of exceptions and the subjective elements introduced into those paragraphs would lead.

44. Mr. PLUNKETT (Ireland) said that it was preferable to restrict the article to the clear rule set forth in paragraph 1 and to delete paragraphs 2 and 3 which, by trying to resolve situations where the traditional rule set forth in paragraph 1 did not produce desirable results, in fact created confusion and uncertainty. If the proposals to delete paragraphs 2 and 3 were not adopted, he would support paragraph 2 of the Bulgarian amendment, namely the deletion of the last part of the last sentence of paragraph 3.

45. Mr. EYZAGUIRRE (Chile) said that he was opposed to the deletion of paragraphs 2 and 3. He considered it important to retain paragraph 2 for the reasons given by the representatives of Finland and the United States. Paragraph 3 completed paragraph 2. His delegation had no special difficulty with the last phrase of paragraph 3, but it might possibly agree to its deletion.

46. Mr. MELCHIOR (Denmark) said he thought that the United Kingdom proposal to delete paragraphs 2 and 3 would only increase uncertainties rather than remove them. He would prefer those paragraphs to be retained. He might, however, possibly agree to the deletion of paragraph 3.

47. Mr. MICCIO (Italy) said that he was in favour of deleting paragraphs 2 and 3 which were a source of confusion because they provided for too many exceptions to the rule set forth in paragraph 1.

48. The CHAIRMAN invited the Committee to vote on the United Kingdom amendment (A/CONF.97/C.1/L.61) to delete paragraphs 2 and 3 of article 17 and the

first paragraph of the Bulgarian amendment (A/CONF.97/C.1/L.91).

49. *The amendments were rejected.*

50. The CHAIRMAN invited the Committee to vote on the Egyptian proposal (A/CONF.97/C.1/L.92) to delete paragraph 3 of article 17.

51. *The proposal was rejected.*

52. The CHAIRMAN invited the Committee to vote on the second paragraph of the Bulgarian amendment (A/CONF.97/C.1/L.91) proposing the deletion of the last portion of the second sentence of paragraph 3, starting with the words "unless the offeree . . .".

53. *The amendment was adopted.*

*The meeting was suspended at 11.35 a.m. and resumed at 11.55 a.m.*

54. The CHAIRMAN said that, in the absence of any objection, he would consider that paragraph 1 of article 17, which had not been the subject of any amendment, was adopted.

55. *It was so decided.*

56. The CHAIRMAN drew the attention of the members of the Committee to the amendment submitted by the Netherlands concerning article 17 (2) (A/CONF.97/C.1/L.98).

57. Mr. MEIJER (Netherlands), introducing the amendment (A/CONF.97/C.1/L.98), said that it proposed the insertion between the first and second sentences of article 17 (2) of a new provision which explicitly entitled the offeree to clear his acceptance from the non-material alterations to which the offeror had made a timely objection, a situation which was not provided for in the existing draft. Under article 15 and article 17 (1), a counter-offer seemed to be considered to be a rejection of the offer, even if it contained only minor modifications. That situation could give rise to abuse and affect good faith in international trade. Non-material alterations or additions could certainly be considered important by the offeror, but the offeree should always be entitled to retract those changes or alterations promptly and revert to the terms of the original offer.

58. The CHAIRMAN said that the Netherlands amendment did not seem to have any support in the Committee.

59. Mr. MEIJER (Netherlands) withdrew his amendment.

60. The CHAIRMAN suggested that the United States proposal (A/CONF.97/C.1/L.97), which was merely a matter of drafting, should be sent direct to the Drafting Committee.

61. *It was so decided.*

62. The CHAIRMAN drew the attention of the members of the Committee to the French amendment to article 17 (3) (A/CONF.97/C.1/L.60).

63. Mr. GHESTIN (France) explained that his delegation had submitted that amendment because it considered that the list contained in article 17 (3), which tried to define the terms which might materially affect the terms of the offer, was too long. It contained references *inter alia* to the extent of one party's liability to the other and the settlement of disputes, which were all in fact secondary considerations which came under the general conditions of purchase. The only material elements seemed to be the price, the quantity and the quality, which constituted the particular terms of contracts and affected the very substances of the sale. The French amendment would also bring article 17 (3) into line with article 12 on offers, which mentioned only the quantity and the price of the goods.

64. Mr. SHAFIK (Egypt) expressed astonishment that the representative of France maintained his amendment despite the deletion of the second part of the last phrase of paragraph 3.

65. Mr. GHESTIN (France) replied that the deletion of the phrase in question did not detract from the usefulness of his amendment.

66. Mr. SEVON (Finland) said that he was unable to approve the French amendment. Terms such as payment and the settlement of disputes were also material. Moreover, when the text was being prepared in UNCITRAL, the developing countries had shown that they attached special importance to the question of the extent of one party's liability to the other and he was thus unable to agree to the deletion of that term.

67. Mr. KRISPIS (Greece) said that he too was opposed to the French amendment. Its aim was, in fact, to delete any reference to payment, which was an important element. The deletion of the words "*inter alia*" would make the list of terms contained in article 17 too rigid, whereas it could only be of an indicative nature.

68. Mr. ROGNLIEN (Norway) said that he was in favour of the French amendment, which would simplify paragraph 3 and facilitate its application. The list in that paragraph was not exhaustive and the fact that a term did not appear did not mean that it was not material; that question should be left to the appreciation of the courts. The aim of the French amendment was to concentrate attention on the really material terms and that was all the more important because the last part of the last sentence of paragraph 3 had been deleted.

69. Mr. FELTHAM (United Kingdom) said he agreed with the representative of Finland that all the terms mentioned in paragraph 3 could be important and material. To avoid any uncertainty, it seemed preferable to consider an acceptance with restrictions as a counter-offer. The wider the definition of the terms referred to in paragraph 3, the less such uncertainties would be encountered. He was thus not in favour of the French proposal.

70. Mr. DABIN (Belgium) said that he was in favour of

the French proposal which would improve paragraph 3. Clauses other than those relating to price, quality and quantity were important, but it was for the parties, and not for a legal provision, to emphasize that importance. The expression "are considered", used in the article implied that it was only a supposition. It might be necessary to reconsider that expression and use one with a more objective meaning.

71. Mr. KOPAC (Czechoslovakia) said that he was unable to support that amendment. Paragraph 3 did not have to be drafted with regard for article 12, which dealt only with the minimum content of the contract. In paragraph 3 it was a question of deciding what was and what was not material, and matters such as the place and time of delivery or the extent of liability were very important.

72. Mr. MASKOW (German Democratic Republic) said that, particularly after having heard the arguments put forward by the representative of Norway, he was in favour of the French amendment which seemed especially important after the deletion of the last phrase of paragraph 3. There was no doubt that the three conditions listed by the representative of France could be considered important. They related to the cases which gave rise to the most serious problems between the parties, whereas, if paragraph 3 was retained as it had been drafted, even terms which posed few problems could be regarded as determinant. Moreover, the French amendment did not exclude the possibility that other terms could be considered material. Lastly, it was more in keeping with international trade practices and would facilitate the formation of contracts. The words "*inter alia*" could however be included to facilitate its adoption.

73. Mr. REISHOFER (Austria) endorsed the Greek representative's objections to the French amendment. The deletion of the words "*inter alia*" could lead to an interpretation according to which the terms related to the price, quality and quantity of the goods were the only ones that were to be considered to alter the terms of the offer materially, and that was unacceptable to his delegation. However, it could support the amendment if the words "*inter alia*" were added, as proposed by the representative of the United States.

74. Mr. GHESTIN (France), replying to the objections to his delegation's amendment, emphasized that the expression "are considered to alter the terms of the offer materially" indicated that it was a matter of a mere supposition. The other essential terms, such as the place and time of delivery, conditions of payment, the extent of liability and the settlement of disputes were normally determined during the negotiations between the parties, in their correspondence or at the time the contract was drafted. In the French proposal, paragraph 3 was intended merely to determine *a priori* the terms supposed to be essential.

75. Mr. FARNSWORTH (United States of America) said that he could support the French amendment



provided that it was understood that the terms quoted did not constitute an exhaustive list.

76. Mr. EYZAGUIRRE (Chile) said he endorsed the objections to the French amendment raised by the representatives of Finland, Greece and Austria. He could not support that amendment, therefore, unless the list of additional terms considered to alter the terms of the offer materially remained open.

77. Mr. SAMI (Iraq) pointed out that the essential problem was to decide if the additional terms listed in paragraph 3, as proposed by France, were mere examples or an exhaustive list. In the first case, the French proposal was acceptable, whereas in the second it made the text too rigid. He could support the French proposal if the words "*inter alia*" were added, which would clearly indicate that it was merely a question of examples and that there might be other terms which were important to the offeror.

78. Mr. DATE-BAH (Ghana) said that he shared the doubts expressed by preceding speakers concerning the advisability of the French amendment. Terms other than those referred to in that amendment should be identified. In that respect, the existing text seemed to him more satisfactory.

79. Mr. STALEV (Bulgaria) also thought that even if the terms listed in the French proposal were simply examples, others should be mentioned in order to make the sense of the paragraph clearer. The existing text of paragraph 3 was more satisfactory in that respect.

80. Mr. BECK-FRIIS (Sweden) said that although he preferred the existing text he would be able to accept the French amendment if the words "*inter alia*" were added. The date and place of delivery might in fact be as important as the price, quality and quantity of the goods.

81. Mr. ROGNLIEN (Norway) asked the French representative whether he would agree to insert the words "*inter alia*" in his proposal.

82. Mr. GHESTIN (France) remarked that the insertion of the words "*inter alia*" would mean that the elements mentioned in the French amendment would become mere examples. He accordingly preferred to maintain his amendment as it stood in document A/CONF.97/C.1/L.60, with the sentence ending after the word "materially" in accordance with the Committee's earlier decision. If the wording was not acceptable to the Committee, his delegation might agree to the insertion of the words "*inter alia*".

83. The CHAIRMAN put the French amendment (A/CONF.97/C.1/L.60) to the vote.

84. *The amendment was rejected.*

85. The CHAIRMAN put to the vote the French amendment as modified by the Norwegian oral sub-amendment to insert the words "*inter alia*" after the word "relating".

86. *The amendment as so modified was rejected.*

87. The CHAIRMAN invited the Committee to take up the Belgian proposal (A/CONF.97/C.1/L.87) to add a new paragraph to article 17.

88. Mr. DABIN (Belgium) explained that the amendment was intended to settle a problem that frequently arose in practice and that ought to be considered in the Convention. The commercial staffs of buyers or sellers were not legal experts and used general conditions in a rather mechanical way. It sometimes happened that the offeror and the offeree agreed on specific points (such as the price, quality and quantity of goods or arrangements for payment) and so far as other matters were concerned simply referred to general conditions the terms of which were conflicting. In that case the conflicting clauses should be deemed not to form part of the contract. The Belgian delegation had placed the words "or implicitly" in square brackets in the phrase "expressly [or implicitly] referred" and left it to the Committee to decide whether they should be included in the text.

89. Mr. SHAFIK (Egypt) supported the Belgian proposal, without the words "or implicitly".

90. Mr. PLUNKETT (Ireland) said that he was strongly opposed to the Belgian amendment. It was contrary to the law of contracts, at least in the common law countries, and to the principle of the freedom of choice of the parties embodied in article 5 of the draft Convention.

91. Mr. KRISPIS (Greece) opposed the Belgian amendment on the same grounds as the preceding speaker. He pointed out that the expression "general conditions" might be interpreted in various ways if it was not defined in the Convention. In his view the Belgian proposal was unduly categorical since conflicting clauses, which were in fact unusual, could in practice be interpreted by the courts in such a way as to provide the two parties with a satisfactory solution. There appeared to be nothing to be gained by laying down too specific a rule in the matter.

92. Mr. FELTHAM (United Kingdom) observed that the Belgian amendment dealt with a typical instance of the "battle of forms" in which each party relied on its own terms. In such cases, it was difficult to find a solution capable of satisfying all the parties. Article 17 (1) appeared to provide a fairly satisfactory definition of the circumstances in which a reply purporting to be an acceptance of the offer should be considered as a rejection constituting a counter-offer. He was in general agreement with the objections to the Belgian proposal stated by the Irish representative and would prefer to keep the existing text of article 17.

93. Mr. LANDFERMAN (Federal Republic of Germany) thought that the Belgian amendment was interesting but felt that it raised an issue that was too complicated for the Committee to settle in the absence of preparatory work by the UNCITRAL Working Group. The latter had not explored the issue raised in the new paragraph proposed by Belgium in sufficient detail. His country had attempted to provide a solution for the pro-



blem in its legislation but had had to abandon the attempt because of the difficulties encountered. The courts had adopted various solutions, some of which were along the lines of the Belgian proposal and excluded conflicting clauses from contracts. That solution could, however, create difficulties, as for example, in the case of general conditions the terms of which were reasonably similar but which were distant from the legal solution. The term "general conditions" was in itself controversial as the Greek representative had indicated. It had also to be considered at what point the terms of such general conditions were mutually exclusive; e.g. one party might refer to general conditions in relation to limitation of liability, the other with regard to the place of delivery, the remainder of the contract being governed by the law.

94. He would be interested to hear the comments of delegations whose countries, such as the United States and the German Democratic Republic, had resolved the problem of the "battle of forms" in their national legislation.

95. He was unable to support the Belgian proposal.

96. Mr. GHESTIN (France) said that the general conditions of sale were a set of regulations in themselves and should, in the opinion of those who drafted the Convention, be considered as a part of the national law of each country.

97. The general conditions of the various countries were rarely precisely the same. Agreement on general conditions was therefore often illusory, as was indicated by the familiar phrase "the battle of forms" and the conflict of general conditions. He nevertheless considered that the issue was an important one and must be covered in the Convention. The Belgian amendment had the great merit of doing so and at the same time of proposing a simple solution. Although difficulties might arise in defining general conditions and deciding at what point they became conflicting, the Belgian amendment seemed to be preferable to the existing text, which completely ignored the problem of conflict between general conditions.

98. Mr. GOLDSTAJN (Yugoslavia) had serious misgivings regarding the Belgian amendment. It frequently happened in the course of trade that reference was made to general conditions, to some terms of which one of the parties might attach substantial importance. If those terms were excluded, the contract would not be concluded.

99. Mr. BOGGIANO (Argentina) considered that the issue was an extremely important one and should be thoroughly explored, but wondered whether a working group should not be set up to do so. He would support the Belgian amendment if the meaning of the term "general conditions" were defined in order to remove the misgivings that had been expressed in that connection.

100. Mr. DABIN (Belgium) thanked delegations for their comments and agreed that the issue should have been explored during the earlier work of the UNCITRAL Working Group. Nevertheless, it was not impossible to define general conditions. The legislation of the Federal Republic of Germany, for example, contained some elements of a definition that might be used. He failed to see how his proposal could conflict with the law of contracts and the principle of the freedom of choice of the parties. The proposed text was designed to cover only those cases where the parties had made specific reference to clauses containing conflicting terms. He agreed that his amendment contained a few vague concepts but the draft convention contained many more, including some of greater importance, the interpretation of which was left to either the judge or the arbitrator.

101. The CHAIRMAN put the Belgian amendment (A/CONF.97/C.1/L.87) to the vote.

102. *The amendment was rejected.*

103. The CHAIRMAN announced that article 17 had been adopted as amended by the second paragraph of the Bulgarian amendment (A/CONF.97/C.1/L.91), deleting the last portion of paragraph 3 beginning with the words "unless the offeree . . .".

*The meeting rose at 12.55 p.m.*

# 11th meeting

Tuesday, 18 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.11

*The meeting was called to order at 3.01 p.m.*

## CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

### Article 18 (A/CONF.97/C.1/L.62, L.93)

1. The CHAIRMAN invited the Committee to consider article 18 and the amendments thereto submitted by the United Kingdom (A/CONF.97/C.1/L.62) and by Egypt (A/CONF.97/C.1/L.93). The Bulgarian amendment (A/CONF.97/C.1/L.94) had been withdrawn.

2. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.62), drew attention to the explanation contained in the United Kingdom comments (A/CONF.97/8/Add.3, p.14). The proposed addition would make it clear that it was open to the offeror to specify that the period for acceptance should begin to run from a point in time different from those mentioned in paragraph 1. The offeror might, for example, state that the offer was open for six days from the date of receipt of the letter, rather than from the date shown on the letter or on the envelope.

3. Mr. HERBER (Federal Republic of Germany) considered the proposed insertion unnecessary. If the proposed words were introduced in article 18 (1), doubts might arise regarding the interpretation of such provisions as article 17 (3), which had been adopted without any such qualification but in respect of which the position was exactly the same. It was always understood that the offeror could specify a different period of time.

4. Mr. SEVON (Finland) said there was no doubt that the result desired by the United Kingdom representative could be arrived at with the text as it stood. It would only create confusion if the proposed words were added in article 18 (1).

5. The CHAIRMAN asked the United Kingdom representative whether he would be prepared to withdraw his amendment on the understanding that the summary record of the meeting would show that the delegations opposing the amendment did so simply because they were convinced that the desired provision was already contained in the draft as it stood.

6. Mr. FELTHAM (United Kingdom) said that he withdrew his amendment (A/CONF.97/C.1/L.62) on that understanding.

7. Mr. SHAFIK (Egypt), introducing his delegation's amendment (A/CONF.97/C.1/L.93), explained that the proposal was intended to deal with the problem which would arise if a short period of time for acceptance were specified and the period happened to coincide with a very long holiday.

8. The CHAIRMAN suggested that the proposal might proceed from a possible misunderstanding of the provisions of article 18 (2).

9. Mr. KRISPIS (Greece) stated that if the Bulgarian delegation had not withdrawn its amendment to article 18 (A/CONF.97/C.1/L.94), the Greek delegation would have wholeheartedly supported it.

10. The CHAIRMAN said that in the absence of further comments, he would consider that article 18 was adopted.

11. *It was so agreed.*

### Article 19

12. *Article 19 was adopted.*

### Article 20

13. *Article 20 was adopted.*

### Article 21 (A/CONF.97/C.1/L.70, L.78, L.89)

14. The CHAIRMAN invited the Committee to consider article 21 and the amendments thereto. If there were no objection, he would take it that the Committee agreed to refer the first part of the Belgian amendment (A/CONF.97/C.1/L.89) which related to a drafting point, to the Drafting Committee.

15. *It was so agreed.*

16. The CHAIRMAN drew attention to the Italian amendment (A/CONF.97/C.1/L.70). In the absence of further support for the proposal in the Committee he would take it that the Committee agreed to reject the amendment.

17. *It was so agreed.*

18. Mr. KOPAC (Czechoslovakia), introducing his delegation's amendment, explained that the written form was important not only where the competent national legislation required it but also where the parties themselves insisted on it because they wanted to have clear proof of the conclusion of the contract and of its contents.

19. The problem which had arisen was whether the wish of one of the parties to have the contract in written form was sufficient to deprive the transaction of its validity if the other party did not comply with that requirement. It was advisable to have a clear-cut rule on the matter and his delegation's amendment accordingly specified that where the offer itself required to be accepted in writing, the acceptance was valid only if the written form was observed.

20. In reply to a question by the CHAIRMAN, Mr. KOPAC (Czechoslovakia) said that the point dealt with in his amendment was not, in his opinion, already covered by the provisions of article 11.

21. Mr. KRISPIS (Greece) supported that view. If the offeror simply asked the offeree to reply in writing, article 17 (2) would apply and the issue would be whether the requirement of a reply in writing constituted a material condition or not. Article 5 referred only to a contract already concluded, and not to an offer as such. A second possibility was that the offeror might invite the offeree to reply in writing, making it clear that otherwise the reply would not be effective. In that case, the reply, if not in written form, would not amount to an acceptance as defined in article 16.

22. In the circumstances, he believed that the solution embodied in the Czechoslovak amendment (A/CONF.97/C.1/L.78) was correct but considered the amendment as such superfluous because the solution would be arrived at under the existing provisions of the draft.

23. Mr. SEVON (Finland) agreed that the amendment was unnecessary.

24. The CHAIRMAN said that in the absence of further comments, he would consider that the Committee agreed not to adopt the amendment.

25. *It was so agreed.*

26. Mr. DABIN (Belgium), introducing his delegation's amendment (A/CONF.97/C.1/L.89) said that it was intended to deal with a practical problem not covered by the existing provisions of the draft. It happened that the parties to a contract reached agreement without paying due attention to the problem of authorizations or licences that might be required from a third party, in the case in question a public authority. The question that then arose was whether the absence of a licence or a permit suspended the formation of the contract itself or merely its performance. The answer in that regard depended on the type of authorizations involved. The proposed amendment made the formation of the contract conditional in principle on the granting of the licence or permit.

27. Mr. FOKKEMA (Netherlands) took the view that the agreement between the parties was sufficient to form the contract but that the absence of a permit or licence would have the effects specified in the internal law of the country concerned. The matter should in his opinion be left to be regulated by the competent national law.

28. Mr. KIM (Republic of Korea) said that he could not accept the solution proposed in the Belgian amendment. In that connection, he drew attention to article 65 of the draft which exempted from all liability a party failing to perform contractual obligations owing to an impediment beyond his control.

29. Mr. SZÁSZ (Hungary) remarked that there were cases in which one of the parties might take the risk of trying to obtain the necessary authorizations or permits. If he failed to do so, he would be liable for breach of contract. He could not accept the view that a contract was not concluded if an application for a necessary licence was unsuccessful. It would be more correct to say that the contract was not effective or that it could not be performed. For those reasons, he did not favour the Belgian amendment.

30. Mr. BENNETT (Australia) agreed. He noted that it would be virtually impossible to apply the rule embodied in the Belgian amendment in the case of a long-term contract for the supply of goods in several shipments spread over a period of time where separate licences were required for the export of each consignment. If a licence was refused for a particular consignment, the Belgian amendment would require the whole contract to be treated as void.

31. Mr. FRANCHINI-NETTO (Brazil) supported the Belgian amendment, which dealt with the very real problem generated by the requirement of a licence or a permit from a public authority.

32. Mr. POPESCU (Romania) considered that in such cases the contract was not effective until any required licence was obtained.

33. Mr. MEDVEDEV (USSR) said that he found the provisions of the Belgian amendment somewhat unclear. In cases in which an authorization from a public authority was required, specific provisions would be included in the contract. The question was not one that could be properly solved by means of a general provision of the kind proposed by the Belgian representative.

34. Mr. DABIN (Belgium), replying to the observations just made, said that in a case where there was formation of a contract, in spite of the fact that there was no authorization, and it could not therefore be performed, the legal position of the parties remained unclear. Moreover, article 65 only applied where the contract was already concluded.

35. The CHAIRMAN noted that the majority appeared not to favour the Belgian amendment. If there were no further comments, he would take it that the Committee agreed to reject it.

36. *It was so agreed.*

37. Mr. SHORE (Canada), introducing his delegation's amendment to article 21 (A/CONF.97/C.1/L.112) said that the new provision was considered necessary by commercial circles in his country. The rule embodied in the

proposed new paragraph gave expression to what was the customary rule of trade in his country.

38. Mr. KRISPIS (Greece) suggested that it might be better to say that the contract was "considered as concluded" irrespective of whether the moment of its conclusion was determined or not.

39. Mr. SHORE (Canada) said that he would have no difficulty in accepting that subamendment.

40. Mr. STALEV (Bulgaria) said that all delegations would agree that a contract was concluded by the consent of the two parties concerned even if the time of its conclusion could not be established. The amendment under discussion was therefore superfluous.

41. Mr. SAMI (Iraq) pointed out that it was impossible to tell when the obligations of buyer and seller began to run if the moment of conclusion of a contract was not determined. He failed to see how a contract could be said to exist under those circumstances.

42. Mr. DATE-BAH (Ghana) said that the text of the draft Convention did not deal with the question whether the contract was validly formed but rather attempted to identify the point when the contract was formed. He felt the amendment was superfluous.

43. The CHAIRMAN said that in view of the limited support for the Canadian amendment he would, if there was no objection, consider it rejected.

44. *It was so agreed.*

45. *Article 21 was adopted.*

#### *Article 22*

46. *Article 22 was adopted.*

#### *Article 12 (continued)*

Report of *ad hoc* working group on paragraph 1 (A/CONF.97/C.1/L.103)

47. Mr. FELTHAM (United Kingdom), speaking on behalf of the *ad hoc* working group composed of Austria, Egypt, Finland, Norway, Republic of Korea, Singapore and the United Kingdom, reminded the Committee that it had been set up following the rejection of a proposal to delete the second sentence of paragraph 1. At the same time, a number of delegations had made suggestions designed to provide a more flexible sentence (A/CONF.97/C.1/SR.8). The working group was submitting two proposals in document A/CONF.97/C.1/L.103. The first proposal commended itself most, but as an alternative the Austrian proposal was also submitted for consideration. The intention of the working group's first proposal was to provide a flexible formula on the definition of what constituted a sufficiently definite proposal to be deemed an offer under the Convention. It avoided the impossible task of putting all the factors involved in the formation of contracts into a single sentence. It referred to the matters most generally

mentioned by delegations as being the most important factors, namely, the goods, the quantity and the price, which a court should consider in the event of a dispute subsequently arising about the binding nature of a contract. The Austrian proposal met the desire for a less rigid formula in another way by giving examples of what should appear in a definite proposal but making no exhaustive definition.

48. Mr. DABIN (Belgium) wondered whether the working group's proposal was admissible. He thought that the rejection by the Committee of the proposal to delete the original second sentence had in effect been a decision to maintain it. He noted that the delegation of France, which had been particularly concerned to retain the existing text had not been a member of the working group. There did not appear to be much difference between the two proposals submitted by the group: they both contained a series of examples.

49. The CHAIRMAN said that after discussions lasting over 10 years, the UNCITRAL plenary had eventually adopted article 51 which set out the criteria for determining the price subsequent to the conclusion of a valid contract, before it had adopted part II of the draft Convention, dealing with formation of the contract. Thus, a contradiction was apparent between the statement in article 12, paragraph 1, that a fixed price was an essential factor in a definite proposal and the provision in paragraph 51 of rules for fixing a price. For that reason some delegations had wanted to delete the second sentence of article 12. The present proposal was to convert it into a sentence giving examples rather than laying down rules, so that it could be maintained.

50. Miss VILUS (Yugoslavia) said that the working group's proposal was a good one and she supported it. If it was adopted, it would go far to solve the problem about the relationship between articles 12 and 51 which had been raised by the Asian-African Legal Consultative Committee (A/CONF.97/8/Add.5). A less rigidly worded article 12 would not be in contradiction with article 51. Furthermore, parties to a contract could make it dependent on other factors of importance to them. However, she would also support the proposal to delete the reference to quantity, which had been made by the Greek representative at the Committee's eighth meeting.

51. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that his delegation wished to maintain its proposal (A/CONF.97/C.1/L.37) pending the outcome of the present discussion. The proposal favoured by the working group (A/CONF.97/C.1/L.103, paragraph 1) would not differ in its effect from the United Kingdom proposal to delete the second sentence of paragraph 1 (A/CONF.97/C.1/L.36). Furthermore, the wording did not make it clear whether it was necessary to indicate both quantity and price or whether one of those two would suffice. If the latter was the case, his delegation would have difficulty in supporting the proposal.

52. Mr. KRISPIS (Greece) said he agreed with those who considered that the meaning of the decision taken by

the Committee at its eighth meeting had been to retain the reference of price and goods in paragraph 1. He personally favoured the deletion of the reference to quantity. The working group's proposal was tantamount to deleting the second sentence since all the elements mentioned in it were merely indicative and a proposal might be deemed sufficiently definite without referring to any of them. On the matter of price, there appeared to be a vicious circle: if the requirement as to price was very vague, then there was no contradiction with article 51; at the same time, however, it should apparently be sufficiently definite to suffice for the formation of contract. He preferred the Austrian proposal (A/CONF.97/C.1/L.103, paragraph 2).

53. Mr. GHESTIN (France) agreed that the effect of the working group's proposal would be virtually the same as deletion of the second sentence since it prescribed the mention of neither quantity nor price, which the Committee had voted to retain. It was particularly undesirable in long-term contracts, for example, for the supply of raw materials, to leave the determination of price to the courts or to one of the parties. In practice, price under those circumstances was always fixed by the stronger party. The maximum of flexibility which his delegation could support was that price should be readily determinable, if not necessarily determined.

54. Mr. ANDRUSCHIN (Byelorussian Soviet Socialist Republic) endorsed the views expressed by the Soviet representative. His delegation could support the Austrian proposal (A/CONF.97/C.1/L.103, paragraph 2) provided that the words "or implicitly" were deleted. Their inclusion would merely lead to disputes.

55. Mr. FOKKEMA (Netherlands) supported the working group's proposal which avoided the drawback in the original wording that an offer might be precise with regard to goods, quantity and price and still be too imprecise on other points to be regarded as sufficiently definite. Under some circumstances, parties might prefer to leave the determination of price to the courts but they should still retain the right to be linked by contract. He preferred the working group's proposal to the Austrian proposal because it did not use the phrase "expressly or implicitly". However, he would point out that the English and French versions of the Austrian proposal were not identical; of the two the French text was the better.

56. Mr. BECK-FRIIS (Sweden) supported the working group's proposal which made it clear that the factors mentioned in the original text of paragraph 1 were examples of factors needed to enable the offeree to decide whether or not to accept the offer.

57. Mr. VISCHER (Switzerland) thought the original text of paragraph 1 was satisfactory. There must be either an implicit or explicit mention of price to make a proposal sufficiently definite. The Committee should consider the question of the possible contradiction between articles 12 and 51.

58. Mr. SEVON (Finland) said that in the case of a freighter stranded in the Pacific with engine trouble, insistence on the determination of price before there was a valid contract for the supply of a spare part could lead to serious difficulties either for the offeror or the offeree. Price should not be made an essential element in the formation of contract: in practice, thousands of contracts were concluded without price being mentioned. His delegation could accept either of the proposals put forward by the working group.

59. Mr. STALEV (Bulgaria) said that the original text had a long history and it would be difficult to achieve a better formulation which was generally acceptable. He therefore would support it as it stood. It must however be interpreted in conjunction with article 51 and if that were done, there would be no danger of situations arising such as that mentioned by the Finnish representative.

60. Mr. OLIVENCIA RUIZ (Spain) said that both the proposals submitted by the working group weakened the tenor of the original text in order to bring it into line with article 51. A number of speakers had mentioned that article and he proposed that it would be better to defer further discussion of article 12 and consider it in conjunction with article 51.

*The meeting was suspended at 4.35 p.m. and resumed at 4.55 p.m.*

61. Mr. FELTHAM (United Kingdom of Great Britain and Northern Ireland) said he wished to stress that the aim of the two proposals submitted by the working group was to make the Convention more flexible; in neither case had an exhaustive definition been attempted. With regard to price, he presumed that the courts would take article 51 into account in determining whether the terms on the subject of price were such as to make it possible to conclude a valid contract by acceptance.

62. Mr. MANTILLA-MOLINA (Mexico) preferred the original draft of the second sentence. The reference in the working group's proposal to "matters such as goods . . ." seemed to beg the question. The Austrian proposal was more precise and made it clear that goods, quantity and price were the necessary factors. There was a lack of co-ordination between articles 12 and 51 and the former should be taken up again when article 51 was under consideration or, as the Spanish representative had proposed, they should be discussed jointly.

63. Mr. BONELL (Italy) endorsed the proposal that the final decision on article 12 should be postponed until the Committee had considered article 51.

64. Mr. MATHANJUKI (Kenya) said he favoured the original draft. With reluctance, he could support the Austrian proposal which expressed much the same idea as the original but which did not go far enough. Certain elements were necessary to make an offer sufficiently definite, in particular the goods and the manner in which the price was to be fixed. He had no strong views with regard to the mention of quantity.

65. Mr. MICHIDA (Japan) said that although he appreciated the efforts of the *ad hoc* working group in putting forward the joint proposal, he continued to prefer the original text. The second sentence of article 12(1) could be seen either as a definition of the conditions under which a proposal was understood to constitute an offer, or simply as an example of such conditions. As he understood it, the joint proposal tended towards the second line of interpretation. However, he would prefer the stronger formulation of the original text.

66. Mr. DATE-BAH (Ghana) said that the object of article 12 was entirely different from that of article 51, and that point should be clarified. Article 12 dealt with formation of the contract, and because some representatives had been concerned at the possibility of contracts being formed without any indication of price—either explicit or implicit—the existing text drafted provided that a contract could not be formed unless there was such an indication. Article 51, on the other hand, covered the situation, peculiar to certain countries, where contracts could be validly formed even if there were no agreement on price. His delegation had always held the view that contracts could be formed only when a price could be determined, either explicitly or implicitly. He preferred the original text, which made that point clear or, failing that, the Austrian proposal. The joint proposal seemed to open up the possibility that a contract could be formed without any agreement as to price.

67. Mr. BECK-FRIIS (Sweden) said that according to the commentary, the second sentence of article 12(1) was not intended to provide an example but to lay down a requirement. For that reason his delegation had voted for the deletion of the sentence and now supported the more flexible version proposed by the working group. The existing text of the sentence, and the statement in the commentary, would make it difficult for Sweden to ratify the formation part of the Convention.

68. Mr. FARNSWORTH (United States of America) agreed with the Swedish representative that the compromise text was an improvement. He could also accept the Austrian proposal, but stressed that the matter should be dealt with at once, and not put off until article 51 was considered. The two questions were entirely separate. Since it was still contemplated that there might be two separate parts to the Convention, which would be separately adopted, it was all the more important to find a solution to article 12 regardless of what was agreed on article 51.

69. The CHAIRMAN said that as a majority of the Committee appeared not to favour the joint proposal in paragraph (1) of A/CONF.97/C.1/L.103, and the Austrian proposal in paragraph (2), he would, if there was no objection, consider the proposal rejected.

70. *It was so agreed.*

71. The CHAIRMAN invited comments on the Soviet proposal (A/CONF.97/C.1/L.37) to amend the second sentence of article 12(1).

72. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that in order to simplify matters, he would be willing to limit his proposal to the deletion of the words "or implicitly" in the second sentence of the paragraph.

73. The CHAIRMAN said that as there appeared to be a majority against the proposal he would, if there was no objection, consider it rejected.

74. *It was so agreed.*

75. The CHAIRMAN said that as there appeared to be a majority against the Yugoslav proposal to delete the word "quantity" in the second sentence of article 12(1), he would, if there was no objection, consider it rejected.

76. *It was so agreed.*

77. The CHAIRMAN drew attention to the proposal by the German Democratic Republic (A/CONF.97/C.1/L.95) for a new article to be added to part II.

78. Mr. PLUNKETT (Ireland) asked whether the proposal envisaged that compensation would be payable even if no contract had been concluded, or if a contract had been concluded, whether it should be payable for something other than breach of contract.

79. Mr. MASKOW (German Democratic Republic) replied that it was the essence of his proposal that compensation for expenses could be claimed even if there were no contract.

80. Mr. BONELL (Italy) strongly supported the proposal. His delegation had already submitted a proposal along similar lines. The existing text of the Convention did not take sufficiently into account cases where no contract was concluded but the parties had engaged in detailed negotiations at the precontractual stage. Such cases needed regulation because of the risk that one of the parties might abuse its position and act in such a way as to damage the interests of the other party. He thought the drafting of the proposal could be improved, notably by the deletion of the phrase "in the course of the preliminary negotiations", and also by the inclusion of a phrase to cover the situation in which the party had not necessarily had expenses, but had suffered damage. He suggested that an *ad hoc* working group be set up to produce an agreed text.

81. Mr. SCHLECHTRIEM (Federal Republic of Germany) sympathized with the object of the proposal but considered it much too far-reaching. Such a general clause might change some of the solutions of the draft, e.g. the provisions dealing with the obligations of the parties or with the revocability of the offer. It would touch on the problem of form requirements and would also affect matters outside the scope of the Convention such as the avoidance of the contract for errors, or the authority of agents.

82. Mr. BENNETT (Australia) said that he had great difficulty with the proposal. It referred to a failure in duty to take reasonable care, a notion that was not found anywhere else in the Convention. It was not clear what was the standard of reasonable care that was envisaged.

The problem was an important one and not merely one of drafting.

83. Mr. KRISPIS (Greece) said he was inclined to support that view. He wondered whether there was any connection between the concept of reasonable care and the concept of good faith in general.

84. Mr. DABIN (Belgium) supported the proposal of the German Democratic Republic which should serve to resolve some difficult issues, e.g. the confidential nature of technological information, raised by the conclusion of international contracts where preliminary negotiations were lengthy. He admitted that the draft Convention before them did not in fact cover the pre-contractual phase other than the most standard of its aspects, the making of a specific offer and its corresponding acceptance. Although the proposal raised some difficult issues, they might be resolved by discussion in a working group.

85. Mr. DATE-BAH (Ghana) could not accept the proposal, which he saw as a further attempt to import

the concept of good faith into the Convention, a concept which had caused great difficulty to the common law countries. It had been agreed as a compromise to introduce that concept into article 6, but it was not appropriate in the present context.

86. The CHAIRMAN said that as there appeared to be a majority against the proposal by the German Democratic Republic (A/CONF.97/C.1/L.95) he would, if there was no objection, consider it rejected.

87. *It was so agreed.*

#### Article 22 (continued)

88. The CHAIRMAN suggested that the Spanish representative's proposal to revise the Spanish text in order to bring it into conformity with the text in other languages should be forwarded to the Drafting Committee.

89. *It was so agreed.*

*The meeting rose at 6 p.m.*

## 12th meeting

Wednesday, 19 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.12

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 23 (A/CONF.97/C.1/L.63, L.81, L.99, L.104, L.106, L.121 and L.126)*

1. The CHAIRMAN drew attention to the fact that the existing text of article 23 was considerably different to the text of the Convention relating to a Uniform Law on the International Sale of Goods, which linked the idea of fundamental breach to the fact that the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects (ULIS, article 10). In the existing text of article

23, the definition of fundamental breach was based on the concept of substantial detriment to the other party.

2. He invited members of the Committee to consider the proposed amendments, starting with those which were furthest from the text of the draft Convention and closest to the ULIS text, i.e. those of Egypt (A/CONF.97/C.1/L.106) and Czechoslovakia (A/CONF.97/C.1/L.81).

3. Mr. SHAFIK (Egypt), introducing his delegation's amendment (A/CONF.97/C.1/L.106), said that the criterion given to define fundamental breach in the existing text was too subjective in nature: the circumstances of the party in breach were taken as a basis of appreciation when the party stated that it had not foreseen and had no reason to foresee that substantial detriment to the other party would result. The Egyptian amendment was an attempt to introduce a more objective principle by indicating that the party in breach ought to provide proof that it had not foreseen such a result and that a reasonable person of the same kind in the same circumstances would not have foreseen it. In other words, the effect of the amendment was to place the burden of proof on the party in breach.

4. Mr. KOPÁČ (Czechoslovakia), explaining the reasons for his delegation's proposal (A/CONF.97/C.1/



L.81), noted that article 10 of ULIS had given rise to many discussions in the UNCITRAL Working Group and that it had been felt that the criterion on which it was based was too subjective. It was in response to such criticism that the existing text had been drawn up and that fundamental breach had been defined in terms of the detriment resulting to the injured party. In his opinion, however, that text was not entirely satisfactory. On the one hand, the concept of substantial detriment was vague and required a more precise definition. On the other, the question of the foreseeability of detriment introduced a subjective element which could create difficulties, particularly in the case provided for in article 42(2) (buyer's right to require performance), where it was important to have objective criteria to define fundamental breach. That was what in effect determined the buyer's right to require performance of the contract on the part of the seller. That right was aimed at foreseeing the loss which might otherwise result from a breach of contract. If the existing definition of fundamental breach given in article 23 were accepted, the buyer would have to wait until he had suffered substantial detriment in order to avail himself of the right, and that was contrary to the requirements of international trade. That was quite apart from the fact that, in most cases, a certain amount of time would have to elapse before the buyer would be able to assess the extent of the detriment he had suffered. Consequently, the definition was not adapted to the remedy provided for in the draft Convention, and it was to be feared that it might lead to numerous difficulties, particularly with regard to the application of articles 43, 44, 45 and 47. His delegation's amendment was an attempt to remedy those difficulties and to bring the definition of fundamental breach into line with the systems of remedy provided in the draft Convention for the party having the right to require performance of contract.

5. The text of his delegation's amendment could certainly be improved and he saw nothing against the Committee establishing a working group for that purpose, provided that the principle contained in the amendment was retained.

6. Mr. REISHOFER (Austria) said that he would be able to accept the Czechoslovak amendment but preferred the Egyptian one, which gave more objective criteria for defining fundamental breach.

7. Mr. FRANCHINI-NETTO (Brazil) said that article 23 was related to article 70, which established a general rule for the calculation of damages. The existing text awarded the party in breach certain privileges which had no legal basis by making it possible for that party to refer to purely personal criteria and to evade the liability incumbent upon him under article 70 to remedy the resulting detriment. Consequently, he found it impossible to approve such a rule and reserved the right to take the floor again during consideration of article 70. He also pointed out that none of the amendments submitted met the criteria for remedy established in article 70.

8. The CHAIRMAN said that it would be possible for

delegations to revert to certain articles in plenary, but that that was not possible in the First Committee.

9. Mr. ROGNLIEN (Norway) said, in connection with the Egyptian amendment, that he could not accept the introduction of a provision on the burden of proof in that connection. However, he felt that the idea of taking as a criterion what a reasonable person of the same kind in the same circumstances could have foreseen introduced a useful point of precision as compared with the existing text, which took solely the point of view of the party in breach. It might be possible to delete the word "reasonable", if it met objections, but it was important to keep the reference to a person of the same kind in the same circumstances. He pointed to certain weaknesses in the drafting of the English text of the proposal as compared with the original French text. Thus, the expression "of the same kind" seemed insufficient as a translation for the French expression "*de sa qualité*".

10. The Egyptian amendment would be acceptable if all reference to proof were deleted and if it was merely specified that a reasonable person of the same occupation (in the same trade) and in the same circumstances would not have had any reason to foresee the detriment.

11. If delegations had many changes of a drafting nature to propose it would perhaps be of interest to form a working group for the Egyptian amendment.

12. Mr. MANTILLA-MOLINA (Mexico) said he would be able to accept the Egyptian amendments with the changes suggested by the Norwegian representative. However, the Czechoslovak proposal seemed to him to restrict the concept of fundamental breach excessively by specifying that the party in breach ought to have known "that the other party would not be interested in performance in case of such a breach". The criterion introduced by the Egyptian proposal seemed to him to be better adapted to the objectives of the Convention. Nonetheless, as the Norwegian representative had said, it would be better not to mention the burden of proof, since the objectives of the Convention were concerned more with the essential duties of the parties than with questions of judicial procedure. It was sufficient to retain the reference to a reasonable person of the same kind and in the same circumstances.

13. Mr. KRISPIS (Greece) said that the existing text already contained objective elements, but the Egyptian proposal made it clearer. He felt, however, that there was no reason to introduce the matter of burden of proof and that it was preferable to concentrate on matters of substance and not to refer to matters of procedure unless it were absolutely necessary, as was the case in article 10. Concerning the expression "reasonable person", he noted that the word "reasonable" had already been used many times in the draft Convention and that it would be sufficient to refer to a person of the same kind in the same circumstances. Finally, the word "and" should be replaced by "or" in the Egyptian amendment.

14. Mr. WAGNER (German Democratic Republic)

said that too much time should not be spent in trying to improve the existing text, since it was not easy to find a more satisfactory formula. The many draft amendments which had been submitted showed that fundamental breach could be defined only in vague terms. However, if the article had to be changed, he would prefer the Czechoslovak text although, in his opinion, it was not desirable to specify at what stage breach of contract entailed consequences for the other party.

15. Mr. HJERNER (Sweden) said he shared the views of the representative of the German Democratic Republic. Even if the definition of fundamental breach given in the existing text was not entirely satisfactory, it nonetheless represented a great improvement on the ULIS text.

16. The concept of "substantial detriment" introduced a concrete element and the subjective nature for which the text had been reproached was justified on the assumption that it was appropriate to take into account the circumstances having led the party in breach to commit a breach of the contract. There could be no fundamental breach if the party in breach was unaware of certain circumstances of which the buyer had not informed him. For example, if the contract mentioned a specific delivery date such as 1 December, because it was important for the buyer to have the goods available for Christmas, the seller should be informed of the fact. If not, in the event of late delivery, he could not know that substantial detriment had resulted for the buyer and could not be considered to have committed a fundamental breach of the contract. The same applied to the quality of goods; the contract might specify the dimensions of the goods, to which the seller might not attach importance, whereas those specifications were essential to the buyer; in such a case it was incumbent upon the latter so to inform the seller. That concept was entirely in accordance with the provision of the second sentence of article 70, according to which damages might not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of a breach of contract.

17. It would be preferable not to take up the question of burden of proof in the Convention since that was rather a matter of procedural law.

18. In short, he was in favour of retaining the existing text of article 23 without any change.

19. Mr. STALEV (Bulgaria) said that article 23 was one of the pillars of the Convention because the various sanctions available to the buyer and the seller as well as certain aspects of passing of risk depended on the definition of fundamental breach. The draft article had the merit of providing an objective criterion for that definition by specifying that a breach was fundamental when it caused substantial detriment to the injured party. However, that criterion would further an application for recovery of damages rather than avoidance of the

contract. To take the case, for example, of a sale with a specific delivery date, if the goods were not delivered on that date and if prices dropped sharply after that date, it would be in the interest of the buyer that the contract should not be performed. The question which then arose would be whether the buyer had the right to abrogate the contract. The existing text left certain doubts on the point. His delegation therefore preferred the definition proposed by the Czechoslovak delegation (A/CONF.97/C.1/L.81), whereby what made a breach fundamental was the fact that the other party was no longer interested in having the contract performed.

20. It was also very important to know at what time the party in breach might foresee the consequences of the breach. If that question was not settled by the Convention, as was currently the case, there was the risk that a party might take some unilateral action to render more serious a breach on the part of the other party by, for example, turning into a contract of sale with a specified delivery date a contract which had not previously had such a condition attached.

21. Mr. TRÖNNING (Denmark) said that he approved the main elements of the Egyptian amendment, which had the merit of introducing more objective criteria of appreciation. He felt, however, that the question of the burden of proof should not be tackled in that article.

22. The Czechoslovak amendment did not seem to him to be acceptable, because the criteria it proposed were very difficult to apply.

23. He thought that it was not appropriate to establish a rule on the subject of deciding from what time the party in breach could foresee the consequences of the breach, and that it was preferable to leave the decision to the judge.

24. Mr. BONELL (Italy) said that his delegation preferred the definition of fundamental breach which was given in ULIS to that given in the draft text under consideration. There seemed to him to be two criticisms that could be levelled against the existing wording of article 23: on the one hand, there was no indication of the time from which the party in breach ought to have seen the consequences of the breach and, on the other, the concept of substantial detriment was not sufficiently clear to constitute an objective criterion.

25. His delegation was inclined to favour the Czechoslovak amendment since, if it were adopted, it would settle the two above-mentioned points. It approved the last part of the amendment in particular which linked the definition of fundamental breach to the injured party's interest in performance, which was a more objective and precise criterion than that of the existing article 23.

26. Mr. KHOO (Singapore) reminded the meeting that, at the time of the 1977 UNCITRAL Conference, a definition of fundamental breach had been reached only after difficult negotiations, in spite of which the text had not satisfied everybody. The second part of the definition in particular, which had been adopted in order to

introduce the question of the burden of proof, had been the subject of reservations, which had again been expressed during the current meeting. For his part, he considered that the second part brought in some rather subjective elements and that it was not necessary to establish in the Convention a rule on the burden of proof. Nonetheless, if the majority of the members of the Committee were prepared to accept the existing text of the draft, he would do likewise.

27. As for the Egyptian amendment, he would be able to accept it provided that the words "of the same kind" were deleted, as they seemed to him to be redundant. It could also agree to the Indian amendment (A/CONF.97/C.1/L.126).

28. Mr. BENNETT (Australia) said he agreed that article 23 was a fundamental one, but he did not believe that perfection could be attained and considered that the existing text was without doubt preferable to all the amendments proposed.

29. The question in fact was to decide whether the nature of the conditions specified in contracts or the nature of any breaches should be considered. That matter had been resolved in different ways by different legal systems. The common law system attached great importance to the nature of the conditions of contracts but that was not the approach which had been adopted in the draft Convention, where greater importance was attached to the nature of the breach.

30. His delegation did not think that it was appropriate to impose strict rules to settle the problem of foreseeability of detriment.

31. Lastly, with respect to the Egyptian amendment, whereas the concept of the "reasonable person" was not unknown in the common law system, he had reservations about its introduction in the article under consideration.

32. Mr. GHESTIN (France) said that the Czechoslovak proposal was too restrictive and thought that it was going too far to require that the other party should lose interest in the contract as a result of the failure to perform before the contract could be terminated. The existing text seemed to him to allow for an essential margin of interpretation and contained an objective element concerning the possibility to foresee the result.

33. His delegation was favourably disposed to the Egyptian amendment, which provided more precise elements of appreciation, but considered the detail regarding the burden of proof superfluous and objected to the over-systematic recourse to the notion of a "reasonable person".

34. Mr. SZÁSZ (Hungary) said that it was impossible to find a really objective criterion for fundamental breach and that judicial practice should play an important role in the matter. Some fundamental elements of appreciation could however be identified such as the seriousness and foreseeability of the detriment. Those elements were already contained in the draft article.

Anything that might be added could only complicate the judge's task without giving him more precise guidance.

35. With regard to the Egyptian amendment, his delegation did not think it would be prudent to introduce into the Convention provisions relating to the burden of proof. The purpose of the last part of that amendment was to provide additional elements of appreciation, but those elements would be interpreted in different ways by different courts.

36. Lastly, with respect to the time element, his delegation considered that care should be taken not to lay down excessively strict rules and to leave it to the court to decide at what time the party in breach should have foreseen the results of the breach.

37. Mr. SEVON (Finland) said that it was useless to try to make the text of that article more precise and that any amendment might well raise more problems than it solved. Article 10 of ULIS had already been severely criticized, and those criticisms could also be applied to the Czechoslovak amendment. On the other hand, it would be possible to retain some of the ideas contained in the Egyptian amendment, together with the changes proposed by the Norwegian delegation. However, he considered that the existing wording was satisfactory.

38. Mr. INAAMULLAH (Pakistan) said that he could accept draft article 23, which linked the idea of fundamental breach with that of substantial detriment. However, he considered that the Egyptian amendment, combined with that of his own delegation (A/CONF.97/C.1/L.99), would improve the text.

39. The CHAIRMAN invited the Committee to vote on the Czechoslovak proposal (A/CONF.97/C.1/L.81).

40. *The Czechoslovak proposal was rejected.*

41. Mr. SHAFIK (Egypt) said that, after listening with much interest to the comments by the various delegations, he was prepared to delete from his amendment (A/CONF.97/C.1/L.106) the reference to proof and to amend the corresponding part of his text, which would then read: "unless the party in breach did not foresee such a result . . .". On the other hand, he agreed with the representative of Sweden that no precision with respect to time should appear in the text; the existing text of article 23 was right not to mention that question. Nor was he favourable to the idea of the representative of Greece that the word "and" should be replaced by the word "or" in the fourth line of his amendment because, in his opinion, the two elements of the provision were complementary and indivisible. Lastly, unlike the representative of Norway, he thought that the word "reasonable" should be maintained.

42. Moreover, he was not in a position to judge if the words "of the same kind" in the English text really corresponded to the words "*de sa qualité*" in the French text and, if his amendment was adopted, he would propose that it should be referred to the Drafting Committee for harmonization.

43. The CHAIRMAN invited the Committee to vote on the Egyptian amendment, as it had just been orally revised by its sponsor, with the proviso that it would be sent to the Drafting Committee and subject to any decisions taken on the other draft amendments.

44. *The Egyptian draft amendment (A/CONF.97/C.1/L.106), as orally revised was adopted.*

*The meeting was suspended at 10.30 a.m. and resumed at 10.50 a.m.*

45. Mr. INAAMULLAH (Pakistan) said that he considered that the expression "substantial detriment" lacked precision; he had therefore replaced it in his amendment (A/CONF.97/C.1/L.99) by a more explicit term. He wished to emphasize the idea of precision and not the actual wording of his text, which he was prepared to revise if necessary.

46. Mr. POPESCU (Romania), Mr. KUCHIBHOTLA (India), Mr. KOPÁČ (Czechoslovakia) and Mr. SHAFIK (Egypt) supported the Pakistan amendment, which made the provision clearer and more precise.

47. Mr. HJERNER (Sweden) said that he did not think that the Pakistan amendment made the text any more precise. In particular, he did not understand the meaning of the words "terms of the transaction". They seemed to him to introduce a new idea which could give rise to many different interpretations. A similar idea existed in German and Scandinavian law, but it was very vague and its interpretation varied with the legal systems of the different countries. In the text, such an idea would be a source of confusion and his delegation could thus not support it.

48. Mr. KHOO (Singapore) said that it was necessary to clarify the idea of fundamental breach and, in his opinion, the Pakistan proposal was the one which came closest to what that idea was intended to mean in the Convention. If the Committee referred to article 45 (1) (a) of the Convention, where failure to perform an obligation under the contract amounted to a fundamental breach, it would realize the importance of the proposal before it. Like the representative of Sweden, he hoped that the representative of Pakistan would specify what he understood by "terms of the transaction". Perhaps the word "terms" could be replaced by the word "nature", in which case he would unreservedly support the Pakistan draft amendment.

49. Mr. KRISPIS (Greece) said that he did not clearly understand what was meant by "basically change" and would thus prefer to retain the expression "substantial detriment". He regretted that he was unable to support the Pakistan draft amendment.

50. Mr. OLIVENCIA RUIZ (Spain) said that the existing text of article 23 contained a subjective element which should not enter directly into the qualification of a breach as fundamental. As the representative of Brazil had pointed out, that subjective element could have serious consequences with respect to remedy and, conse-

quently, the decision as to whether the breach was or was not fundamental. For that reason, his delegation supported the Pakistan draft amendment, because it introduced a much more objective element by referring to the basic terms of the contract on which the consent of the parties was founded.

51. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that he was unable to support the Pakistan draft amendment because he did not consider that it made the idea of substantial detriment any more precise. On the contrary, it introduced an element of uncertainty, which would remain even if the expression "terms of the transaction" were replaced by "nature of the contract", as had been proposed. As the representative of Sweden had pointed out, a breach did not change the nature of the contract.

52. Mr. DATE-BAH (Ghana) said that he appreciated the effort made by the Pakistan delegation to improve the text, but did not find any solution to the problem in the draft amendment before the Committee. The terms of a contract could not be changed by a subsequent act. It might be possible to speak of the expectations, but, even in that case, he would not be satisfied and would prefer to retain the idea of substantial detriment, which must be left to the courts to define. He proposed that a small working party should be asked to find a better wording.

53. Mr. WANG Tian ming (China) supported the Pakistan proposal, because the existing text of article 23 would present difficulties in the event of litigation.

54. Mr. SZÁSZ (Hungary) said he recognized that the idea of substantial detriment was not objective, but did not think that the Pakistan draft amendment provided any improvement in that respect. A fundamental breach did not necessarily lead to a basic change in the terms of a contract. The Pakistan draft amendment did not add any precision and even introduced elements which would present difficulties in practice. Although he was in favour of the idea of trying to find objective criteria, he did not think the Pakistan proposal achieved that aim.

55. Mr. FARNSWORTH (United States of America) said that he was unable to support the Pakistan draft amendment since it did not make the text any more precise and its wording was unsatisfactory. In particular, he had difficulty with the use of the word "basically" because, in United States law, it suggested an idea which was applied to exemption from liability in cases of frustration of a contract and the word basic implied a very important change. If the Pakistan amendment were accepted, the cases in which a basic change would lead to a fundamental breach would be very rare. The text would then lend itself to dangerous interpretations.

56. Mr. POPESCU (Romania) said that the consequences of article 23 were important because, on the one hand, the idea of detriment was allied to a possibility of action in remedy and, on the other, change in the contract affected its economic significance. Considera-

tion should be given to the Pakistan proposal, which took account of the circumstances which could change the nature of the contract.

57. Mr. GHESTIN (France) said that he was unable to support the Pakistan proposal. He preferred the existing text of article 23, in which the idea of substantial detriment provided a flexible and objective solution which corresponded to the practice of the courts. A party could not be bound by a contract when misconduct by the other party caused him substantial detriment. The Pakistan proposal was not without interest but provided no really useful precision, except by requiring that the change should be basic and that was too restrictive. Moreover, the replacement of the word "substantial" by a long periphrasis, such as that proposed by Pakistan, would lead to new problems of interpretation.

58. Mr. ROGNLIEN (Norway) said that the definition given in the existing text would be of little help to the parties or the courts in determining what was a fundamental breach. In its proposal, the Pakistan delegation intended to make that definition more precise by speaking of the terms of the transaction, which was an interesting idea, and one that he would support with some slight changes. It would be enough to replace "basically" by "substantially" and "the terms of the transaction" by "the other party's interests in the transaction".

59. Mr. WAITITU (Kenya) said that he had difficulty in understanding the meaning of the expression "substantial detriment" in the existing text, which was not of much help in defining the fundamental breach. He wished to be associated with the delegations that had supported the Pakistan proposal, which gave a better definition of the idea, but recognized that the wording was not very satisfactory. He would therefore support the proposal by the representative of Ghana to ask a small working party to find a more satisfactory wording along the lines of the Pakistan proposal.

60. Mr. PLUNKETT (Ireland) said that he was not entirely satisfied with article 23 but the longer the discussion continued, the more he realized that the Committee ought to seek a solution not far removed from the existing wording. He was not in favour of the proposal to establish a working party, unless a specific solution was in sight. The statements by the preceding speakers revealed differences of views and the results achieved by a working group could only lead to controversy. He was unable to support the Pakistan draft amendment, but the idea of mentioning the terms of the transaction was a good one and could perhaps be incorporated into article 23.

61. The CHAIRMAN asked the representative of Pakistan if he was prepared to revise his proposal.

62. Mr. INAAMULLAH (Pakistan) said that the important point for him was the basic idea of his proposal and not its wording. It was a matter of clearly defining a fundamental breach, and he was prepared to accept any drafting changes which might prove necessary. He him-

self proposed that the expression "the terms of the transaction" should be replaced by "the expectations of the contract". The best solution might, perhaps, be to establish a working group which would prepare a more satisfactory formula than the expression "substantial detriment".

63. The CHAIRMAN asked whether the members of the Committee were in favour of establishing a working group to produce a generally acceptable draft of article 23 on the basis of the Pakistan proposal, which would then be submitted to the Committee.

64. *The proposal to establish a working group to redraft article 23 on the basis of the Pakistan proposal was adopted.*

65. The CHAIRMAN proposed that the working group should consist of the representatives of Argentina, Czechoslovakia, Federal Republic of Germany, Ghana, Hungary, Norway, Pakistan, Romania and Spain.

66. *It was so decided.*

67. The CHAIRMAN said that any interested delegation was free to join the working group. He invited the Committee to take up the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.63).

68. Mr. KLINGSPORN (Federal Republic of Germany) remarked that his amendment was not inconsistent with the Egyptian amendment already adopted, with the original text or with the Pakistan proposal. It was intended to elucidate the definition of fundamental breach. In his delegation's view, it was impossible to determine whether a breach was fundamental without referring to the terms of the contract. If, for example, a contract specified that the delivery date was of particular importance, failure to observe that date would amount to a fundamental breach, even though in other cases the delivery date would not have been particularly important. That interpretation of fundamental breach seemed, incidentally, to be consistent with the interpretation accepted in the common law countries, where a breach was considered to be fundamental if it affected the very foundations of the contract. It accordingly seemed desirable to specify that all the terms of a contract, express or implied, should be considered in determining whether a breach was fundamental.

69. Mr. DABIN (Belgium) supported the proposal by the Federal Republic of Germany. The important thing was to respect the will of the parties. The basis for determining whether a breach was fundamental must therefore be the contract itself.

70. Mr. FELTHAM (United Kingdom) regretted that he could not support the amendment, which would tend to limit the courts to examining the express and implied terms of the contract without allowing them to take into account the other circumstances of the case. If, for example, a party specified before the contract was concluded that the delivery date was particularly important, would a court have to confine itself to examining the

terms of the contract and ignore the circumstances of the case, if the delivery date was not respected?

71. Mr. SEVON (Finland) was concerned at the proliferation of proposals purporting to define virtually every word used in the draft Convention. There were references to fundamental breaches in other articles of the Convention, among them articles 42, 47 and 60, dealing with the avoidance of contracts. He wondered whether the words it was proposed to add to the draft were likely really to help the courts to determine when a contract could be held to be avoided. Language had its limitations and increasing the number of words simply increased the possibilities of error. He accordingly supported the amendment by the Federal Republic of Germany.

72. Mr. BOGGIANO (Argentina) was also in favour of the amendment, which would provide a basis for defining the term "substantial detriment". Although the wording was not perfect, the main point was to specify that the fundamental consideration was the will of the parties.

73. Mr. KIM (Republic of Korea) wholeheartedly supported the amendment. He noted that it was similar to the provision in article 33 (1) (b), which used the words "expressly or impliedly made known to the seller at the time of the conclusion of the contract".

74. Mr. BENNETT (Australia) was unable to support the amendment, despite the reference by the representative of the Federal Republic of Germany to the definition of fundamental breach used in the common law system. Article 23 was based on the idea of substantial detriment, the existence of which could only be established after it had occurred and then only on a case-by-case basis. It was wrong therefore to say that the degree of detriment had to be determined in the light of the terms of the contract.

75. Mr. LEBEDEV (Union of Soviet Socialist Republics) wondered whether the amendment by the Federal Republic of Germany could be reconciled with the Egyptian amendment (A/CONF.97/C.1/L.106), which had already been adopted. If the new amendment was intended to underline the importance of the terms of a contract, it was redundant, since the Egyptian text meant

that all the circumstances should be taken into account. If it was intended to base the definition of substantial detriment solely on the terms of the contract, it was not justified and seemed to be fundamentally inconsistent with the Egyptian text.

76. Mr. PLUNKETT (Ireland) considered that the proposal by the Federal Republic of Germany did not exclude the circumstances of the case. The Egyptian proposal had been adopted, but could still be modified, while the Pakistan proposal had been referred to a working group. The proposal by the Federal Republic of Germany was similar to the Pakistan draft and might be referred to the same working group.

77. Mr. HJERNER (Sweden) regretted that, having heard the United Kingdom representative's arguments, he could not support the proposal by the Federal Republic of Germany. In his view it was too restrictive, at least as it was currently worded. The wisest course would, in fact, be to refer the text to the working group set up to consider the Pakistan proposal.

78. Mr. HERBER (Federal Republic of Germany) said that he had not intended to restrict the definition of substantial detriment or to exclude the circumstances of the case. He could not agree with the Soviet representative's view that the proposal was inconsistent with the Egyptian amendment. The latter was concerned with the question of foreseeability, whereas his proposal attempted to define the term "substantial detriment".

79. The CHAIRMAN proposed that the amendment by the Federal Republic of Germany should be referred to the working group set up to consider the Pakistan proposal. If the Committee agreed, the representative of the Federal Republic of Germany could join the working group.

80. *It was so decided.*

81. The CHAIRMAN pointed out that although the Egyptian proposal, which had been adopted, could not be substantively amended in the Drafting Committee, the position was different in the case of the other two proposals. The working group's formula would have to be the subject of a decision.

*The meeting rose at 1.05 p.m.*



## 13th meeting

Wednesday, 19 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.13

*The meeting was called to order at 3 p.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 23 (continued) (A/CONF.97/C.1/L.104, L.121, L.126)*

1. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.104) said that it comprised two proposals. The first would involve the insertion, between the words “unless” and “the party in breach”, of the phrase “at the time when the contract was concluded”. As indicated in the Secretariat's commentary, article 23 as drafted did not specify at what moment the party in breach should have foreseen the consequences of the breach, so that in case of dispute, the decision must be made by the tribunal. His delegation believed that the article itself should be more specific: the moment when the contract was concluded, i.e. when its scope was clearly defined by the parties, was the point at which the foresight clause should become effective, since it was at that point that the parties should determine, in their mutual interest, what would constitute substantial detriment.

2. Mr. ROGNLIEN (Norway), Mr. SEVON (Finland) and Mr. SZÁSZ (Hungary) spoke in opposition to the proposal. Information provided after the conclusion of a contract could modify the situation as regards both substantial detriment and foresight. The wording of article 23 should therefore be flexible.

3. Mr. FELTHAM (United Kingdom) withdrew his delegation's first proposal in the light of those comments.

4. Turning to the second United Kingdom proposal, for the addition of a sentence at the end of the article, he said that much of the debate at the previous meeting had been concerned with the definition of “substantial detriment”. Notwithstanding the difficulties involved, his delegation believed that an attempt must be made to arrive at an understanding on the matter; one step in the right direction might be to ensure that a party adversely affected by an unfavourable move in market prices could not too easily escape from a detrimental situation by

seeking all possible grounds to allege breach by the other party, so that the contract might be avoided. The extreme measure of avoidance could be averted if it were specified in article 23 that “a breach does not result in substantial detriment to the other party if damages would be an adequate remedy for him.”

5. Mr. ROGNLIEN (Norway) supported the proposal.

6. Mr. STALEV (Bulgaria) opposed the amendment. Compensation for injury was an established principle, but he did not believe that the manner of compensation should be imposed on the injured party. Apart from the fact that the nature and scale of damages due in respect of injury through breach of contract could be the subject of extremely lengthy deliberations, the injured party should, as a matter of principle, have the right to decide whether to sue for damages or to avoid the contract, as a consequence of substantial detriment.

7. Mr. SEVON (Finland) said that the purpose of article 23 was to establish the circumstances which permitted avoidance, presumably with the understanding that in other circumstances, other remedies (i.e. damages) could be sought. The United Kingdom proposal appeared to reverse the question, by establishing the circumstances where damages could replace avoidance. He could not accept that change of emphasis, the effect of which, moreover, would be to modify the notion of a “fundamental breach”.

8. Mr. DATE-BAH (Ghana) was also troubled by the United Kingdom proposal which begged the question of whether damages would be an adequate remedy. Furthermore, he understood that in English law itself, adequacy of damages was a notion used to determine the availability of the remedy of specific performance. The latter remedy was available only in a very narrow range of circumstances. The use of that very notion of adequacy of damages was likely to lead to the remedy of avoidance being available for too narrow a range of circumstances. For that reason, he could not support the amendment.

9. Mr. PLUNKETT (Ireland) appreciated the intent behind the United Kingdom proposal, but considered that avoidance was a just solution in cases where a party was in fundamental breach of contract. Not only might it be unfair to oblige that party to accept damages; there was also the question of what were adequate damages. Would capacity to pay be taken into account? If so, the determination of that capacity could take considerable time after the breach of contract itself and prolong the uncertainty; if not, the injured party—notwithstanding a ruling that damages, rather than avoidance, would



constitute a remedy—could have great difficulty in recovering them.

10. Mr. GARRIGUES (Spain) also opposed the amendment. Article 23 should be concerned solely with rights to avoidance as a result of substantial detriment through breach of contract. The proper place for consideration of other remedies for breach of contract—including damages—was in articles 41, 42 and 57 of the Convention.

11. Mr. FELTHAM (United Kingdom) withdrew his delegation's second proposal (A/CONF.97/C.1/L.104).

12. The CHAIRMAN called attention to the Turkish amendment (A/CONF.97/C.1/L.121). The proposal being of a purely formal nature, it could perhaps be transmitted without comment to the Drafting Committee.

13. *It was so decided.*

14. The CHAIRMAN called attention to the Indian amendment (A/CONF.97/C.1/L.126). The idea of "a reasonable person" was incorporated in the Egyptian proposal (A/CONF.97/C.1/L.106) adopted subject to final drafting at the previous meeting, so that the Indian amendment appeared to require no further debate.

15. *It was so decided.*

16. The CHAIRMAN observed that consideration of article 23 must now be suspended, pending the conclusions of the working group set up in connection with the earlier proposals by the Federal Republic of Germany and Pakistan concerning definition of the term "substantial detriment".

#### Article 24 (A/CONF.97/C.1/L.100)

17. The CHAIRMAN pointed out that the only amendment (A/CONF.97/C.1/L.100) was of a formal nature and might thus be transmitted without comment to the Drafting Committee.

18. *It was so decided.*

#### Article 25 (A/CONF.97/C.1/L.65, L.123)

19. Mr. KLINGSPORN (Federal Republic of Germany) introduced his delegation's amendment (A/CONF.97/C.1/L.65), the purpose of which was to extend the provision concerning a delay or error in communication to the Convention as a whole. In the draft before the Committee, that provision concerned only Part III, whereas his delegation believed that it should be applicable elsewhere, and more particularly in Part II, article 17 (2). If the amendment was adopted, article 23 might be incorporated in Part I of the draft Convention (Sphere of Application and General Conditions), in a manner to be determined by the Drafting Committee.

20. Mr. WAGNER (German Democratic Republic) introduced his delegation's amendment (A/CONF.97/C.1/L.123), the intention of which was to limit the scope of article 25. As drafted, the provision concerning delay

or error appeared to raise a number of questions which lay outside the framework of the Convention, not the least of which was the definition of "error". His delegation believed that the term should be employed with circumspection and that the provision contained in article 25 should only relate to notices securing claims of one party in cases where no decisions were taken by the other party during the period between the due date of notice and the date on which that notice reached the other party. Such cases were mentioned in articles 37, 39 (2) and 40 (2). In other cases, it was very questionable whether one party should be allowed to rely on notice which the other had not received. As drafted at present, article 25 could give rise to considerable difficulties in relation to articles 42 (2), 44 (2), 45 (2) and 61 (2)—to cite just a few examples.

21. Mr. ROGNLIEN (Norway) observed that the article, which dealt with the risk of delay or error in connection with transmissions, pursued the desirable aim of establishing a general rule, albeit with exceptions. Provision was in fact made for such exceptions in the draft Convention, by means of specific references to receipt; delegates who disagreed with the references could contest them as each article came up for consideration; he himself would do so in the case of article 65 (4).

22. He explained the philosophy behind article 25: Whenever a party was called upon to give notice to comply with a duty or to obtain relief from a loss, it was unreasonable to make that party responsible for delay or error in the transmission or failure of the communication to arrive (the "dispatch" theory). On the other hand, when the purpose of the notice was to create an obligation for the other party, that party should not be penalized as the result of delay, error, or failure to arrive and the "receipt" theory should be applied instead of the rule in article 25.

23. On the proposal submitted by the Federal Republic of Germany, he considered that the dispatch rule in article 25 was generally acceptable when contracts had been concluded, i.e. in matters related to Part III of the draft Convention (Sales of Goods). The situation as regards Part II (Formation of the Contract) was different; for example, it could not be assumed that a contract had been concluded simply because one party had sent a communication which might or might not have been received by the other. For that reason, and notwithstanding the general philosophy to which he had referred, it might be wise to indicate in article 25 that it did not apply to Part II.

24. Mr. FOKKEMA (Netherlands) fully supported the proposal by the German Democratic Republic.

25. Mr. MICCIO (Italy) proposed that the final phrase of article 25 should be amended by the insertion of the word "reasonable" before the word "delay" and by an indication to the effect that failure to arrive must be independent of the will of the parties concerned.

26. The CHAIRMAN ruled that the previous speaker's proposal, which had not been submitted in writing, was out of order.

27. Mr. WAGNER (German Democratic Republic) said that he had endeavoured to interpret the draft Convention in the manner suggested by the representative of Norway as regards the conditions under which article 25 was not applicable. But his uncertainty remained, particularly in the light of paragraph 15 of the commentary by the Secretariat on article 44.

28. The CHAIRMAN observed that the commentary by the Secretariat had been prepared with the aim of helping delegates towards a better understanding of the text of the draft Convention; its contents were in no sense formally interpretative.

29. Mr. ROGNLIEN (Norway) invited the attention of the representative of the German Democratic Republic to the commentary provided by his own Government in document A/CONF.97/8. He reiterated his belief that the most satisfactory procedure would be to specify, by appropriate language at the appropriate points, where the provisions of article 25 were not to apply.

30. Mr. KRISPIS (Greece) said that his delegation would have preferred article 25 not to figure in the Convention at all. It would have been better to leave the question of delay, error or failure to arrive to be assessed in the light of the interpretation of each contract in each particular case. Since there was no proposal to delete the article, he would support the wording proposed by the German Democratic Republic, as being the narrowest.

31. Mr. KLINGSPORN (Federal Republic of Germany) agreed with the representative of Norway that article 25 could not be applied as a general rule as far as Part II of the Convention was concerned. However, in most of the provisions in Part II it was expressly stated that a communication by one party to another must reach the other party in order to be effective. In all those cases, the so-called receipt theory applied, rather than article 25. But there was one provision in Part II—article 17 (2)—that did not indicate whether or not a communication from the offeror must reach the offeree in order to become effective, and in that case it would be appropriate to apply article 25.

32. The CHAIRMAN put the amendments to article 25 to the vote.

33. *The amendment proposed by the Federal Republic of Germany (A/CONF.97/C.1/L.65) was rejected by 25 votes to 7.*

34. *The amendment proposed by the German Democratic Republic (A/CONF.97/C.1/L.123) was rejected by 17 votes to 11.*

35. The CHAIRMAN said that as the two amendments had been rejected, article 25 was adopted as it stood.

36. Mr. HJERNER (Sweden) thought that a vote should also be taken on the article itself. The UNCITRAL text was only the Conference's working docu-

ment, and each article needed to be adopted by the members, by a simple majority vote in the two Committees and by a two-thirds vote in the Plenary. He felt, furthermore, that a proposal for the deletion of an article was not an amendment.

37. The CHAIRMAN thought that to require a vote to be taken on each article was tantamount to a proposal to delete them all.

38. Mr. ROGNLIEN (Norway) suggested that it might be simpler to adopt a procedure whereby any delegation that felt that an affirmative vote was needed on a particular article could ask for a vote to be taken. Otherwise, the article could be regarded as tacitly adopted.

39. After procedural discussion in which Mr. VIS (Secretary of the Committee), Mr. POPESCU (Romania), Mr. MEIJER (Netherlands), Mr. STALEV (Bulgaria), Mr. MEDVEDEV (Union of Soviet Socialist Republics), Mr. ROGNLIEN (Norway), Mr. LI Chih-min (China), Mr. MICCIO (Italy), Mr. SHORE (Canada) and Mr. SAM (Ghana) took part, the CHAIRMAN said that as there appeared to be a majority against both the Swedish proposal and the Norwegian proposal, he would, if there was no objection, consider them rejected.

40. *It was so decided.*

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m..*

#### *Article 26 (A/CONF.97/C.1/L.113, L.117)*

41. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.113), said that it was identical with the United States amendment (A/CONF.97/C.1/L.117). The United States delegation would reserve its remarks in case any further explanation was needed later in the discussion.

42. He reminded the Committee of the terms of article VII (1) of the 1964 Hague Convention, recapitulated in article 16 of the Uniform Law on the International Sale of Goods: "1. Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in the cases in which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law."

43. That formulation had been an attempt to ease the position of those States whose courts regarded specific performance as an exceptional rather than a usual remedy. In the formulation in article 26 of the draft Convention, however, the important word "would" had been changed to "could". The effect was to reduce vastly the protection afforded by the earlier provision to those States whose courts did not readily grant the remedy of specific performance. Under article 26, if a national court had jurisdiction to grant specific performance—in

other words, if it "could" do so—it would be obliged to give such a judgement if that was, under the Convention, an appropriate remedy in the circumstances.

44. Courts in England in fact had jurisdiction entitling them to order specific performance, but it was very rarely exercised. The general principle was that it was not exercised where damages were an appropriate remedy. However, because the courts had jurisdiction to grant it, they no longer enjoyed the protection extended by article VII of the Hague Convention. Since it was not possible to say that they never granted specific performance, they might arguably be compelled to do so under the Convention. The problem was perhaps particular to common law jurisdictions, and he would be interested to hear the views of countries with different legal systems.

45. Mr. DATE-BAH (Ghana) said that his delegation associated itself with the position stated by the United Kingdom.

46. Mr. KRISPIS (Greece) found the argument for the amendment convincing and said that a similar situation could arise in civil law countries as well. It was his delegation's understanding that "law", in the phrase "under its own law" in article 26, included the rules of private international law applicable to the particular forum.

47. Mr. KIM (Republic of Korea) asked whether article 26 covered arbitration proceedings as well as ordinary judicial proceedings. In England, for instance, the two were closely related. As most international commercial disputes were settled by arbitration, it was important to make it clear that article 26 would also be applicable to such proceedings.

48. The CHAIRMAN pointed out that in many States the relevant legislation also related to arbitration proceedings. That should be taken into account in deciding whether article 26 could or should apply to arbitral tribunals as well.

49. Mr. WAGNER (German Democratic Republic) said that his delegation preferred the present text of the Convention, which it interpreted as a compromise to prevent common law courts from being compelled to do something which they could not normally do under their law.

50. Mr. POPESCU (Romania) said he was doubtful about the scope of the present text, since it was possible for international disputes to be judged in the first instance in one country, but for judgement to be enforced by a second judge in another country. In such cases, would article 26 apply to both the original court action and the execution of judgement, and what would happen if the law of the exequatur country did not provide for specific performance? Article 26 should apply to arbitration proceedings as well, if numerous cases were not to fall outside the scope of the Convention.

51. Mr. DATE-BAH (Ghana) agreed with the representative of the German Democratic Republic that the purpose of the compromise was to prevent common law

courts from being compelled to order specific performance when they would not ordinarily do so. The amendment, however, would not affect the compromise, but would merely make the article conform more closely to the expectations that would arise under the compromise.

52. *The United Kingdom and United States amendments (A/CONF.97/C.1/L.113, L.117) were adopted by 26 votes to 10.*

#### Article 27

53. Mr. FARNSWORTH (United States of America), introducing his delegation's amendment (A/CONF.97/C.1/L.119), said that it was a drafting matter only.

54. The CHAIRMAN said that, if there were no objections, the amendment would be sent to the Drafting Committee.

55. *It was so decided.*

56. Mr. BONELL (Italy), introducing amendment A/CONF.97/C.1/L.68, said that paragraph 2 of article 27 laid down the principle that a contract which contained a provision requiring modifications or abrogation to be made in writing could not be otherwise modified or abrogated. Although that principle was unknown in Italian law, under which a contract could be derogated from by oral agreement as well, his delegation was nevertheless prepared to accept it, on the grounds that it offered a sound solution for other legal systems and for international trade in general. However, his delegation considered that it was necessary to limit the principle to a particular situation which often occurred in trade practice, when the requirement of written abrogation or modification had not been specifically accepted by the parties to a contract, but had merely been included in the general conditions drawn up unilaterally by one of them but nevertheless forming part of the contract. It often happened that the same party agreed orally to certain modifications in the conditions. In that case the oral agreement modifying the contents of the general conditions should prevail, and the general principle in paragraph 2 should not apply. Furthermore, as the party who had drawn up the general conditions was sometimes represented by an authorized agent in the actual negotiations, oral modifications agreed to by the agent might be repudiated by his principal in the event of a dispute. The paragraph he had proposed was intended to prevent the economically weaker party from falling into that kind of trap.

57. His delegation was aware that objections might be raised on the grounds that it was too late to introduce another provision on the subject of general conditions into the Convention. He would point out, however, that it did not deal with general conditions as such, but with a *de facto* situation involving general conditions which came under the scope of article 27. The result aimed at by his delegation's proposal could also be achieved by the application of the second sentence of article 27, para-

graph 2, but his delegation doubted whether the sentence exactly covered the situation it envisaged.

58. Mr. STALEV (Bulgaria) said that his delegation could not support the Italian proposal since it appeared to be more suited to consumer contracts than to international commercial contracts. The parties to commercial contracts usually enjoyed equal bargaining power and did not need the defence offered by the amendment.

59. Mr. KOPAC (Czechoslovakia) said that his delegation was also unable to support the amendment, since it would not serve any purpose to introduce a separate provision concerning a written form of agreement to be contained in general conditions when the concept of general conditions was in itself unclear.

60. *The amendment by Italy (A/CONF.97/C.1/L.68) was rejected.*

61. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.66), pointed out that article 27 had been placed in its present position in the draft text before a separate part on formation of the contract had been established. As the article was concerned with the modification of contracts or their termination by mutual agreement, and as a modified contract was in a sense a new contract, it would be more appropriate for it to be transferred to part II. Its inclusion in that part would also simplify the references in article 11.

62. Mr. HJERNER (Sweden) said that his delegation supported the Norwegian proposal, since the modification of a contract or its termination by agreement was an act in the formation of the contract and would therefore be more appropriately placed in part II. Moreover, unless article 27 was transferred to part II, paragraph 2 of the article might be invoked to prevent accession to part III.

63. Mr. TROENNING (Denmark), Mr. KUCHI-BHOTLA (India) and Mr. WAGNER (German Democratic Republic) supported the Norwegian proposal.

64. Mr. SZASZ (Hungary) pointed out that in some legal systems modification was dealt with after fulfilment of the contract, as in Hungary. But in order to meet the requirements of systems where it was dealt with at the time of the conclusion of the contract, it would be theoretically and practically more satisfactory to insert article 27 in part II.

65. Mr. PLANTARD (France) reminded the Committee of his delegation's position that neither the modification nor abrogation of a contract was connected with the formation of the contract.

66. Mr. DATE-BAH (Ghana) said that although modification of a contract in a sense constituted formation of a contract, it was not formation of a contract *simpliciter* but rather formation of a contract modifying a pre-existing contract. If article 27 was transferred, it was liable to create problems for common law countries because of the doctrine of consideration, and should therefore remain where it was.

67. Mr. MANTILLA-MOLINA (Mexico) supported the Norwegian proposal on the grounds that modification of contract was tantamount to an agreement and could therefore be considered a contract in the strict sense. If the transfer of article 27 would create problems for common law countries, however, his delegation would not press for it.

68. Mr. SHAFIK (Egypt) said that his delegation could not support the Norwegian proposal, since it was illogical to deal with the modification of existing contracts in a part of the Convention which was devoted to the formation of the contract. In the Egyptian system of law, a distinction was made between a contract and an agreement. The purpose of a contract was always to create an obligation, whereas an agreement was more general and covered the creation, modification or termination of a contract. Consequently, under Egyptian law, the act of modification or termination implied the existence of an agreement, not a contract, and was therefore unrelated to part II.

69. Mr. KOPAC (Czechoslovakia) supported the proposal for the practical reason that if the article was left in part III it would also apply to article 25, and that would be inadvisable.

70. Mr. POPESCU (Romania) said that it would be inappropriate to insert article 27 in part II, as a contract had to exist before it could be modified or abrogated. His delegation was therefore in favour of leaving the article where it was.

71. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation considered it dubious to state that article 27 related to formation of contract. For there to be modification or abrogation of a contract, the contract must already have been concluded, as the representative of France had rightly indicated. If article 27 was left in part III of the Convention, it would be applicable in countries that might wish to limit their acceptance to that part of the Convention and not to accept part II. The Norwegian proposal to move article 27 to part II would be tantamount to stating that countries which did not ratify part II of the Convention would not be governed by article 11 in its amended form. That would be incompatible with the compromise solution on that very difficult matter which UNCITRAL had sought for almost 10 years and which the present Conference had finally adopted.

72. Mr. SEVON (Finland) said his delegation was unable to support the proposal. The idea behind article 27 was precisely to prevent the doctrine of consideration in common law countries from taking effect.

73. Mr. ROGNLIEN (Norway) emphasized, first, that article 27 was applicable solely to modification or termination by agreement and was not intended to cover avoidance, and secondly, that if the article remained in part III, States ratifying part II only would not be bound by it.

74. *The amendment by Norway (A/CONF.97/C.1/L.66) was rejected by 27 votes to 9, with 9 abstentions.*

*Article 28 (A/CONF.97/C.1/L.130)*

75. Mr. KRISPIS (Greece), introducing his delegation's amendment, said that the three basic obligations imposed on the seller by article 28, namely, to deliver the goods, to hand over the documents and to transfer the property had to be performed "as required by the contract and this Convention". The Convention, however, contained no provisions as regards the transfer of property and as article 28 stood only the clauses of the contract would apply. It was possible that situations would arise where the contract contained no specific provision on the transfer of property or contained a

provision which conflicted with legislation applicable in accordance with private international law. Such situations could be covered by deleting the words "as required by the contract and this Convention" or by adding the words "and the law applicable" at the end of the article.

76. After an exchange of views in which the CHAIRMAN, Mr. KLINGSPORN (Federal Republic of Germany) and Mr. KRISPIS (Greece) took part, Mr. Krispis withdrew his draft amendment.

*The meeting rose at 5.50 p.m.*

## 14th meeting

Wednesday, 19 March 1980, at 7.30 p.m.

*Chairman: Mr. LOEWE (Austria).*

A/CONF.97/C.1/SR.14

*The meeting was called to order at 7.34 p.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 29 (A/CONF.97/C.1/L.107)*

1. The CHAIRMAN invited the Committee to take up article 29 and the amendment submitted by Iraq (A/CONF.97/C.1/L.107). The Netherlands amendment (A/CONF.97/C.1/L.120) had been withdrawn.
2. Mr. SAMI (Iraq) explained that his amendment (A/CONF.97/C.1/L.107) was intended to fill a gap in the article by specifying in subparagraph (a) that delivery was to be to the place indicated by the buyer or, if no such place was indicated, the buyer's place of business. The addition would make the position clear to both buyer and seller.
3. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the point was important, but was settled by the provisions of article 30 (2).
4. [Deleted.]
5. Mr. KRISPIS (Greece) agreed.
6. Mr. HJERNER (Sweden) suggested that delivery must be to a particular person, not to a place. In his

view, the amendment would disturb the balance of article 29.

7. The CHAIRMAN said that in view of the limited support for the amendment (A/CONF.97/C.1/L.107) he would, if there was no objection, consider it rejected.

8. *It was so agreed.*

*Article 30 (A/CONF.97/C.1/L.101)*

9. The CHAIRMAN invited the Committee to take up article 30 and the Australian amendment to paragraph 1 (A/CONF.97/C.1/L.101).

10. Mrs. KAMARUL (Australia) said that her delegation's amendment (A/CONF.97/C.1/L.101) was intended to remove a gap in the present text. Paragraph 1 referred only to the seller's obligation in cases in which he was bound to hand over the goods to a carrier, although there were cases in which the seller had to deliver the goods by any of several methods.

11. Mr. SEVON (Finland) considered that the Australian amendment would improve the text by introducing an element of obligation.

12. Mr. FELTHAM (United Kingdom) also supported the Australian amendment.

13. Mr. FARNSWORTH (United States) was in agreement with the substance of the Australian amendment but felt that the wording could be improved and suggested that the text should be referred to the Drafting Committee. He would prefer to say "pursuant to his obligations" rather than "pursuant to the contract or this Convention".

14. Mr. MANTILLA-MOLINA (Mexico) believed that the Australian amendment would considerably improve the wording of article 30 (1).

15. The CHAIRMAN said that, if there were no further comments, he would take it that the Committee agreed to approve the substance of the Australian amendment (A/CONF.97/C.1/L.101) and to refer the text to the Drafting Committee as suggested by the United States representative.

16. *It was so agreed.*

#### Article 31

17. The CHAIRMAN said that in the absence of comments he would take it that the Committee agreed to adopt the article.

18. *It was so agreed.*

#### Article 32 (A/CONF.97/C.1/L.114)

19. The CHAIRMAN invited the Committee to take up article 32 and the amendment by Yugoslavia (A/CONF.97/C.1/L.114).

20. Miss VILUS (Yugoslavia), introducing the amendment (A/CONF.97/C.1/L.114), said that if it was felt necessary to include a reminder in the Convention that the seller was obliged to hand over to the buyer the documents relating to the goods at the time and place fixed by the contract, it should be made clear that the same obligation existed where the time and place were fixed by usage.

21. Mr. KRISPIS (Greece) supported the Yugoslav proposal but felt that the wording could be improved. The text of article 32 with the Yugoslav amendment might seem to give the seller a choice between the time and place fixed by the contract and the time and place fixed by usage whereas the reference to usage was intended to cover cases in which the contract contained no clause on the subject of the time and place of handing over of the documents.

22. Mr. KIM (Republic of Korea) considered that the amendment was superfluous since the parties were bound under article 8 to observe all relevant usages and that provision governed all the other articles of the draft, including article 32.

23. Mr. SZÁSZ (Hungary) agreed. If a reference to usage were included in article 32, a similar reference might have to be introduced in other articles to avoid giving the impression that usages were not necessarily to be observed in connection with the provisions of those articles.

24. Miss VILUS (Yugoslavia) said that in view of the lack of support for her amendment, she would withdraw it.

25. The CHAIRMAN said that, in the absence of further comments, he would take it that the Committee adopted article 32 as it stood.

26. *It was so agreed.*

#### Article 33 (A/CONF.97/C.1/L.73, L.74, L.82, L.102, L.115 and L.143)

27. The CHAIRMAN invited the Committee to take up article 33 and the amendments by the Federal Republic of Germany (A/CONF.97/C.1/L.73), Australia (A/CONF.97/C.1/L.74), the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.82), Norway (A/CONF.97/C.1/L.102), Canada (A/CONF.97/C.1/L.115) and Singapore (A/CONF.97/C.1/L.143). As the Norwegian amendment (A/CONF.97/C.1/L.102) was not substantive, he suggested that it should be referred to the Drafting Committee.

28. *It was so agreed.*

29. Mr. SHORE (Canada), introducing the Canadian amendment, said that his proposed rewording would make it clear that the requirements of general and particular fitness set forth in the article applied only to a commercial seller, i.e. a seller who dealt in goods of the description supplied under the contract. That had long been a requirement in common law jurisdictions and any doubt concerning the retention of that requirement would give rise to serious difficulties.

30. The amendment would also spell out more fully the meaning of the concept of general fitness as used in paragraph 1 (a) of the article. The comparable concept of "merchantability" in common law jurisdictions had attracted an enormous amount of litigation and in the absence of clearer guidance, similar difficulties might be encountered with the provisions of article 33 (1) (a) if left unchanged.

31. Lastly, paragraph 2 of the existing text of article 33 was much too favourable to the buyer. In particular, if the buyer had examined the goods or been given a sample, he should be deemed to have accepted the goods subject to such defects as a reasonable examination by him would have revealed. The ascribed knowledge of defects should be based on an objective standard, not a subjective one. The Canadian amendment would have introduced that element of objectivity.

32. Mr. FARNSWORTH (United States) saw merit in some parts of the Canadian revision of article 33. In particular, he welcomed the distinction made in paragraphs 1 and 2 between a seller of goods in general and a seller who regularly sold goods of a particular kind. If a manufacturer sold a piece of used machinery and not the goods which he manufactured, an American judge would not impose the same burdens on him as upon a seller who actually manufactured machines. He was less attracted by paragraphs 3 and 4 of the amendment.

33. Mr. FELTHAM (United Kingdom) noted that the formula "who deals in goods of the description supplied under the contract" had been used in United Kingdom legislation and had given rise to difficulties and had been replaced by the formula "sellers who sell goods in the course of business". Similar wording might profitably be used in the Canadian amendment.

34. Mr. MANTILLA-MOLINA (Mexico) proposed



that the discussion on article 33 should be suspended until the following meeting in order to give the representatives more time to study the amendments.

35. Mr. SHAFIK (Egypt) and Mr. KHOO LEANG HUAT (Singapore) supported that proposal.

36. The CHAIRMAN said that, in the absence of further comments, he would take it that the Mexican proposal was adopted.

37. *It was so agreed.*

*Article 34 (A/CONF.97/C.1/L.105, L.122 and L.147)*

38. The CHAIRMAN invited the Committee to consider article 34 and the amendments by Norway (A/CONF.97/C.1/L.105), Turkey (A/CONF.97/C.1/L.122) and Pakistan (A/CONF.97/C.1/L.147). He suggested that the Norwegian amendment (A/CONF.97/C.1/L.105), which was a drafting amendment, should be referred to the Drafting Committee.

39. *It was so agreed.*

40. Mr. ADAL (Turkey), introducing his amendment (A/CONF.97/C.1/L.122), said that the present text of article 34 (1) unduly favoured the buyer, in that it made the seller liable for lack of conformity at the time of the passing of risk even though the lack of conformity became apparent only after that time. In order to redress the balance, his delegation suggested that the concluding words of article 34 (1) should be replaced by the words: "if the lack of conformity becomes apparent within the time stipulated in the contract or within the customary period of time".

41. Mr. FELTHAM (United Kingdom) preferred the text of article 34 (1) as it stood and considered that the reference to a "customary period of time" would not be of great assistance.

42. Mr. SZÁSZ (Hungary) noted that the question dealt with in the Turkish amendment was covered in part by the provisions of articles 36 and 37. Other aspects of the problem would be dealt with in the contract itself.

43. Mr. SEVON (Finland) could not support the amendment which would, he believed, alter the meaning of the provision.

44. The CHAIRMAN said that in view of the lack of support for the amendment (A/CONF.97/C.1/L.122), he would, in the absence of further comments, consider it rejected.

45. *It was so agreed.*

46. Mr. MEHDI (Pakistan) introduced his delegation's amendment to article 34 (2) (A/CONF.97/C.1/L.147).

47. After a brief procedural discussion in which Mr. MATHANJUKI (Kenya), Mr. VISCHER (Switzerland) and Mr. GHESTIN (France) took part, the CHAIRMAN noted that there appeared to be a consensus to suspend the discussion of article 34 until the following meeting. If there were no objection, he would

take it the Committee agreed to adopt that course of action.

48. *It was so decided.*

*Article 35 (A/CONF.97/C.1/L.116)*

49. Mr. SHORE (Canada), introducing his delegation's amendment (A/CONF.97/C.1/L.116), said that the rationale of article 35 clearly suggested that the seller's right to cure non-conformity of goods rendered before the time of delivery had elapsed was meant to include non-conformity of documents relating to the goods. There was a close relationship with articles 28 and 32 and his delegation's amendment aimed at explicating that link.

50. Mr. SHAFIK (Egypt), Mr. FELTHAM (United Kingdom) and Mr. FARNSWORTH (United States of America) supported the Canadian proposal.

51. Mr. SEVON (Finland) said that it was difficult to accept a reference to documents only in article 35. There were a number of other places where such a reference might be added, for example article 36.

52. Mr. HJERNER (Sweden) inquired why the Canadian proposal was directed specifically to article 35. The Committee must adopt a consistent attitude towards similar situations in other articles.

53. Mr. SHORE (Canada) said that article 35 dealt with the examination of documents, whereas article 36 referred to the examination of goods.

54. Mr. HJERNER (Sweden) said that article 35 dealt primarily with goods delivered before the date for delivery.

55. Mr. ROGNLIEN (Norway) suggested that article 37 should also be considered.

56. Mr. KIM (Korea) said that the Canadian proposal should not be adopted too lightly. In certain cases it might prove hard to apply. If, for example, a seller shipped goods and the buyer wished to sell them in transit, the goods might be delivered before the delivery date and the missing element, the documents, might play an important role.

57. Mr. HERBER (Federal Republic of Germany) said he shared the hesitations which had been expressed. In addition to the consideration that the reference to documents might well be included in other articles, it should be noted that if the obligation in respect of documents was added to article 35, perhaps other obligations should also be added; for example, if the seller had promised to obtain an authorization from a public authority for the operation of an installation, he should be under the same conditions to cure the defect. The point raised by Canada was, in his delegation's view, covered by the existing text and should not be specifically mentioned in order not to exclude other obligations from the scope of the article.

58. Mr. FARNSWORTH (United States of America) said it was true that subsequent articles referred to goods when the text might have referred to both goods and



documents. However, he agreed with the Canadian delegation that article 35 as it stood did not enable the seller to cure lack of conformity of documents, particularly since previous articles, for example article 34, referred to lack of conformity in general. He wondered however whether the only way to correct the over-specific reference to goods in article 35 was to add a reference to documents. An alternative solution would be to re-word it on the lines of article 34 by omitting the words "in the goods delivered" from the text. That solution would not be open to the objections which had been raised by several speakers.

59. Mr. SHORE (Canada) said that he appreciated the United States proposal as an alternative solution.

60. Mr. STALEV (Bulgaria) supported the United States suggestion.

61. Mr. ROGNLIEN (Norway) said that in the 1964 ULIS Convention there had been a separate section entitled "handing over of documents", containing articles 50 and 51. ULIS article 50 had been incorporated in article 32 of the draft Convention but article 51 had only been partly covered. However, since remedies for breach of contract were neutral or consolidated, no problem in respect of documents arose in that connection. The problem lay with articles 33 and subsequent articles, in particular articles 36 and 37. One solution was to draft a new article dealing specifically with documents.

*The meeting was suspended at 8.45 p.m. and resumed at 9 p.m.*

62. Mr. SZÁSZ (Hungary) said that section II did not make adequate provision for documents. He supported the United States improvement to article 35 but that would not completely solve the problem. A comparison of the titles of sections I and II showed that whereas section I was called "delivery of the goods and handing over of documents", section II was merely entitled "conformity of the goods" and even without the express mention of goods in article 35, it would still be generally understood to refer to goods and not to documents. Parallel provisions would be required to cover documents; the effect could not be achieved by mere deletion in article 35 and *mutatis mutandis* in articles 36 and 37.

63. Mr. KRISPIS (Greece) said that he doubted whether the United States formulation would cover the intention of the Canadian amendment owing to the structure of the original text. However, the United States suggestion was helpful and he would support it.

64. Mr. PLUNKETT (Ireland) said that, if there was support for the general idea underlying the Canadian proposal, the possibility might be considered of formulating a definition of goods which would, under certain circumstances, make it possible for the term "goods" to be understood as including documents. That would obviate the need to insert a reference to documents in a number of articles.

65. Mr. KHOO (Singapore) said it was clear that the whole group of articles dealt with goods as opposed to documents. An endeavour to graft a mention of documents on to any article in section II would not prove satisfactory. The matter of documents must be dealt with either in section I or by means of separate articles in section II, widening its scope.

66. Mr. MANTILLA-MOLINA (Mexico) said he did not believe the Hungarian representative's objection to be insuperable. What was required was a change of title in section II to refer to both goods and documents. He would then prefer the United States suggestion for modifying the text as being the simpler solution. The only alternative was to accept the text as it stood and retain the present title for the section.

67. Mr. VISCHER (Switzerland) said that the United States suggestion would not serve in the context of the articles. He preferred the Canadian proposal. Article 32 clearly said that the seller had an obligation to hand over documents in the form required by the contract. Article 35 dealt with a special case—the cure of a lack of conformity prior to date of delivery—the only case where cure of defect was possible by the seller. It was logical that cure should relate to documents as well as goods, but it must be so stated explicitly.

68. Mr. KIM (Korea) said that the date of delivery for the goods did not necessarily coincide with the time within which the seller might cure deficiency in the documentation. Article 32 stated the seller was bound to hand over the documents at the time required by the contract. It therefore did not exclude the possibility that the seller might cure a lack of conformity in the documents even though it made no explicit reference to the matter. His delegation opposed the amendment to article 35 owing to the difficulty of timing.

69. The CHAIRMAN suggested that a vote should be taken on both the Canadian amendment (A/CONF.97/C.1/L.116) and the United States oral proposal.

70. *The Canadian amendment was adopted by 20 votes to 11.*

71. *The United States oral proposal was rejected by 9 votes to 8.*

72. Mr. ROGNLIEN (Norway) said he had voted for the Canadian amendment on the understanding that the same words would be added in articles 36 and 37.

73. Mr. SAMI (Iraq) pointed out that there were a number of discrepancies between the Arabic and the French texts of article 35.

74. The CHAIRMAN said that the Arabic text would be reviewed. He took it that the Committee wished to send the amended article 35 to the Drafting Committee, with a request to consider modifying the title of section II.

*Article 36 (A/CONF.97/C.1/L.118, L.144)*

75. Mr. SHORE (Canada), introducing his delegation's amendment (A/CONF.97/C.1/L.118), said article 36

was concerned with the time and place of the buyer's examination of the goods after delivery. The buyer's right to complain of non-conforming goods might be lost if he did not comply with article 36 whereas under Canadian common law sales rules the buyer lost only his right of rejection by failure to conduct a seasonable examination of goods. There were two shortcomings in article 36: the requirement in paragraph 1 to examine the goods "within as short a period as is practical" was too severe, except for a few items, and did not reflect modern merchandising practices. The term "reasonable period of time" struck a better balance between the conflicting interests of buyer and seller. Paragraph 2 did not take into account the common situation in which a buyer stored goods and resold them in their original packaging to another buyer. The buyer might have had an opportunity to examine the goods but having regard to the circumstances, it would not be reasonable to expect him to do so before reselling. Paragraph 3 was arguably ambiguous enough to embrace that type of transshipment but that should not be taken for granted. The Canadian delegation had taken the opportunity to enlarge the paragraph 1 by clarifying the buyer's rights with regard to the time, place and manner of examination.

76. The CHAIRMAN suggested that the Canadian proposal should be discussed paragraph by paragraph, beginning with the proposed new article 36 (a).

77. *It was so agreed.*

78. Mr. DATE-BAH (Ghana) said he could support the Canadian proposal for article 36 (a).

79. Mr. BONELL (Italy) preferred the existing wording although he had no strong feelings on the subject. He suggested that, as a consequential amendment in the light of the decision on article 35, the phrase "or any documents relating thereto" should be added after the phrase "examine the goods".

80. Mr. ROGNLIEN (Norway) supported that suggestion. He preferred the original wording to the less precise formulation "within a reasonable period of time" used in the Canadian proposal. The final part of the subparagraph, following the word "delivery", was superfluous, since the main point was to indicate the buyer's duty, not to explain in detail how he could carry out the examination.

81. Mr. FELTHAM (United Kingdom) said that in the light of the sponsor's explanations he could support the Canadian proposal.

82. Mr. MANTILLA-MOLINA (Mexico) said he would be able to support the Canadian proposal if the last part of the paragraph, following the word "delivery", were deleted. He was not in favour of including a reference to documents. Examination of the goods was essential to ensure they were in conformity with the contract, whereas examination of documents was an entirely different matter.

83. Mr. GHESTIN (France) was prepared to accept the

Canadian formulation "within a reasonable period of time", since it was fairly close to the formulation used in the legal systems of France, Belgium and the Netherlands, but shared the view that the last part of the paragraph was unnecessary and involved undue repetition of the word "reasonable".

84. Mr. MICHIDA (Rapporteur) observed that the wording of paragraph (1) of article 36 had been discussed over many years in UNCITRAL. Although the Canadian version might sound reasonable, it would be difficult to apply in practice, notably in the case of perishable goods such as fish, meat or vegetables. The existing phrase "within as short a period as practicable in the circumstances" gave the trader in such goods a clear point of reference. In contrast, the phrase "within a reasonable period of time" was vague and did not underline the need for the period to be kept short. Since the present formulation could be applied equally well to perishable and to durable goods, he would prefer to keep it.

85. Mr. HJERNER (Sweden) shared that view. The Canadian representative had explained that his proposal was intended to cover the case of packaged goods that needed to be unpacked within a certain period, but that contingency was covered by the phrase "as short a period as is practicable in the circumstances", which had the advantage of drawing attention to the need for prompt action. He was not at all clear as to the meaning of the last part of the paragraph and preferred the original text.

86. Mr. SEVON (Finland) shared the previous speaker's misgivings. The last part of the paragraph might be interpreted as indicating that the buyer could examine goods before delivery, which would open unlimited possibilities for litigation on the question of what was or was not reasonable.

87. Mr. SHORE (Canada) pointed out that paragraph 36 (a) specified that goods should be examined "following their delivery". The word "reasonable" was mentioned several times in order to take into account the fact that in Canadian legislation that word was applied in several different contexts, not only to buyers and sellers but also to time periods and to the goods themselves. If the last part of the paragraph, "and may examine them at any reasonable time and place and in any reasonable manner", caused difficulty, he was willing to withdraw it.

88. Mr. MASKOW (German Democratic Republic) was somewhat surprised that the Canadian representative should be seeking to introduce an entirely new concept which did not correspond to the approach used hitherto in the Convention. The proposal was a very far-reaching one to put forward at such a late stage. It had been suggested that a reference to documents should be added to article 36 (1) as a consequential amendment, but he felt the addition would cause difficulties because it would suggest that documents would be treated in a different manner from goods.

89. Mr. HERBER (Federal Republic of Germany) also favoured the existing text. It should be borne in mind

that the main purpose of article 36 was to ensure that the buyer examined the goods as soon as possible. Article 37 allowed for an additional period in which the buyer could give notice to the seller of his findings, and it was in that context that the concept of a "reasonable period" was appropriate. He supported the view of the representative of the German Democratic Republic in regard to the question of the addition of a reference to documents.

90. Mr. REISHOFER (Austria) considered that the word "reasonable" was too vague, and accordingly preferred the original wording.

91. Mr. DATE-BAH (Ghana) noted that the Indian proposal was very close to the Canadian proposal and suggested that the two might be combined into a single text.

92. Mr. SHORE (Canada) accepted that suggestion. Article 36 (a) would thus read: "The buyer must examine

the goods, or cause them to be examined, within a reasonable period of time in the circumstances, following their delivery."

93. The CHAIRMAN said that as there appeared to be a majority against the revised Canadian proposal for a new article 36 (a) (A/CONF.97/C.1/L.118), he would, in the absence of further comments, consider the proposal rejected.

94. *It was so agreed.*

95. The CHAIRMAN suggested that the Italian representative's proposal to add the words "or any documents relating thereto" after the phrase "examine the goods" in article 36 (1) should be forwarded to the Drafting Committee.

96. *It was so agreed.*

*The meeting rose at 10.15 p.m.*

## 15th meeting

Thursday, 20 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.15

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 34 (continued) (A/CONF.97/C.1/L.147)*

1. Mr. INAAMULLAH (Pakistan) explained that his delegation had submitted its amendment to paragraph 2 of article 34 because it considered that the buyer should be held liable for a breach not only of any express guarantee, but also of any implied warranty, and for a reasonable period. Thus amended, paragraph 2 would be more precise.

2. Mr. FELTHAM (United Kingdom) pointed out that the English word "warranty" proposed by Pakistan was not used in the rest of the Convention. The word "term" would be more appropriate.

3. Mr. HJERNER (Sweden) thought that the Pakistan amendment, which might at first sight appear to be acceptable, was inappropriate in article 34. Paragraph 1

of the article indicated the time at which the conformity of the goods was to be judged. The seller could also give a so-called "maintenance guarantee" which went beyond that time, but it was not necessary to state that in the present paragraph, for if the contract contained a provision stipulating that the seller remained liable even after passage of the risk, that provision would in any event prevail over paragraph 1 of article 34. Paragraph 2 made it clear that where there was an express guarantee it mattered little whether the lack of conformity became apparent after passage of the risk. At any rate, it would seem to be going too far to assimilate express guarantees to implied guarantees. He would therefore prefer to leave article 34 as it stood.

4. Mr. ROGNLIEN (Norway) considered the existing text satisfactory. Since article 34 in fact covered all contractual guarantees, but not so-called "guarantees" presumed by law, it might perhaps be preferable to replace the words "express guarantee" by "contractual guarantee", which could apply equally well to implied guarantees and to express guarantees. As for inserting the word "reasonable" at the end of paragraph 2, he considered that term too vague; the rule ought to be spelt out precisely and the guarantees should be firm.

5. Mr. SAMI (Iraq) considered the Pakistan proposal practical and realistic. When a seller sold his goods, he did not always guarantee them for a reasonable period. In most cases, any such guarantee must be deduced from usage and tradition. It could also derive from the implicit

wish of the parties. For that reason, it would be as well to state that the guarantee could also be implied. He also approved of the addition of the word "reasonable" at the end of paragraph 2.

6. Mr. VISCHER (Switzerland) felt that the word "express" was inappropriate in article 34. The guarantee could result equally well, for example, from the nature of the goods. It might perhaps be best to delete that word and not qualify the guarantee, which could then be implied or express.

7. Mr. DATE-BAH (Ghana) pointed out that the article under consideration might be interpreted as excluding implied guarantees. It would therefore be advisable either to use both the adjectives "express" and "implied", or to delete both. The English word "warranty", also, did not appear to be a very happy choice, in view of its connotations in the legal systems of common law countries. The words "term" or "promise" would be more suitable. Of course, if the guarantee could be implied as well as express, the period of validity could not be determined exactly. For that reason, he was also in favour of the second part of the Pakistan amendment.

8. Mr. KRISPIS (Greece) asked the representative of Pakistan whether he could agree to the present text of the article if the word "express" was deleted and the courts were left to interpret the word "guarantee", if necessary. He was against adding the word "reasonable" at the end of paragraph 2, for the same reasons as the representative of Norway.

9. Mr. INAAMULLAH (Pakistan) said that what he had feared was that the text might be interpreted as excluding implied guarantees altogether. If it was decided to delete the word "express", he would be quite willing to withdraw the first part of his amendment.

10. Mr. LEBEDEV (Union of Soviet Socialist Republics) considered that the terminology employed, especially the word "warranty", was peculiar to some countries and unknown in others. It ought not, therefore, to be used. Moreover, paragraph 2 dealt with a case which apparently raised no doubts in any legal system. If the word "express" was deleted, it might be assumed that the provision referred to all those guarantees covered by the word "warranty", in addition to express guarantees, which would lead to uncertainty and misinterpretation. He was therefore in favour of keeping the existing wording.

11. Mr. POPESCU (Romania) observed that there were contractual guarantees and technical guarantees, which were practically always implied. To cover the entire range of possible guarantees, it would be better to adopt the Pakistan proposal.

12. Mr. BOGGIANO (Argentina) said he would prefer the word "express" to be deleted.

13. Mr. PLUNKETT (Ireland) noted that, if the first part of paragraph 2 of article 34 was taken by itself, it seemed obvious that implicit obligations were also

included. The representative of Pakistan was therefore right to request that implied guarantees should be mentioned in the rest of the text. Deletion of the word "express" did not seem to be an entirely satisfactory solution, for the word "guarantee" always meant an express guarantee. Consequently, the best course would be to use the two adjectives proposed by the representative of Pakistan, but to substitute, perhaps, a more appropriate word for the English word "warranty", for example "term". As for the addition of the word "reasonable", that followed on logically from the first part of the Pakistan proposal, since an implied guarantee could not apply during a specific period. He therefore supported both parts of the Pakistan proposal.

14. Mr. GHESTIN (France) noted that the existing text covered only express guarantees without taking into account implied guarantees, which might arise either from the interpretation of the contract, and hence from the actual but unmentioned wish of the parties, or from "legal" guarantees deduced from the presumed or fictitious wish of the parties. Some delegations were anxious to include a reference to the contractual nature of the guarantees in question, but in that case it would be as well to state that those guarantees could be express or implied. Advertising, for example, might give guarantees which, if not express, were at least implied. He therefore approved of the Pakistan proposal, but thought that it could be improved by being amended to read: "express or implied contractual guarantees". An alternative solution might be to delete the word "express". As for the addition of the word "reasonable" at the end of paragraph 2, that did not seem very satisfactory. If the Pakistan amendment was adopted, perhaps the Drafting Committee could find a better wording.

15. Mr. MICHIDA (Japan) pointed out that the text of paragraph 2 was the outcome of long discussions in the UNCITRAL Working Group. He was therefore in favour of keeping the existing text and could not agree either to the use of the word "warranty" or to the deletion of the adjective "express". Such changes might create serious problems. Moreover, the question of implied guarantees seemed to be covered by paragraph 1 (b) of article 33. Accordingly, he shared the view of the representative of the Soviet Union that, to rule out all uncertainty, the existing text should be retained.

16. Mr. SZÁSZ (Hungary) considered that the first three lines of the English text of paragraph 2 spelt out a rule and that the remainder of the paragraph gave an example which concerned express guarantees only. But other types of guarantee were not excluded. He therefore hoped that the existing text would be kept. However, he could accept any decision to delete the word "express", although, in many legal systems, guarantees must be express.

17. Mr. MASKOW (German Democratic Republic) observed that, under article 34, the seller could be held liable for any lack of conformity which became apparent even after the risk had passed to the buyer. If the liability

of the seller was to be extended, that should be done expressly. Moreover, the period of such extension must be precise and limited in time. In international trade, the parties to a contract could always adopt provisions fixing a specific guarantee period. It seemed unnecessary, therefore, to extend the seller's liability still further, and he was therefore in favour of keeping the existing text.

18. Mr. BONELL (Italy) associated himself with the remarks made by the French representative. The Pakistan proposal was not without merit, but his delegation feared that any mention of an implied guarantee might create difficulties. It would prefer to delete the word "express" in the original text. He understood the objections raised by countries whose legislation provided only for express guarantees, but would point out that, under the terms of article 6, the present Convention was to prevail over national laws, and that article 8 took account of the usages to which the parties had agreed and of the practices which they had established between themselves and which might imply the existence of tacit guarantees, even if the respective legislation referred only to express guarantees. In view of those considerations, his delegation could accept the Pakistan amendment if the reference to an implicit warranty was deleted, but it would prefer to keep the present text of article 34 with the deletion of the word "express".

19. Mrs. VILUS (Yugoslavia) objected to the Pakistan proposal, which would increase the seller's liability. Paragraph 1 of article 34 delimited the liability of the seller in ordinary cases, whereas paragraph 2 covered special cases in which the seller had given an express undertaking that the goods would remain fit for their ordinary purpose or for some particular purpose, or that they would retain certain qualities. In the latter case, any deletion of the word "express" would extend the seller's liability unduly, and that she could not accept. Consequently, she was in favour of keeping the existing text.

20. Mr. STALEV (Bulgaria) pointed out that a guarantee was usually linked to a certain period. When the guarantee was implied, the period was not defined, and in the event of a dispute, it was for the courts to decide the issue. Such a situation would create serious uncertainty, and for that reason he was opposed to the Pakistan proposal.

21. Mr. KIM (Republic of Korea) considered the Pakistan amendment at variance with paragraph 2 of article 37, where the expression "contractual . . . guarantee" was clearly used in the meaning of "express . . . guarantee". Moreover, the amendment was liable to create practical difficulties, in view of the usages and practices established between the parties, which were referred to in article 8. He would therefore vote against the proposal.

22. Mr. WANG Tian ming (China) said that account must be taken of the fact that implied guarantees as well as express guarantees existed in international trade; the Pakistan amendment was useful in that it spelled out the two possibilities. If the question of the period of the

guarantee presented difficulties, it might perhaps be possible, in order to gain time, to delete all reference to that period.

23. Mr. EYZAGUIRRE (Chile) said that that point had been discussed at length at the UNCITRAL Meeting of the Working Group on the International Sale of Goods, held at Vienna in 1977. Personally, he considered that the existing text of paragraph 2 should be kept without change; the first part defined the liability of the seller in the event of a breach of any of his obligations under the terms of the contract, while the second dealt with the special obligations assumed by him in providing express guarantees concerning certain usages or certain characteristics of the goods. That text was satisfactory and he would therefore vote against the Pakistan amendment.

24. The CHAIRMAN asked the representative of Pakistan if he wished to maintain the original text of his proposal as it appeared in document A/CONF.97/C.1/L.147 or if he would prefer the Committee to take a decision directly on the proposal to delete the word "express" in the draft Convention. As far as the guarantee period was concerned, the question was a drafting one. The expression "for a specific period" in the English text of article 34 was more categorical than the French expression "*pendant une certaine période*" and should be brought in line with the French term, which was applicable both to express and implied guarantees.

25. Mr. INAAMULLAH (Pakistan), thanking the delegations which had supported his proposal, agreed that the word "warranty" in the English text should be replaced by the word "term", as requested by the representatives of Ireland and the United Kingdom. He wished his proposal, as thus subamended, to be put to the vote. If it was rejected, he would like the Chairman to put the present text of article 34 (2) to the vote with the word "express" deleted. But he did want the text to refer to a "specific or reasonable period, as the case may be".

26. Mr. MICCIO (Italy) considered that the part of paragraph 2 relating to the guarantee period raised a question of substance and not of drafting. In the Pakistan amendment, the expression "a specific or reasonable period" meant a period that was not specified but would depend on the case in question. His delegation could not support such a vague provision.

27. The CHAIRMAN suggested that if all reference to an express guarantee was deleted, it might be acceptable for the guarantee period not to be very precisely defined. In that respect, the expression in the French text of the draft Convention, "*pendant une certaine période*", was more satisfactory than the one in the English text.

28. He put the Pakistan amendment (A/CONF.97/C.1/L.147) to the vote, on the understanding that the word "warranty" was to be replaced by the word "term".

29. *The Pakistan amendment, as subamended, was rejected.*

30. The CHAIRMAN put to the vote the Pakistan proposal to delete the word "express" in the existing text of article 34 (2).

31. *The Pakistan proposal to delete the word "express" in the existing text of article 34 (2) was adopted.*

32. The CHAIRMAN proposed that the part of paragraph 2 relating to the guarantee period should be referred to the Drafting Committee.

33. Mr. KRISPIS (Greece) considered that the part of paragraph 2 in question did not just raise drafting problems, but also questions of substance, which would have to be settled by the Committee.

34. Mr. DATE-BAH (Ghana) said that if the paragraph was sent for polishing to the Drafting Committee, the Committee should be given precise instructions—for example, to find a less categorical wording for the English text.

35. The CHAIRMAN asked the opinion of the representative of France on the semantic problem involved.

36. Mr. GHESTIN (France) said that the French expression "*une certaine période*", unlike the expression "*une période certaine*" did not refer to a specific period of time and was in line with the decision taken to delete the word "express". It would suffice to find an equivalent wording in the other languages.

37. Mr. FELTHAM (United Kingdom) suggested that in the English text the expression "for a period" should be used.

38. Mr. KHOO (Singapore) said that if no better phrase could be found, it might be possible in the English text to use the expression "for the period specified", which was frequently used in contract law in English-speaking countries, or the expression "for a reasonable period".

39. Mr. HJERNER (Sweden) considered that the words "reasonable period" raised a question of substance, with which the Drafting Committee was not competent to deal.

40. The CHAIRMAN reminded the Committee that it had rejected the Pakistan amendment, and hence the word "reasonable". In order to fix the guarantee period, all that had to be done was to find a neutral word which would apply both to an express guarantee and to an implied one.

41. Mr. FARNSWORTH (United States of America) also thought that the question was not just a drafting one and suggested that in English the expression "for some period" should be used.

42. The CHAIRMAN proposed that the English text at the end of paragraph 2 should be referred to the Drafting Committee with a request for it to be aligned on the French text, which was more in line with the decision taken by the Committee to delete the reference to an "express" guarantee.

43. Mr. INAAMULLAH (Pakistan) supported the Chairman's proposal.

44. *The Chairman's proposal was adopted.*

*The meeting was suspended at 11.20 a.m. and resumed at 11.45 a.m.*

*Article 33 (continued) (A/CONF.97/C.1/L.73, L.74, L.82, L.102, L.115, L.143)*

45. Mr. SAMSON (Canada) said that, following consultations with several other delegations of common law countries, his delegation had decided to withdraw its amendment to article 33 (A/CONF.97/C.1/L.115).

46. The CHAIRMAN drew the attention of the members of the Committee to the amendment submitted by the delegation of the USSR (A/CONF.97/C.1/L.82).

47. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that his delegation's amendment was intended to formulate article 33, paragraph 1, more precisely than at present, so as to state that goods did not conform with the contract unless they met the specifications stated in the contract.

48. Mr. KRISPIS (Greece) thought that the Soviet proposal would improve the text of the article without changing the sense. He could fully support it on the understanding that it would be put into final form by the Drafting Committee.

49. Mr. FELTHAM (United Kingdom) said that while he was not opposed to the Soviet amendment he did not see the need for it, since the condition it laid down was already embodied in the basic principle of the article.

50. Mr. DATE-BAH (Ghana) was afraid that the reference to "specifications", which was a term with a specific technical meaning, would give rise to difficulties.

51. Mr. GARRIGUES (Spain) agreed with the Soviet delegation that the meaning of article 33 should be made as clear as possible. In the Spanish version at least, the second sentence of paragraph 1 was a prime example of negative phraseology that was difficult to follow. However, he would be unable to express an opinion on the Soviet amendment until it had been worded more precisely.

52. Mr. KIM (Republic of Korea) said that while he was not opposed in principle to the Soviet amendment, he too thought that the mention of specifications was liable to create difficulties. There were three types of sales: by catalogue, by sample and by specification, and the Drafting Committee should be asked to employ those terms properly.

53. Mr. BOGGIANO (Argentina) also welcomed the Soviet proposal, which would make the meaning of paragraph 1 clearer. However, like the representative of Spain, he hoped that the last sentence of that paragraph, which contained a plethora of negatives, would be reworded.

54. The CHAIRMAN suggested that, instead of refer-



ring the text to the Drafting Committee, the Committee should set up an *ad hoc* working group composed of the representatives of Argentina, China, France, Iraq, the Republic of Korea, Singapore, the USSR and the United Kingdom to prepare a new draft on the basis of amendment A/CONF.97/C.1/L.82, in the light of the Committee's discussions.

55. *It was so agreed.*

56. The CHAIRMAN drew the attention of the members of the Committee to the amendment proposed by the Federal Republic of Germany (A/CONF.97/C.1/L.73).

57. Mr. KLINGSPORN (Federal Republic of Germany) explained that his delegation had submitted amendment A/CONF.97/C.1/L.73 because it thought that the present text of article 33, paragraph 1 (b), was too complicated and liable to give rise to litigation. In order to remove all ambiguity, it should be expressly stated that the delivery of goods which were not fit for the purpose to which the buyer intended to put them was not a breach of contract unless the parties had expressly or impliedly made that purpose part of the contract.

58. Mr. FELTHAM (United Kingdom) said he was opposed to the amendment by the Federal Republic of Germany, which was substantive and would make it impossible to determine when there were grounds for considering that fitness for a particular purpose was a condition for the conformity of the goods to the contract. His delegation was in favour of keeping the present text, which gave the buyer greater protection.

59. Mr. SEVON (Finland) was also in favour of keeping the present text and was against the amendment by the Federal Republic of Germany for the reasons given by the United Kingdom representative. He further considered that it would be unreasonable to hold the seller responsible in the case, for instance, of goods that corresponded exactly to the specifications laid down by the buyer but were not fit for the particular purpose for which the buyer intended them.

60. Mr. DABIN (Belgium) remarked that the amendment by the Federal Republic of Germany was more restrictive than the existing text.

61. The CHAIRMAN said he would take it that, if the amendment by the Federal Republic of Germany did not receive more support, it was rejected.

62. *The amendment by the Federal Republic of Germany was rejected.*

63. The CHAIRMAN drew the attention of the members of the Committee to the first amendment proposed by Singapore (A/CONF.97/C.1/L.143).

64. Mr. KHOO (Singapore) said that the amendment proposed by his delegation to article 33, paragraph 1 (c), was on the same lines as the Soviet proposal which had been adopted earlier, and was intended to broaden the scope of article 33 so as to cover all the categories of goods with which international sales were concerned. He

pointed out that the word "characteristics", which it was proposed to add, had been used in the corresponding article of ULIS.

65. Mr. SHAFIK (Egypt) supported the amendment by Singapore, which in his opinion greatly improved the text of the article. The goods must have the qualities and characteristics specified by the seller at the time the contract was concluded.

66. Mr. KRISPIS (Greece) was in favour of the proposal by Singapore, but pointed out that "qualities" and "characteristics" often overlapped since some qualities were part of the characteristics, and vice versa.

67. *The first amendment by Singapore (A/CONF.97/C.1/L.143) was adopted, on the understanding that it would be put into final form by the Drafting Committee.*

68. The CHAIRMAN pointed out, with respect to the second amendment proposed by Singapore (A/CONF.97/C.1/L.143), that the Committee had already set up a working group to look into the concepts of quality, quantity, type and description of goods, and wondered whether it was really necessary to consider the subparagraph.

69. Mr. KHOO (Singapore) withdrew his second amendment.

70. The CHAIRMAN drew the attention of the members of the Committee to the amendment proposed by Australia (A/CONF.97/C.1/L.74).

71. Mrs. KAMARUL (Australia) pointed out that document A/CONF.97/C.1/L.74 contained two amendments. She would begin with the amendment to paragraph 1 (d).

72. Her delegation considered that paragraph 1 (d), which indicated the way in which the goods should be contained or packaged, did not cover all possible situations. What would happen if the goods were of a new type and there was no usual container or packaging for them? The provision proposed by her delegation provided that in cases where new standards had not been established, the manner in which the goods would be contained or packaged should be adequate to preserve and protect them.

73. Mr. SEVON (Finland) said, with respect to the Australian proposal, that he had always considered that the purpose of subparagraph (d) was to lay down minimum standards and that greater protection might not be acceptable because of the added cost entailed. He did not see that the second part of the proposal would serve any purpose and preferred the existing text.

74. Mr. HJERNER (Sweden) said that the Australian proposal was not as anodyne as the representative of Australia had implied. It fell into two parts, and he had the same difficulties with the first as the representative of Finland. The buyer would obviously not complain if the goods he received were packaged in a better manner than was usual or than had been specified in the contract, but that would not be true if the packaging involved the



buyer in extra expense. He therefore considered that the first part of the provision should not be included in article 33.

75. The second part went too far, because it would mean, for example, that when goods for which there was no usual manner of packaging were sold ex-factory the seller would nevertheless have to provide the buyer with the necessary packaging when he collected the goods. In such cases, the question should be dealt with in the contract between the parties. Consequently, he was unable to support the second part of the proposal any more than the first.

76. Mr. SZÁSZ (Hungary) said that he too had problems with the Australian proposal. The first part implied that the goods would not conform to the contract unless their packaging gave them greater protection than they would normally have had. That provision might improve the minimum rules laid down in the present text of article 33, but in view of the doubts as to its implications, it would be better to leave it to the parties who wished to go further than the minimum rules to settle the matter in the contract between them.

77. On the second part, he shared the view of the Swedish representative and considered that there too the question should be settled in the contract.

78. He supported the original text of article 33.

79. Mr. KRISPIS (Greece) said he simply wished to point out that the idea underlying the Australian proposal was already expressed by the word "usual" in the original text. The proposal by Australia might be logical, but he did not see any need for it.

80. Mrs. KAMARUL (Australia) said she had been convinced by the arguments against the first part of her proposal and would withdraw it, but maintained the second part.

81. Mr. OLIVENCIA (Spain) said that it was precisely the second part of the proposal he had intended to support. It was evident that when the existing text referred to the usual manner of packaging, it was concerned with actual practice, which might not exist in the case of a new type of goods. In such cases, the contract would not normally provide for the type of packaging, especially as the buyer was liable not to know about the type of packaging used for such goods. He considered it was necessary to fill those gaps and therefore supported the Australian proposal.

82. Mr. KHOO (Singapore) supported the Australian proposal. He doubted whether a court would declare that packaging was necessary in the case of goods which did not require it, such as motor cars. The Australian proposal would of course be interpreted sensibly.

83. Mr. GHESTIN (France) said he was afraid the remaining part of the proposal would create serious difficulties. While the existing text referred to packaging in the usual manner, which was an objective fact, the reference to packaging in a manner adequate to protect the goods was subjective. One example was mineral

water, which was delivered in glass or plastic bottles. Plastics had the advantage of being light, but were objected to by some consumers on ecological grounds. He wondered whether it would be considered that delivery did not conform if the buyer received plastic bottles when he had expected to have glass. There was an element of uncertainty there and he was therefore unable to support the Australian proposal.

84. Mr. HJERNER (Sweden) said he had reconsidered his position and now saw a possibility of agreeing to the Australian proposal on condition that the obligations of the seller were made clear in the light of the definition of the term "ex-factory". If the representative of Australia agreed to amend the text to read "... in such a manner as to enable the buyer to take delivery of the goods", he was prepared to support it. Otherwise, he would prefer the present text.

85. Mrs. KAMARUL (Australia) agreed to amend her text as suggested by the Swedish representative.

86. Mr. EYZAGUIRRE (Chile) supported the Australian proposal on the grounds that it filled a gap in the Convention: provision had not been made for the case of new types of goods for which there was no usual manner of packaging. He saw no objection to the amendment of the proposal as suggested by the representative of Sweden.

87. The CHAIRMAN announced that two votes would be taken. The first would be on the unamended proposal by Australia and the second on the proposal as amended by the Swedish representative.

88. *The Australian amendment to article 33, paragraph 1(d) (A/CONF.97/C.1/L.74, paragraph 2) was adopted.*

89. *The Australian amendment to article 33, paragraph 1(d) (A/CONF.97/C.1/L.74, paragraph 2), as orally amended by the representative of Sweden, was rejected.*

90. The CHAIRMAN asked the representative of Australia to introduce her second amendment (A/CONF.97/C.1/L.74, paragraph 1), on the addition of a paragraph 3 to the existing text of article 33.

91. Mrs. KAMARUL (Australia) explained that her proposal, which was based on article 3, paragraph 2, of ULIS, was intended as a precaution. Some delegations might regard it as superfluous, but the matter was of concern to her delegation since the Australian courts had made it clear that they were inclined to be strict when there was a question of conformity between the goods delivered and the contract. She would be more satisfied therefore if her proposal were included in the Convention.

92. Mr. MICHIDA (Japan) said that the new paragraph proposed by Australia was the same as that of article 33, paragraph 2 of ULIS. In the general discussion of ULIS at the first UNCITRAL session in 1968, and during the proceedings of the Working Group on the International Sale of Goods which had begun in 1969, that provision had been criticized and had been with-

drawn from the UNCITRAL text. It should be excluded for two reasons in particular. First, there was the uncertainty of the test of "insignificant". Depending on findings of "insignificant" non-conformity, the provision might deprive the buyer of his right to remedies for breach. Secondly, a breach however insignificant was nevertheless a breach for which the seller should be liable, and the buyer should not be denied his right to available remedies.

93. Mr. SHAFIK (Egypt) supported the Australian proposal which was useful in the sense that it would reduce losses in transit and would consequently fill a gap in the Convention.

94. Mr. ROGNLIEN (Norway) considered on the contrary that the Australian proposal served no purpose and that if it were to be adopted it should in any case not appear in article 33, which was simply concerned with the characteristics of the goods to be delivered by the seller, but in the chapter of the Convention on remedies. If there was only an insignificant breach of the contract, there might be no damage, but if the breach led to damage, and economic loss was involved, the provisions of the Convention did provide and should provide a remedy.

95. Mr. BONELL (Italy) found the Australian proposal interesting. Article 33 did not confine itself to stating, as it might have done, that a seller was to deliver goods that conformed with the contract. It went further, analysing just how far the conformity should go, and the provision was not counter-balanced by any reservation to the effect that there must be a certain margin of tolerance. If a comparison was made with conformity of documents, it would be seen that the problem could not be dealt with in the same way: there could be no margin of tolerance for documents, whereas there could be for goods. He would support the Australian proposal.

96. Mr. GHESTIN (France) said it seemed to him that there would then be three degrees of damage. In addition to major damage, which was grounds for abrogation of

the contract, and insignificant damage, which was without consequence, there would be an intermediate category. That might lead to further complications and, what was more, it would not be in line with sales practice, and international sales practice in particular. Either there was a margin of tolerance covered by the contract or by usage, and in that respect usage was very important, or the price would be adjusted on the basis of the goods delivered, in accordance with the principle of rebate or allowance. He could not support the Australian proposal.

97. Mr. SZÁSZ (Hungary) considered that the purpose of article 3 was to enable one to determine when goods were in conformity with the contract and that conformity had to be interpreted very strictly, on the assumption that, if the parties wanted to allow a certain degree of tolerance, they would say so in the contract. It was therefore not necessary to say so in the Convention. In addition, the Australian proposal would indicate the consequences of non-conformity that was insignificant, which was not at all the purpose of article 33. He could not, therefore, support the Australian proposal.

98. The CHAIRMAN informed the representative of Australia that she could either ask for her proposal to be put to the vote, or resubmit it later as a separate article to appear elsewhere in the Convention, or withdraw it.

99. Mrs. KAMARUL (Australia) asked for her proposal to be put to the vote.

100. *The Australian amendment for the addition of a paragraph 3 to article 33 (A/CONF.97/C.1/L.74, paragraph 1) was rejected.*

101. The CHAIRMAN proposed that the Norwegian amendment (A/CONF.97/C.1/L.102) should be referred to the Drafting Committee, since it was concerned only with a question of form.

102. *It was so decided.*

*The meeting rose at 1 p.m.*

## 16th meeting

Thursday, 20 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

A/CONF.97/C.1/SR.16

Article 36 (continued) (A/CONF.97/C.1/L.118, L.154, L.155)

### Paragraph 3

1. Mr. SAMSON (Canada) said that his delegation would be disposed to withdraw its amendment to paragraph 3 (A/CONF.97/C.1/L.118), which was merely of a drafting nature, unless other members of the Committee wished to see it maintained.

2. Mr. FELTHAM (United Kingdom) said that commercial circles in the United Kingdom had sought clari-

fication as to whether "redispach" included redirection for the purposes of sale to a third party. He had thought that the existing text sufficed but since two common law delegations had proposed amendments, he would like them to be put to the Committee.

3. Mr. HJERNER (Sweden) said that the choice of the word "redispach" had been discussed at length by the UNCITRAL Working Group. The case it had particularly considered was that of an inland buyer who had bought goods CIF New York and had subsequently borne the cost of forward carriage to Chicago. It would not be necessary to examine the goods in New York, since their ultimate destination was clear at the time the contract was concluded. However, the paragraph did not necessarily cover the case of resales. It was important for both seller and buyer to know where they stood. The provision did not aim at dispensing the buyer from conducting an examination merely on the grounds that he proposed to resell the goods. It would not be reasonable to expect him to unpack an entire consignment of television sets packed in individual cartons, but he should perhaps unpack one such set. The Canadian amendment went too far in covering the general case of resales. The well-balanced existing text should be retained.

4. Mr. FELTHAM (United Kingdom) said he was troubled to hear the Swedish representative state that paragraph 3 was not intended to cover resales. It was recognized under common law that in the case, for instance, of the sale of a chemical packed in drums to a French buyer who resold to an ultimate consumer in Belgium, an examination of the goods was not practicable until they reached the subpurchaser. He hoped that position was covered by paragraph 3.

5. The CHAIRMAN said that from the discussion in UNCITRAL which had led up to the adoption of the present draft text, he had the impression that resale played a part in paragraph 3 but neither the important one conferred on it by the Australian and Canadian proposals nor the insignificant part attributed to it by the Swedish representative. The text should be taken literally. There were three conditions for deferring examination of goods until they reached a new destination. The first was redispach by the buyer, the second was that, before such redispach, there had been no reasonable opportunity for examination and the word "reasonable" was taken to include economic considerations and the third was that the original seller should know about the redispach of the goods. Otherwise, he might think that they conformed if he was not notified within the usual period. The conditions permitting deferment of examination often occurred in resales but the resale in itself did not suffice to authorize such a postponement.

6. Mr. MICHIDA (Japan), Rapporteur, confirmed the Chairman's explanation of paragraph 3.

7. Mr. VISCHER (Switzerland) agreed with the Chairman's explanation.

8. Mr. LOW (Canada) said that according to his delegation's interpretation of the original text, whether or not the buyer's opportunity to examine goods came within the scope of article 36 depended on whether or not it was reasonable. In the case of a commission agent transmitting goods, the opportunity did not reasonably arise until they reached a party concerned and able to conduct an examination. If that interpretation was accepted by the Committee, his delegation would be content with the text as it stood and withdraw its amendment.

9. Mr. ROGNLIEN (Norway), agreeing with the conditions mentioned by the Chairman and that they covered resales, said that the wording of the Australian amendment in A/CONF.97/C.1/L.154 was more in harmony with the Chairman's explanation. He could support it if the phrase "in the existing packaging" was added after the words "redirected in transit or redispached", and subject to further consideration of the actual drafting.

10. Mr. BENNETT (Australia) accepted the two suggestions made by the Norwegian representative.

11. Mr. KHOO (Singapore) said he was uneasy whenever it was stated that if the delegations at the Conference reached an understanding on the interpretation of the text, it was perfectly acceptable. The Conference was not drafting a convention for its own consumption but for use by courts, tribunals and ordinary traders throughout the world. It was the Conference's task to remove phrases open to several interpretations. The Australian amendment was useful in that it helped towards achieving uniformity in interpretation and application. He also supported the suggestions made by the Norwegian representative.

12. Mr. SZÁSZ (Hungary) thought that the Australian amendment was generally acceptable but the phrase "purposes of resale or otherwise" was too wide to be a definition—it covered everything. The question of resale could more appropriately be dealt with in the commentary on the Convention. The main element was whether the buyer had a reasonable opportunity for examination. He had no objection to the phrase "in existing packaging", but he did not feel that it made a significant addition to the text.

13. Mr. OSAH (Nigeria) considered that the Australian amendment was clearer and easier to interpret than the original paragraph 3.

14. Mr. HJERNER (Sweden) said that the question to be asked was whether the Australian amendment was compatible with the Chairman's interpretation of the text, with which he agreed. It clarified the text by adding "redirected in transit" but the phrase "for purposes of resale or otherwise" was superfluous. Furthermore, the addition of the phrase "in existing packaging" made the provision stricter against the buyer since a buyer would not be relieved from his duty of examination in the case of a bulk load split up for redispach.

15. Mr. MICHIDA (Japan), Rapporteur, observed that the Australian amendment did not state by whom the goods were to be redirected or redispached. Was it by a carrier or the buyer? He preferred the wording of the original text. The reference to resale also caused him concern. As the Chairman had stated, postponement of the examination of goods was subject to three strict requirements including the knowledge of the seller, which would be weakened by the amendment. He preferred the existing text of paragraph 3.

16. Mr. EYZAGUIRRE (Chile) said he agreed with the Chairman's interpretation of the original text of paragraph 3. The Australian amendment was compatible with that interpretation and was therefore acceptable.

17. The CHAIRMAN asked what the distinction was between "redirected in transit" and "redispached". The words used in the French text seemed to be synonymous.

18. Mr. FOKKEMA (Netherlands) said that was indeed true of the choice of words in the French text but in English there was a distinction between the two terms used. "Redispached" implied that the goods had reached their first destination and had subsequently been sent on. "Redirected in transit" implied that they had never reached their first destination.

19. Mr. LI Chih-min (China) believed that the Australian amendment much improved the text. In the Chinese text, "other purposes" gave flexibility. The purpose of article 36 was to ensure that the time fixed for the examination was reasonable. Unless all elements were considered, it was difficult to make such a judgement.

20. Mr. BENNETT (Australia) requested that the vote should be taken on his original text in document A/CONF.97/C.1/L.154 and on the two groups of phrases underlined separately.

21. *The phrase "redirected in transit or" was accepted by 20 votes to 19.*

22. The CHAIRMAN noted that the translation of "redirected in transit" would have to be reviewed in the text of other languages.

23. He took it that the words "redirection or" in the fifth line of the amendment should be regarded as a consequential amendment.

24. *It was so agreed.*

25. Mr. ROGNLIEN (Norway), speaking on a point of order, inquired whether the Australian representative would retain after the word "redispached", the words "by the buyer" which appeared in the original text and the reference to opportunity for examination by him.

26. Mr. BENNETT (Australia) said that the intention behind his proposal was not to restrict the examination to the buyer if he did not have sufficient opportunity to conduct it. He regarded the latter part of the paragraph and the reference to the seller's knowledge at the time of the conclusion of the contract as the important element in the paragraph.

27. *The words "for purposes of resale or otherwise,*

*without the buyer having a reasonable opportunity for examination", were rejected by 24 votes to 15.*

28. Mr. FOKKEMA (Netherlands), introducing his delegation's amendment (A/CONF.97/C.1/L.155), explained that it was intended to cover the case where goods might be transferred from one means of transport to another, before redirection in transit or redispach, with a consequent risk of damage. That case was not covered by article 36(3) and as a result the balance between the interest of buyer and seller was unfairly tilted in favour of the buyer. He noted that the corresponding ULIS article included a reference to trans-shipment.

29. Mr. SEVON (Finland) said he had difficulty with the proposal, because a buyer might well receive the goods without knowledge of where or how they might have been trans-shipped. The proposed addition would mean that paragraph (3) lost much of its meaning.

30. Mr. FOKKEMA (Netherlands) said that in view of those objections he would withdraw his proposal.

31. *Article 36 was adopted.*

*Article 37 (A/CONF.97/C.1/L.111, L.125, L.124, L.137, L.131, L.75)*

32. Mr. DATE-BAH (Ghana), introducing his delegation's amendment (A/CONF.97/C.1/L.124), said his delegation wished to see article 37(1) deleted and the matter regulated by paragraph 2. The sanction contained in paragraph 1 was too draconian. Traders in jurisdictions which did not have a rule requiring notice to the seller might be unduly penalized, since they were not likely to be aware of the new requirement until it was too late. If the amendment in paragraph 1 of his proposal were rejected, an alternative formulation was suggested in paragraph 2, which did not deprive the party of his rights to rely on non-conformity.

33. Mr. SEVON (Finland) remarked that articles 36 and 37 were closely connected. The word "must" in article 36(1) implied that unless the buyer examined the goods within the specified period, he could not give notice of lack of conformity. If article 37(1) were deleted, the word "must" in article 36(1) had no meaning, since it meant that no penalties were provided if the buyer did not comply.

34. Mr. STALEV (Bulgaria) did not agree that article 37(1) was draconian. It embodied a view that was accepted by many legislations.

35. Miss O'FLYNN (United Kingdom) could not accept the Ghanaian proposal to delete article 37(1). As she saw it, the rule in article 37(1) was much less draconian from the buyer's point of view than that in article 37(2). She could more readily support a proposal for deletion of article 37 as a whole than for the deletion of paragraph 1.

36. Mr. OSAH (Nigeria) supported the Ghanaian proposal for the deletion of article 37(1). If not deleted, the paragraph should be redrafted.

37. Mr. GHESTIN (France) opposed the proposal. It was essential to retain the requirement in paragraph 1 that a buyer should give notice as soon as possible after he discovered the lack of conformity.

38. Mr. BENNETT (Australia) and Mr. KRISPIS (Greece) were also opposed to the proposal.

39. The CHAIRMAN said that as a majority appeared not to favour the Ghanaian proposal to delete article 37 (1), he would, if there were no objection, consider the proposal rejected.

40. *It was so agreed.*

41. Mr. DATE-BAH (Ghana), introducing his alternative amendment (A/CONF.97/C.1/L.124, paragraph 2), explained that the proposal was intended to ensure that failure to give notice should not lead to the very drastic loss of remedy which an innocent party might suffer under the existing text.

42. Mr. WAITITU (Kenya) supported the proposal. The very rigorous sanction to which a buyer might be subjected under the existing text might discourage many countries from accepting the Convention. The sanction in question was not commonly known, and he urged the Committee to consider carefully whether it should rightly be the intention of the Conference to impose it.

43. Mr. FOKKEMA (Netherlands) did not find the proposal acceptable because an element of uncertainty would be introduced if the buyers waited too long before giving notice.

44. Mr. KIM (Korea) also found the proposal unacceptable. Article 37 was not intended to deal with the consequences of failure to give notice within a certain period but to lay down the length of that period.

45. Mr. VISCHER (Switzerland) said he could not accept the Ghanaian proposal but pointed out that article 38 might go some way towards meeting the Ghanaian representative's concern that over-strict sanctions might unduly penalize the buyer.

46. Mr. MEHDI (Pakistan) supported the proposal. It was surely not the intention to impose such extreme penalties on the buyer. The most that could be contemplated was to indicate that the buyer should compensate the seller for any loss or damage resulting from the failure to give notice envisaged in the article.

47. Mr. LI Chih-min (China) also supported the proposal. A buyer who failed to give notice to the seller in due time should not forfeit his right to rely on a lack of conformity of the goods. The Ghanaian proposal maintained a proper balance between the interests of the buyer and of the seller.

48. Mr. OSAH (Nigeria) said it would be unfortunate if the wording of article 37 (1) remained as it stood as it took away the buyer's right to remedy if notice were not given within a specific period. The question of uncertainty did not arise, since article 37 (2) stipulated a period of notice of two years.

49. Miss O'FLYNN (United Kingdom) also supported

the proposal. It seemed harsh to deprive the buyer of his right to damages based on non-conformity of goods merely because he had not given notice of that non-conformity within a reasonable time. Her support of the Ghanaian proposal did not mean that she was withdrawing her own delegation's proposal for the deletion of article 37 (2).

50. Mr. MANTILLA-MOLINA (Mexico) supported the Ghanaian proposal, which had the merit of being applicable both to perishable and non-perishable goods.

51. Mr. KHOO (Singapore) said article 37 was one of the most controversial in the entire Convention. All would agree that the buyer should give notice of non-conformity, within a reasonable time, since otherwise the credibility of his claim might be questioned. The point on which the Committee was divided was what sanctions should be attached to failure to give notice in time. There was much to be said for the view that the sanction provided in the present text of the Convention was draconian. One possible solution was that suggested in the Ghanaian proposal, namely that failure to give notice should result in mitigation of damages. Another was that the buyer should be held responsible for any eventual loss to the seller. In any event, some alternative should be found to the present wording, which was too drastic.

52. Mr. HJERNER (Sweden) did not think the provision was as drastic as had been implied, since it had to be read in conjunction with article 38, which provided for an exception to the rule. The Ghanaian proposal went too far. Reduction of damages was an unsatisfactory remedy, and was as hard on the seller as on the buyer. The main purpose of the rule was in fact to secure evidence in the case of dispute. If the seller were to establish the cause of the defects complained of, he would need to know of them at an early stage. It would not help him to know that at some later stage damages might be reduced. Furthermore, the Ghanaian proposal overlooked the duty of the seller to repair goods or to deliver substitute goods. If there were to be any restriction at all on the rule in article 37 it should be along different lines. The Ghanaian representative might consider redrafting his proposal to take into account the points he had mentioned, and reintroduce it when article 38 was discussed.

53. Mr. STALEV (Bulgaria) said that article 37 (1) gave the seller an opportunity of ascertaining whether there was a defect in the goods as claimed by the buyer at the moment of the passing of the risk. Experience in arbitration cases on liability for defects showed how difficult it was to establish whether goods were really defective at that decisive moment. Goods initially in perfect conformity with the contract were not uncommonly damaged subsequently through the negligence of the buyer or as a result of causes beyond the seller's control.

54. He might have been able to accept the Ghanaian amendment if it had been possible to know the real meaning of the "reduction of damages" proposed for failure to give notice within a reasonable time. He could

not however visualize what the liability of the buyer for defects could be in the absence of due notice. He accordingly could not support the amendment.

55. Mr. TRÖNNING (Denmark) considered that the UNCITRAL text should be kept. It was essential that disputes regarding non-conformity should be settled quickly and therefore that buyers should give prompt notice if they discovered a lack of non-conformity. There was, however, a danger that in the absence of a severe sanction of the kind provided in article 37(1), buyers would fail to give notice.

56. Under the Ghanaian proposal, the sanction would simply be a reduction in the damages that might possibly be due to the buyer. That sanction would not serve the purpose of settling the question of non-conformity as speedily as possible. A more severe sanction was required for that purpose.

57. The Ghanaian amendment would place the buyer in a favoured position. He would be able to speculate at the risk of the seller. If he found a lack of conformity, he could simply watch the market for the goods so as to keep them if the price rose. If the price fell, he would invoke non-conformity to avoid the contract and buy the goods he required more cheaply elsewhere.

58. Mr. TARKO (Austria) said that, under Austrian law, the time-limit for a buyer to give notice of non-conformity was eight days. Experience gained in court practice in Austria and other countries with similar rules showed that the provision was a good one. His delegation considered the two-year period specified in article 37(2) unduly long, but was prepared to accept it as a compromise.

59. Mr. ELHURVI (Libyan Arab Jamahiriya) supported the Ghanaian proposal. His delegation would find it difficult to accept article 37 as it stood because of the drastic sanction against the buyer for failure to give due notice of non-conformity.

60. Mr. BENNETT (Australia) said that he could not support the Ghanaian proposal. It was highly desirable that disputes arising out of claims of non-conformity should be settled with reasonable expedition and the obligation to give notice within a reasonable time was most important in that respect. The sanction for failure to give notice proposed by Ghana as an alternative to the sanction specified in article 37 would be extremely difficult to administer by courts of law.

61. Mr. HOSOKAWA (Japan) remarked that he could understand the concern that had prompted the Ghanaian proposal but could not support the proposed new text because of the difficulties and uncertainties of its application to concrete cases. Adoption of the proposal would prevent the speedy settlement of disputes, which was of the utmost importance in international trade.

62. Mr. HERBER (Federal Republic of Germany) said that the provisions of article 37 were crucial because one of the main difficulties in cases of non-conformity was to secure proof. Under article 37, the buyer would lose his

claim—a very severe sanction—if he did not notify the buyer of any defects known to him. For that purpose he had, however, a reasonable period of time which could amount to as much as two years—a long period in commercial terms.

63. The alternative sanction proposed by Ghana could well prove to be too weak to ensure that the buyer made defects known to the seller as soon as possible in order to have them examined in time. The "mitigation of damages" formula would, to begin with, only work if there was a claim for damages. The seller would have to prove that he had sustained a loss as a result of the failure to notify. The mitigation system would thus actually come into play only in very rare cases.

64. It should be remembered moreover that the rule in article 37 was not mandatory: the parties could always derogate from it in their contractual arrangements. It was a useful rule that could be easily administered and applied wherever the parties had not agreed on different arrangements.

65. The formula proposed by Ghana was contrary to the established usage in the matter and would thus render the future Convention less attractive to commercial circles, thereby diminishing the likelihood of its wide acceptance by Governments.

66. Mr. DABIN (Belgium) said that he shared the views of those who were unable to accept the Ghanaian amendment and noted that there were sound economic as well as legal arguments against its adoption.

67. Mr. SEVON (Finland) remarked that it would be desirable to find a compromise solution on such an important issue but felt it was virtually impossible to devise a formula capable of satisfying both the supporters and the opponents of the Ghanaian amendment.

68. Mr. OLIVENCIA RUIZ (Spain) defended the existing text of article 37(1) which, in its reference to a reasonable period, provided the needed flexibility. Paragraph 2, for its part, specified a very long period of two years—a formula which also made for flexibility.

69. Mr. DATE-BAH (Ghana) said that he was not wedded to the actual wording of his amendment. Provided the underlaying idea was retained, he could agree to replace the reference to a reduction of the damages by a formula more acceptable to the other representatives, such as a reference to a "financial sanction" that would replace the drastic sanction in the present text of article 37.

70. Mr. KRISPIS (Greece) considered that it was not possible to vote on the amendment with such an important change made orally. A revised amendment should be submitted in writing.

71. After a discussion in which Mr. PLUNKETT (Ireland), Mr. HJERNER (Sweden), Mr. KHOO (Singapore), Mr. ROGNLIEN (Norway), Mr. DABIN (Belgium) and Mr. KRISPIS (Greece) took part, the CHAIRMAN, after seeking the views of members on the



idea contained in the Ghanaian amendment, noted that there was a substantial majority against the principle of the amendment.

72. Mr. DATE-BAH (Ghana) said that, in the circum-

stances, no useful purpose would appear to be served in attempting to frame a revised version of his amendment (A/CONF.97/C.1/L.124). He accordingly withdrew it.

*The meeting rose at 6 p.m.*

## 17th meeting

Friday, 21 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.17

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 37 (continued) (A/CONF.97/C.1/L.124)*

1. The CHAIRMAN, at the request of the representative of Sweden, invited the Committee to revert, on a procedural matter, to the Ghanaian amendment (A/CONF.97/C.1/L.124), which had been withdrawn by its sponsor at the previous meeting.

2. Mr. HJERNER (Sweden) said that during informal talks after the previous day's meeting he had come to realize the importance of the Ghanaian amendment for the Asian-African Legal Consultative Committee. Although he had made his own position on the question perfectly clear, he would not like to miss an opportunity of finding a solution to the problems raised by articles 37 and 38 which would be more satisfactory for delegations that were in the majority.

3. He therefore proposed, first, that at meetings the Committee should confine itself to considering how far the other amendments to those articles were justified and only take indicative votes on them, and second, that it should set up a working group to find a formula which could be satisfactory to all. The working group would be composed of the representatives of countries which had taken a firm position on the question, namely, Bulgaria, Ghana, Pakistan, the United States of America and his own country, as an observer, together with representatives of other countries, such as Argentina, China and Finland.

4. The CHAIRMAN observed that while the represen-

tative of Sweden could suggest what course should be followed, his proposal would have to be put to the vote.

5. Mr. SEVON (Finland) said he considered the question very important for the future of the Convention and would be sorry if the Commission came to regret having adopted a stand which would prevent some States from acceding to the Convention. He supported the Swedish proposal.

6. The CHAIRMAN asked the Committee to try to find a more satisfactory formula which would be dealt with in accordance with rule 32 of the rules of procedure. It should not lose precious time in trying to find a solution to an insoluble problem.

7. Mr. INAAMULLAH (Pakistan) asked the Committee to give serious attention to the Swedish proposal, which he considered very reasonable.

8. Mr. HJERNER (Sweden) requested that his proposal, which had been supported by two delegations, should be put to the vote.

9. Mr. MATHANJUKI (Kenya) thought that article 37 was fundamental to the Convention and that if there were no objections to the Swedish proposal, there would be no need to put it to the vote.

10. Mr. KHOO (Singapore) said that the point at issue was a very important one for the Committee. He approved of the Swedish proposal, for he did not think that the setting up of a working group would necessarily prevent the Committee from making progress on other articles.

11. Mr. HERBER (Federal Republic of Germany) thought it might be dangerous to set up a working group with no precise mandate as to the solution it was to seek. Since no final decision had been taken on articles 37 and 38, he proposed that the Ghanaian delegation should be given an opportunity to submit a revised proposal later, which any other delegations could help draft if they wished. He saw no need to take a vote, unless the representative of Sweden pressed for the formal setting up of a working group.

12. Mr. FARNSWORTH (United States of America) said he was sympathetic towards the Swedish proposal,



but while not actually opposed to the establishment of a working group, would prefer the Committee to follow the normal procedure.

13. Mr. SANCHEZ-CORDERO (Mexico) supported the Swedish proposal and said that if a working group was set up his delegation would like to participate in its work.

14. Mr. PLANTARD (France) supported the proposal made by the Federal Republic of Germany.

15. Mr. HJERNER (Sweden) said he was prepared to follow the procedure proposed by the Federal Republic of Germany, provided that Ghana and Pakistan did not object.

16. Mr. SEVON (Finland) proposed that the debate on the question should be adjourned, in accordance with rule 24 of the rules of procedure.

17. Mr. DATE-BAH (Ghana) supported the Finnish proposal.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Committee decided to adjourn the debate on articles 37 and 38.

19. *It was so decided.*

*Articles 39 and 40 (A/CONF.97/C.1/L.77, L.127, L.128, L.129, L.133, L.134, L.145, L.159)*

20. Mr. OSAH (Nigeria), introducing his proposal on articles 39 and 40 (A/CONF.97/C.1/L.159), said that it merely involved a question of drafting. It seemed to him that article 39 (1) and article 40 (1) had the same purpose, as both concerned the rights or claims of third parties. They could therefore be merged by the Drafting Committee.

21. Mr. DATE-BAH (Ghana) supported that proposal.

22. Mr. HJERNER (Sweden) considered that the Nigerian proposal in fact raised a substantive issue. The text of ULIS had dealt in general with third-party rights and claims, but it had been realized, at the Vienna session of UNCITRAL in 1977 that industrial or intellectual property constituted a separate case. That was why a special article had been drafted on the question; he would therefore like to keep the text as it stood.

23. Mr. HERBER (Federal Republic of Germany) agreed with the representative of Sweden that the Nigerian amendment was not purely a matter of drafting if it was intended to equate third-party rights or claims in general with those based on industrial or intellectual property. If it was only a matter of merging the first two paragraphs of those articles, that did not seem to be very useful. Moreover, article 40 was already long and difficult to understand in its present form.

24. Mr. SZÁSZ (Hungary) observed that rights or claims based on intellectual or industrial property constituted a separate case. With regard to the rights mentioned in article 39, the seller might have no difficulty in knowing what they were, but that did not apply to the

rights referred to in article 40. That was why separate articles had been drafted to deal with those questions.

25. Mr. KRISPIS (Greece) thought the current debate was premature, as proposals were under discussion which had not yet been adopted. The Committee should deal first with articles 39 and 40 and then consider, if necessary, the possibility of merging the first paragraphs of those two articles.

26. Mr. MANTILLA-MOLINA (Mexico) said he thought that it would be preferable to keep the paragraphs in question separate, but that a new sentence might be inserted in article 39 (1), where the treatment of the question of rights or claims based on industrial or intellectual property was not satisfactory, indicating that rights or claims based on industrial or intellectual property were governed by article 40. The Drafting Committee could be left to work out the exact wording of that sentence.

27. Mr. OSAH (Nigeria) said that if the Committee felt that his proposal raised more than a drafting question he was fully prepared to accept its verdict and would not press for his amendment to be put to the vote.

28. Mr. KHOO (Singapore) felt that the wording of article 39 (1) was not wholly satisfactory. The expression "other than one . . ." implied that the obligations of the seller did not apply to rights based on industrial or intellectual property. Perhaps the Committee could adopt the wording proposed by his delegation (A/CONF.97/C.1/L.145), which merely involved a drafting change and might be useful if it proved too difficult to merge the two paragraphs under consideration.

29. Mr. OSAH (Nigeria) said that if a proposal on the lines of those by Mexico or Singapore was accepted, he would withdraw his amendment.

30. Mr. GHESTIN (France) said that the expression "other than one . . ." in article 39 (1) was unsatisfactory. It might be as well to delete that part of the sentence and add a paragraph 3 in article 39, indicating that those provisions did not apply to rights and claims based on industrial or intellectual property, which were governed by article 40.

31. Mr. KRISPIS (Greece) said that the expression "other than one . . ." would seem to imply an exception to the rule, which was not the case, rights or claims based on industrial or intellectual property simply being governed by another article. Perhaps the phrase "subject to article 40" could be inserted in that paragraph. That was a purely drafting suggestion aimed at clarifying the text.

32. Mr. MANTILLA-MOLINA (Mexico) felt that the Committee was spending too much time on the question and proposed that article 39 (1) should be referred to the Drafting Committee, together with the suggestion by the Mexican delegation.

33. Mr. REISHOFER (Austria), supported by Mr. ROGNLIEN (Norway) thought it important to draw a

clear distinction between the two types of rights or claims referred to in the Convention. The Singapore amendment might be purely a drafting matter, but the words "subject to" were liable to cause misunderstandings. It would be better to keep two separate provisions.

34. Mr. MANTILLA-MOLINA (Mexico), speaking on a point of order, requested that the debate on the question under discussion should be closed, in accordance with rule 25 of the rules of procedure.

35. *The proposal was adopted without opposition.*

36. Mr. POPESCU (Romania), speaking on a point of order, proposed that the Committee should vote first on the substance of articles 39 and 40. Drafting matters could be dealt with afterwards.

37. Mr. MANTILLA-MOLINA (Mexico) considered that his proposal should be put to the vote before the Singapore amendment. The French amendment was similar to his own, but the one by Singapore seemed unacceptable.

*The meeting was suspended at 11.10 a.m. and resumed at 11.30 a.m.*

38. The CHAIRMAN asked the representative of Mexico to explain his amendment.

39. Mr. MANTILLA-MOLINA (Mexico) pointed out that his proposal was not to delete a part of article 39 (1) but to add a sentence indicating that rights or claims based on industrial or intellectual property were governed by article 40.

40. Mr. OSAH (Nigeria) felt that in the light of the explanations given by the representative of Mexico, there was a lack of coherence between the end of the sentence and the beginning and that it would be necessary to have the written text of the Mexican proposal.

41. Mr. ROGNLIEN (Norway) and Mr. FOKKEMA (Netherlands) said that when the representative of Mexico had submitted his amendment, they had assumed that the expression "other than one based on industrial or intellectual property" in article 39 (1) had been deleted.

42. Mr. GHESTIN (France) said that he had understood the Mexican proposal to be similar to that by his own delegation, which was to delete from paragraph 1 the expression "other than one based on industrial or intellectual property" and to add a sentence to form a third paragraph on the following lines: "The provisions of the present article are not applicable to rights or claims based on industrial or intellectual property which are governed by article 40".

43. Mr. MANTILLA-MOLINA (Mexico) accepted that interpretation.

44. *The oral amendment submitted by Mexico to article 39 (1) was adopted on the understanding that it would be put into final form by the Drafting Committee.*

45. Mr. SEVON (Finland), introducing his amendment

to articles 39 and 40 (A/CONF.97/C.1/L.133), pointed out that it was in keeping with the comments made by the World Intellectual Property Organization in document A/CONF.97/8/Add.2/ (pp. 9—11).

46. Mr. KRISPIS (Greece) did not see what purpose it would serve to use the wording "industrial property or other intellectual property", which seemed to imply that industrial property was merely an aspect of intellectual property.

47. Mr. SEVON (Finland) said that as his amendment gave rise to difficulties he would withdraw it.

48. Mr. KHOO (Singapore), introducing his amendment to article 39 (A/CONF.97/C.1/L.145), said that its purpose was simply to remove the ambiguity in paragraph 1. The expression "subject to" seemed to him to be quite clear in English but it might not be in the other languages. The Drafting Committee could perhaps try to align the different versions of his proposal.

49. The CHAIRMAN thought that the amendment by Singapore was not just a drafting matter, because rights other than those based on industrial or intellectual property were subject to a different régime and less protection was given to the buyer in the case of rights based on industrial or intellectual property.

50. Mr. KRISPIS (Greece) wondered whether the amendment by Singapore still had any point in view of the fact that the Committee had adopted the Mexican proposal.

51. Mr. FARNSWORTH (United States of America) said that the Mexican proposal, which added a sentence to article 39 (1), and deleted the expression "other than one based on industrial or intellectual property", satisfied the objections which had been raised. The expression in English "subject to . . .", proposed by Singapore, would modify the substance of article 39. Article 40 applied only to rights and claims based on industrial or intellectual property. There were thus two different régimes, and when the matter had been discussed at length at the UNCITRAL session in 1977, that expression had not won acceptance.

52. Mr. KHOO (Singapore) said that in view of the comments made by the United States representative he would withdraw his amendment.

53. The CHAIRMAN invited the members of the Committee to consider the amendment by Norway (A/CONF.97/C.1/L.127), which concerned the English text only.

54. Mr. KOPAC (Czechoslovakia) observed that the amendment proposed by Norway raised the problem of the consequences for the buyer of failing to give notice of the non-conformity of the goods within a reasonable time after he had become aware of it, which was dealt with in article 37 (2). Many delegations had pointed out that the emphasis in the article was not on the lack of conformity of the goods but on the buyer's inability to rely on the provisions of paragraph 2. From that stand-

point, the Norwegian amendment could not be adopted so long as a decision had not been taken about the wording to be used in article 37 (2), which had not yet been finalized. The texts of the two articles should be harmonized.

55. The CHAIRMAN said that he personally did not see a great deal of difference in the French version between the expression "*ne peut se prévaloir*" and the expression "*est déchu du droit de se prévaloir*", which corresponded to the Norwegian proposal, and asked the Norwegian representative if he wished to press his amendment.

56. Mr. ROGNLIEN (Norway), explaining his amendment, said that he attached importance to the harmonization of the expressions used in articles 37, 39 and 45 to define the cases in which the buyer lost his right to rely on the provisions. He recognized, however, that it would be preferable to defer consideration of his proposal until a decision had been taken on the wording of article 37 (2).

57. Mr. KRISPIS (Greece) pointed out that legally as well as logically a person could not lose a right unless he had possessed it in the first place, and that it would be more satisfactory to align the expression used in article 37 (1) and (2) ("the buyer loses the right") with the expression used in article 39 (2) ("the buyer does not have the right").

58. Mr. FARNSWORTH (United States of America), supported by Mr. FELTHAM (United Kingdom), agreed that it was unnecessary to use different terms to express the same idea in different articles and was in favour of the wording suggested by the Norwegian representative for the English text, namely, "the buyer loses the right".

59. The CHAIRMAN asked whether the members of the Committee were in favour of standardizing the expressions used in articles 37, 38, 39 and other articles relating to the right of the buyer to rely on the remedies provided for in the Convention. If the Committee agreed to do so, there were two possible solutions: it could either adopt the expression in article 37, which implied that the buyer had previously possessed the right in question or abide by the formula used in article 39 or other articles which presumed that the buyer had not had the right earlier. In any event, it was necessary to make a choice and to harmonize the wording used in all languages and not merely in English, as the representative of Norway had proposed.

60. Mr. KIM (Republic of Korea) said he would prefer no decision to be taken on the matter until the wording of paragraphs 37 and 38 had been agreed upon.

61. Mr. SAMI (Iraq) commented that in the corresponding Arab legislation the buyer had the right to terminate a contract in the event of failure to fulfil one of its provisions and lost that right in certain conditions. The expression "the buyer loses the right", proposed by the representative of Norway, therefore seemed to him appropriate.

62. The CHAIRMAN considered that the Norwegian

amendment was not substantive, and suggested that all the articles concerned with the right of the buyer to rely on the remedies provided for should be referred to the Drafting Committee, which would be asked to standardize the expression used in them to indicate that the buyer lost his right when he had not performed certain acts and to ensure that it was worded in exactly the same way in the different language versions.

63. *The proposal by the Chairman was adopted.*

64. The CHAIRMAN invited the members of the Committee to consider the Canadian amendment (A/CONF.97/C.1/L.128) and the Norwegian amendment (A/CONF.97/C.1/L.77).

65. Mr. LOW (Canada) explained that the new paragraph 3 he had proposed in amendment A/CONF.97/C.1/L.128 was intended to prevent the buyer from being able to make a claim that was ill-founded and to enable the courts to settle cases in which the buyer had not suffered serious prejudice or inconvenience. However, in order to speed up the work of the Committee, he would withdraw that part of his amendment, but still maintained the principle stated in new paragraph 4, which defined the cases in which the seller would not be deemed to have committed a fundamental breach of contract. In that respect, the amendment was incompatible with the Norwegian proposal.

66. The CHAIRMAN saw no basic contradiction between the Canadian and the Norwegian proposals. It emerged *a contrario* from the Norwegian proposal that if the buyer complied with the obligations laid on him by article 39, he did not commit a fundamental breach of contract. The idea expressed was similar to that of the Canadian proposal.

67. Mr. ROGNLIEN (Norway), introducing the Norwegian proposal (A/CONF.97/C.1/L.77), explained that there was a gap as regards remedies for third-party claims in the existing text of sections II and III of chapter II. Some remedies which referred to breach of contract or non-performance clearly covered breach under article 39 also. But the remedies under article 42 (2), 46 and 47 referred to non-conformity of goods and might not be deemed to cover situations where third-party rights or claims were in question, since they were regarded as presenting a different problem from non-conformity of the goods (see the title of section II). The amendment submitted by his delegation was intended to fill that gap by giving the buyer also the remedies envisaged in cases when the goods delivered were not in conformity with the contract. An alternative amendment on the same lines might be made in the parts of section III where the same clarification was required, in particular in article 46.

68. Mr. HJERNER (Sweden) said he understood the position of the Norwegian representative, who had rightly emphasized that the buyer did not have the same remedies in the case of third-party rights and claims as in that of non-conformity of the goods, but pointed out that the authors of the Convention had deliberately

distinguished between the two cases. While the Canadian proposal was related in certain respects to the Norwegian one, it was too late at the present stage to fill the gaps in the draft Convention with regard to the remedies available to the seller and buyer. The Canadian amendment was designed to prevent the buyer from being seriously prejudiced as a result of third-party rights or claims. However, there might be other factors involved and the gravity of the breach committed by the seller would depend on the circumstances. The problem was too complex to be settled as easily as that, and he would prefer to keep the existing text, in spite of its shortcomings.

69. Mr. KOPAC (Czechoslovakia) said he was unable to support the Norwegian proposal. Article 41 of the draft Convention related to all the remedies available to the buyer in the event of the seller's failure to perform any of his obligations and consequently covered the obligations referred to in articles 39 and 40 as well. The solution proposed by Norway oversimplified the question, and he could not accept it.

70. Mr. MANTILLA-MOLINA (Mexico) agreed.

71. The CHAIRMAN put the Norwegian proposal (A/CONF.97/C.1/L.77) to the vote.

72. *The Norwegian proposal was rejected.*

73. The CHAIRMAN asked whether the representative of Canada maintained his proposal (A/CONF.97/C.1/L.128).

74. Mr. LOW (Canada) considered that in situations such as those envisaged in article 39, the provisions of articles 44 and 45 did not offer a very clear solution. It therefore seemed necessary to clarify the relationship between article 39 and articles 44 and 45. He recognized that his proposal might not be the best possible way of dealing with the uncertainty and that it might be possible to find a more satisfactory wording. He would leave it to the Committee to settle that question.

75. Mr. FOKKEMA (Netherlands) said that he too was anxious to find an answer to the problem that bothered the Canadian delegation. It was important to determine how far the provisions on remedies would also apply to the clauses concerning third-party claims.

76. Mr. WIDMER (Switzerland) agreed with the Canadian and Netherlands delegations but considered that it would be preferable to deal with the matter within the context of articles 41 *et seq.* The question of the seller having a chance to remedy certain minor defects also arose with regard to physical non-conformity.

77. Mr. HJERNER (Sweden) was in favour of the principle behind the Canadian amendment but did not like the wording. The Committee might return to the matter when considering articles 44 to 48, which would give the Canadian delegation a chance to improve the wording of its amendment in the meantime.

78. The CHAIRMAN proposed that the Canadian delegation should withdraw its amendment and resubmit

it when the Committee dealt with the articles on remedies.

79. Mr. LOW (Canada) withdrew his amendment (A/CONF.97/C.1/L.128).

80. The CHAIRMAN drew the Committee's attention to the amendment by the German Democratic Republic to article 40 (3) (A/CONF.97/C.1/L.134).

81. Mr. WAGNER (German Democratic Republic), introducing the amendment, pointed out that article 37 (2) allowed a period of two years for notice of lack of conformity. While it might admittedly be difficult to stipulate a period in article 44 (2), it would be desirable to do so in article 40 (3) if property rights were at stake.

82. Mr. SEVON (Finland) said he was fairly sympathetic towards the idea, but doubtful about its application. If a patent infringement was discovered after three years, there was practically nothing that could be done about it. His delegation could not, therefore, support amendment A/CONF.97/C.1/L.134.

83. Mr. HJERNER (Sweden) and Mr. KRISPIS (Greece) supported the amendment.

84. Mr. DABIN (Belgium) also supported the amendment by the German Democratic Republic and pointed out that the seller might have a heavy burden because in some cases he would have to undertake inquiries and research into industrial property rights, which he would not always be in a position to do. Although Belgium had not submitted an amendment to that effect, it might be as well to delete the words "or could not have been unaware" in article 40 (1). Whatever the circumstances it would be advisable to limit the period during which the seller was liable.

85. Mr. FELTHAM (United Kingdom) opposed the addition requested by the German Democratic Republic, because he was already against the period of two years provided for in article 37. The fundamental right stated in article 40 only applied to a third-party claim which the seller knew by definition the buyer could not have been unaware of.

86. Mr. WAITITU (Kenya), Mr. ROGNLIEN (Norway) and Mrs. KAMARUL (Australia) endorsed the arguments put forward by the representatives of Finland and the United Kingdom and said they could not support the amendment by the German Democratic Republic.

87. Mr. SAMI (Iraq) could not support the amendment either. The buyer might not get to know about a third-party right or claim until long after delivery, perhaps more than two years later.

88. Mr. GHESTIN (France) said he could not support the amendment by the German Democratic Republic because he was not in favour of the two-year period set in article 37. The buyer, moreover, was in an even worse position than the seller to know about industrial or intellectual property rights, and it was reasonable that the seller should bear greater liability in the matter than the buyer.

89. The CHAIRMAN put the amendment by the German Democratic Republic (A/CONF.97/C.1/L.134) to the vote.

90. *The amendment by the German Democratic Republic was rejected.*

91. Mr. BOGGIANO (Argentina) reintroduced amendment A/CONF.97/C.1/L.133, which had been submitted by Finland and then withdrawn.

92. The CHAIRMAN put amendment A/CONF.97/C.1/L.133, reintroduced by Argentina, to the vote.

93. *Amendment A/CONF.97/C.1/L.133 was adopted.*

94. The CHAIRMAN drew the Committee's attention to the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.129).

95. Mr. KLINGSPORN (Federal Republic of Germany) said that the purpose of his amendment was to add an article 40 bis after article 40 in order to deal with a situation for which articles 39(2) and 40(3) did not provide a satisfactory solution. But the question was related to article 38, which had not yet been considered and which the German Democratic Republic was proposing should be deleted. He therefore thought it best that consideration of the amendment be postponed.

#### *Article 41*

96. *Article 41, to which no amendments had been submitted, was adopted without change.*

#### *Article 38*

97. Mr. MASKOW (German Democratic Republic) said that in the light of the discussion on article 37,

during which some delegations had laid stress on the balance between articles 37 and 38, his delegation had decided to withdraw its amendment to article 38.

#### *Article 17 (continued) (A/CONF.97/C.1/L.157)*

98. The CHAIRMAN said that under rule 32 of the rules of procedure, the Committee was to reconsider an amendment to article 17 submitted by the Federal Republic of Germany.

99. Mr. LANDFERMANN (Federal Republic of Germany), referring to his amendment to article 17 (A/CONF.97/C.1/L.157), said that consideration of article 25 had shown article 17 to be unclear on a minor point, which should preferably be dealt with in the First Committee rather than sent to the plenary Conference. The question was whether, in order to be valid, the notice referred to in article 17 had to reach the other party or whether it was enough for it to have been dispatched. The proposal was designed to settle that point.

100. Mr. ROGNLIEN (Norway) supported the proposal by the Federal Republic of Germany and reminded the Committee that during the consideration of article 25 it had been proposed that the rule in question should be stated in article 17(2). He had objected to a general provision to the effect that article 25 should apply to part II. In article 17(2), however, it should be enough for the notice to have been dispatched.

101. Mr. HJERNER (Sweden), speaking on a point of order, called for a vote on the decision to reconsider article 17.

102. *The decision was upheld.*

*The meeting rose at 1 p.m.*

## 18th meeting

Friday, 21 March 1980, at 3 p.m.

*Chairman:* Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.18

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5 and A/CONF.97/6) (continued)**

#### *Article 17 (continued) (A/CONF.97/C.1/L.157)*

1. The CHAIRMAN recalled that the Committee had decided to reopen its discussion on article 17 and invited the representative of the Federal Republic of Germany to introduce his amendment to paragraph 2 of that article.

2. Mr. LANDFERMANN (Federal Republic of Germany) said that the purpose of his amendment was to replace in the first sentence of paragraph 2 the words "unless the offeror objects to the discrepancy without undue delay" by the words: "unless the offeror, without undue delay, objects to the discrepancy orally or dispatches a notice to that effect".

3. As his delegation saw it, the existing text of the paragraph was not clear on at least one point. The first sentence stated that a reply to an offer which purported to be an acceptance but which contained additional or different terms that did not materially alter the terms of the offer, constituted an acceptance "unless the offeror objects to the discrepancy without undue delay". Under that provision, it was not clear whether the objection had to reach the other party in order to be effective. In all other places in the Convention where a similar situation arose, it was specified whether the objection or declaration must reach the other party. In article 16 (2), the first sentence spoke of "the moment the indication of assent reaches the offeror". That provision thus required the objection to reach the other party. In article 19 (2), on the other hand, the concluding words made it clear that the notice took effect regardless of whether it had reached the other party or not.

4. Of those two systems, his delegation had chosen the former (i.e. that of article 16) for the purposes of its amendment to article 17 (2). The reason was that, in both cases, the offeror needed protection against an acceptance which was made too late or with reservations.

5. Mr. FELTHAM (United Kingdom) said he supported the amendment.

6. Mr. ROGNLIEN (Norway) also supported the amendment. It was very important that no party should be deemed to be bound by a contract if he objected to something stated by the other party, regardless of whether the protest reached that other party or not.

7. Mr. WAITITU (Kenya) said he too supported the amendment.

8. Mr. POPESCU (Romania) said that he supported the amendment in the interests of the security of contractual transactions.

9. Mr. KRISPIS (Greece) supported the amendment, particularly because it was in accord with the provisions of article 19 (2).

10. The CHAIRMAN noted that there was widespread support for the draft amendment proposed by the delegation of the Federal Republic of Germany. If there were no further comments, he would take it that the Committee wished to adopt that amendment.

11. *It was so agreed.*

#### *Article 23 (continued) (A/CONF.97/C.1/L.176)*

12. The CHAIRMAN invited the representative of Pakistan to introduce the report of the *ad hoc* working group (A/CONF.97/C.1/L.176). In that connection, he drew attention to a mistake in the list of members of the group appearing in document A/CONF.97/C.1/L.176: "China" should be replaced by "Ghana".

13. Mr. INAAMULLAH (Pakistan), introducing the report (A/CONF.97/C.1/L.176), said that the concluding proviso of the text given in the second paragraph of the report should be corrected, the words "unless the

party in breach did not foresee and had no reason to foresee such a result" being replaced by: "unless the party in breach proves that he could not foresee such a result and that a reasonable person of the same kind in the same circumstances could not have foreseen it". The purpose of that change was, of course, to incorporate the text of the Egyptian amendment to article 23 which had been adopted at the 12th meeting.

14. The text currently being proposed took into account the previous proposals for the improvement of the text of article 23, and in particular, the amendments submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.63) and Pakistan (A/CONF.97/C.1/L.99). The text had been accepted by all the members of the working group except the representative of Hungary.

15. Mr. FELTHAM (United Kingdom) said that the working group's proposal was basically acceptable. He suggested, however, that the words "substantially impair his expectations" be replaced by "substantially disappoint his expectations".

16. Mr. STALEV (Bulgaria) said that his delegation was able to support the proposal, but felt that the language could be simplified.

17. Mr. REISHOFER (Austria) also supported the proposal.

18. Mr. SZÁSZ (Hungary) said that he had been obliged to dissent from the text approved by his colleagues in the working group. The mandate of the group had been to produce a more precise text than that appearing in article 23. It must be admitted, however, that the result had not been successful and that the formula "substantially impair his expectations under the contract" was in no way clearer than the existing formula "substantial detriment to the other party".

19. Mr. KRISPIS (Greece) fully agreed with the previous speaker. The original formula of article 23 and the text proposed by the working group were identical in meaning, the only difference being that the new text contained more complicated phraseology and that the old text was, on the whole, more flexible.

20. Mr. WAGNER (German Democratic Republic) said he supported the drafting improvement submitted by the United Kingdom delegation.

21. Mr. GHESTIN (France) said that he preferred the original text. The one produced by the working group was long and would give rise to difficulties of interpretation. Moreover, it introduced an element of subjectivity which suggested an absence of consensus. Reference to "substantial detriment" was preferable since it was more flexible and more objective.

22. Mr. SAMI (Iraq) said that he too felt that the original text of article 23 was clearer than the complex new text, which was bound to create difficulties.

23. Mr. SCHLECHTRIEM (Federal Republic of Germany) said that the purpose of his delegation's original



proposal (A/CONF.97/C.1/L.63) had been to make it clear that the yardstick for breach of contract was to be found in the terms of the contract itself. As he saw it, the expectations of the party under the contract constituted an objective test.

24. Mr. BONELL (Italy) associated himself with those speakers who had commended the working group, and fully agreed with the comments by the representative of the Federal Republic of Germany. The original vagueness of article 23 had been eliminated and an element of objectivity had been introduced.

25. Mr. ROGNLIEN (Norway) said that he agreed with the remark of the representative of the Federal Republic of Germany that it was necessary to have as objective a criterion as possible.

26. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the working group had not succeeded in producing an improved text for article 23 and that the proposed formulation did not constitute a more acceptable version of the provision under discussion. By introducing the concept of "expectations", the new text detracted from the objectivity of the original one.

27. Furthermore, he pointed out that the word used in the Russian version to render the term "breach" was not correct.

28. In short, he did not favour the working group's proposal and urged that the text of article 23 should be retained as it stood.

29. Mr. LI Chih-min (China) said that the original text of article 23 was better than the proposed redraft by the working group, which was more subjective.

30. There were also some imperfections in the Chinese version of the document in question.

31. Mr. OLIVENCIA RUIZ (Spain) said that he supported the working group's proposal, which avoided the basic problem of article 23, namely the imprecision of the expression "substantial detriment". The text proposed by the working group had the advantage of establishing a direct relationship with the contract by referring to the "expectations under the contract".

32. Mr. KOPAC (Czechoslovakia) said he supported the working group's proposal. The main shortcoming of the existing text of article 23 was that the fundamental breach of contract was defined by reference to what was basically a subjective concept and one that could be interpreted in many different ways.

33. The definition in the working group's report had the advantage of stressing that the term "detriment" had to be interpreted in a broader sense and set against the objective test of the contents of the contract itself.

34. As his delegation saw it, the working group's report constituted a compromise formula and the ideas that it contained should be accepted and referred to the Drafting Committee.

35. Mr. SAM (Ghana) said that, in all cases of breach, recourse must be had to the contract itself. That was the

approach adopted by the working group, and his delegation thus supported its proposal.

36. Mr. BOGGIANO (Argentina) said that, although its drafting could be improved, the text proposed by the working group had the advantage of referring to the expectations under the contract—a fact which was sufficient for his delegation to support it in principle.

37. Mr. PLUNKETT (Ireland) said that he too had criticized the existing text of article 23 and particularly its use of the words "substantial detriment". The working group's redraft represented a great improvement and the reference to "expectations under the contract" provided an essentially objective criterion on which a trial judge could rely.

38. The CHAIRMAN put to the vote the working group's proposal for article 23 (A/CONF.97/C.1/L.176).

39. *The proposal was adopted by 22 votes to 18.*

40. The CHAIRMAN noted that the proposal by the United Kingdom (see para. 15) was of a drafting character. If there were no comment, he would take it that the Committee wished to refer it to the Drafting Committee.

41. *It was so agreed.*

42. *Article 23, as amended, was adopted.*

*Article 42 (A/CONF.97/C.1/L.79, L.135, L.138, L.139, L.161, L.173 and L.180)*

43. The CHAIRMAN invited the Committee to consider article 42 and the amendments thereto proposed by Denmark (A/CONF.97/C.1/L.138), the Federal Republic of Germany (A/CONF.97/C.1/L.135), Finland (A/CONF.97/C.1/L.139), Japan (A/CONF.97/C.1/L.161), Norway (A/CONF.97/C.1/L.79), Sweden (A/CONF.97/C.1/L.173) and the United States of America (A/CONF.97/C.1/L.180).

44. Mr. TRÖNNING (Denmark) withdrew his delegation's amendment (A/CONF.97/C.1/L.138) in favour of that submitted by Finland (A/CONF.97/C.1/L.139) which had the same purport but was better drafted.

45. Mr. FARNSWORTH (United States of America), introducing his proposal to insert a new paragraph (1 bis) in article 42 (A/CONF.97/C.1/L.180), drew attention to his Government's written comments on that point (A/CONF.97/8, pp. 28–29) which gave the background of and the reasons for that proposal.

46. The matter was one of some importance to his Government. It was connected with the problem of specific performance and concerned largely jurisdictions of the common law system.

47. The purpose of the proposed new paragraph (1 bis) was to rule out the remedy of specific performance in cases where the buyer could "purchase substitute goods without unreasonable additional expense or inconvenience". In that connection the replacement of the adjective "substantial" by "unreasonable" in document A/CONF.97/C.1/L.180 should be noted.



48. Unless that limitation was introduced, the buyer would be entitled to compel specific performance by the seller, although the position as to sanctions would vary according to the legal system involved. In the common law system, the sanction was both severe and effective, since specific performance was enforced by penalties such as fines (or, in some jurisdictions, even by imprisonment for contempt of court).

49. It was in view of the undue harshness of that remedy (particularly in the context of international sales) that the drafters of the 1964 ULIS had rightly limited the role of specific performance in the operation of the Convention by stating in article 25 of ULIS: "The buyer shall not be entitled to require performance of the contract by the seller if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates . . .".

50. The United States draft amendment was similar in intent but left out the reference to "conformity with usage" which had given rise to objections. The principle put forward was thus that, if the buyer had substitute goods available, the sensible thing was to expect replacement and not to compel specific performance.

51. Mr. FOKKEMA (Netherlands) said that his delegation did not favour the United States proposal, particularly since the adoption of article 8 of the draft whereby any relevant usage (e.g. on substitute goods) would apply and would govern the provisions of article 42.

52. The only effect of the United States proposal would thus seem to be that the buyer could not require performance where no performance was possible.

53. Mr. ROGNLIEN (Norway) said that he favoured the United States proposed new paragraph (1 *bis*) which would lead to a practical result in the dealings between the parties, especially when they were great distances apart in different continents of the world. In that connection, he approved of the use of the term "unreasonable" in preference to "substantial" which would have been too extreme.

54. The buying of substitute goods was a good solution. He questioned whether existing "usages" were in themselves sufficient to be of assistance in that connection since the question was not so much one of the buyer having the right to buy such goods, which was usual, but rather of his duty to do so rather than make an unreasonable demand for specific performance.

55. In reply to a question by the CHAIRMAN, Mr. FARNSWORTH (United States of America) referred the Committee to the explanations given in the comments by his Government (A/CONF.97/8, p.29) and to the fact that his delegation was making a proposal—in connection with article 58—to restrict the seller's right to demand specific performance in a parallel manner, as announced in his Government's comments (A/CONF.97/8, p.30).

56. Mr. BONELL (Italy) said he welcomed the many amendments put forward to article 42 which afforded an

opportunity of improving the text of that important provision. His delegation was not in favour of the text as it stood and found the corresponding ULIS provision much more convincing. Accordingly, he considered the United States amendment affecting the general principle of specific performances to be an extremely useful one which his delegation warmly supported.

*The meeting was suspended at 4.30 and resumed at 4.50 p.m.*

57. Mr. FELTHAM (United Kingdom) said he supported the United States proposal. He found it difficult to see what interest a buyer could have in forcing a seller to perform when it was possible for he himself to purchase substitute goods, without substantial additional expense or inconvenience, and obtain compensation for any additional costs incurred.

58. Mr. MASKOW (German Democratic Republic) said that, while he understood the concern of the United States delegation, he did not find the proposal acceptable. As he saw it, the amendment would decisively reduce the buyer's freedom to limit the legal consequences of defects, a freedom which was widespread in commercial life and which should be extended rather than restricted. The proposed amendment would oblige the buyer to avoid the contract even in cases where he ought not to be empowered to avoid it but should have recourse to other remedies.

59. Mr. HERBER (Federal Republic of Germany) was also opposed to the proposal, which would amount in practice to a reintroduction of the concept of *ipso facto* avoidance, originally contained in ULIS, that had already been discussed at length and rejected. The proposed amendment would, in effect, do away with the right of the buyer to require specific performance and thus went further than article 25 of ULIS, which had permitted such a practice only in cases where it was in keeping with established usage. To introduce into the Convention a general rule of that kind covering all types of international sales would mean in practice that no provision was made under any legislation for any right of specific performance.

60. Mr. HOSOKAWA (Japan) said that he too was opposed to the United States proposal. It seemed obvious to him that, once a buyer had concluded a contract which bound the seller to perform his obligation, that buyer should have the right to demand performance. If he did not require performance, he should declare the contract void, since otherwise the seller would not know whether or not he was bound under the contract to perform his obligation.

61. Mr. SAMI (Iraq) supported that view. The proposal laid down a requirement for a specific course of action to be followed by the buyer in the event that the seller did not meet his obligations, namely that he should himself purchase substitute goods. That principle was a dangerous one which he found unacceptable.

62. Mrs. KAMARUL (Australia) supported the United

States proposal. Her delegation, which had welcomed the earlier amendment to article 26, felt that it was desirable that the Convention should itself indicate how its provisions were to be interpreted, rather than leave the interpretation to the applicable domestic law.

63. Mr. HJERNER (Sweden) said he was unable to accept the United States proposal. The difficulties encountered by the common law countries had already been met to a certain extent by replacing the word "could" by the word "would" in article 26, but that amendment was not designed to release the party from his promise. The United States amendment, on the other hand, not only removed the enforceability of the promise, but also relieved the seller of his obligations under it, a very serious and far-reaching change. Even if the buyer was able to purchase substitute commodities elsewhere on the market, he should still have the right to hold to the contract and to expect that the seller's promise would be honoured. For his own part, he did not think that article 42 (1) could be extended to cover in addition the right to remedy defects by repair.

64. Mr. GHESTIN (France) said he too found the United States proposal inadmissible. The result of such an amendment would be to encourage the seller to dishonour his obligations if the product he was selling was available on the market. Recourse to damage did not seem to him a satisfactory solution; the essential remedy was to secure performance of the contract.

65. Mr. KRISPIS (Greece) said he agreed with the previous speakers in opposing the proposal. The rule it sought to introduce was too sweeping and would mean that no contract of sale would be safe in practice since, in normal circumstances, goods could be bought at approximately the same price and within the same period of time as specified under the terms of a contract. The proposal would encourage the avoidance of contractual obligations, and would throw open the door to disputes on the interpretation of such terms as "inconvenience" and "additional expense".

66. Mr. DABIN (Belgium) said he shared the misgivings already expressed regarding the United States proposal. The question at issue was not so much the specific one of enforcing performance, but rather the general principle of honouring obligations under a contract, one of the corner-stones of the Convention. The proposal would encourage sellers to evade their obligations on the pretext that the buyer had the option of securing his goods elsewhere.

67. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the basic problem was how to reconcile two radically different approaches to the question of the performance of obligations. In many countries, specific performance was accepted as a general principle whereas, in a number of common law countries, real performance was limited by a number of conditions. In his view, that problem had been satisfactorily settled by the amendment that had been adopted to article 26, but the United States proposal went further in limiting the right to real

performance. If it were adopted, the common law approach would have to be introduced even in those countries where the requirement of performance was not the exception but the rule. To include such a provision in the Convention would be contrary to one of its basic principles, that of *pacta sunt servanda*, and would encourage parties to avoid meeting their obligations in cases where the buyer was in a position to secure substitute goods.

68. Mr. SZÁSZ (Hungary) also found the proposal unacceptable. An adequate solution to the problem of striking a balance between the two approaches to this question was already to be found in the existing texts of articles 26 and 42.

69. Mr. EYZAGUIRRE (Chile) said that he too preferred the existing text. The United States amendment would introduce ambiguity into article 42 (1) and would give rise to disputes. The term "additional expense or inconvenience" was one that was not in keeping with legal usage on the subject in his country.

70. Mr. OLIVENCIA RUIZ (Spain) said he supported the arguments put forward against the draft amendment. The proposed text would give rise to difficulties of proof, since a buyer demanding performance would be obliged to demonstrate that he had been unable to make a substitute purchase.

71. The CHAIRMAN said that, as the majority of the Committee appeared not to be in favour of the United States proposal (A/CONF.97/C.1/L.180), he assumed he was to consider it rejected.

72. *It was so agreed.*

#### Article 42 (2) (A/CONF.97/C.1/L.135, L.138, L.139 and L.173)

73. The CHAIRMAN pointed out that there was a certain similarity between the proposals by Norway, Sweden and Finland. He asked whether those delegations would agree to their draft amendments being considered simultaneously.

74. Mr. SEVON (Finland) said there was indeed a common element in the amendments submitted by the Scandinavian delegations. They all proposed that the buyer should have the right to require the seller to bring non-conforming goods into conformity by repair. Such a remedy was in the interests of the buyer in cases where no substitute goods could be obtained, and was generally in the interests of both parties in that it offered the fairly lenient remedy which would remove obstacles to a contract.

75. Mr. KLINGSPORN (Federal Republic of Germany) said that his delegation's draft amendment (A/CONF.97/C.1/L.135) was to a large extent identical with the Scandinavian proposals as far as the right of the buyer to require the seller to repair the goods was concerned. There was a difference, however, in that, under his delegation's proposal, the seller should not be

required to remedy defects by repair if it was not reasonably practicable for him to do so.

76. Furthermore, he did not think that the buyer's right to require delivery of substitute goods should be dependent on whether or not the lack of conformity constituted a fundamental breach of contract, as was the case under the existing text of article 42 (2). That right should be excluded only if it was not reasonably practicable for the seller to deliver the substitute goods. In that respect also his amendment deviated from those of the Scandinavian delegations.

77. Mr. ROGNLIEN (Norway) said that a specific provision on the buyer's right to repair was required because otherwise, according to the interpretation of specific performance, the buyer might not have that right, and would have to be satisfied with damages. There should be no uncertainty as to the buyer's right to repairs under certain conditions. But paragraph 1 of article 42 did not specify the nature or means of performance as regards the buyer's right to repairs, and as the text stood the seller could choose the manner of performance within the framework of the contract.

78. Turning to the various amendments on the point, he said that the Norwegian proposal (A/CONF.97/C.1/L.79) used the same language as that of the Federal Republic of Germany (A/CONF.97/C.1/L.135), namely "unless it is not reasonably practicable for the seller". The Finnish draft amendment (A/CONF.97/C.1/L.139) referred to "unreasonable costs or harm" and that of Sweden (A/CONF.97/C.1/L.173) to "unreasonable inconvenience or unreasonable expense". None of the Scandinavian proposals wished to change the remedy of substitute goods, but it would seem preferable to put the two remedies into separate sentences, as proposed by the Finnish draft amendment.

79. The condition for requiring repair should be appropriate notice under article 37 or within a reasonable time thereafter, as stated in the original text of paragraph 2.

80. The CHAIRMAN pointed out that, whereas the English texts of the different proposals were very similar, the French text of the Norwegian amendment stated the reasonable practicability requirement in the affirmative form, and that that made a difference to the meaning. He suggested that the four delegations might produce a joint draft amendment on the subject.

81. Mr. HJERNER (Sweden) said that his delegation had reintroduced the text agreed upon in an UNCITRAL Working Group composed of a large number of delegations. His Government was particularly interested in the matter because, as it understood the existing text, repair was not part of performance. Under Scandinavian law, the buyer was unable to request repair unless the possibility had been specifically included in the contract. He did not believe, for that matter, that there was such a provision under any national law once the goods had been delivered. Consequently, the buyer's right to cure by repair had to be expressly stated but, at the same time,

it must be restricted, as proposed in his delegation's amendment.

82. The other amendments on the subject did not seem to take sufficient account of the fact that the type of remedy depended on the nature of the goods concerned: some goods were capable of repair while, in the case of others such as commodities, the remedy lay in substitution. The two remedies could not both be applied to one and the same sale transaction. That aspect had been fully discussed by the UNCITRAL Working Group.

83. He thought that the four delegations concerned would be able to agree upon a joint proposal but it would be useful to have some initial reactions from other delegations first.

84. Mr. BONELL (Italy) said he welcomed the underlying idea of the amendments. Repair was a well-known remedy in practice. However, the original ULIS text of article 42 was better than the proposed amendments because it allowed for the fact that specific performance could take on various aspects according to the nature of the goods.

85. With regard to restriction on the buyer's right to repair, he preferred the formulation of the Federal Republic of Germany—"unless it is reasonably not practicable" which covered the practical issue. The buyer's right to require repair depended not only on the position of the seller but also on the nature of the goods.

86. Mr. FOKKEMA (Netherlands) said he welcomed the Scandinavian proposals regarding a point on which the draft Convention was silent. He pointed out that the provisions of ULIS article 42 were in force between the Contracting States to that Convention. The Scandinavian delegations and that of the Federal Republic of Germany should submit a joint draft amendment. He personally preferred the Swedish formulation. The rule should be that the buyer had normally the right to require repair unless the cost to the seller would be unreasonable.

87. Mr. SAM (Ghana) supported the submission of a joint proposal.

88. Mr. GHESTIN (France) said that the right to repair was sometimes the only effective remedy for the buyer. He took the example of a French firm which had ordered from the United States a specially constructed machine, forming part of a complex chain, for a new factory. The buyer would be faced with considerable losses if he were obliged to hold up production until a new machine could be built.

89. The amendments differed as to the limits on the right to repair. He tended to prefer the formulation of the Federal Republic of Germany, which struck a balance between the interests of buyer and seller. However, he supported the submission of a joint proposal.

90. Mr. SZÁSZ (Hungary) said that domestic legislation in a number of countries gave buyers the right to require repair. He was not sure whether the amendments extended or restricted that right as compared with the

original text. He had previously been of the opinion that, where there was no fundamental breach, the buyer had a right to repair. The amendments appeared to propose that that right should be subject to conditions and that, if they were not met, the buyer should lose his right to specific performance.

91. Consideration should be given not only to the position of the seller but also to the interests of the buyer. For example, the buyer had a right to expect that machinery which had been installed would be rendered operational, even if it was not particularly convenient for the seller to do so.

92. Mr. KRISPIS (Greece) said that the Scandinavian delegations should reconcile their views as to whether or not the buyer had a right to require repair in the case of non-conformity of goods not amounting to a fundamental breach. The amendments did not distinguish between simple non-conformity and fundamental breach.

93. Mr. LEBEDEV (Union of Soviet Socialist Republics) inquired what were the views of the sponsors of the amendments as to the rights of the buyer in cases where repair would lead to unreasonable cost and thus the remedy was not of interest to the seller. It should not be forgotten that the buyer might also have to face considerable inconvenience and higher costs.

94. Mr. EYZAGUIRRE (Chile) said he agreed with the idea that the buyer should be able to require either repair or the offer of substitute goods. The Finnish proposal was perhaps the clearest, but that of the Federal Republic of Germany was simpler. A joint proposal should be submitted.

95. Mr. STALEV (Bulgaria) inquired why the sponsors of the amendments were anxious to introduce restrictions on the right of the buyer to require repair, as contained in the existing text of the draft Convention.

*The meeting rose at 6.10 p.m.*

## 19th meeting

Monday, 24 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).  
later: Mr. MATHANJUKI (Kenya).

A/CONF.97/C.1/SR.19

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 42 (continued) (A/CONF.97/C.1/L.135, L.161, L.180, L.199)*

1. Mr. FARNSWORTH (United States of America), introducing his delegation's amendment (A/CONF.97/C.1/L.180), said that the reasons for submitting it were fully set out in document A/CONF.97/8, pages 28 and 29. A restriction should be placed on the period within which a buyer might require specific performance, otherwise he would be put in a position to speculate at the seller's expense on a rising market. The corresponding ULIS provision required that the buyer should inform the seller "within a reasonable time". The present draft limited such a requirement to the remedy of substitute

goods and did not cover the case where no goods had yet been delivered.

2. Mr. ROGNLIEN (Norway) said that the United States amendment would be acceptable if it related only to nonconforming goods which had been delivered. It would however be difficult to accept it in the case of the non-delivery or delayed delivery of goods. In such cases it was not reasonable that the buyer should lose his right to performance: it was rather for the seller to ask the buyer whether he still wanted the goods delivered.

3. Mr. KRISPIS (Greece) observed that although the United States amendment referred to a reasonable time, it gave no indication as to what that period might be. The provision would therefore be difficult for the courts to interpret. He could not support the amendment unless some specific period of time was mentioned.

4. Mr. SEVON (Finland) asked whether the reference to legal action in the second line of paragraph 2 (*bis*) of the United States amendment meant that the buyer would have to file suit or appoint arbitrators in order to preserve his right to performance.

5. Mr. FARNSWORTH (United States of America) said that the buyer must be required to exercise his choice in a way which precluded him from changing his mind and hence gave him no opportunity for speculation.

6. Mr. FELTHAM (United Kingdom) supported the

United States amendment. Specific performance was a strong remedy and there were good reasons for not extending it to those who did not request it promptly.

7. Mr. HJERNER (Sweden) considered that the United States amendment went too far. The buyer was entitled to wait even if the market was going up. The reference to legal action was not appropriate in the present Convention.

8. Mr. KUCHIBHOTLA (India) agreed that the United States amendment should appear in the Convention.

9. The CHAIRMAN said that it appeared from the discussion that the United States amendment did not command wide support. He took it that the Committee wished to reject it.

10. *It was so agreed.*

11. Mr. SEVON (Finland), introducing the joint proposal by the Federal Republic of Germany, Finland, Norway and Sweden (A/CONF.97/C.1/L.199), said that it dealt only with the question of repair and not with the delivery of substitute goods, on which the delegations concerned held differing views. The joint proposal was mainly based on the wording of the original amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.135). The right to repair was not unlimited under the joint proposal since in some cases the buyer's right to a reduction in price and damages constituted an adequate remedy, particularly when the goods concerned could easily be repaired by him or when the cost of repair to the seller would be unreasonably high.

12. Mr. BONELL (Italy) said his delegation was in favour of expressly mentioning the buyer's right to repair in the Convention but could not support the joint proposal since it left intact the requirement in paragraph 2 that the lack of conformity should constitute a fundamental breach. The buyer's right to ask for substitute goods or repair depended upon the character of the goods as was made clear in ULIS article 42, and not on the character of the breach. That condition should be deleted from paragraph 2.

13. Mr. WIDMER (Switzerland) agreed with the Italian representative that the joint proposal did not cover the entire problem. He inquired whether the representative of the Federal Republic had withdrawn his delegation's original proposal (A/CONF.97/C.1/L.135) which had dealt jointly with the question of repair and substitute goods and had eliminated the condition of fundamental breach.

14. The CHAIRMAN said that the question of substitute goods would have to be dealt with separately, since the joint proposal did not refer to it.

15. Mr. GHESTIN (France) commented that the joint proposal had the merit of stating the buyer's right to repair but that the restrictive clause did not take sufficient account of the interest of the buyer, who should in some cases have the right to insist on repair even if repair would put the seller to considerable inconvenience. He

proposed the addition of the words "due account being taken of the legitimate interests of the buyer" at the end of the first sentence.

16. Mr. KRISPIS (Greece) supported the joint proposal as orally amended by the French representative. The problem of paragraph 2, however, remained. He favoured the idea that the buyer should have a choice between substitute goods or repair whether or not there had been a fundamental breach.

17. Mrs. SOARES (Portugal) favoured the joint proposal without the French oral amendment.

18. Mrs. KAMARUL (Australia) said that the concept of specific performance under discussion was wider than that customary under Australian law but that her delegation could see the reason for it in international trade and supported the clarification of the buyer's right to repair.

19. Mr. MASKOW (German Democratic Republic) supported the joint proposal without the French oral amendment. It had appeared from the earlier discussion that a seller could not refuse repair for reasons of cost. The words "reasonably practicable" referred to technical possibility. The joint proposal must be linked with the proposal on substitute goods by the Federal Republic of Germany and the matter of drafting must be considered: it would be preferable to have them both, if they were both adopted, in one and the same paragraph.

20. Mr. ROGNLIEN (Norway) said there was no disagreement as to the importance of the interests of the buyer. That was the underlying idea of the joint proposal and the French oral amendment was not required. A further duty to repair in particular cases would depend upon the interpretation of the contract, read in conjunction with article 7 (3) of the Convention. It was usual for sellers of factory plant and machines to provide assistance with service and maintenance and to have an establishment in the buyer's country competent to effect repairs. In the case of the raw materials, however, it would often not be reasonable or practicable to insist on the right to repair. What was reasonable or practicable would depend *inter alia* on the nature of the goods and the seller's establishment.

21. Mr. DATE-BAH (Ghana) said that his country's domestic law did not provide for the buyer's right to repair, but he was attracted by the idea of such a remedy for non-conforming plant and machinery, which were particularly important in developing countries. He also supported the French oral amendment, since in such countries it was very unlikely that local staff would be competent to make the necessary repair and however inconvenient to the seller, he should be required to send qualified technicians. He could not agree with the representative of the German Democratic Republic that the phrase "not reasonably practicable" did not include a consideration of costs. It should easily be so interpreted by the courts. It would be better to reword the phrase to read "not technically feasible".

22. Mr. SAMI (Iraq) supported the joint proposal with

the French oral amendment, which balanced the interests of the two parties. The concept of the buyer's right to repair, however, was unknown to his country's domestic legislation.

23. Mr. ZIEGEL (Canada) supported the joint proposal which dealt with a common situation in the sale of machinery and other durables. The seller generally expected to undertake to repair or to replace defective goods. However, he suggested that in the second line of the joint proposal the words "by repair" should be omitted or alternatively, if it was desired to retain them, they should be followed by the words "or otherwise".

24. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that serious attention should certainly be paid to the interests of the buyer, and that some measure of objectivity should be introduced into the criteria relating to the removal of defects. He did not consider that such objectivity was ensured by the wording of the draft amendment and consequently proposed the deletion of the words "for the seller" at the end of the first sentence of the new paragraph 3. If those words were deleted, he would be able to support the draft amendment (A/CONF.97/C.1/L.199).

25. The CHAIRMAN remarked that the purpose of the French and the USSR amendments seemed to be similar and wondered if they could be combined.

26. Mr. GHESTIN (France) said that he could agree to the amendment proposed by the USSR representative but preferred his own because the idea of what was reasonably practicable more specifically applied to the situation of the seller. For the buyer the matter was not one of possibility but, as his amendment put it, of "legitimate interests".

27. Mr. WANG Tian ming (China) said that his delegation supported the French subamendment, which took into account the interests of both seller and buyer. He suggested that the new paragraph 3 should be inserted before paragraph 2 and the paragraphs re-numbered accordingly.

28. Mr. FARNSWORTH (United States of America) said that the proposed new paragraph seemed reasonable although it had no counterpart in the domestic law of the United States, or of other common law countries. He did not consider that the words "reasonably practicable for the seller" would allow the courts to take into account the relative practicability of repairs for both buyer and seller and wondered if more specific wording might not be helpful. He was not sure that either the French or the USSR amendment clarified that point and suggested the introduction of a phrase such as "taking account of the circumstances of the seller and the buyer".

29. Mr. SEVON (Finland) informed the Committee that the French and the USSR amendments, which seemed similar, would both be acceptable to the sponsors of the joint proposal. The United States amendment would also be acceptable to his own delegation.

30. The CHAIRMAN suggested that the representa-

tives of France, the Soviet Union and the United States should try to harmonize their amendments.

31. Mr. PLUNKETT (Ireland) suggested that the Canadian draft amendment should be voted on first because it related to the scope of the whole article.

32. The CHAIRMAN said that he had heard little support of that proposal, probably because it was very close to paragraph 1 of the existing draft article.

33. Mr. FELTHAM (United Kingdom) said that the Canadian proposal seemed to relate more closely to the question of delivery of substitute goods than to that of repair.

34. Mr. ZIEGEL (Canada) explained that he had had in mind, not so much the delivery of substitute goods, as the completion of performance by the delivery of essential, albeit small components, required for complicated machinery.

35. After a discussion in which Mr. ROGNLIEN (Norway), Mr. FARNSWORTH (United States of America), Mr. DATE-BAH (Ghana), Mr. KRISPIS (Greece) and Mr. HJERNER (Sweden) took part, the CHAIRMAN proposed that the representatives who had made oral amendments should try to combine them into a joint proposal.

36. *It was so agreed.*

*The meeting was suspended at 11.20 a.m. and resumed at 11.45 a.m.*

37. The CHAIRMAN announced that the representatives who had proposed oral subamendments had agreed on a joint text which was acceptable to the sponsors of the joint draft amendment (A/CONF.97/C.1/L.199). The new paragraph 3 had accordingly been revised to read: "if the goods do not conform with the contract, the buyer may require the seller to remedy the lack of conformity by repair, unless this is not reasonable, taking into account all the circumstances."

38. *The joint draft amendment as so revised was adopted.*

39. The CHAIRMAN asked the Canadian representative whether he maintained his oral amendment.

40. Mr. ZIEGEL (Canada) thought that the insertion of words "or otherwise" after "repair" would clarify the new paragraph 3. The point at issue was that the seller should be required to put the goods in an operable condition, which might involve replacement rather than repair. The addition of the words "or otherwise" should remove any ambiguity.

41. Mr. HJERNER (Sweden) said that although he sympathized with the Canadian representative's desire to eliminate ambiguity, he could not accept his restrictive interpretation of the word "repair".

42. Mr. DATE-BAH (Ghana) agreed.

43. Mr. FELTHAM (United Kingdom) said that he was



in agreement with the representatives of Ghana and Sweden and was opposed to the Canadian amendment.

44. The CHAIRMAN said that as the Canadian proposal did not appear to have wide support, he took it that the Committee wished to reject it.

45. *It was so agreed.*

46. The CHAIRMAN invited the Committee to take up the draft amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.135).

47. Mr. LANDFERMANN (Federal Republic of Germany) suggested that his delegation's draft amendment (A/CONF.97/C.1/L.135) should be brought into line with the paragraph 3 just adopted. Paragraph 2 should accordingly be revised to read: "if the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods unless this is not reasonable, taking into account all the circumstances. Any request to deliver substitute goods may be made only in conjunction with notice given under article 37 or within a reasonable time thereafter."

48. His delegation's proposal was a compromise between the ULIS provision, which made no reference to fundamental breach and the draft Convention under which delivery of substitute goods could be required only if the lack of conformity constituted a fundamental breach. The text would allow the courts to take account of the circumstances of each particular case, including the difficulties of both the seller and the buyer.

49. Mr. STALEV (Bulgaria) could not accept the amendment. Requiring the delivery of substitute goods even in cases in which the delivery of non-conforming goods did not represent a fundamental breach of the contract might impose heavy expenditures on the seller for transport and the like. From the economic point of view, the avoidance of a contract and the delivery of substitute goods were very similar situations. He preferred the existing text of paragraph 2.

50. Mr. CUKER (Czechoslovakia) said that the Committee had not resolved the question of the link between the delivery of substitute goods and the requirement to remedy lack of conformity by repair. The best way of settling the question would be to revert to the Federal Republic's original proposal and to try to combine it with the new paragraph 3.

51. Mr. BONELL (Italy) said that his delegation was unable to accept the existing text of article 42 (2) and strongly supported the amendment proposed by the Federal Republic. It was generally agreed that paragraphs 2 and 3 dealt only with specific cases and that the general right was set out in paragraph 1. The choice between the two possible remedies described in paragraphs 2 and 3, basically depended on the nature of the goods and not, as the existing text of paragraph 3 provided, on the nature of the breach. He appreciated the Bulgarian representative's concern that there might be cases in which delivery of substitute goods might prove unreasonable but felt that the wording adopted for para-

graph 3 should allay those fears. He agreed with the Czechoslovak representative that the amendment proposed by the Federal Republic should be combined with the new paragraph 3.

52. Mr. HJERNER (Sweden) said he preferred the original text. The main problem in regard to the amendment concerned the nature of the goods. While the remedy of repair was more suitable in the case, for example, of machines, the remedy of substitution was more suitable in the case of commodities. If any amendment were to be made, it should be along the lines of the original ULIS provision, namely that the right to request substitute goods applied only in the case of goods which were substitutable. The Federal Republic's proposal confused the situation, since it combined two ideas, substitution and repair, that ought to be kept separate.

53. Mr. GHESTIN (France) had some hesitation in accepting the proposal. The delivery of substitute goods might turn out to be even harder on the seller than simple avoidance, especially when costs of transport were involved. He agreed with the previous speaker that a clear distinction should be drawn between repair and substitution. He preferred the Federal Republic's original proposal (A/CONF.97/C.1/L.135), which seemed more flexible.

54. The CHAIRMAN noted that opinion in the Committee appeared to be equally divided in regard to the revised amendment by the Federal Republic of Germany. If there were no objections, he would consider the proposal rejected.

55. *It was so agreed.*

56. Mr. HOSOKAWA (Japan), introducing his delegation's amendment (A/CONF.97/C.1/L.161), said the proposed addition might seem obvious, but that it was best to make the position clear in order to avoid uncertainty. In practice it was unlikely that, in a good business relationship, a buyer would request substitute goods one day and the following day avoid the contract in its entirety; however, unless the Convention expressly precluded such a possibility, avoidance of contract might appear to be permitted under the Convention. The addition he proposed would not restrict the buyer's right to avoidance; a buyer could always avoid the contract if the seller did not conform to his request under article 42.

57. Mr. KHOO (Singapore) suggested that it might be more appropriate to deal with the Japanese proposal under article 45, which dealt with the question of avoidance of contract.

58. Mr. ZIEGEL (Canada) supported that suggestion.

59. *It was so decided.*

60. Mr. MATHANJUKI (Kenya) took the Chair.

*Article 43 (A/CONF.97/C.1/L.136, L.156, L.163, L.179)*

61. The CHAIRMAN drew attention to the Turkish amendment (A/CONF.97/C.1/L.136), which was a



drafting proposal. He suggested that it should be forwarded direct to the Drafting Committee.

62. *It was so decided.*

63. Mr. FELTHAM (United Kingdom) introducing his delegation's amendment (A/CONF.97/C.1/L.156), said the word "fix" in article 43 (1) did not make clear that the buyer, in determining the additional period of time of reasonable length for performance, needed also to inform the seller of that period. His delegation accordingly proposed that the phrase "give notice to the seller" should be substituted for "fix". If a notice was lost or delayed, the case would fall within the scope of article 25.

64. Mr. KHOO (Singapore) supported the United Kingdom proposal. However, in order to avoid the need to redraft subsequent articles in which the word "fix" was used, he suggested that the proposal should be further amended to read "The buyer may, by giving notice to the seller, fix . . .".

65. Mr. FERRARO (Italy) said the French version of the United Kingdom amendment would need redrafting, since the phrase "*par voie de notification*" was not clear.

66. Mr. ROGNLIEN (Norway) could not agree with the United Kingdom representative that his amendment should be covered in all respects by article 25, namely that the giving of notice should be at the risk of the receiver. He would prefer it to constitute an exception to article 25, so that there should only be consequences for the seller if in fact he had received the notice. (See article 45 (1) (b).) It did not seem to him right for the situation of the seller to be changed by a notice he had not even received. The question was an important one which needed to be decided before the proposal was adopted.

67. Mr. SAMI (Iraq) was opposed to the United Kingdom proposal, which seemed to him to restrict the freedom of the buyer as to how he notified the seller. It implied that the notice given should be sent in writing, and could not be made orally. He preferred the existing text.

68. Mr. SEVON (Finland) sympathized with the intent behind the United Kingdom proposal, but agreed with the Norwegian representative regarding the giving of

notice. In regard to the point raised by the representative of Iraq, he did not think the provision as worded implied that written notice was mandatory.

69. Mr. KRISPIS (Greece) said he would have some difficulty with the United Kingdom proposal, since his delegation was opposed to the dispatch theory and hence had not wished article 25 to appear in the Convention. That article might be taken as being applicable both to the original text and to the text as amended by the United Kingdom, and he would have difficulty in accepting either of them.

70. Mr. GHESTIN (France) preferred the original text. As he saw it, if the buyer was to fix an additional period of time for performance by the seller, that meant that the latter would necessarily be informed of it by some means or other. If the phrase "give notice" were used, the difficulty arose of defining what form that notice should take.

71. Mr. VINDING KRUSE (Denmark) said the problem mentioned by the Norwegian representative would be solved if a sentence were added requiring performance by the seller within the additional period, provided he had been informed of the period.

72. Mr. FELTHAM (United Kingdom of Great Britain and Northern Ireland) said that his proposal was not intended to require either written or formal notification.

73. Mr. DATE-BAH (Ghana) suggested that if the communication was assumed to be informal the phrase "The buyer may fix, and inform the seller of an additional period" would be more appropriate. He pointed out that the difficulty mentioned by the Norwegian representative was inherent in the existing text and was not consequential upon the amendment proposed by the United Kingdom. Once the period of time had been fixed, there would necessarily be a communication, and article 25 covered all communications unless there were indications to the contrary.

74. Mrs. KAMARUL (Australia) agreed that the text of article 43 (1) gave rise to difficulties and that it should be stated how the period of time was to be fixed if uncertainty was to be avoided.

*The meeting rose at 1 p.m.*

## 20th meeting

Monday, 24 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.20

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 43 (continued) (A/CONF.97/C.1/L.156, L.179)*

1. Mr. SCHLECHTRIEM (Federal Republic of Germany) considered that article 43 (1) raised both a drafting and a substantive problem. As far as the wording was concerned, the United Kingdom proposal to add the words “may give notice to the seller” was acceptable. As for the substantive question, which was whether the notice must be received by the seller in order to be effective, article 25 was applicable on that point; its answer was no. Accordingly, if the Committee wished to state the principle of receipt in article 43 (1), it would be necessary to amend article 25.
2. Mr. ZIEGEL (Canada) thought it was clear from the wording of article 43 (1) that the buyer was required, if he fixed an additional period of time for performance by the seller, to advise the latter accordingly. In his delegation's view, such notice must reach the seller before it could be effective. Lastly, it would be advisable to explain what was meant by the phrase “of reasonable length”.
3. Mr. FARNSWORTH (United States of America) suggested inserting in article 43 a provision similar to the one in article 44 (4).
4. The CHAIRMAN said he suspected there might be some misunderstanding regarding the purpose of article 43 (1). When the buyer fixed an additional period of time for performance by the seller, he was acting for the latter's benefit, although not obliged to do so. Consequently, it was hard to see what importance the receipt of the notice could have, since it was the buyer, not the seller, who was bound by the fixation of the additional period of time, which was designed to enable the seller to perform the contract.
5. Mr. HJERNER (Sweden) agreed with that view. The fixation of an additional period of time was a privilege which the buyer granted the seller. He agreed with the United Kingdom representative that the buyer must

advise the seller of the additional period, but that did not mean that the notice would not be effective unless it had been received by the seller. If the seller was in breach, the fixation of an additional period of time was to his advantage. The situation envisaged in article 44 was different: it was essential that notice by the seller should reach the buyer, for in that case it was the seller who had failed to perform his obligations. Personally, he thought the existing wording was much to be preferred.

6. Mr. OSAH (Nigeria) said he saw no need for the United Kingdom amendment, as the words “additional period of time” implied that the buyer would give notice to the seller.
7. Mr. SAMI (Iraq) said that at first he had thought the purpose of the United Kingdom proposal was to require the buyer to give the seller notice of the additional period of time in writing. In view of the United Kingdom delegation's explanation that such notice could be given otherwise than in writing, he agreed that the additional period of time fixed by the buyer must be brought to the seller's notice. That, moreover, was the meaning of article 43 (1), which there was absolutely no need to change.
8. Mr. KUCHIBHOTLA (India) observed that the text of article 43 (1) was perfectly clear. The word “fix” presupposed a written or oral notice, which was governed by the provisions of article 25.
9. Mr. FELTHAM (United Kingdom) pointed out that the fixation of an additional period of time, as provided for in article 43 (1), was not solely a privilege accorded by the buyer to the seller. Such notice entitled the buyer, in the event of failure to perform the contract, to request its avoidance.
10. In his delegation's mind, the amendment had merely been designed to improve the wording of the paragraph. However, he had been convinced by those representatives who had argued that it also raised a substantive problem, the solution to which was to insert in article 43 (1) a provision similar to that in article 44 (4).
11. Mr. EYZAGUIRRE (Chile) considered article 43 (1) satisfactory, because it established that the buyer could fix an additional period of time of reasonable length for performance by the seller of his obligations. It would be better to avoid any reference to notice as in the United Kingdom amendment, since that would introduce an idea which would make the text more restrictive.
12. The CHAIRMAN, observing that the representative of the United Kingdom was seeking to widen the scope of his proposal, asked him whether he wished to maintain his amendment in its original form.

13. Mr. FELTHAM (United Kingdom) said he would stick to the wording of his original proposal, provided that it did not create difficulties for translation into the other languages, but that he was prepared to accept the amendment proposed by the United States delegation, having been convinced by the argument that the notice must be received by the seller. He therefore asked the Chairman to put to the vote first the proposal to introduce in article 43 (1) a provision similar to the one in article 44 (4).

14. Mr. ROGNLIEN (Norway) proposed that the following sentence should be inserted in article 43 (1): "Such notice is not effective unless received by the seller".

15. The CHAIRMAN said it would be advisable to leave the Drafting Committee to establish the exact text of the paragraph.

16. Mr. DATE-BAH (Ghana) considered that article 43 (1) raised two separate problems. First, there was a drafting problem: should the buyer be required to specify the additional period of time accorded? Secondly, there was a substantive problem: should the principle of sending or of receipt be adopted for the notice?

17. The CHAIRMAN put to the vote the proposal to add to article 43 (1) a provision similar to that in article 44 (4).

18. *The proposal was rejected by 27 votes to 10.*

19. Mr. STALEV (Bulgaria) said that he had voted against the proposal, not because he was opposed to the principle of receipt, but because that principle followed from the text of the draft itself.

20. Mr. FELTHAM (United Kingdom) asked for his original amendment (A/CONF.97/C.1/L.156) to be put to the vote.

21. Mr. DATE-BAH (Ghana) said that if it was only a drafting matter, the Drafting Committee had the necessary room for manoeuvre. Putting the United Kingdom proposal to the vote would have the effect of establishing the text once and for all.

22. The CHAIRMAN pointed out that for some delegations the amendment raised a substantive rather than a drafting issue.

23. Mr. HJERNER (Sweden) wondered whether the United Kingdom delegation was not seeking to introduce into the text of the Convention the theory that notices became effective at the time of receipt, not of sending. That question had already been settled in article 25. If the United Kingdom amendment were adopted, it would be necessary—as the representative of India had already pointed out—to amend article 25.

24. Mr. KRISPIS (Greece) agreed with the remarks by the Swedish representative. However, the word "fix" might be interpreted as pointing to the receipt theory.

25. The CHAIRMAN said that to his way of thinking the United Kingdom proposal merely sought to clarify

the principle of sending. The problem was merely a drafting one.

26. Mr. GHESTIN (France) thought that something more than a drafting question was involved, at least in the French version. Adding the words "may give notice to the seller" changed the original meaning of the paragraph and created uncertainty about such notice, which pre-supposed a specific procedure.

27. Mr. SZÁSZ (Hungary) felt that the United Kingdom amendment raised a question of substance, not of drafting, and should therefore be put to the vote.

28. Mr. FELTHAM (United Kingdom) said he could accept a slight drafting change in the English text, namely, the addition, after the word "fix" in the original text of article 43 (1), of the words "by notice".

29. The CHAIRMAN said that that would make the problem more distinctly one of drafting.

30. Mr. ROGNLIEN (Norway) disagreed. The original text of article 43 (1) did not establish any position regarding the sending of a notice and could be interpreted as being neutral in relation to article 25. If the new idea were to be introduced, it would then imply a reference to the provisions of article 25, and the interpretation of article 43 might be altered in cases where the seller did not receive the notice. On the one hand, the buyer would be unable to resort to any remedy during the period of time fixed; and on the other, non-observance by the seller within the additional period of time, referred to in paragraph 1 (b) of article 45—to which his delegation would revert later—would give the buyer a right to avoid. The present text was neutral and would allow a reasonable and flexible interpretation of the effect in all respect as regards [for the purpose of] the provisions in articles 43 (2), 45 (1) (b) and 45 (2) (b).

31. The CHAIRMAN put the United Kingdom amendment (A/CONF.97/C.1/L.156) to the vote.

32. *The United Kingdom amendment was rejected.*

33. Mr. HONNOLD (United States of America), introducing his delegation's amendment to article 43 (1) (A/CONF.97/C.1/L.179), said that its purpose was to remove the ambiguity which existed on the question of whether avoidance of the contract was limited to cases of non-delivery of the goods. However, that was also the aim of the proposal submitted by Norway on article 45 (1) (b) (A/CONF.97/C.1/L.162), which was closely linked to article 43 (1), and for the sake of a compromise, his country would withdraw its amendment, in the hope that the question would be clarified in the context of article 45.

34. Mr. MEIJER (Netherlands) introduced his country's amendment to article 43 (2) (A/CONF.97/C.1/L.163), it being understood that the change to the first sentence would render the second superfluous. In the event of a breach of contract, the buyer could resort to remedies other than a claim for damages, and he must be able to make use of them, but not resort to a remedy

which would be inconsistent with the position adopted by him vis-à-vis the seller. It would be recalled that the Committee had decided, in connection with the amendment by Japan to article 42 (4) (A/CONF.97/C.1/L.161), to revert to the question in the context of articles 43, 44 and 45. He hoped that the Japanese proposal would be broadened on the lines proposed by the Netherlands.

35. The CHAIRMAN noted that the Netherlands amendment appeared to command little support. If there were no objections, he would take it that the Committee wished to reject it.

36. *It was so decided.*

*Article 44 (A/CONF.97/C.1/L.140, L.141, L.142, L.146, L.148, L.160, L.164, L.180, L.198, L.203)*

37. Mr. STALEV (Bulgaria), introducing the Bulgarian amendment to article 44 (A/CONF.97/C.1/L.160), said that the existing text did not achieve a proper balance between the seller's interests and those of the buyer, since article 44 (1) permitted the buyer to declare the contract avoided immediately in the event of non-conformity which amounted to a fundamental breach of contract without giving the seller an opportunity to remedy his failure to perform. It would be more satisfactory if the buyer could, within a reasonable time, obtain the goods specified in the contract without having to request substitute goods, which could cause the seller considerable loss if he had to bear high transport costs.

38. Mr. KLINGSPORN (Federal Republic of Germany) said that he shared the Bulgarian representative's view; indeed, his delegation had submitted an identical proposal (A/CONF.97/C.1/L.140). The existing text created a situation which was neither satisfactory nor logical. If, for example, the seller delivered a machine on the date fixed and the machine, once it was installed, failed to work in a satisfactory manner, that should not be regarded as a fundamental breach of contract and the buyer should not be able to declare the contract avoided if the seller was prepared to remedy the fault within a reasonable time. The seller's right to remedy his failure to perform should prevail over the buyer's rights. The situation should also be clarified in respect of article 45.

39. Mr. FOKKEMA (Netherlands) said that he was concerned about the correct interpretation of article 44 (1) and the consequences of the proposed deletion. Rather than adopt the amendment, it would be preferable to specify that, in a case such as that described by the representative of the Federal Republic of Germany, the buyer could not declare the contract avoided if the necessary remedy could be applied within a reasonable time without causing loss to the buyer and if no fundamental breach of contract had occurred.

40. Mr. ROGNLIEN (Norway) supported the view expressed by the representatives of Bulgaria and the Federal Republic of Germany and thought that the amendment to paragraph 1 should be adopted. The existing text of article 44 was confusing and might be misleading

owing to the combined reference to avoidance and to the words "if he can do so without such delay as will amount to a fundamental breach of contract". The said delay was already a part of the fundamental breach under article 45 on which the right of avoidance was based. He referred to ULIS 1964, article 43, and the consolidated remedy system which UNCITRAL had adopted. Even if there were a fundamental lack of conformity at the time of delivery, such a serious defect would not justify an immediate avoidance if it could be cured without an intolerable delay. Article 44 (1) as worded at present might be taken to imply that the buyer could declare the contract avoided even if a fundamental breach had not yet fully developed in time.

41. Mr. LOW (Canada) said that he was in favour of the proposal by Bulgaria and the Federal Republic of Germany concerning article 44 (1). He had already had occasion to express his concern at the fact that a minor breach might be invoked to justify avoidance of the contract by the buyer under article 45 without the seller's having any possibility to remedy that breach. The amendment would remove that danger. If it was not adopted, Canada might reserve the right to put forward other proposals along the same lines.

42. Mr. SAMI (Iraq) thought that the amendment under consideration would have the effect of depriving the buyer of the right to avail himself of article 45. The buyer should be able to declare the contract avoided either if the seller failed to perform all his obligations within the period of time fixed or if a fundamental breach of contract had occurred and the buyer had fixed a period of time for the seller to remedy the breach in question. He could not support the amendment proposed by Bulgaria and the Federal Republic of Germany.

43. Mr. BENNETT (Australia) said that he could not support the Bulgarian proposal. Like the representative of Canada, he thought that the Convention should not permit one of the parties to the contract to declare the contract avoided on the grounds of a failure to perform by the other party which was of minor importance. The buyer's right to declare the contract avoided was governed by article 45. If the contract was avoided under article 45, the seller could not remedy the failure. In such a case, therefore, he had to act before the contract was avoided. For that reason, the first phrase of article 44 (1) was useful and should be kept.

The representative of Norway had expressed the view that article 44 (1) would suffice with the first phrase deleted so long as it was made clear that a delay could amount to a fundamental breach. It should not be forgotten, however, that a contract could be avoided on the ground of a fundamental breach which had nothing to do with late delivery.

44. Mr. FELTHAM (United Kingdom) said that he shared the view of those who felt unable to accept the amendment proposed by Bulgaria and the Federal Republic of Germany. In support of its amendment, the latter delegation had mentioned the example of a machine

which had been delivered but did not work. If the machine could be repaired within a few days, there was no fundamental breach, which was what article 44 was concerned with. Conversely, the case should be considered where the seller had delivered a machine which in no way fulfilled the buyer's expectations, whereupon the latter lost confidence and did not even wish the seller to attempt to repair it. The buyer should be able to declare the contract avoided at that point without having to listen to the seller's arguments. Hence, the first phrase of article 44 (1) should be kept.

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

45. Mr. KRISPIS (Greece) reserved his delegation's position on the substance of the question raised in the amendment proposed by Bulgaria and the Federal Republic of Germany. He pointed out, however, that since the proposed rule stated that the seller "may" remedy, the deletion of the first phrase of paragraph 1 would not bring about the result which those two delegations wished to achieve; the article that should be amended in order to achieve that result was article 45. The Committee should therefore adopt a decision on the substance of their proposal rather than on the deletion of the first phrase of article 44 (1).

46. Mr. HOSOKAWA (Japan) remarked that under article 45 (1)(a), the buyer could declare the contract avoided even if the seller was able to remedy his failure to perform by virtue of article 44 (1). His delegation's own amendment (A/CONF.97/C.1/L.164) was intended to give the seller the possibility, under article 44, of remedying a breach whether that breach was or was not a fundamental one. The explanations given by the delegation of the Federal Republic of Germany showed that the purpose of its amendment was exactly the same. He would therefore be prepared to support the proposal of the Federal Republic of Germany should the Japanese proposal not be adopted in its entirety.

47. Mr. HONNOLD (United States of America) supported the proposal to delete the first phrase of article 44 (1). An effort should be made to establish a balance between the seller's right to remedy and the buyer's right to avoid. The first phrase of paragraph 1 might infringe the seller's right to remedy. The buyer's right to avoid had to be protected of course, but article 45 did all that was necessary in that respect, since the seller was required to remedy in full.

48. Mr. HJERNER (Sweden) noted that the amendment proposed by the Federal Republic of Germany and Bulgaria gave rise both to a question of substance and to one of form and delegations were interpreting the amendment in different ways. As to substance, his delegation firmly supported the amendment. The seller's right to remedy must, in one way or another, prevail over the buyer's right to avoidance of the contract. In order to achieve that end it would not, however, suffice to delete the first phrase of article 44 (1). The essential thing was

to define precisely what constituted a fundamental breach. If the failure to perform could be easily remedied, the breach could not be a fundamental one unless there was unreasonable delay. As a first choice, therefore, he would support the Japanese proposal in its entirety (A/CONF.97/C.1/L.164); failing the adoption of that proposal, he would wish draft article 44 to remain unchanged.

49. The second part of the Bulgarian proposal, calling for the deletion of paragraphs 2, 3 and 4 of article 44, touched upon matters other than the question of fundamental breach. He wanted to make sure that, for the purposes of the discussion, the two parts of the proposal were separate.

50. Mr. WAGNER (German Democratic Republic) said that he was able to support the amendment to article 44 (1) proposed by Bulgaria and the Federal Republic of Germany. The amendment did not restrict the buyer's right to avoid, which was protected by article 45, but was merely designed to specify more precisely the seller's right to remedy.

51. Mr. KUCHIBHOTLA (India) said that, in his view, the amendment proposed by Bulgaria and the Federal Republic of Germany would definitely restrict the buyer's right to avoid. He therefore could not support the amendment.

52. Mr. ZIEGEL (Canada) remarked that in the case of contracts for the sale of durable goods, the seller was frequently allowed to remedy any failure to perform his obligations. In practice, therefore, the seller's right to remedy was quite as well protected as the buyer's right to avoid. Nevertheless, the Convention should recognize the seller's right to remedy in principle and in a general form. The present wording of article 44 did not in any way cover the case where, for example, the buyer might have lost confidence, because of an explosion, in the machine which had been delivered and did not wish to give the seller an opportunity to remedy. If the Committee accepted the general principle of the seller's right to remedy, it might perhaps be necessary to set up an *ad hoc* working group to draft the corresponding provision.

53. Mr. SZÁSZ (Hungary) said that he supported the Bulgarian amendment and agreed with the idea of deleting the first phrase of article 44 (1). The connection between the seller's right to remedy, dealt with in article 44, and the buyer's right to avoid, covered by article 45, should, however, also be mentioned in article 45.

54. He was under the impression that the right to remedy would henceforth be granted under article 44, not only in the event of non-conformity, but also in the event of delay. If that was so, the words "the date for" in the second and third lines of paragraph 1 should be deleted, so that the passage would read: "... even after delivery ...".

55. Mr. BOGGIANO (Argentina) noted that the existing text of article 44 envisaged the case of fundamental breach within the meaning of article 23. The example

mentioned by the representative if the Federal Republic of Germany was one of failure on the part of the seller to perform his obligations, but not of fundamental breach. Once a fundamental breach had occurred, the buyer should be able to declare the contract avoided, to negotiate a new contract and to negotiate a possible remedy. Where there was presumption of fundamental breach, and where such breach could give rise to avoidance of the contract, freedom of trade required that the seller should be able to declare the contract avoided; it would not be right, therefore, to delete the phrase part of article 44 (1).

56. Mr. EYZAGUIRRE (Chile) also said that, in his view, the first phrase of article 44 (1) should be kept, so as to preserve the buyer's right to avoid the contract on whatever ground. If that right of the buyer's were undermined, the obligation to remedy would lose its point.

57. Mr. BORTOLOTTI (Observer for the International Chamber of Commerce) said that the problem should not really arise except in cases where the buyer had genuine grounds for avoidance. Where it was not known whether the grounds for avoidance were valid, would the seller have to remedy in any case or would he have to wait at the risk of being unable to remedy after a certain time and of suffering loss himself?

58. Mr. KLINGSPORN (Federal Republic of Germany) said that some delegations had pointed out that the deletion of the first phrase of article 44 (1) would not suffice to give the seller's right to remedy precedence over the buyer's right to avoid. His delegation had, however, submitted an amendment to article 45 (A/CONF.97/C.1/L.153) which met that point.

59. Mr. STALEV (Bulgaria) said that his delegation, whose proposal was aimed solely at ensuring a better balance in the protection given to the buyer's and the seller's interests, was prepared to consider any suggestions designed to improve that proposal. Furthermore, since the proposal dealt exclusively with cases of non-conformity, the suggestion made by the Hungarian representative with regard to cases of delay appeared to be justified.

60. Mr. HJERNER (Sweden) said that it might perhaps be advisable to set up a working group, as proposed by the representative of Canada, for the purpose of drafting a new text taking into account all the suggestions that had been made.

61. The CHAIRMAN pointed out that the Canadian representative had only suggested setting up a working group if the Committee accepted the principle behind the amendments by the Federal Republic of Germany and Bulgaria.

62. Mr. HJERNER (Sweden) supported the proposal by Canada, but suggested that a working group should be set up before the Committee took a decision.

63. Mr. STALEV (Bulgaria) supported the Swedish proposal.

64. Mr. KLINGSPORN (Federal Republic of Germany)

ny) would prefer it if a working group were not set up until the Committee had taken an indicative vote on the question of principle, namely, whether in article 44 the seller's right to remedy should prevail over the buyer's right of avoidance or whether, on the contrary, the interests of the buyer should be explicitly protected.

65. The CHAIRMAN suggested that the Committee should take an indicative vote on the principle behind the proposals by Bulgaria (A/CONF.97/C.1/L.160) and the Federal Republic of Germany (A/CONF.97/C.1/L.140), on the understanding that the vote would not affect the proposals themselves.

66. *The principle behind the proposals by Bulgaria and the Federal Republic of Germany was supported by 14 delegations and opposed by 18.*

67. Mr. ROGNLIEN (Norway) asked for an explanation of the implications of the decision which had just been taken.

68. The CHAIRMAN explained that article 44 remained unchanged, that the proposals had not been rejected as such and that a new proposal couched in the same or different terms could be submitted. Delegations were quite free to set up a working group on the question if they wished.

69. Mr. SAMI (Iraq) was of the opinion that a final decision should be taken as the Committee had no new proposal before it and no working group had been formally set up.

70. Mr. FOKKEMA (Netherlands) said that it was apparent from the vote that all delegations wished to adjourn consideration of the proposal.

71. The CHAIRMAN pointed out that, under rule 24 of the rules of procedure, a representative was entitled to move the adjournment of the debate on the question under discussion. Apart from the proposer of the motion, two representatives could speak in favour of the adjournment and two against, after which the motion would be put to the vote immediately.

72. Mr. FOKKEMA (Netherlands) moved that the debate should be adjourned.

73. Mr. STALEV (Bulgaria) seconded the motion by the representative of the Netherlands.

74. Mr. SAMI (Iraq) considered that the two amendments before the Committee had been examined at length and that it would be a waste of time to prolong the debate. A vote should therefore be taken immediately.

75. Mr. MANTILLA-MOLINA (Mexico) said that a large number of speakers had taken part in the discussion and that the Committee was well able to vote on the amendments. An adjournment would simply impede the progress of the Committee's work. Moreover, it would be best to avoid indicative votes, which were not provided for in the Committee's rules of procedure and took up time to no good purpose.

76. The CHAIRMAN put to the vote the motion to adjourn the debate on the amendments by Bulgaria and



the Federal Republic of Germany (A/CONF.97/C.1/L.160, L.140).

77. *The motion for adjournment was adopted by 19 votes to 15.*

78. The CHAIRMAN invited the Committee to consider the amendment by the United States of America (A/CONF.97/C.1/L.203).

79. Mr. FARNSWORTH (United States of America) said that there was a close link between article 42, on performance by the seller of his obligations, and article 44, on the seller's right to remedy failure to perform. The changes which his delegation would like to make in article 44 were intended to clarify that link. On the one hand, under article 42, the buyer could require the seller to remedy a lack of conformity or to deliver substitute goods. On the other, under article 44, the seller could remedy failure to perform or deliver substitute goods. What would happen if the buyer, claiming his rights under article 42, required substitute goods and the seller, basing himself on article 44, offered to remedy? It would seem reasonable to allow the seller to do so, and that was the purpose of his delegation's amendment. It should be noted, moreover, that the two alternatives put forward differed very little; it was the general idea underlying them that was important.

80. Mr. MANTILLA-MOLINA (Mexico) asked that consideration of the United States amendment should be adjourned as it was closely connected with the amendments submitted by Bulgaria and the Federal Republic of Germany. The proposals were in fact at variance with each other. The amendments suggested by the last two countries were intended to allow the buyer to require performance even if the lack of conformity constituted a fundamental breach of contract, whereas the amendment submitted by the United States would on the contrary strengthen the seller's rights. Moreover, the Spanish text of the amendment had not yet been circulated.

81. The CHAIRMAN announced that consideration of the United States amendment was adjourned and invited the Committee to consider the amendment by Singapore (A/CONF.97/C.1/L.148).

82. Mr. KHOO (Singapore) explained that his amendment was intended to make it easier to understand the

principle stated in article 44 (1). As it was now worded, a seller who committed a breach of contract could not remedy it until the consequences of the delay in performance had been assessed. As the paragraph did not make it clear how to assess delay or how to determine whether it represented a fundamental breach of contract, it would be simpler to allow the seller to remedy provided he could do so without unreasonable delay.

83. Mr. SEVON (Finland) said that the introduction of the idea of unreasonable delay would enable the seller to defer performance of his obligations even longer. The seller was bound to remedy failure to perform before there was a fundamental breach of contract. If the expression "unreasonable delay" was used, the period during which the seller was entitled to remedy could in certain cases be extended. The only positive aspect of the proposal was that it shortened the time-limit allowed in certain cases.

84. Mr. HJERNER (Sweden) supported the amendment by Singapore.

85. Mr. KIM (Republic of Korea) considered that the idea of fundamental breach was a guarantee for the buyer and should not be dropped.

86. Mr. MANTILLA-MOLINA (Mexico) suggested adjourning consideration of the amendment by Singapore, since it was related to the other proposals on which the debate had already been postponed. In terms of substance, the amendment introduced the new idea of unreasonable delay, which was difficult to define, and discarded that of fundamental breach, which had already been defined in article 23.

87. Mr. BENNETT (Australia) said he was of the same opinion as the representative of Mexico and did not think it was useful to discuss the matter further.

88. Mr. STALEV (Bulgaria) proposed that delegations in favour of amending article 44 (1) should work out a compromise text as quickly as possible.

89. The CHAIRMAN suggested that consideration of article 44 as a whole should be adjourned, while hoping that the adjournment would not delay the work of the Committee too much.

90. *It was so agreed.*

*The meeting rose at 6 p.m.*



## 21st meeting

Tuesday, 25 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.21

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 37 (continued) (A/CONF.97/C.1/L.75, L.111, L.125, L.131, L.137, L.204)*

1. Mr. DATE-BAH (Ghana), introducing the joint proposal by Finland, Ghana, Kenya, Nigeria, Pakistan and Sweden (A/CONF.97/C.1/L.204), said that following the previous discussion on article 37 (A/CONF.97/C.1/SR.17), the sponsors had endeavoured to draft a compromise under which a buyer who had a reasonable excuse for failure to give notice did not lose all his rights to rely on a lack of conformity, but which at the same time recognized that the requirement for due notice by the buyer was an important aspect of the seller's right to cure.
2. Reference had been made in the discussion to the possibility of such a proposal leading to speculation on the part of the buyer and to the exclusion of the seller's right of avoidance. There had never been an intention to exclude that right. The basic rule, as stated in the original text of paragraph 1 of the article, was retained: notice must be given. The only remedies left to the buyer, with a reasonable excuse for failure to give notice were financial remedies—damages or limited costs, against which could be offset foreseeable financial loss on the part of the seller caused by the buyer's failure to give notice. It was further provided, in order to discourage fictitious claims, that the buyer's claim for damages could not include loss of profit. It had been argued that the seller would have difficulty in assembling evidence in the case of very tardy claims. That problem could be tackled under the provision about foreseeable financial loss. Under the joint proposal, the buyer was given every incentive to give notice in due time since his failure to do so resulted in a loss of rights; however, if he had reasonable excuse, he would retain certain residual rights.
3. Mr. WIDMER (Switzerland) inquired whether the reference in the last sentence of the new paragraph 3 to

the buyer's failure to give notice meant that he had given no notice at all or he had given late notice.

4. The CHAIRMAN said that it was his understanding that both possibilities were covered. By the word “notice”, the reader should understand not the formal communication referred to in paragraph 1 but rather an intimation by the buyer that there was some defect in the goods delivered. That might well take the form of the institution of legal proceedings or a refusal to pay the price fixed in the contract.

5. Mr. BONELL (Italy) said that the phrase might lead to doubts about the merits of the proposal.

6. Mr. INAAMULLAH (Pakistan) said that his delegation was one of the sponsors of the joint proposal because the original text of article 37 which was one of the most controversial in the draft Convention, was highly detrimental to the interests of the buyer. After discussion by the Trade Law Sub-Committee, the Asian-African Legal Consultative Committee, at its twentieth session in 1979, had reached the conclusion that the article should establish the presumption that if the seller did not receive notice that the goods were defective within a reasonable time, he was entitled to assume that the goods had been handed over to the buyer in conformity with the contract and had referred to a similar provision in article 19, paragraph 1, of the United Nations Convention on the Carriage of Goods by Sea adopted in Hamburg in 1978. (A/CONF.97/8/Add.5, page 2). The joint proposal was not intended to disadvantage the seller but rather to improve the position of the buyer.

7. Mrs. KAMARUL (Australia) said that the joint proposal was a satisfactory compromise. Most cases would still fall under the two-year time-limit but a greater degree of flexibility had been introduced. While supporting the joint proposal in principle, she wondered why loss of profit was to be excluded from claims for damages and also whether the term “damages” included a reduction in the price. In paragraph 3 of the joint proposal, she would prefer the use of a word less associated with the law of procedures than “set off”.

8. Mr. KOPAC (Czechoslovakia) expressed doubts about the joint proposal. Paragraphs 1 and 3 seemed somewhat uncoordinated. Paragraph 1 referred to a loss of right whereas paragraph 3 asserted that under some circumstances there might be no loss of right. The relationship between the two paragraphs required clarification. Furthermore, it was not certain how loss of right on the part of the buyer would apply in practice. Under some circumstances, the seller might well for commercial

reasons remedy a lack of conformity in the goods delivered even when the time-limit for notice had expired. The relationship to article 44 should be borne in mind. In that connection he noted that his delegation's amendment to article 37 (A/CONF.97/C.1/L.111), referred not to loss of right but to the buyer not being "entitled to exercise his right" after a specific period.

9. Mr. REISHOFER (Austria) said that his delegation would be prepared to accept the joint proposal in principle but thought that some improvements of detail were needed. He regretted the omission from paragraph 1 of the provision in the original text that the buyer should be obliged to specify the nature of the lack of conformity. That provision would be useful in cases where there was an intermediate buyer who would be obliged to provide such information under the national law concerned. In paragraph 2, which the joint proposal left unaltered, he would have preferred a shorter time limit for notification, for instance, the period of one year specified in the Czechoslovak amendment. He had doubts about the usefulness of the reference to "foreseeable financial loss" in the new paragraph 3 and considered that the expression was lacking in clarity. He supported the suggestion that paragraph 3 should constitute a separate article.

10. Mr. SAMI (Iraq) observed that the joint proposal represented a commendable balance between the interests of the buyer and the seller and in general he supported it. Paragraph 3 should become a separate article.

11. Mr. FARNSWORTH (United States of America) agreed that the joint proposal constituted a praiseworthy attempt to strike a balance but doubted its usefulness in practice because it left too many issues unresolved. It would be difficult to interpret "reasonable" as applied to "time" in paragraph 1 and "excuse" in paragraph 3. There was a reference to loss of profit—a term which had not been used in a technical sense elsewhere in the Convention. It would be difficult to define what was foreseeable in the way of loss, and even more difficult to define how it was caused. For example there would be the problem of deciding whether the goods were defective when delivered or became defective later through use. If there was considerable delay in giving notice of lack of conformity, the seller might legitimately complain that evidence with regard to testing and testimony of relevant witnesses was no longer available for his defence in a suit brought against him by the buyer. Furthermore, the last sentence of paragraph 3 put on the seller the burden of proof of financial loss which once again he might not have the evidence to sustain. It would be better to delete the sentence altogether.

12. Mr. FELTHAM (United Kingdom) supported the joint proposal. In particular, he supported paragraph 3 which would be useful in a case such as the sale of a complicated machine under a series of contracts containing detailed specifications. In such cases article 38 would not apply. The machine might appear to work, although one part had not been constructed strictly in accordance with specifications, but six months later malfunctioning might

cause a fire which destroyed the buyer's factory. In such a case the buyer should have a claim for damages. The United States representative had mentioned difficulties of providing evidence to show that the goods delivered had been in conformity with the contract. That problem could be safely left to the courts to decide. Although he supported the joint proposal, he was maintaining the United Kingdom proposal to delete paragraph 2 of article 37 (A/CONF.97/C.1/L.137).

13. Mr. OLIVENCIA RUIZ (Spain) said that in its attempt to find a balanced compromise between the interests of the seller and the buyer, the joint proposal seemed to have sacrificed clarity. The article would have been clearer if it had first stated the duty to notify and had then set out the juridical consequences of failure to give notice within the required time. In that connection he had difficulty in interpreting the expression "reasonable time" in paragraph 1 and the expression "reasonable excuse" in the new paragraph 3. He wondered if the maximum of two years referred to in the original paragraph 2, which had been retained, might not be taken as the "reasonable time" referred to in paragraph 1. His delegation considered that the wording should be clarified even if the central ideas were retained.

14. Mr. ROGNLIEN (Norway) wondered how the provisions set forth in the joint draft proposal would work in practice. Since evidence would have to be furnished that the defect did really exist at the time of delivery it was essential that the article should contain some reference to the burden of proof. The assessment of the financial loss caused to the seller by the buyer's failure to give notice depended on the possibility of establishing original conformity where evidence was lacking or unavailable, and would be a difficult task. Another point that needed clarification was the definition of a reasonable excuse. It was further regrettable that the amended paragraph 1 would not provide that the notice to the seller should specify the nature of the lack of conformity.

15. Mr. GHESTIN (France) said that the compromise solution put forward in the joint proposal unfortunately lacked the precision necessary in the Convention. The joint proposal also contained terms which would be difficult to interpret in practice. For instance, a reasonable time might take into account the possibility of a reasonable excuse. He was afraid that the text would be a fruitful source of litigation. Like other delegations, he would regret the disappearance from paragraph 1 of the requirement that the nature of the lack of conformity should be specified. For those reasons, he would have difficulty in accepting the proposal.

16. Mr. KRISPIS (Greece) said that his delegation could accept only one excuse for failure to notify the lack of conformity within a reasonable time, namely that of *force majeure*, which was a generally accepted legal principle and need not be specified in the Convention. The last sentence of paragraph 3 which referred to an exception to an exception would greatly complicate matters and lead to litigation. His delegation therefore opposed the proposal.

17. Mr. LEBEDEV (Union of Soviet Socialist Republics) considered that the joint proposal would do little to promote the interests of either buyer or seller because of the likelihood of disputes concerning the interpretation of the various elements of the new paragraph 3. A compromise, although laudable, should not introduce an element of uncertainty which would make it unworkable in practice.

18. Mr. HERBER (Federal Republic of Germany) noted that the existing text of article 37 (1) was in itself a compromise and said that the discussion of the draft article seemed to show that there was no possible common basis for a further compromise. Although a compromise nearly always complicated the legal situation, it might be acceptable if it enjoyed virtually unanimous support. That seemed not to be the case with the joint draft proposal and he thought it preferable to keep the existing text in the draft Convention.

19. Mr. WANG Tian ming (China) remarked that the joint proposal would greatly improve article 37 and offered a better balance between the interests of buyer and seller. He recognized that no compromise proposal could be perfect and agreed that the word "reasonable" might lead to uncertainty. Nevertheless, it had been used in other text adopted by the Committee and its meaning would no doubt be settled by the courts in the light of the circumstances. His delegation supported the joint proposal in principle.

20. Mr. VINDING KRUSE (Denmark) said that his delegation, like others, found it difficult to foresee the consequences of the proposed compromise, especially when applied to specific cases. He still considered that the original wording of articles 37 and 38 gave the buyer the same protection as the joint draft proposal. He agreed with the representative of the Federal Republic of Germany that the compromise would be acceptable only if it commanded virtually unanimous support.

21. Mr. EYZAGUIRRE (Chile) preferred the original text of article 37 (1) and particularly regretted the deletion of the requirement that the nature of the lack of conformity should be specified. In the new paragraph 3, he had difficulty with the exclusion from damages of loss of profit. Despite those and other ambiguities, his delegation would, however, vote in favour of the joint proposal.

22. Mr. SEVON (Finland) conceded that the proposal, like many compromise texts, was not as clear as the original article.

23. With regard to paragraph 1, the sponsors would, in deference to the wishes of a number of representatives, agree to keep the existing text. In the case of the proposed new paragraph 3, various representatives had expressed objections to the last sentence and the sponsors would, if the Committee wished, regretfully agree to its deletion. He noted that reference was made to loss of profit in articles 70 and 73 of the Convention, although with a different connotation. He suggested that the

Spanish representative's comments on the structure of the article should be referred to the Drafting Committee.

24. He asked that a vote should be taken on the new paragraph 3, as a whole, and also on the new paragraph omitting the last sentence.

25. The CHAIRMAN said that he understood that the existing paragraphs 1 and 2 of article 37 would remain unchanged and that the new paragraph 3 would, if adopted, be inserted in the Convention as a separate article after article 40. He invited the Committee to vote on the new draft paragraph 3 as a whole.

26. *The new draft paragraph 3 as a whole was rejected.*

27. The CHAIRMAN invited the Committee to vote on the new draft paragraph 3 without the last sentence.

28. *The new draft paragraph 3, without the last sentence, was adopted, on the understanding that it should be inserted as a separate article after article 40.*

29. Mr. KOPAC (Czechoslovakia), introducing his delegation's proposal (A/CONF.97/C.1/L.111), said that the amendment constituted a compromise. It proposed that the time-limit for notification should be reduced from two years to one year, and also that failure to give notice within that period should not mean that the buyer forfeited his right, but only the exercise of that right. His proposal thus maintained a balance between buyer and seller.

30. Mr. HERBER (Federal Republic of Germany) observed that the joint proposal just adopted by the Committee maintained the two-year time-limit. In the circumstances, he did not see how the Czechoslovak proposal could constitute a compromise. His delegation was not prepared to dilute the right of the seller any further, and therefore could not accept the Czechoslovak proposal.

31. Mr. KRISPIS (Greece) said that he did not understand the significance of the formulation "the buyer is not entitled to exercise his right", and would be unable to support the proposal.

32. The CHAIRMAN said that in view of the lack of support for the Czechoslovak proposal, he would, if there was not objection, consider it rejected.

33. *It was so agreed.*

34. Mr. ADAL (Turkey), introducing his delegation's amendment to paragraph 1 (A/CONF.97/C.1/L.125), said his proposal was intended to provide for the possibility that parties might wish to agree between themselves the conditions under which the buyer's rights and obligations were to be exercised. In the absence of such agreement the provisions of article 37 (1) would operate automatically. His proposal was related to the Canadian amendment to article 36 in connection with the possible loss of rights by the buyer, an amendment which he had supported.

35. Mr. KRISPIS (Greece) had no objections to the Turkish proposal but believed it to be redundant since the words "unless otherwise provided in the contract of sale" were already covered by article 5.

36. Mr. SZÁSZ (Hungary) supported that view.

37. The CHAIRMAN said that in view of the lack of support for the Turkish proposal, he would, if there was no objection, consider it rejected.

38. *It was so agreed.*

39. Mr. FELTHAM (United Kingdom), introducing his delegation's proposal (A/CONF.97/C.1/L.137), said that article 37 (2) was in effect a limitation or prescription provision and was out of place in the Convention, which was essentially concerned with contracts of sale. There was already in existence a Convention which made provision for dealing with the complex and difficult cases that might arise in relation to the issue of limitation, namely the Convention on the Limitation period in the International Sale of Goods. In his view the matter was too complicated to deal with in a provision such as article 37 (2), which in effect laid down a two year cut-off period. Such a period would not be appropriate in cases where, for example, latent defects in machinery were only discovered after a period of two years. Such issues were best dealt with under national law.

40. Mr. HERBER (Federal Republic of Germany) said that the matter raised by the United Kingdom representative had been discussed at length. He himself was in favour of keeping article 37 (2) because there was need to have a clear rule on who bore the risk of undiscovered non-conformity. He noted that the Czechoslovak proposal had been rejected because it was inconsistent with the compromise solution just adopted by the Committee and did not see how the United Kingdom proposal, which proposed the deletion of a provision adopted as part of the compromise solution, could be accepted.

41. Mr. HJERNER (Sweden) said that for his delegation the retention of the two-year time-limit has been an important element in the compromise proposal adopted. If the United Kingdom proposal were adopted and no period were specified many countries might have great difficulty in adhering to the Convention.

42. Mr. GHESTIN (France) supported the United Kingdom proposal. He considered it essential to bring the time period referred to under article 37 (2) within the general context of the time periods referred to in related articles of the Convention, all of which ran from the moment at which the defect in the goods was discovered. Article 37 (2) provided for a different kind of time period, which ran from the date of delivery of the goods. That approach was much less favourable to the buyer, since it did not allow for the possibility that defects might remain hidden until long after the time of delivery. Such a provision did not exist under French law. A time-limit might be necessary, but the period indicated was too arbitrary. Two years was too long in the case of perishable goods and too short in the case of items such as machinery. The proviso "unless such time-limit is inconsistent with a contractual period of guarantee" did not seem to him sufficient to modify the severity of the provision.

43. If the United Kingdom proposal were not accepted, he proposed that the phrase "or with the nature of the goods or of the defect" should be added at the end of the existing text of paragraph 2.

44. Mr. ROGNLIEN (Norway) felt that the time-limit specified in article 37 (2) was important and should be retained. The period of two years was already a compromise; in some countries the period was six months, in others one year. In regard to the question of whether the period might be too short in some cases, he pointed out that the buyer might in fact be a consumer, and as such outside the scope of the Convention; in that connection, he drew attention to his delegation's proposal (A/CONF.97/C.1/L.75). Such goods as machinery were normally accompanied by a guarantee and an agreement as to servicing, which would solve the problem of defects coming to light after the stipulated two-year period.

45. Mr. REISHOFER (Austria) agreed that the existing article 37 (2) was a necessary part of the compromise solution just agreed. There was need for a time-limit on which parties to a transaction could rely. Without such a provision it would be difficult for many countries to accept the compromise solution.

46. The CHAIRMAN said that as a majority appeared not to favour either the United Kingdom proposal (A/CONF.97/C.1/L.137) or the French proposal for an addition to the existing text he would, if there was no objection, consider both proposals rejected.

*It was so agreed.*

47. The CHAIRMAN invited the Committee to consider the Turkish amendment to article 37 (2) (A/CONF.97/C.1/L.125).

48. Mr. ADAL (Turkey), introducing his delegation's amendment (A/CONF.97/C.1/L.125) explained that a period of two years was too long and should be reduced to one year.

49. Mr. DATE-BAH (Ghana) said that the compromise proposal adopted earlier in the meeting was a package and that it was part of that arrangement that paragraph 2, with its two-year limit, should remain unchanged. The point was of great importance to developing countries, which frequently bought complex machinery. It would be unreasonable to expect a buyer of machinery in a developing country to notify the seller of a defect within one year when machinery not infrequently waited for more than a year before it could be installed.

50. Mr. REISHOFER (Austria) supported the Turkish proposal.

51. The CHAIRMAN said that as a majority appeared to oppose the proposal, he would, if there was no objection, consider it rejected.

52. *It was so agreed.*

53. The CHAIRMAN drew attention to the amendment to article 37 (2) by the German Democratic Republic (A/CONF.97/C.1/L.131). He asked whether the

sponsor considered the proposal to be of a drafting character.

54. Mr. WAGNER (German Democratic Republic), introducing his proposal (A/CONF.97/C.1/L.131), said that the amendment proposed that the two-year period should run from the date of delivery rather than the date the goods were handed over because the delivery date specified in the contract was known to both parties whereas the date of handing over of the goods was known with certainty only to the buyer. Moreover, taking the delivery date as a starting point would make the two-year period somewhat shorter and his proposal would thus go some way to meeting the concern of the Czechoslovak and Turkish delegations who had suggested a reduction in the two-year period. Finally, the specified delivery date was chosen by agreement of the parties whereas the date the goods were handed over depended on factors outside the control of the seller. It would be unfair to make the seller suffer as a result of a delay in the handing over of the goods to the buyer.

55. Mr. KRISPIS (Greece) said that he would be prepared to support the proposal if it could be taken as a purely drafting amendment. He believed that it would be an improvement to replace the cumbersome expression "the date on which the goods were actually handed over" by a reference to "delivery", which was the term used throughout the draft.

56. Mr. SAMI (Iraq) said that the proposal under discussion was a substantive amendment. The effect of the proposal would be to curtail the two-year period which his delegation like many others favoured. He therefore strongly opposed it.

57. Mr. SCHLECHTRIEM (Federal Republic of Germany) supported the proposal. He noted that the existing text of article 37 (2) did not cover cases in which the contract of sale provided for delivery to a third party.

58. Mr. SEVON (Finland) agreed. He could only accept the existing text of article 37 (2) on the understanding that the term "buyer" was to be construed as meaning "original buyer" and anyone to whom his rights had been transferred.

59. Mr. HJERNER (Sweden) said that although a point of substance might be involved, he believed the proposal would make the paragraph more precise. The date of delivery was the decisive date for the passing of risk and for a number of other purposes. It would therefore be natural to attach the two-year period to that date. The date of actual handing over of the goods might in contrast not be known to both parties. He favoured the proposal largely for technical reasons but would be prepared to reconsider his position if many delegations had serious objections to it.

60. Mr. DATE-BAH (Ghana) said that the general trend was to move away from the somewhat rigid and purely legal concept of "delivery" and towards a less formal approach that would refer to the handing over of the goods. It was for that reason that the adverb "actually"

had been introduced before the words "handed over" in article 37 (2).

61. Mr. ROGNLIEN (Norway) pointed out that the term "delivery" was nowhere defined in the draft Convention. The passing of risk took place not upon delivery but on the actual handing over of the goods to the carrier or the buyer.

62. Mr. ZIEGEL (Canada) asked for clarification of the meaning of the terms "delivery" and "handing over". If a buyer received documents of title relating to the goods, or was given warehouse receipts for the goods, would the operation constitute a "handing over" of the goods? If not, the term "handing over" would be construed as meaning a physical handing over of the goods. There could clearly be a difference in time between the handing over of legal title and the physical handing over of goods.

63. Mr. WAGNER (German Democratic Republic) considered that the expression "handing over" in article 37 (2) must be construed as the physical handing over to the buyer of the goods.

64. The CHAIRMAN said that as a majority appeared to oppose the proposal he would, if there were no objection, consider it rejected.

65. *It was so agreed.*

66. The CHAIRMAN invited the Committee to consider the last remaining amendment to article 37, proposed by Norway (A/CONF.97/C.1/L.75).

67. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.75), said that it was intended to deal with the problem of recourse actions in cases where a commercial buyer had sold the goods to a sub-purchaser. As the text now stood, the two-year period would run from the time of handing over of the goods to the original buyer. That rule would be unfair to such a buyer, who might be left with no time at all in which to make a claim of recourse when notified by the sub-purchaser of a lack of conformity.

68. A solution was suggested by paragraphs 2 and 3 of article 18 of the New York Prescription Convention, 1974, which specified that the relevant period ran from the moment the first buyer received notice from the sub-purchaser, or for a reasonable period of time thereafter. His delegation's proposal was based on that provision and specified that the two-year period should not expire before a reasonable time after the buyer had received notice from the sub-purchaser. He would not press for a vote if the proposal was not enthusiastically supported within a short period.

69. The CHAIRMAN noted that there appeared to be little support for the proposal.

70. Mr. ROGNLIEN (Norway) accordingly withdrew his proposal (A/CONF.97/C.1/L.75).

71. The CHAIRMAN said that the Committee had completed its consideration of the various amendments to article 37. He took it that the Committee agreed to

adopt the article and the new paragraph 3 proposed in document A/CONF.97/C.1/L.204.

72. *It was so agreed.*

*Article 38 (continued) (A/CONF.97/C.1/L.132)*

73. The CHAIRMAN invited the Committee to take up article 38 and the amendment by the German Democratic Republic (A/CONF.97/C.1/L.132).

74. Mr. WAGNER (German Democratic Republic) withdrew his delegation's amendment.

75. The CHAIRMAN said that, if there were no objection, he would take it that the Committee agreed to adopt article 38.

76. *It was so agreed.*

*New article 40 bis (A/CONF.97/C.1/L.129)*

77. The CHAIRMAN invited the Committee to consider the proposal for a new article 40 bis.

78. Mr. KLINGSPORN (Federal Republic of Germany), introducing his delegation's proposal for a new article 40 bis (A/CONF.97/C.1/L.129), said that the buyer lost the benefit of articles 39 and 40 if he did not give notice to the seller specifying the nature of the claim of the third party within a reasonable time. In the absence of such notice to the seller, it was appropriate for the buyer no longer to be able to rely on the provisions of articles 39 and 40.

79. Those considerations were not valid if the seller was aware of the existence of the right or claim of the third party concerned. In that case, it would be unfair to deprive the buyer of his remedy on grounds of non-notification within a reasonable time.

80. Comparison might be made with the situation covered by article 38, which specified that the seller was not entitled to rely on the provisions of articles 36 and 37 if the lack of conformity related to facts of which he knew or could not have been unaware.

81. Mr. HJERNER (Sweden) considered that the analogy with article 38 was not valid. There was a great dif-

ference between claims based on intellectual or industrial property and mere non-conformity or defects in the goods.

82. Mr. BOGGIANO (Argentina) supported the proposed new article 40 bis but suggested that the formula "knew of the right or claim . . ." should be expanded to read "knew or could not have been unaware . . .".

83. Mr. FOKKEMA (Netherlands) said that as he understood it the Swedish representative's objections related to questions of intellectual or industrial property and to the matters covered by article 40 rather than to the obligations referred to in article 39. Since article 40 (1) already made reference to the seller's knowledge of the right or claim in question, it might be possible for the sponsor to link the proposed new article 40 bis with article 39 alone.

84. Mr. KLINGSPORN (Federal Republic of Germany) explained that his proposal was intended to apply to articles 39 and 40. Article 40 (1) referred to knowledge of the right or claim as such, but did not speak of the nature of the claim or right. His proposal was needed to introduce that necessary idea.

85. He stressed that a distinction should be drawn between two types of obligations. The first was the obligation of the buyer to notify the seller of the right or claim by a third party within a reasonable time of becoming aware of the existence of such right or claim. The second type of obligation was that of informing the seller of all steps taken by the third party concerned. That second obligation was not covered by the existing text of article 40 (3) because under the terms of that provision the notice mentioned had to be given within a reasonable time "after" the buyer became aware or ought to have become aware of the right or claim of the third party. That provision did not cover the situation where a suit was brought by the third party against the buyer at a later stage.

86. The obligation in question flowed not from the provisions of article 40 (3) but from the general obligation under article 73 to mitigate damages. That obligation would not be affected by his delegation's proposal for a new article 40 bis.

*The meeting rose at 1 p.m.*



## 22nd meeting

Tuesday, 25 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.22

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 40 bis (continued) (A/CONF.97/C.1/L.129)*

1. Mr. BENNETT (Australia) supported the new article 40 bis proposed by the Federal Republic of Germany (A/CONF.97/C.1/L.129). Articles 39 and 40 stated the seller's obligation to deliver goods free from any third-party right or claim and the liability that derived from it. The limitations to that liability of the seller were set out in article 40 (3) and article 37, according to which the buyer could not rely on the provisions of those articles if he did not give notice of the lack of conformity or of the third-party claim. As far as article 40 was concerned, the situation was more awkward because the seller's obligations depended on the buyer's knowledge of the third-party claim. It was not clear why the buyer should be bound, under article 40 (3), to tell the seller what the latter already knew. Accordingly, he fully supported the proposal by the Federal Republic of Germany.

2. Mr. KRISPIS (Greece) expressed full support for the amendment by the Federal Republic of Germany as a useful supplement to article 39. The idea of the amendment was to complete the provision of article 40 (2) in a most logical manner.

3. The CHAIRMAN declared the debate on the question closed and put the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.129) to the vote.

4. *The amendment by the Federal Republic of Germany was adopted.*

*Article 44 (continued) (A/CONF.97/C.1/L.80, L.140, L.141, L.142, L.146, L.148, L.160, L.164, L.203, L.213)*

5. The CHAIRMAN said that the working group, consisting of the representatives of Bulgaria, Canada, the German Democratic Republic, the Federal Republic of

Germany, the Netherlands, Norway and the United States of America, had submitted an amendment to article 44 (A/CONF.97/C.1/L.213) and invited the Committee to consider it.

6. Mr. STALEV (Bulgaria) explained that the amendment was intended to guarantee the right of the seller to remedy a failure to perform while at the same time safeguarding the lawful interests of the buyer, who must be assured that the contract would be executed. That was the basic difference between it and the former text. If the proposal was adopted, his delegation would be ready to agree to the amendment by Pakistan to delete the remaining paragraphs.

7. The CHAIRMAN asked whether the various alternatives proposed in document A/CONF.97/C.1/L.213 had been ranked in order of preference, and whether the authors had tried to present the various points of view or whether they had decided to leave it to the Committee to settle the point in the last resort.

8. Mr. SCHLECHTRIEM (Federal Republic of Germany) explained that alternative III was intended to clarify alternative I and that in fact the two constituted a single proposal.

9. Mr. ROGNLIEN (Norway) said that alternative I should be voted on before alternative II. The double reference to article 45 and fundamental breach as it appeared in the original text of article 44 (1), had been thought inappropriate; the working group had therefore tried to amend the wording of the first paragraph in two ways: alternative I deleted the reference to avoidance, while keeping the reference to fundamental breach. Alternative II, on the contrary, deleted the reference to the latter while making article 44 subject to article 45, since the buyer must retain the right to declare the contract avoided. In addition, the idea of unreasonable delay had been introduced instead of delay "not amounting to a fundamental breach". The proposed formula "unreasonable delay" was more flexible and offered a remedy, suspending the buyer's actual avoidance of the contract under article 45. With respect to paragraph 2 of alternative II, if the buyer had declared the contract avoided in accordance with article 45, the seller had no means of remedy. Paragraph 2 of article 44 provided for a period of time during which the buyer could not resort to any remedy which was inconsistent with performance by the seller. The provision had been kept in paragraph 2 of alternative II, but the rights of the seller had been limited, to the advantage of the buyer by a new reference to article 43.

10. The CHAIRMAN asked the sponsors of the amendments to article 44 submitted earlier if they wished



to maintain their proposals or if they considered that joint amendment A/CONF.97/C.1/L.213 replaced them.

11. Mr. FARNSWORTH (United States), Mr. OZERDEN (Turkey), Mr. INAAMULLAH (Pakistan), Mr. ROGNLIEN (Norway), Mr. SEYON (Finland) and Mr. HOSOKAWA (Japan) said they wished to maintain their amendments (A/CONF.97/C.1/L.203, L.146, L.142 and L.80, L.141, L.164).

12. Mr. STALEV (Bulgaria) and Mr. HERBER (Federal Republic of Germany) withdrew their amendments (A/CONF.97/C.1/L.160, L.140).

13. Mr. KHOO (Singapore) explained that he would only withdraw his amendment if alternative II proposed in document A/CONF.97/C.1/L.213 was adopted.

14. Mr. FOKKEMA (Netherlands) said that he was in favour of alternative II.

15. Mr. KRISPIS (Greece) proposed that the words "Subject to article 45" at the beginning of paragraph 1 of alternative II, which he thought unclear, should be replaced by the words "Subject to the contract not having been declared avoided in accordance with article 45".

16. The CHAIRMAN proposed that the Committee should revert to the amendment suggested by Greece if alternative II was adopted.

17. Mr. HJERNER (Sweden) said that alternative I introduced conditions and new elements that were unacceptable to his delegation. Paragraph 1 of alternative II was still very close to the original wording of article 44; paragraph 2 on the other hand departed from paragraph 2 of article 44, which concerned the case, frequently met with, in which the seller, having delayed in delivering the goods, asked the buyer whether he was nevertheless willing to accept delivery. He was therefore not in favour of paragraph 2 of alternative II.

18. The CHAIRMAN put alternative I of amendment A/CONF.97/C.1/L.213 to the vote.

19. *Alternative I was rejected.*

20. The CHAIRMAN put to the vote paragraph 1 of alternative II, which would replace paragraph 1 of article 44.

21. *Paragraph 1 of alternative II was adopted.*

22. The CHAIRMAN put to the vote paragraph 2 of alternative II, which would replace paragraph 2 of article 44.

23. *Paragraph 2 of alternative II was rejected.*

24. Mr. CUKER (Czechoslovakia) asked whether the Committee was to take a decision on the amendment suggested by the Greek representative to the wording of the new paragraph 1 of article 44.

25. The CHAIRMAN noted that opinion in the Committee seemed to be divided, some delegations having spoken in favour of the new article 44 in its present wording while other delegations seemed to want a change.

26. Mr. KRISPIS (Greece) wished it to be placed on record that, as far as his delegation was concerned, the words "Subject to article 45" at the beginning of the new paragraph 1 of article 44 should be understood as meaning: "Subject to the contract not having been declared avoided in accordance with article 45".

27. Mr. CUKER (Czechoslovakia) associated himself with the Greek representative's comments. The new wording of paragraph 1 was open to a number of interpretations. It would therefore be desirable to refer the text to the Drafting Committee for the necessary modifications.

28. Mr. BONELL (Italy) did not share the views of the representatives of Greece and Czechoslovakia. The amendment proposed by Greece would alter the text of paragraph 1 of article 44 considerably.

29. The CHAIRMAN said that, in view of the limited support for the Greek amendment, he would take it, if there was no objection, that the Committee wished to reject it.

30. *It was so decided.*

31. The CHAIRMAN drew the attention of the Committee to the amendment put forward by the United States delegation (A/CONF.97/C.1/L.203).

32. Mr. FARNSWORTH (United States of America) explained that his delegation had submitted its amendment because it seemed essential to include in the text a provision stating the right of the seller to remedy, in the manner chosen by him, his failure to perform his obligations. The Committee had amended article 42 so that it should be quite clear that the buyer could, in the case of a fundamental breach, require the seller to perform, either through the delivery of substitute goods or by remedying the defect in the goods. It could happen, however, that the buyer might require performance in a certain manner whereas the seller would prefer to acquit himself of his obligations in another manner. The seller should therefore be permitted to determine the manner in which he intended to remedy his failure to perform. The United States amendment proposed two alternatives. The choice between the two was purely a drafting matter and should be left to the Drafting Committee.

33. The CHAIRMAN put the United States amendment (A/CONF.97/C.1/L.203) to the vote.

34. *There were 10 votes in favour and 10 against.*

35. *The amendment was not adopted.*

36. Mr. KHOO (Singapore) said that his delegation withdrew its amendment (A/CONF.97/C.1/L.148), since it no longer served any useful purpose after the adoption of new paragraph 1 for article 44.

37. The CHAIRMAN invited the members of the Committee to consider the amendments proposed by Turkey (A/CONF.97/C.1/L.146) and Pakistan (A/CONF.97/C.1/L.198) deleting paragraphs 2, 3 and 4 in article 44.

38. Mr. OZERDEN (Turkey) said that he wished to maintain his amendment, despite the adoption of new

paragraph 1 in article 44, because that paragraph expressly stated the means available to the seller to remedy failure to perform and implicitly indicated the procedure to be followed for that purpose. It was obvious that the seller should take action within a reasonable time. Paragraph 2 was therefore unnecessary. Paragraphs 3 and 4 were even more superfluous because the principles stated in them derived from contract law.

39. Mr. SEVON (Finland) was opposed to the deletion of the three paragraphs in question, since they were intended to settle the practical problems which often arose when a seller failed to perform his obligations.

40. Mr. ROGNLIEN (Norway) also objected to the deletion of those paragraphs, which were useful in that they stated very precisely the relation between the parties where the seller would remedy failure to perform after the date of delivery.

41. The CHAIRMAN noted that most of the members of the Committee were not in favour of the proposals by Turkey and Pakistan. If there were no objections, therefore, he would take it that the proposals were rejected.

42. *It was so decided.*

43. The CHAIRMAN suggested that the Norwegian amendment (A/CONF.97/C.1/L.142), which would combine paragraph 2, 3 and 4 of article 44 to form an article 44 *bis*, should be referred to the Drafting Committee.

44. *It was so decided.*

45. The CHAIRMAN invited the members of the Committee to consider the amendments by Norway (A/CONF.97/C.1/L.80) and Finland (A/CONF.97/C.1/L.141) together, since, although submitted in separate documents, they were so similar that they could be considered a joint proposal.

46. Mr. SEVON (Finland) explained that his amendment (A/CONF.97/C.1/L.141) concerned a situation in which the seller requested the buyer to make known whether he would accept performance without indicating any time in his request. The amendment would allow the seller in such cases to perform his obligations within a reasonable time after the buyer had given notice of non-conformity.

47. Mr. HJERNER (Sweden) said he was opposed to the Finnish amendment. A similar proposal had been considered in 1977 and rejected by a large majority. It was necessary for the seller to state in his request the period of time within which he intended to perform his obligations.

48. Mrs. KAMARUL (Australia) supported the Finnish amendment, but suggested that the words "under article 37" should be deleted.

49. Mr. FELTHAM (United Kingdom) was unable to accept the Finnish amendment. It was essential for the seller to make it clear in his request how much time he would need to perform his obligations if the buyer was not to be left in a state of uncertainty.

50. Mr. ROGNLIEN (Norway) pointed out that, if the seller failed to state the time within which he intended to perform his obligations, the buyer could let the seller's request remain unanswered and declare the contract avoided when the seller performed which would be unjust to the seller and even contrary to the principle of good faith. By introducing the idea of "reasonable time" the amendment would preclude any such injustice.

51. The CHAIRMAN, replying to a question by Mr. CUKER (Czechoslovakia), explained that the provisions of article 44 would apply when the seller requested the buyer to allow him to remedy his failure to perform. The procedure provided for in paragraphs 2, 3 and 4 of that article gave the seller an assurance that the buyer would not declare the contract avoided and thus prevent the seller from remedying his failure to perform.

52. The CHAIRMAN put to the vote the joint proposal by Finland and Norway (A/CONF.97/C.1/L.80, L.141).

53. *The proposal was rejected by 20 votes to 7.*

54. The CHAIRMAN drew the attention of the Committee to the amendment by Japan (A/CONF.97/C.1/L.164). The first part of the amendment, which would modify article 44 (1), was no longer valid after the adoption of the new paragraph 1.

55. Mr. HOSOKAWA (Japan) orally revised his proposed new paragraph 2 *bis* by substituting the words "perform his obligations" for the words "do so". His amendment was intended to prevent the buyer from declaring the contract avoided in the event of delivery of non-conforming goods before the seller had had an opportunity to remedy failure to perform. The time allowed to the seller to make a request to that effect would be very short. The amendment would enable the seller to perform his obligations and would prevent the contract from being avoided in cases in which another solution was available, without weakening the position of the buyer in any way.

56. Mr. KLINGSPORN (Federal Republic of Germany) and Mr. STALEV (Bulgaria) supported the Japanese amendment.

57. Mr. FOKKEMA (Netherlands) said that he could not support the amendment, which would have the effect of placing the buyer who had received non-conforming goods, and was entitled to declare the contract avoided, in an uncertain position.

58. Mr. HOSOKAWA (Japan) said that he was prepared to withdraw his amendment.

59. The CHAIRMAN suggested that the amendment by Japan (A/CONF.97/C.1/L.161) should be considered in connection with article 45.

60. *It was so decided.*

*The meeting was suspended at 4.20 p.m. and resumed at 4.40 p.m.*

Article 45 (A/CONF.97/C.1/L.149, L.153, L.161, L.162, L.165)

*Paragraph 1 (a)*

61. Mr. KLINGSPORN (Federal Republic of Germany), replying to a question by the CHAIRMAN, said that the amendment submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.153) to paragraph 1 (a) was no longer valid in view of the new text adopted for article 44 (1).

*Paragraph 1 (b)*

62. The CHAIRMAN asked the Committee if it considered that the amendment by Norway (A/CONF.97/C.1/L.151) was a drafting matter.

63. Mr. ROGNLIEN (Norway) said that would be the case if it was clearly understood that subparagraph (b) was concerned only with non-delivery and not with lack of conformity. In the case of failure by the seller to deliver, the buyer could fix an additional time for delivery, stating that otherwise he would declare the contract avoided. However the situation was not the same when there was a lack of conformity in goods delivered. If the Committee accepted his interpretation the amendment proposed would be a matter of drafting for purposes of clarification, but if not, it would have to be regarded as a substantive matter.

64. Mr. FOKKEMA (Netherlands) thought that the question was one of substance. He had submitted an amendment which took a completely different point of view from the Norwegian amendment, and it was for the Committee to decide which of the two interpretations was correct.

65. The CHAIRMAN suggested that consideration of the Norwegian amendment should be deferred.

66. *It was so decided.*

67. Mr. ZIEGEL (Canada) introduced the Canadian amendment (A/CONF.97/C.1/L.150) to paragraph 1 (b). The purpose of the amendment was to rectify an apparent divergence between that subparagraph and article 43 (1), which he found difficult to understand. Article 43 (1) referred to the additional time allowed to the seller "for performance . . . of his obligations", which covered the whole range of obligations arising under the Convention and the contract, but article 45 (1)(b) applied only to non-delivery of the goods by the seller. While it was in the interests of the buyer to give the seller additional time, after which he could declare the contract avoided if the seller failed to deliver the goods within the stated time, it might also be important for the buyer to be able to resort to the *Nachfrist* procedure if the goods were defective. That was why Canada proposed adding a reference to failure to perform "any other material obligation" in the existing text, which would then correspond to article 43 (1).

68. Mr. FOKKEMA (Netherlands) said that while the amendment proposed by his delegation (A/CONF.97/C.1/L.165) was not worded in quite the same way as the

Canadian amendment, it was on the same lines and based on the same considerations. It was strange that under article 43 the buyer was entitled to give the seller additional time to perform, whereas article 45 did not give him any other right on the expiry of that time if the seller had not yet performed his obligations. The buyer should be able to declare the contract avoided because of failure to perform a material obligation as well as failure to make delivery.

69. Mr. HJERNER (Sweden) pointed out that the question raised by the Canadian representative had been under discussion for years. The restriction on the scope of subparagraph (b) in cases of non-delivery was perfectly sound because the situation was not the same as if the seller had delivered defective goods. In the latter case, the buyer would not be able to transform a simple breach into a fundamental breach by the mere fact of allowing the seller additional time. On the other hand, non-delivery should in all cases amount to a fundamental breach. If the buyer wondered whether enough time had been allowed for the breach to be considered fundamental, he could allow the seller additional time, at the end of which the breach would be fundamental and the buyer could declare the contract avoided.

70. The Canadian representative had asked why the additional time provided for in article 43 paragraph 1 applied to the performance by the seller of all his obligations. It should be noted that, under paragraph 2 of that article, the buyer could not change his mind before the expiry of the time-limit or declare the contract avoided. The additional time might cover cases of non-conformity, but the provision did not have the same implications as article 45. It seemed to him that it was pointless to amend articles 43 and 45.

71. Mr. SCHLECHTRIEM (Federal Republic of Germany) said that he shared the view of the Netherlands and Canadian representatives. The *Nachfrist* procedure was not intended to transform an insignificant breach into a fundamental breach. It was a question of defining what constituted a fundamental breach. The buyer did not always know, and if he accorded the seller an additional period of time, that gave him time to clarify the situation.

72. Mr. VINDING KRUSE (Denmark) said he was in favour of the Norwegian proposal, for there were still some doubts about the interpretation of paragraph 1 (b). If the buyer had fixed an additional period of time, and if the seller had not delivered the goods within that period of time, the existence of a fundamental breach would have to be determined in accordance with subparagraph (a).

73. Mr. SAMI (Iraq) thought that the Arab text of the Canadian amendment did not correspond exactly to the English text, which created difficulties. He gathered that if the seller had not delivered the goods or had failed to perform all his material obligations and did not remedy such failure, the buyer could not for that reason declare the contract avoided. If the buyer fixed an additional

period of time for performance by the seller, the latter could always say that he was going to perform his obligations. In other words, the buyer was deprived of the right to avoid the contract on the grounds of lack of conformity or late delivery, and the seller was given the advantage over him. He could not support the Canadian proposal and hoped that the original text of the subparagraph would be kept.

74. The CHAIRMAN said that there must be some misunderstanding, for the Canadian proposal had more or less the same aim as the Netherlands one and the two proposals were actually more favourable to the buyer than the existing text. Not only did failure to deliver the goods within the additional period of time fixed by the buyer enable him to declare the contract avoided, but he could also take that step if the seller had not performed all the material obligations for which the buyer had granted him an additional period of time for performance.

75. Mr. FOKKEMA (Netherlands) confirmed that the Chairman's interpretation was right. It was very hard to determine at what time a breach became fundamental, as was pointed out in the commentary on paragraph 1 of article 43 (A/CONF.97/5, p.117, para.6). His amendment would make it clear that, once the buyer had fixed an additional period of time for performance by the seller, by the end of which it was essential for the former that the contract should have been performed, the seller must comply with that request and perform his obligations.

76. Mr. FARNSWORTH (United States of America) endorsed the Swedish representative's statements and agreed that it would be undesirable to amend the existing text. The *Nachfrist* procedure was aimed at enabling the buyer to clarify his position, but the buyer might also take advantage of that system to make a breach appear to be a fundamental breach, which would be undesirable.

77. Mr. KRISPIS (Greece) pointed out that if the buyer had fixed an additional period of time of reasonable length for performance by the seller, in conformity with article 43, and the seller did not perform his obligations within that additional period of time, the buyer could invoke a fundamental breach within the meaning of article 45 (1) (a). There was therefore no reason to include, in subparagraph (b), the non-performance of obligations other than delivery of the goods as grounds for avoiding the contract. Personally, he hoped that the Committee would stick to the text proposed in the draft Convention.

78. Mr. SANCHEZ-CORDERO (Mexico) supported the Canadian and Netherlands proposals. Compared with the draft Convention, the version of paragraph 1 (b) proposed by the Netherlands had the advantage of being more general.

79. Mr. SEVON (Finland) said that in countries where the *Nachfrist* procedure was unknown, the rules proposed by Canada and the Netherlands would certainly not be interpreted in the way indicated by the representative of the Federal Republic of Germany. For his country, the Canadian and Netherlands proposals simply

meant that any breach of contract whatsoever could be declared a fundamental breach and that hence the buyer would have the right to avoid the contract for any breach by the seller whatsoever. It was out of the question to introduce such a radical change into the Convention at such a late stage in its preparation. Thus the Canadian and Netherlands proposals were quite unacceptable for his delegation.

80. Mr. ROGNLIEN (Norway) pointed out that under the terms of the present article 45, the buyer could, in the case of failure to deliver dealt with in paragraph 1 (b), by making use of the *Nachfrist*, invoke any delay to declare the contract avoided. That text was therefore satisfactory, and the Canadian and Netherlands proposals would only make for confusion in the entire system.

81. Mr. BOGGIANO (Argentina) noted that the Canadian proposal concerning failure to perform "material" obligations in effect referred back to article 45 (1) (a) and was therefore superfluous. As for the Netherlands proposal, since it concerned the failure to perform any obligation, material or otherwise, it would enable the buyer to get round his obligation to invoke a fundamental breach by the seller in order to declare the contract avoided. He was therefore unable to support that proposal.

82. Mr. BORTOLOTTI (International Chamber of Commerce) considered that any change in the régime provided for in the draft Convention would be dangerous; the seller must be protected against any unjustified avoidance of the contract by the buyer. There was a risk that the amendment proposed by Canada and the Netherlands would allow a non-fundamental breach to be transformed into a fundamental breach, through the *Nachfrist* procedure. Any reference to the non-performance of "material" obligations would be tantamount to introducing into the Convention a third degree of gravity of breach, calculated indeed to sow confusion. In the interests of businessmen and *bona fide* buyers, it would be better to keep to the original text.

83. Mr. OLIVENCIA RUIZ (Spain) was of the same opinion. The buyer must not be authorized to invoke, in order to declare the contract avoided, failure to perform a "material" obligation, which had not been defined in the Convention. Article 45 (1) (a), as proposed in the draft Convention, contained a general rule authorizing avoidance of the contract for a fundamental breach regardless of the period of time accorded for performance by the seller. Subparagraph (b) of that same article spelled out a subsidiary rule by which failure to deliver within the additional period of time fixed in accordance with paragraph (1) of article 43 could be regarded as a fundamental breach. That text met the requirements and was the one which should be adopted.

84. Mr. FELTHAM (United Kingdom) said that he too was against the Canadian and Netherlands amendments, the effect of which would be to authorize the buyer to transform a lack of conformity, for example, into a fundamental breach. On the commodity market, the buyer

might quite well avail himself of such a provision to avoid the contract as soon as prices moved against him.

85. Mr. ZIEGEL (Canada) explained that in submitting its amendment his delegation in no way intended to authorize the buyer to transform just any breach into a fundamental breach within the meaning of draft article 45 (1) (a). The words "material obligation" used in the amendment were to be understood in the sense of the "fundamental breach" referred to in draft article 45 (1) (a). He referred the Committee to the commentary on draft article 43 (A/CONF.97/5, para.6, p.117) and said the sole purpose of his country's amendment was to make it clear that, where the buyer had fixed an additional period of time of reasonable length for performance by the seller, non-observance of that time-limit would constitute a fundamental breach simply because, for the buyer, that period henceforth constituted a fundamental element of the contract.

86. The CHAIRMAN expressed surprise. If paragraph (1) (b) proposed by Canada was not intended to authorize a non-fundamental breach to be transformed into a fundamental breach, it was pointless, since the rule was already spelled out in subparagraph (a).

87. Mr. FOKKEMA (Netherlands) pointed out that it was often difficult to say straight away whether the loss suffered by the buyer constituted a fundamental breach, and it was for that reason that the fixation of an additional period of time made that period of time a fundamental factor. It would therefore be advisable to widen the sphere of application of draft article 45 (1) (b) to give the buyer the necessary remedies when the seller disregarded his fundamental obligation arising from the additional period of time. For some delegations, draft article 45 (1) (a) already met that need. If that was so, paragraph 1 (b) of the draft article would itself be quite unnecessary.

88. Mr. ZIEGEL (Canada) requested that the debate

should be adjourned in order to give him an opportunity of discussing with the Netherlands representative the possibility of submitting a joint proposal to the Committee.

89. Mr. PLANTARD (France) said he was opposed to any adjournment of the debate.

90. *The Canadian motion to adjourn the debate was rejected.*

91. The CHAIRMAN asked the representative of Canada if he would agree to his proposal (A/CONF.97/C.1/L.150) being reworded in accordance with the Netherlands proposal (A/CONF.97/C.1/L.165), provided the Netherlands representative inserted in the third line of his proposal, before the word "obligations", the word "material".

92. Mr. ZIEGEL (Canada) said he would.

93. Mr. FOKKEMA (Netherlands) agreed, in turn, to add the word "material" before the word "obligations" in his proposed text. Perhaps the Canadian and his own delegations might get some delegations to support their joint proposal if they added to their text a sentence along the following lines: "This provision does not apply where, after the expiry of this period of time, it is still necessary to decide whether or not the breach is fundamental". The Drafting Committee might be asked to consider that suggestion.

94. Mr. HJERNER (Sweden) thought that the Committee could not vote on such an important amendment when it had not been circulated in writing.

95. The CHAIRMAN put to the vote the joint Canadian and Netherlands proposal (A/CONF.97/C.1/L.165), amended by the addition of the word "material" in the third line, subject to any drafting changes.

96. *The proposal was rejected by 31 votes to 9.*

*The meeting rose at 6 p.m.*

## 23rd meeting

Wednesday, 26 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.23

*The meeting was called to order at 10.04 a.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 45 (A/CONF.97/C.1/L.149, L.151, L.152, L.153 and Corr.1, L.161, L.162) (continued)*

1. The CHAIRMAN reminded the Committee of its earlier decision to consider the Japanese amendment to article 42 (A/CONF.97/C.1/L.161) under article 45 (A/CONF.97/C.1/SR.19, paragraphs 56-59).

2. Mr. HOSOKAWA (Japan) explained that the amendment, which would require drafting changes if it were to be included in article 45, was intended to clarify the relationship between the buyer's right under article 42 and his right under article 45. Those provisions seemed to allow the buyer to avail himself of his remedy

under article 42 and subsequently still take action under article 45 to avoid the contract. Although the situation he envisaged was unlikely to occur in practice, he believed the possibility should be ruled out. He added that he would be willing to withdraw his amendment if members were agreed that the substance was covered by article 44 (2).

3. Mr. KLINGSPORN (Federal Republic of Germany) considered that article 44 (2) would not cover the case but that article 43 (2) could be applied by analogy.

4. Mr. ROGNLIEN (Norway) believed that practically all the situations with which the Japanese amendment was intended to deal were already covered either by the provisions of article 43 (2) or by those of article 44 (2). He also referred to the principle of good faith contained in article 6.

5. The CHAIRMAN, having consulted the meeting, said that the Norwegian representative's views appeared to be shared by the majority.

6. Mr. HOSOKAWA (Japan) said that, on that understanding, he withdrew his amendment.

7. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed to refer the amendment by Singapore (A/CONF.97/C.1/L.149), which was of a purely drafting character, to the Drafting Committee.

8. *It was so agreed.*

9. Mrs. KAMARUL (Australia), introducing her delegation's proposal (A/CONF.97/C.1/L.142), said that she did not maintain the first amendment to paragraph 2. The second amendment was intended to remove an inconsistency between subparagraphs (a) and (b). Subparagraph (b) specified that the reasonable period of time for avoidance would begin to run when the buyer knew or ought to have known of the breach relied on. Subparagraph (a) on the other hand provided simply that the period would begin when the buyer became aware that delivery was made, the underlying assumption being that a buyer would always be actually aware of when goods were delivered and that the seller need not be protected against the possibility that the buyer ought to have been aware that a delivery had been made late.

10. That assumption was not justified. Cases would arise in which late delivery was made to a store or to a third party. In such a case, the seller's position should not be prejudiced. If the buyer ought to have been aware that the delivery was late, the reasonable period for avoidance action should be taken to have commenced.

11. Mr. HJERNER (Sweden) opposed the Australian proposal, which was not in conformity with the system of the draft. The provisions of article 45 were a consequence of the dispatch theory.

12. Mr. WAGNER (German Democratic Republic) supported the Australian proposal.

13. The CHAIRMAN said that as there appeared to be

little support for the Australian proposal he would, if there was no objection, consider it rejected.

14. *It was so agreed.*

15. Mr. ROGNLIEN (Norway), introducing his delegation's amendment to article 45 (2) (A/CONF.97/C.1/L.162), said that the substance was similar to that of the amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.153). The proposed reference in paragraph (2) (b) to article 44 would have the effect of extending the period of notice in favour of the buyer. The proposal by the Federal Republic of Germany (A/CONF.97/C.1/L.153 and Corr.1) referred in detail to the contents of article 44 (2). His own formulation was much simpler and referred briefly to "any additional period of time" applicable under articles 43 or 44. If the Committee agreed that there was only a difference in wording between his delegation's proposal and that of the Federal Republic of Germany, he suggested that both should be referred to the Drafting Committee.

16. Mr. KLINGSPORN (Federal Republic of Germany) agreed that the differences between his delegation's proposal and the Norwegian amendment were of a drafting character and could be left to the Drafting Committee.

17. Mrs. FERRARO (Italy) considered that there was a difference in substance between the two proposals. The Norwegian text, unlike that of the Federal Republic of Germany, did not refer to paragraph (2) of article 44.

18. Mr. KRISPIS (Greece) supported the two proposals. In substance they were identical, but from the standpoint of drafting, the Norwegian text seemed to be preferable.

19. Mr. HJERNER (Sweden) had some doubts about the two proposals under discussion. He was not at all convinced of the need for the proposed rule in practice and noted that no examples had been given in support of the proposals.

20. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed to refer the two proposals to the Drafting Committee.

21. *It was so agreed.*

22. *Article 45, as amended, was adopted.*

*Article 46 (A/CONF.97/C.1/L.166, L.167, L.168, L.169, L.170 and L.181 and Corr.1)*

23. Mr. ROGNLIEN (Norway), introducing his proposal (A/CONF.97/C.1/L.167), said that its main purpose was to amend the time at which the value of non-conforming goods should be assessed with a view to reduction in price. His delegation considered that the time of delivery would be preferable to that of the conclusion of the contract partly because the goods might not have existed at the latter time and partly because the value at the time of delivery would be a more adequate substitute for damages. On the other hand, it would in most cases hardly be necessary to refer to a specific time; the important point was that the comparison between the values of



conforming and non-conforming goods should refer to the same time. The proposal was also intended to simplify the text. If more precise wording was desired, he could support the draft amendment submitted by Finland (A/CONF.97/C.1/L.170).

24. The CHAIRMAN invited comments on the question of the time at which the value of conforming and non-conforming goods was to be assessed.

25. Mr. REISHOFER (Austria) supported either the Norwegian or the Finnish proposal, since the time of delivery seemed more logical than the time of conclusion of the contract.

26. Mr. HONNOLD (United States of America) said that his delegation could also support either of the draft proposals. The United States comments on the draft Convention (A/CONF.97/8) had suggested an amended wording, but the proposed text would make it more consistent and easier to explain to lawyers in his country.

27. Mr. GHESTIN (France) agreed that the time of delivery seemed a more realistic time to assess the value of the non-conforming goods. The lack of conformity was a matter of performance and the time at which it was assessed should be that at which performance was completed.

28. Mr. GORBANOV (Bulgaria) said that he considered that the time should be that of the conclusion of the contract. Assessments of value at the time of delivery might be falsified by fluctuations in the price of the goods.

29. Mr. KRISPIS (Greece) supported the proposals because the crucial time at which the non-conforming goods should be assessed was the time of delivery.

30. Mr. SAMI (Iraq) endorsed the Bulgarian representative's statement because buyer and seller agreed on the price at the time of conclusion of a contract. If the time of delivery was mentioned, it would not be clear whether that meant the time the goods were handed over to a carrier or when they were delivered to the buyer himself. The proposed amendment might be detrimental to the buyer.

31. Mr. KUCHIBHOTLA (India) expressed a preference for the existing text, because the parties agreed on the price when concluding the contract. Any other interpretation would be contrary to the provisions of article 12.

32. Mr. BONELL (Italy) said that he too preferred the existing text for the reasons given by the Bulgarian and Indian representatives. The price reduction was not intended as an exclusive remedy or an alternative to a claim for damages under article 41.

33. Mr. HERBER (Federal Republic of Germany) pointed out that in practice the time at which the price reduction was to be estimated did not greatly matter, provided that the assessment of conforming and non-conforming goods was made at the same time. His dele-

gation would be ready to endorse any simple and understandable solution.

34. Mr. MATHANJUKI (Kenya) said that he was unable to support the Norwegian and Finnish proposals because the price communicated to the buyer under article 12 should be the one referred to in article 46.

35. Mr. WIDMER (Switzerland) felt that there seemed to be some misunderstanding of the Norwegian and Finnish proposals. The price was that agreed at the conclusion of the contract but the moment at which the price reduction was to be determined was the time of delivery, in other words, of the transfer of risk. He therefore supported the Norwegian and Finnish proposals.

36. Mr. MASKOW (German Democratic Republic) preferred the time of the conclusion of the contract because the price of conforming goods had been agreed at that point and only the price of non-conforming goods had to be assessed whereas at the time of delivery it would be necessary to assess both prices.

37. Mr. BORTOLOTTI (Observer, International Chamber of Commerce) said that although the time stipulated would not greatly change the situation, the time of conclusion of the contract would give a clearer point of reference and might avoid disputes in practice.

38. Mr. ROGNLIEN (Norway) also felt that some confusion had arisen. One should distinguish between the price and the value of goods. Naturally the price had been fixed at the time of the conclusion of the contract. His proposal did not refer to the price at the time of delivery, but to the proportional reduction of the prices compared with the difference between the value of conforming and non-conforming goods. If the goods did not exist at the time of conclusion of the contract, their value could only be estimated even though their price had been fixed. For practical purposes he would be equally happy to see any reference to time deleted.

39. Mr. FELTHAM (United Kingdom) explained that the remedy involved in the article was not familiar to lawyers in the common law countries. He agreed that in some cases the proportion involved did not vary whether the assessment was made at the time of conclusion of the contract or the time of delivery. However, repair costs need not vary in the same proportion as the price of goods so that in fact a decision on the time did involve a matter of substance.

40. The CHAIRMAN said that as a majority appeared to support the Norwegian amendment, he would, if there was no objection, consider it adopted.

41. *It was so agreed.*

42. The CHAIRMAN invited comments on the amendment by Argentina, Spain and Portugal (A/CONF.97/C.1/L.168) concerning the place at which the value of the non-conforming goods was to be assessed.

43. Mr. DATE-BAH (Ghana) said that he did not consider that the Committee's decision on the time of delivery necessarily meant that it should also be specified



that the assessment should be of the value of the goods at the place of delivery. The prevailing price for the goods might be very different at the place of conclusion of the contract and the place of delivery. His delegation preferred the existing text, which contained no reference to the place.

44. Mr. HONNOLD (United States of America) pointed out that the buyer could not realize that the goods were defective until he received them. It therefore seemed practical that if the place was specified it should be the one where the buyer took possession of the goods. Whether the rule should be the time or place of delivery or the time or place of handing over the goods could be decided later.

45. Mr. BOGGIANO (Argentina), introducing the joint proposal of Argentina, Portugal and Spain (A/CONF.97/C.1/L.168), said that in the circumstances envisaged in article 46, adequate protection should be given to the buyer, as the injured party. The object of the joint proposal was to ensure that the reduction in price took account of prevailing prices at or close to his place of business or habitual residence so that he could realistically expect to be able to replace the defective goods. As was to be seen from the examples given in the Secretariat commentary on article 46 (A/CONF.97/5, page 126 *et seq.*), the rule referred mainly to fungible goods in respect of which it was understandable that the reduction in price for partial performance should be so calculated. There was precedence in various general rules, as for example in the EEC's coarse grains trade convention, where reference was made to the value at the point of disembarkation of goods. However, there was no specific mention of fungible goods in the text of article 42 and the principle could with advantage be extended to complex machinery in the case of which the reduction in price should reflect the steps the buyer would have to take to remedy any defect in his place of business or habitual residence, which might be completely different from those which would have to be taken elsewhere.

46. Mr. KRISPIS (Greece) supported the joint proposal, which would fill an undesirable gap in the draft Convention. It was well known in international trade that prices varied greatly from place to place and it was therefore important to specify the place of valuation. The most reasonable place seemed to be that at which the buyer would have liked to have had the goods available, which would usually be the same as the place of delivery.

*The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.*

47. Mr. ROGNLIEN (Norway) said it would perhaps be better to omit any reference to the place of valuation, which was a complicated issue. In any case the comparison must refer to the same place when assessing the value of conforming or non-conforming goods. A time difference was also involved when goods were to be sent from one place to another. If the buyer was not satisfied with the result of the valuation, he could ask for damages

instead of a reduction in price and in certain respects even in addition to price reductions.

48. Mr. FOKKEMA (Netherlands) agreed with the Norwegian representative. The joint proposal was based on the assumption that the buyer's place of business or habitual residence was where he wished to have the goods available but he might have intended them for another destination, which might be changed again by a resale. In some cases, the delivery of goods was deemed to take place at the moment the relevant documents were handed over, even though the goods themselves might still be on the high seas.

49. Mr. ZIEGEL (Canada) preferred to omit any mention of place.

50. Mr. KUCHIBHOTLA (India) concurred.

51. Mr. OLIVENCIA RUIZ (Spain) said that to be serviceable, article 46 must specify both time and place. Value depended upon the type of goods and on the particular market concerned. There was no one prevailing price. It was true that the subject was complex but failure to tackle it would lead to the article being open to differing interpretations, and that would be undesirable in a unification Convention. His preference was for the place to be specified as the buyer's place of business or habitual residence because that was where his interests had been harmed by the non-conformity of the goods. The buyer must be protected.

52. Mr. EYZAGUIRRE (Chile) supported the joint proposal.

53. Mr. BOGGIANO (Argentina) asked that a vote should be taken on the original text of the joint proposal (A/CONF.97/C.1/L.168). If it was rejected, he asked that a vote should be taken on the Norwegian oral amendment to add the words "at the place of delivery of the goods".

54. *The joint proposal (A/CONF.97/C.1/L.168) was rejected by 23 votes to 11.*

55. *The Norwegian oral amendment was rejected by 22 votes to 12.*

56. Mr. FELTHAM (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.169), said that it was a drafting amendment. In the opinion of a legal body to which his delegation had submitted the text of the draft Convention, the phrase "the buyer may declare the price to be reduced" did not make it clear that it was the right of the buyer to do so.

57. Mr. HERBER (Federal Republic of Germany) wondered whether the formulation proposed by the United Kingdom representative made it clear that the buyer had such a right unilaterally without reference to any authority. Perhaps neither the proposed amendment nor the original wording was adequate to encompass the meaning both of the buyer's right and the way in which it was to be exercised.

58. Mr. KRISPIS (Greece) suggested that the United Kingdom wording should be strengthened by the addi-

tion of the phrase "by so stating to the seller" after the words "is entitled to reduce the price".

59. Mr. HONNOLD (United States of America) said that the point was whether the use of the word "may" in the original text adequately expressed the concept of entitlement. It appeared to be a drafting matter which should be referred to the Drafting Committee.

60. Mr. ZIEGEL (Canada) observed that the United Kingdom representative had not objected to the use of the words "may fix" in article 43 paragraph 1. Perhaps the Drafting Committee should be asked to ensure consistency in the formulation used to express the possession and exercise of a right throughout the Convention.

61. The CHAIRMAN said he believed that there was general agreement about the unilateral right of the buyer to declare the price to be reduced in relation to the lack of conformity of the goods, subject to the jurisdiction of the courts. The seller could sue to obtain the full price. On that understanding, he would take it that the Committee wished to refer the United Kingdom amendment to the Drafting Committee.

62. *It was so agreed.*

63. Mr. KLINGSPORN (Federal Republic of Germany), introducing his delegation's proposal (A/CONF.97/C.1/L.166), said his delegation believed that the second sentence of article 46 should refer to article 35 as well as to article 44. It seemed to him logical that a provision in regard to a buyer's declaration of reduction of price should apply not only to the case in which a seller remedied a failure to perform his obligations after the date for delivery (article 44), but also the case in which such a failure was remedied before the date for delivery (article 35).

64. The CHAIRMAN said that as there appeared to be a majority in favour of the proposal, he would, if there were no objection, consider it adopted.

65. *It was so agreed.*

66. The CHAIRMAN invited attention to the proposal by the United States (A/CONF.97/C.1/L.181).

67. Mr. HONNOLD (United States of America) said he withdrew the proposal.

68. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.167), said it made reference to article 39, which provided that the seller must deliver goods which were free from any right or claim of a third party. Such a right or claim might be a total claim, in which case there would be no room for price reduction, but it might also be a partial or negative claim, in which case a price reduction might be practicable, because it might be possible to determine what was the diminished value of the goods.

69. Mr. HJERNER (Sweden) was opposed to the Norwegian proposal and noted that a similar proposal had been submitted earlier by the Norwegian delegation in A/CONF.97/C.1/L.77, and rejected. He did not think it was appropriate to apply the remedy of price reduction

to cases under article 39; that article applied not only to justified claims, but also to claims which might not be justified, and which therefore could not be exactly defined in monetary terms.

70. Mr. DATE-BAH (Ghana) supported the Norwegian proposal. Non-conformity, properly so-called, ought to include third-party claims. He did not see why a distinction should be made between remedies for goods that were defective in the physical sense and goods that were defective in other senses. Although the reduction of price would not invariably be an appropriate remedy, there might be many situations where it would be appropriate. He saw no reason for artificially withholding remedy from the buyer in cases where the value of the goods might be even further diminished by claims based on other grounds than actual physical defects.

71. Mr. BONELL (Italy) also supported the Norwegian proposal.

72. Mr. SAMI (Iraq) said he too could support the Norwegian proposal, but would like to know on what basis the price reduction would operate; would it be in the same proportion as was indicated in the first sentence of the paragraph?

73. Mr. ROGNLIEN (Norway), replying to the point raised by the Swedish representative, said that his delegation's present proposal was a more limited one than the earlier proposal which had been rejected. He agreed that in some cases article 46 would not be applicable, since it would not be possible to establish the proportionate value of conforming and non-conforming goods, it being very difficult to determine the value of a claim in regard to the former. In such a case, the solution would be to leave it to the courts to decide whether or not article 46 applied. If that were the understanding of the Committee, he would agree to withdraw his proposal. In reply to the question raised by the representative of Iraq, the price reduction envisaged was intended to be on the basis of the proportion indicated in the existing first sentence of article 46.

74. Mr. SCHLECHTRIEM (Federal Republic of Germany) sympathized with the intent of the Norwegian proposal but feared it might give rise to problems. First, a price reduction in the case of third-party claims might be inappropriate in certain cases. Secondly, the amendment might lead to the conclusion that in the case of article 40 a price reduction was not permitted.

75. Mr. MASKOW (German Democratic Republic) said that he had some hesitation in supporting the Norwegian proposal. During the discussion of the earlier proposal along the same lines, it had been pointed out that it had not yet been decided how the consequences of third-party claims were to be treated under the Convention. Some representatives had considered that the question was an open one and that articles 41 and those related to it could be applied to such claims where it was found appropriate. If the Norwegian proposal were adopted, it could be concluded that those articles could not be applied where third-party claims were concerned.

76. Mr. ROGNLIEN (Norway) said that in view of the previous speaker's comments he was willing to withdraw his proposal, on the understanding that it would be up to the courts to decide whether and to what extent article 46 was applicable to third party claims under article 39.

77. Mr. INAAMULLAH (Pakistan) said he wished it to be recorded that his delegation reserved its position as to article 46. The Committee's adoption of the amendment by Norway (A/CONF.97/C.1/L.167) and the rejection of that by Argentina, Spain and Portugal (A/CONF.97/C.1/L.168) constituted an unfair deal for the buyer, particularly in the developing world. He would have preferred the original text.

78. *Article 46, as amended, was adopted.*

*Article 47 (A/CONF.97/C.1/L.171, L.172)*

79. Mr. KHOO (Singapore), introducing his delega-

tion's amendment (A/CONF.97/C.1/L.171) said that article 47 (2) was not appropriate in the context of the article as a whole. He considered that it should be deleted.

80. The CHAIRMAN said that as there appeared to be no support for the amendment he would, if there was no objection, consider it rejected.

81. *It was so agreed.*

82. Mr. BENNETT (Australia) said he withdrew his delegation's proposal (A/CONF.97/C.1/L.172).

83. *Article 47 was adopted.*

*Article 48 (A/CONF.97/C.1/L.174)*

84. The CHAIRMAN suggested that the Norwegian proposal be forwarded direct to the Drafting Committee.

85. *It was so decided.*

*The meeting rose at 1 p.m.*

## 24th meeting

Wednesday, 26 March 1980, at 3 p.m.

*Chairman: Mr. LOEWE (Austria).*

*The meeting was called to order at 3 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 48 (continued) (A/CONF.97/C.1/L.108)*

1. Mr. SAMI (Iraq) introduced his delegation's amendment to article 48 (2) (A/CONF.97/C.1/L.108). The provision envisaged the case in which the buyer agreed to take delivery of a quantity greater than that provided for in the contract. The seller could have sent the excess quantity by mistake, or he could have acted intentionally in the belief that the buyer would not refuse it. The buyer, for his part, might find himself in an awkward position if it would be expensive for him to return the excess quantity to the seller, but he might on the other hand have need of it. It could also happen that the price of the goods had dropped since the conclusion of the contract. The Iraqi proposal to replace the words "he must pay for it at the contract rate" by the words "he must pay for it

at no more than the contract rate" would at all events facilitate the negotiation of the price of the excess quantity and would be in the interests of both parties.

2. Mr. KRISPIS (Greece) thought that while the thinking behind the proposal by Iraq was sound, the case in question was covered by article 5 of the draft Convention.

3. The CHAIRMAN noted that the amendment by Iraq did not command support. If there were no objections, he would take it that the Committee rejected it.

4. *It was so decided.*

*New article 48 (a) (A/CONF.97/C.1/L.175)*

5. Mr. FOKKEMA (Netherlands) introduced the text of a new article to be inserted after article 48 (A/CONF.97/C.1/L.175). He would illustrate the advantages of the proposed provision by the following example: a museum in the Netherlands bought a famous Goya painting from France, which had been duly identified as such in the contract. Four years after the delivery of the painting, an expert found that it was not by Goya but by one of his pupils. The Board of Directors of the Netherlands museum considered that the discovery greatly reduced the value of the painting and consulted a lawyer. Under the Convention, the situation was clear. The Netherlands museum could invoke the remedies provided for in chapter II, on the grounds of non-conformity of the goods. However, it was stipulated in article 37 (2) that the buyer

lost the right to rely on a lack of conformity of the goods if he did not give the seller notice thereof at the latest within a period of two years from the date on which the goods were handed over to him. The Netherlands museum was therefore unable to take legal action. The lawyer consulted would probably nevertheless advise the museum to bring an action, disputing the validity of the contract, despite article 4(a) of the Convention, which stated that the Convention was not concerned with the validity of the contract, because in that particular case, the museum could legitimately claim an error of substance, which was a valid reason in French municipal law as well as Netherlands municipal law. There would be a serious gap in the Convention if article 37(2) could be circumvented so easily. His delegation, therefore, without going as far as the provisions of ULIS, which did not allow the buyer to rely on any remedies other than those available to him under the Convention, would like to see it clearly stated in the Convention that the buyer could not exercise the remedies granted under the Convention or the national law applicable for lack of conformity or for invalidity of the contract except "under the terms of articles 36 to 38", article 37 being in the present case the most important of the three.

6. Mr. VINDING KRUSE (Denmark) considered that the Netherlands proposal was sound and improved the Convention considerably. Some delegations would undoubtedly be reluctant to approve it on the grounds that the Convention, by virtue of article 4, was not concerned with "the validity of the contract". It should also be borne in mind that, in the example given by the Netherlands representative, the derogation from the period of two years accorded to the buyer (contractual period of guarantee) to rely on lack of conformity under article 37(2) could not be invoked.

7. Mr. DATE-BAH (Ghana) said he was unable to support the Netherlands proposal because all questions bearing on the validity of the contract had been deliberately excluded from the sphere of application of the Convention and were covered solely by municipal law.

8. Mrs. FERRARO (Italy) was in favour of the Netherlands proposal. Under Italian law, notice could be given if a mistake in the essential qualities of the goods after five years, and invalidity of the contract was very close as grounds to lack of conformity.

9. Mr. SCHLECHTRIEM (Federal Republic of Germany) also supported the Netherlands proposal. In the interpretation of ULIS prevailing in his country, the problem raised by the Netherlands representative would normally come under the rules applicable to failure to perform or lack of conformity in order to protect the unified system of remedies from conflicting provisions of national law.

10. Mr. KRISPIS (Greece) regretted that he was unable to support the Netherlands proposal because it involved municipal law. The proposal presupposed that the Convention and municipal law would be applied simultaneously, and that was extremely difficult to accept,

particularly when the principle concerned was of such broad scope.

11. The CHAIRMAN put the Netherlands proposal to the vote (A/CONF.97/C.1/L.175).

12. *The Netherlands proposal was rejected by 24 votes to 6.*

#### Article 49

13. *Article 49, to which there were no amendments, was adopted without change.*

#### Article 50 (A/CONF.97/C.1/L.201)

14. Mr. OLIVENCIA RUIZ (Spain) introduced an amendment to article 50 (A/CONF.97/C.1/L.201) on behalf of the sponsors (Argentina, Portugal and Spain). It concerned the addition to article 50 of a sentence dealing with a question which was not mentioned at all in the draft Convention, namely, the nature of the payment or, in other words, of the currency in which the buyer was required to pay the price. The omission was presumably not accidental, but due to the fact that, under national legislation or exchange controls, payment of the price assumed different forms depending on the country concerned. However, the additional sentence proposed would not hinder the application of national regulations in any way, since the sponsors made it clear that payment ought to be effected in the contractual currency. They had mainly been thinking of cases in which national exchange regulations would prevent the buyer from paying in the agreed currency and considered that the present text of article 50 was not sufficient to compel the buyer to pay. The buyer could in fact invoke article 65 to evade his obligations in that respect, which would be wrong. If the buyer was materially able to pay the price, he should be prevented from taking advantage of the gap in the Convention which would make it possible for him to evade the obligation to do so. The sponsors had therefore believed it useful to give the seller the power to require equivalent payment in the legal currency of the buyer's place of business.

15. Mr. HJERNER (Sweden) said he fully appreciated the sponsor's reasons for submitting the proposal. However, the question of the currency in which payment should be made was extremely complex and formed the subject of a specific convention drawn up by the Council of Europe. The omission of any provision on the currency of payment in the draft Convention was in fact intentional and justified. He would therefore be unable to support the proposal.

16. The representative of Spain had said that the buyer would be able to invoke the remedies available to him under article 65 to evade the obligation to pay the price. But article 65 was concerned exclusively with the payment of damages, and the draft Convention, unlike ULIS, did not give the buyer any means whatsoever of evading his fundamental obligation.

17. The proposal gave the impression that a creditor

would be unable to demand payment except in the place where the buyer had his place of business, whereas the creditor could claim his rights wherever the buyer had any assets. The sentence to be added to article 50 would thus represent a restriction which would be prejudicial to the interests of the creditor.

18. Mr. KRISPIS (Greece) considered that the draft Convention refrained quite deliberately from mentioning the currency of payment. The problems connected with the currency of payment were related to those concerning the validity of the contract, which, under article 4 (a) of the draft Convention, were excluded from its sphere of application. In the event of litigation on the currency of payment, the national courts would first consider whether or not the contract was valid. If it was found to be valid, the next question to be settled would be the rate of exchange at which the payment should be made, i.e. the rate of exchange on the date of the contract or on the date of the judgement. At the stage it had reached in its work, the Committee could not longer take up such complex problems.

19. The CHAIRMAN put to the vote the proposal by Argentina, Portugal and Spain (A/CONF.97/C.1/L.201).

20. *The proposal was rejected by 22 votes to 9.*

*Article 51 (A/CONF.97/C.1/L.83, L.158, L.183, L.196, L.200, L.202 and L.205)*

21. The CHAIRMAN invited the Committee to consider first of all amendments A/CONF.97/C.1/L.83, L.158 and L.205 to delete article 51, the last containing an alternative proposal if article 51 was maintained.

22. Mr. ANDRYUSHIN (Byelorussian Soviet Socialist Republic) said that the reasons for his delegation's amendment (A/CONF.97/C.1/L.158) were explained in document A/CONF.97/8/Add.1. Article 51 stipulated that it was the price charged by the seller at the time of the conclusion of the contract that must be paid, even if no such price was mentioned in the contract. But if the price was not stated in the contract, it was not valid. The question was governed by article 12 (1), which provided that one of the conditions that must be met in order for a contract to be valid was precisely that the price should be expressly or implicitly fixed.

23. Mr. FELTHAM (United Kingdom) maintained that article 51 was still valid. For instance, a buyer might order spare parts for machines purchased earlier and the seller send parts without the price having been fixed; article 51 was perfectly applicable in those circumstances. It was only reasonable that the buyer should pay the price charged at the time of the conclusion of the contract. He was therefore against deleting the article.

24. Mr. VINDING KRUSE (Denmark) fully agreed with the United Kingdom representative.

25. Mr. MINAMI (Japan) thought that in view of the provisions of article 12, article 51 was unnecessary. Account must also be taken of the possibility that some

countries might only ratify Parts I and III of the Convention. That being so, why keep article 51, which envisaged an exceptional situation?

26. Mr. SEVON (Finland) said there was no means of knowing whether countries would ratify one particular part of the Convention rather than another. His own delegation had some difficulties with regard to article 12 (Part II). If article 51 was deleted, national law would then apply, which would tend to weaken the Convention. The fact the price was not fixed in a contract did not mean that there was no contract, as was shown by commercial practice. Furthermore, article 51 unified the provisions of the different national legislations on the subject.

27. Mr. DATE-BAH (Ghana) considered article 51 out of place in the Convention. Under Part II of the Convention, a contract which did not expressly or implicitly fix the price was invalid. Some countries' national law, admittedly, recognized the conclusion of the contract even in that case. But it was not the purpose of the Convention to unify national law. To keep article 51 would only create confusion in the minds of courts called upon to interpret article 12 and article 51 together. Article 51 should therefore be deleted.

28. Mr. KRISPIS (Greece) pointed out that article 12 provided for two possibilities: the price might be expressly fixed in the contract, or the contract might make provision for determining it. It would therefore be useful to keep article 51, since it applied precisely in the event that the price was not explicitly fixed.

29. Mr. LANDFERMANN (Federal Republic of Germany) thought that the formula proposed in article 12 was sufficiently flexible. As for article 51 it offered a procedure which was merely intended to help the court to determine the price when it was not fixed in the contract. The two articles should be harmonized, in order to ensure that as many States as possible ratified Parts II and III of the Convention. Perhaps it would suffice to amend the wording of article 51.

30. Mr. SAMI (Iraq) was in favour of keeping article 51 as it stood, since it was entirely consistent with national legislation. Countries which ratified that Part of the Convention would not have to amend their laws. Article 51, moreover, had the advantage of being clear and would be helpful in resolving complex problems and situations.

31. Mr. EYZAGUIRRE (Chile) said he was unable to support the proposal to delete article 51. His country's code of commerce, like that of many other Latin American countries, contained similar provisions and no problem had arisen so far. The article would provide a completely satisfactory solution for countries which might be unable to ratify Part II of the Convention, but would be prepared to ratify Part III.

32. Mr. MANTILLA-MOLINA (Mexico) was in favour of keeping article 51. Article 12 and article 51 were, in fact, complementary, the former sanctioning contracts

in which the price was implicitly fixed and the latter providing a means of determining the price.

33. Mr. BENNETT (Australia) said he could not support the USSR amendment (A/CONF.97/C.1/L.83), as article 51 contained some useful provisions.

34. Mr. ROGNLIEN (Norway) said that it was realistic to think that Governments might not ratify Part II of the Convention. Difficulties might also otherwise arise in connection with the relations between Parts II and III. If the parties to the contract excluded the application of Part II of the Convention, Part III would still apply and the contract would remain valid in spite of article 12. Usages might also come into play and modify article 12. Thus it was necessary to keep article 51.

35. Mr. KIM (Republic of Korea) said he was unable to support the USSR amendment (A/CONF.97/C.1/L.83), for the reasons put forward by previous speakers. The provisions of article 12 were not mandatory. Article 51 would have its *raison d'être* if, for example, the parties excluded the application of one Part of the Convention.

36. Mr. MATHANJUKI (Kenya) said he was sympathetic towards the USSR proposal, because the link between article 12 and article 51 would create a problem when it came to interpreting the Convention. However, if the contract related to a particular type of goods, article 51 might prove useful. He suggested rewording article 51.

37. Mrs. FERRARO (Italy) objected to the deletion of article 51. Her country's legislation contained a similar provision and regulated the matter in the same way. The important thing was the commercial transaction, regardless of whether the price had been fixed implicitly or expressly. Where the parties referred to a price, even if the reference was not obvious, it was clear that there was an undertaking to pay that price. The contract was therefore valid.

38. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that that question had given rise to varying interpretations from the very beginning. Some countries whose legislation on that point was vague had referred to the Hague Sales Convention of 1964. The Committee should proceed cautiously when it took a final decision on that question. Many countries, while accepting Parts I, II and III of the Convention, nevertheless found articles 12 and 51 contradictory. There would accordingly be a risk of error and uncertainty for the courts, and still more so for the trading partners. Even more serious difficulties were liable to arise if, for example, a country ratified Part III of the Convention, but not Part II; in that case, article 51, even an improved version, would be construed as a general rule applicable to all international transactions. As worded at present, article 51 left each country's court to decide whether or not a contract which did not fix the price was valid, but at the same time it sought to regulate the consequences of such contracts, which was tantamount to a partial unification of the law on the subject. The disadvantages of such a solution outweighed the positive aspects.

39. Mr. HJERNER (Sweden) reminded the Committee of an important fact: the Convention was composed of two Parts, one relating to the sale of goods and the other to the formation of contracts. Countries could ratify the one without ratifying the other. With respect to article 12, a stricter approach had prevailed, provisions having been introduced to the effect that a contract was not valid unless it stated the price. At the last UNCITRAL session, a compromise solution had been reached, article 51 being applicable to cases where the sale had been validly concluded without the price of the goods having been stated in the contract. Some delegations had been in favour of introducing a more flexible provision in Part III for the benefit of countries which only ratified that Part. In his opinion, article 12 and the first sentence of article 51 provided enough protection for those who preferred a strict rule. It would be pointless to bring article 51 and article 12 still closer together, as that might discourage some countries from acceding to one or other of those two Parts.

40. Mr. OSAH (Nigeria) thought that article 51 served a useful purpose in the Convention. It was quite natural that, if a sale was concluded without the price of the goods having been stated, the buyer should pay the price generally charged by the seller. The very pertinent example given by the United Kingdom delegation clearly showed the advantages of having such a provision. However, he had reservations on the second sentence of article 51, which might make for confusion.

41. The CHAIRMAN put to the vote the amendments to delete article 51 submitted by the Byelorussian SSR (A/CONF.97/C.1/L.158), the USSR (A/CONF.97/C.1/L.83) and France (A/CONF.97/C.1/L.205).

42. *The amendments were rejected by 27 votes to 14.*

*The meeting was suspended at 4.35 p.m. and resumed at 4.55 p.m.*

43. Mr. PLANTARD (France), introducing the second French amendment to article 51 (A/CONF.97/C.1/L.205, para.2), said that his delegation had realized that it would be difficult to secure the deletion of article 51 and had therefore drawn up a subsidiary proposal aimed at harmonizing articles 12 and 51.

44. His delegation had endeavoured to improve the wording of article 51, for in the view of some delegations, articles 12 and 51 were contradictory in their present form and therefore liable to create difficulties in their application. It had also tried to harmonize the content of articles 51 and 12 in an effort to reconcile the two approaches involved and as a concession to those delegations which had difficulty in accepting the principle whereby the price must, in every case, be determined in the contract or at least be determinable.

45. He drew the Committee's attention to the new, and to his mind, fruitful element in the French proposal. When a contract did not expressly fix the price, it must, under the terms of article 12, make provision for determining it. Such provision might be of a very tenuous



nature and even implicit. The idea of implicit provision would provide an answer in the situations envisaged in the examples given by various delegations. A French court in a similar case would take it that there had been an implicit agreement by the parties on the price generally charged by the seller or on the market price, to which the parties would be supposed quite naturally to have referred.

46. Mr. BONELL (Italy) said that he subscribed, broadly speaking, to the ideas put forward by the French representative, even though he did not think the French proposal entirely satisfactory. While the Committee should now try to harmonize article 51 and article 12, in the light of the debates to which the proposal to delete article 51 had given rise, it was doubtless still too early to establish a text which would be likely to command the widest support.

47. Article 12 clearly stated the principle whereby a contract, in order to be valid, must expressly or implicitly fix the price. It was essential to reaffirm that principle in article 51. However, provision must be made for cases where the contract was not sufficiently clear on that point. Consequently, the purpose of article 51 would be to specify which criteria should be applicable for determining the price when it had not been stated or expressly or impliedly made provision for in the contract, provided, of course, that those criteria reflected the wish of the parties.

48. In conclusion, he wondered whether the solution might not be to insert in the first sentence of article 51, before the words "the buyer", the following sentence: "the parties are deemed to have impliedly agreed that . . .".

49. The CHAIRMAN said that he could not put to the vote an amendment which had not been submitted in writing.

50. Mr. SHORE (Canada) warmly supported the French proposal, as a successful attempt to harmonize legal systems with different approaches. Drafted in the manner proposed, article 51 would allow greater flexibility and would result in improved co-ordination of international trade; he believed that it deserved the Committee's closest attention.

51. Mr. DATE-BAH (Ghana) was not convinced that the French proposal would permit a satisfactory harmonization of articles 12 and 51. As the representative of Sweden had pointed out, the first phrase of the latter established that its provisions were subordinate to those of the former; article 51 was only applicable, therefore, in cases where a Contracting State had not ratified or accepted Part II of the Convention (Formation of the contract). Furthermore, the likelihood of contracts being concluded without any indication of price was very remote. The French proposal merely reiterated the principle set out in article 12, in a manner which might give rise to confusion; it was therefore superfluous. His delegation would favour keeping article 51 as originally

drafted, since Part II of the Convention should not be called in question.

52. Mr. BENNETT (Australia) said that he would support any acceptable compromise solution for article 51, but was not sure that the French proposal was satisfactory in that respect. Moreover, as a number of speakers had pointed out, the discussion had revealed a pronounced divergence of views between delegations which advocated a very restrictive approach and those which favoured greater flexibility; it might therefore be asked whether it was realistic to seek a generally acceptable formulation. It might be preferable to acknowledge that some States would not be able to accept Part II of the Convention.

53. The amendment proposed by France had the disadvantage of stipulating that the contract should provide guidelines for determining the price. In reality, many contracts contained no guidelines whatever for the price-fixing procedure. He believed that article 51 as originally drafted constituted a reasonable solution.

54. Mr. PLANTARD (France) wondered whether the English text was a faithful rendering of his amendment. Where the original spoke of "indications" for determining the price, the English spoke of "guidelines". The distinction was more than a question of nuance, in so far as indications could be tacit.

55. Mr. HONNOLD (United States of America) said that despite that clarification he could not agree to the French proposal, which would still leave the situation uncertain.

56. Mr. MANTILLA-MOLINA (Mexico) was regretfully unable to support the French proposal, which, in his opinion, was no clearer than the original text of article 51. Its reference to indications for determining the price appeared to relate to the time of the conclusion of the contract and to its actual or implicit content; it thus constituted a suggestion as to the manner in which the contract should be formulated. Article 51 provided for cases in which the question of price, having been omitted from the terms of the contract, was submitted to arbitration; the question was what criteria were to be applied in the arbitration process. In that respect, the text proposed by France could lead to confusion.

57. Mr. WAITITU (Kenya) did not find the French solution satisfactory. If article 51 was to be kept in the Convention, it would have to represent a compromise; the oral amendment submitted by Italy to the French proposal might be the answer.

58. Mr. LANDFERMANN (Federal Republic of Germany) believed that articles 12 and 51 could be reconciled; although its wording could be improved, the French proposal offered a satisfactory solution and was acceptable to his delegation.

59. Mr. SEVON (Finland) moved the adjournment of the debate on the article, in accordance with rule 24 of the rules of procedure. He proposed that an *ad hoc* working group, composed of the representatives of Ar-



gentina, France, Ghana, Pakistan, Sweden and the USSR, should be set up to prepare an acceptable proposal.

60. Mr. OSAH (Nigeria), Mr. HJERNER (Sweden) and Mr. BOGGIANO (Argentina) supported the proposals by the representative of Finland.

61. The CHAIRMAN said that if there were no objections, he would consider that the Committee wished to adopt the motion for adjournment and to approve the establishment of the proposed working group, to which the representatives of India, Italy and Turkey would also be added.

62. *It was so decided.*

#### *Article 52 (A/CONF.97/C.1/L.109, L.207)*

63. Mr. OLIVENCIA RUIZ (Spain) introduced the joint amendment by Argentina, Portugal and Spain (A/CONF.97/C.1/L.207). Its sole purpose was to render article 52 more explicit, since the existing text could be misunderstood. In establishing stricter and more specific criteria for the determination of price according to weight, it merely clarified the original and thus amounted to a drafting amendment. Its sponsors would not object to it being put to the vote or transmitted to the Drafting Committee.

64. Mr. KRISPIS (Greece) believed that the matter was one of substance. In the light of article 5, as the Committee had recognized in another context, an expression such as "unless otherwise agreed" was quite superfluous.

65. Mr. BENNETT (Australia) pointed out that in the English text the replacement of the word "fixed" by the word "stated", which was narrower in sense, would entail a change of substance; he would be unable to accept such a change.

66. Mr. MANTILLA-MOLINA (Mexico) fully supported the amendment, which was merely a drafting matter.

67. Mr. HONNOLD (United States of America) believed that the matter could be considered as one of drafting provided it was understood that the term "unless otherwise agreed" allowed for commercial usage and practices to be taken into account. Under no circumstances should the Drafting Committee alter that idea.

68. Mr. OLIVENCIA RUIZ (Spain), replying to a question by the CHAIRMAN, said he would prefer the joint proposal by Argentina, Portugal and Spain to be put to the vote. The amendment comprised not only the addition of a phrase, but also the deletion from the original text of the words "in case of doubt".

69. *The proposal was rejected by 22 votes to 10.*

70. Mr. SAMI (Iraq) introduced his delegation's proposal concerning article 52 (A/CONF.97/C.1/L.109). The general provisions of the draft Convention, and more particularly article 8, acknowledged the validity of usage. But usage varied according to the country and the goods involved. When the parties were aware of any usage and had agreed to it, the situation was clear, but there were situations where doubt could exist. The first part of the Iraqi amendment (A/CONF.97/C.1/L.109, paragraph 1) was designed to remove that doubt as far as the provisions of article 52 were concerned.

71. Mr. KRISPIS (Greece) supported the Iraqi proposal, which made the text clearer.

72. Mr. WAGNER (German Democratic Republic) considered the addition to article 52 proposed by Iraq to be superfluous.

73. Mr. SCHLECHTRIEM (Federal Republic of Germany) was unable to support the Iraqi proposal, which might lead to recognition of local usages which fell outside the scope of the Convention. Article 8, which dealt with the question of usage, was limited in scope.

74. Mr. ZIEGEL (Canada) shared that point of view. Article 52 only applied in cases of doubt. The court would have to consider all possible sources of interpretation, while abiding by article 8 and taking due account of usage. If usage did not clarify the situation, there was no point in mentioning it in article 52.

75. Mr. HONNOLD (United States of America) endorsed the remarks by the representative of Canada. Article 8 referred both to usage and to practices. The effect of the Iraqi proposal would be to exclude the latter by not mentioning them. There was no point in mentioning both those elements in article 52, and it would be inadvisable to mention only one.

76. Mr. SAMI (Iraq) explained that the second Iraqi amendment (A/CONF.97/C.1/L.109, paragraph 2) was designed to take account of the fact that certain goods lost or gained weight during transit—a matter which was not covered by the draft Convention. He called attention to an error which had crept into the French text of the proposal, where the words "*résultant des usages*" should read "*toléré par les usages*".

77. The CHAIRMAN observed that there was little support for the Iraqi proposal. He concluded that the Committee did not wish to adopt it.

78. *It was so decided.*

*The meeting rose at 6.05 p.m.*

## 25th meeting

Thursday, 27 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.25

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

### *Article 51 (continued)*

1. Mr. REISHOFER (Austria) stressed that the working group set up at the previous meeting to work out a compromise text taking into account the various amendments proposed to article 51 should bear in mind the close connection between that article and article 12. The *ad hoc* working group on article 12 had put forward a text (A/CONF.97/C.1/L.103) that would enable contracts of sale to be concluded in cases where the price had not been fixed or determined, but that proposal had been rejected by a small majority. He felt that decision was an unfortunate one in terms of the future prospects for acceptance of the Convention, and welcomed the opportunity to make a second effort to reconcile articles 51 and 12. The problem was exceedingly important, particularly for States intending to adhere to both Parts of the Convention, namely the Part concerning sales as well as the Part concerning formation of contracts.

2. Mr. DATE-BAH (Ghana) urged that no change should be made to article 12, and that the working group should deal simply with article 51. If article 12 was changed, some States might be unwilling to accept not only Part II of the Convention, but the Convention as a whole.

3. The CHAIRMAN did not think it was appropriate for the Committee to enter into a discussion of article 12 at that stage; the matter could be taken up again in plenary. The Austrian representative had been concerned that the working group on article 51 should not overlook the importance of the relation between that article and article 12. However, it was for the working group itself to decide on that matter, since it had received no specific terms of reference in that regard.

4. Mr. GHESTIN (France) emphasized that there should be no misunderstanding regarding the task of the working group. In endeavouring to harmonize the two provisions, the group should assume that article 51 was

to be brought into line with article 12 and not *vice versa*, since article 12 had already been adopted. There could be no question of changing the wording of article 12 to bring it into line with that of article 51.

5. The CHAIRMAN said that that statement would be noted.

### *Article 33 (continued) (A/CONF.97/C.1/L.214)*

6. Mr. FELTHAM (United Kingdom), introducing the joint proposal by the *ad hoc* working group (A/CONF.97/C.1/L.214) said the object of the proposal was to make clearer the distinction between the need for goods to conform to the express obligations of a contract, and the need for goods to conform to obligations arising out of surrounding circumstances, such as, for example, the indication by the seller of a particular item as a sample or model. With that aim in view, the group had agreed that the second sentence of paragraph 1 of the existing text should be modified to bring it into line with the language used in the first sentence. The only difficulty had been that the proposed wording had proved difficult to render appropriately in Russian.

7. Mr. OLIVENCIA RUIZ (Spain) said that the introductory clause of the new paragraph 2 caused difficulties in the Spanish version also, chiefly because of the double negative it contained.

8. Mr. HERBER (Federal Republic of Germany) did not think the word "require" in the proposed new paragraph 2 of article 33 was appropriate. He suggested that the word "provide" would be preferable.

9. Mr. ZIEGEL (Canada) wondered whether the proviso "where the contract does not require otherwise" was necessary at all, since article 5 of the Convention already made clear that everything in Part III might be varied or excluded by agreement between the parties. It would be confusing if later articles of the Convention introduced qualifications and exceptions, since that might imply that some provisions were not subject to exclusion and variation by such agreement between the parties. Apart from that consideration, the proviso was ambiguous. It could be taken as implying either that the contract might derogate from the presumptions of paragraph 2 or as implying that the parties might have agreed on a higher standard than that put forward in paragraph 2.

10. He proposed that the introductory clause of paragraph 2 should be deleted.

11. Mr. FELTHAM (United Kingdom) replied that the words "where the contract does not require otherwise" could be interpreted in either sense. The parties could be taken to be agreeing on either a higher or a lower stand-

ard. He appreciated the point raised by the Canadian representative; in provisions relating to conformity there might be some merit in making clear that those provisions were subject to contrary agreement. It was for that reason that the working group had kept fairly closely to the original text. He himself would have preferred the word "provide" to the word "require", but the group had decided on "require" as a compromise solution.

12. Mr. INAAMULLAH (Pakistan) shared the Canadian view. The phrase "where the contract does not require otherwise" was different in substance from the original phrase "except where otherwise agreed". The change was not one of drafting.

13. The CHAIRMAN put to the vote the Canadian oral amendment to delete the words "where the contract does not require otherwise" in paragraph 2 in the joint proposal (A/CONF.97/C.1/L.214).

14. *The proposal was rejected.*

15. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that his delegation, like several others, had had misgivings about the use in the joint proposal (A/CONF.97/C.1/L.214) of the verb "require" in the crucial proviso of paragraph 2. He suggested that that verb should be replaced by the much more appropriate "provide". The opening words of the paragraph would thus read: "Except where the contract does not provide otherwise . . .". His remark applied to both the English and the Russian texts.

16. Mr. GORBANOV (Bulgaria) noted that in the French version the term used was "*prévoit*", which corresponded exactly to the suggestion made by the previous speaker.

17. Mr. FELTHAM (United Kingdom) said it would be helpful if the Committee took a vote on the USSR suggestion. A decision would help to avoid a very long discussion at a later stage in the Drafting Committee. His delegation regretted that it had had to abstain when the Committee took a decision on the text of the introductory words of paragraph 2 as contained in the joint proposal. He would gladly support the USSR representative's suggestion.

18. Mr. ZIEGEL (Canada) said that his delegation had been in favour of deleting the initial proviso of the new paragraph 2 but had no objection to the remainder of the proposal.

19. Mr. KHOO (Singapore) said that, although a member of the *ad hoc* working group, he had been unable to support the introductory words in paragraph 2 proposed by the group because the discussion had shown that there were strong arguments against that wording. In the USSR suggestion, the use of the word "provide" seemed to imply that the matters in question must be provided for in writing in the contract. That being the case, he was concerned at the fact that the suggested wording would leave outside its scope two situations which frequently occurred in practice. The first was the case in which usage provided otherwise than specified in

the various subparagraphs of article 33 (1). The second case was where an oral agreement between the parties—legally valid under the draft Convention—had a similar effect. Since the amendment by the USSR representative seemed much too narrow, he urged that the formula in the original draft "except where otherwise agreed" should be kept.

20. Mr. OLIVENCIA RUIZ (Spain) said that he wished to raise a point of procedure. It was impossible to discuss a proposal on the wording of a provision without having a written text available in all official languages. He urged the Committee to bring to an end a pointless multilingual discussion and request the working group to prepare two or more alternative forms of the words, to be submitted to the Committee in writing in all official languages.

21. After a procedural discussion in which Mr. KHOO LEANG HUAT (Singapore), Mr. DATE-BAH (Ghana), Mr. FARNSWORTH (United States of America) and Mr. KOPAC (Czechoslovakia) took part, the CHAIRMAN put the joint proposal (A/CONF.97/C.1/L.214) to the vote.

22. *There were 10 votes in favour and 10 against.*

23. *The proposal was not adopted.*

24. After a discussion as to the exact meaning and bearing of the vote, a discussion in which Mr. ZIEGEL (Canada), Mr. INAAMULLAH (Pakistan), Mr. FELTHAM (United Kingdom), Mr. ROGNLIEN (Norway), Mr. DATE-BAH (Ghana) and Mr. LEBEDEV (Union of Soviet Socialist Republics) took part, the CHAIRMAN explained that the vote had the effect of retaining the text of article 33 in its original form, since the reformulation in three paragraphs put forward in the joint proposal had been turned down.

25. The only question outstanding was that of the opening proviso of the second sentence of article 33 (1). The rewording in the joint proposal, "Where the contract does not require otherwise", had been rejected. The original language "Except where otherwise agreed" would thus appear in principle to have been retained. The USSR delegation, however, had suggested the use of the term "provide", which would be a halfway house between the original term "agreed" and the language used in the joint proposal. He suggested that the Drafting Committee should be requested to find the best form of words for that proviso in all the official languages.

26. *It was so agreed.*

#### *Article 53 (A/CONF.97/C.1/L.182)*

27. Mr. KLINGSPORN (Federal Republic of Germany), introducing his delegation's amendment (A/CONF.97/C.1/L.182), said that under paragraph 1 (a) of article 53 in the draft, the buyer was required to pay the price to the seller at the seller's place of business. In many countries, national law conferred jurisdiction upon the courts of place of performance of obligation. A claim for payment of price could, under that system, be

brought before the courts of the country where the obligation to pay that price had to be performed. Since in principle the place of performance was the locality where the debtor had his place of business, it followed that the proper forum was the court of that place of business.

28. By specifying that the buyer must pay the price at the seller's place of business, paragraph 1 (a) of draft article 53 deviated from that principle since the seller's place of business could be regarded as the place of performance. In his delegation's view, the result would be unjustly to the disadvantage of the buyer. His delegation was of the firm opinion that proceedings for payment must always be brought in at the courts of the debtor's place of business.

29. Since article 53 did not cover the point, his delegation proposed to add a new paragraph 3 embodying an explicit rule to the effect that jurisdiction of the courts at the seller's place of business could not be derived from the provision of paragraph 1 (a) of article 53 whereby payment had to be made at the seller's place of business.

30. Mr. BOGGIANO (Argentina) said that, without prejudice to his delegation's position on the substance of the rule proposed, he wished to express his misgivings at what seemed to him a sweeping proposal on a subject which was alien to the subject matter of the draft Convention and which might therefore well be outside the terms of reference of the Conference.

31. The proposed rule would affect the whole system of rules of private international law on the subject of jurisdiction. In particular, it would affect the autonomy of the will of the parties regarding choice of forum. It would, moreover, impinge on important rules of jurisdiction in the national legislation of individual countries.

32. Mr. FOKKEMA (Netherlands) supported the proposal of the Federal Republic of Germany. For the reasons already given, he strongly favoured a proposal which would have the effect of protecting the buyer from an unjustified result of the existing terms of article 53.

33. Mr. KUCHIBHOTLA (India) opposed the proposal. Rules of jurisdiction did not come under the purview of the draft Convention under discussion. None of the articles of the draft dealt with jurisdiction. Furthermore, the proposal by the Federal Republic of Germany could have the undesirable effect of impinging upon national rules on jurisdiction.

34. The CHAIRMAN said that as the majority appeared to oppose the proposal by the Federal Republic of Germany, he would, if there were no objection, consider the proposal rejected.

35. *It was so agreed.*

*The meeting was suspended at 11.20 a.m. and resumed at 11.40 a.m.*

#### Article 54 (1) (A/CONF.97/C.1/L.189)

36. Mrs. SOARES (Portugal), introducing the joint proposal by Argentina, Spain and Portugal

(A/CONF.97/C.1/L.189), said that the proposed opening proviso in paragraph 1 corresponded to the opening proviso "in article 53 (1) of the draft Convention". It was necessary, for the sake of symmetry and to avoid difficulties of interpretation.

37. The proposed change in the last sentence of the paragraph was intended to bring out better the meaning of the rule embodied in the last sentence which was an expression of the *exceptio non adimpleti contractus*. That wording was also better suited to the non-imperative character of the rule. In the present text the use of the word "condition", which had a precise legal connotation, could be misleading.

38. Mr. VINDING KRUSE (Denmark) said that his delegation supported both amendments but thought that the wording should be revised by the Drafting Committee.

39. Mr. KRISPIS (Greece) said that the first amendment seemed superfluous because the matter was already covered by articles 5 and 8. He supported the second amendment, which he considered an improvement on the existing wording.

40. Mr. GHESTIN (France) said that the French delegation too could approve both proposals. The first brought the text of article 54 into line with that of article 53 and the second clarified the meaning of the article.

41. Mr. BENNETT (Australia) also supported both proposals, the first of which made the text consistent with that of article 53. He was not sure whether or not such introductory words were necessary, but if they existed, they should exist in both articles. The proposed wording of the last sentence of paragraph 1 gave a better definition of what was involved in the provision than the existing wording, although he would like clarification of the meaning of the words "in this case".

42. Mr. ROGNLIEN (Norway) said that his delegation would not support the first amendment, which it considered unnecessary. It also preferred the existing text of the last sentence of paragraph 1 because the handing over of the goods and payment should be simultaneous and concurrent. It was not correct to state that the seller could just sit and await payment by the buyer.

43. Mr. ZIEGEL (Canada) agreed with the Greek representative that the point made in the first amendment had already been made in other articles. His delegation was opposed to the second amendment because it overlooked the possibility that the seller might have agreed to give the buyer credit. He would also like clarification of the phrase "in this case".

44. The CHAIRMAN said that he took it that if the first amendment was adopted, the Committee would wish to refer it to the Drafting Committee.

45. *It was so agreed.*

46. Mr. HJERNER (Sweden) welcomed the attempt in the first amendment to bring the wording into line with that of article 53 but considered the word "bound"

inappropriate to a situation where the buyer had been granted credit. His delegation also had reservations on the reference to a "specific time", which need not necessarily form part of a credit agreement. The second amendment should be studied in conjunction with article 62, paragraphs 1 and 2.

47. The CHAIRMAN invited the Committee to vote on the first amendment in document A/CONF.97/C.1/L.189.

48. *The amendment was adopted.*

49. The CHAIRMAN asked the sponsors if they agreed that the second amendment should be considered in conjunction with article 62.

50. Mrs. SOARES (Portugal) confirmed that the sponsors agreed to postpone consideration of the second part of their proposal.

#### *Article 55 (A/CONF.97/C.1/L.206)*

##### *New article 55 bis (A/CONF.97/C.1/L.206)*

51. Mr. OLIVENCIA RUIZ (Spain), introducing the proposal by the Argentine, Portuguese and Spanish delegations (A/CONF.97/C.1/L.206), said that the proposed new article covered matters which seemed to have been omitted from the draft Convention. Provisions concerning payment no doubt raised fewer problems than those relating to the obligation to deliver. Nevertheless it seemed desirable to include some traditional rules concerning the buyer's obligations in the Convention as had been done in the case of the seller. The provisions in question were generally accepted in international trade, and the sponsors proposed that they should be inserted either after article 55 or at some other place the Committee might consider more appropriate.

52. Mr. MASKOW (German Democratic Republic) remarked that the Convention was designed to solve practical problems rather than to attain full symmetry between buyer and seller. Most of the problems referred to in the proposals were already solved in the Convention, notably in article 55. The remainder were not really practical problems. A seller was normally interested in being paid as soon as possible and it seemed unlikely that a buyer would be unwilling to withdraw his payment.

53. Mr. HONNOLD (United States of America) expressed doubts as to the need for the proposed new article in view of the opening sentence of article 54.

54. The CHAIRMAN said that, in view of the lack of support for the proposed new article, he would, if there was no objection, consider the proposal rejected.

55. *It was so agreed.*

56. Mr. KRISPIS (Greece) said that he had supported the proposal because of its symmetry with article 47, which dealt with partial performance but not with payment of part of the price.

#### *New article 55 ter (A/CONF.97/C.1/L.206)*

57. Mr. OLIVENCIA RUIZ (Spain) explained that the sponsors had not been inspired by a desire for symmetry but by a concern that the Convention as a whole should be homogeneous. The purpose was to present as complete as possible a set of regulations on contracts of sales. Similar problems were presented by early delivery and early payment but whereas the former might raise problems of storage, the latter might equally well raise problems of currency fluctuations. The seller should thus be given the right to accept or refuse payment before the appointed date. In view of the opposition to the proposed article 55 bis, the proposed article 55 ter would probably not meet with the approval of the Committee. However, he wished reference to the question to appear in the summary record so that it would be clear that the matters had not been overlooked but that reference to them had been considered unnecessary.

58. Mr. HJERNER (Sweden) said that the point was a practical one and deserved consideration. His delegation could support it provided that the word "refuse" meant immediate refusal. A seller might wish to refuse payment before the appointed date in the light of currency fluctuations.

59. Mr. MASKOW (German Democratic Republic) asked if the proposal meant that if premature payment had caused an actual loss to the seller, the latter was not entitled to claim damages.

60. Mr. OLIVENCIA RUIZ (Spain) said that, speaking for his own delegation, he agreed with the example given by the Swedish representative and also with his comment that refusal to accept payment should be immediate. If the seller agreed to the buyer paying the price before the appointed date, he would have no claim for damages or for further payment.

61. Mr. KOPAČ (Czechoslovakia) said that he had doubts about the desirability of adopting the proposed article 55 (ter) in view of the problem of its relationship with article 48, paragraph 1. If the buyer accepted delivery before the appointed date, was the seller obliged to take the price, whatever the exchange rate of the money concerned?

62. Mr. ROGNLIEN (Norway) observed that on the question of damages, reference should be made to article 57, paragraph 2. If the seller refused to accept payment from the buyer there could be no claim for damages. If he accepted, it would depend upon the terms of acceptance. In theory, he might have a claim for damages on the grounds of breach of contract by the buyer in paying before the appointed date, but it would be unlikely to succeed in practice.

63. Mr. KRISPIS (Greece) said that for reasons of interpretation, it was important to establish symmetry in the Convention in dealing with the respective obligations of seller and buyer. Refusal by the seller to accept premature payment might constitute an abuse of right but that aspect fell outside the scope of the draft Convention. He

supported the joint proposal with the same qualification as the Swedish representative and would further suggest that the opening phrase should be modified to read "If the buyer likes to pay the price".

64. The joint proposal for a new article 55 (*ter*) (A/CONF.97/C.1/L.206) was rejected by 21 votes to 20.

#### Article 56

64a. Article 56 was adopted.

#### Article 57

64b. Article 57 was adopted.

#### Article 58

64c. Article 58 was adopted.

#### Article 59

64d. Article 59 was adopted.

#### Article 60 (A/CONF.97/C.1/L.185 and L.209)

65. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.185), said that the basic principle in article 60(2) was that the seller retained the right of avoidance without time-limit so long as the price remained unpaid. After the buyer had made payment, the situation rightly changed. The existing text of paragraph 2(a) was objectionable because the term "late performance" did not distinguish between paying the price and taking delivery. The text was open to two interpretations: one was that each delay was to be treated separately and independently of other aspects of performance. In that case, subsequent to the receipt of late payment, the seller could not avoid the contract on that ground in conjunction with tardiness in taking delivery. The seller would have to consider as a separate issue whether the buyer's failure to take delivery amounted to a fundamental breach of contract under paragraph 1(a) or (b) of the article, and hence he retained the right of avoidance. The other interpretation was that the seller's right to avoid the contract was kept open until the buyer had completed performance in all respects both as regards payment and taking delivery. In such a case, since both payment and taking delivery would be involved, the right to avoid would not be subject to a time-limit before full performance had been completed. It would be possible to avoid the contract on the separate ground of the late receipt of payment as long as the buyer had not taken delivery.

66. The purpose of the Norwegian amendment was partly to limit in time the right of the seller to avoid the contract after the buyer had paid the price but had not

taken delivery and partly to clarify the text. The seller would still have recourse to other remedies, such as damages, or under the provisions of article 76 or 77. The Norwegian proposal would constitute a limitation in time of the *Nachfrist* provision in paragraph 1(b) but did not run counter to it. If the Committee preferred the former interpretation of paragraph 2, it should still consider the desirability of clarifying the text in that sense.

67. Mr. ADAL (Turkey), introducing his delegation's amendment (A/CONF.97/C.1/L.209), said that its intention was to clarify the text and co-ordinate it with paragraph 2 of article 45. In particular, it omitted from paragraph 2(b) the reference to "a reasonable time", which was liable to give rise to disputes.

68. Mr. HERBER (Federal Republic of Germany) agreed that the existing text of paragraph 2 was not particularly clear but thought that the proposed amendment was even less so. He also had a substantive objection to the Norwegian amendment: the right of the seller to avoid contract should not be automatically excluded in cases where the buyer had been late in paying the price and had not yet taken delivery of the goods. In cases of bulky material like coal occupying storage space which was required by a fixed date for another purpose, failure to take delivery might well constitute a fundamental breach of contract.

69. Mr. FELTHAM (United Kingdom) opposed the Norwegian amendments. The case mentioned by the representative of the Federal Republic of Germany should qualify for *Nachfrist* notice under paragraph 1(b), but the effect of the Norwegian proposal would be to prohibit that because no time limit could be imposed for taking delivery, provided the buyer had paid the price. As he understood the present text, failure on the buyer's part to take delivery in due time would enable the seller to avail himself of an advantageous offer for the goods concerned without obliging him to account to the buyer as he was required to do under article 77.

70. Mr. ZIEGEL (Canada) said that article 60 might have important domestic consequences in common law systems. If, as he believed, it would permit the seller to avoid the contract after delivery of the goods on the grounds that the buyer had committed a fundamental breach of contract by, for example, failure to pay the price, the title to the goods would automatically revert to the seller under common law although under the terms of the contract he had purported to pass it to the buyer. He was aware that the Convention stated explicitly that it did not attempt to regulate matters of title. However, the attention of common law States proposing to adopt the Convention should be drawn to the possible need to adopt complementary national legislation.

*The meeting rose at 1.05 p.m.*



## 26th meeting

Thursday, 27 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.26

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

*Article 60 (continued) (A/CONF.97/C.1/L.185, L.209)*

1. Mr. ROGNLIEN (Norway) said it was his impression, in the light of the exchange of views at the previous meeting, that most representatives were not in favour of the interpretation of article 60 (2) proposed by his delegation (A/CONF.97/C.1/L.185). He was ready to defer to the majority, but he considered that the existing text of paragraph 2 should be clarified, as its ambiguous wording would enable the seller to speculate on possible price fluctuations. His delegation had therefore prepared a new text, which it would like to submit to the Committee at a later stage. The text could not be sent directly to the Drafting Committee because it took account of only one of the two possible interpretations of paragraph 2; such matters were not for the Drafting Committee to decide.
2. The CHAIRMAN proposed the establishment of a working group to consider the new text prepared by Norway consisting of representatives of the Federal Republic of Germany, Norway, Turkey and the United Kingdom.
3. *It was so decided.*

*Article 61 (A/CONF.97/C.1/L.110, L.197, L.218)*

4. Mr. POPESCU (Romania) supported the Pakistan proposal that article 61 should be deleted (A/CONF.97/C.1/L.197). The article gave the seller the right to make his own specification in place of the buyer's, thereby giving him a privilege which was not offset by any recognized right of the buyer. That would be going too far and might even be harmful.
5. Mr. FELTHAM (United Kingdom) was also in favour of deleting article 61. It had emerged from consultations with commercial organizations in his country that the principle behind the article was not in line with international trading practice. Its provisions went too far and were unrealistic. If the buyer failed to supply the desired specification, there would be no point in the seller manufacturing goods without it. In any case the seller

was adequately protected by the provisions relating to fundamental breach.

6. Mr. LI Chih-min (China) supported the Pakistan proposal. The specification referred to in article 61 was in fact one of the characteristics that had to be defined in the contract of sale, of which it was an integral part. Article 61 was therefore superfluous.

7. Mr. HJERNER (Sweden) wanted article 61 to be kept as it stood. All the information he had been able to gather led him to draw the opposite conclusion to the United Kingdom representative. The provisions concerning the seller's right to declare the contract avoided or claim damages did not give him enough protection, and the remedies open to him might very well not be feasible in practice. A buyer who equivocated and failed to provide specifications on time might very well be doing so with the aim of escaping from the contract. The seller must be able to act fast. A court might be able to intervene in some cases, but was likely to take too long.

8. On the other hand, the right of the buyer was protected under article 61, since it specified that if the seller made the specification, he had to take account of any requirement of the buyer that might be known to him and to inform the buyer of the details of the specification. If the buyer failed to follow up the seller's communication, it could be thought that he was not acting in good faith.

9. Mr. WAGNER (German Democratic Republic) considered that article 61 was extremely useful and should be kept. In cases in which a delay due to the buyer was liable to cause harm to the seller, it enabled the latter to act, but it also protected the rights of the buyer, who would not have to pay damages if the seller availed himself of the article's provisions.

10. Mr. REISHOFER (Austria) shared the opinions of the representatives of Sweden and the German Democratic Republic. Article 61 had a useful role to play and should be kept.

11. Mr. BENNETT (Australia) was for keeping article 61, which was reasonable and balanced, since it gave the seller rights whilst protecting the interests of the buyer; the sole object of the article was to prevent the buyer from resorting to delaying tactics.

12. Mr. KRISPIS (Greece) was also in favour of keeping article 61, since it gave the seller strictly determined rights. If the seller exercised the rights referred to in paragraph 1, he had to inform the buyer, who still had an opportunity to provide his own specification. If the buyer did not reply, it could be taken that he had given his agreement. Finally, article 61 would help to safeguard



the contract and avoid such procedures as a declaration of avoidance or a claim for damages by the seller.

13. Mr. HONNOLD (United States of America) agreed with the proposal by Pakistan to delete the article, which was based on ULIS but had not been examined in depth by UNCITRAL. First, the buyer might have good reason for not being able to provide a specification and might be acting in good faith. Secondly, goods produced by the seller in accordance with a specification made by himself might well be unusable by anybody and thus represent a considerable waste. Finally, it was difficult to reconcile article 61 in its present wording with the provisions of article 73 on the mitigation of damages.

14. Mr. KIM (Republic of Korea) thought that it would be better to delete article 61. Specification was an important element of the contract, as was evident from article 33 (1) (a) on conformity of the goods.

15. Mr. VINDING KRUSE (Denmark) considered that as a whole, article 61 was satisfactory and well balanced and should not be deleted. If it were, the buyer would have an easy way out of his obligations. If the buyer wished to be released from the contract, he should inform the seller, who would be able to try to cut his losses.

16. The CHAIRMAN put the Pakistan proposal (A/CONF.97/C.1/L.197) to the vote.

17. *The proposal by Pakistan was rejected by 22 votes to 9.*

18. Mr. SAMI (Iraq) said that since article 61 was to be kept, the seller's right to declare the contract avoided, which was stated in article 60, should be referred to in paragraph 1; he therefore proposed adding, after the words "any other rights he may have", the words "declare the contract void or" (A/CONF.97/C.1/L.110).

19. The CHAIRMAN noted that the words "without prejudice to any other rights he may have" in article 61 (1) included the right to declare the contract avoided if the conditions for avoidance obtained.

20. Mr. LANDFERMANN (Federal Republic of Germany) supported the Iraqi proposal (A/CONF.97/C.1/L.110). The Chairman had been right in saying that the words "without prejudice to any other rights he may have" applied to the right to declare the contract avoided. But as he had also said, the conditions for avoidance of the contract had to be met. At the same time, it was nowhere stated that the buyer's failure to make specification constituted a fundamental breach and, in any case, the *Nachfrist* system did not apply to specifications. There was therefore good reason to state that where the buyer had not made a specification, the seller had the right to declare the contract avoided.

21. Mr. VINDING KRUSE (Denmark) felt that the Iraqi proposal was not necessary, since the right to declare the contract avoided was implicitly granted to the seller by the very wording of article 61. Moreover, the principle underlying the Convention as a whole was that avoidance of the contract should be exceptional. If it was

stated in article 61 that where the buyer did not make the specification, the seller was more or less automatically entitled to declare the contract avoided, failure to make specification would automatically become a fundamental breach by the buyer, whereas it could very often be of a minor nature. He therefore opposed the proposal by Iraq.

22. Mr. KRISPIS (Greece) noted that if article 61 had not been kept in the Convention and if the buyer did not make the specification, the seller would have had to decide himself whether the absence of specification entitled him to declare the contract avoided. It should be clearly understood that article 61 gave the seller a right, not an obligation. Acceptance of the Iraqi proposal would probably lead the seller to avoid the contract automatically where the buyer failed to make specification. It would be better to state that the buyer's failure to make specification came under the general provisions of article 60, i.e., it was linked to the buyer's right to declare the contract avoided.

23. Mr. REISHOFER (Austria) was against the proposal by Iraq since it would be too drastic in its effects. A failure on the part of the buyer to make specification was often of no great importance and should not automatically result in avoidance of contract.

24. Mr. DATE-BAH (Ghana) considered for the same reasons that the Iraqi proposal was dangerous: the slightest delay in the transmittal of the specification would be enough to entitle the seller to declare the contract avoided. He hoped that the representative of Iraq would withdraw his proposal.

25. Mr. ZIEGEL (Canada) was opposed to the Iraqi amendment for slightly different reasons. The principle applied throughout the Convention was to refrain from defining what type of breach constituted a fundamental breach; articles 45 and 60 merely gave the general framework within which buyer and seller could declare the contract avoided. If an explicit provision were to be inserted in article 61 whereby the buyer's failure to make specification was grounds for the seller to avoid the contract, it would be in conflict with the basic principle underlying the Convention and would pave the way for all kinds of exceptions to that principle.

26. Mr. SAMI (Iraq) said that he had hoped through his amendment to protect the seller in cases where, if the buyer failed to make specification, he was not able to do so himself. In such a case, was the seller still bound by the contract, how could he get out of it, was he solely entitled to claim damages? But since most of the members of the Committee were opposed to his proposal, he would withdraw it.

27. The CHAIRMAN, in the absence of the representative of Kenya, the sponsor of the proposals in document A/CONF.97/C.1/L.219, stated that the amendment to article 61 (1) concerned only the form of the English text and did not apply to the French. He therefore proposed that the Committee should adopt the amendment without referring it to the Drafting Committee.

28. *It was so decided.*

29. The CHAIRMAN stated that while the two amendments to article 61 (2) would not alter it radically, they would still affect its substance. He felt that the first amendment was unnecessary, as it was difficult to imagine that the seller would not, in fixing a reasonable time for the buyer to make a different specification, take "into account the nature and circumstances of the case". The Committee would also have to express its views on the second amendment, which would modify the second sentence in paragraph 2 by adding the phrase "within a reasonable time" after the words "if the buyer failed to do so".

30. Mr. DATE-BAH (Ghana) also considered that the first amendment to paragraph 2 was superfluous, since the idea was self-evident.

31. Mr. FELTHAM (United Kingdom) believed the second amendment to be justified, since article 61 did not determine the point in time at which the specification made by the seller would become binding on the buyer.

32. Mr. KRISPIS (Greece) was not opposed to the second amendment, but pointed out that the clarification it provided was already to be found in the article as drafted, according to which the seller must "fix a reasonable time within which the buyer may make a different specification". On the other hand, he firmly supported the first amendment, which further clarified the conditions under which the seller could make a specification himself.

33. Mr. BONNELL (Italy) was very hesitant about the first amendment. The second seemed undesirable, since the phrase "within a reasonable time" occurred frequently in the draft Convention and could lead to different interpretations. He would prefer article 61 (2) to remain unchanged.

34. Mr. KHOO (Singapore) supported the second amendment. In order that the second sentence in the paragraph should follow on logically from the first, however, the proposed insertion should be reworded to read "within the time so fixed".

35. Mr. LANDFERMANN (Federal Republic of Germany) was against the first amendment. The second seemed unnecessary; if it were adopted, however, it should be in the wording suggested by the representative of Singapore.

36. Mr. FELTHAM (United Kingdom) also supported the proposal by Singapore with regard to the wording of the second amendment.

37. Mr. KUCHIBHOTLA (India) was not in favour of the second amendment, which would contradict the provisions of article 59. The buyer should be able to fix the period of time and to benefit from a certain extension after receipt of the seller's communication.

38. *The first amendment proposed by Kenya to article 61 (2) was rejected.*

39. On a proposal by Mr. LEBEDEV (Union of Soviet

Socialist Republics), the second amendment, together with the proposal by Singapore concerning its wording, was referred to the Drafting Committee.

*The meeting was suspended at 4.15 p.m. and resumed at 4.40 p.m.*

#### Article 62 (A/CONF.97/C.1/L.187)

40. The CHAIRMAN invited the members of the Committee to consider the amendment to article 62 (1) submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.187).

41. Mr. KLINGSPORN (Federal Republic of Germany) said that according to article 62 (1), as originally drafted, a party might suspend the performance of his obligations only when, after the conclusion of the contract, there occurred a deterioration in the ability to perform or in the creditworthiness of the other party. During the UNCITRAL meetings, however, it had been decided that the article would be applicable if at the time of conclusion of the contract one party was unable to perform its obligations and the other party did not know. It therefore seemed advisable to amend the original text.

42. The CHAIRMAN noted that in the amendment the word "deterioration" had been replaced by the word "deficiency" and wondered whether that was appropriate. He suggested that the amendment should be referred to the Drafting Committee.

43. The matter covered by article 62, which would be familiar to all those who had taken part in the UNCITRAL Working Group, could be looked at in two ways: on the one hand, the deterioration in a party's ability to perform could occur after the conclusion of the contract; on the other hand, the deterioration could have existed before the conclusion of the contract but only have become known afterwards. The amendment proposed by the Federal Republic of Germany envisaged a case where one party was in such financial straits at the time of conclusion of the contract that performance of his obligations was objectively impossible but where that deterioration only became evident after conclusion of the contract.

44. Mr. FOKKEMA (Netherlands) supported the amendment, since it protected the interests of a party who, after the conclusion of the contract, discovered a deterioration in the other party's ability to perform.

45. Mr. KRISPIS (Greece) believed the proposal by the Federal Republic of Germany to be a useful one, but suggested that the phrase "after the conclusion of the contract" should be deleted, since the deterioration would have occurred before the conclusion of the contract.

46. Mr. BONELL (Italy) considered that the phrase in question should be kept, since it introduced an essential element of timing. He was, moreover, unable to support the amendment proposed by the Federal Republic of Germany, believing that each party had an opportunity,

and indeed a duty, to determine the situation of the other before concluding the contract. If a party considered that the contract could be concluded nevertheless, he should not be permitted to go back on that decision because of facts which he should have known. The amendment by the Federal Republic of Germany recalled article 73 of the Uniform Law on the International Sale of Goods (ULIS), but laid more stress on the discovery of deterioration after the conclusion of the contract.

47. Mr. ROGNLIEN (Norway) was in favour of the amendment (A/CONF.97/C.1/L.187), because it was often difficult in practice to determine just what was the financial situation of an individual or a company at the time of contracting. It was conceivable that the ability to perform or the creditworthiness of one party could—unknown to the other party—have already deteriorated before the conclusion of the contract. The amendment by the Federal Republic of Germany was more explicit than the UNCITRAL text.

48. Mr. BOGGIANO (Argentina) considered that if the security of contractual relationships was to be preserved, the situation should be made clear. The amendment submitted by the Federal Republic of Germany was a step in that direction.

49. Mr. TARKO (Austria) believed that the text submitted by the Federal Republic of Germany was clearer and more objective than the original draft.

50. Mr. FOKKEMA (Netherlands) noted that the amendment by the Federal Republic of Germany was in keeping with the spirit of article 73 of ULIS. It should be remembered that the party in default had nothing to gain by revealing the deterioration in his ability to perform or creditworthiness. The other party should certainly have taken steps to inform himself, but might have been deceived by false information.

51. Mr. HONNOLD (United States of America) observed that the amendment would actually involve a question of substance. The term "deterioration" implied a change in relation to a given point of reference, namely, the situation when the contract was concluded. Inability to perform the contract could, however, have been evident before the conclusion of the contract.

52. Mr. MASKOW (German Democratic Republic) said that as a general rule, a party whose ability to perform or whose creditworthiness had deteriorated would seek to conceal that state of affairs. It would be difficult for the other party to determine, before the conclusion of the contract, whether or not the first party was in a position to meet his obligations.

53. Mr. DATE-BAH (Ghana) considered that the words "it becomes apparent" in the amendment were vague. He therefore suggested that it should be referred to the Drafting Committee.

54. Mr. MANTILLA-MOLINA (Mexico) reserved his delegation's position concerning the amendment, the wording of which needed to be made clearer. A deterioration in the ability to perform might not become evident

before the conclusion of the contract. Furthermore, as the Netherlands representative had pointed out, a party who concluded a contract while aware that he could not meet the attendant obligations was committing a fraud. But how could it be proved that the other party had been unaware of the first party's situation at the time when the contract was concluded? Furthermore, a company of modest size which was expecting an advance of funds might well believe that it would be fully able to honour its obligations.

55. Mr. MICHIDA (Japan) believed that the amendment by the Federal Republic of Germany raised a question of substance. He drew the attention of members of the Committee to paragraphs 3, 4 and 5 of the commentary on article 62 (A/CONF.97/5), which gave examples of cases in which performance could be suspended: deterioration in one party's creditworthiness, change in general conditions, outbreak of war or imposition of an embargo.

56. Mr. BENNETT (Australia) supported the amendment proposed by the Federal Republic of Germany, because there was no reason to require a party to perform his obligations when it was clear that the other party would be unable to perform his. Nevertheless, the wording of the amendment was too vague: at what time did it become apparent that there was a serious deficiency in the ability of a party to perform, and to whose notice must that deficiency be brought?

57. Mr. GORBANOV (Bulgaria) said that the purpose of article 62 was to enable a party to suspend performance if, at the time of performing his obligations, he had serious grounds for believing that the other party would be unable to perform his. Article 63, which provided that a party might declare the contract avoided if it was clear that the other party would commit a breach, was based on the same principle. The introduction in the Convention of provisions such as those in article 62 of the UNCITRAL draft and those proposed by the Federal Republic of Germany would lead national courts and international arbitral bodies to apply the principle stated and to recognize that a party might suspend performance of his obligations if it was clear that the other party would not perform his.

58. Mr. ZIEGEL (Canada) agreed with the United States representative that replacing the word "deterioration" by the very different word "deficiency" would be a substantive change. If the word "deficiency" meant the diminution of a party's ability to perform, justifying the other party in suspending the performance of his obligations, his delegation could agree to the proposal by the Federal Republic of Germany.

59. He requested some explanation on paragraph 3 of article 62. From the Secretariat's commentary (A/CONF.97/5), it would appear that a party which suspended performance because the other party had not provided adequate assurance of his performance was entitled to claim damages for any loss suffered. He was

surprised at that interpretation, which was not justified by anything in article 62.

60. Mr. MICHIDA (Japan) explained that article 62 referred only to suspension of performance and in no way touched on questions of liability.

61. Mr. PLANTARD (France) thought that the proposal by the Federal Republic of Germany would considerably alter the spirit of article 62. In its present form, the article simply provided that if, after the conclusion of the contract, a party became uncreditworthy, the other party would be able to suspend performance of his obligations. A party which had concluded a contract without previously making sure of the other party's creditworthiness could not get out of his obligations, because he ought to have taken the necessary precautions. Under the terms of the proposal by the Federal Republic of Germany, the seller might conclude a contract without checking the buyer's creditworthiness and then, finding that the latter would be unable to perform his obligations, suspend the performance of his own obligations, in other words go back on his word. That would be very questionable from the point of view of the security of commercial transactions. His delegation was therefore unable to support the proposal by the Federal Republic of Germany.

62. The CHAIRMAN observed that the same rule applied the other way round: if a seller became uncreditworthy and could no longer deliver the goods as agreed, the buyer was released from his commitments.

63. Mr. PLANTARD (France) agreed, but stressed that each party was required to make sure of the other party's creditworthiness before concluding the contract.

64. Mr. VINDING KRUSE (Denmark) said he was in favour of the proposal by the Federal Republic of Germany, which concerned an important issue. In international trade, the partners were very often located at a great distance from each other. It would therefore be excusable if a party did not have any information about the creditworthiness of the other party, especially as it often had only a very short period of time in which to decide whether or not to conclude a contract. He noted that under article 62(3), a party must continue with performance if the other party provided adequate assurance of his performance, for example, if it provided a bank guarantee.

65. Mr. ROGNLIEN (Norway) supported the proposal by the Federal Republic of Germany for the same reasons as the Danish representative. It was also necessary to take into account the nature of the contract. Clearly, if it envisaged a complex transaction involving one party in credit arrangements, that party could be expected to take more precautions than if all that was at stake was a simple transaction for the sale of goods. But the Convention under consideration was aimed at promoting international trade. To require a party to make detailed inquiries about the other party's financial situation would undoubtedly run counter to that objective.

66. Mr. MANTILLA-MOLINA (Mexico) was against the proposal by the Federal Republic of Germany, which seemed to him to be contrary to the Convention. Article 62 as it stood referred to an act subsequent to the conclusion of the contract which brought about a change in the situation of the parties. The proposal by the Federal Republic of Germany sought to widen its scope considerably. A party would be able to suspend performance of the contract, i.e. in practice avoid it, if, after the conclusion of the contract, it realized that it had from the beginning been mistaken about the creditworthiness of the other party.

67. The CHAIRMAN asked the representative of the Federal Republic of Germany if he wished to maintain his amendment in its original form.

68. Mr. KLINGSPORN (Federal Republic of Germany) said that he did wish to maintain the wording of his proposal. He gathered that the United States representative considered the word "deficiency" preferable to the word "deterioration". However, he would have no objection to the Drafting Committee trying to improve his text, particularly in the languages other than those in which it had been submitted.

69. The CHAIRMAN put to the vote the amendment to article 62(1) submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.187).

70. *The amendment by the Federal Republic of Germany was adopted by 18 votes to 15.*

71. *Paragraph 2 of article 62 was adopted without change.*

72. The CHAIRMAN invited the Committee to consider the amendment to paragraph 3 of article 62 submitted by the Federal Republic of Germany (A/CONF.97/C.1/L.187). He drew attention to a mistake in the French text, where the opening words of the second part should read "*Modifier comme suit le paragraphe 3*", not "*le paragraphe 2*".

73. Mr. KLINGSPORN (Federal Republic of Germany) said that his amendment, which concerned a minor point, was intended to spell out the adequate assurance of performance referred to in that paragraph. The word "assurance" seemed too vague and might give rise to differing interpretations. It would therefore be better to give examples. The working group had, moreover, already considered inserting the words which appeared in the amendment.

74. Mr. HJERNER (Sweden) did not agree that the point at issue was a minor one. It was not without reason that the present text gave no examples. The question had already been considered by the working group, and one of the earlier drafts had, in fact, included examples, but in the end it had been decided to drop them. By placing the emphasis on a guarantee or a documentary credit, the proposal by the Federal Republic of Germany tended to present those methods, which ought to be exceptional, as a normal means of providing adequate assurance of per-

formance. Actually the parties very often confined themselves, in practice, to explaining their circumstances.

75. Furthermore, it should be noted that the cost of providing a guarantee or a documentary credit might represent a substantial share of the profit which a party had hoped to derive from the contract. He was therefore in favour of keeping to the existing text, which was less restrictive than the proposal by the Federal Republic of Germany.

76. Mr. FELTHAM (United Kingdom) agreed with the Swedish representative's arguments. In some legal systems, the fact that that provision contained an enumeration moving from the particular to the general was not without effect on its interpretation.

77. Mr. BONELL (Italy) considered that the amendment by the Federal Republic of Germany was too favourable to the economically stronger party, which could, on the basis of a mere impression of the other party's financial situation, compel that party to provide

adequate assurance of his performance, which might involve him in considerable expense. His delegation was therefore unable to support the proposal.

78. Mr. ZIEGEL (Canada) was also against the proposal by the Federal Republic of Germany. He was not quite clear how the word "guarantee" was supposed to be interpreted. Was it a purely financial guarantee or was it a guarantee of the quality of the goods? Also, although it might be appropriate to request a buyer in financial difficulties to provide a documentary credit, the same would not be true when it was the seller who was unable to perform his obligations.

79. The CHAIRMAN, noting that the majority of members did not seem to be in favour of the proposal by the Federal Republic of Germany, said that if there were no objections, he would take it that the proposal was rejected.

80. *It was so decided.*

*The meeting rose at 6 p.m.*

## 27th meeting

Friday, 28 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.27

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 54 (1) (continued) (A/CONF.97/C.1/L.189)*

1. Mrs. SOARES (Portugal), introducing the amendment proposed by Argentina, Portugal and Spain to the last sentence of paragraph 1 of article 54 (A/CONF.97/C.1/L.189), consideration of which had been deferred from the 25th meeting (A/CONF.97/C.1/SR.25), said that it was a drafting amendment to reformulate the last sentence in which the use of the word "condition", which had a precise legal meaning, was misleading.

2. Mr. ROGNLIEN (Norway) considered that the amendment failed to make clear the important point that the handing over of the goods and the payment should be concurrent.

3. Mr. MINAMI (Japan) concurred.

4. *The amendment by Argentina, Portugal and Spain to the last sentence of paragraph 1 (A/CONF.97/C.1/L.189) was rejected by 17 votes to 7.*

*New article 62 (bis) (A/CONF.97/C.1/L.224)*

5. Mr. ZIEGEL (Canada), introducing the joint proposal by Australia and Canada for a new article 62 (bis), said that it dealt with a practical problem to which article 62 did not provide a definite solution. It should be made clear that if a party did not receive adequate assurance of the other party's ability to perform he was entitled to avoid the contract and not merely suspend performance. If, for example, a buyer heard rumours that the seller from whom he had ordered equipment for a hydro-electric installation, might be unable to build the items concerned and did not receive any assurance from the latter, suspension of performance would merely delay the entire project still further. Similarly, a seller who had taken on special staff and entered into subcontracts to build a particular piece of equipment would not have his problem solved by suspension if he received no adequate assurance from the buyer. He must be able to take a definite decision with regard to the continued employment of staff and to the subcontracts. The solution in the joint proposal was to be found in the domestic legislation of various countries. The cases with which it was con-

cerned were perhaps covered by the commentary on article 63 (A/CONF.97/5, page 164) or by example 73B (*ibid.*, page 191), but the matter should perhaps be expressly dealt with.

6. Mr. BENNETT (Australia) explained that his delegation supported the general idea of suspension of contract set out in article 62, although it was not a concept known to Australian law. However, without the joint proposal, the text would prejudice the rights of the non-defaulting party by leaving him in a position of intolerable uncertainty.

7. Mr. SEVON (Finland) said that the proposed new article appeared to enable the party requiring assurance of performance to avoid the contract even if the other party asserted that there were no grounds for questioning his ability to perform. He could not therefore support the proposal as drafted.

8. Mr. FOKKEMA (Netherlands) disagreed with the Finnish representative's interpretation of the proposed new article. Article 62 stated that there must be good grounds for concluding that the other party would not perform his obligations. In the last analysis, that would be for the courts to decide and if the judgement was that no good grounds existed the article would not apply. He had held the opinion that the cases cited by the Canadian representative would fall under article 63. If, however, there was any doubt on the matter, he would support the joint proposal.

9. Mrs. FERRARO (Italy) opposed the joint proposal. The Convention established the principle that avoidance of contract could follow a fundamental breach but the exact circumstances should not be specifically defined in each article. That should be left to the courts to decide.

10. Mr. INAAMULLAH (Pakistan) said that the present text of article 62 placed too much confidence on the ability of one party to judge the other's capacity to perform. No objective test was proposed. The joint proposal was on the same lines and he could not support it.

11. Mr. HJERNER (Sweden) also opposed the joint proposal. The UNCITRAL Working Group had considered the cases mentioned by the Canadian representative but had reached the conclusion that, as a matter of principle, avoidance of contract should stem only from fundamental breach and anticipatory avoidance on the grounds of anticipatory fundamental breach only in the clear case dealt with under article 63.

12. The CHAIRMAN said that the joint proposal did not seem to command wide support. He took it that the Committee did not wish to adopt it.

13. *It was so agreed.*

#### Article 63

13a. *Article 63 was adopted.*

#### Article 64

13b. *Article 64 was adopted.*

Article 65 (A/CONF.97/C.1/L.191/Rev.1, L.210, L.190, L.186, L.223, L.208, L.217)

#### Paragraph 1

14. Mr. ROGNLIEN (Norway), introducing his delegation's amendment to paragraph 1 (A/CONF.97/C.1/L.191/Rev.1), said that the amendment in the first line was merely a matter of drafting. With regard to the amendment in the third line—the substitution of the words "of a kind which" for the word "that"—his delegation considered that it might be doubtful whether a party could foresee all the details of an impediment but he should be able to foresee the kind of impediment likely to arise. For example, he could reasonably be expected to foresee difficulties arising from general climatic conditions but he could not anticipate the exact time and place of a particular thunderstorm.

15. The CHAIRMAN suggested that the drafting amendment in the first line of paragraph 1 should be sent to the Drafting Committee.

16. *It was so agreed.*

17. Mr. HERBER (Federal Republic of Germany) said that he could not support the Norwegian amendment to the third line of paragraph 1. The proposed formulation was too general. Under the present well-balanced text which had been adopted in UNCITRAL there must have been a concrete impediment the party could not have foreseen. It should be left to the courts to consider whether a particular concrete impediment should have been foreseeable or not.

18. Mr. ROGNLIEN (Norway) said he appreciated the view of the representative of the Federal Republic of Germany that the application of paragraph 1 should be left to the courts.

19. The CHAIRMAN said that he took it the Committee did not wish to adopt the Norwegian amendment to the third line of paragraph 1.

20. *It was so agreed.*

#### Paragraph 2

21. Mr. ADAL (Turkey), introducing his delegation's proposal to delete paragraph 2 (A/CONF.97/C.1/L.210), said it would be dangerous to accept failure by a third person as an exemption since it would provide a ready excuse for parties unwilling to fulfil their obligations. For example, a seller behindhand with his deliveries could assert that a company which was in reality wholly under his control constituted a third person; it would be difficult for a buyer in a foreign country to prove otherwise. On the other hand, a buyer might excuse late payment on the grounds that those who owed him money were also late with their payments. In his delegation's view, paragraph 1 was adequate to cover unexpected circumstances, including failure by a third person.

22. The CHAIRMAN said that the Turkish proposal did not seem to command wide support. If necessary, the



Committee might revert to it after it had considered various other proposals to amend paragraph 2.

23. Mr. VINDING KRUSE (Denmark), introducing his delegation's proposal (A/CONF.97/C.1/L.186), said that paragraph 2 of article 65 covered cases where impediments were caused by third parties engaged to perform the whole or a part of the contract but not cases where impediments were caused by suppliers to the contracting party. It did not seem reasonable that a party should be exempted from liability because he had chosen an unreliable supplier, whereas he was liable if he had chosen an independent contractor to fulfil his obligations. The buyer might have no knowledge of whether the seller had engaged an independent contractor or had used a supplier, and thus the whole matter would be outside his control. The distinction between an independent contractor and a mere supplier could often lead to uncertainty in regard to liability. There should be no difference made in such cases as to the seller's responsibility, and his delegation therefore proposed that the words "by his supplier or" should be inserted.

24. Mr. MICHIDA (Rapporteur) reminded members that the question of the wording of paragraph 2, and in particular the addition of the words "by his supplier or" proposed by the Danish delegation, had been extensively discussed at the UNCITRAL Working Group in January and February 1974. It had been decided at that time that the words should not be included because they would make the provision too loose and would thus tend to exempt the seller from liability to an extent that might, notably in view of the current crisis in oil supplies, eventually paralyse the world economy.

25. Mr. HJERNER (Sweden) said he too recalled the discussions in the UNCITRAL Working Group on the wording of paragraph 2. However, the current discussion was more confusing, because of the differing interpretations that were being placed on the meaning of paragraph 1. The object of the Danish proposal was not to exempt the failing party from his responsibility; on the contrary, its purpose was to make his liability stricter. The Rapporteur's arguments were based on the assumption that any failure by the supplier could not be covered by paragraph 1, whereas the Danish delegation, and his own, interpreted the position in the opposite way. As now drafted, paragraph 1 was far too wide. If the seller himself was given exemption in cases where failure was due to *force majeure*, he saw no reason why the same exemption should not apply in the case of subcontractors and suppliers. He therefore supported the Danish proposal.

26. Mr. DATE-BAH (Ghana) said he was somewhat confused by the different arguments that had been put forward. He had felt that the Danish proposal would tend to erode the obligation assumed by the seller to too great an extent, but the previous speaker's comments had raised some doubts in his mind. However, he felt that the most natural interpretation of article 65 was that implied in the intervention by the Rapporteur, namely that

possible breaches of a contract caused by failure of suppliers to perform their obligations constituted a commercial risk which the seller could reasonably be expected to take into account and should not be entitled to pass on. He therefore could not support the proposal.

27. Mr. BONELL (Italy) also preferred the existing text of paragraph 2. The case of a third person engaged by the seller to perform all or part of the contract was normally the kind of case in which the seller had to be held liable for his choice, since it was inevitably his choice alone. He had some hesitation in supporting the proposal to broaden the scope of the provision by including also a reference to the supplier, because, unlike the third person, a supplier might not necessarily be chosen by the seller in every case. He considered that the cases the proposal envisaged could generally be covered by the existing provisions of paragraph 1, which would have the advantage of providing a more flexible solution.

28. Mr. ZIEGEL (Canada) considered the word "supplier" contained in the Danish proposal highly ambiguous. The courts would have great difficulty in construing its meaning, and there was no reason why they should necessarily interpret it in the sense intended by the Danish delegation. It appeared from the discussion that some representatives had in mind a situation where a seller of a finished article had alternative sources of supply in respect of certain raw materials, but there might also be cases where an important element in the process of manufacture (such as, for example, electricity or natural gas) was available only from a single source. In such a case, the argument that the seller was not responsible for the choice of his supplier was irrelevant. The situation was clearly one which would fall within the scope of paragraph 1, and was one in which it would be unfair to subject the seller to the double conditions imposed in paragraph 2. He was therefore opposed to the inclusion of the supplier in paragraph 2; the question of the extent to which the seller or corresponding party could rely on the failure of his sources of supply should be governed by the provisions of paragraph 1.

29. Mr. HERBER (Federal Republic of Germany) was strongly opposed to the amendment. He pointed out that article 65(1) already imposed a heavy responsibility on the seller, and permitted only a very limited exemption. The liability envisaged was one which went beyond most national legislations. Paragraph 2 was even stronger with respect to third parties whom the party in breach had engaged to perform his contractual obligations, in particular his servants. He did not think it just that the supplier should be regarded in the same way as a third party engaged by the seller to perform the whole or part of the contract, since, as had already been shown, there were many different types of supplier and in some cases the seller had no freedom of choice between them.

30. Mr. SEVON (Finland), Mr. VINDING KRUSE (Denmark), and Mr. WAGNER (German Democratic Republic) expressed their willingness to withdraw their delegations' proposal (A/CONF.97/C.1/L.190, L.186,



and L.217) in view of the Rapporteur's comments as to the interpretation of article 65.

*The meeting was suspended at 11.25 a.m. and resumed at 11.45 a.m.*

31. Mr. INAAMULLAH (Pakistan), introducing his delegation's amendment to paragraph 2 (A/CONF.97/C.1/L.223), said that he would be prepared to accept the Turkish proposal to delete the paragraph but as an alternative, he was proposing the introduction of a final proviso which would make it clear that the exemption from liability under paragraph 2 would only apply where subcontracting was envisaged in the contract itself.

32. Mr. VISCHER (Switzerland) said that he supported the Pakistan amendment as an alternative to the Turkish proposal. It was his impression that the doubts raised by paragraph 2 had not been dispelled.

33. Mr. INAAMULLAH (Pakistan) observed that the Turkish proposal to delete the paragraph was prompted by the provision's lack of precision and clarity. His own amendment would improve the text in that respect.

34. Mr. MATHANJUKI (Kenya) considered that the Turkish amendment should be regarded as the main proposal and the Pakistan amendment as an alternative in the event of its rejection.

35. Mr. VINDING KRUSE (Denmark) pointed out that, for the purposes of article 65, it was necessary to distinguish clearly between a supplier on the one hand and an independent contractor on the other. The provisions of the article had been interpreted by the Swedish representative and the Rapporteur as meaning that a party could be excused for failure to perform his obligations if the failure was attributable to failure by a subcontractor to perform his obligations. Paragraph 2 of the article covered the case of the independent contractor. Its provisions were formulated as an exception to paragraph 1 but they in fact constituted a broadening of the party's liability. That broadening of liability resulted from the requirement that the circumstances preventing performance should be beyond the control of the party concerned. For an independent contractor liability would thus be broader than that specified in paragraph 1 for a supplier. His delegation wished to retain paragraph 2 and did not support the proposal to delete it. It wished at the same time, however, not to limit the liability of the parties.

36. The CHAIRMAN said that his interpretation of article 65 differed from that of the Rapporteur. Paragraph 1 provided for exclusion of liability where the party concerned was prevented from performing his obligations by events outside its control. Paragraph 2, on the other hand, made provision for a much broader exception. It exempted the party concerned if his failure to perform his obligations was due to the failure to perform on the part of a subcontractor whom he had engaged to perform the whole or part of the contract. The amendments by Denmark and Finland would have had the effect of broadening the exemption still further.

37. Mr. DATE-BAH (Ghana) said that in the light of the discussion he believed that the Turkish proposal to delete the paragraph would not serve its intended purpose.

38. The CHAIRMAN, noting that only a minority supported the amendment by Pakistan (A/CONF.97/C.1/L.223), said that if there was no objection, he would consider the proposal rejected.

39. *It was so agreed.*

40. The CHAIRMAN asked whether any delegation wished to revive the Turkish proposal to delete paragraph 2.

41. Mr. ADAL (Turkey) said that his proposal still stood.

42. Mr. WIDMER (Switzerland) supported the Turkish proposal.

43. Mrs. KAMARUL (Australia) also supported the Turkish proposal. The primary purpose of paragraph 2 was to restrict the operation of the provisions of paragraph 1. Paragraph 2 was thus an exception under paragraph 1, not a new and separate exception. The wording of paragraph 2, however, suggested a wider exception than was desired. Her delegation believed that it would be better to drop paragraph 2 and leave the rule in paragraph 1 to be interpreted by the courts.

44. Mr. ROGNLIEN (Norway) observed that there were wide differences between the interpretations placed upon paragraph 2 by different delegations. The text was obviously ambiguous. He suggested that a small working group should be set up to produce an unambiguous text capable of attracting wide support.

45. His interpretation of paragraph 2 was that its provisions constituted a limitation of the exemption under paragraph 1 and therefore provided for an enlargement of the liability of the parties under the contract. If that interpretation was correct, it was preferable to keep paragraph 2 in the text. If, however, one accepted the Chairman's interpretation, it would be preferable to delete the paragraph.

46. Mr. OLIVENCIA RUIZ (Spain) considered that the exception provided for in paragraph 2 should remain confined to the case of the subcontractor and should not be broadened to other third parties. He supported the suggestion to set up a working group to reformulate the paragraph but would oppose any suggestion to refer the matter to the Drafting Committee.

47. Mr. ADAL (Turkey) said that his delegation maintained its proposal to delete paragraph 2 but would be prepared to participate in a working group to reformulate its provisions.

48. Mr. KUCHIBHOTLA (India) supported the suggestion to set up a working group.

49. The CHAIRMAN noted that there was general support for the suggestion to set up a working group and proposed that it should consist of the representatives of

the German Democratic Republic, Ghana, Pakistan, Spain, Sweden, Switzerland and Turkey. If there was no objection, he would take it that the Committee agreed to set up a working group consisting of those members.

50. *It was so agreed.*

51. Mr. HONNOLD (United States of America) hoped that the working group would not embark on a general recasting of the provisions of paragraph 2 and that its mandate would be confined to clarifying the relationship between the provisions of paragraphs 1 and 2.

### Paragraph 3

52. Mr. ROGNLIEN (Norway), introducing his delegation's amendment (A/CONF.97/C.1/L.191/Rev.1), said that the text of paragraph 3 could be construed as meaning that the exemption ceased with the impediment, even if the latter was of very long duration. That result was undesirable because, in the case of a long-term impediment, circumstances could change radically and make it totally unrealistic to impose performance at that late stage. In reality, the problem of permanent relief had not been dealt with in the paragraph; the matter had been left to national law. Accordingly, his delegation proposed that the rule now embodied in the single sentence of paragraph 3 should relate to temporary impediment. His delegation's proposal contained also a separate provision, in the form of a new second sentence, to deal with the problem which arose when, after the removal of the impediment, the circumstances were so radically changed that it would be manifestly unreasonable to hold liable the party concerned.

53. The question had been discussed for a long time within UNCITRAL without arriving at any agreement. His delegation's proposal would, he hoped, provide a solution. If no agreement could be reached on the proposed formula, he would suggest the deletion of the word "only" from paragraph 3 a second best solution based on the understanding that the paragraph and the whole of article 65 did not contain provisions regulating a possible permanent relief.

54. Mr. FELTHAM (United Kingdom) remarked that the existing provision did not even make it clear that the question of permanent exemption was left to national law. The buyer was protected under the Convention by his right to avoid a contract on the grounds of fundamental breach. After a long period, the seller should also be able to claim exemption if the situation had changed so radically that it was unreasonable to expect him to perform. The Norwegian proposal covered that eventuality.

55. Mr. MEIJER (Netherlands) also supported the proposal. The seller should not be entitled to insist on performance in all circumstances after a long period of impediment. By that time, the original basis of the contract might have been radically changed. In that connection, he drew the Committee's attention to the footnote to example 65G of the comments on that article

which referred to possible special provisions in individual contracts (A/CONF.97/5, page 173).

56. Mrs. KAMARUL (Australia) was also in favour of the Norwegian proposal, which filled a gap in the existing paragraph 3.

57. Mr. MASKOW (German Democratic Republic) said that his delegation endorsed the underlying idea of the second sentence of the draft proposal but would like to extend it. It would prefer the party affected by the impediment also to have the right to avoid the contract. According to the existing text the other party had such a right because the non-performance could constitute a fundamental breach, whereas the party in breach seemed not to possess such a right. If that idea was accepted, the reference to the removal of the impediment in the Norwegian proposal would no longer be necessary because even before it was removed it would have become clear that the circumstances had so radically changed as to make performance impossible. He would therefore like the wording redrafted along those lines.

58. Mr. HJERNER (Sweden) said that his delegation opposed the proposal. Such a provision had been omitted from the draft Convention for the very good reason that it was impossible to cover all eventualities. The Norwegian proposal in fact was tantamount to introducing a provision similar to the doctrine of frustration in English law or the *théorie de l'imprévision* in French law. It took into account only part of the problem namely the situation of the non-conforming party at the time the impediment ceased to exist. There could, however, be other more serious complications. For instance, what was the position of the party which had performed and had made no breach? It would be manifestly unjust that he should not be compensated for expenses incurred by performance. In business relations there were various possible solutions, such as that neither party could recover anything from the other, which was unjust to the non-failing party, that that party might recover his expenses but not the anticipated profits or that the losses might be shared equally between parties. A just solution greatly depended on the nature of the business involved. In view of all those problems, the working group had decided to leave the matter open in the Convention to be solved either by some contractual arrangement between the parties or by applicable law. He strongly recommended that the existing text should be retained.

59. Mr. PLANTARD (France) also opposed the proposal. Paragraph 3, which referred to paragraph 1 of the same article, covered cases where performance was impossible due to an impediment, in which case the party concerned was exempt from liability. In the Norwegian proposal, the impediment which made performance impossible was something very different from *force majeure* and much closer to the *théorie de l'imprévision* in French law or the doctrine of frustration in Anglo-Saxon law.

60. Mr. BOGGIANO (Argentina) pointed out that under the Norwegian proposal, the radical change in

circumstances envisaged seemed to refer to a situation in which the basis of the contract was fundamentally altered. In such a situation, the outcome should not be exemption from liability for one party but an equitable revision of the contract. A matter of fundamental principle was involved. His delegation opposed the proposal because it could lead to injustice.

61. Mr. BONELL (Italy) supported the Norwegian proposal. It did not refer to what was commonly called *force majeure* or impediment in the strict sense but only to partial impediment. The first sentence of the proposed paragraph 3 fell well within the scope of paragraph 1 and made it clear that the exemption would have effect only for the period during which the impediment existed. The second sentence made an exception to that general rule but did not introduce a new concept of the impediment. He noted that the problem had been dealt with by ULIS in a way similar to that proposed in the Norwegian amendment and that that rule had not so far as he knew been strongly criticized.

62. Mr. ROGNLIEN (Norway) said that the difficulty lay not in the proposal but in the subject itself. The consequences of, and problems involved in, the existing provision would be much worse than those in his proposed solution. The problems of the conforming party had not been mentioned because in case of impediment, he would almost always be able to avoid the contract on the grounds of fundamental breach or could ask for restitution of goods or services supplied.

63. His delegation's proposal had attempted to solve

part of the problem on the basis of uniformity. The rest would have to be left to national law or to another article in the Convention. However, he thought it a mistake to abandon any attempt at solution just because the whole problem could not be solved.

64. Mr. MINAMI (Japan) said that his delegation supported the idea underlying the proposal but had doubts about the wisdom of introducing it into the Convention in the light of the many difficult problems involved.

65. Mr. HONNOLD (United States of America) strongly supported the proposal. It certainly should not be rejected on the grounds that it did not solve all possible problems. The Norwegian amendment went some way to solving some of those problems and would substantially improve the existing text, which, as at present drafted, might lead to further difficulties.

66. Mr. SAMI (Iraq) considered that the proposal might create more problems than it solved. For instance, the party experiencing the temporary impediment might be tempted to extend it to his own advantage.

67. The CHAIRMAN invited the Committee to vote on the Norwegian draft proposal as a whole.

68. *The Norwegian draft proposal was rejected.*

69. The CHAIRMAN invited the Committee to vote on the alternative Norwegian amendment to delete the word "only" from paragraph 3.

70. *The amendment was adopted.*

*The meeting rose at 1.05 p.m.*

## 28th meeting

Friday, 28 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.28

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/3, 6) (continued)**

*Article 65 (continued) (A/CONF.97/C.1/L.190, L.191/Rev.1, L.208, L.217)*

1. Mr. MASKOW (German Democratic Republic)

introduced his delegation's amendment to article 65 (3) (A/CONF.97/C.1/L.217). The aim was to bring paragraph 3 into line with paragraph 1, which covered both the impediment and its consequences.

2. The CHAIRMAN suggested that, as the amendment was simply a drafting change, the paragraph should be referred to the Drafting Committee.

3. *It was so decided.*

4. The CHAIRMAN drew the Committee's attention to the amendments to paragraph 4 proposed by Norway (A/CONF.97/C.1/L.191/Rev.1) and Finland (A/CONF.97/C.1/L.190), which were very close to one another. He asked the Norwegian representative whether his amendment was purely a matter of drafting.

5. Mr. ROGNLIEN (Norway) thought that it was a matter of substance and not merely of form. The point

was that in its present wording, article 65 (4) introduced an exception to the general rule set forth in article 25 whereby the sender of a communication did not bear the risk of delay or error in transmission or more precisely: The delay or error in transmission did not deprive the sender of his right to rely on the communication. Under the terms of paragraph 4 as it now stood, the party that was unable to perform because of an impediment was the one which bore the risk. The same party was liable for the damages resulting from non-receipt of notification by the other party. In his delegation's opinion it would be wrong for a party that had notified the other party, by a means appropriate in the circumstances, of an impediment to the performance of his obligations to be held responsible for a delay or an error in transmission. It would, in particular, be wrong in cases where the delay was due to *force majeure*. It would, therefore, be better to apply the general rule of article 25 to article 65. The situation would have been the opposite if the notice was intended to create obligations for the other party.

6. The CHAIRMAN wondered whether amendment A/CONF.97/C.1/L.191/Rev.1 was a good solution. The Norwegian representative was proposing to overturn the rule in article 65 (4) on the grounds that the impediment preventing performance of the obligation was often also an obstacle to giving notice. Nevertheless it was not very clear why the risks involved in transmission should then be borne by the addressee, particularly since with serious events such as the outbreak of war, the existence of the impediment would be well known. Perhaps there should be a different arrangement, by which for example there would be an exception in cases of *force majeure* to the rule that the party who had been unable to perform his obligation should notify the other party of the impediment.

7. Mr. HONNOLD (United States of America) was in favour of amending paragraph 4 for the reasons explained by the Norwegian representative. The abrogation of the despatch principle was not meant to make the addressee bear the risks of transmission but to ensure that the non-performing party was not held liable if he encountered serious transmission problems.

8. Mr. KLINGSPORN (Federal Republic of Germany) regretted that he could not support the Norwegian proposal, as it would result in the addressee being made to bear the risks of transmission. The Committee should consider various cases which might arise. If the impediment to a party's performance of his obligation was not such as to make it impossible to give notice of that impediment, e.g. when the impediment arose from national legislation placing an embargo on the export of the goods covered by the contract, it was right for the risk of delay or error in transmission to be borne by the seller. If the impediment affected both performance and notification, as in the case of a breakdown in communications or the postal service, then under article 65 (1) the seller would be released from all his obligations, including the obligation to notify the other party of the

impediment. There was thus no need to amend paragraph 4 at all.

9. Mr. MASKOW (German Democratic Republic) was in favour of the Norwegian proposal and thought that article 25 should govern the notice referred to in paragraph 4.

10. Mr. REISHOFER (Austria) was against the Norwegian proposal. The exception made to article 25 in article 65 (4) was designed to protect innocent parties and was totally justified, given the circumstances in which an impediment usually arose. In the case of *force majeure*, to which the Norwegian representative had referred, it would be better to make an exception to the rule requiring the non-performing party to notify the other party of the impediment.

11. Mr. OSAH (Nigeria) supported the Norwegian proposal, also being of the opinion that the rule in article 25 was the one which should apply.

12. Mr. FOKKEMA (Netherlands) considered that the argument put forward by the representative of the Federal Republic of Germany, to the effect that a party unable to perform his obligation was exempted from his responsibilities under article 65 (1) in cases where, through circumstances beyond his control, the notification he was required to give was not received by the other party, demonstrated the justice of the Norwegian proposal, the aim of which was to settle the question of liability.

13. Mr. CUKER (Czechoslovakia) said that the Norwegian proposal was ambiguous. In the final phrase it was stated that the party who had to notify the other party of an impediment to performance of his obligation was liable for damages as a result of failure to perform. He wondered whether it was to be taken that the party was held liable for damages resulting from non-performance or solely for damages resulting from the failure to notify.

14. Mr. WIDMER (Switzerland) pointed out that the same ambiguity already existed in the French text on the existing paragraph 4. If one referred to the commentary on article 65, it was clear that only the damages resulting from the failure to notify were meant. It would therefore be better to bring the French text into line with the English version and that was simply a matter of drafting.

15. The CHAIRMAN put to the vote the Norwegian amendment to article 65 (4) (A/CONF.97/C.1/L.191/Rev.1).

16. *The amendment was rejected by 17 votes to 14.*

17. The CHAIRMAN invited members to consider the amendment to paragraph 5 proposed by the Federal Republic of Germany (A/CONF.97/C.1/L.208).

18. Mr. KLINGSPORN (Federal Republic of Germany) said that under the existing paragraph 5 a party could require another party whom an impediment had temporarily made unable to perform to perform his obligation when the impediment ceased. The rule in

question should be amplified by stating that in the event of a permanent impediment, the exemption provided for in article 65 prevented the other party from requiring performance of the obligation. That was the aim of the proposal by his delegation, which also included a drafting amendment changing the order of the paragraphs.

19. Mr. REISHOFER (Austria) supported the amendment by the Federal Republic of Germany to make article 65 prevent one party, in the event of a permanent impediment, from exercising his right to demand performance of the obligation by the other party. In document A/CONF.97/C.1/L.191/Rev.1 Norway had submitted a very similar proposal, which was also acceptable to his delegation.

20. The CHAIRMAN asked the representative of Norway whether he considered his proposal was the same as the one by the Federal Republic of Germany.

21. Mr. ROGNLIEN (Norway) said that his proposal had the same aim as the one by the Federal Republic of Germany, although it was slightly different in form.

22. Mr. LEBEDEV (Union of Soviet Socialist Republics) was unable to support either the Norwegian proposal (A/CONF.97/C.1/L.191/Rev.1) or the one by the Federal Republic of Germany (A/CONF.97/C.1/L.208). The Norwegian amendment to article 65 (5), which would permit either of the parties, including the one whom an impediment had made unable to perform his obligation, to declare the contract avoided, was based on the same logic as had led the Norwegian delegation earlier to propose its amendment to article 65 (3). However, the Committee had decided to keep the existing wording of paragraph 3. It could not therefore adopt the Norwegian proposal on paragraph 5.

23. The amendment proposed by the Federal Republic of Germany did not appear to be justified from the substantive point of view. It might have very dangerous consequences. For instance, if a seller who had delivered a part of the goods was unable, owing to *force majeure*, to deliver the rest, or if the buyer refused to pay for the goods already delivered, without, however, avoiding the contract, the seller would be deprived, under the proposals by the Federal Republic of Germany and Norway, of the right to require payment, which was unacceptable.

24. Mr. HJERNER (Sweden) emphasized the delicate and abstract nature of the problem dealt with in article 65 (5). He reminded members that the text adopted by UNCITRAL at its last meeting had represented a fragile compromise. Any change in that text would be liable to disturb its balance in an unpredictable manner. The amendment proposed by the Federal Republic of Germany was not just a clarification, but involved a substantive issue. The Norwegian amendment was different in form and had still wider implications.

25. The question of whether exemption should relate not only to damages but also to the obligation to perform had been debated at length in UNCITRAL, and it had been decided not to include any provisions on the latter

aspect. If a party was exempted from performance it would not be required to pay damages. As far as the obligation to perform was concerned, no problem arose in practice, where there was a real inability to perform. But if the obligation to perform was abrogated, a party would no longer be held liable for any other consequences, whereas there might be contractual remedies connected with the obligation to perform which were not mentioned in the Convention; if the provisions proposed in the Norwegian amendment were to be applied, those remedies could not be invoked. Furthermore, although a party which was unable to perform owing to an impediment was not required to pay damages, it should not for that reason be content to wait until the impediment had disappeared. It had a duty to make all possible efforts to overcome the impediment and its consequences and to perform the contract.

26. Mr. PLANTARD (France) agreed with the Swedish representative. Article 65 provided for cases where performance was impossible; where that was so, there was little sense in referring to the case where a party might wish to force the other party to perform, since performance was impossible by definition. He was opposed to the Norwegian proposal, which might create confusion and difficulties of interpretation.

27. Mr. ROGNLIEN (Norway) said he failed to see the difficulties which, according to some delegations, would arise from his delegation's amendment. The amendment did not mention all the possible or existing remedies, but merely cited some which were unaffected by article 65, see the initial words in the amended paragraph: "Nothing in this article prevents . . .". The right to avoid a contract was evoked only in accordance with the Convention. A party who was unable to perform owing to an impediment could not avoid the contract, unless the other party had committed a fundamental breach, which was not a very realistic situation. The most realistic situation would be where a party who did not receive the goods was entitled to avoid the contract, even though the other party's failure to perform was due to an impediment.

28. Delegations which favoured the existing text maintained that if performance was impossible, the other party could not require it. But article 65 covered not only physical impossibility to perform, but also impossibility to perform for external economic reasons, for example. If the existing wording was interpreted literally, the other party could, in such cases, require performance. Obviously, the Convention could not resolve all the problems that might arise, but it must be recognized that the existing text of paragraph 5 was unsatisfactory.

29. Mr. VINDING KRUSE (Denmark) said that article 65 dealt with very complex problems and applied to widely varying situations. Any amendments to that article, particularly paragraph 5, should therefore be considered with the utmost caution, for they might have unforeseen consequences. He was not in favour of introducing the word "performance" into that para-

graph. Consequently, he was unable to support either the amendment by the Federal Republic of Germany or that by Norway.

30. Mr. FELTHAM (United Kingdom) said he was strongly in favour of the amendment by the Federal Republic of Germany. It would be inadvisable to give a party the right to require performance if the other party was unable to perform owing to an impediment. In the case of partial delivery referred to by the representative of the Soviet Union, the buyer would obviously have to pay the price of the goods delivered; the amendment of the Federal Republic of Germany contained nothing that would give him special protection enabling him to evade that obligation.

31. Mr. FOKKEMA (Netherlands) said that he had not been convinced by the objections raised and that he supported the amendments (A/CONF.97/C.1/L.191/Rev.1, L.208). From the drafting point of view, he preferred the Norwegian amendment. He, too, thought that the problem raised by the representative of the Soviet Union could easily be solved. An impediment could relate to only a fraction of a party's obligations; the article would then apply only to that fraction.

32. He acknowledged that a party must not be exempted from his obligation to perform, even if there was an impediment: but the amendments would not have that effect. If the impediment was temporary, the obligation to perform continued and re-emerged as soon as the impediment had disappeared. It was also clear that a party which was unable to perform owing to an impediment must do all in its power to overcome that impediment, failing which it would be liable for damages.

33. The question of contractual remedies arose more in connection with the amendment by the Federal Republic of Germany. In general, it would seem that the Convention could not regulate that aspect, for the question of the interpretation of the contract would always arise. If the parties had agreed to contractual remedies outside the framework of the Convention, those remedies would likewise become ineffective in cases of *force majeure*.

34. Mr. REISHOFER (Austria) said he was in favour of amendments A/CONF.97/C.1/L.191/Rev.1 and L.208, whose opponents had not argued very convincingly. No one denied that performance of an obligation could not reasonably be demanded in the cases of impediment envisaged in article 65. Why, then, not say so unambiguously, as in the amendment by the Federal Republic of Germany? In cases of partial performance, it would be reasonable to interpret the article as not forbidding a party to exercise any of its rights other than the right to obtain damages or the right to require performance of the rest of the contract.

35. Mr. MASKOW (German Democratic Republic) said he was unable to support either of the amendments under consideration. The obligation to perform did not disappear just because there was an impediment. The proposed texts were not clear on that point.

36. Mr. HJERNER (Sweden) said that a distinction must be drawn between cases where a party was not required to pay damages because it would be unfair to regard it as responsible for the situation and cases where a party could not perform its obligations, owing to an impediment, but the obligation to perform remained. He would press for the existing text of paragraph 5 to be kept.

37. Mr. KLINGSPORN (Federal Republic of Germany) said it was clear from article 65(1) that a party which had an impediment had an obligation to do all it could to overcome that impediment. If it did not do so, it would not be exempted from its liabilities. Only in so far as it was impossible for a party to overcome the impediment should the exercise of its right to claim damages and to require performance be excluded.

38. Mr. HONNOLD (United States of America) considered that the clarification proposed by the Federal Republic of Germany in article 65(5) in no way altered or diminished the obligation of a party which had an impediment to endeavour to overcome that impediment. It had been said that if one party had an impediment and the other party was unable to require performance, that would undermine the obligation to perform. But that argument could only be upheld by disregarding all the remedies provided for in articles 42 and 58, involving application to a court to require performance. Nevertheless, a party should not be able to get a court to order someone to do the impossible. That showed how much the present wording of paragraph 5 left to be desired; it was far too strong, as the expression "any right" covered the right to require performance. Paragraph 5 should be as reasonable as possible. The very slight change proposed by the Federal Republic of Germany would make the text consistent and prevent abuse.

39. Mr. MATHANJUKI (Kenya) supported the Norwegian proposal. It should be stated in the Convention that if a party had an impediment, the other party might avoid the contract, which would enable it, for example, to obtain substitute goods. The present text of paragraph 5 was not sufficiently clear.

40. Mr. ROGNLIEN (Norway), replying to a question by the CHAIRMAN, said that he would like his country's proposal and the proposal by the Federal Republic of Germany to be put to the vote separately.

41. The CHAIRMAN put the Norwegian amendment to article 65(5) (A/CONF.97/C.1/L.191/Rev.1) to the vote.

42. *The amendment was rejected by 22 votes to 13.*

43. The CHAIRMAN put the amendment by the Federal Republic of Germany to article 65(5) (A/CONF.97/C.1/L.208) to the vote.

44. *The amendment was rejected by 19 votes to 15.*

45. Mr. MASKOW (German Democratic Republic) said that his delegation's amendment to article 65(5) (A/CONF.97/C.1/L.217) was designed to make it clear that where a party availed itself of the exemption



provided for in article 65, not only could the other party not exercise any right to claim damages, but it could also not claim any penalties or liquidated damages provided for in the contract. If that was not clearly stated, cases of exemption in respect of damages could be governed by the Convention, while those in respect of liquidated damages or penalties provided for in the contract would come under municipal law, which would be inconvenient. He wished to make it clear that his proposal in no way raised the question of the validity of clauses on penalties or liquidated damages, that question being excluded from the sphere of application of the Convention by article 4 (a).

46. Mr. VINDING KRUSE (Denmark) said that he would have considerable hesitation in supporting that proposal, because article 65 (5) referred only to rights under the Convention, which sharply delimited the scope of the provisions. Moreover, penalties and liquidated damages related to different factors from damages. The contract might even stipulate that liquidated damages were due even where one of the parties was able to avail itself of the exemption provided for in article 65. In other words, the proposal by the German Democratic Republic would have the effect of regulating the application of contractual provisions with which the Convention, by virtue of article 4, was not concerned.

47. Mr. ZIEGEL (Canada) was of the same opinion. The principle underlying the entire Convention was that the clauses of the contract prevailed over the provisions of the Convention itself. The proposal by the German Democratic Republic infringed that fundamental principle. If the contract contained a clause on liquidated damages, it would be for the national courts to decide whether the parties had intended that clause to apply regardless of whether there had been an impediment to performance. The clauses adopted by the parties should not be subject to a provision which would have the effect of setting them aside, as would happen if the proposal by the German Democratic Republic were adopted.

48. The CHAIRMAN said he noted that the proposal by the delegation of the German Democratic Republic had received no support. If there were no objections, he would take it that the Committee wished to reject it.

49. *It was so decided.*

#### *New article 65 bis (A/CONF.97/C.1/L.217)*

50. Mr. MASKOW (German Democratic Republic) said that article 65 covered the case in which one of the parties was unable to perform any of his obligations because of an impediment beyond his control. In his view, account should also be taken of the case in which the failure to perform could be imputed to the act or omission of the other party. In such a case, the second party should not be empowered to exercise any of his rights under the Convention. Such was the purpose of the new article 65 bis proposed by his delegation (A/CONF.97/C.1/L.217).

51. Mr. BENNETT (Australia) said that the provision in question was far too broad. By providing that neither party "may exercise any right under this Convention", it left nothing at all of the rights and obligations under the Convention. That was not the right way to solve the problem brought up by the representative of the German Democratic Republic. It would be better to deal with the problem in particular provisions. Moreover, the formula "if he has caused . . . the failure to perform" could give rise to difficulties in its application.

52. Mr. LEBEDEV (Union of Soviet Socialist Republics) said he thought that the idea underlying the proposal by the delegation of the German Democratic Republic was an extremely important one, since it related to the liabilities of the parties in the event of failure to perform and because that problem arose in connection with a number of provisions and previous proposals. If the members of the Committee accepted the basic idea of the proposal—an idea which was very well-founded and which could usefully appear in the Convention—namely, that if one of the parties by his own act or omission caused the failure to perform of the other party, the first party could not, in such a case, exercise his rights under the Convention, the Committee could then consider the problem of the form the provision should take, with due regard *inter alia* for the comments by the Australian representative.

53. Mr. HJERNER (Sweden) said that the delegation of the German Democratic Republic had been quite right to draw the Committee's attention to a very important principle, which would, however, be more appropriately stated at the point where the Convention defined breach. However that might be, he agreed with the representatives of Australia and the Soviet Union that the provision should be worded more clearly. It might perhaps read: "A party may not rely on the failure of another party to perform if by his own act or omission he has caused that failure".

54. Mr. BOGGIANO (Argentina) said he too considered that the principle raised by the delegation of the German Democratic Republic was an important one and should be spelt out in the Convention. Nevertheless, the formula used in the proposal by the delegation of the German Democratic Republic was too broad and the Committee should take no decision until it had a revised wording before it.

55. Mr. WIDMER (Switzerland) said he endorsed all the comments which had been made concerning the importance of the principle in question. That was precisely why he was opposed to the proposal by the delegation of the German Democratic Republic. The principle was so important that, once it was stated at all, it would have to be mentioned in every article of the Convention. However, the principle had been set out once and for all in article 6. By virtue of the principle of good faith stated in article 6, a party could not take advantage of a failure of his own which impeded the other party from performing his obligations.



56. Mr. BONELL (Italy) said that he thought it would be desirable to refer to the principle of good faith not only at the time of the performance of the contract but also at the time of its formation. The proposal by the delegation of the German Democratic Republic covered only a portion of performance, but it was nevertheless important to stress, if only at that point in the Convention, that rights were not to be abused. His view was the opposite of that expressed by the representative of Switzerland: article 6 set forth the principle of good faith in such a general way that it was extremely vague, and it would be useful to include an explicit example of what the principle meant.

57. Mr. ZIEGEL (Canada) said that he fully endorsed the comments by the representative of Switzerland. The principle underlying the proposal by the German Democratic Republic was, of course, perfectly justified, but there was no reason to refer to it at that specific place in the Convention. For that matter, it was inconceivable that any court or arbitrator should come to a conclusion at variance with the provision proposed by the delegation of the German Democratic Republic. It would be better to refrain in the Convention from stating the obvious.

58. Mr. VINDING KRUSE (Denmark) said he was not at all certain that article 6 covered the basic principle raised by the representative of the German Democratic Republic, since there was a danger that the principle of good faith might be interpreted differently from country to country. The absence of any provision covering that point was a genuine gap in the Convention. Nevertheless, since it was obviously impossible to refer to the proposed rule in all the articles to which it applied, and since the proposed provision covered only one aspect of the problem, the delegation of the German Democratic Republic might, perhaps, revise its proposal in the light of article 73, on the reduction of damages, and submit it in the form of an amendment to article 73.

59. Mr. FOKKEMA (Netherlands) said he thought that the amendment proposed by the delegation of the German Democratic Republic was a judicious one. There was, in fact, a gap in the Convention, since the good-faith provision, which was drafted in a restrictive way, did not cover the situation under consideration. Nevertheless, it would be useful if the delegation of the German Democratic Republic were to reword the new article it was proposing, since it would be better to refer to the liability of a party rather than the fact that he had caused the failure of the other party to perform his obligations, the concept of "cause" being far too broad. The new article 65 *bis* could be worded to read: "A party cannot rely on the failure by the other party to perform his obligations when he is himself responsible for that failure".

60. Mr. ALKIN (Ireland) said he was unable to support the amendment submitted by the delegation of the German Democratic Republic because, in his view, the rule to which it referred was the basic principle underlying the whole Convention.

61. Mr. POPESCU (Romania) said that the proposed

new article supplied an excellent illustration of the concept of good faith in commercial contracts.

62. Mr. MASKOW (German Democratic Republic) said that he intended to reformulate draft article 65 *bis*, with due regard for the comments made by the representatives of Sweden and the Netherlands, and to resubmit it later in its revised form. The new article could, perhaps, be placed after article 23 but not after article 73.

63. Mr. ZIEGEL (Canada) said he wished to stress that, in his delegation's opinion, article 65 did not cover the case in which there was only a partial failure to perform an obligation. Thus, for instance, if a portion of the goods had been destroyed, the contract would remain valid for the other portion which had not been affected. The fact that it was not possible to perform part of the contract did not necessarily involve complete failure to perform the contract.

64. The CHAIRMAN pointed out that the Convention contained a provision whereby if partial performance was of no interest to the buyer, the contract became completely void. He invited the representative of Canada to submit an amendment to the plenary Conference, if he so desired.

*Title of section III of chapter IV  
(A/CONF.97/C.1/L.191)*

65. Mr. ROGNLIEN (Norway) said that his delegation was proposing that the title of the section should be amended as indicated in document A/CONF.97/C.1/L.191 because articles 67 and 68 of the draft Convention related not only to the effects of avoidance but also to the loss of the right to require delivery of substitute goods in certain cases where restitution of goods received was impossible.

66. *The Norwegian amendment to the title of section III of chapter IV (A/CONF.97/C.1/L.191) was adopted.*

*Article 66 (A/CONF.97/C.1/L.192)*

67. The CHAIRMAN said that no amendment had been submitted to paragraphs 1 and 2 of article 66. He thus invited the members of the Committee to consider the Norwegian proposal that a new paragraph 3 should be added to that article (A/CONF.97/C.1/L.192).

68. Mr. ROGNLIEN (Norway) said that the idea of concurrent action stated in article 66(2) with respect to restitution should also apply where there was a delivery of substitute goods.

69. Mr. MASKOW (German Democratic Republic) said that he was opposed to the inclusion of that general principle in the Convention. In any case, it was rare in commercial practice to return the goods that had first been received when substitute goods were delivered.

70. Mr. HERBER (Federal Republic of Germany) said he thought that the Norwegian amendment was an acceptable one. Nevertheless, if that new paragraph was

adopted, it would be better to place it after article 42, which dealt with substitute goods.

71. Mr. HJERNER (Sweden) said that the new paragraph would usefully complement paragraphs 1 and 2 of article 66. Its wording appeared to be quite satisfactory.

72. Mr. HONNOLD (United States of America) said he did not see how the Norwegian proposal would work in practice. There were procedures for the exchange of goods for the price, as by sight draft with bill of lading, but there was no readily applicable system for the exchange of rejected goods against substitute goods. The Committee was in danger of creating machinery which would be very difficult to operate. If one of the parties was in default, there was no need to include special and unusual measures to protect him.

73. The CHAIRMAN put the Norwegian amendment (A/CONF.97/C.1/L.192) to the vote.

74. *The amendment was rejected.*

#### Article 67

75. *No amendment having been submitted to article 67, it was adopted without change.*

#### Article 68

76. *No amendment having been submitted to article 68, it was adopted without change.*

#### Article 69 (A/CONF.97/C.1/L.225, L.226 and L.226/Rev.1)

77. The CHAIRMAN, having noted that article 69 raised the question of the interest which the seller, in the event of restitution, was bound to refund to the buyer over and above the actual price, suggested that the Committee might consider the amendments to article 69 at the same time as the other amendments regarding provisions on the fixing of a rate of interest.

78. Mr. BONELL (Italy) said that, since paragraph 1 of article 69 was the counterpart of the rule concerning the buyer set forth in paragraph 2, there was no reason why it should not be considered separately.

79. Mr. MICHIDA (Japan) said he fully endorsed the Chairman's suggestion.

80. The CHAIRMAN said that, if there was no objection, he would take it that the Committee wished to defer its consideration of article 69 to the following meeting.

81. *It was so decided.*

*The meeting rose at 5.55 p.m.*

## 29th meeting

Monday, 31 March 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.29

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 69 and provisions regarding interest (A/CONF.97/C.1/L.216, L.218, L.222, L.225 and L.226/Rev.1)*

1. The CHAIRMAN invited the Committee to consider, in connection with article 69, the general question of provisions regarding interest in the Convention.

2. Mr. KOPAC (Czechoslovakia), commenting on his

delegation's proposal for a new article 60 *bis* (A/CONF.97/C.1/L.218), said that he believed the Convention should include a specific provision relating to the payment of interest. Although the proposal suggested that the provision should be included as a new article 60 *bis*, it could be inserted at any point in the Convention deemed appropriate by the Committee. Unlike the joint proposal (A/CONF.97/C.1/L.216) for a new article 73 *bis*, which suggested that the applicable interest rate should be that prevailing in the country of the creditor, his delegation's proposal recommended that the rate should be that prevailing in the country of the debtor. If the Committee did not agree to the rate being stipulated as equal to the official discount rate, his delegation could accept its second alternative, namely the rate applied to unsecured short-term international commercial credits plus 1 per cent. The 1 per cent increase was intended as a penalty. Should the interest rate be higher in the seller's than in the buyer's country, the seller was entitled to claim damages under paragraph 2. If the Committee did not agree to that solution, his delegation would be prepared

to amend paragraph 2 to state that if the interest rate prevailing in the seller's country was higher than that in the buyer's country, the interest should be paid at that higher rate. His delegation was ready to discuss any other changes in its proposal.

3. The CHAIRMAN asked the Czechoslovakian representative if he did not think it preferable to substitute the words "debtor" and "creditor" for "buyer" and "seller" to take account of the situation set out in article 69 and other circumstances. He also wondered if the Czechoslovak proposal would not in fact lead to a situation where the highest interest rates were always applied.

4. Mr. KOPAC (Czechoslovakia) said that his delegation was willing to make that change. He noted the main purpose of the provision was to prevent breaches of contract and to ensure that the price was paid or other debts reimbursed within the specified time-limit.

5. Mr. HJERNER (Sweden) observed that the proposal by the delegations of Denmark, Finland, Greece and Sweden (A/CONF.97/C.1/L.216) covered much the same ground as the Czechoslovak amendment and was, he thought, somewhat simpler. Both proposals were intended to ensure that interest should be dealt with specifically in the Convention and not merely considered as a form of damages. A provision similar to the Czechoslovak proposal existed in ULIS but had been abandoned during discussions in UNCITRAL for various reasons. He understood that the fear that such a provision would be unacceptable under Islamic law was unfounded because interest on arrears was accepted under that law.

6. The joint proposal stipulated that the rate of interest should be that customary for commercial credits at the creditor's place of business. Some flexibility was necessary in view of current interest rate fluctuations. Both paragraphs of article 69 should be read in conjunction and the interest rate calculated accordingly. Articles 60 and 69 dealt with somewhat different situations and the same rule need not apply to both.

7. The matter of interest was one of the most important issues in the Convention and the duty to pay interest must be clearly stated. Since the various amendments had different points in common, it might be desirable to give the sponsors the opportunity to consolidate them in the light of views expressed during the discussion.

8. Mr. VINDING KRUSE (Denmark) endorsed those views. The wording of the provision should be as flexible as possible. The joint proposal had a broader applicability than the Czechoslovak proposal, which referred only to payment of the price. Other payments might also be in arrears and there should be a general rule covering interest in all those cases.

9. The Czechoslovak proposal was very close to the ULIS rule in its reference to the official discount rate. He drew attention to article 58 of the draft Convention prepared by UNCITRAL in 1977, which gave a choice between the official discount rate and the rate for short-term commercial credits, as did the Czechoslovak propo-

sal. The joint proposal referred only to the latter which he thought clarified the situation.

10. Mr. KRISPIS (Greece) endorsed the views expressed by the two preceding speakers.

11. Mr. DATE-BAH (Ghana) believed that interest should be paid. However, the subject was too complicated to be encompassed by a simple uniform rule. Not only did national policies and structures of interest differ but commercial interest usually operated at several levels. In most countries, payment of interest was subject to national legislation. He therefore preferred the United Kingdom proposal (A/CONF.97/C.1/L.226/Rev.1).

12. Mr. SONO (Japan) said that his delegation's proposal (A/CONF.97/C.1/L.222) was concerned with the calculation of damages rather than the payment of interest. His delegation supported the joint proposal (A/CONF.97/C.1/L.216) and if it was adopted, would withdraw its own proposal.

13. Mrs. FERRARO (Italy) also favoured the joint proposal (A/CONF.97/C.1/L.216). The Convention should include a provision about the payment of interest. There was a basic distinction between interest, which should be payable whenever payment of sums due was delayed, and damages which were associated with other problems and breaches of contract. The Czechoslovak proposal (A/CONF.97/C.1/L.218) was clear with regard to interest but not with regard to damages. The calculation of the rate at which interest should be payable was a difficult matter and might perhaps be left unregulated in the Convention. In any case, her delegation could not accept the Czechoslovak proposal as to the rate of interest, which would be difficult to define or to foresee.

14. Mr. ZIEGEL (Canada) said that the Convention should clarify the cases in which claims for payment of interest were justifiable. However, a number of questions were involved. Interest rates might be assessed differently according to whether they related to a restitutionary claim, in which case the object was to deprive the defaulting party of unjustifiable enrichment, or to claims for damages for breach of contract, the object was to compensate the claimant for the loss of use of his money and the creditor's place of business should determine the rate of interest. In a period in which interest rates in North America had fluctuated by up to 50 per cent over the preceding year one problem was to establish whether the rate should be that prevailing at the time when judgement was rendered or on the date when payment was actually made. As the whole matter deserved more attention than it could readily be given in the Committee, he favoured setting up a working party consisting of the sponsors of the various proposals to work out a generally acceptable solution.

15. Mr. BOGGIANO (Argentina) said that the first question to be decided was whether or not the Convention should contain rules on the payment of interest. If there was a wish that it should do so, the next point to consider was the scope of the rules. Article 69, paragraph 1

referred to restitutionary interest payable by the seller to the buyer, but there was also the case of delayed payment by the buyer and symmetry seemed to require that in both cases the creditor should recover interest at the rate prevailing at his place of business. At all events, any proposal for calculating the rate of interest should be based on realistic assumptions and for that reason his delegation favoured the joint proposal (A/CONF.97/C.1/L.216). The rate should certainly take into account current inflationary conditions. If it was impossible to achieve agreement as to the rate, the solution might be to omit any reference to it and leave it to the interpretation of the courts.

16. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that payment of interest was a complex matter and was subject to national legislation in many countries. When UNCITRAL was preparing the present draft Convention, it had discovered that it was not possible to adopt a rule like that in ULIS article 83 but the joint proposal (A/CONF.97/C.1/L.216) was based on the same principle. In view of national legislation, it was more logical to accept the legal rate of interest in the country where the physical or legal entity of the debtor was situated, as was proposed in document A/CONF.97/C.1/L.218. However, one idea might usefully be taken from the joint proposal. In order to establish a general rule, reference should be made to the defaulting party and to overdue payment rather than to the buyer and the seller.

17. Mr. WAGNER (German Democratic Republic) said that his delegation would welcome a rule to regulate the payment of interest but he feared it would not be possible to devise one which was generally acceptable. He would support, with some improvements of drafting, the Czechoslovak proposal (A/CONF.97/C.1/L.218), but the discussion had shown that other delegations favoured a different principle. It was a matter on which differences between economic systems were involved and it would be impossible to find an equitable solution. He therefore favoured the United Kingdom proposal (A/CONF.97/C.1/L.226/Rev.1) to give up the idea of including the subject in the Convention.

18. Mr. VENKATASUBRAMANYAN (India) said that since delayed refunds and payments were unfortunately frequent features of international sales, the matter of interest should be regulated by the Convention so that the rights and obligations of both parties were clearly known. The basic principle on which the rate of interest was determined should be to give the defaulting party the least possible incentive to delay payment. He should therefore be under a legal obligation to pay interest at the rate prevailing either at his own or the other party's place of business, whichever was the higher, and at the rate prevailing at the time payment was actually made rather than at the date judgement was rendered. Account should be also taken of the currency in which the debt had been incurred, since interest rates varied greatly from one currency to another.

19. Mr. SEVON (Finland) considered that the main

point was to have some provision in the Convention about the payment of interest. He would therefore be prepared to accept an amendment of the joint proposal (A/CONF.97/C.1/L.216), of which he was one of the sponsors, to take account of the objections raised by the Czechoslovak and Soviet delegations. He was even prepared to accept the United Kingdom proposal, which made it clear that the provisions with regard to damages did not cover the question of interest, although he would consider that an unfortunate solution. He suggested that the best course would be for the sponsors of the various proposals to attempt to produce a consolidated text.

20. Mr. INAAMULLAH (Pakistan) said that his delegation's proposal (A/CONF.97/C.1/L.225) related only to the specific point of the rate at which interest should be payable under article 69, paragraph 1. He supported the suggestion that a working party should be set up to consolidate the proposals on other aspects of the question.

21. Mr. NICHOLAS (United Kingdom) commented that his delegation's proposal (A/CONF.97/C.1/L.226/Rev.1) started from the general recognition that the present text was unsatisfactory in that it required the seller to pay interest on refunds but there was no corresponding obligation laid on the buyer who was late in paying the price. One solution was that the Convention should contain a general provision for the recovery of interest on all sums in arrears. However, previous experience had convinced his delegation that it would be unrealistic to hope to reach a generally acceptable text within the ambit of the Conference. He therefore felt that the only practical solution was to accept the United Kingdom proposal, which made it clear that the Convention did not deal with the question of interest, but left it to the applicable national law.

22. The CHAIRMAN said that there appeared to be general agreement that the defaulting party should pay interest both in the special case referred to in article 69 and more generally whenever payment of sums due was delayed. The point at issue was whether it was feasible to work out rules for the calculation of interest by reference to one of the formulations which had been proposed or whether the question of interest could clearly be left outside the scope of the Convention. If the Committee wished to explore the possibility of finding a generally acceptable rule, it would be necessary to set up a working group for the purpose and to defer for the time being taking a vote on the various proposals before the Committee.

23. Mr. HJERNER (Sweden) said he would prefer a consolidated proposal based on proposals by those representatives who were in favour of the principle of defining an interest rate in the Convention. The main difficulty with the United Kingdom solution was that it might lead to difficulties in regard to conflicting legislations.

24. Mr. PLANTARD (France) believed that an effort should be made to formulate a provision on the question which would satisfy all concerned. In 1977 an earlier

provision on the subject had been deleted precisely because it had not met with general support, and the time had now come to make a fresh attempt to find a solution. He pointed out that the provision would need to define the date to which reference was to be made to calculate the rate of interest, particularly where the rate was calculated on the basis of the discount rate or the rate used for commercial credits, which fluctuated, and in his delegation's view that time should be the moment of effective payment.

25. The CHAIRMAN suggested that a working group, consisting of the representatives of Argentina, Czechoslovakia, Ghana, Greece, India, Japan and Sweden should be set up to formulate a consolidated proposal for a rule regarding rate of interest.

26. *It was so decided.*

27. Mr. DATE-BAH (Ghana) suggested that one Islamic country be included in the working group.

28. Mrs. FERRARO (Italy) said that her delegation would also like to participate in the group's work.

29. Mr. ZIEGEL (Canada) pointed out that two distinct proposals had been put forward. The first was that an attempt should be made to elaborate a comprehensive rule on interest that would be applied whenever one party owed money to another. The second was that, on the contrary, the Convention should not attempt to deal with any aspect of the problem of interest. He suggested that it might be useful to take an indicative vote in order to establish the balance of opinion between the two proposals.

30. Mr. FARNSWORTH (United States of America) said that as he saw it the purpose of the interest requirement was to compensate a party concerned for the loss of the use of money which he should have been paid. It did not seem to him likely that that party would have made use of that money in the other party's place of business; he would more probably have done so in his own place of business. His delegation preferred the joint proposal put forward in A/CONF.97/C.1/L.216, but, if that were to be abandoned, he would prefer the United Kingdom solution to the compromise solution suggested by the representative of Finland. He agreed that it would be useful for the working group to know in advance what was the measure of support for either solution.

31. The CHAIRMAN asked the Canadian representative whether he was suggesting that the Committee should vote on the United Kingdom proposal.

32. Mr. ZIEGEL (Canada) said his suggestion had been not that the Committee take a formal vote, but merely an indicative vote as between the United Kingdom proposal and the other solutions proposed, so that the working group would have some knowledge of where the main interests of representatives lay.

33. Mr. LEBEDEV (Union of Soviet Socialist Republics) said it seemed to him a better course to let the working group first prepare a consolidated version of the various proposals put forward for a provision on interest

rate, and only after that to proceed to a vote on that version and on the United Kingdom proposal. To take a vote first on the United Kingdom proposal might complicate the issue.

34. The CHAIRMAN pointed out that some representatives had objected to the taking of an indicative vote on the grounds that no provision was made for it in the Rules of Procedure. He would therefore prefer to avoid the taking of such a vote.

35. Mr. ROGNLIEN (Norway) said that although the Rules of Procedure made no provision for indicative voting, neither did they prohibit it. An indicative vote on the question at issue would be useful in giving the working group guidance on how to go about its work. He agreed with the Soviet representative that it would be premature to take a formal vote on the United Kingdom proposal, since that would mean that there would be no opportunity to make a choice between the various alternative solutions.

36. Mr. BENNETT (Australia) said it was desirable in principle that the Convention should make clear that interest would be payable when the parties were in default; in practice, however, it would be difficult to find a formulation that would cover the complex considerations that arose in regard to the very different legal and economic systems involved. He hoped that the working group would come forward with some satisfactory proposals, but if that were not the case, he would support the United Kingdom solution.

37. Mr. WANG Tian ming (China) said there was a clear division of opinion in the Committee on whether or not the Convention should include a provision concerning interest. His delegation favoured the inclusion of such a provision, and supported the suggestion that an indicative vote should be taken to establish how much support there was for either view. Without such a vote, it would be difficult for the working group to carry out its work.

38. Mr. SAMI (Iraq) supported that view.

39. Mr. OLIVENCIA RUIZ (Spain) said the question of the payment of interest was a complex one from the juridical viewpoint. If the Convention did not clearly lay down the basis on which the interest was to be applied, in other words in what currency it was to be paid, it would be difficult to establish a rule that would be universally applicable. Since his delegation's proposal (A/CONF.97/C.1/L.201) had been rejected, he could now favour the United Kingdom solution. However, in order to reach a decision the Committee would need to have before it all the possible options, and he awaited with interest the outcome of the working group's work.

40. Mr. HERBER (Federal Republic of Germany) said that as he saw it, there were only two courses open. The first was to include a provision stating the duty to pay interest on sums in arrears and the second was to leave the whole question of interest outside the Convention, as the United Kingdom delegation proposed.

41. The CHAIRMAN said that he took it that the Committee agreed to defer the discussion on article 69 until the working group submitted its report.

42. *It was so agreed.*

43. In reply to a question by Mr. DATE-BAH (Ghana), the CHAIRMAN said that since the draft did not contain any rule on the calculation of interest, any proposal that the proposed working group might make on the subject was bound to be further removed from the existing text than the United Kingdom proposal to drop the reference to interest. Accordingly, when the time came for voting, the working group's text would be voted upon first and the United Kingdom proposal second.

*Article 51 (continued) (A/CONF.97/C.1/L.232)*

44. The CHAIRMAN drew attention to the revised article 51 (A/CONF.97/C.1/L.232) submitted by the 10-member *ad hoc* working group.

45. Mr. HJERNER (Sweden), introducing the proposal (A/CONF.97/C.1/L.232), said that the members of the *ad hoc* working group had encountered several difficulties in their task of redrafting article 51. The first concerned the introductory sentence, which involved the relationship between the provisions of article 51 and those of article 12 (1) on the subject of price. The second concerned the concluding portion of the first sentence of article 51, which contained a rule that some delegations considered too favourable to the seller. Lastly, a number of delegations favoured the deletion of article 51.

46. The group had decided that article 12 would be left untouched and had decided to retain the reference to a contract which had been "validly" concluded. It had also decided to replace the words: "price generally charged by the seller" by: "price generally charged at the time of the conclusion of the contract". That last change was particularly important in that the seller would be able to look not only to his own price but also to the price charged for the goods in the particular trade concerned. The joint proposal represented a well-balanced compromise and he urged the Committee to adopt it.

47. Mr. STALEV (Bulgaria) supported the joint proposal.

48. Mr. KRISPIS (Greece) suggested the elimination of the proviso "in the absence of any indication to the contrary", which might lead to difficulties of interpretation. In fact, an indication as to the price might be express or implied, or may derive from an hypothetical or presumptive intention of the parties. Since the latter two possibilities were excluded, while the former two were expressly dealt with in article 51, it was impossible for "other indications" to exist.

49. Mr. OLIVENCIA RUIZ (Spain) took the view that the joint proposal could not affect the legal assumptions on which the rule embodied in the former article 51 was based. He also criticized as inadequate the use of the adverb "validly" before the verb "concluded" since the provisions of article 51 were governed by those of article

4 (a) on validity. He agreed with the previous speaker that the proviso "in the absence of any indication to the contrary" should be deleted.

50. Mr. ALKIN (Ireland) suggested the deletion of the words "or implicitly" in the first sentence of the joint proposal. With that deletion, the text would offer three possibilities: first, that the price should be fixed; second, that provision should be made for determining the price and, third, that there should be an implied (or an implicit) price. His proposed deletion would serve to remove the confusion which resulted from the double reference to implied price in the text of the joint proposal.

51. Mr. KRISPIS (Greece) supported the suggestion.

52. Mr. DATE-BAH (Ghana) thought that the Irish representative's suggestion would destroy the compromise achieved by the working group. With the deletion suggested by the Irish representative, it would be possible to have a contract without any agreement on the price. His delegation was totally unable to accept such a notion.

53. Mr. MANTILLA-MOLINA (Mexico) regretted that he could not fully support the joint proposal. He agreed with the Spanish representative that a reference to the validity of the contract would conflict with the provisions of article 4 of the draft. He supported the suggestion for the deletion of the proviso "in the absence of any indication to the contrary".

54. On the most important aspect of the compromise proposal, he opposed the idea of replacing the reference to the price "generally charged by the seller" by the alternative wording "generally charged at the time of the conclusion of the contract". The formula would lead either to the same conclusion as the existing text or else to an absolutely unfair result.

55. Mr. BENNETT (Australia) supported the joint proposal (A/CONF.97/C.1/L.232) and said that he agreed with the comments made by the Ghanaian representative on the Irish representative's suggestion. He opposed the suggested deletion of the proviso "in the absence of any indication to the contrary" since there were circumstances in which it could be useful.

56. Mrs. FERRARO (Italy) said that, although she had been a member of the *ad hoc* working group, she proposed that the word "validly" should be deleted on the grounds that the question of validity was already covered by the provisions of article 4. She agreed with the Mexican representative that the reference to the "price generally charged at the time of the conclusion of the contract" was undesirable.

57. Mr. KRISPIS (Greece), commenting on the Italian representative's suggestion, pointed out that the reference to a "validly concluded" contract was not confined to the question of validity under the Convention itself. It was meant to cover validity under the national law, validity under the Convention and even validity under a combination of both.



58. Mr. HJERNER (Sweden) reaffirmed his determination to abide by the compromise reached in the *ad hoc* working group.

59. Mr. BOGGIANO (Argentina) said that his delegation too would uphold the compromise proposal. In particular, he attached great importance to the retention of the adverb "validly" before the verb "concluded".

60. The CHAIRMAN said that as a majority appeared

to oppose the Italian subamendment to delete the word "validly" from the first sentence of the joint proposal, he would, if there was no objection consider the subamendment rejected.

61. *It was so agreed.*

62. *The joint proposal was adopted by 29 votes to 4.*

*The meeting rose at 1.04 p.m.*

## 30th meeting

Monday, 31 March 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.30

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*New article 65 bis (continued) (A/CONF.97/C.1/L.217, L.234)*

1. The CHAIRMAN invited members of the Committee to consider the revised text submitted by the German Democratic Republic for a new article 65 *bis* or 23 *bis* (A/CONF.97/C.1/L.234).

2. Mr. MASKOW (German Democratic Republic) explained that the new article submitted earlier (A/CONF.97/C.1/L.217) had been reworded in more restrictive terms so as to stress the factual relationship of the parties' obligations rather than their rights and to take account of the comments made during consideration of the first draft. He thought it would be best for the new article to be inserted after article 65, i.e. in the section on exemptions. However, that was a matter which could be dealt with by the Drafting Committee.

3. Mr. SCHLECHTRIEM (Federal Republic of Germany) asked whether it would not be possible to replace the expression "in so far as" by "to the extent that".

4. Mr. VINDING KRUSE (Denmark) asked whether the wording of the article would have to be amended if it were to be inserted after article 23.

5. Mr. MASKOW (German Democratic Republic), replying to the previous two speakers, said that he could

agree to the subamendment proposed by the representative of the Federal Republic of Germany and that he did not think it would be necessary to change the wording of the article if it were to be inserted after article 23. The main thing was that the provision should form a separate article.

6. Mr. ROGNLIEN (Norway) asked whether the proposal by the German Democratic Republic presupposed that the other party was at fault and whether it was to apply where the act or omission was not one of negligence. What happened if both parties had been at fault, if both parties had contributed to the failure to perform, but one party to a lesser extent than the other? Perhaps the text should be further elaborated to cover all the different situations likely to arise.

7. Mr. MASKOW (German Democratic Republic) explained that the exemption applied whether the other party had been at fault or not. For example, if machinery was delivered that conformed to sketches submitted with the order, then the seller was exempted if the sketches turned out to be inaccurate. If the buyer of the machinery claimed damages, the court would determine whether the other party could or could not avail himself of the provisions on exemption. On the other hand, the expression "in so far as" was sufficiently elastic to allow the court to determine each party's share of the responsibility.

8. Mr. KRISPIS (Greece) was of the opinion that the new article should be incorporated in the Convention, if only to clarify the rest of the text.

9. The CHAIRMAN put to the vote the new article proposed by the German Democratic Republic (A/CONF.97/C.1/L.234), on the understanding that if it was adopted the Drafting Committee would decide where it was to be inserted.

10. *The new article proposed by the German Democratic Republic was adopted and referred to the Drafting Committee.*



*Drafting proposals concerning section IV and section II of chapter IV (A/CONF.97/C.1/L.230)*

11. The CHAIRMAN drew the attention of members to the drafting proposals submitted by Norway (A/CONF.97/C.1/L.230).

12. Mr. ROGNLIEN (Norway) explained that in his opinion section IV—Damages (articles 70—73)—and section II—Exemptions (article 65) of chapter IV should be combined to form a separate chapter which would be inserted between the existing chapters III and IV. The provisions on damages were important enough to have a place of their own in the Convention, before the existing chapter IV on provisions common to the obligations of the seller and of the buyer.

13. Mr. ZIEGEL (Canada) considered that the Drafting Committee was in the best position to reorganize chapter IV as a whole.

14. Mr. HERBER (Federal Republic of Germany) was afraid that to combine the provisions on damages with those on exemptions would make for some confusion, since article 65 did not apply only to damages.

15. Mr. ROGNLIEN (Norway) thought that the articles on damages and article 65 could be brought closer together without necessarily being placed in the same chapter.

16. Mr. VINDING KRUSE (Denmark) felt it should be left to the Drafting Committee to consider the Norwegian proposals.

17. The CHAIRMAN said that if there was no objection, he would take it that the Committee wished to refer the Norwegian proposals (A/CONF.97/C.1/L.230) to the Drafting Committee.

18. *It was so decided.*

*Article 70*

19. The CHAIRMAN invited members to consider the amendment by Pakistan (A/CONF.97/C.1/L.235).

20. Mr. DATE-BAH (Ghana) took it that the intention of the Pakistan delegation was to provide a more objective wording, so as to make sure that damages for loss of profit could not be claimed automatically when, for example, the party in breach could not reasonably have foreseen the risks of loss.

21. Mr. KRISPIS (Greece) could not support the amendment because it contained a mixture of objective and subjective criteria. The criterion applied in the existing text was objective enough since the damages could not exceed the loss which the party in breach had foreseen or ought to have foreseen. Moreover, the word "reasonable" had already appeared too often in the Convention.

22. The CHAIRMAN noted that there was not much support for the amendment by Pakistan (A/CONF.97/C.1/L.235). If there was no objection, he would consider that the Committee rejected it.

23. *It was so decided.*

*Article 71 (A/CONF.97/C.1/L.193)*

24. Mr. ROGNLIEN (Norway) explained that his proposal was a drafting amendment designed to simplify the existing text and suggested that it should be referred to the Drafting Committee.

25. The CHAIRMAN said that if there was no objection he would consider that the Committee wanted to refer the amendment to the Drafting Committee, drawing its attention to the apparent differences between the French and English wording.

*Article 72 (A/CONF.97/C.1/L.194)*

26. The CHAIRMAN invited members to consider the Norwegian amendment (A/CONF.97/C.1/L.194) to paragraphs 1 and 2 of article 72. As the amendment to paragraph 2 was solely a matter of drafting, he suggested it should be referred to the Drafting Committee.

27. *It was so decided.*

28. Mr. ROGNLIEN (Norway) said that article 72 (1) made provision, in the event of avoidance without any substitute transaction, for the party claiming damages to recover the difference between the price fixed by the contract and the current price at the time he had first had the right to declare the contract avoided. However, the Norwegian delegation considered that it would in practice be very difficult to determine when that was and that it would therefore be best to take either the time of delivery, or the time of avoidance, whichever came first.

29. The UNCITRAL Working Group had initially considered making the relevant time the time of avoidance, and later the time of delivery, but it had then been pointed out that the latter time might not be suitable for a case of anticipatory breach taking place before delivery.

30. The CHAIRMAN reminded the Committee of the point made by some delegations that to adopt the time of avoidance might encourage one of the parties to speculate on a favourable movement in the current price. The UNCITRAL Working Group had then considered whether the time of delivery should not be used, but it had turned out that in cases of anticipatory breach that would be too late. It was thus that the present solution had been arrived at, whereby the reference date for determining the current price was the one when the contract could first have been declared avoided.

31. Mr. ROGNLIEN (Norway) observed that in cases of anticipatory breach it would be difficult to fix the precise date on which a party had first had the right to declare the contract avoided, particularly since the definition of what was meant by an anticipatory breach of contract was not without its problems. The criterion used in article 72 was too vague. That was why his delegation proposed that the relevant time should be the time of delivery or, in cases of anticipatory breach, the time of avoidance, whichever of the two came first. It was a simple criterion, easy to apply and reasonable. It also

reduced to a minimum the possibility to speculate on price developments.

32. Mr. ADAL (Turkey) supported the Norwegian amendment (A/CONF.97/C.1/L.194), which applied the same principle as the Turkish Civil Code.

33. Mr. ZIEGEL (Canada) agreed with the ideas underlying the Norwegian proposal but had some reservations about its wording. Though he understood the reasons that had led the UNCITRAL Working Group to adopt the solution in the existing paragraph 1, he nevertheless thought, like the Norwegian representative, that the criterion of the time when the contract could first have been declared avoided was too difficult to apply. Many situations could be imagined where application of that criterion would run into practical difficulties, such as the case of faulty goods whose defects did not appear until after the time when the contract might first have been declared avoided. It would therefore be best to take as the relevant date the time of avoidance of the contract, even though it might admittedly encourage an innocent party to indulge in speculation. On the other hand, unlike the Norwegian representative, he did not think it a good idea to make the reference date for determining the current price the time of delivery, because that would also be difficult to apply. As the aim of article 72 was to propose a formula for assessing damages, it would be best to use the current price at the time of avoidance of contract. He therefore proposed that, at the end of the first sentence of article 72 (1), the words "at the time he first had the right to declare the contract avoided" should be replaced by the words "at the time of avoidance".

34. Mr. BENNETT (Australia) said that on the whole he was in favour of the Norwegian proposal since the rule given in article 72 (1) was difficult to apply. With regard to the oral amendment proposed by the Canadian representative, he thought it would be best to speak of the actual date of avoidance of the contract and that, given the risk of speculation by the innocent party, there was something to be said for not letting the period become too elastic. Hence he was not against adopting the time of delivery as reference date if it came first. The idea of a reasonable time was already established in the Convention, in particular in article 45 (2), in connection with the buyer's right to avoid the contract in the event of fundamental breach. A third date might be considered, which likewise had the advantage of not letting the period become too elastic, namely, the date of payment of the price if it occurred before the delivery of goods or avoidance of contract.

35. Mr. HJERNER (Sweden) understood the desire for clarity which had prompted the Norwegian proposal but was afraid it might have unacceptable results. In his delegation's opinion, the reference date for fixing the current price should be that of avoidance of the contract, as in the first draft of the Convention. It was important that a party which had carried out a contract should not be forced to abandon a favourable position when it was

the other party which was in breach; yet that was what might happen if any alternative to the time of avoidance were adopted. It would be contrary to the principle of good faith as well as to that of "*pacta sunt servanda*", and he was therefore in favour of the oral amendment by Canada.

36. Mr. MANTILLA-MOLINA (Mexico) supported the Norwegian and Canadian proposals.

37. The CHAIRMAN noted that the Committee now had before it an amendment by Norway and a sub-amendment by Canada, which he felt was further away from the existing wording of paragraph 1.

38. Mr. ROGNLIEN (Norway) said that he had not been convinced by the arguments put forward by the Canadian representative against the date of delivery. If the relevant date for fixing the current price was to be solely the time of avoidance, it would give the innocent party an opportunity to speculate on the price; that would no longer be true if the point of reference were to be the time of delivery or the time of avoidance, whichever came first. In his opinion, the Canadian proposal amounted to a separate amendment and not a sub-amendment to his own.

39. Mr. NICHOLAS (United Kingdom) stressed that the Norwegian proposal had the advantage of preventing one party from speculating on price movements.

40. Mr. ZIEGEL (Canada) said that the date adopted in the existing paragraph 1 for fixing the current price, i.e. the time when the innocent party had first had the right to declare the contract avoided, raised objections both of a practical nature, as already pointed out by several speakers, and of a theoretical nature, because the innocent party was very often not in a position to declare the contract avoided.

41. He thought the risk of speculation should not be overestimated, particularly when, as nowadays, markets were liable to sharp fluctuations. Finally, he considered that his proposal was not radically different from the Norwegian one.

42. The CHAIRMAN agreed that the Canadian proposal was along the same lines as the Norwegian one, since both called in question the formula used in the existing paragraph 1 for fixing the current price. For his own part, he was opposed to any amendment to paragraph 1 and considered that to leave it open to one of the parties to declare avoidance of contract or not was bound to encourage him to engage in speculation. For that reason he had, throughout the work of UNCITRAL, always recommended the existing solution.

43. He put to the vote the Canadian oral amendment that the reference date for determining the current price should be solely the time of avoidance of the contract.

44. *The amendment was rejected by 17 votes to 13.*

45. Mr. BENNETT (Australia) reminded the Committee that he had submitted an oral amendment to the effect that a third possibility should be taken into

account for determining the current price, namely, the date of payment of the price.

46. The CHAIRMAN put the Australian amendment to the vote.

47. *The amendment was rejected.*

48. Mr. SCHLECHTRIEM (Federal Republic of Germany) said he was opposed to the Norwegian amendment, for similar reasons as the Chairman. In the case of anticipatory breach, a party could still, if the Norwegian proposal were adopted, wait to see how the market moved, that is he could speculate and avoid the contract on a date most favourable to him.

49. Mr. ROGNLIEN (Norway) considered that the risk of speculation was in fact very limited and that it arose only if the contract was avoided after delivery. It was avoided before delivery, the reference date for determining the current price should be that on which the contract had been avoided. In reply to a question by Mr. HJERNER (Sweden), he explained that the date of delivery meant the date of actual delivery, not the date fixed in the contract.

50. Mr. ZIEGEL (Canada) observed that under the terms of article 73 the innocent party was required to take measures to mitigate his loss. That obligation also applied to the situation referred to in article 72.

51. Mr. FOKKEMA (Netherlands) asked how the Norwegian formula would apply when the contract was declared avoided because of failure to deliver the goods.

52. Mr. ROGNLIEN (Norway) said that if delivery had not been made, the reference date for determining the current price would have to be the date of avoidance of the contract.

53. The CHAIRMAN put the Norwegian proposal (A/CONF.97/C.1/L.194) to the vote.

54. *The proposal was rejected by 21 votes to 12.*

#### Article 73

55. Mr. HONNOLD (United States of America), introducing his delegation's amendment to article 73 (A/CONF.97/C.1/L.228), said that the principle stated in article 73, whereby the party who relied on a breach of contract was required to take such measures as were reasonable in the circumstances to mitigate the loss, was an important general principle. However, article 73 was not very clear as it stood, for it might lead to the conclusion that if the injured party failed to take such measures, the party in breach could only claim a reduction in the damages and could not rely on such failure in connection with the other remedies open to him, for example, the right to reduce the price. That restrictive conception of the obligation to mitigate the loss might have very questionable results. For example, a buyer might realize, shortly after placing an order, that he would be unable to use the goods; he therefore proposed to the seller that he should pay him damages and asked him not to go ahead with the order; but the

seller ignored his request and used materials and labour in producing the goods. If the seller then resold the goods and subsequently claimed damages from the buyer, the principle in article 73 according to which the seller was required in such cases to take measures to mitigate his loss would naturally apply. On the other hand, if the seller claimed the price of the goods from the buyer, under a strict interpretation of the existing article 73 that principle would not operate and the seller would be able to claim the full price. His delegation's amendment was therefore intended to prevent such a narrow and mistaken interpretation of the principle of mitigation of loss.

56. Mr. NICHOLAS (United Kingdom) endorsed the arguments put forward by the United States representative. In its present form, the provision might in fact be used by an unscrupulous party to get out of his obligations. It should therefore be amended.

57. The CHAIRMAN questioned whether article 73, if amended in the way proposed by the United States representative, would still be in the right place in section IV, which dealt with damages.

58. Mr. HONNOLD (United States of America) thought that, rather than moving the amended article 73 elsewhere, it would be better to broaden the scope of section IV on damages, for example by entitling it "Damages and reduction of damages".

59. Mr. KRISPIS (Greece) supported the United States amendment, which filled a gap in the Convention. He wondered whether the words "which should have been mitigated" in the second and third lines of the amendment ought not to be replaced by the words "which could have been mitigated".

60. Mr. HERBER (Federal Republic of Germany) considered that the United States proposal was useful in theory, but liable to make for confusion. The considerations set forth in respect of damages were presumably equally valid for a reduction in the price, but in using the expression "any other remedy", the United States proposal was possibly seeking to cover a far wider field, including, for example, the right to declare the contract avoided. It was hard to see how there could be an adjustment in that case. It was conceivable that, in the absence of measures to mitigate the loss, the right to declare the contract avoided might be abrogated, but such situations did not come under article 73. He asked the United States representative if it would not suffice to refer in the amendment to the right to a reduction in the price. He was unable, moreover, to support the Greek representative's suggestion.

61. Mr. ALKIN (Ireland) asked the United States representative whether he did not think that the first sentence of the existing text provided a satisfactory answer to the point raised by him. The proposed addition to the second sentence would merely seem to indicate a series of possibilities of action.

62. Mr. HONNOLD (United States of America)

thought it would not be enough to mention the right to a reduction in the price, as suggested by the representative of the Federal Republic of Germany. That was a limited remedy applicable only in particular situations. The question of whether and how the principle of the mitigation of loss would apply in the event of avoidance of the contract was of purely theoretical interest.

63. Matters would be simpler if he could in fact consider, as the Irish representative had suggested, that the first sentence of the text proclaimed a principle generally applicable to the various remedies provided for in the Convention. But he doubted whether the second sentence would be interpreted as furnishing the means for implementing that principle. Every care must be taken to avoid a narrow interpretation and to ensure that the principle of the mitigation of loss through reasonable measures had as broad a scope as possible.

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

64. Mr. ZIEGEL (Canada) said that the wording of article 73 and the relationship between that article and the provisions of the Convention dealing with specific performance created difficulties for him. Article 73 only applied to cases where a party relied on a breach of contract; in those cases, and in those cases only, the party concerned was required to take measures to mitigate the loss. However, if the seller or the buyer wished to require performance of the contract, he did not rely on a breach, and the situation was reversed.

65. According to the reasoning of the United States representative, if an innocent party was obliged to accept the repudiation of an obligation, it was not entitled to require specific performance. That point of view might, perhaps, be in line with the practice in common law countries, but it was not in line with the principles underlying the Convention, according to which the buyer and the seller had an absolute right to require specific performance so long as they had not had recourse to inconsistent remedies. In the case cited by the United States representative, the seller had not had recourse to such remedies; he simply wished to exercise his right to performance of the contract, which no provision in the Convention denied him. The United States amendment was liable to create difficult problems in connection with specific performance. If, on the other hand, it did not affect specific performance, it was difficult to see what it added to article 73.

66. Mr. HJERNER (Sweden) said that, while he understood the reasons for the United States proposal, he could not accept it. He shared the viewpoint of the Canadian representative. The United States proposal would limit the seller's right to require performance and would give the buyer a unilateral right to avoid the contract.

67. Mr. MANTILLA-MOLINA (Mexico) said he was against the United States proposal, which he thought ill-advised. Its wording was somewhat vague and the sub-

stance unacceptable. The idea it introduced should be the subject of a separate article relating to the price and cases in which there was a reduction in the price. That question differed fundamentally from the one dealt with in article 73, which was concerned solely with a reduction in the damages. In the case cited by the United States representative, the fact that the buyer changed his mind did not constitute avoidance of the contract and the seller was entitled to proceed with manufacture since nothing had released him from his obligations. It was reasonable that the seller should seek to recover the price, and it would be unreasonable if, as proposed by the United States, the price could be reduced. He did not see why there should be such a reduction, since the seller had not committed any wrong, or how it would be determined.

68. Mr. BOGGIANO (Argentina) said that he was unable to support the United States proposal. According to the present wording of article 73, it was the party relying on a breach of contract who must take measures. The scope of the article was limited to that party. Article 73 applied solely to the amount of the reduction in the damages. But the United States proposal referred to "any other remedy"; such remedies might include various declarations or measures which were quite unforeseeable. That was where the difficulty lay, for it was impossible for the Committee to take a decision on such a vague and imprecise proposal which provided for measures that were not quantifiable.

69. Mrs. KAMARUL (Australia) said she supported the United States proposal, which she considered balanced and justified. The existing text of article 73 needed to be clarified.

70. Mr. HONNOLD (United States of America) said that, despite the misgivings voiced by some representatives, his country's amendment would not amount to a general restriction of the right to require specific performance or recover the price. It must be remembered that the scope of article 73 was extremely limited. Nor would it limit full protection for the innocent party. When that article applied, the party in breach was entitled to the full amount of damages, including the amount corresponding to the loss of profit, and when it did not apply, the party would be entitled to take steps to secure specific performance or payment of the price. In some civil law countries, cases involving wastage of labour and materials would be covered by the rules on good faith. The Convention did not contain any general provision on that subject, and the amendment, by providing that appropriate action must be taken to mitigate the loss and avoid wastage, would give expression to that concept of good faith.

71. Mr. FOKKEMA (Netherlands) said that he fully understood the thinking of the United States delegation. He, too, considered that something must be done, but the means selected did not seem to him to be the best. The case presented by the United States was not characteristic of the contracts covered by the Convention, but came within its purview through article 3, which stated

that contracts for the supply of goods to be manufactured or produced were to be considered sales. In countries which applied the French civil code, the customer was free to terminate the work provided he paid the other party what was due to him under the contract. His country would be willing to agree to a new provision being inserted in the Convention to the effect that the buyer had the right to avoid the contract provided he paid the costs. But the United States proposal was based on a different idea and confused various principles. If article 73 was to be applied, it would be necessary to determine, first, at what time there was non-performance. The situation would differ, depending on whether non-performance was considered to have arisen after the decisive moment when the buyer had declared that he would not take delivery of the goods or whether the buyer was not entitled to declare that he did not wish the work to continue; non-performance then assumed a different aspect. The solution proposed was not satisfactory, and another should be found.

72. Mr. VINDING KRUSE (Denmark) freely acknowledged that cases arose in which there was a loss in respect of labour, raw materials or transport, but it was very difficult to deduce from the formula proposed by the United States delegation that those were the cases envisaged. The Netherlands representative's suggestion did not seem to provide a very satisfactory solution either.

73. Mr. SCHLECHTRIEM (Federal Republic of Germany) thought the United States proposal justified in so far as it related solely to a reduction in price. Beyond that however the wording was too general and hence dangerous, for the courts would have every latitude to interpret and modify the terms of the contract.

74. Mr. HONNOLD (United States of America) asked whether it would be possible to set up a small working group of those members of the Committee who supported the idea behind his proposal in order to arrive at a more acceptable formulation.

75. The CHAIRMAN thought that the Committee should first vote on the idea behind the proposal.

76. Mr. KRISPIS (Greece) said that he would abstain. Although he had been ready to accept the United States proposal at first, after the discussion he was no longer sure that it did not entail some risks, such as those pointed out by the representative of the Federal Republic of Germany.

77. The CHAIRMAN explained that the idea of the United States proposal was to extend the application of the rule set forth in the second sentence of article 73 to cases involving not only damages, but also some other consequences of the breach of contract, such as losses in respect of raw materials, labour, transport etc. He invited the Committee to vote purely on the principle behind the United States proposal (A/CONF.97/C.1/L.228).

78. *The principle behind the United States proposal was rejected by 24 votes to 8.*

#### Article 74 (A/CONF.97/C.1/L.211)

79. Mr. KLINGSPORN (Federal Republic of Germany) said that article 74 dealt with the seller's obligation to preserve the goods if the buyer was slow in taking delivery. The existing text assumed that the seller was ready to deliver the goods. The seller might however be inclined to keep them if the delivery of goods and the payment of the price were concurrent conditions and if the buyer failed to pay the price. That case was given as an example in the commentary on article 74 (A/CONF.97/5, p.193). His delegation accordingly proposed (A/CONF.97/C.1/L.211) that article 74 should be explicitly broadened to cover cases in which the payment of the price and the delivery of the goods were to be effected simultaneously and where the buyer was slow in paying.

80. Mr. PLANTARD (France) considered that the proposed change was unnecessary as the existing text, "if the buyer is in delay in taking delivery of the goods . . .", did not specify the reasons for the delay and could cover the case envisaged in the amendment, namely, that the buyer delayed payment.

81. Mr. KRISPIS (Greece) agreed.

82. Mr. SEVON (Finland), supported by Mr. VINDING KRUSE (Denmark), Mr. FOKKEMA (Netherlands) and Mr. ROGNLIEN (Norway), supported the proposal by the Federal Republic of Germany. It was not certain that article 74 in fact covered the case in which the buyer was slow in paying, since it might happen that the buyer wished to take delivery without paying. It would therefore be useful to clarify article 74 in the manner suggested by the Federal Republic of Germany.

83. *The proposal (A/CONF.97/C.1/L.211) was adopted by 19 votes to 5.*

84. Mr. LEBEDEV (Union of Soviet Socialist Republics) remarked that the text of the amendment just adopted was not completely clear. It was hard to see how one of the parties could be in delay in performing his obligation when the two parties had to discharge their obligations simultaneously.

#### Article 75 (A/CONF.97/C.1/L.178, L.227)

85. Mr. WANG Tian ming (China), introducing his delegation's amendment (A/CONF.97/C.1/L.178), said that while article 75 dealt mainly with the question of the buyer's preserving the goods, it also dealt with the question of his rejecting them. The buyer could reject goods, which implied that he could reject them at his discretion. His delegation accordingly proposed that article 75 should be amended to make it clear that the buyer could reject goods only on the grounds of lack of conformity and that, if he intended to reject the goods, he must also inform the seller of his intention and provide the relevant documents including the inspection certificate issued by an inspection firm. The text of the amendment should be completed by the insertion of the words "without undue delay" after the words "informing the seller".

86. The CHAIRMAN suggested that the Chinese dele-

gation's amendment was based on a misunderstanding since article 75 did not give the buyer an unconditional right to reject goods. Article 75 applied only if the buyer exercised the right to reject the goods which was given to him in two cases alone: when he was entitled to avoid the contract even after taking delivery of the goods or when he was entitled to request the replacement of the goods by reason of lack of conformity. Article 75 was intended to specify that if the buyer was entitled on one of these grounds to exercise his right to reject the goods he was still under an obligation to preserve them. The text should perhaps be made clearer.

87. Mr. WANG Tian ming (China) said that he had decided to submit his amendment precisely because article 75 had seemed ambiguous when he read it. Perhaps the text should be referred to the Drafting Committee.

88. *It was so decided.*

89. Mrs. KAMARUL (Australia) said that her delegation's amendment (A/CONF.97/C.1/L.227) was intended to make it clear in article 75 (1) that the buyer was obliged to preserve the goods if he had received them and intended to reject them, even in the case envisaged in article 75 (2), namely, when the buyer had taken possession of them on behalf of the seller in the circumstances

set out in that paragraph. If that idea was implicit in paragraph 1, the Australian proposal was simply a drafting change. If not, it was a substantive amendment.

90. Mr. ROGNLIEN (Norway) considered that the amendment was a substantive one which would modify the buyer's obligations, since the conditions were different in the case hitherto envisaged in paragraph 1 and the case envisaged in paragraph 2.

91. Mr. KRISPIS (Greece) interpreted the amendment differently. As he saw it the amendment specified that the seller was obliged to preserve the goods in all cases in which he took delivery of them.

92. Mr. HONNOLD (United States of America) thought that the clarification provided by the Australian amendment was simply a matter of drafting, since the seller was already obliged to preserve the goods as soon as he took possession of them.

93. The CHAIRMAN noted that the Australian amendment was being interpreted in various ways. He proposed that further discussion should be deferred to the next meeting.

94. *It was so decided.*

*The meeting rose at 6 p.m.*

## 31st meeting

Tuesday, 1 April 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

*The meeting was called to order at 10.03 a.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 75 (A/CONF.97/C.1/L.227) (continued)*

1. Mr. BENNETT (Australia) said that, following the discussion at the previous meeting, his delegation had reconsidered the wording of its proposal (A/CONF.97/C.1/L.227). His delegation continued to consider that the buyer's obligation to preserve the goods should be made clear in the situation envisaged in paragraph 2. That could be achieved either by amending paragraph 2

A/CONF.97/C.1/SR.31

or by introducing a new paragraph 3 to deal with the question. The proposal had the further advantage of making the provisions of articles 76 and 77 applicable to the cases governed by article 75 (2).

2. If a new paragraph 3 were added, it might provide that a buyer who had taken possession of goods on behalf of a seller in accordance with paragraph 2 must take such steps as were reasonable in the circumstances to preserve them and might retain the goods until his reasonable expenses had been reimbursed by the seller.

3. His delegation was not wedded to that formulation and would accept any form of words having the same effect. Nor did it insist that the new provision should constitute a separate paragraph.

4. Mr. BOGGIANO (Argentina) supported the Australian proposal. The proposal would have the merit of making provision for the buyer's right to retain the goods as security for the payment of his expenses in the situation mentioned in article 75 (2).

5. The CHAIRMAN said that there appeared to be no opposition to the central idea in the Australian proposal.



The only objection had been that the point was already covered by the provisions of the draft. His own suggestion was that the purpose of the Australian proposal could be achieved more simply by inserting a new sentence between the first and second sentences of paragraph 2 stating that in such cases, the provisions of paragraph 1 were applicable.

6. Mr. BENNETT (Australia) said that his only objection to the wording suggested by the Chairman was that it did not bring out the buyer's right to retain the goods in the situation governed by paragraph 2 as specifically as did his delegation's proposal.

7. Mr. KHOO (Singapore) said that he had no objection in principle to the insertion of a provision on the lines of the Australian proposal, but had misgivings concerning the omission from it of the proviso "provided that he could do so without . . . unreasonable inconvenience or unreasonable expense" which appeared in paragraph 2. If the Committee agreed that the same conditions should apply to the taking possession of goods as to the preservation of goods, he could agree to the Australian proposal and the Chairman's formulation being referred to the Drafting Committee.

8. Mr. OLIVENCIA RUIZ (Spain) supported the wording suggested by the Chairman but said that he understood the doubts expressed by the previous speaker. At the same time, it was essential to set forth in paragraph 2 the buyer's right to retain the goods until his expenses had been reimbursed by the seller. He could not understand why the existing text of article 75 departed so materially from the corresponding provision in the 1964 ULIS. He welcomed the fact that the Australian proposal would make a buyer in the situation envisaged in paragraph 2 liable to all the obligations set forth in articles 76 and 77.

9. Mr. ROGNLIEN (Norway) supported the Australian proposal. He agreed, however, that the same result could also be achieved with the language suggested by the Chairman.

10. Mr. SEVON (Finland) considered that only the original Australian proposal (A/CONF.97/C.1/L.227) could be referred to the Drafting Committee as no revised proposal had been submitted in writing. The Drafting Committee could, of course, reshape the proposed amendment at its will.

11. Mr. ZIEGEL (Canada) remarked that as the buyer, in the situation covered by paragraph 2, was being required to assume certain responsibilities that had not previously devolved on him, it would clearly be appropriate to apply the test of reasonableness both to the trouble and to the expense to which that buyer might be put in order to discharge those new responsibilities.

12. Mr. HONNOLD (United States of America) suggested that the Australian representative should submit the revised version of his delegation's proposal in writing. A revised text would probably be accepted with-

out discussion, thereby reducing the burden on the hard-pressed Drafting Committee.

13. Mr. GREGOIRE (France) said that he had two objections to the Chairman's formulation. The first was the absence of any reference to the requirement that the steps taken and the expenses reimbursed should be reasonable. The second was the fact that the formulation did not clearly specify the buyer's right to retain the goods until his expenses were reimbursed.

14. In reply to a question by the CHAIRMAN, Mr. BENNETT (Australia) said that he would be prepared to see the substance of his proposal referred to the Drafting Committee, on the understanding that the latter would work on the basis of the Chairman's formulation.

#### *Article 76*

15. *Article 76 was adopted.*

#### *Article 77 (A/CONF.97/C.1/L.188)*

16. Mr. BOGGIANO (Argentina), introducing the amendment submitted by the delegations of Argentina, Portugal and Spain said that the proposal was intended to avoid possible difficulties by providing that the seller should be given notice requiring him to take possession of the goods within a reasonable time and warning him of the intention to proceed with an immediate sale. If the Committee decided the amendment was a mere clarification of the existing wording, the sponsors would have no objection to its being referred directly to the Drafting Committee.

17. Mr. KRISPIS (Greece) considered that the proposal dealt with an important substantive question. He believed that the wording should be revised to make it clear whether the "reasonable time" mentioned in the amendment was to be added to the "unreasonable delay" in the existing text. The warning of the intention to proceed with an immediate sale should be more categorical.

18. Mr. HJERNER (Sweden) suggested that the notice to the other party should include the date and place of the sale, which was implicit in article 77 (1), in order to enable the other party to attend the sale himself or to send a representative.

19. Mr. GREGOIRE (France) endorsed the Greek representative's comments. He thought that the notice should require the other party to take possession of the goods immediately rather than within a reasonable time.

20. Mr. SAMI (Iraq) agreed that further delay should not be encouraged. He preferred the existing wording, which adequately covered the whole question.

21. Mr. KHOO (Singapore) supported the joint proposal. The existing wording of paragraph 1 did not make it clear whether the party in default must be given an opportunity to take back the goods. He did not agree that the amendment necessarily imposed an additional delay on the party who was bound to preserve the goods. On the other hand, the delay in taking back the goods on



the part of the seller could be due to a *bona fide* dispute as to the buyer's right to reject the goods. The proposal would be improved if it were specified that the notice should give an indication of the date on which the buyer proposed to sell the goods. It might also be clearer if the words "in case of default" were added after "proceed" in the last line of the amendment. Those changes could be made by the Drafting Committee.

22. Mr. FOKKEMA (Netherlands) also saw merit in the proposal but thought the wording could be improved. In particular it should be made clear that there was no intention of imposing a double delay on the party who was bound to preserve the goods. The text might be referred to a small working group or to the Drafting Committee.

23. Mr. BOGGIANO (Argentina) said that the sponsors agreed to the suggestion that the notice should specify the intended date of sale and that the text should make clear that there would be no question of a double delay. It was important that the person holding the goods should not dispose of them without warning their owner, especially if the unreasonableness of the delay was interpreted unilaterally.

24. Mr. ZIEGEL (Canada) said it was his view that the phrase "notice of the intention to sell" in the existing text necessarily implied reasonable notice to give the other party adequate opportunity to prevent the sale if he so wished. He appreciated the sponsor's desire to put the matter beyond doubt but thought the same effect could be obtained by inserting the word "reasonable" before the phrase "notice of the intention to sell". Double delay would not necessarily result since under the existing text of paragraph 1, it was open to the party concerned to give notice of his intention to sell before the unreasonable delay referred to had actually occurred. It was the sale itself that could not take place until there had been an unreasonable delay. The interests of both parties were thus protected.

25. Mr. OLIVENCIA RUIZ (Spain) said that the concluding phrase of the present text of paragraph 1 implicitly required an additional period to elapse before the sale. In order to comply with article 77, it was not sufficient for a party merely to announce his intention to sell without providing any details or giving adequate opportunity for the other party to take appropriate action. However, it was to guard against the possibility that the paragraph might be so interpreted that the delegations of Argentina, Portugal and Spain had proposed their amendment. It should further be noted that article 77 did not impose an order in which steps should be taken: the conjunction "provided that" did not establish a definite time for notification of intention to sell. The text of the amendment could be improved in the Drafting Committee.

26. The CHAIRMAN asked the sponsors whether they wished it to be passed to the Drafting Committee with the subamendments they had accepted, or whether they would prefer a small working group to be set up.

27. Mr. BOGGIANO (Argentina) said that he would prefer a working group to be set up.

28. The CHAIRMAN suggested that the working group should be composed of Argentina, Canada, Netherlands, Singapore and Spain.

29. *It was so agreed.*

30. Mr. MICHIDA (Japan), Rapporteur, recalled that the present text had been discussed in UNCITRAL. It had been felt that very strict requirements should not be imposed on merchants. He hoped that the working group would bear in mind the need to keep the text flexible.

31. Mr. MASKOW (German Democratic Republic) drew the working group's attention to the need to bear in mind the implications of the amendment of the Federal Republic of Germany to article 74 (A/CONF.97/C.1/L.211) which the Committee had accepted at its thirtieth meeting (A/CONF.97/C.1/SR.30).

32. Mr. KRISPIS (Greece) drew the working group's attention to the repeated use of the word "reasonable" in article 77.

#### Article 78

33. *Article 78 was accepted.*

#### *Positioning of articles on damages (articles 70—73) and on passing of risk (articles 78—82) (A/CONF.97/C.1/L.230)*

34. Mr. ROGNLIEN (Norway), introducing his proposal regarding the repositioning of the articles on damages and on passing of risk (A/CONF.97/C.1/L.230), said that although the only earlier explicit mention of passing of risk occurred in article 34, the concept was vital for an understanding of the rights and obligations of the parties. Unless it was placed earlier, a non-lawyer reading the text would fail to understand many of the preceding articles, particularly the buyer's remedies for breach of contract by the seller and the buyer's obligation to pay the price. For example, article 49 must be read in conjunction with article 78. He suggested that chapter V on passing of risk should be repositioned either between the present chapters II and III or immediately after chapter III. The section on damages (section IV of chapter IV) should also come earlier but after the articles on passing of risk.

35. Mr. HONNOLD (United States of America) supported the Norwegian proposal. The final decision about the repositioning of the articles concerned should be left to the Drafting Committee.

36. Mr. HJERNER (Sweden) inquired whether the Drafting Committee should not also consider their positioning after sections I, II or III of chapter III.

37. Mr. ZIEGEL (Canada) asked whether the Drafting Committee would be at liberty to recommend no change in the positioning of the articles concerned.

38. The CHAIRMAN said that he took it that the Committee wished to pass the Norwegian proposal to the

Drafting Committee to make whatever recommendations it deemed appropriate.

39. *It was so agreed.*

*The meeting was suspended at 11.22 a.m. and resumed at 11.48 a.m.*

Article 79 (A/CONF.97/C.1/L.233, L.236, L.238, L.241)

40. Mr. NICHOLAS (United Kingdom), introducing his delegation's amendment (A/CONF.97/C.1/L.238) said it was essentially a matter of drafting. The word "destination" usually referred to the locality at which the goods ended their journey, whereas the more general word "place" could include intermediate localities. In the third line of paragraph 1, he took it that the intention was to refer to any particular place, which would normally be other than the destination of the goods, and he proposed that the text should read accordingly. It could not have been the intention of the drafters to suggest, in the sixth line of the text, that the goods could be handed over to a carrier at their destination. He therefore proposed the deletion of the phrase "other than the destination".

41. Mr. HONNOLD (United States of America) said that now that the United Kingdom proposal (A/CONF.97/C.1/L.238) had been adopted, the part of his own delegation's proposal (A/CONF.97/C.1/L.233) relating to article 79 (1) was redundant and he would withdraw it.

42. Mr. INAAMULLAH (Pakistan), introducing his delegation's amendment (A/CONF.97/C.1/L.236), said the proposal was essentially a drafting one. Its intent was to clarify that when goods were handed over to the first carrier for transmission to the buyer, that procedure should be in accordance with the contract.

43. The CHAIRMAN suggested that the amendment be forwarded to the Drafting Committee.

44. *It was so agreed.*

45. Mr. HONNOLD (United States of America), introducing his delegation's amendment to article 79 (2) (A/CONF.97/C.1/L.233), said the existing text laid undue emphasis on identification by specifying that goods should be marked with an address. That was not the most normal means of identification and was unworkable for bulk goods. For the sake of clarification he proposed a more flexible formulation which would be more in accord with commercial practice.

46. Mr. ZIEGEL (Canada) supported the amendment in principle, but thought the wording might be improved by the addition of the word "or" before "notification", to make clear that those were alternative methods. In addition, the word "sent" was not entirely appropriate, since it supposed that notification would always be sent by mail. He also assumed that the intent of the provision was that notice would not actually have to reach the buyer as long as it had been dispatched to him either by mail or by other carriers.

47. Mr. HONNOLD (United States of America) said those amendments would be useful and he could agree that they should be incorporated in his proposal and forwarded to the Drafting Committee.

48. Mr. SCHLECHTRIEM (Federal Republic of Germany) said he was not sure he understood the purpose of the United States proposal. He would prefer the original text.

49. Mr. KRISPIS (Greece) thought the United States proposal should be left unchanged. The wording suggested by Canada would open the way to disputes in that it would not be clear whether the receipt theory or the dispatch theory was to operate.

50. Mrs. FERRARO (Italy) said she could support the United States proposal. However, if the buyer did not receive the notification it did not seem equitable that he should bear the risk, and she would therefore prefer the provision to specify that notification should be received by the buyer.

51. Mr. HJERNER (Sweden) also supported the proposal. The provision as now drafted was too strict and the amended wording would provide some flexibility.

52. Mr. HONNOLD (United States of America), in reply to the suggestion that the risk would not be passed until notice was received by the buyer, said he feared that such a provision would lead to difficulties in practice. If, for example, notification was received by a buyer only after a ship carrying the goods had put to sea, it would be very difficult to establish, in the case of damage occurring in the course of the voyage, the precise time at which the damage had occurred.

53. Mr. MASKOW (German Democratic Republic) said he too could support the United States proposal. With regard to the Italian suggestion, it did not seem logical that it should be necessary for the buyer actually to receive the information concerned, whereas in other cases it was not necessary.

54. Mr. STALEV (Bulgaria) shared that view.

55. Mr. SCHLECHTRIEM (Federal Republic of Germany) said he withdrew his objections to the wording of the proposal.

56. The CHAIRMAN noted that a majority supported the United States proposal. If there was no objection, he would consider it adopted.

57. *It was so agreed.*

58. Mr. BENNETT (Australia), introducing his delegation's proposal (A/CONF.97/C.1/L.241), said it was intended to fill a gap in the existing text. The general rule was that the risk passed to the buyer when the goods were handed over to the first carrier for transmission. He did not question the appropriateness of that rule, but felt it necessary for the article to recognize the close relationship between the passage of risk in the goods and the need to insure those goods. It was important that the article should not provide for the risk to pass before the buyer had an opportunity to insure. He drew attention to

article 30 (3), which provided that the buyer should be able to request information necessary for him to effect the insurance of the goods. If such a request had been made under that provision, it would be appropriate for article 79 nevertheless to provide for the risk to pass.

59. Mr. MANTILLA-MOLINA (Mexico) said he could not support the proposal. He pointed out that the text of article 30 (3) referred to "available" information, which implied that such information might in fact not be provided in certain circumstances.

60. Mr. KOPAC (Czechoslovakia) said he too had difficulties with the proposed amendment. He felt that the provisions of article 30 (3) should be sufficient to cover the situation.

61. Mr. WAGNER (German Democratic Republic) said he too was opposed to the Australian amendment. It was not the case that there was a gap in the Convention; the lack of a provision to that effect was intentional. If

the purpose of the proposal was to enable the buyer to have the necessary information for insurance purposes, it could only be effective if he had in fact received that information, and it would be impracticable to try to foresee the moment at which the information would be received.

62. The CHAIRMAN noted that there was little support for the Australian proposal. If there was no objection, he would therefore consider it rejected.

63. *It was so agreed.*

64. Mr. HONNOLD (United States of America) said that the failure of the proposal might not be as serious for the buyer as some representatives might fear, in view of the provision under article 60 (1) (a) which provided protection for the buyer in case of fundamental breach of contract.

*The meeting rose at 12.25 p.m.*

## 32nd meeting

Tuesday, 1 April 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.32

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

*Article 80 (A/CONF.97/C.1/L.195, L.231, L.237, L.240, L.244)*

1. Mr. ZIEGEL (Canada) said that he was withdrawing his delegation's amendment to delete article 80 (A/CONF.97/C.1/L.240).

2. Mr. INAAMULLAH (Pakistan), introducing his delegation's amendment (A/CONF.97/C.1/L.237), said that on the question of goods sold in transit, the provision of article 80 passing on the risk to the buyer from the time the goods were handed over to the carrier was unjust. Basically, the provision applied to sales of commodities carried in bulk, and it should be remembered that in such transactions the buyer, having purchased the goods in transit, often had them diverted to another des-

tination whilst they were still on the high seas. In other words, he did not see the goods and thus did not know the state they were in. It would therefore be much more just, as his delegation proposed, to state in the first sentence of article 80 that the risk was assumed by the buyer "from the time the contract is concluded".

3. Mr. KRISPIS (Greece) asked whether Pakistan's amendment to the first sentence of article 80 would result in the second sentence being deleted.

4. The CHAIRMAN said that, logically, that was what would happen.

5. Mr. HJERNER (Sweden) was against the Pakistan amendment. UNCITRAL had spent a long time on the provision in article 80, and he felt that criticism of the provision was perhaps due to a misunderstanding. It should be understood that the proposed rule stemmed from purely practical considerations. In the maritime transport of bulk commodities and sales made essentially on the basis of documents current practice was for the buyer to use the documents to take out separate insurance or for him to be covered by a general policy, and he purchased the goods in the state they were in when the risk passed from the buyer to the carrier. The provision in question would thus in no way have the effect of penalizing him. Article 80 should therefore either be kept as it was in the draft Convention or deleted. The procedure proposed by the representative of Pakistan, which amounted to trying to define the state of goods at the

time of the conclusion of the contract, was likely to be impossible to apply in practice.

6. Mr. ROGNLIEN (Norway) was against the Pakistan amendment for very similar reasons to those advanced by the representative of Sweden. When goods sold in transit were damaged, it was extremely difficult to establish when the damage had taken place. That was the practical consideration behind article 80. A similar provision had already existed in the 1964 ULIS (article 99), though broader in scope. Under the new wording proposed, it was limited to cases where documents controlling the disposition of goods were issued. He would be introducing a proposal (A/CONF.97/C.1/L.195) on the matter later, but in any case the mere fact that it was in many cases impossible to know what condition goods were in when they were sold on the high seas made it essential for the risks to be passed to the buyer at the time the goods were handed over to the carrier.

7. Mr. SEVON (Finland) agreed that in strict logic article 80 might seem strange but it effectively met the practical considerations raised by the representatives of Sweden and Norway. The representative of Pakistan was right in saying that the provision applied almost entirely to bulk trade, but his proposal would be ineffective in practice because in many cases it would be almost impossible to establish the state of goods at the conclusion of the contract.

8. Mr. MINAMI (Japan) was unable to support the Pakistan amendment, for the reasons already given by the representatives of Sweden, Norway and Finland.

9. Mr. KRISPIS (Greece) observed that when article 80 had been drafted in UNCITRAL he had made a similar proposal to the one Pakistan was putting forward. At the end of the discussion he had withdrawn it. As Canada had withdrawn its amendment to delete article 80, which he would have supported, his only alternative was to press for the wording proposed in the draft Convention.

10. Mr. DATE-BAH (Ghana) was not concerned that established practice should outweigh all considerations of logic in the matter. Before the goods were sold to him the buyer had no interest to protect, i.e. no insurable interest. At all events, under Ghanaian law he could not take out insurance against the risks. The passage of risk should therefore take place at the time of the conclusion of the contract, and his delegation therefore supported the Pakistan amendment.

11. *The amendment by Pakistan (A/CONF.97/C.1/L.237) was rejected.*

12. Mr. KIM (Republic of Korea) noted that the Pakistan proposal just rejected would have had the merit of solving the extremely complex problem created by the passage of risk when goods were sold several times over during transit and not always as a whole.

13. Mr. HONNOLD (United States of America) proposed a slight amendment of substance to the first sentence of article 80 (A/CONF.97/C.1/L.231). The expression "documents controlling the disposition of

goods" was likely to be understood as being limited to negotiable bills of lading, mainly used when the seller had no confidence in the buyer's credit, whereas the rule in article 80 should be applicable whether the document was negotiable or not and whether the buyer was covered by insurance or not. To remove any ambiguity in that respect his delegation proposed that the wording in question should be replaced by "the documents embodying the contract of carriage".

14. Mr. ROGNLIEN (Norway) supported the proposal for the reasons stated by the United States representative. He asked whether in the English text, the term "embodying" meant anything other than "containing".

15. Mr. HONNOLD (United States of America) said that in the context the words had exactly the same meaning.

16. Mr. WIDMER (Switzerland) supported the United States amendment, as it could help prevent misunderstandings. In the French text, the "*documents constatant le contrat de transport*" was satisfactory.

17. The CHAIRMAN pointed out that the phrase "documents controlling the disposition of goods" existed in many conventions on the carriage of goods. It did in fact mean negotiable documents, other types of documents normally being covered by the phrase "consignment note".

18. Mr. GORBANOV (Bulgaria) was in favour of keeping the phrase "documents controlling the disposition of goods", because it was not really possible to buy and sell just on the basis of the contract of carriage.

19. Mr. GREGOIRE (France) supported the United States amendment. Once it was stated that the passage of risk corresponded to a passage of ownership, the rule did not need to be confined to "documents controlling the disposition of goods".

20. *The United States amendment (A/CONF.97/C.1/L.231) was adopted by 15 votes to 13.*

21. Mr. ROGNLIEN (Norway), introducing his delegation's amendment to article 80 (A/CONF.97/C.1/L.195), said the article made no provision for cases where no document embodying the contract of carriage was issued. Article 99 (1) of ULIS 1964 made some such provision, but too broadly, since it failed to state who was the consignee of the goods. The goods in question were not just any goods. Under article 79 (2) the goods had to be clearly identified to the contract. In his amendment that rule was adapted to the risk assumed by the buyer of the goods in transit, by requiring that the goods should be handed over to the first carrier for transmission to a specified consignee from whom the right under the contract was derived. Although the situation of a sale without shipping documents was not a common one in practice, the Convention would not be complete if it were not covered.

22. Mr. SEVON (Finland) recognized that the term "seller" in the last part of the sentence might lead to some confusion. But one situation that might arise was

that of goods in transit at the time of sale which the seller sent to another buyer. He considered the Norwegian amendment acceptable as it would make it possible to deal with problems that might arise regarding the validity of documents issued by computer. The practice of carrying goods without issuing documents, which had so far been limited to certain regions, was bound to grow more widespread in the future.

23. Mr. KRISPIS (Greece) wondered whether it might not be enough just to delete the clause "who issued the documents controlling their disposition".

24. Mr. ROGNLIEN (Norway) observed that an essential condition would then be dropped, namely, transmission to a specified person, namely the seller or another consignee.

25. Mr. MANTILLA-MOLINA (Mexico) requested an explanation of the last part of the sentence in the Norwegian amendment.

26. Mr. ROGNLIEN (Norway) explained that it related to the case where goods were sold to a new buyer, namely the actual buyer, while in transit; it did not matter what had happened before they had been handed over to the first carrier and by whom they had been handed over, e.g. by a previous seller. The important thing was that they should have been handed over to the first carrier for transmission to the seller who was a party to the actual contract or to a consignee from whom the seller derived his rights.

27. Mr. ZIEGEL (Canada) questioned the need for documents to have been issued before article 80 could take effect. Article 99 (1) of ULIS did not mention any document, merely stipulating that the risk should be borne by the buyer as from the time at which the goods were handed over to the carrier.

28. The CHAIRMAN noted that the Norwegian amendment went further than the original text, as modified by the United States amendment, since it provided for the case where there was no document embodying a contract of carriage.

29. Mr. ZIEGEL (Canada) requested that the Drafting Committee should remove all ambiguity on the subject of the carrier, so as to make it quite clear that the term meant an independent carrier and not a seller who, as in the case of a vertically integrated company, used his own means of transport.

30. Mr. WAGNER (German Democratic Republic) said he feared that where, for example, the goods were first carried by rail to a port, passage of the risk would be detrimental to the buyer. His delegation could not support the Norwegian amendment, which was too complex and obscure.

31. Mr. HJERNER (Sweden) agreed with the Finnish representative on the need to take account of new means of communication and new methods of issuing documents. The Convention should provide for those new means and methods and not sanction too strict an inter-

pretation of the word "document". Nevertheless, it was seldom that no document at all was issued. The Convention should not attempt to regulate exceptional cases, but the most common situations, which were when there was a document embodying the contract of carriage or a document controlling the disposition of the goods, or any other document testifying to the existence of the transaction. Perhaps the Committee might consider substituting another word for the word "document".

32. Mr. ROGNLIEN (Norway) said that the difficulty about deleting all reference to shipping documents was that a provision would then be needed requiring the goods to be identified to a particular contract. If they were carried in bulk to several specified or unspecified consignees or buyers, they were not identified to a particular contract; the risk must not pass to any one of the buyers until that had been done. The old ULIS text was not clear on that point. His country's amendment was aimed precisely at filling that gap by providing for the existence of a particular consignee, which meant that the goods were identified to the contract in question. That condition was essential for passage of the risk in the particular situation in question.

33. Mr. MANTILLA-MOLINA (Mexico) maintained that the text was still obscure, particularly the last part of the sentence; why would the goods be transmitted to the seller?

34. Mr. HONNOLD (United States of America) feared that if article 80 was amended in accordance with the Norwegian proposal, it might be open to too broad an interpretation. When the goods were forwarded by different means of transport, it was essential to define the limits of carriage. The original text, as modified by the United States amendment, did so, since it stipulated the existence of documents embodying the contract of carriage. Consequently, he could not support the Norwegian amendment.

35. Mrs. FERRARO (Italy) considered the original text of article 80 the most satisfactory one. Her delegation could not accept the Norwegian proposal, because if no document were issued, the only proof of the transaction would be a transport document which did not identify the goods and, if there were several successive sales, it would be the last buyer who bore all the risks, which would be unfair. Her delegation was therefore unable to support the Norwegian amendment.

36. Mr. KRISPIS (Greece) thought that where no document had been issued the original text of article 80 was open to two interpretations: first, the risk passed at the time the goods were handed over to the first carrier, and second, it passed at the time of delivery. As for the Norwegian proposal, it was superfluous, since it was clear from the original text that in the absence of documents the risk was assumed by the buyer from the time the goods were handed over to the first carrier.

37. Mr. ROGNLIEN (Norway), finding that his amendment (A/CONF.97/C.1/L.195) was not getting

enough support in the Committee, said that he would withdraw it.

38. Mr. VENKATASUBRAMANYAN (India) introduced an amendment (A/CONF.97/C.1/L.244) to add a second paragraph to article 80. His delegation would have preferred to drop that article altogether, but had assumed, for purposes of its proposal, that it would be kept, which had proved to be the case. Article 80 did not provide for the case, which had occurred in practice, where the goods, sold during transit between two ports, were completely lost in a shipwreck. Buyer and seller were both unaware of the loss at the time of the conclusion of their contract. In his delegation's view, there would be no contract in such a case, since the parties had assumed that the goods existed whereas in fact they no longer did. It would be advisable to take that possibility into account in article 80 which was why his delegation proposed that the second paragraph should read: "The provisions of paragraph (1) do not apply where the goods are lost or damaged before the conclusion of the contract".

39. Mr. ZIEGEL (Canada) said that the Indian representative had raised the very important question of the interaction between article 80 and the provisions of national law governing the validity of the contract. Common law systems provided that where the parties were mistaken about the existence of the goods at the time of the conclusion of the contract, it was no longer valid. That was the rule of "*res extincta*", which the Indian amendment was designed to preserve. If it was not accepted, and given that the Convention was not concerned with the validity of the contract, could a contracting party, against whom article 80 was invoked maintain that the contract was invalid because the goods had not existed at the time of its conclusion and that article 80 was no longer operative? During the consideration of previous articles, some delegations had asked whether a buyer, having noted a lack of conformity of the goods, could declare that, owing to an error as to the nature of the goods, he did not regard himself as bound by the contract or by the provisions which would otherwise have been applicable (article 37 in the case in point). The same question arose again with article 80. The Committee should therefore decide whether or not article 80 prevailed over any other contrary provision of national law concerning the validity of the contract in the event of a mistake by the parties as to its purpose.

40. The CHAIRMAN noted that one part of the Convention was aimed at unifying the law, but that it could be circumvented by the provisions of national law. One answer to that situation, admittedly an inadequate one, was provided by article 6 of the Convention, which dealt with the interpretation and application of the provisions of the Convention.

41. Observing that the Indian amendment (A/CONF.97/C.1/L.244) commanded only limited support, he said that if there were no objections he would take it that the Committee wished to reject it and adopt article 80 with the change proposed by the United States.

42. *It was so decided.*

43. Mr. INAAMULLAH (Pakistan) expressed a wish that the record of the meeting should mention that the Pakistan amendment (A/CONF.97/C.1/L.237) which had been rejected reflected the remarks and proposals made by the Asian/African Legal Consultative Committee in document A/CONF.97/8/Add.5. That Committee had made the following comments on article 80: "The Committee noted that the purpose of this article was to determine at what point of time the risk passed in respect of goods sold in transit. Under article 80, the risk passed retroactively at the time when the goods were handed over to the carrier who issued the document controlling their disposition. There was strong support for the view that a rule under which the risk of loss passed prior to the making of the contract was unacceptable. Thus, it was difficult to comprehend why a buyer of goods in transit that had been damaged before the conclusion of the contract should bear the risk. Accordingly, the Committee strongly suggested that the rule should be modified to the effect that the risk of loss would be deemed to have passed at the time the contract was concluded".

44. His delegation regretted that a large majority of members of the Committee had not seen fit, for reasons which to him seemed unconvincing, to take into account the legitimate interests of sellers of bulk commodities in developing countries. His delegation noted that the representatives of Ghana, Kenya, Nigeria, the Republic of Korea, Singapore and Thailand had voted in favour of his proposal.

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

#### *Article 74 (continued) (A/CONF.97/C.1/L.211)*

45. Mr. KLINGSPORN (Federal Republic of Germany) reminded the meeting that during the previous day's discussion leading up to the adoption of his country's amendment to article 74 (A/CONF.97/C.1/L.211), some delegations had felt that the meaning of some of the expressions used in the amendment was not completely clear. As the question was one of drafting he suggested that the amendment should be sent to the Drafting Committee. The Drafting Committee should also consider article 77 in order to make allowance for the widened scope of article 74 as amended.

46. *It was so decided.*

#### *Article 81 and new article 81 bis (A/CONF.97/C.1/L.212, L.242)*

47. The CHAIRMAN invited the Committee to consider the proposal by the Federal Republic of Germany (A/CONF.97/C.1/L.212) to add a new article 81 bis after article 81.

48. Mr. KLINGSPORN (Federal Republic of Germany) said that article 81 (1) governed the passage of risk when a buyer committed a breach of contract by failing



to take delivery of goods placed at his disposal. Other situations might be envisaged where non-performance by the buyer of another of his obligations would have the effect of delaying delivery of the goods; for example, if the buyer did not carry out his obligation to supply a letter of credit or if he failed to indicate the name of the ship on board which the goods were to be transported. In his delegation's opinion, the risk of loss in such cases should pass to the buyer from the last date when, apart from such breach, delivery of the goods could have been in accordance with the contract.

49. He wished to show the advantages of his country's proposal by giving two examples. In the first, in connection with the situation covered in article 79 where a contract involved carriage of goods, the seller was to deliver the goods on 1 June by handing them over to the sea carrier. In his opinion, assuming that the buyer was to arrange for the carriage of the goods and that he should specifically have given the name of the ship on which they were to be carried, but failed to fulfil that obligation, the risk should pass to the buyer on 1 June, it being understood that if the contract was for the sale of goods which had not yet been identified, risk would only pass when the goods were clearly identified to the contract. Existing article 79 did not seem to be applicable in the situation given in the example where the seller was not in a position to hand over the goods to the sea carrier because the buyer had not given the name of the ship to be used for the carriage of the goods.

50. In the second example, in connection with article 80, the seller was to deliver the goods by placing them at the disposal of the buyer on 1 June at a place of business of the seller. Assuming that payment of the price and delivery of the goods were to take place at the same time and that on 1 June the buyer was quite ready to take over the goods but was not in a position to pay the price, it was not certain that article 81 would be applicable since that article presupposed that the buyer committed a breach of contract by not taking delivery of the goods. Thus, in the above-mentioned example, the buyer was ready to take delivery of the goods but the breach of contract he committed was that of not paying the price. Article 81 was concerned solely with the obligation to take over the goods.

51. He reminded the meeting that the problem had already been discussed during consideration of his delegation's amendment to article 74, which had been adopted by a large majority. His delegation therefore proposed that a new article 81 *bis* should be added to govern passage of risk in the above-mentioned and similar cases. The wording of the proposal might certainly be improved, particularly in the light of the fact that existing article 81 (1) already covered a specific case, i.e. where delivery of the goods was delayed because of a breach of contract committed by the buyer. The phrase "except in cases covered by article 81" might, for example, be added at the beginning of paragraph 1 of the new article 81 *bis* in order to clarify the relationship bet-

ween article 81 and new article 81 *bis*, but that was purely a drafting matter.

52. Mr. ZIEGEL (Canada) did not quite see what was the purpose of paragraph 2 of the new article 81 *bis* proposed by the Federal Republic of Germany.

53. Mr. KLINGSPORN (Federal Republic of Germany) explained that the paragraph was largely based on article 81 (3), which provided that if a contract related to the sale of goods not at that time identified, the goods were not deemed to have been placed at the disposal of the buyer until they had been identified to the contract. The same problem arose in connection with new article 81 *bis*. Thus, in the second example given above, the buyer was not in a position to pay the price and as a result the goods were still in the possession of the seller. If those goods had not been identified to the contract the risk should not pass to the buyer until they had been. That was the purpose of the new article 81 *bis* (2).

54. Mr. OLIVENCIA RUIZ (Spain) considered that the amendment proposed by the Federal Republic of Germany was superfluous since the expression "placed at his disposal" in article 81 (1) seemed to him to cover the situations foreseen by the representative of the Federal Republic of Germany. It was therefore unnecessary to provide in a separate paragraph for the case where the seller was not able to deliver as a result of breach of an obligation by the buyer. Paragraph 2 of new article 81 *bis* merely repeated the rule already given in article 81 (3).

55. The CHAIRMAN noted that the amendment proposed by the Federal Republic of Germany (A/CONF.97/C.1/L.212) had received only limited support. If there was no objection, he would take it that the Committee rejected it.

56. *It was so decided.*

57. Mrs. KAMARUL (Australia), introducing her delegation's amendment to article 81 (A/CONF.97/C.1/L.242), said that the article provided for the passage of risk to the buyer when he took over the goods or when the goods were placed at his disposal, where the contract did not involve carriage. A problem arose in that respect when the seller, in accordance with article 54, made payment a condition for handing over the goods. It might be asked whether article 81 (1) was applicable in that case. It was certainly possible to interpret article 54 (1) as meaning that the goods might be handed over to the buyer notwithstanding the fact that the seller made payment a condition for handing over the goods or the documents controlling their disposition, but that interpretation seemed to be contradicted by the last sentence of article 79 (1), which governed the passage of risk when the sales contract involved carriage. It was in fact expressly stated in that sentence that the fact that the seller was authorized to retain documents controlling the disposition of the goods did not affect the passage of risk. If such a provision was necessary in article 79, as her delegation believed it was, it would seem desirable in the interests of clarity to introduce a similar provision in



article 81. That was the purpose of her delegation's proposal to insert a new paragraph 3 after paragraph 2, with existing paragraph 3 becoming paragraph 4.

58. Mr. ROGNLIEN (Norway) was not in favour of the Australian proposal since in article 81 the words "placed at his disposal" had the same meaning as in article 29 (b) and (c) and covered only the goods as such and not the documents controlling their disposition. There was therefore no reason to mention the documents controlling their disposition in article 81. If, however, the Committee decided otherwise, article 29 would have to be changed accordingly.

59. Mr. VINDING KRUSE (Denmark) said that the Australian proposal in part overlapped with the amendment by the Federal Republic of Germany which the Committee had just rejected.

60. Mrs. KAMARUL (Australia) said that, in view of the lack of support, her delegation would withdraw its proposal.

#### Article 82 (A/CONF.97/C.1/L.229/Rev.1)

61. Mr. HONNOLD (United States of America), introducing his delegation's amendment to article 82 (A/CONF.97/C.1/L.229/Rev.1), underlined the importance of that article, the aim of which was to protect the buyer against the risk of loss when the conditions of carriage were defective and that represented a fundamental breach of contract on the part of the seller. The existing wording of article 82 was not sufficiently clear, and his delegation therefore proposed that it should be changed so as to specify that the risk of loss did not pass to the buyer as long as he retained the right to declare the contract avoided. That rule was particularly important for the buyer, particularly in the light of article 34(1), which stipulated that the seller was liable for any lack of conformity at the time of passage of risk to the buyer, even where such lack of conformity only became apparent at a later date. It was clear that while the buyer might declare the contract avoided because the seller had not carried out his obligations in regard to conformity, the buyer had available all the remedies offered by the Convention in the event of breach of contract.

62. Mr. NICHOLAS (United Kingdom) supported the United States proposal, which provided useful clarification with regard to an important protection for the buyer. The new text was clearly preferable to the existing draft.

63. Mr. HJERNER (Sweden) said that the United States proposal should not be accepted since it involved changes of substance and raised difficulties. The proposed change might appear unimportant but in fact it was likely to upset the whole of the system established by the Convention. It was clear from article 82, in the existing wording, that the buyer might declare the contract avoided and that the risk might be passed to the seller retroactively. However, that rule did not only apply in the event of total loss of the goods but also in the event

of lack of conformity or quality. If it was said, as in the United States proposal, that risk of loss did not pass to the buyer as long as he could exercise his right of avoidance, that meant that there was no passage of risk and that the time when the buyer could control the quality of the goods was delayed until a time when he would have lost the right to declare the contract avoided. That situation would be unreasonable. If the buyer decided not to declare the contract avoided, the normal rules on the passage of risk ought to apply.

64. The CHAIRMAN noted that the United States proposal did not appear to have received wide support. If there was no objection, he would take it that the Committee rejected it.

65. *It was so decided.*

#### Article 65 (continued) (A/CONF.97/C.1/L.243)

66. Mr. MASKOW (German Democratic Republic) introduced the proposal (A/CONF.97/C.1/L.243) by the *ad hoc* working group set up to prepare suggestions concerning paragraph 2 of article 65, with the aim of clarifying its relationship with paragraph 1. The representatives of Spain and Turkey had also contributed to the deliberations of the working group, which had been followed by an observer for Denmark. The working group proposed two possible solutions: variant I, which clarified the text of paragraph 2; and variant II, which proposed its deletion. In variant I, which should be slightly modified by the insertion of the word "also" after the words "third person" in the third line, the working group had endeavoured to bring out the fact that paragraph 2 contained an additional condition for exemption: namely, that the party in breach must show not only his own exemption from liability but also—and for the same reasons—that of the third person engaged. Denmark, Ghana, Norway and Sweden preferred that alternative. The other members of the working group felt that to keep paragraph 2 could affect the interpretation of paragraph 1, widening its scope to a considerable extent. Moreover, keeping paragraph 2 would make delimitation of the respective fields of application of the two paragraphs difficult, since the phrase "engaged for the performance of the whole or a part of the contract" might be interpreted in many different ways. Would a carrier, for example, be covered by that phrase? For all those reasons, Switzerland, Turkey and his own country favoured variant II.

67. Mr. SEVON (Finland) supported variant I. The discussion of paragraph 2 had shown that it could be construed in two different ways. Some representatives believed that it would make the non-performing party liable in a greater number of cases than did paragraph 1; others thought that its liability would be more limited. The text proposed by the working group in variant I was clearer than the original text and reflected the observations by the Rapporteur of the Committee.

68. Mr. OLIVENCIA RUIZ (Spain) said that his delegation had submitted a written proposal to the working

group which was essentially the same as variant I as finally adopted. That variant seemed to him a definite improvement on the original text. He was opposed to the deletion of paragraph 2, believing that it was essential for the Convention to make explicit provision for cases where a third person was involved in the performance of a contract.

69. Mr. VINDING KRUSE (Denmark) supported the new text proposed by the working group. It was necessary to clarify the relationship between paragraphs 1 and 2. If the seller engaged a sub-supplier to furnish material or components in part performance of obligations contracted with regard to the buyer, and if defects in those articles led to a lack of conformity in the merchandise sold to the buyer, such a case should be solved by paragraph 1 and not by paragraph 2. On the other hand, the seller himself could be held liable for those defects if—for example—he had been careless in selecting the sub-supplier, if he had not taken adequate steps to check the quality of the material or components supplied by the sub-supplier, or if he had not remedied the defects or obtained replacements. In all those cases, the seller could not disclaim liability on the grounds of non-performance by the sub-supplier by invoking the impediment referred to in article 65 (1).

70. Mr. PLANTARD (France) did not favour variant I, which would, he believed, make exemption too widespread and too easy. It was not enough that the third person or sub-contractor should be in a situation of *force majeure* for the party who had assumed direct responsibility to be entirely exempted from liability. If, for example, a consignment of coffee was ordered from a merchant, who applied to a Brazilian supplier, and if the latter was in a situation of *force majeure*, the merchant could not disclaim liability on the grounds that the supplier was in that situation, which would be the effect of variant I. He would have to obtain coffee elsewhere and perform his obligation, because he was not in a situation of *force majeure*. Since the Committee must choose between the two, his delegation would prefer variant II, i.e. the deletion of paragraph 2.

71. The CHAIRMAN observed that variant I made no mention of a supplier, but referred merely to "a third person whom a party has engaged for the performance of

the whole or a part of the contract"; the criterion for exemption stated in paragraph 1 would only apply to that party.

72. Mr. ALKIN (Ireland) was in favour of keeping the existing text of paragraph 2. The new version proposed by the working group oversimplified the matter and opened a giant loophole by enabling the non-performing party to disclaim liability merely by proving that a third person had been unable to perform the contract. The text went far beyond the existing provisions. Pursuing the example cited by the representative of France, he said that for one party to be able to release himself from the contract simply because the supplier engaged was in a situation of *force majeure* would be to favour that party unreasonably, to the detriment of the other party. Variant I proposed for article 65 (2) might lead to quite different results from what had been intended.

73. Mr. SEVON (Finland) wondered whether the representatives of France and Ireland had taken due account in their interpretation of variant I of the oral change made by the representative of the German Democratic Republic.

74. Mr. HJERNER (Sweden) fully supported variant I. The working group's terms of reference had merely covered a matter of drafting and the clarification of paragraph 2. The Committee had already decided to keep that paragraph, and those who had voted in favour of doing so had made it clear that in their view its purpose was to increase the liability of the party in breach. He considered that the representatives of France and Ireland had misinterpreted article 65 (1), which was not concerned with *force majeure* nor with impossibility, but with the quite different issue of circumstances beyond the control of one of the parties. The purpose of paragraph 2 was to limit the scope of paragraph 1. The wording proposed for the former by the working group was sufficiently flexible, since it made no mention of a sub-contractor or supplier, but referred merely to a third person. He pointed out that there was a discrepancy between the French and English texts of variant I; in the second line of the former, the words "*pour exécuter*" should be replaced by the words "*pour l'exécution de*" to bring the two texts into line.

*The meeting rose at 5.55 p.m.*

## 33rd meeting

Wednesday, 2 April 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.33

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1–82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Article 65 (continued) (A/CONF.97/C.1/L.243)*

1. The CHAIRMAN said that the Committee had still to reach a decision on the proposal by the *ad hoc* working group (A/CONF.97/C.1/L.243) regarding article 65 (2). The group had proposed two solutions: variant I, a version close to the existing text, and variant II, deletion of the paragraph.
2. Mr. SCHLECHTRIEM (Federal Republic of Germany) said that he was not entirely clear as to the significance of variant I. According to the explanation given by the Swedish representative at an earlier meeting, it would appear that the new version would substantially broaden the scope of the provision. He therefore felt unable to support it.
3. Mr. VENKATASUBRAMANYAN (India) said that he would prefer to delete the paragraph. It should be open to the seller, in a case in which reliance had to be placed on a single subcontractor, to make appropriate arrangements. However, he could not support a general provision whereby the seller would escape liability if the subcontractor to whom he had entrusted the performance of the contract was prevented from performing it, even though there might be alternative ways in which the seller could have the contract performed.
4. Mr. BENNETT (Australia) said he favoured variant I, which made the position clear. The existing text of article 65 (2) was somewhat ambiguous, and might be interpreted as allowing exemption in circumstances which should not warrant it.
5. Mr. EYZAGUIRRE (Chile) said he also supported variant I, which did not substantially change the sense of the existing text.
6. Mr. ROGNLIEN (Norway) pointed out that article 65 (2) limited exemption from liability, and hence enlarged the liability. If the provision were deleted, it would mean that the liability of the failing party was less

than if it were retained. That point should be borne in mind if the proposal for deletion were put to the vote.

7. Mr. ZIEGEL (Canada) said that the discussion of the amendment hinged on the meaning of the word “impediment” in article 65 (1). If that were to be construed as including impediments due to the failure of a subcontractor or other third party to perform sub-portions of the contract, then a provision such as paragraph 2 was necessary to circumscribe what would otherwise be an open-ended defence for the principal contracting party.

8. It had become clear from the lengthy discussions that had taken place in the UNCITRAL Working Group that different legal systems had different concepts of the role of the defence of impediment, and the problem was thus a complex one. However, if it was to be assumed that the basis of the defence in question was the concept of an impediment beyond the control of the contracting party, then it would be logical to add a paragraph to make it clear that what was involved was the failure of the subcontracting party to carry out that part of the contract entrusted to him.

9. He thus accepted the amendment in principle, but suggested that the Drafting Committee might be asked to replace the phrase “for the performance of the whole or a part of the contract” by “to perform the whole or a part of the contract”.

10. Mr. HONNOLD (United States of America) agreed that the amendment was important to add clarity to the provision. As currently worded, it could be construed as giving too wide an exemption from responsibility when performance had not been in accordance with the contract.

11. It was necessary to appreciate the importance of the concept of “impediment” in paragraph 1 in order to appreciate the significance of the wording of paragraph 2. In ULIS (1964) exemption could be based on a “condition” over which the party had no control. In UNCITRAL it was felt that the language was open to too broad an interpretation and might apply where a seller supplied defective goods but could not be proved to have been at fault. To avoid that construction, it had been decided to replace “circumstance” by the concept of “impediment”. That concept implied that the seller was not to be held free of responsibility for defects in the goods he supplied, even if he had not been at fault in regard to his own manufacturing processes. It was also understood that, even under article 65 (1), there would be no “impediment” if a seller instead of doing the manufacturing himself, bought goods from a supplier and those goods proved defective.

12. That was a sound result because, if the seller was responsible for the defect, he had a recourse action to recover his loss from the supplier, a recourse which the ultimate buyer might not have. Because it had been felt that that was not spelt out clearly enough in article 65 (1), article 65 (2) had been drafted to avoid any possible ambiguity.

13. In view of the complexity of the subject and the language problems it involved, he thought it essential that the revised text of article 65 (2) should be entirely clear as to the scope of the exemption from liability, lest it should be construed as being more broad than intended.

14. Mr. NICHOLAS (United Kingdom) said he was disturbed that some people should have received the impression that the article could provide a defence for a seller who had supplied goods with a latent defect; that had certainly not been the intention of those who had drafted the provision.

15. He agreed with the Indian representative that the deletion of paragraph 2 would weaken the position of the buyer vis-à-vis the seller. That was precisely the result which the working group had intended to avoid by including paragraph 2, and he considered it would be deplorable if the paragraph were deleted.

16. Mr. KRISPIS (Greece) said he considered that the amendment proposed for a revised article 65 (2) was already covered by the existing article 65 (1); nevertheless, it would be as well to retain such a provision in order to exclude any possibility of doubt.

17. As currently worded, however, both versions of the paragraph gave the impression that non-exemption was the rule and exemption was the exception. It was important in legal provisions to make it clear which was in fact the rule and which the exception since, in cases of doubt, it was the rule which was taken to be applicable. He would thus prefer the following wording: "However, the failure of a third person whom a party has engaged for the performance of a whole or part of the contract exempts that party from liability if the said third person . . ." etc.

18. Mr. WIDMER (Switzerland) said that, even after the comments by the Greek representative, he feared that the provision would still be liable to misinterpretation by persons who had not followed the current discussion. In principle, the contents of paragraph 2 were already covered by paragraph 1, and the best solution would thus be to delete paragraph 2 for the sake of greater clarity.

19. Mr. OSAH (Nigeria) said that deletion of paragraph 2 would not solve the problem. The existing article 65 (2) tended to make exemption available only to the seller, since there was no reference to, for example, such impediments as *force majeure* or government action which might prevent the buyer from fulfilling his obligations under the contract. Such impediments, particularly in developing countries, could have serious effects and should be regarded as beyond the expectation

or control of the buyer. He therefore supported variant I.

20. Mr. MANTILLA-MOLINA (Mexico) said that, as had already been pointed out, the concept underlying the proposed paragraph 2 was contained in paragraph 1. He felt that the proposed amendment would not clarify the issue but rather confuse it and that such a wording was a positive invitation to a breach of contract. It would be a great mistake to include such a provision, which should be deleted.

21. Mr. GREGOIRE (France) said that the prolonged and somewhat confused discussion which had taken place had obviously stemmed from a misunderstanding due to faulty drafting. The resultant ambiguity had led many speakers to interpret the revised text of article 65 (2) as meaning precisely the opposite of what the working group had intended. He felt that he could put forward, at least for the French text, a better form of words that would satisfy the vast majority of delegations.

22. In reply to a question by Mr. INAAMULLAH (Pakistan), Mr. DATE-BAH (Ghana) explained that the third person who was engaged for the performance of the whole or a part of the contract need not be mentioned expressly, or even indicated impliedly in the contract itself.

23. Mr. MASKOW (German Democratic Republic) said he supported variant II of the joint proposal, namely deletion of paragraph 2. No convincing reason had been put forward during the discussion to justify making a difference between the normal supplier, who was subject to the provisions of article 65 (1), and a person engaged to perform the whole or a part of the contract, who was dealt with in article 65 (2). There were cases in practice in which sub-suppliers were even more important than persons engaged to perform the whole or a part of the contract.

24. His delegation could see no justification for making a different assessment of the obligations of a party in those two cases and thought that the rule in article 65 (1) should apply in all cases.

25. Mrs. FERRARO (Italy) said that she was unable to support variant I of the joint proposal. As the Ghanaian representative had just explained, the third party in question might not even be mentioned in the contract. It was unacceptable that the aggrieved party in a case of failure to perform should be placed in the position of having to introduce legal proceedings against a totally unknown person.

26. The principle to be applied in the matter was that, where a third party was selected solely by the party engaging him, that party to the contract was responsible for the acts of the third party. Liability for the conduct of the third party would cease to apply only if the third party had been selected by the aggrieved party.

27. In reply to a question by Mr. LEBEDEV (Union of Soviet Socialist Republics), the CHAIRMAN explained

that variant I would be voted on with the addition of the word "also" at the end of the third line of the English text as it appeared in document A/CONF.97/C.1/L.243.

28. Mr. HJERNER (Sweden) said that, at a previous meeting, the Committee had already rejected a proposal to delete paragraph 2 of article 65. Following that vote, it had set up the five-member *ad hoc* working group for the sole purpose of clarifying the text of the paragraph. In his view, therefore, the *ad hoc* working group's variant II could not be put to the vote, since it simply proposed the deletion of paragraph 2, a proposal that had already been rejected by the Committee.

29. Following a brief procedural discussion in which Mr. ROGNLIEN (Norway) and Mr. DATE-BAH (Ghana) took part, the CHAIRMAN put to the Committee the procedural issue as to whether it would be in order to take a vote on variant II in document A/CONF.97/C.1/L.243.

30. Having noted that the Committee had decided in the affirmative by a large majority, he invited it to vote on variant II of the working group's proposal, namely the deletion of paragraph 2 of article 65.

31. *Variant II of the proposal was rejected by 23 votes to 22.*

32. In reply to a question by Mr. MATHANJUKI (Kenya), Mr. ZIEGEL (Canada) explained that his subamendment to replace in variant I the words "for the performance of" by the shorter formula "to perform" was a mere drafting proposal which would, he understood, be considered by the Drafting Committee.

33. In reply to a question by Mr. DABIN (Belgium), the CHAIRMAN said that, if the Committee adopted the text appearing in variant I of the joint proposal, the Drafting Committee would take into account the Canadian drafting subamendment and, with regard to the French version of the text, the comments by the representative of France.

34. Mr. HJERNER (Sweden) said that the Canadian subamendment to the text in variant I was not a mere drafting proposal. The *ad hoc* working group had intentionally made use of the formula "for the performance of" in the original (English) text. The French text did not correspond to the original and should be brought into line with it.

35. In reply to a question by Mr. PLANTARD (France), the CHAIRMAN explained that, if the text in variant I was rejected, the Committee would thereby decide to retain the existing text of article 65 (2).

36. He invited the Committee to vote on variant I of the working group's proposal (A/CONF.97/C.1/L.243).

37. *Variant I of the proposal was rejected by 21 votes to 16.*

#### *Article 60 (continued) (A/CONF.97/C.1/L.221)*

38. The CHAIRMAN invited the Committee to consider the joint proposal by the Federal Republic of Ger-

many, Ghana, Greece, Norway, Turkey and the United Kingdom (A/CONF.97/C.1/L.221) for a revised text of article 60 (2).

39. Mr. ROGNLIEN (Norway), introducing the joint proposal, said that, when the Committee had discussed article 60 at a previous meeting, there had been widespread dissatisfaction with the wording of its paragraph 2. As for its substance, the prevailing view during the discussion had been that the seller should be able to declare the contract avoided if the buyer had not taken delivery of the goods, even after the latter had already paid the price.

40. In order to clarify the meaning of the provision, the sponsors proposed that the paragraph should be reworded in such a way as to divide into two separate subparagraphs the contents of the existing subparagraph *a*. The proposed new subparagraph *a* would deal exclusively with the question of late payment by the buyer, while the new subparagraph *b* would cover cases of late performance other than late payment of the price.

41. Lastly, the former subparagraph *b* would become a new subparagraph *c*, with some purely drafting changes.

42. In reply to a question by Mr. MINAMI (Japan), Mr. ROGNLIEN (Norway) said that it had not been the sponsors' intention to make any change of substance in the provisions of the former subparagraph *b*. They were able to agree that the concluding words of the new subparagraph *c* should be brought into line with those of article 45 (2) (*a*).

43. Mr. SEVON (Finland) said that the question put to the sponsors by the representative of Japan involved an issue of substance.

44. Mr. STALEV (Bulgaria) said that he could not support the joint proposal to reword article 60 (2). The formula proposed made the text of the paragraph more complex and more casuistic; it was bound to cause difficulties, particularly in relation to article 45, which the Committee had already adopted.

45. In reply to a question by Mr. WAGNER (German Democratic Republic), Mr. ROGNLIEN (Norway) explained that late payment, which was covered by the new subparagraph *a*, was a part of late performance, the remainder of which was covered by the new subparagraph *b*.

46. In reply to a question by Mr. PLANTARD (France), Mr. ROGNLIEN (Norway) explained that the new subparagraph *c* was simply the former subparagraph *b* with a new letter. Since no change of substance was intended, he suggested that the contents of the subparagraph and the text of the original subparagraph *b* should be referred to the Drafting Committee, with instructions that the provision was to be brought into line with article 45, as adopted by the Committee.

47. The CHAIRMAN said that, if there were no further comments on that point, he would take it that the concluding subparagraph of article 65 (2) was to be

referred to the Drafting Committee in the manner proposed by the Norwegian representative.

48. *It was so agreed.*

49. The CHAIRMAN said that there remained only the question of the proposed subdivision of the former subparagraph *a* into two new subparagraphs, *a* and *b*, dealing with late payment and with late performance other than late payment respectively. He put to the vote the joint proposal to that effect.

50. *The joint proposal was rejected by 20 votes to 19.*

*The meeting was suspended at 11.25 a.m. and resumed at 11.45 a.m.*

#### *Article 77 (continued) (A/CONF.97/C.1/L.246)*

51. Mr. BOGGIANO (Argentina) said that the representative of Singapore had participated in the work of the *ad hoc* working group in addition to the representatives of the countries listed in the heading of the draft proposal (A/CONF.97/C.1/L.246).

52. The proposed amendment to article 77 (1) consisted of two parts, the first of which was the addition of a reference to paying the price, as well as to the cost of preservation, in order to bring the paragraph into line with the amendment to article 74 which had been adopted.

53. The second part of the amendment, which had been decided upon after a prolonged discussion of various alternatives as being the one most likely to meet with general acceptance, was the addition of the word "reasonable" before "notice" in the last phrase of the paragraph. The existing text contained no reference to the time or nature of the notice to be given, and might be deemed to cover a very short notice indeed.

54. The danger of such a wording was that the party bound to preserve the goods might decide unilaterally that the delay in taking possession of them was unreasonable, notify his intention to sell and then do so immediately, the other party thus being faced with a *fait accompli*. The amendment, however, stipulated that reasonable notice of the intention to sell must be given so as to enable the party which would suffer the consequences of the sale to react accordingly, a last recourse that should be preserved for that party.

55. Moreover, it had also been pointed out that such a sale could give rise to uncertainties concerning its validity and the title of the new owner of the goods and, while such considerations did not of course enter into the contract proper and thus did not need to be covered by the Convention, it would be wise to prevent such difficulties from arising by giving the other party an opportunity to prevent the sale.

56. Another possible situation was that of a buyer who had received the goods but intended to reject them for lack of conformity under article 75 and subsequently decided that he was entitled to sell them. Such a sale

could make it difficult to examine the goods and determine whether or not they conformed to the contract. That was another reason why the other party should be given the opportunity to prevent the sale, even at the last moment, although such a situation was also covered by the principles of contractual good faith.

57. With the slight change proposed in the amendment, however, paragraph 1 would safeguard the commercial interests of both buyer and seller or, more specifically, those of the party who was bound to preserve the goods and those of the party who should have taken action concerning them.

58. Mr. KRISPIS (Greece) said that he preferred the existing wording because the word "reasonable" might be interpreted as referring to the content of the notice rather than to the time at which it was given.

59. Mr. VINDING KRUSE (Denmark) said that the wording should be more specific. He suggested the expression "notice of a reasonable length".

60. Mr. ZIEGEL (Canada) reiterated the comment he had made at the Committee's 31st meeting that the word "notice" in the existing text implied notice of a reasonable length and that double delay would not necessarily result. It would be for the courts to determine whether or not reasonable time had been given to the other party, a conclusion that would largely depend on the circumstances of the case.

61. Mr. MATHANJUKI (Kenya) said that his delegation had difficulty in agreeing to the proposal, mainly because it extended the seller's right to sell the goods when the buyer had delayed taking possession. The seller already had the right to declare the contract avoided under article 60 or to claim for damages under article 70. Any extension of those rights would merely complicate the Convention.

62. He had no objection to the word "reasonable" because he assumed that the first party would allow for the time it would take for his notice to reach the other party.

63. Mr. SAMI (Iraq) said that the amendment might complicate the matter still further since it could be interpreted in various ways. He considered the existing text to be perfectly clear and understood that the notice of intention to sell would be given after the unreasonable delay and before the party bound to preserve the goods took steps to sell them, so that the other party would have time to fulfil his obligations and thus avoid the sale.

64. Mr. ROGNLIEN (Norway) doubted whether the word "reasonable" was really necessary, since the principle of good faith enunciated in article 6 would favour that interpretation of the existing text. It might be better if, instead of referring to "reasonable notice", the amendment added to the end of the sentence the phrase "a reasonable time in advance".

65. Mr. GREGOIRE (France) said that the discussion appeared to revolve around the English text of the



amendment. There was no problem with the French text which spoke of "*dans des conditions raisonnables*".

66. Mr. SCHLECHTRIEM (Federal Republic of Germany) said that, since the amendment also included the addition of the words "the price or" which was necessitated by the amendment to the text of article 74,\* he suggested that the two parts of the amendment should be put to the vote separately.

67. Mr. WIDMER (Switzerland) said that, for the sake of reaching a consensus, he would agree to the addition of yet another "reasonable" to the text of the draft Convention.

68. Mr. STALEV (Bulgaria) said he could not support the amendment because it would not be possible to give the other party reasonable notice of intention to sell in the case of goods which, owing to defects, deteriorated very rapidly.

69. Mr. BOGGIANO (Argentina) said that the idea of the *ad hoc* working group was more effectively conveyed in the Spanish text by the phrase "*con antelación razonable*". Many of the objections that had been voiced appeared to be due to the unsatisfactory nature of the English text which would have to be improved by the Drafting Committee.

70. In response to the point made by the Bulgarian representative, he said that paragraph 2 of article 77 would apply in the case of perishable goods.

71. The CHAIRMAN asked whether the Committee wished to add to the text of article 77 the words "the price or", as a consequential amendment to the amendment of article 74.

72. *It was so decided.*

73. The CHAIRMAN invited the Committee to vote on the principle underlying the reference to "reasonable notice", on the understanding that, if the amendment were adopted, the text in all languages would be brought into line by the Drafting Committee.

74. *The amendment to article 77 (A/CONF.97/C.1/L.246) was accepted by 23 votes to 15.*

#### *Reconsideration of article 66 (A/CONF.97/C.1/L.239)*

75. The CHAIRMAN said that the delegation of Canada wished to submit an amendment (A/CONF.97/C.1/L.239) to article 66, which the Committee had already adopted. According to rule 32 of the rules of procedure, such a course required approval by a two-thirds majority of the representatives present and voting. He would therefore ask the Canadian representative to explain his proposal.

76. Mr. ZIEGEL (Canada), introducing his delegation's draft amendment to article 66 (A/CONF.97/C.1/L.239), said that under Canadian law, as was also the case in other common law countries, once the

goods had been delivered and title was deemed to have passed to the buyer, it would be too late to seek the return of the goods. It was therefore the invariable practice in such countries for the seller to take the necessary steps to reserve his title to goods.

77. The application of article 66 as it stood would bring about a fundamental change in the situation. That might not be a matter of grave concern in so far as it related merely to the respective rights of buyer and seller, but it appeared that article 66 would also encompass the possibility of the buyer's bankruptcy and other situations involving the rights of third parties. In such cases, therefore, it would be difficult to reconcile the article with domestic legislation. The latter could of course be amended, but in federal countries such as Canada, where jurisdiction was divided between the constituents, that was not an easy task. His delegation therefore proposed the addition of another paragraph to article 66 in order to make it clear that it was not intended that the seller's rights should interfere with those of third parties or creditors in the event of the buyer's bankruptcy. There were two alternative texts, but their aim was identical.

78. The CHAIRMAN, speaking as the representative of Austria, said he did not think that the problem was peculiar to common law countries. The question of bankruptcy was a complex one in all legal systems and there were different schools of thought about the best way to decide the order of priority among creditors even under the same legal system. Furthermore, the problem did not affect sales only. In any case, article 4 (b) of the draft Convention made it clear that such matters fell outside its scope. The Canadian amendment was too simple to provide a satisfactory solution in all cases.

79. Mr. KOPAC (Czechoslovakia) concurred.

80. Mr. SHAFIK (Egypt) said that the matter should be kept outside the Convention. Under Egyptian domestic law, the seller in such a case would lose not only his right to restitution of the goods but also his right to damages.

81. Mr. ZIEGEL (Canada) said that he would not insist on a vote being taken on whether or not article 66 should be reconsidered.

82. He did not feel that the Chairman's explanation entirely resolved the difficulty, since the seller's right of restitution might be interpreted as a right *in rem* and not merely as giving him the status of a preferred creditor in the event of bankruptcy.

83. Mr. FOKKEMA (Netherlands) said he wondered whether the use throughout the draft Convention of the phrase "avoidance of contract" was a happy choice. It appeared that lawyers from common law countries had far less difficulty with the phrase "discharge by breach". The attention of the Drafting Committee might, perhaps, be drawn to the matter.

84. The CHAIRMAN said that it might be regarded as rather late in the day to change a key phrase in the draft Convention.

\* See A/CONF.97/C.1/SR.30, paras. 79-83.



*Reconsideration of article 72 (A/CONF.97/C.1/L.245)*

85. The CHAIRMAN said that there had also been a request to reconsider article 72 under article 32 of the rules of procedure. He asked the sponsors of the amendment (A/CONF.97/C.1/L.245) to explain their proposal, after which the request would be put to the vote.

86. Mr. BENNETT (Australia), introducing the amendment to article 72 on behalf of the delegations of Greece, Norway, Republic of Korea and his own delegation, said that, during the previous discussions of paragraph 1 of the article,\* some delegations had

thought that the time criterion was much too vague and would have the undesirable effect of encouraging parties to resort to precipitate action to declare contracts avoided. The amendment proposed to fix the time as that of actual avoidance but, in view of the undesirability of encouraging delay for reasons of speculation, it also included a final sentence about the current price to be applied in such a situation.

87. *There were 21 votes in favour of reconsidering article 72 and 14 against. Having failed to obtain the required two-thirds majority, the proposal was not adopted.*

\* See A/CONF.97/C.1/SR.30, paras. 28-54.

*The meeting rose at 12.45 p.m.*

## 34th meeting

Thursday, 3 April 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5 and 6) (continued)

#### *Article 73 bis (A/CONF.97/C.1/L.247)*

1. Mr. HJERNER (Sweden), introducing the document prepared by the *ad hoc* working group on Interest (A/CONF.97/C.1/L.247), said that Japan had been omitted from the list of countries participating in the working group's deliberations, in which the German Democratic Republic and a number of other countries had also taken part. The proposals formulated by the working group constituted neither a package deal nor a compromise, but offered three possible solutions to the problem of interest. The working group had not, in fact, succeeded in putting forward a single alternative to the United Kingdom proposal (A/CONF.97/C.1/L.226), but the differences between the suggested alternatives were not perhaps as great as might appear. The question of interest involved two major problems—the first concerning the price or any sum which had not been paid by the buyer on the stipulated date of payment; and the second concerning the restitution of the price. Each of

A/CONF.97/C.1/SR.34

the proposed alternatives for article 73 *bis* was in two parts: an introductory phrase which defined the rate of interest, and a provision dealing with the place where that rate should be calculated.

2. As far as the drafting was concerned, he pointed out that the words "the country of" should be inserted after the words "financial centre of" in the fourth line of the English text of alternative I; and that the French text of alternative II should be aligned with the English original, the phrase "*pour la première solution sus-indiquée*" being replaced by "*pour le premier taux sus-indiqué*", or words to that effect.

3. The first part of the text was identical in each of the alternatives. In view of the considerable differences involved, it was important, when determining interest rates, to establish a realistic scale of rates that were neither excessive nor artificial. For that reason, the working group had decided to take short-term commercial credit as a point of reference. The possibility of applying another similar appropriate rate was envisaged for countries where short-term commercial credit did not exist.

4. The working group had based the introductory phrase in each alternative on what it considered to be the satisfactory formulation adopted by the UNCITRAL Working Group on International Negotiable Instruments. There could obviously be different interest rates for different currencies; what was important, however, was to fix a realistic rate. As far as the problem of the time at which the rate should be calculated was concerned, it had been observed that the matter frequently depended on a decision by a judge or by one of the parties, with consequent fluctuations in that rate.

5. With respect to the second part of the proposed article, most members of the working group had favoured alternative I, which offered the simplest solution. For many reasons it seemed natural to calculate the rate of interest on the basis of the rate prevailing in the country of the creditor's place of business, since the creditor was the injured party who had to take steps to remedy that injury. Nevertheless, other members of the working group, and Czechoslovakia in particular, had encountered difficulties in that connection. It was true that, as far as State trading countries were concerned, it might be inappropriate to mention the place of business of the creditor; and interest rates could vary according to the type of business involved. With regard to alternative II, all the members of the working group had agreed that, if the rate of interest prevailing in the country of the party in default was lower than that prevailing in the creditor's country, the latter would suffer injury; he should consequently be enabled to obtain the rate which he would have to pay for the credit which he required. On the other hand, he should not be permitted to demand an excessive rate of interest. The final part of alternative II took account of those considerations. Alternative III, which comprised a simplification of alternative II, incorporating a slight difference of substance, had obtained no preferential support in the working group, and might therefore be left aside. Lastly, as far as article 69 was concerned, the working group was of the opinion that the rate of the interest mentioned therein should be defined in the same manner as in article 73 *bis*, by a simple reference to the rate prevailing in the country where the seller had his place of business. The texts prepared by the working group could be the subject of drafting changes, and the new provisions which they contained might be incorporated in a section entitled "Damages and interest", or in a separate chapter dealing with the matter of interest.

6. Mr. WAGNER (German Democratic Republic) found the first alternative quite unacceptable. The argument put forward during the earlier discussion, according to which the party claiming interest would not primarily utilize sums that were due to him in the debtor's country, might be valid as far as certain countries were concerned; but it was certainly not so for the socialist countries or for the majority of the developing countries, which relied on their foreign trade earnings to pay for imports from the countries where those earnings were made. If there was a delay in payment, they were obliged to seek credit on the international financial markets. The rate of interest prevailing in the country of the party claiming payment was thus of no concern whatever.

7. Another problem arose in connection with inflation rates. If the party in default had his place of business in a country where the rate of inflation was high, and if he was in arrears with his payment, the purchasing power of the sums due to the creditor would decrease; compensation could to a certain extent be effected by applying the rate of interest in the country where the defaulting party

had his place of business. The solution of alternative I would thus be particularly attractive to delegations from countries where the rate of inflation was high, but not to the others.

8. Alternatives II and III offered a compromise solution. His delegation would prefer alternative III, which appeared more flexible and which took greater account of the conditions of international trade. If it proved impossible to reach a compromise, his delegation would deem it preferable to leave any reference to the question of interest out of the Convention.

9. Mr. KLINGSPORN (Federal Republic of Germany) found it difficult to support any of the alternatives proposed by the working group, since none of them took account of the principle that, where a party was in arrears, the payment of interest constituted an element of the obligation to pay damages. At all events, the innocent party should be entitled to interest on the sum due in an amount based on interest rates fixed by law or by the Convention itself and which represented a minimum figure. It should, however, be left to the innocent party to prove actual injury arising from non-payment was more substantial than the damage fixed by law. Article 73 *bis* should make it clear that the injured party must be paid any further damages recoverable under article 70; the corresponding provisions of articles 71 and 72 made such a clarification essential.

10. Mr. SHAFIK (Egypt) said that certain countries and legal systems, whose religions forbade the payment of interest, attached special importance to the question under discussion. Those countries were often wealthy; some of them were oil-exporting countries; others consumed great quantities of goods from the developed countries. If they—and the major consumers among them in particular—were to be encouraged to adhere to the Convention, that instrument should not deal with the matter of interest in a manner unacceptable to them. Although it might be desirable to omit any reference to interest from the Convention, such a solution was hardly a realistic one, when what was involved was a well-established practice, but it would be advisable to provide for reservations which would permit any country, particularly those where the concept of interest was incompatible with their religion, to apply the relevant clauses in a different manner.

11. Mrs. VILUS (Yugoslavia) stressed the complexity of the issues related to interest, especially in the case of the developing countries, which were mainly purchasers of goods, which lacked financial resources, and which consequently found themselves frequently in arrears. She readily understood the position of those delegations which would prefer the Convention not to deal with interest. Nevertheless, her own delegation, having consulted business circles in Yugoslavia, had come to the conclusion that it would be preferable for the Convention to contain certain provisions on the subject, since the absence of any regulatory mechanisms could make the problems even more intractable. She would prefer

alternative III or—because it was perhaps more objective—alternative II.

12. Mr. REISHOFER (Austria) said he concluded from the discussion that it would be difficult for the members of the Committee to agree on a generally acceptable solution. He himself was inclined to favour alternative I as being logical and more simply drafted than alternative II. Nevertheless, many countries would consider that there was no reason to select the country of the party claiming payment as the place where the rate of interest should be calculated. On the other hand, many countries would consider that the provisions of alternative II would prove difficult to apply in the courts. Nevertheless, in the light of the discussions on articles 69 and 73 *bis*, it seemed to him that there would be unanimity on the point that the Convention should indeed take the question of interest into account. In those circumstances, lest the Committee should find itself in a blind alley if it tried to spell out what the method of calculating interests should be, it might perhaps be better simply to state: "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon", or to retain the text that the United Kingdom representative had proposed for insertion in chapter I (A/CONF.97/C.1/L.226/Rev.1): "This Convention does not affect any right of the seller or buyer to recover interest on money".

13. Mr. ROGNLIEN (Norway) congratulated the working group on the three alternatives it had submitted, all of which seemed to him to be acceptable. He would prefer alternative I, but could support alternative II, or even accept alternative III. The solution put forward by the Austrian representative should be adopted only as a last resort, in the event that none of the alternatives proposed by the working group were adopted, since such a solution would amount to a failure to standardize international trade law and would leave the door open to disputes that would be difficult to settle. The representative of the Federal Republic of Germany felt that the provisions on damages contained in the Convention were sufficient but he himself could not share that opinion. The party should automatically have the right to interest on sums in arrears, without having to prove that specific damage had been suffered.

14. The representative of Egypt had pointed out a special difficulty encountered by Arab countries, where interest was not permitted. He, the speaker, was unaware of any refusal on the part of such countries to charge interest on loans or credit offered in international relations. It might be that another term was used, in which case it would be easy to add after the word "interests" in the proposed provisions a phrase such as "or any other corresponding fee".

15. Mr. DATE-BAH (Ghana) said that, although he had been a member of the working group which proposed the different alternatives on the question of interest, he did not recommend any of them for the Committee's approval. Alternative I in particular might lead the debtor to fail to pay the price or any other sum in arrears

in order to have cheap credit. The solution put forward by the representative of the United Kingdom (A/CONF.97/C.1/L.226/Rev.1) should be adopted and no specific provision on the matter of interest included in the Convention.

16. Mr. OLIVENCIA RUIZ (Spain) said that, as a result of article 69, the question of interest was already an integral part of the Convention since that article mentioned the obligation to pay interest. It would therefore be useful, in order to encourage uniformity in international trade law, to include in the Convention a specific provision governing the matter of interest.

17. Of the three alternatives proposed he preferred alternative II. It would, however, be appropriate to clarify the rate of interest charged and to add, in the three texts proposed—the first three lines of which were identical—the word "normal" before the word "rate" in the second line since short-term commercial credit was affected by variable conditions and it was therefore important that the "normal" rate of interest should be applied. In addition, the words "financial centre" should be replaced by "credit organization" because there was a difference between the two terms which was presumably not exclusive to the Spanish legal system. It would also be advisable to retain the terminology adopted once and for all in the Convention and to speak not of the "country" of the party claiming payment or of the defaulting party, thus bringing in the question of nationality which was excluded from the sphere of application of the Convention, but either of the State concerned or of the country where the party concerned had his place of business. Even after making those three corrections—the last two of which were of a drafting nature—to the provision to be adopted, the Committee would still leave certain gaps, which he thought regrettable, concerning in particular the currency of interest payment and the moment from which the interest would run. Nonetheless, it would be the most satisfactory solution to adopt.

18. Mr. VINDING KRUSE (Denmark) said he was firmly convinced that a provision concerning the question of interest should be included in the Convention, since otherwise the courts would have to fall back on domestic law, and that would entail some extremely complex problems. Doubtless the proposed provisions (A/CONF.97/C.1/L.247) would not resolve all the problems, but they would at least settle the essentials. He preferred alternative I, but alternatives II and even III were compromise texts which would make the rule more acceptable to a greater number of countries, and his delegation would be able to support them.

19. Mr. KOPÁČ (Czechoslovakia) said that he too was of the opinion that a rule on the question of interest would be extremely useful for the unification of international trade law. The question of interest was of undeniable economic importance. He had been a member of the *ad hoc* working group on Interest and within the group had expressed his support for either alternative II or alternative III. It seemed to him to be preferable in calculating interest to apply the rate in the debtor's

country so as to prevent the debtor from deliberately attempting to avoid paying the price and taking advantage of a lower rate in the creditor's country. However, alternatives II and III were compromise texts which, it seemed to him, gave sufficient protection to the creditor. Some members of the working group feared that the rule proposed in alternative II might be difficult to apply because it would be difficult to prove that the rate in the creditor's country was higher. Such delegations would, no doubt, be able to support alternative III, which did not require that proof be provided.

20. Mr. SAMI (Iraq) said that, for the benefit of the representative of Norway, he wished to point out, as the representative of Egypt had done, that certain Arab countries did not charge interest. His delegation would have preferred that there were no reference at all to interest in the Convention. If, however, a provision concerning that question had to be included it would be desirable, in order to make it possible for the countries which did not charge interest to accede to the Convention, to allow them expressly to enter a reservation to such a provision. Once that was done, the developing countries could all support either alternative II or alternative III, on the understanding that damages might be higher than interest, as the representative of the Federal Republic of Germany had pointed out, which understanding might be stated in articles 70 and 71 on damages. His delegation supported alternative III with the reservation that the last sentence, "However, in case the party claiming interest . . .", should be deleted, since he did not think that such a flexible provision was essential.

21. Mr. INAAMULLAH (Pakistan) said he reserved the right to present his amendment (A/CONF.97/C.1/L.225) once again if none of the alternatives was adopted. In his opinion, alternative II was best suited to the developing countries. However, in a spirit of conciliation, he was prepared to support alternative III on condition that the last sentence was deleted.

22. Mr. ZIEGEL (Canada) said he was, in principle, in favour of alternative I. He felt that the question of interest should not give rise to so much discussion that the Committee should decide not to include any provision on the subject. He thought that alternative I was in line with the approach adopted in the case of damages. The basic principle underlying articles 70 *et seq* was that the injured party might receive damages for loss, including loss of profit. Alternative II favoured the injured party too much. It was obvious that the injured party would try to obtain compensation for his loss. However, alternative II entitled that party to receive more than he had lost if the rate of interest in the debtor's country proved to be more favourable. Such a provision would be quite contrary to the principle adopted in the case of damages. It was not very clear how that provision might protect the interests of the developing and planned-economy countries. Moreover, the expression "the other party's actual credit costs" was a dubious one. In many cases, the actual credit costs would be higher than the rate of interest for short-term commercial credits, since the latter were cal-

culated on the basis of the rates applied for the most solvent borrower. Such was not the position of many traders who had to pay credit costs well above the interest rates for short-term commercial credits. The same applied to alternative III.

23. Referring to the comments of the representative of Iraq, he thought that two solutions might be envisaged: Arab countries concluding a contract with other countries not belonging to the same system might omit all references to interest; or else, application of the article relating to interest might be optional; countries would be free to accept or reject the provisions concerned at the time of accession to the Convention. He also thought that it would be necessary to change alternative I, in the event of its adoption, so as to specify from what moment interest began to run. He proposed that "calculated from the date when the sum is due until the actual payment thereof" be added to the end of alternative I.

24. Mr. HJERNER (Sweden) said that he was in favour of alternative I but, in the interest of compromise, could support alternatives II and III. He suggested that the Drafting Committee should improve the wording.

25. Mr. STALEV (Bulgaria) said he thought the matter had been discussed sufficiently and proposed the closure of the debate.

26. Mr. KLINGSPORN (Federal Republic of Germany) opposed the closure of the debate on the grounds that further discussion would no doubt make it possible to find other solutions.

27. Mr. POPESCU (Romania) said he shared the view of the representative of the Federal Republic of Germany.

28. The CHAIRMAN put to the vote the proposal to close the debate.

29. *The proposal was adopted.*

*The meeting was suspended at 4.30 p.m. and resumed at 4.50 p.m.*

30. The CHAIRMAN put to the vote alternative I proposed by the *ad hoc* working group on Interest (A/CONF.97/C.1/L.247).

31. *Alternative I was rejected by 22 votes to 17.*

32. The CHAIRMAN put to the vote the amendment to alternative II, whereby the last part of the sentence would be deleted and the text would end at the words "party in default".

33. *The amendment was rejected by 16 votes to 9.*

34. The CHAIRMAN put to the vote the amendment to alternative III proposing the deletion of the last sentence.

35. *The amendment was rejected by 15 votes to 8.*

36. The CHAIRMAN put to the vote alternative II as reproduced in document A/CONF.97/C.1/L.247.

37. *Alternative II was adopted by 20 votes to 14.*

38. The CHAIRMAN said that the members of the Committee still had to vote on the amendments submitted orally by the representatives of Spain and Canada. He put to the vote the proposal by the representative of Spain to add the word "normal" before the word "rate" in the second line of the text of alternative II.

39. *The amendment was adopted by 9 votes to 6.*

40. Mr. OLIVENCIA RUIZ (Spain) said that he would not press for a vote on the other two amendments proposed by his delegation and suggested that they should be sent to the Drafting Committee.

41. Mr. ZIEGEL (Canada) said that the Canadian amendment was also of a drafting nature and could be sent to the Drafting Committee. In reply to a comment by the Chairman, who had wondered whether the use of the term "thereon" in the second line of alternative II did not remove the object of the Canadian proposal, he said that, if other delegations felt there was no ambiguity in the text regarding the appropriate starting date for the calculation of interest, he would not insist on it.

42. Mr. KRISPIS (Greece) said that the question was one of substance and not merely of form. The Canadian amendment could in fact be interpreted as meaning that the interest rate due from the party in default was constant. On the other hand, if alternative II was maintained as it stood, the interest rate should be understood as fluctuating. His delegation felt strongly that the second position was the correct one.

43. Mr. PLANTARD (France) said that it was obvious that, whether reference was made to the discount rate or, as in alternative II, to the prevailing rate for short-term commercial credit to determine the rate of interest, both of those rates would fluctuate considerably over time. It was essential therefore to fix the date that was to be used as the starting point for calculating the interest rate. As the French delegation had already had occasion to specify during the discussion, the date should be that of the date of effective payment. The Canadian amendment thus raised a problem of substance which the Committee must settle.

44. The CHAIRMAN asked the Canadian representative whether he wished to maintain his amendment in its original form.

45. Mr. ZIEGEL (Canada) said that the draft amendment had been intended only to clarify the text of alternative II and that his delegation had not intended to adopt any particular position with regard to the interest rate that should be applied, which was a separate matter. However, if the intention of the *ad hoc* working group on Interest had been to adopt the solution of a fluctuating interest rate, that should be stated more explicitly in the text since it was a very important point.

46. As a number of delegations seemed to feel that the Canadian amendment raised a matter of substance, he would prefer to withdraw it.

47. The CHAIRMAN said that alternative II proposed

by the *ad hoc* working group, as orally amended by the representative of Spain, had been adopted, and would be sent to the Drafting Committee.

48. Mr. HONNOLD (United States of America), speaking on behalf of the members of the *ad hoc* working group, said he took it that there was a clear understanding that the First Committee had not given the Drafting Committee a mandate to alter the text of alternative II in so far as the substantive question raised by the Canadian proposal was concerned.

#### *Article 69 (continued) (A/CONF.97/C.1/L.247)*

49. The CHAIRMAN invited the Committee to consider the proposal by the *ad hoc* working group concerning article 69 (A/CONF.97/C.1/L.247), that, at the end of paragraph 1 of the article it should be specified that the rate of interest due was calculated in the same way as in article 73 *bis*.

50. Mr. KRISPIS (Greece) said that he could not support the position of the *ad hoc* working group.

51. The CHAIRMAN put to the vote the amendment to article 69 submitted by the *ad hoc* working group (A/CONF.97/C.1/L.247).

52. *The amendment was adopted by 26 votes to 8.*

#### *Articles 62 and 63 (continued) (A/CONF.97/C.1/L.249 and 250)*

53. The CHAIRMAN said that the Committee had before it two proposals by the representative of Egypt in connection with articles 62 and 63 (A/CONF.97/C.1/L.249 and 250). To enable them to be considered, it would be necessary, according to the rules of procedure, for the Committee to decide by a two-thirds majority to reopen the discussion.

54. Mr. SHAFIK (Egypt) said that articles 62 and 63 were of vital importance to the developing countries.

55. Paragraph 1 of article 62, as it stood, authorized a party to suspend the performance of his obligations when he had good grounds to conclude that the other party would not perform a substantial part of his obligations. In the view of the Egyptian delegation, it was extremely dangerous to empower the parties to withdraw from their obligations solely on the basis of such a purely subjective assessment of the situation and without any supervision by the courts.

56. While he agreed that article 63 was based on a more reasonable criterion, in that it was necessary for it to be "clear" that one of the parties was about to commit a fundamental breach of contract for the other party to be able to declare the contract avoided, he could not accept that the only penalty provided for in such a case should be avoidance of the contract. It would be greatly preferable to provide an opportunity for the party in default to re-establish himself. Moreover, the extreme solution provided for in article 63 was far from being justified in all cases, even in the event of bankruptcy. If a party was

obliged to declare a suspension of payment, the court very often appointed a receiver and it was quite possible that the receiver would be in a position to perform the contract. He must therefore be left the opportunity to do so.

57. The Egyptian delegation did not propose that articles 62 and 63 should be deleted, since they had a *raison d'être* and could be useful. The proposed amendment was intended to combine the existing articles 62 and 63, while applying to article 62 the criterion set forth in article 63, namely that it should be clear that one party was about to commit a fundamental breach of the contract. The proposal, which had been submitted in the form of two separate articles so as not to alter the current order of articles in the Convention, was intended as a compromise between the interests of the developed countries and those of the developing countries.

58. The CHAIRMAN said that there was an error in

the French text of the Egyptian amendment to article 62. In the fourth line of the French text of paragraph 1 of the proposed new article 62, the words "*autre partie*" should refer to the party to which the notification was addressed or, in other words, the party who it was clear would commit a fundamental breach of contract.

59. The CHAIRMAN put to the vote the Egyptian proposal to reopen the debate on articles 62 and 63.

60. *There were 27 votes in favour and 6 against. Having obtained the required two-thirds majority, the proposal was adopted.*

61. The CHAIRMAN suggested that the consideration of articles 62 and 63 should be postponed until the next meeting.

62. *It was so decided.*

*The meeting rose at 5.30 p.m.*

## 35th meeting

Friday, 4 April 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.35

*The meeting was called to order at 10.05 a.m.*

### CONSIDERATION OF ARTICLES 1-82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)

Articles 62 and 63 (continued) (A/CONF.97/C.1/L.249, L.250, L.251)

1. The CHAIRMAN reminded the Committee that at the previous meeting it had decided to reopen consideration of articles 62 and 63. That would bring the Committee to the end of its substantive work, and no more amendments would be accepted. The text of article 62 as adopted at the 26th meeting consisted of the UNCITRAL text with an amendment by the Federal Republic of Germany (A/CONF.97/C.1/L.187) to paragraph 1. The Committee had adopted the UNCITRAL text of article 63 unchanged. The Committee now had before it Egyptian proposals for articles 62 and 63 (A/CONF.97/C.1/L.249, L.250) and an Italian proposal for article 62 (1) (A/CONF.97/C.1/L.251).

2. Mr. SHAFIK (Egypt), introducing his delegation's amendments (A/CONF.97/C.1/L.249, L.250), said that he considered the criterion for avoidance given in the adopted text of article 63 to be clearer and less subjective than the criterion for suspension of performance given in the adopted text of article 62 (1). In his amendment to article 62, therefore, he had taken the wording used in article 63 as the basis for dealing with the whole question of suspension or avoidance of contract. However, the remedy in article 63 as adopted whereby a party might proceed directly to avoidance of contract was rather drastic; even if the other party had already been declared bankrupt, his creditors might still be prepared to fulfil the contract. He therefore proposed that notification should be given in all cases. The Egyptian proposal for article 63 (1) was virtually identical with the adopted text of article 62 (2) and the proposal for article 63 (2) was on the same lines as the adopted article 62 (3).

3. Mr. BONELL (Italy), introducing his delegation's amendment (A/CONF.97/C.1/L.251), said that he was not satisfied with the Egyptian proposals. As the title of the chapter indicated, articles 62 and 63 dealt with problems common to both seller and buyer, and the Egyptian proposal was likely to upset the balance achieved in the original text. His delegation had difficulty in accepting the idea of suspension of performance in the extreme case of fundamental breach, as in the Egyptian proposal for article 62 (1). It had always considered suspension of contract a purely precautionary measure, which was ex-



pected to be temporary. The procedure would in any case be the same as under the article as adopted, but the Egyptian text was unnecessarily complicated. The Italian proposal was therefore to restore the original text of article 62 as adopted by UNCITRAL, which his delegation had always supported.

4. Mr. ROGNLIEN (Norway) said that there seemed to be a discrepancy in the Egyptian proposal for article 62 (A/CONF.97/C.1/L.249) between the reference in paragraph 1 to intended suspension of performance and that in paragraph 2 to avoidance of the contract. It would be better to deal with suspension and avoidance of contract in separate articles, as in the adopted text. The Egyptian wording for article 62 (1), moreover, did not enumerate the reasons for concluding that one of the parties would commit a fundamental breach of contract, an enumeration which seemed useful to tighten up conditions for suspension. However, the main problem with the Egyptian text was that suspension of performance seemed to be subject to prior notice with a reasonable period allowed for the other party to respond. In some cases that would be too much to ask. When a serious deficiency in the other party's ability to perform had become apparent, the first party should have the right to hold back his own performance. A seller should have the right to refuse to dispatch the goods and a buyer the right to refuse to pay the price even if advance payment was stipulated in the contract, without either declaring the contract avoided or himself committing a breach of contract. It was true that under the Egyptian proposal for article 63 (1) (A/CONF.97/C.1/L.250) the seller could prevent the goods from being handed over, but that was too limited. He suggested that interested delegations should work out a joint proposal with the Egyptian representative for submission to the plenary.

5. Mr. SCHLECHTRIEM (Federal Republic of Germany) supported that suggestion. The remedies of suspension and avoidance of contract should not be lumped together.

6. Mr. SEVON (Finland) said he was not entirely convinced by the objections raised to the adopted text of article 62 (1). In any case the Egyptian text for that paragraph was not clear. It would appear that a party who wished to suspend performance of his obligations could do so, but the text said only that he could notify the other party of his intention to suspend. As to the "reasonable period of time", it presumably could not extend beyond the period during which performance was supposed to take place. Although he had difficulties with the Egyptian proposal, he too supported the suggestion of a working group to consider the matter.

7. Mr. KRISPIS (Greece) said that he too was not convinced that article 62 (1) as adopted failed to define objectively the conditions for suspension of performance because of anticipatory fundamental breach. It amplified the word "reasonable" by referring to "a serious deficiency" and to "good grounds" which seemed to imply

that parties who wished to suspend must have some *prima facie* evidence to act on.

8. Mr. SAMI (Iraq) said there might be reasons which had caused a party to fail to perform but which were not considered adequate to prevent the other party from meeting his obligations. There should be well-defined criteria to cover such a situation, which would offer a guarantee to a party in doubt as to the performance of a contract by another party. If the party in doubt did not receive notification from the other party guaranteeing performance of the contract, he might under article 62 suspend performance of his obligations and thus avoid the contract. The other party would moreover have been given a chance to avert the serious consequences that would arise from refusal to perform. The two proposals submitted by the Egyptian representative thus permitted a better balance between the interests of the two parties.

9. Mr. HONNOLD (United States of America) said that the adopted text of articles 62 and 63 seemed less harsh on the non-performing party than the Egyptian amendments. For example, should some natural disaster occur after the contract had been concluded making it seem likely that one party would be unable to perform, it would seem desirable that the other party should have the option of suspending performance. However, he was not sure that if assurance was not forthcoming suspension should necessarily lead on to avoidance. Article 62 (1) as adopted did not refer to "fundamental breach", whereas article 63 did; he assumed that the difference was intentional. He was therefore somewhat concerned that the Egyptian proposal made use of the term "fundamental breach" in article 62 instead of the more flexible formula in the adopted text.

10. Mr. ZIEGEL (Canada) pointed out that in the Egyptian amendment to article 62 (A/CONF.97/C.1/L.249), the phrase "*il est manifeste*" in the original French version of paragraph 1 had been translated into English as "it becomes apparent", which was not a proper equivalent. He had much sympathy with the aims behind the Egyptian proposal and supported the suggestion that a working group should be set up to find ways of reconciling different views on the question.

11. Mr. SHAFIK (Egypt) said that his proposal had been based on the UNCITRAL text of article 63, which in English read "it is clear that". The English version of his proposal should be brought into line with the French.

12. Mr. HJERNER (Sweden) said that he did not find the solution proposed by the Egyptian representative entirely acceptable. The essence of the proposal was that a party who acted on the assumption of an anticipatory breach would need to prove that the breach was clearly going to happen. However, to establish an obligatory procedure of waiting for adequate assurances might prove too stringent, because in such a situation quick action might be necessary. In addition, the right of suspension of performance was also a very important remedy, which was not covered in the Egyptian proposal. He could therefore not support it in its present form, but



would be willing to participate in a working group to draft a new compromise version.

13. Mr. DABIN (Belgium) said that the Egyptian formulation was more restrictive than the adopted text and hence clearer. Phrases such as "gives good grounds to conclude" made article 62 as adopted far too subjective. Since the article had no equivalent in national legislation, its meaning needed to be made clear beyond all doubt. He supported the suggestion that the Egyptian proposal should be considered in a working group, which should report to the plenary.

14. Mr. PLANTARD (France) said that article 62 in the form in which it had been adopted would raise considerable political and economic problems for his country, which would as a result have great difficulty in acceding to the Convention. He preferred the Egyptian proposal for two reasons: first, the criteria it offered were more objective than in the adopted text; and secondly, the system of obligatory notification gave the non-performing party an opportunity to defend its position. The proposed article 62 (2), however, seemed somewhat too stringent in creating automatic avoidance when the party in default had failed to provide assurances.

15. Mr. BENNETT (Australia) said the Egyptian proposal offered an improvement over the remedy now provided in article 63 in that it required the grounds for avoidance to be properly established before that drastic remedy was exercised. However, he had some doubts as to whether the remedy of avoidance should be exclusive of the right to suspend, as under the Egyptian proposal for article 62. There would be some value in retaining a flexible right of suspension, exercisable for specifically stated reasons, along the lines of article 62 as adopted. Suspension was not the type of remedy which should be circumscribed by notice requirements of the kind set out in the Egyptian proposal.

16. Mr. ADAL (Turkey) said that since the concept of fundamental breach was one of the main issues before the Conference, it was important that article 62 should be clarified. The Egyptian amendment would be useful in assisting judges and arbitrators in interpreting the Convention and would also make for a fairer balance between the interests of buyer and seller. He therefore supported it.

17. Mr. GROZA (Romania) said he too supported the proposal. The procedure suggested would be useful in providing the non-performing party with a means of protecting himself against the very serious consequences entailed in avoidance of the contract.

18. The CHAIRMAN suggested that the Egyptian amendments to articles 62 and 63 should be voted on together. If the proposals were rejected, the Committee would have to consider the Italian amendment to article 62 (1) (A/CONF.97/C.1/L.251).

19. Mr. SHAFIK (Egypt) said that he was prepared to accept that suggestion. He asked also that a vote should be taken on the proposal that an *ad hoc* working group

should be set up to produce a generally acceptable text of articles 62 and 63.

20. The CHAIRMAN put to the vote the Egyptian amendments to articles 62 and 63 (A/CONF.97/C.1/L.249 and A/CONF.97/C.1/L.250) as revised by the subamendment by the Federal Republic of Germany which had been accepted by the sponsors.

21. *There were 19 votes for and 19 against.*

22. *The amendments were not adopted.*

23. The CHAIRMAN put to the vote the proposal that an *ad hoc* working group should be set up to draft a new text of articles 62 and 63. The group would also consider *inter alia* the Italian amendment (A/CONF.97/C.1/L.251).

24. *The proposal was adopted by 23 votes to 11.*

*The meeting was suspended at 11.25 a.m. and resumed at 11.55 a.m.*

25. The CHAIRMAN announced that the delegations of Argentina, Egypt, Federal Republic of Germany, Finland, France, German Democratic Republic, Iraq, Mexico, Republic of Korea and United States of America would take part in the working group.

#### **Report of the Drafting Committee on the articles of the Convention on Contracts for the International Sale of Goods referred to it by the First Committee (articles 1—17) (agenda item 4) (A/CONF.97/C.1/L.249 and Corr.1 (English only))**

26. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, introducing the Drafting Committee's report (A/CONF.97/C.1/L.249, Corr.1 and Add.1), explained that certain words had been placed between square brackets in articles 7 and 8 because some members of the Drafting Committee felt that inclusion of the words involved an issue of substance outside the jurisdiction of the Drafting Committee. At the same time, the Drafting Committee considered that inclusion of the words made the meaning of the articles clearer and would serve to facilitate the interpretation of their provisions.

27. The CHAIRMAN invited the Committee to consider the Drafting Committee's report article by article.

#### *Article 1*

28. Mr. KRISPIS (Greece) drew attention to the formula "in determining the application of this Convention" which had been added at the end of the text of article 1 adopted by the Committee. He did not object to the addition but thought that the word "determining" added nothing to the meaning and should be dropped.

29. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, said that the words had been added as a consequential drafting change following the adoption of certain other articles of the draft, in particu-

lar article 70 as amended. The addition was intended to make it clear that the provisions of article 1 (3) were concerned with the question whether the Convention should be applied at all. In considering certain other articles the question whether a party to the contract had a civil or a commercial character might be relevant. For example, in the case of article 7 (2), which provided that statements and conduct of a party were to be interpreted "according to the understanding that a reasonable person of the same kind" would have had, it would be material to know whether the person concerned was a merchant or not.

30. Mr. KRISPIS (Greece) regretted that the explanation made his position more difficult and suggested that an issue of substance was involved.

31. The CHAIRMAN said that if there were no further comments, he would take it that the Committee agreed to adopt article 1 in the form proposed by the Drafting Committee.

32. *It was so agreed.*

#### Article 2

33. *Article 2 was adopted.*

#### Article 3

34. Mr. ROGNLIEN (Norway) pointed out that the word "obligation" in paragraph 2 should be in the plural.

35. *Article 3 was adopted subject to that correction.*

#### Article 4

36. *Article 4 was adopted.*

#### Article 4 bis

37. Mr. ROGNLIEN (Norway) proposed that the word "personal" should be inserted before the word "injury" in order to eliminate any possibility of doubt as to whether the provisions of article 4 bis covered also damages to property.

38. Mr. PLANTARD (France) remarked that the French text of the article referred to "*décès ou lésions corporelles causés à quiconque par les marchandises*".

39. Mr. ZIEGEL (Canada) opposed the proposal. The Drafting Committee's wording implied that the injury referred to was personal.

40. Mr. FELTHAM (United Kingdom), supported by Mr. HONNOLD (United States of America) said that although the expression "personal injury" was a satisfactory one its use was not strictly necessary in the context.

41. Mr. ROGNLIEN (Norway) said it was his understanding that a distinction was drawn in English between "injury" and "damage", the former term being normally applied to persons and the latter to property. English was, however, used internationally by many persons un-

familiar with the niceties of the language and it was in the interest of those persons that he had proposed the use of the expression "personal injury".

42. Mr. PLANTARD (France) explained that the words "to any person" were an attempt to render the French "*à quiconque*". Those words had been introduced in deference to the wishes of certain delegations in order to clarify the meaning of the provisions of article 4 bis on the question of a claim by one of the parties to the contract against the other resulting from a claim against the former asserted by a third party.

43. The CHAIRMAN said that as a majority appeared to favour the text of article 4 bis proposed by the Drafting Committee, he would, if there was no objection, consider it adopted.

44. *It was so agreed.*

#### Article 5

45. *Article 5 was adopted.*

#### Article 6

46. *Article 6 was adopted.*

#### Article 7

47. Mr. KOPAC (Czechoslovakia), Rapporteur of the Drafting Committee, said that inclusion of the words in square brackets in paragraph 2 would make it clear that the words "a reasonable person of the same kind" were intended to refer to the party to whom the statement was addressed and not to the party making the statement or performing the conduct.

48. Mr. STALEV (Bulgaria) opposed the inclusion of the words in square brackets.

49. Mr. ROGNLIEN (Norway) said that he saw no reason to replace the word "a" by the word "one" in the first part of the paragraph, but supported the proposed inclusion of the words "as the other party". The addition introduced an important clarification.

50. Mr. HONNOLD (United States of America) strongly supported the inclusion of the words in square brackets. He stressed that a person with technical skill and knowledge was required to make his statement in such a way as to make his meaning clear to a person not possessed of such skill and knowledge.

51. Mr. HJERNER (Sweden) was also in favour of the proposed additions. When article 7 had been framed, the general understanding had been that the word "understanding" referred to the interpretation given by the person receiving the statement.

52. The CHAIRMAN said that in the absence of further comment he would take it that the Committee wished to adopt article 7 with the words in square brackets included.

53. *It was so agreed.*

*Article 8*

54. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, said that the word "impliedly" in paragraph 2 had been placed between square brackets because some members considered it superfluous.

55. Mr. KRISPIS (Greece) suggested that the word "impliedly" should be dropped, since the will of the party was presumptive it could not at the same time be implied. Moreover, the presumption applied only if the parties had not "agreed" otherwise and "agreement" was taken to be either express or implied.

56. Mr. LEBEDEV (Union of Soviet Socialist Republics) urged the inclusion of the word "impliedly". As the article dealt with situations in which there was no direct agreement, the reference to an implied consent to usage was essential. The substance of the matter was more important than any stylistic difficulties that might be involved in the use of the word "impliedly".

57. Mr. ZIEGEL (Canada) agreed with the Greek representative. The word "impliedly" was superfluous. There was something incongruous in deeming something to take place and at the same time referring to it as being implied.

58. The CHAIRMAN pointed out that the word "impliedly" had been present in the text of article 8 when the Committee had discussed and approved it. Any objection to the word at the present stage would constitute an issue of substance and could not therefore be entertained. In the circumstances, he would take it that the Committee approved the article with the inclusion of the word "impliedly".

59. Mr. DABIN (Belgium) pointed out that his delegation had asked if it was necessary to keep the phrase "unless otherwise agreed" in paragraph 2 since those words were unlikely to be applicable to the formation of the contract, except in the case of parties who regularly worked together. The matter had been referred to the Drafting Committee.

60. The CHAIRMAN explained that the Committee had decided to insert the reference to formation of the contract because the rest of the text referred to the contract in general and not its formation. Various delegations had found it particularly important to include the phrase "unless otherwise agreed", which was in the UNCITRAL text.

61. *Article 8 was adopted.*

*Articles 9—11*

62. *Articles 9—11 were adopted.*

*Article 11 bis*

63. Mr. HJERNER (Sweden) asked why the provision had been inserted after article 11 rather than after article

27, paragraph 2 of which specifically mentioned a contract in writing.

64. Mr. SEVON (Finland) explained that the text of article 11 bis had originally been intended to be part of article 9. In any case, it must be included in Part I of the Convention.

65. Mr. KRISPIS (Greece) and Mr. ROGNLIEN (Norway) agreed that the provision must be included in the part of the Convention concerned with definitions.

66. The CHAIRMAN said that if there was no objection, he would take it that the Committee wished to leave the provision as article 11 bis.

67. *Article 11 bis was adopted.*

## PART II — FORMATION OF THE CONTRACT

*Article 12*

68. Mr. BENNETT (Australia) asked why the Drafting Committee had not decided to include in paragraph 2 of the article the Australian amendment (A/CONF.97/C.1/L.69) submitted at the Committee's 8th meeting, proposing the insertion of a reference to the need for the proposal to be "sufficiently definite".

69. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, replied that the amendment had been considered superfluous because the requirements set out in paragraph 1 applied to paragraph 2 also.

70. Mr. BENNETT (Australia) said that the proposal covered in paragraph 2 was a very special case and that it would have been clearer if the reference to its being sufficiently definite had been included. However, he would not insist on that amendment.

71. *Article 12 was adopted.*

*Articles 13—16*

72. *Articles 13—16 were adopted.*

*Article 17*

73. Mr. KOPAČ (Czechoslovakia), Rapporteur of the Drafting Committee, replying to a question by Mr. MINAMI (Japan), explained that the word "orally" had been inserted in the fourth line of article 17 (2) to bring it into line with article 19.

74. Mr. HJERNER (Sweden) asked if the phrase "among other things" in paragraph 3 was necessary in the light of the deletion of the last part of the original paragraph.

75. The CHAIRMAN reminded the representative of Sweden that the Committee had decided to keep the phrase.

76. *Article 17 was adopted.*

*The meeting rose at 1 p.m.*

## 36th meeting

Friday, 4 April 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.36

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE “DECLARATIONS RELATING TO CONTRACTS IN WRITING” IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5, 6) (continued)**

**Consideration of the Report of the Drafting Committee to the Committee (agenda item 4) (continued)**

*Articles 18—31 (A/CONF.97/C.1/L.248 and Add.1)*

1. The CHAIRMAN invited the Committee to continue its consideration of the articles of the Convention which had been adopted by the Drafting Committee.
2. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that document A/CONF.97/C.1/L.248/Add.1 was not yet available in Russian. His delegation therefore reserved the right to return at a later stage to any articles which might be adopted by the Committee.

### *Article 18*

3. Mr. NICHOLAS (United Kingdom) said that the definite article “the” before the word “notice” at the end of the second line of paragraph 2 should be replaced by the indefinite article “a”. Reference to “the notice” rather than to “a notice” in the paragraph in question could be misinterpreted to mean that such notice constituted a necessary element of the formation of the contract.
4. *Article 18, as amended by the United Kingdom, was adopted.*

### *Articles 19—21*

5. *Articles 19—21 were adopted.*

### *Article 22*

6. The CHAIRMAN pointed out that a corrigendum had been issued to the English text of the article (A/CONF.97/C.1/L.248/Corr.1): the word “to” should be added before the word “his” in the third line.
7. *Article 22 was adopted.*

### *Article 23*

8. Mr. ROGNLIEN (Norway) was surprised to see that the words “a reasonable person of the same kind” still appeared in the article.

9. The CHAIRMAN remarked that the phrase had already been used in article 7.

10. Mr. HJERNER (Sweden) noted that substantive changes had been made to article 23 by the Drafting Committee. The changes seemed acceptable, but he nevertheless wished to reserve his delegation’s position.

11. The CHAIRMAN reminded delegations that under the rules of procedure they were always free to return in the plenary to articles adopted by the Committees. Reservations made in committee therefore had little practical point.

12. Mr. OLIVENCIA RUIZ (Spain) said that he was surprised not to find any reference to the idea of expectations under the contract, which the *ad hoc* working group had proposed should be included in the article (A/CONF.97/C.1/L.176).

13. Mr. VIS (Executive Secretary of the Convention) explained that the Drafting Committee had taken the greatest care to ensure that the wording of the article corresponded to that of the amendments. The *ad hoc* working group had indeed agreed on the phrase “substantially impair his expectations under the contract”, but that wording had proved unacceptable to the representatives of civil law countries. Those representatives had suggested that, rather than refer to expectations under the contract, the article might speak of the interests of one of the parties, but that solution had not proved acceptable to the representatives of common law countries. The text of article 23 finally adopted by the Drafting Committee represented a compromise which was acceptable to everyone.

14. Mr. SEVON (Finland) said that a further drawback of the text proposed by the *ad hoc* working group had been that it made a subjective consideration the basis for article 23, whereas the text proposed by the Drafting Committee established a more objective criterion.

15. Mr. OLIVENCIA RUIZ (Spain) noted those explanations. He did not feel, however, that the Spanish text of article 23 was entirely satisfactory, and therefore proposed that the Spanish-speaking delegations should confer with a view to improving the Spanish text, without, of course, introducing any changes of substance.

16. The CHAIRMAN thanked the Spanish representative for his suggestion. It was essential that the Conven-

tion should be drafted in such a way that the idiom of each official language was preserved.

17. Mr. PLANTARD (France) made a grammatical correction in the French text of article 23: the word "aurait" in the penultimate line should be replaced by the word "eût".

18. *Article 23, as amended by Spain and France, was adopted.*

#### Article 24

19. *Article 24 was adopted.*

#### Article 25

20. Mr. MINAMI (Japan) pointed out that in the English text of article 25 the verb "to rely" was followed by the preposition "on", whereas in article 14 (2) (b) the same verb was followed by the preposition "upon".

21. Mr. NICHOLAS (United Kingdom) said that with the verb "to rely" it was preferable to use the preposition "on".

22. The CHAIRMAN said that the United Kingdom representative's statement would be borne in mind in connection with article 14 (2) (b).

23. Mr. OLIVENCIA RUIZ (Spain) drew attention to a typing error in the Spanish text: the word "modificación" in the second line should read "notificación".

24. *Article 25 was adopted.*

#### Articles 26—30

25. *Articles 26—30 were adopted.*

#### Article 31

26. Mr. HONNOLD (United States of America) said that the comma at the end of the first line of the English text of article 31 (a) and the word "or" at the end of the second line of the subparagraph should be deleted.

27. *Article 31, as amended by the United States of America, was adopted.*

28. The CHAIRMAN suggested that further consideration of articles adopted by the Drafting Committee should be deferred until the next meeting. At that meeting the Committee would also have before it the proposals of the *ad hoc* working group set up to consider proposals to amend article 62 and 63.

29. *It was so decided.*

*The meeting rose at 3.35 p.m.*

## 37th meeting

Monday, 7 April 1980, at 10 a.m.

Chairman: Mr. LOEWE (Austria).

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5 and 6) (continued)**

**Consideration of the Report of the Drafting Committee to the Committee (agenda item 4) (continued)**

*Articles 32—82 (A/CONF.97/C.1/L.248/Add.2 and Add.3)*

#### Article 32

1. The CHAIRMAN invited the First Committee to

A/CONF.97/C.1/SR.37

consider article 32, and sought an explanation of the foot-note to the English text in document A/CONF.97/C.1/L.248/Add. 2.

2. Mr. KOPAC (Czechoslovakia), Rapporteur of the Drafting Committee, explained that two sentences had been added to the text of article 32—which a number of delegations had considered superfluous in its initial form—in order to take account of the earlier proposal, made in connection with article 35, that a provision be included whereby the seller might, before delivery of the goods, cure any lack of conformity in the documents relating thereto.

3. The CHAIRMAN said that the Drafting Committee had acted in accordance with its terms of reference.

4. *Article 32 was adopted.*

#### Article 33

5. Mr. ROGNLIEN (Norway) said that paragraph 3 of article 33 referred only to subparagraphs (a) to (d) of paragraph 2, and thus appeared to set them apart from the introductory phrase. According to that phrase there

was an exception to the subsequent subparagraphs when otherwise agreed, but any further liability agreed to would fall outside the scope of paragraph 2 and would fall under paragraph 1, to which paragraph 3 did not refer. Paragraph 3 as drafted thus appeared to him to be too restrictive and confusing, and he proposed that it be reworded to refer not merely to subparagraphs (a) to (d) of paragraph 2, but to the paragraph in its entirety.

6. Mr. HJERNER (Sweden) said he opposed the Norwegian amendment which, he thought, involved a change of substance. Paragraph 3 of article 33 provided for an exception to subparagraphs (a) to (d) of paragraph 2 by exonerating the seller from liability if, at the time of the conclusion of the contract, the buyer knew or could not have been unaware of the lack of conformity. The introductory phrase of paragraph 2, which provided for express agreement between the parties, should not be linked to paragraph 3, which referred to a simple state of affairs.

7. Mr. LEBEDEV (Union of Soviet Socialist Republics) said he shared the opinion of the representative of Sweden.

8. The CHAIRMAN said that the Committee appeared to prefer to retain article 33 in the form submitted by the Drafting Committee.

9. *Article 33 was adopted.*

#### *Articles 34—37*

10. *Articles 34—37 were adopted.*

#### *Article 38*

11. Mr. SHAFIK (Egypt) said there was an error in the French text of article 38, where "*frais*" in the second line should read "*faits*".

12. *Article 38 was adopted.*

#### *Article 39*

13. *Article 39 was adopted.*

#### *Article 40*

14. Mr. GREGOIRE (France) said that, in the French text of paragraph 2 (a) of the article, the final word "*ou*" should be deleted, since the introductory phrase "*Dans les deux cas suivants*" indicated that the two cases were not cumulative in their effect.

15. Mr. ZIEGEL (Canada) proposed the replacement of the word "cases" by the words "a case" in the English text, the deletion of the word "*deux*" from the French text and the retention of the words "*or*" and "*ou*", in order to make it clear that the two subparagraphs were to be taken separately.

16. *Article 40, as amended by the Canadian proposal, was adopted.*

#### *Article 40 bis*

17. *Article 40 bis was adopted.*

#### *Article 40 ter*

18. Mr. ROGNLIEN (Norway) said that the words "in accordance with articles 70 to 73" might usefully be added after the word "damages" in article 40 *ter*.

19. Mr. KRISPIS (Greece) said that such an amendment would call the whole of the text in question.

20. *Article 40 ter, as submitted by the Drafting Committee, was adopted.*

#### *Articles 41—44*

21. *Articles 41—44 were adopted.*

#### *Article 45*

22. Mr. GREGOIRE (France) said that, in the French text of paragraph 2 (a) of the article, a comma should be added after the words "*en cas de livraison tardive*".

23. *Article 45, amended in accordance with the proposal by the representative of France, was adopted.*

#### *Articles 46 and 47*

24. *Articles 46 and 47 were adopted.*

#### *Article 48*

25. Mr. ROGNLIEN (Norway) proposed that the words "by or determinable from the contract" should be added to article 48, after the words "the date fixed", to bring it into line with articles 31 and 55.

26. Mr. ZIEGEL (Canada) said he would prefer to replace the word "fixed" by "agreed", which would cover both cases.

27. Mr. BONELL (Italy) said he agreed with the Norwegian representative and suggested adding the words "provided for in article 31".

28. Mr. PLANTARD (France) said he was afraid the innumerable cross-references from one article to another might encumber the text and make the Convention difficult to apply.

29. Mr. HONNOLD (United States of America) supported the proposal by the Norwegian representative.

30. Mr. LEBEDEV (Union of Soviet Socialist Republics) asked whether the Norwegian amendment was designed to cover the three situations for which provision had been made in article 31 or only the one contained in subparagraph (a) of the article in question.

31. Mr. ROGNLIEN (Norway) said that his amendment was intended to adjust the wording of article 48 to that of articles 31 and 55 and to prevent the word "date" from being interpreted too restrictively.

32. Mr. NICHOLAS (United Kingdom) said that the Norwegian amendment would alter the substance of the article.

33. The CHAIRMAN noted that the Norwegian amendment had not received enough support.

34. *Article 48, as submitted by the Drafting Committee, was adopted.*

#### *Articles 49—59*

35. *Articles 49—59 were adopted.*

#### *Article 60*

36. Mr. ROGNLIEN (Norway) said that, for the sake of clarity, either the words "by the buyer" in article 60(2)(b) should be deleted, or the word "he" in paragraph (2)(b)(i) should be replaced by the words "the seller".

37. The CHAIRMAN suggested that the word "he" in paragraph (2)(b)(i) should be replaced by the words "the seller".

38. *Article 60, with the Chairman's amendment, was adopted.*

#### *Article 61*

39. *Article 61 was adopted.*

#### *Article 78*

40. Mr. KOPAC (Czechoslovakia), Rapporteur of the Drafting Committee, said that the Drafting Committee had changed the order of the different articles, as instructed by the First Committee, but that the original numbering of the articles had been retained, so as to make consideration of the text easier.

41. *Article 78 was adopted.*

#### *Article 79*

42. Mr. INAAMULLAH (Pakistan) said he was surprised to see that the Drafting Committee had failed to take into consideration his delegation's proposal to add to the first sentence of article 79(1), after the words "to the first carrier" the words "in accordance with the contract" (A/CONF.97/C.1/L.236), although that proposal had been referred to it by the First Committee.

43. Mr. KOPAC (Czechoslovakia), Rapporteur of the Drafting Committee, said that the Drafting Committee had felt that it was not necessary to make such a distinction.

44. Mr. INAAMULLAH (Pakistan) said he would be willing to accept the word "contractually" instead of the phrase "in accordance with the contract".

45. Mr. HERBER (Federal Republic of Germany) said that the word "contractually" could lead to confusion when used in connection with the handing over of goods. For example, it could be interpreted as meaning that the goods should be in conformity with the specifications in the contract.

46. Mr. HJERNER (Sweden) said that, in some con-

tracts, the place where the goods were to be handed over to the carrier was not stated; that was the case with CIF contracts, where the port of dispatch was not named. The proposal by Pakistan was thus likely to create difficulties.

47. Mr. SHAFIK (Egypt) said he endorsed the comments made by the representative of Pakistan.

48. The CHAIRMAN said that the members of the Committee should trust the Drafting Committee and try not to alter the texts it had prepared except, of course, when they felt the wording was not clear.

49. *Article 79 was adopted.*

50. Mr. INAAMULLAH (Pakistan) asked that note be taken of the fact that the Asian-African Legal Consultative Committee had recommended insertion of the words "in accordance with the contract" after the words "to the first carrier" in article 79, which it thought would assist in interpreting the article in question.

#### *Articles 80—82*

51. *Articles 80—82 were adopted.*

#### *Article 64*

52. Mr. ROGNLIEN (Norway) said that the Drafting Committee had quite rightly changed the order of the different sections of chapter V. Nevertheless, he wondered whether it might not be better to place the section concerned with damages at the beginning of chapter V, followed by the section relating to exemptions. Next would come the section on anticipatory breach and instalment contracts, followed by the section on the effects of avoidance and, finally, the section on preservation of the goods.

53. Mr. KOPAC (Czechoslovakia), Rapporteur of the Drafting Committee, said that, after protracted discussion the Drafting Committee had concluded that the best solution would be to place the section on anticipatory breach and instalment contracts at the beginning of chapter V, since the provisions on exemption and damages did not come into play until after a breach had taken place.

54. The CHAIRMAN invited the Norwegian representative to submit his proposal to change the order of the different sections of chapter V to the Drafting Committee, which was responsible for decisions of that kind.

55. Mr. ZIEGEL (Canada) said that article 64(2) was largely based on the initial drafts of articles 62 and 63. It might perhaps be useful if the paragraph in question were brought into line with the new articles 62 and 63 produced by the *ad hoc* working group. Under those articles, a party was entitled to declare the contract avoided only in very specific circumstances, whereas paragraph 2 of the existing article 64 laid down no conditions, apart from a requirement that action be taken within a reasonable time.

56. The CHAIRMAN suggested that article 64, as



adopted by the Drafting Committee, be considered simultaneously with articles 62 and 63, as proposed by the *ad hoc* working group.

57. *It was so decided.*

#### Article 70

58. *Article 70 was adopted.*

#### Articles 71 and 72

59. Mr. KOPÁČ (Czechoslovakia), Rapporteur of the Drafting Committee, said that a terminology problem arose in connection with articles 71 and 72. In the former article, the English text of the Convention referred to "contract price", and in the latter, to "price fixed by the contract", whereas the French text of the two articles referred to "*prix du contrat*" only. The Drafting Committee had therefore left those expressions in articles 71 and 72 in square brackets, so that the Committee could take a decision on the matter. The Drafting Committee had noted that the choice of one or other of those expressions could affect the interpretation of other provisions in the Convention. For example, the expression "contract price" was consistent with the provisions of article 51 on the determination of the price if a contract had been concluded but did not fix the price expressly or impliedly, whereas the expression "price fixed by the contract" would seem to exclude the price determined in accordance with the provisions of that article.

60. Mr. KRISPIS (Greece) thought it would be advisable to use the expression "contract price" in articles 71 and 72, as otherwise numerous difficulties would arise in the application of the Convention.

61. Mr. LEBEDEV (Union of Soviet Socialist Republics) felt that the expression "price fixed by the contract" should be retained in article 72, but that the expression "contract price" should be used in article 71 since, otherwise, some countries would be unable to ratify Part II of the Convention dealing with formation of the contract.

62. Mr. SEVON (Finland) thought that the use of different expressions in articles 71 and 72 had been deliberate and that the same expressions should therefore be retained.

63. Mr. PLANTARD (France) said that there was a discrepancy between the original English and French versions of those two articles, since the French version referred to *prix du contrat* (contract price) only. The Committee should therefore give a definite ruling on the matter.

64. Mr. HONNOLD (United States of America) said he feared that if, in article 72, the expression with the narrowest meaning was retained, that is to say, "price fixed by the contract" the innocent party would be unable to claim damages if the price was not expressly stated in the contract. Consequently, the solution proposed by the Finnish representative would run counter to the interests of an innocent party.

65. It would be better to use the same expression in articles 71 and 72. While difficulties might arise in some legal systems, it was important that the text of the Convention should be consistent.

66. Mr. BONELL (Italy) endorsed the Finnish representative's remarks, since the use of two different expressions in articles 71 and 72 had been motivated by substantive reasons. He suggested using the same expressions as in ULIS, where the expression "price fixed by the contract" occurred in article 84, and the expression "contract price" in article 85.

67. Mr. PLANTARD (France) said he would have no objection to adopting the expression "price fixed by the contract" in article 72.

68. *Article 71, with the reference to "contract price", was adopted.*

69. *Article 72, with the reference to "price fixed by the contract", was adopted.*

#### Article 73 bis

70. Mr. HJERNER (Sweden) considered that the Drafting Committee had made a commendable effort to produce a clear text of article 73 bis, but that the proposed text differed on some minor points of substance from alternative II adopted by the Committee (A/CONF.97/C.1/L.247). It should be noted that the formula adopted by the Committee was similar to the one decided on by the working group on international bills of exchange. He therefore proposed that paragraph 1 of article 73 bis should be modified slightly, so as to bring it more in line with alternative II adopted by the Committee. The paragraph would read as follows:

"If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest thereon at the rate for a normal short-term commercial credit or at another similar appropriate rate prevailing in the main financial centre of the State where the party in default has his place of business or, in case the other party's actual credit costs are higher, at a rate corresponding thereto but not at a rate higher than the rate in the State where he has his place of business, as defined above."

71. Mr. MANTILLA-MOLINA (Mexico) considered the text of article 73 bis particularly obscure and feared that businessmen as well as lawyers would have difficulty in understanding it. It would therefore be desirable to adopt a clearer formulation.

72. The CHAIRMAN pointed out that the text of article 73 bis was the result of a compromise in the First Committee.

73. Mr. LEBEDEV (Union of Soviet Socialist Republics) said that the Drafting Committee had tried to improve the wording of article 73 bis so as to make it clearer. Its members had turned out to have very different ideas on paragraph 1 of that article, which was why the Drafting Committee had not been able to produce a

more satisfactory text. Some had felt that, as worded at present, it was incomprehensible. They had nevertheless proposed that it should be kept, maintaining that it was impossible to go into details of banking techniques in the Convention.

74. The CHAIRMAN thought that the only solution would be to keep the Drafting Committee's compromise text, taking into account the amendments proposed by the Swedish delegation.

75. Mr. KHOO (Singapore), Chairman of the Drafting Committee, said that he was sorry about the Swedish representative's criticism of the text submitted by the Drafting Committee, which had endeavoured to introduce the necessary clarifications into the text adopted by the First Committee without changing the substance. It had spent a good deal of time on that difficult task and any ambiguities that might still persist were not its fault. If the Committee or the Conference considered that those ambiguities should be removed, it would be up to them to take the necessary action. But it would be quite pointless to revert to the texts in document A/CONF.97/C.1/L.247.

76. Mr. MANTILLA-MOLINA (Mexico) pressed for an explanation of the Drafting Committee's enigmatic text, which he failed to understand.

77. The CHAIRMAN thought that it would be better not to change the Drafting Committee's text at the present stage of the debate. If there were no objections, he would take it that the Committee wished to keep that text, on the understanding that it might still be subject to drafting improvements.

78. *It was so decided.*

#### Article 73

79. *Article 73 was adopted.*

#### Article 65

80. Mr. KOPÁČ (Czechoslovakia), Rapporteur of the Drafting Committee, drew the Committee's attention to a foot-note to paragraph 5 of article 65 (A/CONF.97/C.1/L.248/Add. 3, p. 3). The Drafting Committee had wondered whether paragraph 5 merely related to the right to claim damages under the Convention, or whether it also referred to the right to do so under the contract. It had finally decided that paragraph 5 should cover both the rights deriving from a contract and those deriving from the Convention.

81. Mr. ROGNLIEN (Norway) said he favoured the solution advocated by the Drafting Committee.

82. The CHAIRMAN thought that it would be unwise to introduce new expressions into the text and proposed that the words "the contract or" should be deleted.

83. *It was so decided.*

84. Following a question by Mr. SEVON (Finland) on the subject of paragraph 1, an exchange of views ensued

in which Mr. ZIEGEL (Canada), Mr. ROGNLIEN (Norway), Mr. SHAFIK (Egypt), Mr. HJERNER (Sweden), Mr. PLANTARD (France) and Mr. DABIN (Belgium) took part, on the question of whether the French expression "*indépendant de sa volonté*" actually corresponded to the words used in the English version, namely, "beyond his control".

85. Mr. KOPÁČ (Czechoslovakia), Rapporteur of the Drafting Committee, replying to a question by Mr. BONELLI (Italy), explained that the numbering of the paragraphs had not been changed and, in particular, that paragraph 3 had been kept in its original place, on logical grounds.

86. *Article 65 was adopted.*

#### Article 65 bis

87. Mr. ROGNLIEN (Norway) asked whether the expression "by his own act or omission" covered the acts and omissions not only of the party concerned but also of persons whom that party might employ in the performance of the contract.

88. After an exchange of views, in which Mr. MAS-KOW (German Democratic Republic), Mr. MICHIDA (Japan), Rapporteur of the Committee, Mr. KHOO (Singapore), Chairman of the Drafting Committee, and Mr. SHAFIK (Egypt) took part, the CHAIRMAN proposed that the Committee should keep the current wording of article 65 bis, on the understanding that the expression "by his own act or omission" was unanimously recognized as covering not only the acts or omissions of the party concerned but also those of persons who might be employed by him for the purposes of the performance of the contract.

89. *It was so decided.*

*The meeting was suspended at 11.50 a.m. and resumed at 12.10 p.m.*

#### Articles 66—69

90. *Articles 66—69 were adopted.*

#### Articles 74—77

91. *Articles 74—77 were adopted.*

92. Mr. LEBEDEV (Union of Soviet Socialist Republics) felt he should point out that the term "deterioration" in the first line of article 77 (2) had given rise to varying interpretations in the Drafting Committee. Some members had felt that the term referred only to the physical state of the goods and that the party "bound to preserve the goods" was only bound to ensure their physical preservation. Others had felt that the obligation to ensure the preservation of the goods extended to the commercial interest which they represented and that the party bound to preserve them must accordingly follow the market and see that the goods were sold satisfactorily, as soon, for example, as the price started to fall. Since the difference of interpretation turned upon a point of

substance, the Drafting Committee had been unable to make the text more specific in one sense or the other.

93. The CHAIRMAN said that the Drafting Committee had been right not to try to settle a point which had not been raised in Committee. The plenary Conference would perhaps be able to remedy the omission. On behalf of the Committee, he thanked the members of the Drafting Committee for the excellent text they had produced (A/CONF.97/C.1/L.248 and Add.1—3) in frequently difficult circumstances.

*Articles 62 and 63 (continued) (A/CONF.97/C.1/L.252, L.253)*

94. Mr. GREGOIRE (France), speaking on behalf of the *ad hoc* working group composed of Argentina, Egypt, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Iraq, Mexico, the Republic of Korea and the United States of America, introduced the amendments to articles 62 and 63 in documents A/CONF.97/C.1/L.252 and L.253. In the French version of the amendment to article 62 (A/CONF.97/C.1/L.252), in the second line of paragraph 1, the archaic formula "*lorsqu'il appert*" should be replaced by the words "*lorsqu'il apparaît*".

95. As far as article 62 was concerned, the text proposed by the *ad hoc* working group departed very little from the text submitted by the Drafting Committee, as the group had not reverted to the question whether the facts which created an apparent expectation of non-performance preceded or followed the conclusion of the contract and had taken it that only facts which had existed before the conclusion of the contract and became known afterwards were taken into consideration. That being the assumption, the *ad hoc* group had been concerned essentially with finding a legal procedure to regulate the recognized right of a party to suspend the performance of the contract when the other party was likely not to fulfil its obligations. His delegation found it difficult to accept that the right should not derive from a decision by a court of law but the right had nevertheless been granted in principle. The *ad hoc* group's decision had been to limit the scope of that principle by replacing the words "when there are good grounds to conclude", which were regarded as too subjective, by the words "when, after the conclusion of the contract, it appears". In that connection, he wished to point out that in French legal terminology, the expression "*il apparaît*" had an objective meaning and was synonymous with "*il est établi*" ("it is established"). Some members of the *ad hoc* working group, nevertheless, continued to have doubts and would have liked to see the adoption of a stronger term, for example "*il est manifeste*" ("it is evident").

96. In regard to article 63, the members of the working group had decided unanimously that the declaration of avoidance of the contract should be made subject to the other party being given notice in advance. Some members, however, had wished to delete the words "if time allows" at the beginning of the new paragraph 2.

97. Mr. SAM (Ghana) endorsed the French representative's interpretation of the words "*il apparaît*" in paragraph 1 of the proposed article 62, which should be understood as meaning "*il est manifeste*". In the circumstances, the corresponding term in the English version, "it appears", was inappropriate and should be replaced by the words "it is clear", which, moreover, the Committee had decided, during the debate on the original Egyptian proposal (A/CONF.97/C.1/L.249), to use in place of the words "it becomes apparent", which had been felt to be ambiguous. His delegation would vote in favour of the text proposed by the *ad hoc* working group provided the English version used the words "it is clear".

98. Mr. GREGOIRE (France) explained that agreement had been reached in the *ad hoc* working group on the French formula "*il apparaît*", which was to be interpreted in the sense he had just noted. At that time, however, the working group had decided to render the French formula "*il apparaît*" by the English words "it appears".

99. The CHAIRMAN observed that for some years there had been controversy on the question of what situation was envisaged. According to one argument, one of the parties was in a difficult financial position, the other party was unaware of the fact, and it emerged, after the conclusion of the contract, that the first party would be unable to carry it out. According to the other argument, each of the parties was bound to ascertain, before the conclusion of the contract, whether the other party was creditworthy. The delegation of Ghana seemed to infer from the explanations given by the French representative that the proposed text corresponded to the second argument.

100. Mr. GREGOIRE (France) said that the first proposition was the one accepted by the working group. If there was still the slightest doubt in that respect, it would be removed if the article stated: "... when, after the conclusion of the contract, it is evident ...".

101. Mr. BENNETT (Australia) thought that the text proposed by the *ad hoc* working group for article 62 (A/CONF.97/C.1/L.252) was more objective and read better than the text proposed by the Drafting Committee. However, his delegation was not clear what weight should be given in the new wording proposed for paragraph 1 of that article, to the proviso expressed by the words "if it is reasonable to do so", which seemed to be independent of the threat of non-performance of the contract. Moreover, with the new wording it would need to be apparent that the non-performance of the contract would result from a matter mentioned in subparagraph (a) or (b). That was different from the position under the UNCITRAL text. In that text such matters related only to the grounds for concluding that there would be non-performance, which could result from any cause. Possibly all that was needed was to make some drafting changes in the text proposed by the working group.

102. Mr. KRISPIS (Greece) said he was prepared to support the proposals of the *ad hoc* working group for

articles 62 and 63, as they did not depart appreciably from the text proposed by the Drafting Committee. However, in order to meet the civil law lawyer's constant desire to distinguish between temporal and conditional clauses, the word "if" should be substituted for the word "when" in the second line of paragraph 1 of the text proposed by the working group for article 62.

103. Mr. HERBER (Federal Republic of Germany) supported the texts proposed by the working group for articles 62 and 63 without any of the amendments suggested in the course of the discussion by the representative of Ghana and the representative of Australia.

104. Mr. HONNOLD (United States of America) remarked that although articles 62 and 63 were certainly closely linked they had different functions. Article 62 authorized suspension of the performance of the contract—but not a declaration of avoidance of contract—if one party gave the other grounds for assuming that it would not be carried out, while article 63 allowed the contract to be avoided as soon as it became clear that the other party would not perform it. If an attempt was to be made to amend article 62 so as to make it applicable to the same situation as article 63, the whole relationship between the two provisions would become meaningless and the structure would collapse. The proposals by the working group should therefore be adopted without any change.

105. Mr. ROGNLIEN (Norway) was of the same opinion

as the United States representative and supported the proposals of the working group. Article 62 was concerned with the ability to suspend performance of the contract, whereas article 63 allowed the contract to be avoided. If it was agreed to use the words "it is clear" in the English version of article 62, as suggested by the representative of Ghana, there would no longer be any difference between it and article 63. But it must be easier for one of the parties to suspend performance of his obligations than to declare the contract avoided.

106. Mr. PLANTARD (France) noted that two points in a very important question were still unclear. The first, on which he did not intend to dwell, concerned the word "appears". For some, that simply meant that the fact was apparent whereas for others it implied that it was evident. The second ambiguity concerned the moment at which the deficiency became apparent. But whether it did so before or after the conclusion of the contract was of little importance, and there was unanimous agreement on that point. Consequently, all that was necessary to dispel the confusion which all the members of the Committee had complained about was to delete the words "after the conclusion of the contract".

107. The CHAIRMAN suggested that the discussion should be continued at the following meeting.

108. *It was so agreed.*

*The meeting rose at 1 p.m.*

## 38th meeting

Monday, 7 April 1980, at 3 p.m.

Chairman: Mr. LOEWE (Austria).

A/CONF.97/C.1/SR.38

*The meeting was called to order at 3.05 p.m.*

**CONSIDERATION OF ARTICLES 1—82 OF THE DRAFT CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AND OF DRAFT ARTICLE "DECLARATIONS RELATING TO CONTRACTS IN WRITING" IN THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES FOR THE DRAFT CONVENTION (agenda item 3) (A/CONF.97/5) (continued)**

*Articles 62 and 63 (continued) (A/CONF.97/C.1/L.252, L.253)*

1. Mr. SAMI (Iraq) proposed that the phrase "if it is reasonable to do so" in the working group's text for article 62 (1) (A/CONF.97/C.1/L.252) should be deleted, because otherwise any party wishing to avoid a contract

would be able, by putting forward excuses, to evade its obligation to notify the other party.

2. Mr. WANG Tian ming (China) said that although the amendments proposed by the *ad hoc* working group would in general make the original text easier to understand, he did not consider the phrase "if it is reasonable to do so" an improvement and therefore supported its deletion. The words "it appears" in the same paragraph were subjective and should be replaced by either "it becomes evident" or "it becomes apparent". His delegation also considered that the phrase "If time allows" at the beginning of the working group's text for article 63 (2) (A/CONF.97/C.1/L.253) might enable one party to find some excuse for not notifying the other. He therefore proposed that it too should be deleted.

3. Mr. SAM (Ghana) proposed that the words "it appears" in the new article 62 (1) should be replaced by "it becomes clear".

4. He also supported the deletion of the phrase "If time allows" at the beginning of the new article 63 (2).
5. Mr. VINDING KRUSE (Denmark) said that he did not think the first phrase in article 63 (2) should be deleted, because a situation could arise in which, owing to lack of time, it would be fair for the seller, for instance, not to give notice before declaring a contract avoided.
6. Mr. SHAFIK (Egypt) supported the deletion of the words "If time allows" in article 62 (2) because they might lead to abuse.
7. Mr. ZIEGEL (Canada) strongly urged the Committee to adopt the text proposed by the *ad hoc* working group without amendment because it had been the result of intensive discussion and represented a compromise.
8. With regard to the words "it appears" in article 62 (1), he saw little difference between their implications and those of the words "good grounds" in article 64.
9. The CHAIRMAN invited the Committee to vote on the Iraqi amendment to delete the phrase "if it is reasonable to do so" in the working group's text for article 62 (1).
10. *The amendment was adopted.*
11. Mr. KHOO (Singapore) proposed that the first part of article 62 (1) (A/CONF.97/C.1/L.252) should be amended to read "A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party . . .".
12. *The proposal was adopted.*
13. Mrs. FERRARO (Italy) reminded the Committee of her delegation's proposal to revert to the UNCITRAL text of article 62 (1), which it maintained.
14. The CHAIRMAN invited the Committee to vote on the working group's text for article 62 (1), as amended.
15. *The working group's text for article 62 (1) (A/CONF.97/C.1/L.252), as amended, was adopted.*
16. The CHAIRMAN pointed out that the Italian proposal was no longer pertinent.
17. The CHAIRMAN invited the Committee to vote on the Chinese proposal to delete the words "If time allows" at the beginning of the working group's text for article 63 (2).
18. *The proposal was rejected.*
19. The CHAIRMAN invited the Committee to vote on

the working group's text for article 63 (2) and (3) (A/CONF.97/C.1/L.253), on the understanding that it might call for some redrafting.

20. *The proposed new paragraphs were adopted, subject to possible redrafting.*

21. Mr. KHOO (Singapore) pointed out that article 62 (1) used the word "apparent", article 62 (2) the word "evidence" and article 63 the word "clear". He could see no difference in the ideas which those words sought to convey and suggested that the same expression should be used throughout.

22. Mr. ROGNLIEN (Norway) supported that view.

23. The CHAIRMAN said that the Drafting Committee might be requested by the plenary to make the text consistent.

#### *Article 64 (continued)*

24. The CHAIRMAN asked whether there were any comments on article 64 in the light of the amendments to article 62 and 63. If not, he would take it that article 64 was to be kept as it stood.

25. *It was so decided.*

#### **Consideration of the Report of the Committee to the plenary Conference (agenda item 5) (A/CONF.97/C.1/L.215 and Add.1—14 and Add.4/Corr.1 and Add.5/Corr.1)**

26. Mr. MICHIDA (Japan), Rapporteur, introduced the Committee's draft report. Votes for and against were recorded in the report except where there had been an overwhelming majority to reject an amendment and the votes had not been counted.

27. Mr. MEDVEDEV (Union of Soviet Socialist Republics) said that as the report was exceptionally detailed, there was not enough time to check that all the texts were in conformity. He hoped, however, that such checking would be done before the report was submitted to the Conference.

28. The CHAIRMAN said that, if there were no objections, he would take it that, subject to an examination to ensure concurrence of the text, the Committee adopted its report to the plenary Conference.

29. *It was so decided.*

*The meeting rose at 4.20 p.m.*

## SUMMARY RECORDS OF MEETINGS OF THE SECOND COMMITTEE

### 1st meeting

Monday, 17 March 1980, at 10 a.m.

Chairman: Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.1

*The meeting was called to order at 10.15 a.m.*

#### **ADOPTION OF THE AGENDA (item 1 of the provisional agenda) (A/CONF.97/C.2/L.1)**

1. *The provisional agenda (A/CONF.97/C.2/L.1) was adopted.*

#### **ELECTION OF A VICE-CHAIRMAN AND A RAP- PORTEUR (RULE 46 OF THE RULES OF PROCE- DURE) (agenda item 2)**

2. Mr. WAGNER (German Democratic Republic) nominated Mr. Makarevitch (Ukrainian Soviet Socialist Republic) for the office of Vice-Chairman.
3. *Mr. Makarevitch (Ukrainian Soviet Socialist Republic) was elected Vice-Chairman by acclamation.*

#### **CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARA- TIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERI- OD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6, 7; A/CONF.97/ C.2/L.2—L.6)**

4. Mr. ENDERLEIN (Secretary of the Committee) drew the Committee's attention to document A/CONF.97/6, containing draft articles A to K, which had been prepared by the Secretary-General in the light of the views and proposals put forward by Governments on the first draft, and to document A/CONF.97/7 on the relationship of the draft Convention to the Convention on the Limitation Period in the International Sale of Goods, including a draft Protocol to the latter. The Committee also had before it various new articles or amendments proposed by Governments (A/CONF.97/C.2/L.2—L.6).

##### *Article A*

5. *Article A was adopted.*

##### *Article B*

6. Mr. BENNETT (Australia) said that federal systems

of government, involving, in one form or another, a constitutionally guaranteed division of power among the constituent units of the federation, gave rise to problems for the States concerned in becoming parties to a convention. If there were to be no federal clause in the present Convention, a federal State acceding to it would assume an unqualified obligation in international law to apply its provisions to contracts falling within the scope of article 1. No problems would arise if the central Government had constitutional power to implement the Convention without legislative assistance from its state or provincial legislatures, but if it had to depend on them for at least some of the necessary implementing legislation it would be in no position to assume an unqualified obligation of that nature. In the case of Australia, there was a distinct possibility that the constitutional powers of the federal Government would be inadequate to implement all the articles of the Convention. His delegation was therefore strongly in favour of the inclusion of a federal clause.

7. With regard to the kind of clause that would be most appropriate, his delegation supported the alternative I for article B. It was essentially identical to article 11 of the Convention on the Recovery Abroad of Maintenance and did not go any further than was necessary to meet the difficulties he had mentioned. In the case of articles that came within the legislative jurisdiction of constituent units which were not bound to take legislative action, paragraph (b) faced the realities of the situation by confining the obligation of the federal Government to bringing such articles, together with a favourable recommendation, to the notice of the appropriate authorities of those units. Paragraph (c) made it possible to obtain information on the law and practice of a federal State party to the Convention so that it could be ascertained how far particular provisions were being implemented.

8. Alternative II was essentially identical to article 31 of the Limitations Convention and differed from alternative I in that its purpose was not to qualify the obligation of the central Government but to enable the Convention to be applied progressively to particular units of the State concerned. His Government, however, had no wish to apply the Convention in a piecemeal fashion, since Australia's tradition had always been to accede to international instruments as a whole. Furthermore, his delegation was troubled about other questions raised by

alternative II. If, for instance, it was decided that the Convention would be applied in some territorial units of a State but not others, could such units justifiably be treated as Contracting States for the purposes of article 1? In view of those considerations, his delegation was doubtful whether alternative II would be suitable without amendment.

9. Mr. LOW (Canada) said that the inclusion of an appropriate federal State clause which would not require Canada to apply the rules of the Convention throughout its territory was essential if his country was to become a party to the Convention. In view of the importance of article B to certain States, he suggested that its consideration should be postponed to give those States more time to discuss their position.

10. Mr. WAGNER (German Democratic Republic) said that although his country did not face the same problems as Australia and Canada, the adoption of alternative I would create difficulties because it would prevent the Convention from being applied as a unity. His delegation therefore preferred alternative II.

11. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that alternative I for article B presented certain specific difficulties, and also suffered from a lack of clarity, especially in paragraph (b). It was not clear why the federal Government would be required to bring the articles in question to the notice of the competent authorities of states, provinces or cantons, together with a favourable recommendation, and what would be the results of doing so. His delegation also had certain difficulties with paragraph (c): the question of the "extent" of application would present great difficulties for the Soviet Union, as it was unclear who would determine the extent to which a provision should be given effect in a state or territorial unit.

12. The CHAIRMAN, referring to the proposal made by the Canadian representative, suggested that discussion of article B might be suspended and a small working group established to consider paragraphs (b) and (c) and arrive at a formulation which would be acceptable to all federal States. The members of the working group should be Australia, Brazil, Canada and possibly the Byelorussian or Ukrainian Soviet Socialist Republic. He asked the Federal Republic of Germany whether it wished to be represented as well.

13. Mr. LANDFERMANN (Federal Republic of Germany) said it was not necessary for his country to be represented on the working group because it would be able to apply the Convention without difficulty in view of the legislative powers enjoyed by the federal Government. With reference to the point made by the representative of the Soviet Union, he agreed that paragraph (c) of alternative I might be construed as meaning that every federal State had to make a statement on its law. He hoped that the working group would not make that a binding requirement.

14. Mr. SANCHEZ CORDERO (Mexico) said that the working group should consider the proposal made by

Canada for a new article (A/CONF.97/C.2/L.2) as well as alternatives I and II for article B.

15. The CHAIRMAN said that the working group would naturally consider all the relevant documentation. He asked if the United Kingdom and the Union of Soviet Socialist Republics would also wish to be represented on the working group.

16. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that in his opinion article B was not solely the concern of federal States, but affected the interests of other States as well, in that they might wish to apply the Convention to contracts involving commercial establishments in the territory of a federal State. It would therefore be of interest to non-federal States to see what decision was taken on article B.

17. The proposed working group might be useful, but he thought it would be preferable for the delegations of Australia and Canada to discuss the problem between themselves first and raise it again later in the Committee.

18. Mr. LOW (Canada) agreed that the Committee should not lose time on such a technically complex problem until the States concerned had thrashed it out and arrived at certain conclusions to present to the Committee.

19. Miss O'FLYNN (United Kingdom) said that her delegation did not foresee any difficulty whether the federal clause was included or not. It was unlikely that her Government would wish to apply the Convention in just one part of the United Kingdom. However, it did have certain views on the proposals put forward, preferring the one made by Canada in document A/CONF.97/C.2/L.2. It was prepared to serve on the working group, if it was set up.

20. Mr. SAM (Ghana) also believed that the matter could be of concern to any State, irrespective of its structure. If a decision was taken to set up a working group, representatives of any country should be allowed to participate at any time in its meetings.

21. Mr. BENNETT (Australia), sensing that members of the Committee tended to prefer alternative II, asked whether their broad approval could accommodate the uncertainty which he detected in its text concerning the relationship between "territorial units" and "Contracting State" as far as the application of the Convention was concerned.

22. Mr. LOW (Canada) observed that the draft before the Committee lacked what was present in other international instruments, namely, an interpretation article to assist in determining the definition of what was a Contracting State. Without such an article, the exact meaning of substantive clauses could give rise to lengthy debate. He was prepared to submit a working paper on that subject to the Committee.

23. The CHAIRMAN suggested that the representatives of Canada and Australia might hold an exchange of views and—taking account of any observations which



any other delegation might wish to make—prepare a new text for consideration by the Committee.

24. *It was so decided.*

*Article C—Declaration of non-application of Convention*

25. Mr. PIRC (Czechoslovakia) considered that the proposed text was not clear. More particularly, it failed to take account of the fact that a non-Contracting State towards which a unilateral declaration of non-application had been directed might—during the period in which that declaration was being considered—become a Contracting State, in other words that the provisions of paragraph (1) could supersede those of paragraph (2). He expressed the opinion that declarations of non-application should be subject to two essential conditions: firstly, they should be made jointly by the States concerned, and not unilaterally; and secondly, they should only be made by Contracting States.

26. The ASSISTANT SECRETARY said that, for the sake of clarity, the Secretariat wished to propose that the final phrase of the French text of article C, paragraph (2), should be replaced by the words "*soit unilatéralement sous condition de réciprocité*". The change was not intended to affect the substance.

27. Mr. PLANTARD (France) believed that such a change would in fact make a substantive difference to the text. Reciprocal unilateral declarations were not the same as unilateral declarations subject to reciprocity.

28. He was, in any case, doubtful whether paragraph (2), however drafted, could be implemented, since accessions and ratifications would occur over a lengthy period of time.

29. In his opinion, reciprocity was not an important issue. According to paragraph (1), a Contracting State could make a declaration of non-application at any time; any State to which such a declaration had been made would be free to make a similar declaration, or not to do so, when it acceded to the Convention. That was surely enough.

30. Mr. LOW (Canada) said that he understood the article as drafted to imply that in the absence of joint or reciprocal declarations by two Contracting States with similar laws concerning the sale of goods, a declaration of non-application by one of those States in respect of the other would constitute a unilateral derogation in relation to another Contracting Party. In other words, he believed that the provisions before the Committee derived from strict treaty law and had been drafted with the aim of preventing such derogations. Nevertheless, he found the text ambiguous. In the first place, it was by no means clear what could be declared non-applicable, when such a declaration could be made, or how and when the declaration itself could be applied. That uncertainty was—in his opinion—increased by the reference to "the same or closely related rules", since the word "rules" was itself open to different interpretations.

31. Mr. FOKKEMA (Netherlands) asked why the text before the Committee was so far removed from paragraphs 2 and 3 of article II of the 1964 Hague Convention, which appeared to offer a far more acceptable and comprehensible basis for any clauses concerning declarations of non-application.

32. Mr. PLANTARD (France) said that as a result of the discussion, his understanding of the article had become clearer. Paragraph (1) was essentially concerned with declarations of non-application made by Contracting States in respect of non-Contracting States. Paragraph (2) covered cases where two Contracting States were involved. He remained doubtful, nevertheless, with regard to the practical implementation of the provision and wondered whether the Committee might not usefully ask itself whether the article was really necessary. If the answer was affirmative, a small group might be set up with the task of examining the two paragraphs and preparing a more satisfactory draft.

33. Miss O'FLYNN (United Kingdom) suggested that in view of the fact that such a situation might frequently occur, paragraph (2) should be modified to allow for joint or reciprocal unilateral declarations of non-application by a Contracting State on the one hand, and one which would very soon accede to the Convention, on the other.

34. Mr. BENNETT (Australia) said that his delegation was in favour of a provision to the general effect of article C. Such a provision could be useful in dealing with matters of trade between two countries that were closely connected geographically and otherwise, as in the case of Australia and New Zealand. He agreed with the representative of France that the article as drafted, in particular paragraph (2), posed certain difficulties and should be looked at by a working party.

35. Mrs. BELEVA (Bulgaria) said that article C was basically acceptable to her delegation as it stood.

36. Mr. FOKKEMA (Netherlands) said that article C was of special interest to his delegation, particularly with regard to Benelux. The Netherlands was seeking to make its laws on the offer and sale of goods, and the transfer of property, uniform with those of other countries. Article D might help to avoid the need to invoke article C, but it would save trouble if both were kept.

37. Mr. ROUTAMO (Finland) felt that as it stood the text of the article presented a number of difficulties.

38. The CHAIRMAN noted that opinion in the Committee was generally in favour of keeping article C. He suggested that a drafting group, consisting of the representatives of Canada, Finland, France and the Netherlands, should be appointed to prepare a final version.

39. *It was so decided.*

*New article C bis (A/CONF.97/C.2/L.3)*

40. Mr. BENNETT (Australia) said that the new article proposed by his delegation had the same effect as ar-

article V of the Convention relating to a Uniform Law on the International Sale of Goods (ULIS). It would allow a Contracting State to make a declaration that it would apply the Convention only where the parties had chosen it as the law governing the formation and interpretation of their contract. In other words, the article would enable the State, through a declaration, to adopt an "opting-in" approach, rather than the "opting-out" approach provided for in article 5. His delegation did not agree that if individual States were permitted to adopt an "opting-in" approach, the Convention might prove to be little more than a model law. He felt that the Convention would quickly commend itself to a number of States, so that they would see no need to make a declaration of the kind provided for in the new article. Regardless of the fate of the Australian proposal, the Convention would come into operation and would apply in a significant number of States. In some States, however, including Australia, there was a certain anxiety on the part of businesses engaged in international trade that the Convention might not be well suited to their needs. Where such anxiety existed, the Governments concerned would naturally be reluctant to become parties to the Convention and thereby force it on their businesses. It would be better for businesses to be given an opportunity to move gradually and by their own decision to make the Convention apply to their contracts. After that had come about, the further step could be taken of applying the "opting-out" approach.

41. He believed that the Australian proposal would help to encourage the maximum number of States to become Parties to the Convention. The more States became Parties to it, the more businessmen would see it as in their own interest to have their dealings governed by the Convention, and the better the prospects would be of one day achieving a law of universal application.

42. Mr. TARKO (Austria) was unable to support the Australian proposal. His delegation felt that it was most important that there should be no reservations to the Convention, except minor ones affecting secondary issues. If reservations were to be permitted concerning the whole sphere of application of the Convention, as in the Australian proposal for an "opting-in" clause, or as in ULIS, the entire work of UNCITRAL would probably have been in vain. In his delegation's view, a State making an "opting-in" declaration could hardly be counted as a Contracting Party. Such a declaration would narrow the scope of application of the Convention to an extraordinary extent. If an article of the kind proposed were adopted, it would be very difficult for Austria to accept the Convention as a whole.

43. Mr. PIRC (Czechoslovakia) had no general objection to discussing the Australian proposal. However, he felt that reservations to the Convention should probably be discussed at the end of the Conference. If the Australian proposal was to be discussed in the Second Committee, the Czechoslovak proposal on article C and a new article C *bis* should also be circulated and discussed.

44. Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) felt that a declaration of the kind referred to in the Australian proposal would demonstrate more clearly that the Contracting Parties had chosen the Convention as the applicable law. In addition to the interpretation of contracts, however, the proposal should cover their implementation. He therefore suggested that the last part should be broadened in scope. He also suggested that the words "acceptance, approval" should be inserted between "ratification" and "or accession".

45. Mr. BAN (Hungary) felt that the Australian proposal merely offered a further possibility of avoiding the application of the Convention. Article 5 already provided for exclusion, variation or derogation by the Contracting Parties. Seen in that context, the Australian proposal ran counter to the main thrust of the Convention, and his delegation would be unable to support it.

46. Miss O'FLYNN (United Kingdom) said that her delegation fully endorsed the principle underlying the Australian proposal. The parties to a contract for the international sale of goods ought to be able to choose the law they considered most appropriate to their circumstances. That principle had been recognized in article 5 of the draft Convention, which permitted exclusion. Clearly, there were differences of opinion on the way in which such exclusion should be effected, but however article 5 was interpreted it did not go far enough. Where important issues were involved a State should be able to decide that the parties to a contract should not be bound by the terms of the Convention unless they positively chose it to apply.

47. She felt that delegations ought to have more confidence in the Convention. If it proved a satisfactory instrument for governing the international sale of goods, those concerned would adopt it readily enough. Contracting States should be able to specify that it applied only where it had been chosen as the law to govern the contracts in question. Such a provision would ensure more ratifications.

48. She agreed with the representative of the USSR that the text as it stood was too restrictive. She proposed, therefore, that the last part of article C *bis* should run: "as the law governing the contract and its formation". She also endorsed the addition suggested by the representative of the USSR.

49. Mr. PFUND (United States of America) said it was not desirable that the burden should be on the parties to a contract to apply the Convention rather than to exclude it, if they wished, under article 5. The Australian wish to meet the possible anxieties of parties about the Convention could be taken care of through the provisions of that article. The Convention should not require affirmative action to make it applicable to particular contracts. His delegation considered that the First Committee had reached the right decision in that respect, and it was therefore unable to support the Australian proposal.

50. Mr. WAGNER (German Democratic Republic) also doubted the usefulness of the Australian proposal,

which would limit the application of the Convention. Under article 5, the parties to a contract were allowed to exclude its application entirely. If that was not done, the terms of the Convention should be implemented. That was the meaning of accession to the Convention.

51. Mr. COPITHORNE (Canada) believed that the Australian proposal could be helpful, since it would permit more parties to determine the choice of the law applying to their contractual arrangements. Such a provision would make the Convention more attractive and result in more accession to it. His delegation would therefore support some version of the new article proposed by Australia. The exact wording could be considered further in a smaller group.

52. Mr. BENNETT (Australia) said that the amendments suggested by the United Kingdom were acceptable to his delegation.

53. Mr. PLANTARD (France) said that his delegation was opposed to the Australian proposal for the reasons already put forward by the delegations of Austria, the United States, Hungary and the German Democratic Republic. Contracting States that were allowed to make reservations of the kind provided for in the new article would have no obligations under the Convention. If such States were among the Parties whose accession made it possible for the Convention to enter into force, the anomalous situation might arise in which the Convention would become operative with many of its original signa-

tories not bound by its terms. The Australian proposal would upset the whole process of progress towards the unification of private law.

54. Mr. HERBER (Federal Republic of Germany) said that his delegation was strongly opposed to the Australian proposal. The experience of the Hague Conventions, in which provision had been made for similar reservations, showed how dangerous such a course could be. It was one of the reasons for the failure of the Hague Conventions, even among those States which were willing to accept them. A State making use of a reservation of the kind in the Australian proposal was not really a Contracting State. If a State was not willing to accept the rules of the Convention as non-mandatory law, it was not a Contracting State and should not be counted as such.

55. Mrs. BELEVA (Bulgaria) shared the views of the representative of the Federal Republic of Germany and other delegations opposing the Australian proposal. She could see no reason for the proposal if both the States concerned were parties to the Convention.

56. Mr. LI Chih-min (China) considered the Australian proposal reasonable and flexible. Its provisions were in line with the general principles of the Convention and would enable more countries to accept it. His delegation was therefore ready to discuss the proposal further.

*The meeting rose at 1 p.m.*

## 2nd meeting

Tuesday, 18 March 1980, at 10 a.m.

*Chairman:* Mr. MANTILLA-MOLINA (Mexico).

*The meeting was called to order at 10.05 a.m.*

### **ELECTION OF A VICE-CHAIRMAN AND A RAP- PORTEUR (RULE 46 OF THE RULES OF PROCE- DURE) (agenda item 2) (continued)**

1. Mr. INAAMULLAH (Pakistan) said that the members of the Group of 77 had unanimously decided to nominate Mr. Kuchibhotla (India) for the post of Rapporteur.
2. Mr. WAITITU (Kenya) seconded the nomination.
3. Mr. Kuchibhotla (India) was elected Rapporteur by acclamation.

### **CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARA- TIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO**

A/CONF.97/C.2/SR.2

### **THE CONVENTION ON THE LIMITATION PERI- OD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)**

*Article C bis* (continued) (A/CONF.97/C.2/L.3, L.7)

4. Mr. SAM (Ghana) said that his delegation appreciated the intention of the delegation of Australia in putting forward the new article *C bis* (A/CONF.97/C.2/L.3) but regretted that it was unable to support it. By contrast with the "opting-out" provision in article 5, the new article was an "opting-in" provision. A similar proposal had been put forward at the eleventh session of UNCITRAL, and the Committee had decided after a lengthy debate that it was unable to accept a formulation of that kind. If the Committee was persuaded to accept the proposed new article, the three years of effort put into the preparation of the draft Convention would have been in vain.

5. Mr. OPALSKI (Poland) said that the proposed new article *C bis* was contrary to the spirit of the agreement reached in the First Committee on article 5. It would transform what had been designed as an international legal instrument into a general statement of conditions, the application of which would depend solely on the will of the parties to a given transaction. Moreover, it would create a situation in which there was no difference between the position of a Contracting State and that of a State that was not bound by the Convention. His delegation was strongly opposed to the inclusion of a provision of that kind.

6. *The Australian proposal (A/CONF.97/C.2/L.3) was rejected by 17 votes to 4.*

7. The CHAIRMAN invited the Committee to consider the Czechoslovak proposals on article C and a new article *C bis* (A/CONF.97/C.2/L.7).

8. Mr. PIRC (Czechoslovakia) said that the new article *C bis* proposed by his delegation bore no relation to the article *C bis* proposed by Australia and just rejected by the Committee. It had to do with usages in international trade. The principle under which there were certain usages that prevailed over existing international conventions was an obstacle to the unification of conventions and was largely responsible for previous failures to achieve it. It would be a grave defect in the Convention if such a principle was adopted, and his Government would probably be unable to ratify it. The discussion in the First Committee had shown that other States shared that difficulty.

9. It was desirable, therefore, in order to enable the largest possible number of States to ratify the Convention, to provide for reservations to article 8 (2), and thus to avoid the consequences which that provision would have in respect of usages that States were unwilling to apply between themselves because they were not in accordance with the Convention.

10. Mr. WAGNER (German Democratic Republic) felt that the amendment to article C in fact dealt with a different subject from that of article C as it stood in document A/CONF.97/6. It was a problem of particular importance to countries that had special laws for international economic contracts, and he hoped that countries in a different situation would show an appreciation of their difficulties.

11. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) thought that the Czechoslovak proposals would help to secure the largest possible number of ratifications. As much leeway as possible should be left, so that States would be able to apply parts of the Convention separately. The proposed reservation would represent a very small departure from the Convention compared with the acceptance by States of Part II or Part III only.

12. Mr. HERBER (Federal Republic of Germany) expressed serious misgivings about the Czechoslovak amendment to article C, particularly in the light of the

experience of the 1964 Convention, which had provided for a similar reservation. His delegation agreed with the view that the scope of application of article 1 (1) (b) of the present Convention was too wide and had argued against it in the First Committee. It would have preferred to restrict the scope of the draft Convention to relations between Contracting States. That did not mean, however, that reservations should be allowed. Similar reservations to the 1964 Convention had left it very unclear when the Convention applied and when it did not. His delegation did not consider that article 1 (1) (b) justified a reservation of the kind proposed. If the problem was truly an impediment to ratification, it would be preferable for provision to be made in the plenary to restrict the scope of the Convention's application.

13. Mr. TARKO (Austria) agreed with the previous speaker. Article 1 (1) (b) had already been adopted in the First Committee and should not now be subject to reservations. If the question was important to a number of States, it would be better for them to make a new proposal to the Plenary.

14. Miss O'FLYNN (United Kingdom) considered that article 1 (1) (a) would normally apply and that only rare cases would come under 1 (1) (b). Since a declaration on the lines proposed by the delegation of Czechoslovakia would thus have a practical effect only in fairly rare cases, her delegation felt able to support it.

15. Mr. WAGNER (German Democratic Republic) regretted that his delegation was unable to support the Czechoslovak proposal for a new article *C bis*. Reservations should mainly relate to the scope of the Convention; those to its content should be strictly limited.

16. Mr. FOKKEMA (Netherlands) was also against the proposal, which would leave the parties an unacceptable degree of latitude in the choice of the conditions governing their contracts.

17. *The Czechoslovak amendment to article C (A/CONF.97/C.2/L.7, first paragraph) was rejected by 18 votes to 5.*

18. *The Czechoslovak proposal for a new article C bis (A/CONF.97/C.2/L.7, second paragraph) was rejected by 24 votes to 2.*

#### Article (X)

19. Mr. ENDERLEIN (Secretary of the Committee), noting that article (X) was under discussion in the First Committee, said that it might be better for the Second Committee to postpone its consideration of that article until the First Committee had finished with it.

20. *It was so decided.*

#### Article D (A/CONF.97/C.2/L.9)

21. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that his delegation's amendment (A/CONF.97/C.2/L.9) involved no more than a draft-

ing change. International treaties were designated by a number of other terms besides "convention".

22. Mrs. BELEVA (Bulgaria) supported the Soviet amendment.

23. Mr. ROMAN (Assistant Secretary of the Committee) said that it was the practice of the Secretary-General as the depositary of international agreements to use "agreement" as a generic term. The term "convention" should be used for the draft Convention itself.

24. Mr. AL-TAWHEEL (Iraq) supported the Soviet amendment. The use of the word "international" would help to distinguish between bilateral and international agreements.

25. Mr. LOW (Canada) suggested that the words "any international agreement" should be used instead of "international agreements". In other respects he fully supported the Soviet amendment.

26. The CHAIRMAN took it that, as he heard no objection, the Committee agreed to adopt the Soviet amendment as orally subamended by Canada.

27. *It was so decided.*

28. Mr. OSAH (Nigeria) said that the provision in article D was based on article 37 of the Prescription Convention and was valid in that context, since the Prescription Convention dealt only with the period of time in which parties could bring an action. However, as the present Convention dealt with the formation of contracts, and the obligations of buyers and sellers, there was no justification for including such a provision, and in any case articles 30 and 59 of the Vienna Convention on the Law of Treaties had already made sufficient provision on that point. He therefore proposed that article D should be deleted altogether.

29. The CHAIRMAN said that, if there was no support for the proposal by the Nigerian representative, he would take it that it was rejected.

30. *It was so decided.*

31. *Article D, as amended, was adopted.*

32. Mr. PELICHET (Observer for the Hague Conference on Private International Law) said that under article IV of the Hague Sales Convention of 1964, any State that had already ratified or acceded to a Convention on conflict of laws in respect of the international sale of goods was entitled to declare that it would apply the Uniform Law in the cases governed by the Convention only if that Convention itself required the application of the Uniform Law. There was no provision of that kind in the present Convention, and certain delegations feared that its absence might be interpreted *a contrario* as obliging States parties to the Hague Convention of 1955 on the Law Applicable to International Sales of Goods (Corporal Movables) to denounce it in order to accede to the new Convention.

33. In his opinion, that interpretation would be wrong. The provisions of article IV of the 1964 Convention

were indispensable because article 2 of the Uniform Law excluded the rules of private international law for purposes of its application. Consequently, without the reservation in article IV, the States Parties to the 1955 Convention on the Conflicts of Laws would have had to denounce it in order to accede to the 1964 Convention. However, the structure of the present Convention was completely different from that of the 1964 Convention in that its article 1 left the question of conflict of laws open and referred expressly to the application of the rules of private international law. There was thus no contradiction between the present Convention and the 1955 Hague Convention, and it was therefore unnecessary for the former to include a provision on the lines of article IV of the 1964 Convention. The absence of a provision of that kind would not prevent a State Party to the 1955 Hague Convention from acceding to the new instrument.

34. The CHAIRMAN said that the statement made by the Observer for the Hague Conference would be recorded in the report.

#### Article E

35. Mr. MINAMI (Japan) said that article E was perfectly consonant with article 1, paragraph 1 (a), because it referred to "the States" in which the parties had their places of business, but not with paragraph 1 (b), under which neither party need have its place of business in a Contracting State. He would like to know what implications the application of paragraph 1 (b) would have for article E, in which there was no mention of the rules of private international law.

36. Mr. ENDERLEIN (Secretary of the Convention) said that under article 1, paragraph 1 (a), both parties had to have their places of business in a Contracting State, but under paragraph 1 (b) only one Contracting State was involved. In article E, paragraph (a), he understood the words "in respect of the States in which the parties have their places of business" to mean both States or one State only, as appropriate. The wording should perhaps be made clearer.

37. Mr. LOW (Canada) said that the term "States" in article E did not cover the situation in which neither of the States in which the parties had their places of business was a Contracting State, whereas article 1, paragraph 1 (b), gave the parties a choice of law in such cases.

38. Mr. PLANTARD (France) said that there were two possible situations. In the first, the Convention would be applicable under article 1, paragraph 1 (a), because the two States were both Contracting States; to see whether that was so, it would be necessary to ascertain whether the two States were Contracting States and whether the Convention had entered into force in regard to them; the answer would be yes or no. Article E was therefore unnecessary in that case. In the second case, the Convention would be applicable under article 1, paragraph 1 (b), because the rules of conflict led to the application of the law of a Contracting State; it would be a simple matter to discover whether a State was a party to the Convention

and whether the Convention had entered into force by virtue of the period of time established in article 1. Again, article E was unnecessary.

39. Mr. BENNETT (Australia) said that his delegation had reservations about the idea of deleting article E, since the article did more than merely establish the date of application. He was not aware of any other provision in the Convention which laid down the basic obligation of a Contracting State to apply the Convention, irrespective of its date of application. That obligation flowed from article E, and his delegation was therefore in favour of keeping it. The point made by the representative of Japan was a valid one, and the wording needed to be made quite clear.

40. Mr. PELICHET (Observer for the Hague Conference on Private International Law) agreed with the representative of France in many respects, but did not think that article E should be deleted. While there would be no difficulty in determining whether ratification had taken place by both States, as under article 1, paragraph 1 (a), or by only one, as under paragraph 1 (b), it was nevertheless necessary to keep article E in order to determine what contracts were covered by the Convention. The difficulty might be solved by a simple form of words such as "This Convention shall be applicable only to contracts concluded after it has entered into force in the cases provided for in article 1".

41. Mr. HERBER (Federal Republic of Germany) said that the proposal made by the Observer for the Hague Conference was exactly what he had had in mind. Article E was not very important, because it only dealt with contracts that were concluded on or after the date of entry into force of the Convention; those represented exceptional cases which it would usually be possible to settle without difficulty. But as a pattern had been laid down in article 33 of the Prescription Convention, cited in the foot-note to article E, and had also been established in the Hamburg Rules, it might be said that a precedent had been created. The wording of article E, paragraph (b), could be aligned with that of the Prescription Convention by putting a full stop after the word "Convention" in the second line and deleting the remainder of the paragraph. Paragraph (a) might be amended in the same way, a semi-colon being put after the word "Convention" in the penultimate line and the remaining words deleted.

42. Mr. FOKKEMA (Netherlands) said that the problem raised by the Japanese representative could not be solved as easily as the representative of the Federal Republic of Germany seemed to think, because there might be a difference between the moment at which the Convention entered into force in general and the moment it entered into force with regard to a particular State. Use of the phrase "in respect of the State or States concerned" might cover the point, but it would be preferable to make the meaning absolutely clear.

43. Mr. LOW (Canada) said that the first thing to be certain of was the real objective of article E. He regarded

article E as an additional provision to the normal rules of treaty law designed to establish the precise point in time when those rules would apply to a particular transaction involving certain States. The problem was to determine which States were covered by the Convention. As a rule had been established for that purpose in article 1, it was probably unnecessary to make paragraph (b) of article E more specific. Each State should apply the Convention in respect of the contracts to which it was applicable as from the date of its entry into force for the States that were connected with the transactions covered by the contracts.

44. He suggested that a working party should be set up to redraft article E in such a way as to cover the gap which had been noticed by the representative of Japan.

45. The CHAIRMAN suggested that a small working party should be set up, composed of the representatives of Australia, the Federal Republic of Germany, France and Japan and the Observer for the Hague Conference, to draft a new text for article E.

46. *It was so decided.*

## Article F

### Paragraph (1)

47. Mr. LOW (Canada) suggested that article 41 of the Prescription Convention might serve as a model for a more simple paragraph than that submitted to the Committee. In other words, would it not be sufficient to stipulate that the new Convention would be open for signature at the concluding meeting of the Conference and, until a date to be decided upon, at the United Nations office at Vienna?

48. Mr. ROMAN (Assistant Secretary of the Committee) pointed out that the functions of the Secretary-General as the depositary for international agreements made it necessary—for formal and juridical reasons—to centralize all administrative procedures related to those agreements to the greatest extent possible at United Nations Headquarters in New York, although in certain cases Conventions might remain open for signature during a certain period at their place of adoption. The text before the Committee had been drafted with those considerations in mind.

49. Mr. PLANTARD (France) suggested 31 December 1980 as the closing date for signature of the Convention.

50. Mr. ROMAN (Assistant Secretary of the Committee) said that as far as agreements for which the Secretary-General was the depositary were concerned there was no established precedent regarding the period during which they were open for signature.

51. Miss O'FLYNN (United Kingdom), supported by Mr. PFUND (United States of America), believed that at least 12—and preferably 18—months should be allowed, in view of the length and complexity of the Convention. A period of a little more than 18 months had been allowed for signature of the Prescription Convention.



52. Mr. HERBER (Federal Republic of Germany) believed that the period should be short enough to encourage States to complete as rapidly as possible the examination of its provisions which must precede their signature of the Convention. He would suggest 31 March 1981 as the closing date.

53. Mr. LOW (Canada) agreed with the representatives of the United Kingdom and the United States. In his opinion, 18 months would not be an inordinately long period, in view of the consultations which national authorities would have to hold with their legal specialists in order to determine that the substantive provisions of the Convention could be ratified by the Governments concerned.

54. The CHAIRMAN invited members of the Committee to express their preference for one or other of the two suggestions.

55. *There were 6 votes in favour of the suggestion that the closing date for signature should be 31 March 1981 and 18 votes in favour of 30 September 1981.*

56. *Article F (1) was adopted, subject to insertion of the title of the Conference in the second line and to completion of the third line in accordance with the preference just expressed.*

#### Paragraph (2)

57. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) and Mr. AL-TAWEEL (Iraq) pointed out linguistic inaccuracies in the Russian and Arabic texts respectively and presumed that they—together with any other similar inaccuracies detected elsewhere in the text—should be brought to the attention of the Drafting Committee.

58. The CHAIRMAN confirmed that understanding.

59. *Article F (2) was adopted.*

#### Paragraph (3)

60. Mr. ROMAN (Assistant Secretary of the Committee) said that the Secretariat wished to propose the insertion of the words "at any time" between the words "open" and "for accession". That proposal was designed to avert certain difficulties encountered in the past by the Secretary-General with regard to the interpretation of clauses concerning accession (without prior signature) to international agreements for which he was the depositary. In the absence of such a provision, those clauses had sometimes been taken to mean that States which for various reasons wished to do so could not accede to the agreements before the end of the period during which they were open for signature. In consequence, the deposit of instruments of accession had been delayed, as well as the entry into force of the agreements themselves.

61. *The amendment proposed by the Assistant Secretary was adopted.*

62. *Article F (3), as amended, was adopted.*

#### Paragraph (4)

63. Mr. ROMAN (Assistant Secretary of the Committee) proposed that at the end of the sentence the words "designated in article A" should be added.

64. Mr. LOW (Canada), referring to the corresponding text in the Prescription Convention, suggested that paragraph (4) might simply read: "Instruments . . . shall be deposited with the Secretary-General of the United Nations."

65. Mr. ROMAN (Assistant Secretary of the Committee) said that the suggestion would be acceptable to the Secretariat.

66. *The oral amendment by the representative of Canada was adopted.*

67. *Article F (4), as amended, was adopted.*

#### Article G

68. Mr. TARKO (Austria) suggested that the article might contain a clause providing for the withdrawal of declarations pursuant to paragraph (1).

69. Mr. FOKKEMA (Netherlands) pointed out that provision was made for such a contingency in article H (6).

70. *Article G was adopted.*

#### Article H

##### Paragraphs (1) and (2)

71. *Paragraphs (1) and (2) were adopted.*

##### Paragraphs (3) and (4)

72. Mr. LOW (Canada) reminded members of the Committee that the final drafting of paragraphs (3) and (4) would be subject to the consultations which were still taking place on article B and suggested that consideration of those paragraphs should be deferred.

73. *It was so decided.*

##### Paragraph (5)

74. Mr. AL-TAWEEL (Iraq) suggested that in accordance with the decision taken on article F (4), the references to "the depositary" in paragraphs (5) and (6) be replaced by "the Secretary-General of the United Nations".

75. Mr. PLANTARD (France) observed that the final drafting of the second half of paragraph (5), and of paragraph (7), would depend on the outcome of the deliberations of the working group set up to consider article C. Irrespective of that outcome, he would query the necessity of imposing a six-month delay on the entry into force of reciprocal or joint declarations made under the Convention.

76. Mr. LOW (Canada) considered that the paragraph as drafted contained a number of redundant words. In



his opinion, article 40 (1) of the Prescription Convention dealt more felicitously with matters very similar to those covered by the paragraph before the Committee; would it not be advisable, therefore, to replace the phrase "declarations of which the depositary receives formal notification after entry into force", in the first sentence of the latter, by the words "declarations made thereafter", as used in the first sentence of the former, especially since paragraph (2) of article H and the remainder of paragraph (5) made the sense of the provision clear?

77. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) suggested that further discussion should be deferred in order to allow members time to consider possible improvements to the text.

78. *It was so decided.*

#### *Paragraphs (6) and (7)*

79. Miss O'FLYNN (United Kingdom) introduced her delegation's amendment (A/CONF.97/C.2/L.6). A similar proposal for the use of the jussive future tense in the provisions of other articles was appended as a note to that document. Those proposals, being of a linguistic and not a substantive nature, might not require the attention of the Drafting Committee.

80. Mr. WAITITU (Kenya) said he understood that UNCITRAL considered it more in keeping with the spirit of international conventions and agreements if their texts were free from any notion of compulsion. He was not

sure whether the amendment proposed by the representative of the United Kingdom would not introduce such a notion.

81. Mr. ROMAN (Assistant Secretary of the Committee) said he believed that there was a tendency, in the English texts of agreements deposited with the Secretary-General, to use the jussive future rather than the present tense in provisions such as those to which the United Kingdom proposal was directed.

82. Mr. PFUND (United States of America) observed that the present tense was used in the English text of the Final Act of the United Nations Conference on the Carriage of Goods by Sea. In view of the uncertainty, therefore, it might be wise to refer the matter to the Drafting Committee.

83. The CHAIRMAN, replying to a question from Mr. MAKAREVITCH (Ukrainian Soviet Socialist Republic), said it was his understanding that the Drafting Committee would be responsible for checking the texts, in all the language versions, of amendments agreed upon by the Committee, rather than the full texts of all the articles adopted by it. It was also his understanding that the United Kingdom proposal involved purely linguistic improvements in the English draft alone. In the light of the discussion, however, it might be advisable to transmit that proposal to the Drafting Committee.

84. *It was so decided.*

*The meeting rose at 1 p.m.*

## 3rd meeting

Thursday, 20 March 1980, at 10 a.m.

*Chairman:* Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.3

*The meeting was called to order at 10.10 a.m.*

**CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)**

*Article (X) (continued) (A/CONF.97/C.1/L.88, L.96)*

1. The CHAIRMAN invited the Rapporteur of the First Committee to report on that body's deliberations concerning article (X) and the amendments proposed thereto.

2. Mr. MICHIDA (Japan), Rapporteur of the First Committee, said that article (X) had been considered at the eighth meeting of that Committee.\* An amendment proposed by the Netherlands (A/CONF.97/C.1/L.76) had been rejected, and an amendment proposed by the Union of Soviet Socialist Republics (A/CONF.97/C.1/L.35) had been withdrawn.

3. The First Committee had also considered an amendment proposed orally by the Federal Republic of Germany—and subsequently issued in document A/CONF.97/C.1/L.96—for the insertion, after the words "at the time of signature, ratification or accession", of the words "or at any time thereafter". There had been no objection to that proposal and it had been transmitted together with two other proposals for amendment submitted by the United Kingdom in document A/CONF.

\* See A/CONF.97/C.1/SR.8.

97/C.1/L.88 to the Second Committee for consideration during its resumed debate on article (X).

4. Mr. HERBER (Federal Republic of Germany) said that his delegation's proposal was designed to relieve Contracting States whose legislation did not, at the time of signature, ratification or accession require contracts of sale to be concluded in or evidenced by writing but which might—at some future date—impose such a requirement, of the necessity to provide for such a contingency by making a declaration at the time specified in the article as drafted. The amendment would also relieve States which had not made declarations at the originally stipulated times of the obligation to denounce the Convention if their legislations subsequently required contracts of sale to be concluded in or evidenced by writing.

5. The withdrawal of declarations by Contracting States if appropriate changes occurred in national legislation appeared to be provided for in article H (6); article H (2) would presumably ensure that declarations and communications relating thereto would be formally notified to the depositary, whose functions would include informing the Contracting States.

6. *The proposal by the Federal Republic of Germany (A/CONF.97/C.1/L.96) was adopted.*

7. Miss O'FLYNN (United Kingdom) introduced the first of the two amendments contained in document A/CONF.97/C.1/L.88, which was virtually self-explanatory. Her delegation believed that Contracting States should also be able to make the declaration referred to in article (X) at the time of acceptance or approval of the Convention.

8. *The proposal was adopted.*

9. Mr. LI Chih-min (China) suggested that the amendment just adopted might be incorporated at other points in the draft Convention where reference was made only to action "at the time of signature, ratification or accession".

10. Mr. SONO (Japan) said he wondered whether it might not be advisable, in the light of the amendment by the Federal Republic of Germany, to indicate that declarations made in accordance with article (X) could not be applied retroactively, i.e. in respect of contracts established prior to those declarations.

11. Mr. FOKKEMA (Netherlands) agreed with the previous speaker that such declarations should not be applied retroactively, but observed that article H (5) provided for a six-months delay before they came into effect. That provision was sufficient, he believed, to underline—if necessary—what he considered to be self-evident.

12. In the light of the decisions by the Committee concerning the previous two proposals, he wondered whether it might not be possible to delete from the amended article the phrase "at the time of signature, ratification, acceptance, approval or accession, or at any time thereafter", and modify the text to read, quite

simply, "A Contracting State . . . may at any time make a declaration . . .".

13. Mr. HERBER (Federal Republic of Germany) considered that the Netherlands suggestion could be examined by the Drafting Committee, but pointed out that explicit formulation of the type used in the article was established practice in international conventions.

14. Mrs. BELEVA (Bulgaria) said she could not agree with the Netherlands suggestion, because she—like the representative of Japan—was concerned lest the impression be given, albeit inadvertently—that provisions of the Convention could take effect retroactively.

15. Mr. PLANTARD (France) said, without prejudice to the final outcome of its deliberations, that the working group set up to examine article C had retained the formula "at any time" in connection with the declarations covered by that article. In the interests of simplicity, he favoured the Netherlands suggestion.

16. Mr. SAM (Ghana) said that he preferred the wording of the amendment by the Federal Republic of Germany. However, the matter could, perhaps, be left to the Drafting Committee to resolve.

17. Miss O'FLYNN (United Kingdom) said she noted that the wording of articles H (1) and J (1) appeared to establish a precedent of enumeration. On the other hand, the effect of the amendment by the Federal Republic of Germany was to generalize the provisions of article (X), so that the simplification suggested by the representative of the Netherlands might be acceptable.

18. As regards the concern expressed by the representatives of Japan and Bulgaria, she considered that other provisions in the draft Convention would ensure that declarations could not be applied retroactively.

19. Mr. SONO (Japan) observed that the provisions of article C, to which the representative of France had alluded, were placed in a specific temporal context by a direct reference to that article in article H (5). If the Netherlands suggestion were adopted, the same safeguard might be provided through a similar specific reference in article H (5).

20. The CHAIRMAN said that the Committee seemed to agree that the language of article (X) might be simplified, and that it should be harmonized with the language employed in other parts of the draft Convention. If there were no objections he would take it that the Drafting Committee was to be entrusted with that task.

21. *It was so decided.*

22. Miss O'FLYNN (United Kingdom) reminded the Committee that document A/CONF.97/C.1/L.88 contained a second proposal by her delegation. Replacement of the words "a Contracting State" in the last line of article (X) by the words "the Contracting State" might at first sight appear to be already a matter of drafting, but there was a slightly substantive aspect to the question. As originally drafted, the scope of the article could be interpreted more widely; the United Kingdom amendment

would—she believed—serve its intended purpose by removing the element of ambiguity.

23. *The proposal was adopted.*

*Article B (continued) (A/CONF.97/C.2/L.13)*

24. Mr. LOW (Canada) introduced the proposal of the *ad hoc* working group composed of Australia, Canada and Norway, concerning article B (A/CONF.97/C.2/L.13). He said that the proposal had been drafted on the assumption that members of the Committee were inclined to favour alternative II in document A/CONF.97/6.

25. The essential purpose of the working group's proposal for a new paragraph was to rectify an omission in the 1974 Prescription Convention by providing a gloss for the term "Contracting State" in relation to the federal State clause. As the note appended to the proposal pointed out, in the absence of a provision such as that contained in the proposed new paragraph, article I (1) (a), could cause the Convention to apply to a contract between a party in a unitary Contracting State and a party in a territorial unit of a federal Contracting State, even though the Convention did not extend to that unit. The proposed paragraph would avoid that result. It would also ensure that the Convention would not apply to contracts between parties in two different territorial units of the same State, unless provision to that effect were made in the domestic legislation of those units.

26. The proposal by the working group would—he believed—also dispel any implication that territorial units of a federal Contracting State could be deemed as having any international personality, in other words that they could be regarded as "Contracting States" for the purposes of the Convention.

27. Pointing out that the matter was of concern to unitary, as well as to federal States, and that numerous international conventions provided interpretations in connection with the latter, he expressed the hope that the draft prepared by the working group would minimize, if not entirely remove, the confusion that had existed in the past.

28. Mr. BENNETT (Australia) endorsed the introduction by the previous speaker. His own delegation, which had set out the main issues covered by the working group's proposal when it had expressed its preference for alternative I, now accepted that the proposal could be incorporated in and considered for adoption as part of alternative II.

29. Mr. PELICHET (Observer for the Hague Conference on Private International Law) agreed that the proposal met a need that was felt by all States but wondered whether its drafting was entirely satisfactory. There was, indeed, a proviso that the place of business of a party to a contract should, for the purposes of the Convention, "be deemed not to be in the Contracting State, unless the place of business is in a territorial unit to which the Convention has been extended" but major

commercial enterprises could have places of business in more than one territorial unit of a non-unitary State. In such a case, the fact that one of those places of business was in a territorial unit covered by the Convention could be considered as compliance with the proviso, even if the contractual relationship itself had been established in a territorial unit to which the Convention had not been extended. The consequent difficulties could be avoided by the addition, at the end of the final sentence, of the phrase "and unless it is in a territorial unit from which the commercial transactions have been carried out".

30. Mr. LOW (Canada) said that it was necessary to proceed on the assumption that the rule laid down in article 9 (a) applied throughout the Convention.

31. He drew attention to the fact that the English text of new paragraph 4 used the definite article "the" in the fifth line in referring to "Contracting State", for which the translation in the French text was "*dudit*". That was tantamount to stating that if a contract was entered into by a party with a place of business in a territorial unit which had not implemented the Convention, that unit would be deemed not to be in the Contracting State. The working group had tried to establish a rule of construction to bring the contract into a place to which the Convention was relevant. The connecting factor of the place of business did not involve the artificial presumption that the place of business would be deemed not to be in the Contracting State. It seemed to him that the difficulty of location could be resolved without making an unnecessarily artificial presumption if the indefinite article "a" were used before "Contracting State".

32. Mr. BENNETT (Australia) said that on the whole he would prefer the definite article to be left in the fifth line. The purpose of the paragraph was to deal with problems that might arise in a federal State which had made a declaration, and the present wording would best serve that purpose.

33. Mr. GONZALES ARQUATI (Argentina) said his delegation supported the proposal made by the working group, which would resolve any ambiguous situations that might arise, and also found the wording of the Spanish version to be satisfactory.

34. Mr. PLANTARD (France) said that it was clearly preferable to replace the word "*dudit*" in the French version, which involved an artificial presumption, by "*d'un*".

35. Mr. FOKKEMA (Netherlands) agreed with the French representative. Unless the indefinite article was used, a party with a place of business in, say, a province of Canada might be deemed not to have its place of business in Canada, as national law would not apply to it.

36. Miss O'FLYNN (United Kingdom) said her delegation supported the working group's proposal as filling the gap in alternative II. It also agreed that the definite article in the fifth line should be replaced by the indefinite article, although it did not think that the use of the former raised the presumption referred to, but mere-

ly meant that for certain limited purposes the place of business should be treated as not being in the Contracting State.

37. She agreed with the Canadian representative that the point raised by the Observer for the Hague Conference was covered by the definition of place of business given in article 9 (a).

38. Mrs. BELEVA (Bulgaria) pointed out that in the last three lines of the Russian version of the new paragraph 4, it was stated that the place of business "was" the territorial unit to which the Convention had been extended instead of that it was "in" the territorial unit in question.

39. Mr. SAM (Ghana) said that alternative II would be greatly improved by the addition of the paragraph proposed by the working group and agreed that the point made by the Observer for the Hague Conference was covered by article 9. He was in favour of using the indefinite article in the fifth line of the English text, in order to align it with the third line and thus avoid confusion in future.

40. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that in the Russian text the word "no" in the third line should be changed to "a".

41. With regard to the discussion on the use of the definite or indefinite article, he would prefer the present wording in the fifth line to be kept in order to make it clear that the reference was to a specific Contracting State and its territorial units. The absence of articles in the Russian language would make it difficult to convey the sense imparted by the indefinite article in other languages.

42. Mrs. BELEVA (Bulgaria) considered that the sense of the indefinite article in the English, French and Spanish versions was reflected in the Russian version as it stood.

43. The CHAIRMAN said he would take it that, if there were no objections, the proposal by the working group (A/CONF.97/C.2/L.13) was adopted with the drafting changes indicated, which would be introduced in the different language versions.

44. *It was so agreed.*

45. The CHAIRMAN invited the Committee to consider the rest of article B, alternative II.

46. Mr. MINAMI (Japan) proposed that the words "acceptance, approval", which appeared in paragraph 3, should also be added after the word "ratification" in the third line of paragraph 1.

47. *It was so agreed.*

48. Mr. HERBER (Federal Republic of Germany) said that it had to be made quite clear that if a State did not make a declaration the Convention would be applicable to all its territorial units. That possibility was covered by paragraph 3 but not with sufficient clarity. It would be simpler if paragraph 1 referred only to cases in which an exceptional declaration was needed. Paragraph 1 should

accordingly be amended to read in the fourth and fifth lines: "... declare that this Convention shall extend to one or more of its territorial units but not to all of them, and may amend its declaration ...". That would bring it into line with paragraph 4 and eliminate the need for paragraph 3.

49. Mr. LOW (Canada) said that the representative of the Federal Republic of Germany had raised a valid point, although it was arguable that there was ambiguity about the application of the Convention to a federal State under paragraph 1, as the question had been dealt with in article 29 of the Vienna Convention on the Law of Treaties.

50. If the Committee amended paragraph 1 to conform to paragraph 4, federal States that would otherwise have made a declaration that the Convention applied to all their territorial units would be deprived of the possibility of doing so; such a declaration was, however, sometimes regarded as desirable for the internal purposes of certain federal States. Paragraph 3 was not very felicitous, but any attempt to improve matters by amending paragraph 1 might depart from the precedents for that paragraph established in a number of conventions, and in so doing, create uncertainty as to its own meaning and that of its counterparts in those conventions as well. The point might be met by adding a new sentence on the following lines: "In the absence of such a declaration, the Convention shall have effect within all the territorial units of that State".

51. Mr. SAM (Ghana) said his delegation was opposed to the amendment by the Federal Republic of Germany to paragraph 1, which would deprive Contracting States of the possibility of declaring that the Convention extended to all their territorial units.

52. Miss O'FLYNN (United Kingdom) said that her delegation had no problem with the wording of paragraph 1 since it was clear that a federal State was not required to make a declaration if it intended the Convention to apply to all its territorial units. If it refrained from making a declaration, paragraph 3 would apply.

53. Mr. BENNETT (Australia) agreed that there were many precedents for paragraph 1, and that it would therefore be best to leave it in its present form. However, there was no need to refer in paragraph 3 to the time at which the declaration was to be made, which was abundantly clear from paragraph 1.

54. Mr. HERBER (Federal Republic of Germany) said that, in the light of the discussion, he would withdraw his suggestion in regard to paragraph 1 of article B.

55. The CHAIRMAN said that if he heard no further objection to paragraph 1 he would take it that it was adopted.

56. *It was so decided.*

57. The CHAIRMAN said that as there were no amendments to paragraph 2 he would take it that it was adopted.

58. *It was so decided.*

59. The CHAIRMAN said, in regard to paragraph 3, that the Canadian delegation, supported by Australia, had proposed that the reference to the time of signature should be deleted. He suggested, therefore, that the words from "declaration" to "Convention" should be deleted.

60. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that it would be necessary to make it clear in the Russian text of paragraph 3 that the declaration referred to was made under paragraph 1.

61. Mr. ENDERLEIN (Secretary of the Committee) suggested that paragraph 3 should run: "If a Contracting State makes no declaration under paragraph 1 of this article, the Convention shall have effect within all territorial units of that State".

62. *It was so decided.*

63. Mrs. BELEVA (Bulgaria) suggested that, as paragraph 4 was logically linked to paragraphs 1 and 2 it should come before paragraph 3.

64. Mr. LOW (Canada) had no objection to the paragraph or to the suggestion, but felt that the order of the paragraphs in the article came within the competence of the Drafting Committee.

65. The CHAIRMAN took it that, as he heard no objection, the Committee considered that the Bulgarian proposal should go to the Drafting Committee.

66. *It was so decided.*

67. The CHAIRMAN said that if there were no objections, he would take it that the Committee adopted article B, as amended, as a whole.

68. *It was so decided.*

#### *Article C (continued)*

69. The CHAIRMAN invited the members of the *ad hoc* working group to introduce their proposal for article C (A/CONF.97/C.2/L.10).

70. Mr. LOW (Canada) said that there had been some concern when article C was first considered regarding its effects on the rights and the capacity of Contracting States to contract out of the Convention, possibly to the prejudice of the rights of other Contracting States, and also its effects on relations between Contracting and non-Contracting States. The working group had endeavoured to improve upon the draft in the Secretariat paper (A/CONF.97/6) and on the wording in ULIS. The task had proved exceedingly difficult, and the resulting text was very complex.

71. Mr. BAN (Hungary) said that his delegation found the new draft acceptable.

72. Mr. ROUTAMO (Finland), speaking as a member of the working group, said that although the original text of paragraph 1 of article C had provided an opportunity for Contracting States to make a declaration in regard to non-Contracting States, it had offered no explanation of

what would happen if the latter subsequently ratified the Convention. Paragraph 3 of the new text therefore sought to explain what the position would be if the non-Contracting State later acceded to the Convention. He said that the word "of" after "approves" in the second line of the paragraph was an error.

73. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) asked whether paragraph 3 meant that the State which subsequently ratified the Convention could declare that it could not accept a declaration made under paragraph 2 at any time, or only at the time of ratification.

74. Mr. LOW (Canada) said that paragraph 3 covered the situation in which a Contracting State had made a declaration that it had the same legal rules on matters governed by the Convention as a non-Contracting State. The paragraph contemplated the possibility that the non-Contracting State concerned might subsequently ratify the Convention and thus become bound by its terms and entitled to certain rights under it. The question was whether, once the position of the non-Contracting State had changed, the declaration that the two States' legal rules were similar would automatically continue and the State which had ratified the Convention first would go on not applying the Convention in regard to the second State, or whether there should be a mechanism preventing the earlier declaration from continuing to have effect. It was felt that rather than requiring the second State to take affirmative action to maintain the previous situation, it would be better to have the declaration remain in force unless that State made a declaration to the effect that it did not wish the earlier declaration to apply. The reason why the group had felt that the earlier declaration should be maintained even in the absence of a new declaration by the second State was that it had assumed that, since the two States had similar systems, the second State would be content not to have the Convention apply. If it did wish the Convention to apply, it was in its hands to make a declaration that it no longer accepted the declaration by the first State.

75. Mr. PLANTARD (France) said that he would try to explain the complex situation envisaged by the article from a different angle. The working group had considered that there were three situations that could arise as a result of the mechanism established by article C: the declarations envisaged could be simultaneous; they could be successive; and, if successive, they could be unilateral or reciprocal. In the first case, State A would ratify the Convention and make a declaration, and State B would ratify the Convention and make a simultaneous declaration. Those would be joint declarations and would normally have effect for the application of article 1 (1) (a), the situation in which both were Contracting States but had jointly agreed that the Convention should not apply to relations between them.

76. The situation in the second case was more complicated. In that event, the declarations were unilateral and reciprocal but not joint because one declaration

would be made before the other. State A would make a unilateral declaration to the effect that its legislation was the same as that of State B, and State B would subsequently make a similar declaration. The situation would be the same as before but with a small gap in time.

77. Paragraph 2, however, envisaged a situation in which State A made a declaration that its legislation was the same as State B's, but State B was not and did not become a party to the Convention. The declaration would remain effective as far as the first State was concerned, and it would be assumed that the law of the first State, or of the second which was not a party to the Convention, would not incorporate the provisions of the Convention for the purposes of parties whose place of business were in those States. That situation would arise under article 1 (1) (b) in particular.

78. The third situation envisaged the case in which both States became parties to the Convention. State A, the first, would ratify the Convention and make a declaration. Subsequently, the second State, State B, would ratify the Convention but not make a declaration. The situation would then be different from that in paragraph 1 because there would be no reciprocal declaration. That was the situation which paragraph 3 attempted to deal with. It was a situation that could arise in practice and it was therefore important to provide a solution. In the working group's proposal, it was assumed that the declaration by State A was in force as far as it was concerned, whereas for State B nothing was changed. In other words, State A would not apply the Convention in its relations with State B. However, State B, not having made a declaration, would apply the Convention even in its relations with State A. However, under paragraph 3, State B would have been given an opportunity to reject the application of the Convention as far as it was concerned.

79. Mr. SONO (Japan) said that his question was on a matter of policy rather than interpretation. Paragraph 1 stated the basic principle: that the ideal was that there should be joint or reciprocal unilateral declarations. Paragraph 2 envisaged a less fortunate situation in which one State was not a Contracting State; the text therefore made room for the Contracting State to declare unilaterally that the Convention would not apply. Paragraph 3 dealt with a situation in which a non-Contracting State under paragraph 2 became a Contracting State. It appeared from what the French representative had said that a declaration under paragraph 2 would remain in effect unless the new Contracting State decided that it could not accept it. Until that point, only the first State could ignore the Convention whereas the second would have to apply it. A situation could be envisaged, however, in which the second State declared that it could accept the declaration of the first State. That would not be a specific declaration by itself that it had decided not to apply the Convention. In that case, only the first State would be free to exclude the application of the Convention, and not the second because it had not made a

positive decision to do so. The meaning of "accept" was not altogether clear.

80. Paragraph 3 dealt with an exceptional situation and ignored the basic principle stated in paragraph 1, and he wondered whether it was wise or necessary to make a provision for such a position. There seemed to be a gap in policy between paragraph 3 and paragraph 1. Another approach could be envisaged, which his delegation would prefer, whereby paragraph 3 would require the second State to declare at the time of accession whether it would accept the declaration of the first State or not. The working group were nevertheless to be congratulated on having formulated paragraph 1 as the basic principle of the article.

81. Mr. PELICHET (Observer for the Hague Conference of Private International Law) said that he had both practical and political doubts about the solution proposed by the working group in paragraph 3. It was perhaps satisfactory from the legal point of view but it could cause a great deal of confusion from the point of view of merchants and traders. If the second State, State B, decided to ratify the Convention, an act would be published in that State and its merchants would gather that the Convention was to apply. How would they know in practice that it would not apply to State A by reason of a declaration made perhaps ten years earlier by that State? It would be better to recognize that once State B had ratified the Convention it had performed an international legislative act that changed the situation, and if it wanted nevertheless to retain privileged relations with State A, it must make a declaration to that effect.

82. It could be assumed, moreover, from the identity of their legislation that the two States concerned had close relations. Thus, from the political point of view, it would be very difficult for State B to declare that it was unable to accept a declaration made by State A.

83. Mr. BENNETT (Australia) congratulated the members of the working group on the effort reflected in document A/CONF.97/C.2/L.10. Nevertheless, his delegation had strong reservations regarding the nature of the action that State B must take under paragraph 3 if it did not want the declaration to continue in force. Paragraph 3 said that the declaration would remain in effect unless the approving State declared that it could not accept it. That type of declaration was politically undesirable, especially between the kind of States envisaged in article C. It was generally accepted that they would be States having very close relations with each other, and it would therefore cause great difficulty if one Government had to declare that it could not accept the declaration of another friendly State. The form of the last few words of the paragraph should be altered.

84. He felt that, in the circumstances contemplated in paragraph 3, the declaration should automatically cease to have effect, so that either a further joint or reciprocal unilateral declaration as envisaged in article 1 would be necessary, or else State B on accession to the Convention would have to make a positive declaration that it could



accept the declaration by State A, which would then continue to have effect. That declaration would need to be made when State B ratified or acceded to the Convention.

85. Mr. PLANTARD (France) said that the members of the working group were aware of the weaknesses in the text they had proposed, but had felt there was a need for some provision of that kind. He agreed that, as the representative of Japan had suggested, the ideal solution would be to require State B, on ratifying the Convention, to declare itself in respect of the declaration made by State A. It was not possible, however, to impose such a requirement on States. Therefore, three possibilities must be considered. In the first situation, the simplest, State B would accept the declaration. If it did so, or if it made a declaration itself, there would be no further problem. The position would refer back to paragraph 1 and the machinery provided for in that paragraph would come into play. Another possibility was that State B

would make no declaration, being unaware of the declaration by the other State. The position would then be left artificially as it existed in paragraph 2. State B could not be considered either to have accepted the declaration or to have rejected it. Vis-à-vis State A, therefore, State B would not be a Contracting State. That left a third hypothesis, in which State B explicitly refused a declaration by State A to the effect that their systems of law were closely related. The working group had wanted to leave that possibility open to State B. Paragraph 3 could perhaps be deleted altogether, but it might prove useful from the point of view of making the application of the Convention as wide as possible.

86. The CHAIRMAN felt that it would be useful for delegations to have an opportunity to discuss the matter further. He suggested that the working group should take the matter up again and possibly submit a new proposal at the text meeting.

*The meeting rose at 1.05 p.m.*

## 4th meeting

Monday, 24 March 1980, at 10 a.m.

Chairman: Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.4

*The meeting was called to order at 10.05 a.m.*

### CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)

#### Article C (continued)

1. The CHAIRMAN said that as the *ad hoc* working group appointed to consider article C was still deliberating further discussion of the article by the Committee should be postponed.

2. *It was so agreed.*

#### Article F (continued)

3. Mr. ROMAN (Assistant Secretary of the Committee) said that an amendment had been proposed to article F, already approved by the Committee, whereby the words "by all States" would be inserted after the words "shall remain open for signature" in the third line of

paragraph 1. The Secretariat was in favour of the addition.

4. The CHAIRMAN said that, as he heard no objection, he took it that the addition to article F, paragraph 1, was approved.

5. *It was so decided.*

#### Article E (continued) (A/CONF.97/C.2/L.11)

6. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that his delegation wished to propose a rather tardy amendment to article E. The document was still in the course of preparation and he wondered whether the Committee would prefer to postpone consideration of the matter until it had been circulated or whether it would allow him to make an oral presentation.

7. Mr. SAM (Ghana) said he thought that the representative of the USSR should be permitted to present his amendment orally and the Committee should then decide whether or not it would be necessary to postpone the discussion.

8. Mr. PIRC (Czechoslovakia) thought that it would be preferable not to consider the amendment until it was available in writing.

9. Mr. FRANCHINI-NETTO (Brazil) wished to know whether there was a specific article on reservations to the



Convention. He would revert to the matter after consideration of the Soviet proposal.

10. Mr. HERBER (Federal Republic of Germany) said he thought that the Soviet representative should be allowed to present his delegation's amendment orally, so as to save the time of the Committee.

11. The CHAIRMAN said that the feeling in the Committee seemed to be that the representative of the Soviet Union should be permitted to present his delegation's amendment orally.

12. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that the draft of article E as prepared by the Secretariat (A/CONF.97/6) and the proposal by the *ad hoc* working group (A/CONF.97/C.2/L.11) might give the impression that the Convention would enter into force for countries that had not acceded to it. Such a provision would not be in accordance with the international law applying to agreements between States, particularly article 34 of the Vienna Convention on the Law of Treaties which stated that a treaty did not create either obligations or rights for a third State without its consent, and an amendment therefore seemed to be necessary.

13. It was accordingly proposed in his delegation's draft amendment\* that in paragraph *a*, the words "or after" should be deleted, and the words "the States in which the parties have their places of business" replaced by "that State or later" and that in paragraph *b*, the words "or after" should be deleted and the words "the States in which the parties have their places of business" replaced by the words "that State or later".

14. Such a formulation would reflect the terms of the corresponding article in the Prescription Convention without interfering in any way with the application of article 1 of the draft Convention.

15. The CHAIRMAN enquired whether the Committee considered the proposal too complex to discuss before its submission in a written form.

16. Mr. PLANTARD (France), supported by Mr. LOW (Canada), thought that the discussion should be postponed until the amendment was available in writing.

17. Mr. HERBER (Federal Republic of Germany) noted that the members of the *ad hoc* working group had not yet introduced their proposal (A/CONF.97/C.2/L.11). The authors of that proposal had certainly not intended to make the provisions of the Convention binding on non-Contracting States. The matter was clearly, therefore, a question of drafting.

18. The impression received by the Soviet delegation might perhaps have arisen from the fact that the second line of article E (1), as proposed by the working group, used the term "Contracting State or States", which had been interpreted as meaning a Contracting State or non-Contracting States. If that were so, the misunderstanding could be removed by inserting a second "Contracting" before the word "States".

19. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that his delegation could accept any wording that would exclude the possibility of an interpretation to the effect that the Convention would come into force for non-Contracting States.

20. Mr. PLANTARD (France) said that there was no such ambiguity in the French text of document A/CONF.97/C.2/L.11. It had been quite clear in the *ad hoc* working group that article E was intended to refer only to Contracting States. If that meaning could be clarified in the other languages, the Soviet amendment might not perhaps be necessary.

21. Miss O'FLYNN (United Kingdom) said that any possible ambiguity should be removed. That could be done either by referring to subparagraphs (a) and (b) of article 1 instead of simply to article 1, or, as the representative of the Federal Republic of Germany had suggested, by inserting the word "Contracting" before the word "States" in paragraph 1 and in the penultimate line of paragraph 2.

22. Mr. LOW (Canada) said that the textual ambiguity could be avoided by replacing the word "the" before the words "Contracting State" by the word "any".

23. Miss O'FLYNN (United Kingdom) did not think that the solution suggested by the representative of Canada was adequate; the Convention could then be understood to apply if it was in force for any one of the Contracting States referred to in article 1. In her view, the text proposed by the *ad hoc* working group would be clearer if, in addition to inserting the word "Contracting" before the word "States", as the representative of the Federal Republic of Germany had suggested, the positions of the words "Contracting States" and "Contracting State" were reversed; in other words, if the plural preceded the singular. That would follow the order adopted in article 1 (a) and (b) of the Convention.

24. Mr. AL-TAWEEL (Iraq) said that it was difficult to assess a legal text on the basis of an oral presentation. Unless the Soviet delegation wished to withdraw its amendment in the light of the comments made by some speakers, it should submit the amendment in writing.

25. Mr. PLANTARD (France) said that the French text of the working group's proposal was perfectly clear and required no amendment. He hoped that the Soviet delegation would not insist on its amendment if the text in the other languages were brought into line with the French text, possibly by adopting the suggestion made by the representative of the Federal Republic of Germany with regard to the English text.

26. Mr. FOKKEMA (Netherlands) said he endorsed those comments.

27. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that the insertion of the word "Contracting" before the word "States" in both paragraphs of the English and Russian versions of the text of article E, as proposed by the *ad hoc* working group, would meet the point he had raised.

\* Subsequently circulated as document A/CONF.97/C.2/L.20.

28. Mr. LI Chih-min (China) said that, like the French version, the Chinese text was satisfactory as it stood and required no amendment.

29. Mr. BENNETT (Australia) said that the English text of the working group's proposal was not wholly satisfactory. He had been attracted by the Canadian representative's suggestion that the word "any" should be substituted for the word "the", but had been convinced by the United Kingdom representative that the definite article served a purpose, the precise nature of which, however, still eluded him. The difficulty was that the text was too elliptical, and he wondered whether the Drafting Committee should not be requested to re-examine and, possibly, to recast the clause in question.

30. Mr. SAM (Ghana) suggested that, before the Committee proceeded any further with the discussion on article E, the proposal by the *ad hoc* working group should be formally introduced.

31. Mr. PLANTARD (France) and Mr. BECK-FRIIS (Sweden) supported that suggestion.

32. Mr. FOKKEMA (Netherlands), speaking as a member of the *ad hoc* working group, introduced the proposal. He said that the working group had been faced with two problems: first, the fact, pointed out by the representative of Japan, that the Secretariat draft did not adequately cover cases where the Convention applied as a result of paragraph 1 (b) of article 1; and, secondly, the possibility that one of the Contracting States concerned might have acceded to the Convention at a date subsequent to the Convention's entry into force for the other Contracting State concerned. In trying to deal with those two problems, the working group had possibly erred on the side of excessive brevity, and the proposed text could perhaps be expanded; he believed, however, that the working group's intention was sufficiently clear.

33. The CHAIRMAN said that the proposal had been formally introduced and was before the Committee for discussion.

34. Mr. WAGNER (German Democratic Republic) said that he supported the working group's proposal with the incorporation of the drafting amendments that had been suggested.

35. Mr. LI Chih-min (China) said that, while he appreciated the working group's efforts and the explanations given by the Netherlands representative, he felt that the proposal, which differed substantially from the original draft, required further clarification. In particular, the Secretariat draft spoke of contracts proposed or concluded on or after the date of entry into force of the Convention, while the working group's proposal referred to contracts proposed or concluded before the Convention's entry into force. It was his delegation's view that, before its entry into force, the Convention did not exist.

36. Mrs. BELEVA (Bulgaria) said that she accepted the text of the proposal in its French version and also agreed with the proposal to amend the English text by inserting

the word "Contracting" before the word "States". She drew attention to the fact that paragraph 2 of the proposal spoke of the "formation of contracts" whereas paragraph 1 referred only to "contracts", and suggested that the order of the paragraphs might be reversed.

37. Mr. LOW (Canada) said he agreed with the representatives of Australia and China that the working group's text was somewhat lacking in clarity. In particular, he was not entirely satisfied with the use of the phrase "in respect of" in the English text or "*à l'égard du ou des*" in the French text. The idea behind the proposal was clear, but he was not convinced that the text as it stood fully achieved its purpose.

*The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.*

38. Mr. BECK-FRIIS (Sweden), referring to the proposal by the *ad hoc* working group (A/CONF.97/C.2/L.11), said that his delegation could support the proposal as amended to bring the English version into line with the French one, although it would not object if other delegations thought that further work was required to clarify the text.

39. Mr. SAM (Ghana) said that the proposal constituted a distinct improvement in the text of article E. A clear distinction needed to be made between article 1 of the Convention, which concerned the sphere of application of the whole Convention, and article E which concerned only the date of its application by a Contracting State. He pointed out that the existing text of article E referred to Contracting States applying the provisions of the Convention, while the text of the proposed amendment contained the negative expression "does not apply". His delegation saw no ambiguity in the phrase "Contracting State or States" and agreed with the representative of France that the text was clear if read not in isolation but in conjunction with article 1. He therefore supported the proposal subject to any amendments which might be made by other delegations.

40. Miss O'FLYNN (United Kingdom) said that her delegation, which also supported the substance of the proposal, was of the opinion that the amendments discussed were of a drafting nature. It supported the Bulgarian proposal that the two paragraphs should be transposed so that reference would be made to formation of contracts and then to contracts.

41. Mr. LI Chih-min (China) said that his delegation was concerned about two points; the wording used in respect of the date of application of the Convention to contracts, and the negative wording employed in the article. It was not able to take up a definite position until the article had been further clarified.

42. Mr. FOKKEMA (Netherlands), commenting on the observations by several delegations that the formula used in the proposed amendment was a negative one, explained that a question of intertemporal law was involved. The Convention would normally apply as soon as there was a contract between parties who both had

their places of business in Contracting States or between parties one of whom had his place of business in a Contracting State the legislation of which was applicable under the rules of private international law. In exceptional cases only, there might be an instance of a contract that had not yet been concluded or was not yet in formation on the relevant date to which the Convention would not apply.

43. In response to the comment by the representative of Canada, he pointed out that the text of the amendment read: "contracts concluded before its entry into force in respect of the Contracting State" and not "Contracts concluded . . . in respect of" with a parenthetical phrase: "before its entry into force". There were two important moments in time as far as the application of the Convention was concerned: the first, which was referred to elsewhere in the Convention, was when the Convention entered into force with regard to a State and the second, which article E attempted to define, was when the contract was concluded or at a decisive point of time in its formation.

44. Mr. PLANTARD (France) proposed that article E should be placed after article J, the article from which it derogated, since that order would clarify both articles.

45. Mr. FOKKEMA (Netherlands) said that his delegation was able to support the French proposal.

46. Mr. SONO (Japan), who also supported the French proposal, said he was convinced that without article E traders might find themselves in a difficult position. The change in the positions of articles E and J might also allay the misgivings of the representatives of Canada and China.

47. Mr. SAM (Ghana) said that his delegation supported the Bulgarian proposal to invert the paragraphs, as that would bring the proposal into line with the existing text of article E.

48. Mr. LOW (Canada) said that inversion of the paragraphs would mean that the article would be more in keeping with article 1 of the Convention and with the normal process of concluding a contract. It might also perhaps assist in interpretation, since the literal ambiguity to be found in paragraph 1 was absent from paragraph 2.

49. Mr. HERBER (Federal Republic of Germany) said that he had been reluctant to agree to the inversion. The reason why the working group had opted for the order of paragraphs to be found in its proposal was that the first paragraph, dealing with the application of the Convention to contracts and corresponding to Part III of the Convention, was much more important than the second one. However, if the text read as well when inverted, he would not object to the proposal.

50. Mr. FOKKEMA (Netherlands) said that his delegation was able to support the Bulgarian proposal but that a slight change would be required in the French version of paragraph 2, which, as it stood, obviously needed a

paragraph to precede it. It would have to begin, as in the English, "This Convention does not apply . . .".

51. The CHAIRMAN noted that there appeared to be no objection to the external modifications proposed, i.e. the inversion of paragraphs 1 and 2, with the relevant drafting changes in the new initial paragraph of the French text, and the placing of article E after article J. He took it that the Committee wished to approve the proposal by the working group (A/CONF.97/C.2/L.11), as thus amended.

52. *It was so decided.*

53. Recalling the earlier discussion on the subject, Miss O'FLYNN (United Kingdom) formally proposed that, in each of the two paragraphs of article E as drafted by the working group, the phrase "in respect of the Contracting State or States . . ." be replaced by the phrase "in respect of the Contracting States or the Contracting State . . .". That addition would—she believed—clarify the text and relate it more effectively to article 1.

54. Mr. LOW (Canada) said that he did not consider that the insertion of the word "Contracting"—as proposed by the United Kingdom delegation—was necessary in both paragraphs.

55. Mr. SAM (Ghana) said that the proposal should be transmitted to the Drafting Committee for examination.

56. After a discussion, in which Mr. AL-TAWHEEL (Iraq), Mr. SAM (Ghana), Mr. WAITITU (Kenya) and Mr. FOKKEMA (Netherlands) took part, on the problem of ensuring the conformity of all the language versions, the CHAIRMAN observed that the proposed amendment had met with no formal opposition. He therefore concluded that the Committee was able to accept the amendment, but that it would wish the Drafting Committee to ensure that there were no discrepancies between the different language versions of the amended text.

57. *It was so decided.*

58. *Article E, as amended, was adopted, subject to examination by the Drafting Committee.*

*Article J (A/CONF.97/C.2/L.8, L.12, L.12/Corr. 1 (French only), L.17)*

59. Mr. ROMAN (Assistant Secretary of the Committee) said that document A/CONF.97/C.2/L.17 contained a revised version of article J, replacing that contained in document A/CONF.97/6, which had been prepared by the Office of Legal Affairs subsequent to the issuance of the latter document.

60. Members of the Committee would note, *inter alia*, that account had been taken in the revised draft of the suggestion by the United Kingdom, in document A/CONF.97/C.2/L.12 (with a corrigendum affecting the French text only), that the question of the date on which denunciations of the 1964 Conventions should become effective could not be determined in the provisions of the new Convention, since that was a matter

governed by the texts of the 1964 Conventions themselves. The Secretariat concurred with that view, and the original draft of paragraphs 3, 4 and 5 of article J had been modified accordingly.

61. In connection with the above consideration, moreover, a new text had been prepared for paragraph 6, which was a procedural measure designed to ensure co-ordination between the entry into force of the new Convention and the cessation of effect of the 1964 Conventions. The Secretariat believed that the co-ordination would be such as to permit the 13-month period after the date of deposit of the [tenth] instrument, as initially proposed, to be reduced to 12 months, and had revised the draft text of article J (1) accordingly.

62. The Secretariat further approved, as more appropriate, the United Kingdom proposal in document A/CONF.97/C.2/L.8 that the words "(including an instrument which contains a declaration pursuant to article G)" be substituted for the words in round brackets in the original draft of paragraph 1.

63. The CHAIRMAN noted that the relevant documentation had not yet been distributed in all the working

languages, and suggested that consideration of article J be deferred.

64. *It was so agreed.*

#### *Article (X) (continued) (A/CONF.97/DC/L.3)*

65. Mr. SONO (Japan) observed that document A/CONF.97/DC/L.3, containing the text of draft articles as adopted by the Second Committee for consideration by the Drafting Committee, neglected to point out that the Drafting Committee had also been entrusted with the task of harmonizing the language of article (X) with that employed in other parts of the draft Convention.\* He reiterated his own concern that it should be made perfectly clear that the declarations referred to in that article could not be applied retroactively.

66. Mr. ENDERLEIN (Secretary of the Committee) agreed that such a decision had been taken. The Drafting Committee would also be asked, *inter alia*, to ensure that the text of article (X) was compatible with that adopted by the First Committee for article 11.

*The meeting rose at 12.55 p.m.*

\* A/CONF.97/C.2/SR.3, paragraphs 20 and 21.

## 5th meeting

Tuesday, 25 March 1980, at 10 a.m.

*Chairman:* Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.5

*The meeting was called to order at 10.10 a.m.*

### **CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)**

#### *Article C (continued) (A/CONF.97/C.1/L.10, L.23)*

1. Mr. ENDERLEIN (Secretary of the Committee) recalled that at its third meeting,\* the Committee had examined the proposal of the *ad hoc* working group for article C (A/CONF.97/C.2/L.10). The working group's draft for paragraphs 1 and 2 had met with no major objections, but paragraph 3 continued to present diffi-

culties. Consideration of that paragraph had been deferred pending further consultations.

2. Mr. FOKKEMA (Netherlands), introducing document A/CONF.97/C.2/L.23 said that the new proposal for paragraph 3 which it contained reflected an attempt to accommodate the view expressed by many members of the Committee that it would be undesirable for the text to imply that, when a non-Contracting State which was the object of a declaration made under paragraph 2 of article C became a Contracting State, its silence with regard to that declaration signified assent to its continued application. Thus, where the text of paragraph 3 in document A/CONF.97/C.2/L.10 would oblige that State to declare formally that it could no longer accept a unilateral declaration made in its respect by a Contracting State at a time when it was not itself a party to the Convention, the new text proposed by the Netherlands would take account of the changed situation by making the declaration itself subject to the provisions of paragraph 1. In other words, what had originally been a unilateral declaration by a Contracting State with regard to a non-Contracting State, in accordance with paragraph 2, would become a declaration in accordance with para-

\* See A/CONF.97/C.2/SR.3, paras. 69–86.

graph 1, and thus invite a joint or reciprocal unilateral declaration by the other (new) Contracting State.

3. Mr. LOW (Canada) said that the text before the Committee appeared to resolve on outstanding problem, on which much time had been spent already, in a substantially adequate and relatively clear manner. In a spirit of compromise, and with the aim of expediting the Committee's work, he could accept the provisions contained therein.

4. Mr. PLANTARD (France) also found the proposal acceptable. The text, which was certainly an improvement on that contained in document A/CONF.97/C.2/L.10, might perhaps be made even more explicit by the insertion of the word "unilateral" between "object of a" and "declaration" in the first phrase, but that could be a matter for the Drafting Committee to decide.

5. Notwithstanding that expression of approval, he wished to suggest that the new drafting of paragraph 3 underlined a deficiency in paragraph 1. Nothing was said in the latter concerning the consequences, for the Contracting States concerned, of a unilateral declaration made by one of them which was not reciprocated by the other. He believed that it should be made clear in the text that such a declaration would be without effect.

6. Mr. PFUND (United States of America) said that both the Netherlands proposal and the text of paragraph 3 as drafted by the working group appeared to assume that a unilateral declaration by a Contracting State in respect of a non-Contracting State would continue to have effect when the latter became a party to the Convention. Since, however, there was a wider operative assumption that States becoming parties to the Convention would be bound by that action in respect of those which had become Participating States at an earlier date, it might be advisable to provide for affirmative action—at least by the new Contracting State, if not by both—as far as the exception set out in paragraph 1 was concerned.

7. Mr. ENDERLEIN (Secretary of the Committee) suggested that the situation might be clarified by the addition, at the end of the Netherlands version of paragraph 3, of the phrase "provided that the new Contracting State joins in such a declaration or makes a reciprocal unilateral declaration".

8. Mr. FOKKEMA (Netherlands) agreed in the light of the discussion that his proposal might usefully be made more explicit. In response to the observation by the representative of France concerning paragraph 1, he expressed the opinion that the expression "Two or more Contracting States . . . may at any time declare . . .", together with the subsequent details concerning the manner of that declaration, implied that a unilateral non-reciprocal declaration would be without effect as far as the provisions of the paragraph were concerned. More accurately, and by analogy with private law, the effect of such a declaration would depend on the response to an offer, pending which—as a legal act with some significance—it would remain incomplete.

9. If it were deemed necessary to clarify the situation, he would be able to agree to the addition, at the end of paragraph 3, of a phrase similar to that suggested by the Secretary. His own preference would be for the words: "and will be open to completion by a reciprocal declaration by the new Contracting State".

10. Mr. BENNETT (Australia) said he endorsed the views expressed by the representative of the United States, and concurred with the Secretary's suggestion. His basic concerns were, firstly, that article C should provide for the Convention to be rendered inapplicable, by means of joint or reciprocal declarations, where two Contracting States were involved; and, secondly, that provision should be made for unilateral action only where one of the States was a non-Contracting State.

11. During the Committee's earlier discussions, he had expressed and explained his reservations with regard to a solution whereby the former non-Contracting State would be required to declare that it could no longer accept a declaration of which it had been the object under paragraph 2. On condition that the text finally adopted by the Committee provided for positive action on the part of both of the Contracting States in question to indicate that they wished the declaration of inapplicability to remain in effect, he would not be over-concerned as to the manner in which it was drafted.

12. Miss O'FLYNN (United Kingdom) said that, although the Committee's earlier discussion of article C had shown that there was no ideal solution to the problem posed by the later accession to the Convention of a non-Contracting State, which was the object of a declaration under article C, an effort had nevertheless to be made to provide one that was acceptable. On the whole, her delegation preferred the approach suggested by the United States representative and endorsed by the representative of Australia. It differed slightly from that of the Netherlands proposal (A/CONF.97/C.2/L.23), but she believed that the aim of the latter, with the modifications put forward by the Secretariat, was essentially the same, namely to make it clear that a non-Contracting State was bound by the declaration only when it had given a clear indication of its desire to be so. She would therefore support the Netherlands proposal as amended by the Secretariat.

13. Mr. PFUND (United States of America), replying to a question by Mr. SONO (Japan), said that he thought that the wording proposed by the Secretary of the Committee provided adequately for the concerns his delegation had expressed.

14. The addition, at the end, of the further words "of its own" would make the position completely clear.

15. Mr. SONO (Japan) thought that the suggested modifications completely reversed the purport of the Netherlands proposal.

16. Mr. WAITITU (Kenya) thought that the proviso suggested by the Secretariat was superfluous, if the declaration referred to in the third line of the Netherlands

proposal was a declaration made by the new Contracting State.

17. Mr. SAM (Ghana) said he had the impression that the United States view and the wording suggested by the Secretariat were very close. To be quite sure, he asked the Secretary to read out the whole text of paragraph 3 as proposed by the representative of the Netherlands and amended by the Secretariat and the representative of the United States.

18. Mr. ENDERLEIN (Secretary of the Committee) said that the text of paragraph 3, as proposed by the *ad hoc* working group in document A/CONF.97/C.2/L.10, had contained a provision that a declaration under paragraph 2 would remain in effect. Majority opinion in the Committee had clearly been opposed to that solution; accordingly, the Netherlands proposal reversed the effect, and provided that a unilateral declaration under paragraph 2, though it would continue to exist, would be an offer merely and would have no effect unless responded to by the new Contracting State. With the addition proposed by the Secretariat, the position became quite clear. The full text of paragraph 3 would then run:

"(3) If a State which is the object of a declaration under paragraph (2) of this article subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph (1), provided that the new Contracting State joins in such a declaration or makes a reciprocal unilateral declaration of its own."

19. The CHAIRMAN proposed that, in view of the pressure of time, the debate on paragraph 3 should be closed.

20. Mr. SONO (Japan) opposed the proposal, on the grounds that other important matters remained to be discussed.

21. Mr. FOKKEMA (Netherlands) said that he encountered no problem of substance in the wording proposed by the Secretariat. He felt, however, that the article should go to the Drafting Committee to be put into its final form.

22. The CHAIRMAN said that majority opinion seemed to favour closure of the debate and asked the Japanese representative whether he maintained his opposition.

23. Mr. SONO (Japan) said that he would withdraw his objection but would be obliged to abstain from voting on the proposed text.

24. The CHAIRMAN said that, as he heard no objection, he would declare the debate on article C (3) closed.

25. *It was so decided.*

26. The CHAIRMAN said that, as there seemed to be a clear majority in favour of the text read by the Secretary, he would, in the absence of any objection, take it that the Committee wished to approve the text proposed by the

delegation of the Netherlands, as supplemented by the Secretariat and the representative of the United States, on the understanding that it would be sent to the Drafting Committee to be put into its final form.

27. *It was so decided.*

28. Mr. SAM (Ghana), speaking in explanation of vote, said that he had agreed to the proposal only because the text was to be submitted to the Drafting Committee.

*Article J (continued) (A/CONF.97/C.2/L.8, L.12, L.17)*

#### *Paragraph 1*

29. Mr. ENDERLEIN (Secretary of the Committee) said that, as the Assistant Secretary had informed the Committee during its earlier discussion of article J, the revised text of the article (A/CONF.97/C.2/L.17) took account of the points raised by the delegation of the United Kingdom in document A/CONF.97/C.2/L.12. Consequently, only the proposal by the same delegation in document A/CONF.97/C.2/L.8 remained to be dealt with. He suggested that the Committee should discuss the article paragraph by paragraph.

30. Two main topics were covered in paragraph 1, the number of instruments of ratification required for the Convention to enter into force, and the time that must elapse between the deposit of the last ratification and actual entry into force.

31. Miss O'FLYNN (United Kingdom), introducing her delegation's amendment to paragraph 1 (A/CONF.97/C.2/L.8), said that the longer formulation within brackets in the Secretariat text was not acceptable because it was not in an instrument of ratification, acceptance, approval or accession that a State declared itself not to be bound by the provisions of Part II or Part III of the Convention. Such a declaration was made at the time of the deposit of an instrument of ratification etc. The formulation in the original paragraph 6 of article J (A/CONF.97/6) was thus more accurate, as well as being briefer and simpler.

32. Mr. SAM (Ghana) supported the United Kingdom proposal.

33. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) asked whether the text proposed by the United Kingdom was intended to replace paragraph 1 or only to amend it.

34. Miss O'FLYNN (United Kingdom) said that the text was intended only as a substitute for the part in brackets in the Secretariat's revised version of paragraph 1.

35. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that under article G (1), a State might declare at the time of signature, ratification, acceptance or accession that it would not be bound by the provisions of Part II or Part III. The United Kingdom amendment to article J seemed to refer only to an instrument of rati-



fication, and was thus not in keeping with the terms of article G.

36. Mr. LOW (Canada) said that the word "instrument" in the text proposed by the United Kingdom should be understood as being inclusive, that is, as covering instruments of ratification, acceptance, approval or accession. He saw no difference in substance between the formulation proposed by the United Kingdom and the text of paragraph 1 of article J as it appeared in document A/CONF.97/C.2/L.17; the United Kingdom text was, however, simpler and he supported it for that reason.

37. Miss O'FLYNN (United Kingdom) agreed with the interpretation offered by the representative of Canada.

38. Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) said that he was prepared to accept the United Kingdom proposal, on the understanding that the Russian text would be appropriately modified in the Drafting Committee.

39. Mr. PLANTARD (France) said that, if he had to choose between the two passages appearing in brackets, he would choose the United Kingdom text as being both simpler and clearer. His first preference, however, was for a text ending with the word "accession", the passage in brackets being deleted as superfluous.

40. Mr. LOW (Canada) said that the suggestion just made by the French representative had a substantive policy element. If the passage in brackets were deleted, the question would arise whether the Convention would enter into force if some of the States parties were bound by it only in part.

41. Mrs. BELEVA (Bulgaria) said that, far from being superfluous, the passage in brackets was both useful and important. She supported the United Kingdom proposal.

42. Mr. WAITITU (Kenya) agreed with the preceding speaker.

43. The CHAIRMAN invited the Committee to vote on the French proposal to delete the passage in brackets starting in the fourth line of paragraph 1 of article J.

44. *The proposal was rejected.*

45. *The United Kingdom proposal, contained in document A/CONF.97/C.2/L.8, was adopted unanimously.*

46. The CHAIRMAN invited the members of the Committee to give their views on the word "tenth" appearing in square brackets in the third line of paragraph 1.

47. Mr. TARKO (Austria) suggested that, in the interests of bringing the Convention into force as soon as possible, the word "tenth" should be replaced by the word "sixth".

48. Mr. PLANTARD (France) said that, in his view, ten instruments represented a minimum. If the Convention was to have a genuine unifying effect and replace the 1964 Hague Conventions, the number of States parties should be at least as great as, and if possible greater than, the number of parties to each of those Conventions.

49. The CHAIRMAN invited the Committee to vote on the Austrian proposal to replace the word "tenth" by the word "sixth".

50. *The proposal was rejected.*

51. *It was decided that the square brackets around the word "tenth" should be deleted.*

52. *Paragraph 1, as amended, was adopted.*

#### Paragraph 2

53. Mr. SAM (Ghana) suggested, for the sake of simplicity, that the words "the [tenth] instrument . . . has been deposited" in the second and third lines of the paragraph should be replaced by the words "it has entered into force". The beginning of the paragraph would then read as follows:

"For each State ratifying, accepting, approving or acceding to this Convention after it has entered into force, this Convention, with the exception . . .".

54. Mr. ENDERLEIN (Secretary of the Committee) explained that the fact that the tenth instrument of ratification, acceptance, approval or accession had been deposited did not mean that the Convention had entered into force; a further 12 months had to elapse before that was the case. A State might ratify, accept, approve or accede to the Convention less than 12 months after the tenth instrument had been deposited.

55. Mr. SAM (Ghana) said that, in view of the explanation given by the Secretary of the Committee, he withdrew his suggestion.

56. The CHAIRMAN suggested that the square brackets around the word "tenth" in the second line of the paragraph should be deleted.

57. *It was so decided.*

58. Miss O'FLYNN (United Kingdom) reminded the Committee that her delegation had submitted certain drafting amendments to paragraphs 1 and 2 of article J (A/CONF.97/C.2/L.6).

59. The CHAIRMAN said that the amendments in question had been referred to the Drafting Committee.

60. *Paragraph 2, as amended, was adopted.*

#### Paragraph 3

61. Mr. AL-TAWEEL (Iraq) said that he felt that paragraphs 4 and 5 of the existing text might be replaced by an addition to paragraph 3 in order to make the article shorter. Paragraph 4 referred to States which denounced the 1964 Hague Sales Convention and paragraph 5 to States which denounced the 1964 Hague Formation Convention, while paragraph 3 referred to both Conventions. He therefore proposed that the words "as shall any State which declares that it will not be bound by the provisions of Part II, Part III or Parts II and III of this Convention" should be added to paragraph 3.

62. The CHAIRMAN said that, in his view, the Iraqi proposal did not prevent a decision being taken on para-



graph 3. He assumed therefore that, in the absence of any further comment and with the reservation that the Iraqi proposal would be studied when paragraphs 4 and 5 were considered, the Committee wished to approve paragraph 3.

63. *It was so decided.*

#### Paragraphs 4 and 5

64. Mr. ENDERLEIN (Secretary of the Committee) said that the Secretariat felt that the Iraqi proposal was an interesting one and that paragraphs 4 and 5 might be replaced by the simple addition to the first line of paragraph 3 of the words "in whole or in part" so that paragraph 3 would begin "A State which in whole or in part ratifies . . .".

65. Mr. AL-TAWEEL (Iraq), replying to a question from the Chairman, said that his delegation accepted the Secretariat's suggestion, which would make the text of the article both clearer and shorter.

66. Mr. PLANTARD (France) said that, while the Secretariat's proposal as it stood was satisfactory from a logical point of view, it might not be equally satisfactory from the point of view of international law and might require drafting changes. With that reservation, his delegation was able to support the proposal.

67. Mr. ROMAN (Assistant Secretary of the Committee) said that, while the Secretariat quite understood the reticence on the part of the French delegation, the expression "partially or wholly" had been used on a number of occasions and had always been applied to a ratification accompanied by a reservation in respect of a part or parts of a convention. In the Secretariat's view, the text as proposed would not produce major difficulties in view of existing practice.

68. Mr. LANDFERMANN (Federal Republic of Germany) said that his delegation was against the proposal, which it felt was an oversimplification. A State that had ratified only one of the 1964 Hague Conventions and subsequently ratified the new Convention in part only would not need to denounce the old Convention if it did not cover the same field as that covered by the later, partial ratification.

69. That position was explained in paragraphs 4 and 5, and he thought it would be difficult, if not impossible, to condense those paragraphs into a single sentence. The existing paragraphs 4 and 5 were satisfactory.

70. Mr. LOW (Canada) said that his delegation had some sympathy for the Iraqi proposal. However, while it might be thought that paragraphs 4 and 5 were too long, they were accurate and clear and, if there was no objection of a substantive nature, he proposed that they should be adopted as they stood in order to expedite the Committee's work.

71. *Paragraphs 4 and 5 were adopted.*

#### Paragraph 6

72. Mr. KULSDOM (Netherlands) said that the last sentence of paragraph 6 referred to consultation between the depositary of the Convention and the Government of the Netherlands as the depositary of the 1964 Conventions.

73. His Government was anxious to play its part in preventing any difficulties from occurring in connection with the ratification of the new Convention and the denunciation of the old Conventions. It took the view that it was the duty of a State which was, or had been, a party to the 1964 Conventions to ensure that the entry into force of the new Convention in its territory would take effect on the same date as the denunciation of the 1964 Conventions.

74. Mr. ROMAN (Assistant Secretary of the Committee) said that the necessary procedure was already in being, and that no difficulties were expected regarding consultation between the Secretary-General and the Netherlands Government on the subject of the Convention.

75. The CHAIRMAN said that, if there were no objection, he would take it that the Committee wished to adopt paragraph 6.

76. *It was so decided.*

#### Article H (continued) (A/CONF.97/C.2/L.6)

77. Mr. ENDERLEIN (Secretary of the Committee) reminded the meeting that paragraphs 1, 2 and 6 of article H had already been approved and that the discussion on paragraphs 3, 4, 5 and 7 had been postponed because the consideration of articles B and C, to which those paragraphs made reference, was not then complete.

78. Mr. LOW (Canada), supported by Mr. BENNETT (Australia), proposed that paragraphs 3 and 4 should be deleted.

79. The CHAIRMAN said that, if there was no objection to that proposal, he would take it that the Committee wished to delete paragraphs 3 and 4.

80. *It was so decided.*

#### Paragraph 5

81. Mr. PLANTARD (France) said he felt that the six-month period imposed on States having made reciprocal or joint declarations was not justified. Where a declaration was made simultaneously with ratification, there was no difficulty but, in the case of a declaration made after that date, the period might be more of a disadvantage than an advantage, in view of the provisions of article C, and he proposed that it be reduced.

82. Mr. LOW (Canada) said that his delegation agreed with the French proposal, as declarations under article C would seem to affect only the two or more States directly concerned.

83. Mr. BENNETT (Australia) said that his delegation endorsed the French proposal.

84. Mr. LANDFERMANN (Federal Republic of Germany) said that he hesitated to agree to the proposal since he felt that it was useful for some time to elapse between a declaration being made and the entry into effect, since that would enable all the parties concerned to become aware of the change in the law. It might be important for traders in some of the countries affected to know of the declaration before it took effect. He therefore preferred that the text remained unchanged.

85. Mr. SAM (Ghana) said that his delegation agreed with the previous speaker.

86. *The French proposal to modify paragraph 5 was rejected.*

#### Paragraph 7

87. *Paragraph 7 was approved.*

88. Mr. SONO (Japan), speaking on a point of procedure, asked whether complete votes could be taken in the future, with records of the numbers of delegations in favour, against and abstaining. The system used to date, namely counting only those in favour, was not fully informative.

89. The CHAIRMAN said that he had taken note of the request by the representative of Japan and that the procedure he advocated would be adopted when convenient.

*The meeting rose at 12 noon.*

## 6th meeting

Wednesday, 26 March 1980, at 10 a.m.

*Chairman:* Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.6

*The meeting was called to order at 10.05 a.m.*

### CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)

*Article K (A/CONF.97/C.2/L.6, L.15, L.16)*

1. Mr. ENDERLEIN (Secretary of the Committee) said that, of the three amendments, one proposed by the United Kingdom (A/CONF.97/C.2/L.6) had already been accepted. An amendment to paragraph 2 proposed by the United Kingdom (A/CONF.97/C.2/L.15) and an amendment proposed by the German Democratic Republic for a new paragraph 3 (A/CONF.97/C.2/L.16) remained to be considered. There were no amendments to paragraph 1.

#### Paragraph 2

2. Miss O'FLYNN (United Kingdom), introducing her delegation's amendment (A/CONF.97/C.2/L.15), said that it was of a purely drafting nature whose purpose was to clarify paragraph 2.

3. The CHAIRMAN said he took it that, in the absence of any objection, the Committee wished to approve para-

graph 1 of article K as it stood and to amend paragraph 2 as proposed by the United Kingdom delegation.

4. *It was so decided.*

#### New paragraph 3

5. Mr. WAGNER (German Democratic Republic) said that his delegation felt there was a need in article K for a formula paralleling that in article E which spelt out the relation between entry into force and application. It therefore proposed that a new paragraph 3 be added to clarify the relation between denunciation and application. Such a paragraph would make it clear that the formation of a contract would fall within the scope of the Convention only if the State or States was or were a Contracting State or Contracting States.

6. He recognized that the wording of the amendment would have to be brought into line with that of the articles which had already been approved.

7. Mr. PLANTARD (France) said that his delegation did not see the usefulness of such a paragraph. Once a denunciation became effective, the State concerned was by definition no longer a Contracting State and it was quite unnecessary to say that the Convention did not apply. The parallel with the formula used where a State became a Contracting State was an illusory one.

8. *The proposal by the German Democratic Republic (A/CONF.97/C.2/L.16) was rejected by 7 votes to 3.*

#### New article Y (A/CONF.97/C.2/L.4)

9. Mr. TARKO (Austria) said that his delegation felt

that it was important not to allow reservations to be made to the Convention since they would weaken it and give rise to uncertainty. The reservations permitted by article (X) were acceptable as a compromise, but the lack of any provision that no other reservations were permissible would enable a State to make a reservation to any article as it saw fit. He therefore proposed that article Y be added, so that no reservations other than those already agreed upon could be made.

10. As it stood, his delegation's amendment (A/CONF.97/C.2/L.4) referred to the initial wording of article (X), as it had been put forward at the beginning of the Conference. In view of subsequent events, however, the proposed text should be revised to read: "No reservation or declaration other than those made in accordance with articles B, C, (X) or G shall be permitted." The wording was, *mutatis mutandis*, identical with that of article 39 of the Prescription Convention.

11. Mr. PLANTARD (France) said that his delegation supported the Austrian amendment. Although the rule was already implicit in the Convention and it was reasonably clear that no exceptions other than those specified were permitted, its explicit inclusion was justified, particularly for the purpose of avoiding problems in regard to States which had not participated in the Conference and which might later wish to enter reservations incompatible with the spirit of the text.

12. He suggested that the paragraph should read: "No reservation or declaration other than those expressly provided for in this Convention shall be permitted."

13. Mr. ROMAN (Assistant Secretary of the Committee) pointed out, in connection with the Austrian amendment, that the proposal as amended appeared to specify that declarations in general were not permitted. As the purpose of the amendment was to prevent reservations and declarations which contained reservations, it might be sufficient to refer to "reservations" only so as to avoid including general declarations not containing reservations, such as those often made by States at the time of accession.

14. Mr. SONO (Japan) asked whether the text to be put to the vote was that proposed by the Austrian delegation, which included the word "declaration", or the text suggested by the Secretariat.

15. Mr. TARKO (Austria) said that his delegation had proposed that the word "declaration" be included because the final clauses referred only to declarations and there might be some confusion between declarations proper and declarations containing reservations.

16. If the sense was clear with the use of the word "reservation" alone, his delegation would agree to the omission of the word "declaration" but wished to keep the rest of the sentence as orally amended, i.e. including the reference to articles B, C, (X) and G.

17. Mr. SONO (Japan) said that his delegation would prefer to delete the reference to article B as the meaning of the word reservation was rendered ambiguous

thereby. He would welcome the Secretariat's views on that point.

18. Mr. ROMAN (Assistant Secretary of the Committee) said that the provisions of article B did not, strictly speaking, constitute a reservation. He suggested the more general formula: "No reservations shall be permitted except those expressly authorized in this Convention."

19. Mr. TARKO (Austria) said that his delegation was able to accept the Secretariat's suggestion.

20. Mr. SONO (Japan) said that, while his delegation could agree to the original Austrian proposal, it thought that the formula proposed by the Secretariat was more satisfactory, as it was not yet known whether the First Committee would adopt further provisions to which reservations might be permitted.

21. The CHAIRMAN invited the Committee to vote on new article Y, as orally revised.

22. *New article Y was adopted.*

#### *Authentic text and witness clause*

23. Mrs. BELEVA (Bulgaria) said that it seemed to her delegation that the wording in the last sentence of the clause, "being duly authorized by their respective Governments, . . ." did not necessarily correspond to national procedures. It might be preferable to delete the words "by their respective Governments".

24. Mr. ROMAN (Assistant Secretary of the Committee) said that the formula in question followed standard and well-established practice. In that connection, the word "Government" was used to cover the totality of powers represented by the State.

25. The CHAIRMAN, noting that the representative of Bulgaria accepted the Secretariat's explanation, invited the Committee to vote on the text as it stood.

26. *The authentic text and witness clause was adopted unanimously.*

#### **Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/7; A/CONF.97/C.2/L.14, L.18, L.19, L.21, L.22)**

27. Mr. ENDERLEIN (Secretary of the Committee) explained that document A/CONF.97/C.2/L.18 contained a revised version of the text of the draft Protocol annexed to A/CONF.97/7. In view of the discussions in the First and Second Committees and of the texts of articles 1—9 as adopted by the First Committee and of the articles in document A/CONF.97/6 as adopted by the Second Committee, the Secretariat intended to submit a new document covering the preamble and articles I—III, as a basis for discussion on the substance of that text. He suggested that, in the meantime, the Committee might wish to go on to discuss the desirability of the draft Protocol in general and articles IV—IX in particular.

28. Mr. SAM (Ghana) said he wondered whether, since the Secretariat was to produce a further document, it might not be prudent to postpone the discussion until all the documents were available.

*The meeting was suspended at 10.50 a.m. and resumed at 11.35 a.m.*

29. Miss O'FLYNN (United Kingdom) said that the Committee should first pronounce itself formally on the desirability of establishing a Protocol to the Convention on the Limitation Period in the International Sale of Goods.

30. Mr. WAGNER (German Democratic Republic) said it was important to ensure that, where States had ratified both the Prescription Convention and the new Convention, contracts between parties residing in those States would be governed by the two instruments, and not merely by the second. The establishment of a Protocol to the Prescription Convention was thus desirable. Such a step might, indeed, encourage States to ratify that instrument.

31. Mr. LANDFERMANN (Federal Republic of Germany) said he agreed with the previous speaker.

32. In the absence of dissenting views, the CHAIRMAN said he took it that the Committee wished to place on record its endorsement of the proposal that a Protocol to the Prescriptions Conventions be established.

33. *It was so decided.*

34. The CHAIRMAN invited the Committee to begin its detailed examination of the draft Protocol submitted by the Secretariat (A/CONF.97/C.2/L.18). The Preamble and the Final Provisions would be considered first.

#### *Preamble*

35. In reply to a question by Mr. SONO (Japan), Mr. ENDERLEIN (Secretary of the Committee) said he did not think it necessary for the terms of the Preamble to the Protocol to be identical with the terms to be adopted in the Preamble to the Contracts Convention, which had still to be settled. The Drafting Committee could be relied upon to ensure that the formulations employed in the two cases were fully compatible.

36. *The Preamble was adopted, subject to final review by the Drafting Committee.*

#### *Final Provisions*

##### *Article IV*

37. *Article IV was adopted.*

##### *Article V*

38. In reply to a question by Miss O'FLYNN (United Kingdom), Mr. ROMAN (Assistant Secretary of the Committee) drew attention to the first foot-note of the

text prepared by the Secretariat, which explained why the language had been simplified.

39. He confirmed her understanding that the word "accession", as employed in the article, should be interpreted as a generic term covering actions such as acceptance or approval.

40. *Article V was adopted.*

#### *Article VI*

41. Mr. ENDERLEIN (Secretary of the Committee) pointed to an error in the texts of paragraphs 1 and 2, and the second foot-note. Article 44 of the Prescription Convention provided for initial entry into force after the deposit of ten, not six, instruments. The draft before the Committee should be corrected accordingly.

42. The Committee was required, during its examination of the article, to determine how many instruments of accession should be deposited before the entry into force of the Protocol and when the entry into force should take effect. As far as the latter question was concerned, the Secretariat would suggest that, in both paragraphs of the article, the incomplete phrase "on the first day of the \_\_\_\_\_ month" should be completed by insertion of the word "sixth".

43. *It was so decided.*

44. The CHAIRMAN invited comments on the number of instruments to be deposited before the Protocol entered into force.

45. Mr. PLANTARD (France) opted for the first of the alternatives suggested by the Secretariat, namely two instruments.

46. Miss O'FLYNN (United Kingdom) said she preferred the second alternative of ten instruments.

47. Mr. LANDFERMANN (Federal Republic of Germany) agreed with the representative of France that the deposit of two instruments should be sufficient. It was important to ensure that the States, however few in number they might be, which wished to bring the Prescription Convention into line with the new Contracts Convention should be able to do so as rapidly as possible.

48. Mr. SAM (Ghana) endorsed the views of the previous speaker.

49. Mrs. KAMARUL (Australia) said she agreed with the representatives of France and Federal Republic of Germany. Paragraph 1 of the article, proviso (b), would ensure that the Protocol could not enter into force until the Contracts Convention came into force. The number of ratifications required for entry into force of both the latter and the Prescription Convention was already significant and once the Contracts Convention was in force, the Protocol should be given effect where adopted, as soon as possible. She consequently favoured the first of the alternatives suggested by the Secretariat.

50. The CHAIRMAN invited members of the Commit-

tee to express their preference for one or other of the two suggestions.

51. *There were 20 votes in favour of the suggestion that two instruments of accession should be deposited for the Protocol to enter into force.*

52. *The suggestion was adopted.*

53. Mr. FARNSWORTH (United States of America), Mr. PLANTARD (France) and Mr. LANDFERMANN (Federal Republic of Germany) queried the significance of the final sentence of paragraph 1 and—more particularly—of the words “If applicable” as employed in both paragraphs 1 and 2. The relationship between the various provisos was not altogether clear.

54. The CHAIRMAN suggested that, in view of the prevailing uncertainty on that point which appeared to derive from a matter of drafting rather than of substance, article VI, as completed by the Committee’s two decisions, should be referred to the Drafting Committee.

55. *It was so decided.*

#### Article VII

56. Mr. KULSDOM (Netherlands) said that, under the existing text of article VII, any subsequent ratification of the 1974 Convention would be regarded as an accession to the Protocol provided that the State concerned notified the depositary accordingly. It was not entirely clear, however, at what moment such a notification was to be made. The article should indicate that it was to be made simultaneously with ratification or accession.

57. Mr. KAI (Japan) said he had a more fundamental question in regard to the article. He did not think that the implied reference to the rights and obligations of States as Contracting States to the 1974 Convention was legally appropriate in a Protocol the parties to which might be quite different from the parties to the Convention.

58. Mr. PLANTARD (France) said he too had doubts regarding article VII. The aim of the article seemed to be to encourage States subsequently ratifying the 1974 Convention to make a declaration to the effect that they acceded to the Protocol, in the absence of which they would be regarded as having acceded to the 1974 Convention but not to the Protocol. The 1974 Convention thus remained open for signature separately from the Protocol, and States could adhere to the Convention alone or to the Convention and the Protocol by means of a separate act of ratification accompanied by a declaration.

59. The French text at any rate was unsatisfactory particularly the phrase “*notifie le depositaire*” which was an anglicism. The correct construction was “*notifier à*”.

60. Mr. ROMAN (Assistant-Secretary of the Committee) said that the French representative’s objection was, of course, well-founded, although the verb “*notifier*” was increasingly used without the preposition, even in official texts.

61. The machinery proposed in article VII was intended

to work in the following way: when a State deposited an instrument of accession it could, by making a notification, declare that the accession was equally valid for the Protocol.

62. The article was based on article 40, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties, which had to do with the amendment of multilateral treaties. That paragraph read:

“5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended;

and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.”

63. Article VII improved on that text by providing for a positive notification so that there would be no room for doubt regarding the intent of the State concerned to accede to the Protocol.

64. Mr. FARNSWORTH (United States of America) said that, as it stood, article VII was difficult to follow and he therefore suggested that it be referred to the Drafting Committee. His particular objection was that the article first stated a general rule and then added a proviso which detracted from that rule. It might be better to reverse the order of the phrase.

65. Mr. LANDFERMANN (Federal Republic of Germany) thought that, if the article were redrafted along the lines proposed by the representative of the United States, it would become intelligible and no difficulty should arise. Such a change might also meet the concern of the representative of Japan.

66. He endorsed the proposal by the representative of the Netherlands that it should be clearly stated in the article that the notification had to be made at the moment of accession, so as to avoid any possible problem with respect to retroactivity.

67. Mr. PLANTARD (France) said that the Assistant-Secretary of the Committee had interpreted article VII as being in conformity with the Vienna Convention on the Law of Treaties and as meaning, *inter alia*, that a State becoming a party to the amended Convention would also apply the unamended Convention to States which were parties to the Convention only and not to the Protocol amending it.

68. That was of course the general rule, but he wondered if it was really suitable for the Convention in question, whose sphere of application took into account the status of Contracting States vis-à-vis the places of business of the parties to a contract. The wording of the Protocol was such that, in order to determine whether the Convention was applicable—and that was true of both the Prescription Convention and the Sales Convention—it would be necessary to determine whether the

parties had their places of business in Contracting States, understood in the broad sense of States Parties to the 1974 Convention and also to the Protocol.

69. The rule of the Vienna Convention might lead to practical difficulties in respect of application, especially in connection with paragraph (1)(b) of article 1, according to which the Convention would apply when the rules of private international law led to the application of the law of a Contracting State. There was a risk that the applicable law might be that of a State which was a party to the unamended Convention but not a party to the Protocol. The point was a very fine one, but he wondered whether the rule of the Vienna Convention was properly suited to the Convention under discussion.

70. Mr. LANDFERMANN (Federal Republic of Germany) said that, while the question posed by the representative of France was very interesting and very difficult to answer, he did not think that it was particularly relevant to article VII. Discussion of the matter could therefore be postponed until it was essential to resolve the question.

71. Mr. ROMAN (Assistant-Secretary of the Committee) said that the aim of the article was to avoid administrative difficulties. It sometimes happened that the Secretary-General as depositary received instruments of ratification or accession which, through administrative error, did not cover all the agreements in question. Article VII would make it possible to find out whether the State concerned wished to accede to the Protocol or, in other words, to the Convention as amended by the Protocol, and to remind it if necessary that an appropriate notification was required. The article was to some extent the counterpart of a proposal made by the Canadian representative.

72. Mr. SAM (Ghana) thought that the point made by the representative of the Netherlands would be met by the change proposed by the representative of the United States. If the United States proposal could be put into an exact form and adopted, the representative of the Netherlands might be able to withdraw his suggestion. The article as amended could then be sent to the Drafting Committee for a final version.

73. Mr. FARNSWORTH (United States of America) said that the same thought had occurred to him. The article with the change he suggested might not be quite as clear as it would be if amended along the lines proposed by the representative of the Netherlands, but it would, he felt, be sufficiently clear in the context.

74. He proposed therefore that article VII should read: "If the State concerned notifies the depositary accordingly, the ratification or accession effected in respect of the Convention of 12 June 1974 after the entry into force of this Protocol shall be considered to constitute an accession in respect of this Protocol." Such a wording would suggest that the notification should be at the same time as the accession or would at any rate make it harder to assume the contrary.

75. Mr. KULSDOM (Netherlands) said that the proposal by the representative of the United States met the point he had sought to make.

76. The CHAIRMAN said that, if there were no objection, he would take it that the Committee wished to approve article VII, as reworded by the representative of the United States and to forward it to the Drafting Committee to be put in final form.

77. *It was so decided.*

#### *New article 5 bis*

78. The CHAIRMAN invited the representative of Austria to introduce his delegation's proposal for the addition of a new article to the Protocol (A/CONF.97/C.2/L.22). The document referred to a new article 5 bis, but he was informed by the Secretariat that it would be more appropriate to include it as article VII bis.

79. Mr. TARKO (Austria) said that the discussion of article VII had shown that there could be parties to the unamended 1974 Convention and to the Convention as amended by the Protocol, but it was hard to imagine a State acceding to the Protocol if it were not a party to the 1974 Convention. To be on the safe side, however, it should be clearly stated that the accession to the Protocol of any State which was not a Contracting Party to the 1974 Convention would have the effect of an accession to the Convention as amended by the Protocol.

80. After hearing the Assistant-Secretary's explanation with regard to article V, he wished to revise his delegation's proposal to read: "Accession to this Protocol by any State which is not a Contracting Party to the Convention shall have the effect of accession to the Convention as amended by this Protocol."

81. Mrs. BELEVA (Bulgaria) supported the Austrian proposal as being in accordance with consistent international practice in regard to treaties.

82. Mr. LANDFERMANN (Federal Republic of Germany) said he did not know about the consistent international practice but thought that the question of which States were Parties to the Prescription Convention, and the manner in which it was to be ratified, had to be exclusively regulated by the Prescription Convention itself. It was not permissible to include in the Protocol rules governing accession to the Prescription Convention itself. There might be States which ratified the Prescription Convention and not the Protocol, and those States must be sure that accession to the Convention was possible only according to the rules laid down in the Convention.

83. Since the final clauses of the 1974 Convention contained no provision of the kind proposed by the representative of Austria, his delegation was unable to support the proposal. A similar difficulty existed with regard to article VIII.

84. Mr. ROMAN (Assistant-Secretary to the Committee) said that, although the proposal by the Austrian delegation was relatively new in the depositary practice

of the Secretary-General, it would seem to be quite desirable. The result would be a simplification of administrative procedures, in that the depositary would be able, on the basis of the provision, to accept a single instrument of accession (in respect of the amending Protocol) as applying also to the unamended Convention, since the intention of the acceding State to become a party to the Convention would then be clearly established.

85. The depositary would, of course, treat the instrument of accession in the same way as if there had been two instruments—one for the unamended Convention and one for the Protocol. The Austrian proposal would thus seem to present no legal difficulty from the point of view of the Secretariat.

*The meeting rose at 1 p.m.*

## 7th meeting

Thursday, 27 March 1980, at 10 a.m.

Chairman: Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.7

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)**

**Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/C.2/L.14, L.18 and Add.1, L.21, L.22) (continued)**

1. The CHAIRMAN invited the Committee to continue its examination of the Austrian proposal contained in document A/CONF.97/C.2/L.22, as orally amended by the Austrian representative at the previous meeting. He reminded the Committee that the Austrian proposal, if adopted, would appear in the Protocol as article VII *bis*.

2. Mr. SAM (Ghana) said that, despite the Austrian representative's cogent introduction of his proposal and the interesting explanations offered by the Assistant-Secretary, he could not help feeling that to stipulate that accession to a protocol dealing with peripheral matters should have the effect of accession to the convention, as amended by that protocol, was to put the cart before the horse. He had therefore regretfully to oppose the Austrian proposal.

3. Miss O'FLYNN (United Kingdom) said that she was satisfied with the principle underlying the Austrian proposal and did not share the doubts expressed by the representatives of the Federal Republic of Germany and Ghana. A protocol was clearly an ancillary document to

which no State would accede unless its intention was also to accede to the convention which the protocol amended.

4. If, however, the objections formulated by the representatives of the Federal Republic of Germany and Ghana were widely shared, the problem could perhaps be resolved by amending article V(1) of the Protocol, already adopted by the Committee, to read: "This Protocol shall be opened for accession only to States that are already Contracting Parties in respect of the Convention of 12 June 1974."

5. Mr. WAGNER (German Democratic Republic) said that he supported the Austrian proposal, which was logical and well-founded.

6. *The Austrian proposal for a new paragraph VII bis was adopted.*

### Article VIII

7. Mr. FARNSWORTH (United States of America) proposed that the words "unless it notifies a contrary intention" in the third line of article VIII should be replaced by the words "unless it notifies the depositary of a contrary intention".

8. *It was so decided.*

9. Mr. ENDERLEIN (Secretary of the Committee) pointed out that, in view of the decision just taken by the Committee to include article VII *bis* in the Protocol, a reference to that article should also be included in article VIII.

10. *It was so decided.*

11. Mr. LANDFERMANN (Federal Republic of Germany) said that, for the reasons he had put forward in connection with the Austrian proposal, he was not satisfied with article VIII. He would not, however, press the point.

12. The CHAIRMAN said that the statement by the



representative of the Federal Republic of Germany would be duly noted.

13. Miss O'FLYNN (United Kingdom) said she noted the Protocol did not contain a denunciation clause. Such a clause was perhaps rendered unnecessary by article 56 of the Vienna Convention on the Law of Treaties, but the Committee should, in her view, give the matter some attention.

14. Mr. ROMAN (Assistant-Secretary of the Committee) said that, while the inclusion of a denunciation clause in the Protocol would be quite acceptable in terms of legal practice, a complex situation might result, however, if a State which was a Contracting Party to the Convention of 12 June 1974 became a Contracting Party to the Protocol and subsequently denounced it. The implications of the proposal had therefore to be carefully examined.

15. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that international legal practice contained examples of much simpler ways of amending existing conventions than that currently under consideration, e.g. the 1929 Warsaw Convention. However, since the Committee had already adopted most of the articles of the Protocol before it, he agreed that consideration should be given to the inclusion of a denunciation clause, and suggested that the Secretariat should be invited to produce the draft text of such a clause.

16. Mr. SONO (Japan) pointed out that a provision for denouncing the Protocol might give rise to problems in connection with article VII *bis*, which the Committee had just adopted.

17. The CHAIRMAN suggested that the Secretariat should be asked to prepare a draft denunciation clause, with due regard for the comments made by the representatives of the United Kingdom and Japan.

18. *It was so decided.*

19. *Article VIII, as amended, was adopted.*

#### Article IX

20. Mr. FARNSWORTH (United States of America) pointed out that article IX referred to "the Prescription Convention", whereas the other articles of the Protocol referred to "the Convention of 12 June 1974". He proposed that the texts of the various articles should be harmonized.

21. *It was so decided.*

22. *Article IX, as amended, was adopted.*

23. The CHAIRMAN invited the Committee to consider whether the brackets around the word "Arabic" in the second line of the final sentence of the Protocol should be deleted. Arabic was not one of the languages of the Prescription Convention.

24. Mr. SAM (Ghana) said that, in view of the fact that the delegation of Iraq was participating in the Committee's work, it was only fair that Arabic should be in-

cluded among the languages in which the text of the Protocol would be equally authentic.

25. Mr. AL-TAWEEL (Iraq) said that, in addition to his own delegation, the delegation of Saudi Arabia was also participating in the Conference and Arabic had been adopted as one of the Conference's working languages. He requested, accordingly, that Arabic should be included among the languages in which the text of the Protocol was to be equally authentic.

26. In reply to a question by Mr. LANDFERMANN (Federal Republic of Germany), Mr. ROMAN (Assistant-Secretary of the Committee) said that, although there was no original Arabic text of the Convention of 12 June 1974, the fact that Arabic was one of the official languages of the current Conference meant that it was one of the languages in which the provisions of the Protocol were being discussed and in which any votes would be cast. There was thus no legal objection to the adoption of the Protocol in Arabic. The Arabic texts of the amended provisions of the 1974 Convention would be duly taken into account by the Secretariat when producing the Arabic translation of that Convention as amended.

27. The CHAIRMAN suggested that, in the light of the discussion, the brackets around the word "Arabic" in the final sentence of the Protocol should be deleted.

28. *It was so decided.*

29. The CHAIRMAN invited the Committee to consider the Statement by the Secretary-General on the Relationship of the Draft Convention on Contracts for the International Sale of Goods to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/C.2/L.18/Add.1).

30. Mr. ENDERLEIN (Secretary of the Committee), introducing the document, pointed out that the word "this" in the first line of article I should be replaced by the word "the".

31. The CHAIRMAN said that, while annex II of the document was open for discussion, annex I had been included in the document for the purpose of information only and required no decision.

32. Mr. STENERSEN (Norway) pointed out that the document in question had been distributed quite recently and that his delegation had not yet had sufficient time to study it. He requested a postponement of the discussion.

*The meeting was suspended at 10.50 a.m. and resumed at 11.35 a.m.*

33. The CHAIRMAN invited the Committee to consider annex II to the Statement by the Secretary-General (A/CONF.97/C.2/L.18/Add.1).

34. Mr. LANDFERMANN (Federal Republic of Germany) said that the formula in annex II was a complicated one and it was difficult to deduce from it which article or articles of the Prescription Convention might need to be replaced, modified or retained.

35. In the circumstances, it might be useful to begin by considering annex I since to do so might clarify the situation. He proposed therefore that the Committee should start by examining annex I and decide which of the articles of the Prescription Convention were in keeping with the Contracts Convention.

36. Mrs. BELEVA (Bulgaria) said that, in the Russian version of annex II, article I, the words "notwithstanding the provisions of articles 1, 2 (a), 3, paragraph 2, and 5 of this Convention" had been omitted.

37. The CHAIRMAN said that the Secretariat had taken note of the omission which would be rectified.

38. Mr. ROSENBERG (Union of Soviet Socialist Republics) said that he shared the concern of the representative of the Federal Republic of Germany and thought that it would be better firstly to consider and compare the pertinent provisions of the Prescription Convention and the Contracts Convention and draw the appropriate conclusions. It would then be possible to discuss the form that the Protocol should take and whether reference should be made to those articles which needed to be brought into line or whether those articles should be reformulated and included in the Protocol so that it could become the basis for accession and ratification. In his delegation's view, the latter was the more suitable solution.

39. Mr. STENERSEN (Norway) said that his delegation, which endorsed the views expressed by the delegations of the Federal Republic of Germany and the USSR, did not find the existing draft acceptable.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Committee wished to adopt the proposal by the Federal Republic of Germany and consider annex I article by article.

41. Mr. PLANTARD (France) said that it seemed to his delegation that annex I was for information only and that it should not lead to a discussion. He proposed that the Committee should begin discussing annex II.

42. Mr. LANDFERMANN (Federal Republic of Germany) said that his delegation maintained its proposal that the Committee should begin by considering annex I and then decide whether any changes needed to be made to article 2 of the Prescription Convention.

43. Mr. SONO (Japan) said that his delegation was also in favour of examining annex I first. The simplest approach might be to identify the areas in which parallels between the two Conventions were considered necessary, to consider formulas which would incorporate the ideas in question and to leave minor drafting changes to one side unless they affected the substance.

44. Mr. STENERSEN (Norway) said he agreed that the substance should be discussed first and the drafting afterwards.

45. Mr. PLANTARD (France) withdrew his proposal to proceed immediately to the consideration of annex II.

46. Mr. STENERSEN (Norway) referred to the amend-

ment proposed by his delegation (A/CONF.97/C.2/L.14) that articles 2 and 3 of the Prescription Convention should be deleted and replaced by a new article.

47. The CHAIRMAN suggested that the Committee should, for the time being, restrict itself to the study of the comparative table in annex I and then take up the relevant proposals.

48. He noted that there were no comments on the comparative texts of article 2 (b), (c), (d) and (e) of the Prescription Convention and articles 1 (2), 9 (a), 9 (b) and 1 (3) of the Contracts Convention.

49. Mr. ROSENBERG (Union of Soviet Socialist Republics) said, with reference to article 3 of the Prescription Convention and article 1 (1), subparagraphs (a) and (b) of the Contracts Convention, that there was a difference between the two articles. The Prescription Convention started from the assumption that it was to be applied only to Contracting States whereas the Contracts Convention made provision for other principles. His delegation could, however, agree to apply to the Prescription Convention the same provisions as those contained in the Contracts Convention.

50. Mr. LANDFERMANN (Federal Republic of Germany) said that, while his delegation also agreed that the reference to private international law in article 1 (1) (b) of the Contracts Convention should be applied to the Prescription Convention, it thought that that should be done in the way set out in its proposal (A/CONF.97/C.2/L.21).

51. The reference to private international law in the Contracts Convention meant, in most cases, that the Convention would apply only if the rules of private international law with regard to contracts of sale led to the application of the law of the Contracting State. However, if the same wording were adopted in the Prescription Convention, it would relate to the rules of private international law in respect of prescription and those rules varied from country to country. The result would thus be a difference in the spheres of application of the two Conventions.

52. If, for example, a contract under the rules of private international law came within the jurisdiction of country A, and if private international law were applied in respect of prescription in country B, country A being a Contracting State of both Conventions and country B being a party to neither Convention, the Contracts Convention would apply but the Prescription Convention would not.

53. Mr. SONO (Japan) said that article 3 of the Prescription Convention should be given very careful consideration. When the Prescription Convention was being adopted, much time had been spent on the problem of the application of private international law, since the characterization of the prescription period differed from State to State. His delegation thought it was vitally important to exclude private international law from the application of the Prescription Convention. Articles 1 (1)

and 3 (1) of the Prescription Convention taken together stated that it was the duty of the Contracting States to apply the Convention and article 3 (2) further emphasized that private international law should be taken as excluded. However, if a text such as that of article 1 (1) (b) of the Contracts Convention was included, the whole approach of the Prescription Conference would be reserved and the question of characterization would recur.

54. His delegation agreed with the two previous speakers that an amendment should be made, but not one based on article 1 (1) (b). It was important to ensure that the Prescription Convention was applied in uniform fashion, and that could not be achieved by bringing in the private international law of each State.

55. The proposals by the Federal Republic of Germany and Norway were thus very interesting, as they brought the rules of private international law into play in relation only to contracts of sale and not to prescription. Moreover, if the text contained in subparagraph (b) of the proposal by the Federal Republic of Germany were adopted, article 3 (2) might become unnecessary. If, on the other hand, article 1 of the Contracts Convention were combined with article 3 of the Prescription Convention, the object of that proposal would be nullified.

56. Mr. SAM (Ghana) said he endorsed the view of the previous speaker. It was important to remember that the Prescription Convention was an attempt to avoid the introduction of the rules of private international law and the Committee should take care to restrict their application to contracts of sale and not to prescription. His delegation supported the proposals by the Federal Republic of Germany and Norway, which went a long way towards solving the problem of annex II, article 1.

57. Mr. FARNSWORTH (United States of America) said that his delegation also had difficulty in accepting a simple incorporation of the rules of private international law. It even had some difficulty in accepting the proposal by the Federal Republic of Germany.

58. Article 30 of the Prescription Convention, taken in conjunction with article 13, was designed to enable a creditor to stop the running of a period by bringing an action, generally in his own State. That was possible under the Prescription Convention as long as it applied only if both parties were from Contracting States. If the situation were changed by the Protocol so that one party might be from a Contracting State and the other from a non-Contracting State, the creditor in the non-Contracting State would be unable to stop the running of the period by suing the debtor in his own State, because article 30 would not apply. The result would be to deny a creditor in a non-Contracting State a right which a creditor would have if he were from a Contracting State.

59. Mr. LANDFERMANN (Federal Republic of Germany) said he believed that a distinction should be made between the Contracting States mentioned in article 3 (1) of the Prescription Convention and those mentioned in article 30 of that instrument. According to the provisions

of the former of those articles, the Convention would apply "only if, at the time of the conclusion of the contract, the places of business of the parties to a contract of international sale of goods are in Contracting States". However, the acts and circumstances referred to in article 13, and more particularly the commencement of judicial proceedings against the debtor, could be initiated by the creditor in a State other than the one in which he had his place of business. Whether or not those acts and circumstances would have effect for the purposes of the Convention in accordance with article 30 would depend on whether that other State was a party to the Convention.

60. Mr. FARNSWORTH (United States of America) said he agreed that creditors could sue in States other than those in which they had their places of business, however costly and time-consuming an exercise that might be.

61. What was important in his view was the fact that even if the proposal by the Federal Republic of Germany were adopted, it would not ensure that a creditor whose place of business was in a non-Contracting State would have the right to sue in his own country for the purposes of article 13 and thus secure the cessation of the limitation period. He could, of course, commence judicial proceedings but they would remain without effect, because the State in which he had his place of business was not a party to the Convention.

62. Mr. SONO (Japan) said that, although it was unfortunate that a creditor in a non-Contracting State should be denied resort to article 30 because the State in which he had his place of business was not a party to the Prescription Convention, the responsibility for that situation lay with the State in question and not the authors of the Convention.

63. During the preparation of that instrument, great care had been taken in article 2 (a) to define an international contract of sale of goods; after a great amount of thought, it had been decided to limit its field of application by paragraph 1 of article 3. That limitation had consequently been reflected in article 30, whose provisions were almost unprecedented and the successful application of which depended on their being confined to Contracting States.

64. Miss O'FLYNN (United Kingdom) said that her delegation believed that there could be no objection *per se* to differences between the spheres of application of the two Conventions. While they were concerned with related fields of law, they were not so closely connected as to be unable to operate satisfactorily in independence. She had as yet heard no convincing argument in favour of aligning the sphere of application of the Prescription Convention with that of the draft Contracts Convention, and shared the doubts of the representative of the United States with regard to the implications of such an alignment for articles 13 and 30 of the former. She was thus unable to support the proposals in that connection.

65. Mr. PLANTARD (France) said he disagreed with

that view. It would be of great help to States which contemplated accession to both instruments if their scope were coincident, if not identical.

66. The difficulties invoked by the representative of the United States with regard to the transposition to article 3 of the Prescription Convention of article 1 (1) (b) of the draft Contracts Convention were not, in his opinion, very serious. What was envisaged in that subparagraph was a situation in which the rules of private international law led to the application of what was by definition a "foreign" law, i.e. one devised for the purposes of national, rather than international transactions. The fact that the machinery of articles 13 and 30 might, or might not, come into play was fundamentally immaterial; irrespective of whether the places of business of the parties to a contract of international sale of goods were in Contracting States, or whether the rules of private international law led to the application of the law of a Contracting State, a suit instituted in a non-Contracting State would remain without effect.

67. In the light of those considerations, he said that he could see no difficulty in extending the provisions of article 1 (1) (b) of the draft Contracts Convention to the Prescription Convention. The application of those provisions would entail the non-application of article 13 of the international instrument, since by their very application, "foreign" and not international law would be invoked.

68. Mr. ENDERLEIN (Secretary of the Committee) said that the current discussion underlined a fundamental issue as far as the Protocol as a whole was concerned. Faced with the draft articles of the Contracts Convention and the corresponding articles of the Prescription Convention, the Committee should ask itself what, in the latter, should be changed in the interests of harmonization; what did not require change; and what should at all costs be preserved.

69. As far as the second of those questions was concerned, the Secretariat had indicated, in document A/CONF.97/C.2/L.18/Add.1, annex I, those articles of the two instruments in which there was no difference of substance. Those articles were thus virtually interchangeable, and the Committee might well decide to replace the formulation in the Prescription Convention by that in the Contracts Convention.

70. On the other hand, certain articles in the Prescription Convention should, in the opinion of the Secretariat, be preserved; the articles in question were listed in the final phrase of article I in annex II to the Statement by the Secretary-General (A/CONF.97/C.2/L.18/Add.1) which read "notwithstanding the provisions of articles 1, 2 (a), 3, paragraph 2, and 5 of this Convention".

71. Of those articles, article 3 (2) was also the subject of a note in annex I of the document, which suggested that, even if the sphere of application of the Prescription Convention were to include the provisions of article 1 (1) (b) of the Contracts Convention, that paragraph could remain unchanged. That suggestion by the Secretariat

was echoed in the note to be found on page 3 of the English text of the Norwegian proposal (A/CONF.97/C.2/L.14), which stated that it was "well founded that the Prescription Convention should apply irrespective of what rules of international law regarding prescription may lead to." And, as had been pointed out earlier in the discussion, what those rules led to differed greatly from State to State.

72. Several representatives had referred to article 30 of the Prescription Convention which, as he recalled, had been the subject of lengthy debate during the Prescription Conference. Notwithstanding the eventual inclusion of the word "Contracting" before "State" in the second line of that article, considerable support had been expressed for the idea that any suit brought in any State should have effect for the purposes of the Convention in a Contracting State.

73. In the opinion of the Secretariat, the Committee was entitled to review the provisions of that article and, if it so desired, to propose the deletion of the controversial adjective, thereby aligning the scope of the Prescription Convention with that of the draft Contracts Convention as provided for under article 1 (1) (b).

74. Mr. LANDFERMANN (Federal Republic of Germany) said he considered that the Committee's immediate task was to decide among three options as far as article 3 of the Prescriptions Convention was concerned: it could leave that article unchanged, as suggested by the representative of the United Kingdom; it could transpose to the article the provisions of article 1 (1) (b) of the draft Contracts Convention—although no member of the Committee appeared to favour that solution; or it could adopt one or other of the proposals by Norway and the Federal Republic of Germany in documents A/CONF.97/C.2/L.14 and A/CONF.97/C.2/L.21 respectively.

75. Mr. SONO (Japan) said he agreed with the previous speaker but wished to point out that the proposal by the Federal Republic of Germany was concerned only with contracts of sale, and excluded the application of the rules of private international law to the characterization of prescription.

76. Mr. ENDERLEIN (Secretary of the Committee) said that the delegation of the Federal Republic of Germany also proposed the deletion of article 3 (2) which placed the question in an entirely different light.

77. He suggested that, before taking any action on the various proposals concerning article 3, the Committee might wish to continue its comparison of the articles in the two instruments, to see whether any other changes were required.

78. Mr. HIJERNER (Sweden) said that the harmonization exercise had been initiated for the purpose of accommodating situations which had not been foreseen at the time of the Prescription Conference and—more specifically—in order to provide definitions of such terms as "place of business", "consumer sales" and the like.

79. The issue under discussion, which centred on article

1 (1) (b) of the draft Contracts Convention, was by no means a new one, and he submitted that the Prescription Conference—having carefully weighed all the implications—had consciously and deliberately decided that the scope of the Prescription Convention should be narrower.

80. Moreover, the revision of article 30 of that Convention required by any extension of article 3 would be a difficult and delicate task, in view of the complex relationships between court actions, national judgements and legal procedures in different States, quite apart from the fact that two parties, one of which had its place of business in a Contracting State and the other in a non-Contracting State, could have many reasons for establishing contracts in accordance with the law of the former.

81. Even if the proposal by the Federal Republic of Germany were adopted, it would not be sufficient to state that the rules of private international law must make the law of a Contracting State applicable to the contract of sale; it would have to be made quite clear that the law of the Contracting State was to be represented by the rules for international sales.

82. In the light of those considerations, he thought that it would be extremely difficult—if not indeed outside its mandate under General Assembly resolution No.33/93—for the Committee to attempt to extend the scope of the Prescription Convention in respect of non-Contracting States.

83. Mr. SONO (Japan) said he could not agree with the remarks by the previous speaker, which he interpreted as signifying opposition to the proposal by the Federal Republic of Germany.

84. He believed that no further discussion should take place with regard to article 30 of the Prescription Convention. More generally, he observed that to permit what was tantamount to a re-opening of the debate on the international effect of that Convention would be to place those States which had ratified it in an invidious position.

85. Lastly, if the proposal by the Federal Republic of Germany were adopted, he would propose that article 3 (2) of the Prescription Convention be deleted, and it was his understanding that other delegations would support that proposal.

86. In reply to a question by the CHAIRMAN, Mr. HJERNER (Sweden) said that his remarks had been addressed to article 3 (1) of the Prescription Convention,

which he would prefer to leave unchanged. He had endeavoured to point out that the adoption of subparagraph (b) in the amendment proposed by the Federal Republic of Germany (A/CONF.97/C.2/L.21) would raise many complex issues, including the questions of revising article 30 of the Prescription Convention and of the difference in the relationships between the rules of private international law on the one hand and prescription and international sale on the other.

87. Above all, he believed that if the extension of the scope of the Prescription Convention was envisaged, the implications should be examined in their entirety, and not in piecemeal fashion.

88. After a procedural discussion in which Mr. SAM (Ghana), Mr. PLANTARD (France), Mr. SONO (Japan) and Mr. HJERNER (Sweden) took part, the CHAIRMAN invited the Committee to vote on the question whether paragraph 1 of article 3 of the 1974 Prescription Convention should be retained.

89. *The proposal was rejected by 10 votes to 5, with 4 abstentions.*

90. Mr. ENDERLEIN (Secretary of the Committee) suggested that, in view of the fact that one of the outstanding proposals (that by the Secretariat) was related not only to article 3 (1) of the Prescription Convention but also to a number of other questions, further voting might be deferred until those questions had been more fully discussed.

91. Mr. SONO (Japan), speaking on a point of order, asked that the vote on article 3 (1) be completed.

92. Mr. SAM (Ghana) said that, while he agreed with the previous speaker's interpretation of the rules of procedure, he appreciated the reasons for the suggestion by the Secretary of the Committee.

93. Noting that, for reasons of time, the meeting was about to be adjourned, he asked whether, at the start of its next meeting, the Committee would continue its vote or examine the questions to which the Secretary had alluded.

94. The CHAIRMAN said that it was for the Committee itself to answer that question when it next met. The circumstances were exceptional, and a pause for reflection might be salutary; he hoped that members of the Committee would not be too strict in invoking the rules of procedure.

*The meeting rose at 1.05 p.m.*

## 8th meeting

Friday, 28 March 1980, at 3 p.m.

Chairman: Mr. MANTILLA-MOLINA (Mexico).

*The meeting was called to order at 3.05 p.m.*

### CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)

#### Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/7; A/CONF.97/C.2/L.14, L.18, L.18/Add.1, L.18/Add.2, L.21, L.26) (continued)

1. Mr. ENDERLEIN (Secretary of the Committee) said that it was clear from the vote taken at the previous meeting (A/CONF.97/C.2/SR.7) that the feeling in the Committee was that article 3, paragraph 1 of the Prescription Convention should not be left unchanged. It was proposed, therefore, that consideration of article 3, paragraph 1 should continue, the proposal by the Federal Republic of Germany (A/CONF.97/C.2/L.21) being taken first. If that amendment was rejected, the proposal by Norway (A/CONF.97/C.2/L.14) should be voted on.

2. After the voting on those proposals, which were related to article 1 (1) (b) of the draft Convention, had been completed, the Committee could take up the proposed new article VIII *bis* on denunciation (A/CONF.97/C.2/L.18/Add.2). After that clause had been discussed and, possibly, adopted, the Committee might go on to consider the remainder of the comparisons in annex I to the Secretariat document (A/CONF.97/C.2/L.18/Add.1).

3. When the principles of the provisions of the Prescription Convention and of the Contracts Convention in regard to the scope of application and final provisions had been sufficiently discussed, the Committee could, if necessary, vote on the various proposals made in that connection.

4. Mr. LANDFERMANN (Federal Republic of Germany) said he noted that the version of article 1 proposed by the Japanese delegation in document A/CONF.97/C.2/L.26 differed very little from his own delegation's proposal for that article and that he was ready to accept the Japanese formula.

5. Mr. SONO (Japan) said that, as he understood it, the Committee was engaged in the process of completing the vote on article 3, paragraph 1, and he did not think that that procedure should be altered by his delegation's

A/CONF.97/C.2/SR.8

proposal. While he agreed that the version of article 1 proposed by his delegation was virtually the same as the version proposed by the Federal Republic of Germany, he felt that the whole of the Japanese proposal in document A/CONF.97/C.2/L.26 should be left out of consideration for the time being.

6. The Secretary had suggested an order of voting that differed slightly from the procedure that had, in his view, been agreed upon at the previous meeting. It had then been agreed that the Norwegian proposal and the proposal by the Federal Republic of Germany were more or less identical in substance. Separate votes on the two proposals might thus produce some strange results. He thought it could be assumed that, if the proposal by the Federal Republic of Germany was adopted, the Norwegian proposal would be withdrawn.

7. Mr. SAM (Ghana) asked the representative of Norway if he agreed that his delegation's proposal was identical in substance with that of the Federal Republic of Germany, so that if the latter was adopted there would be no need to vote on the Norwegian proposal.

8. Mr. STENERSEN (Norway) said that the differences between his delegation's proposal and that of the Federal Republic of Germany were matters of drafting only and that their substance was, in fact, the same.

9. Mr. ROSENBERG (Union of Soviet Socialist Republics) said that, before a vote was taken on article 3, paragraph 1, he would like to point out that the Committee was required by its terms of reference to harmonize the provisions of the Prescription Convention and of the Contracts Convention in regard to the scope of application and the final clauses. Article 1, subparagraph (1) (b) of the draft Contracts Convention as approved by the First Committee stated that the Convention should apply "when the rules of private international law lead to the application of the law of a Contracting State". The proposal of the Federal Republic of Germany went further, however, and stated that the Convention should apply if the rules of private international law made the law of a Contracting State applicable to the contract of sale.

10. Although that was an interesting proposal, he wondered if the Second Committee was within its mandate in voting on what was virtually an amendment to the provisions of article 1 as approved by the First Committee. By being more specific, the proposed wording extended the scope of the subparagraph too far and put it out of harmony with the Prescription Convention.

11. Mr. SONO (Japan), speaking on a point of procedure, said that the Committee was actually engaged in voting. Nevertheless, it was important that an anxiety such as the representative of the USSR clearly felt should



be given expression. There had been little support voiced at the previous meeting for paragraph 1 (b) of article 1 of the Contracts Convention. He called again for the completion of the vote on article 3, paragraph 1.

12. The CHAIRMAN invited the Committee to vote on the proposal by the Federal Republic of Germany that article 1 of the Protocol, as reproduced in document A/CONF.97/7, be replaced by the text in document A/CONF.97/C.2/L.21.

13. *The proposal in document A/CONF.97/C.2/L.21 was approved by 10 votes to 7, with 3 abstentions.*

14. The CHAIRMAN said that any proposals not in keeping with the amendment by the Federal Republic of Germany would thus seem to have been rejected. If there was no objection therefore, he would assume that the Committee did not wish to vote on them explicitly but to proceed to the new draft article on denunciation (A/CONF.97/C.2/L.18/Add.2).

15. *It was so agreed.*

16. The CHAIRMAN invited the Committee to consider the proposal put forward by the Secretary-General in response to the request it had made at its previous meeting (A/CONF.97/C.2/L.18/Add.2).

17. Miss O'FLYNN (United Kingdom) said that, as had been pointed out at the previous meeting, it was not clear whether Contracting States would be able to denounce the Protocol because there was no specific provision to that effect. The Secretary-General's proposal for a new article VIII bis would fill that gap.

18. The situation provided for in paragraph 3 of the proposed new article was unlikely to arise very often but, if it did, the paragraph would offer a satisfactory solution.

19. As for the more usual situations dealt with in paragraphs 1 and 2, she wondered what the position would be if a State denounced the 1974 Convention but not the Protocol. Denunciation of the main instrument would normally be taken as a denunciation of the Protocol, since adhesion to the Protocol without the Convention would be meaningless, but it was not altogether clear from the text. She wondered whether a provision should be included to the effect that denunciation of the Convention was to be taken as denunciation of the Protocol also.

20. Mr. ROMAN (Assistant-Secretary of the Committee) said that there was no specific provision in the draft Protocol to meet the case mentioned by the representative of the United Kingdom because the Protocol was an amending instrument that referred only to certain specific provisions of the Convention. If the Convention itself was denounced, the Protocol would be unable to stand alone and would therefore cease to exist.

21. Miss O'FLYNN (United Kingdom) said she agreed that the Protocol was clearly subsidiary to the main instrument, and, of course, no State would adhere to the Protocol only.

22. Mr. SAMI (Iraq) said he wondered whether it might not be necessary to provide for a partial denunciation of the Convention. A State might find that its jurisdiction changed after it had ratified the Convention, and that it had become unable to apply some provisions to which it had not initially objected.

23. Mr. VIS (Executive Secretary) said that there was no provision to that effect in the current text and he knew of no case in which provision was made for the partial denunciation of an agreement. If such a provision were made, it would mean in effect that, although the Convention set forth what reservations were allowed in regard to certain subjects, the door would be opened to make reservations indirectly as well as those that were expressly permitted.

24. Mr. ROMAN (Assistant-Secretary of the Committee) said that there were some instances in ILO Conventions of provisions for partial denunciation. What was before the Committee, however, was a draft Protocol to amend the Prescription Convention. The introduction of a provision making it possible to denounce parts of the Protocol would be tantamount to permitting reservations after the ratification of an instrument. That was not a problem which came within the framework of the document under discussion.

25. Mr. SAMI (Iraq) said that, if provision was made for partial denunciation, it would not be necessary for a State to enter new reservations.

26. The CHAIRMAN said that the Protocol referred to the Prescription Convention which, unlike the draft Convention on Contracts for the International Sale of Goods, made no provision for partial ratification or acceptance. The Protocol for the Prescription Convention could not therefore include any provision for partial denunciation. He invited the Committee to vote on the new article VIII bis proposed by the Secretary-General (A/CONF.97/C.2/L.18/Add.2) as a whole.

27. *Article VIII bis of the draft Protocol was approved by 15 votes to none, with 6 abstentions.*

28. The CHAIRMAN invited the Committee to continue its consideration of the tabular comparison of the provisions of the Prescription Convention and of the Contracts Convention, in annex I to document A/CONF.97/C.2/L.18/Add.1. He asked for comments on article 4 of the Prescription Convention and on the corresponding article of the draft Convention, namely article 2.

29. Mr. SONO (Japan) said that subparagraphs (a) and (e) of article 4 of the Prescription Convention should be brought into line with paragraphs (a) and (e) of article 2 of the draft Convention.

30. Mr. LANDFERMANN (Federal Republic of Germany) said he wished to make it quite clear that the adoption of his delegation's proposal in document A/CONF.97/C.2/L.21 meant that it had been decided to delete paragraph 2 of article 3 of the Prescription Convention and to make the former paragraph 3 of that ar-



ticle, paragraph 2. He took it that the former paragraph 3 had been adopted without change. He wished to clarify that point because, in the Statement by the Secretary-General (A/CONF.97/C.2/L.18/Add.1), there was a note to paragraph 3 of article 3 saying that there was no substantial difference between it and article 5 of the draft Convention. That note was not entirely correct, because the word "expressly", which did not appear in the new Convention, should be retained in what had become paragraph 2 of article 3.

31. In regard to article 4 of the Prescription Convention, he supported the Japanese proposal that paragraphs (a) and (e) should be brought into line with the corresponding paragraphs of the draft Convention.

32. Mr. ROSENBERG (Union of Soviet Socialist Republics) said he agreed with the representative of the Federal Republic of Germany that there were specific differences between the former paragraph 3 of article 3 of the Prescription Convention and the terms of article 5 of the draft Convention. The Prescription Convention envisaged the possibility of excluding all the provisions of the Convention in respect of both parties. The new draft Convention provided for the exclusion of the application of the whole Convention and also made it possible to derogate from or vary the effect of any of its provisions. That, of course, was not possible under the Prescription Convention.

33. Miss O'FLYNN (United Kingdom) said that her delegation too supported the Japanese proposal. She also wished to endorse fully the views expressed by the representatives of the Federal Republic of Germany and of the Soviet Union with regard to article 3 of the Prescription Convention. In her delegation's view, there were substantial differences between paragraph 3 of article 3 of the Prescription Convention and article 5 of the draft Convention, but nothing should be done to bring the Prescription Convention into line with the provisions of article 5 of the draft Convention.

34. Mr. TARKO (Austria) also supported the Japanese proposal.

35. Mr. SAMI (Iraq) said he thought it would be difficult for the Committee to decide which of the two texts was to be preferred unless the text used for the draft Convention included the amendments approved by the First Committee and any changes made by the Drafting Committee.

36. Mr. SONO (Japan) reminded the members of the Committee that they were engaged in discussing the principles of the articles in the annex to the Statement by the Secretary-General. Since the question was solely one of substance, the Committee could proceed with its discussion of each of the articles regardless of the exact wording.

37. Mr. ENDERLEIN (Secretary of the Committee) said he could assure the Committee that the tabular comparison in annex I was based on the latest version of the draft Convention, received from the Drafting Committee

after its consideration of articles 1 to 9, as approved by the First Committee.

38. The task of the Committee was to determine whether the differences between the provisions of the two Conventions were important enough to justify amending the Prescription Convention. The Committee had already decided that the Prescription Convention should be amended and, once it had determined in principle what amendments were necessary, it would then be able to decide precisely how the draft Protocol should be amended. That would be the point at which the Japanese proposal in A/CONF.97/C.2/L.26 became relevant to the discussion.

39. Mr. STENERSEN (Norway) said that the amendment to article 4 contained in the document submitted by his delegation (A/CONF.97/C.2/L.14, article II) was based on the old text of the draft Convention on Contracts for the International Sale of Goods. As that text had since been changed by the Drafting Committee, he wished to withdraw the proposal concerning article 4 and endorsed the proposal submitted by the delegation of Japan (A/CONF.97/C.2/L.26).

40. After a brief discussion in which Mr. SONO (Japan) and Mr. LANDFERMANN (Federal Republic of Germany) took part, the CHAIRMAN invited the Committee to vote on the substance of the Japanese proposal relating to article 4 (A/CONF.97/C.2/L.26, article II).

41. *The proposal was adopted by 18 votes to none, with 3 abstentions.*

#### Article 6

42. Mr. STENERSEN (Norway) drew attention to the amendment to article 6 contained in his delegation's proposal (A/CONF.97/C.2/L.14, article III).

43. Mr. SONO (Japan) said that he was opposed to the Norwegian amendment. The Committee had agreed to avoid changing the text of the Prescription Convention wherever possible. In his view, the result achieved would be the same without the Norwegian amendment.

44. Mr. LANDFERMANN (Federal Republic of Germany) said that it was his understanding also that the Committee had agreed not to amend the Prescription Convention if no substantial difference was involved.

45. Miss O'FLYNN (United Kingdom) pointed out that, while many delegations had expressed disagreement with the Secretariat's notes to the effect that there was no substantial difference between certain provisions of the Prescription Convention and those of the Contracts Convention, particularly with regard to article 3 of the Prescription Convention, they did not necessarily, however, wish the Prescription Convention to be brought into line with the Contracts Convention.

46. Mr. STENERSEN (Norway) withdrew his delegation's amendment to article 6.

47. After further discussion in which Mr. TARKO (Austria), Mr. ROSENBERG (Union of Soviet Socialist

Republics), Mr. SAM (Ghana), Mr. SHORE (Canada) and Mr. SONO (Japan) took part, the CHAIRMAN invited the Committee, in the absence of any proposal to amend article 6, to proceed to the consideration of article 7.

#### Article 7

48. Mr. STENERSEN (Norway) said he noted the absence of support for his delegation's proposal to amend article 7 (A/CONF.97/C.2/L.14, article IV) and thus withdrew it.

49. Mr. LANDFERMANN (Federal Republic of Germany) proposed that the reference to good faith in international trade, contained in article 6(1) of the Contracts Convention, and the provision concerning the manner of settling matters not expressly settled in the Contracts Convention, contained in article 6(2), should be incorporated in article 7 of the Prescription Convention.

50. Mr. SONO (Japan) said that he strongly opposed that proposal. The Prescription Convention was a technical document which had nothing whatever to do with the general principles governing the relationship between buyer and seller, in the context of which the concept of good faith in international trade was quite irrelevant. In that connection, he welcomed the Norwegian representative's decision to withdraw his amendment to article 7, the text of which should remain unchanged.

*The meeting was suspended at 4.35 p.m. and resumed at 4.50 p.m.*

51. Mr. SAM (Ghana) said he agreed with the representative of Japan that, like the other general principles, the principle of good faith in international trade was not germane to the rules set forth in the Prescription Convention.

52. Miss O'FLYNN (United Kingdom) said she endorsed the proposal made by the representative of the Federal Republic of Germany. The Committee had an opportunity to bring article 7 of the Prescription Convention into line with the text of the Contracts Convention, and failure to do so might be interpreted as a deliberate choice. The concept of good faith referred to in article 6(1) of the Contracts Convention was perhaps less relevant to the Prescription Convention, but it was not entirely irrelevant. Similarly, she was unable to agree with the Japanese representative that the reference to general principles contained in article 6(2) of the Contracts Convention was unnecessary in the context of the Prescription Convention.

53. Mr. WAGNER (German Democratic Republic) said that he fully agreed with the Japanese representative and opposed the proposal made by the Federal Republic of Germany.

54. *The proposal was rejected by 11 votes to 6, with 3 abstentions.*

#### Article 31

55. Mr. SONO (Japan) proposed that the text of paragraph 4 of article B of the Contracts Convention should be added to article 31 of the Prescription Convention.

56. Mr. STENERSEN (Norway) drew attention to document A/CONF.97/C.2/L.19, submitted by his delegation, which contained an identical proposal in respect of article 31.

57. Mr. SAM (Ghana) and Mr. LANDFERMANN (Federal Republic of Germany) endorsed the proposal by the Japanese and Norwegian representatives.

58. *The proposal was adopted.*

#### Article 34

59. Mr. SONO (Japan) proposed that *mutatis mutandis* article 34 be replaced by article C of the Contracts Convention in its entirety.

60. The CHAIRMAN said that, if there was no objection, he would take it that the Committee agreed on the question of substance and that the provisions of article C would be substituted for those of article 34, subject to drafting changes.

#### Article 37

61. Mr. SONO (Japan) proposed that article 37 should be retained as it stood, since there was no substantive difference between it and article D of the Contracts Convention.

62. Mr. ROSENBERG (Union of Soviet Socialist Republics) said that, while his delegation agreed with the Japanese point of view in regard to substance, there were some terminological differences. The Contracts Convention referred to "international agreements" and article 37 of the Prescription Convention to "conventions". It would be desirable to make sure that the Prescription Convention would be interpreted as applying not only to conventions but to all sorts of international agreements.

63. Mr. WAITITU (Kenya) asked why the Secretariat had felt that it might be advisable to align article 37 of the Prescription Convention with article D of the Contracts Convention.

64. Mr. ENDERLEIN (Secretary of the Committee) pointed out that, during the discussions in the Committee, the view had been expressed that "international agreement" was sometimes considered a more generic term than "convention", which could be understood in either a narrow or a broad sense. The suggestion that "international agreement" be used was therefore an attempt to avoid any ambiguity, although the change was not imperative. If the Committee decided not to use the term "international agreement", the Secretariat would understand "conventions" as having the same meaning as the term "international agreement" in the Contracts Convention.

65. Mr. SONO (Japan) said that in view of the Secretariat's statement and the interpretation of the word "con-

ventions" by the Soviet delegation, he assumed that the existing text could be maintained.

66. Mr. WAITITU (Kenya) said that his delegation could agree to the text as it stood but that, in view of possible different interpretations, it might be advisable to align the Conventions.

67. Mr. ROMAN (Assistant-Secretary of the Committee) said that, bearing in mind the final clauses in which reference was made to international agreements, it might be useful to harmonize the texts. In the Prescription Convention "convention" in the sense of international agreement appeared only once and it could therefore be changed quite easily.

68. Mr. MAKAREVITCH (Ukrainian Soviet Socialist Republic) said that, for the sake of uniformity, it might be advisable to standardize the language, since that did not appear to be a complex matter. It would entail changing "conventions" to "international agreements", the remainder of the text remaining the same.

69. The CHAIRMAN invited the Committee to vote on the replacement of the word "conventions" by "international agreements".

70. *The proposal was adopted.*

71. Mr. SONO (Japan) said that as the Committee had decided to replace article 34 by the provisions of the new article C of the Contracts Convention some adjustment would be necessary. He drew attention to the provisions of article H (5) of the Contracts Convention which were not reflected in article 40, paragraph 1 of the Prescription Convention. His delegation therefore proposed that article 40, paragraph 1, be replaced by provisions such as those of article H (5). It was a matter of technical alignment and was referred to in document A/CONF.97/C.2/L.26.

72. Mr. SAM (Ghana) said that his delegation had no difficulty with the Japanese proposal and suggested that, since it was not a matter of substance, the necessary changes might be left to the Secretariat.

73. Mr. ENDERLEIN (Secretary of the Committee) said that the Secretariat agreed with the comments of the representative of Japan. After article 34 had been replaced by the substance of new article C, there would be a gap in the Prescription Convention since it contained no provision relating to joint or reciprocal declarations. The Japanese proposal, if approved, would remedy that situation.

74. Mr. SONO (Japan) said that the matter of principle and substance should be decided upon in the Committee. Speaking on a point of order, he proposed that the debate on annex I be closed and that the Committee proceed to the examination of formula, in regard to which his delegation wished to introduce document A/CONF.97/C.2/L.26.

75. Mr. LANDFERMANN (Federal Republic of Germany) requested clarification on the question of joint, reciprocal and unilateral declarations covered by the pro-

posed addition to paragraph 1 of article 40 and the period of time referred to in the proposed amendment.

76. Mr. SONO (Japan) said that the six-month period was mentioned in article 40, paragraph 1, but was not quite clear on the subject of the situation of reciprocal and unilateral declarations. The last part of article H (5) covered such a situation and should therefore replace the existing text.

77. Mr. ENDERLEIN (Secretary of the Committee) said that in article H, which the Committee had already adopted, there was a provision that determined the moment at which declarations under article C would take effect. He took it that it was the intention of the Japanese delegation to include such a sentence in article 40, even though the text as circulated in document A/CONF.97/C.2/L.26 did not in fact seem to be a complete repetition of article H. He suggested that, if the Committee could agree on the matter of principle, the provisions in article H in their entirety should be included at the end of article 40.

78. Mr. STENERSEN (Norway) said that his delegation agreed with the comments of the Japanese representative and the Secretariat.

79. Mr. LANDFERMANN (Federal Republic of Germany) said that his delegation also agreed in principle that article 40, paragraph 1, should be brought into line with article H (5).

80. The CHAIRMAN said that, if there were no objections, he would take it that the suggestion by the Secretariat that provisions such as those contained in article H should be included at the end of article 40 was approved.

81. *It was so decided.*

82. Mr. ENDERLEIN (Secretary of the Committee), replying to a question put by Mr. NOVOSILTSEV (Union of Soviet Socialist Republics), confirmed that the Secretariat would carry out the work of bringing article 40 into line with article H on the assumption that some words had been unintentionally omitted in document A/CONF.97/C.2/L.26.

83. In reply to a question put by Mr. TARKO (Austria), he said that, as the Committee had already adopted proposals in connection with the Protocol, the Secretariat assumed that its proposal contained in annex II had been implicitly rejected.

84. The CHAIRMAN took it, in the absence of any objection, that the Committee agreed that such was the case.

85. *It was so decided.*

#### Article 30

86. Mrs. KAMARUL (Australia), referring to article 3, paragraph 1 (b) of the Prescription Convention as amended by the Protocol, said that it seemed to her delegation to be unfortunate that the benefits of the provisions of the Convention regarding cessation of the limita-

tion period would not apply to parties that were otherwise regulated by the Convention, since article 30 would not be applicable where only one party was a Contracting State or where neither party was a Contracting State. Her delegation wondered whether the majority of the Committee shared its concern on that point, and whether the matter might not be debated further so as to decide if the word "Contracting" should be deleted from article 30 or another more appropriate amendment made to that article.

87. Mr. LANDFERMANN (Federal Republic of Germany) said that, in his delegation's view, the difficulty with regard to the sphere of application of article 3, paragraph 1 (b), was not as great as it might appear. Article 30 referred to two Contracting States but they were not identical with the Contracting States under the old Prescription Convention. Thus, even if parties had their places of business in two Contracting States and the Convention was applicable, a creditor might start proceedings in a third, non-Contracting State where he would not therefore have the benefit of article 30.

88. It was true that the conditions of article 30 were not always fulfilled in every case where the Prescription Convention applied, but in the view of his delegation that did no harm. The reason for including the word "Contracting" in article 30 was that the benefit of interrupting the limitation period was to restrict legal proceedings as far as the Contracting States were concerned. Article 30 could thus remain unchanged, even with the new sphere of application.

89. Mr. ROSENBERG (Union of Soviet Socialist Republics) said that his delegation endorsed the view of the Federal Republic of Germany. Article 30 applied to States which were Contracting States and did not refer to the manner in which provisions were to be applied.

90. Mr. PIRC (Czechoslovakia), referring to the final provisions of the Protocol, said that his delegation proposed that a text be included having the same wording as that proposed by his delegation for new article C bis (A/CONF.97/C.2/L.7), the word "ratification" being deleted and the word "Convention" replaced by "Protocol". The possibility of making reservations regarding the sphere of application would make both Conventions more acceptable to a greater number of countries. As some countries had specific legal systems governing the sphere of application or conclusion of agreements regarding international trade, too broad a sphere of appli-

cation might be an obstacle to many countries, including his own.

91. The CHAIRMAN said that the Czechoslovak proposal would be considered later, following further discussion of the point raised by the representative of Australia.

92. Mrs. KAMARUL (Australia) said, with regard to article 30, that her delegation had no specific text to propose, other than the suggestion that the word "Contracting" might be deleted. It would like to know if the Committee was concerned about the discrepancy it had pointed out since, in that case, the matter might be referred to the Secretariat for consideration. However, if the majority did not feel any concern, her delegation was willing to withdraw its proposal.

93. Mr. SONO (Japan) said that his delegation was against debating the issue at that meeting.

94. Mr. PFUND (United States of America) said he assumed that the representative of Japan was in favour of having the issue debated in a plenary meeting, a view that his delegation supported.

95. Miss O'FLYNN (United Kingdom) said her delegation supported the Japanese view that the matter was worth considering further in a plenary meeting.

96. Mr. SAM (Ghana) said that, as he understood the matter, the Australian delegation was asking only for the views of the Committee.

97. The CHAIRMAN put to the vote the proposal that the matter be debated.

98. *The proposal was rejected.*

99. Mr. LI Chih-min (China) said that his Government had not taken part in the formulation of the Prescription Convention, nor had it ratified that Convention or acceded to it. Consequently, his delegation had not expressed its views during the discussion on the subject. However, his delegation was willing to take note of matters relating to the Protocol to the Prescription Convention and its relationship to the Contracts Convention and also to note the decisions taken by the Committee.

100. The CHAIRMAN confirmed that the Committee would take note of the position of the Chinese delegation.

*The meeting rose at 6.05 p.m.*

## 9th meeting

Tuesday, 1 April 1980, at 10 a.m.

Chairman: Mr. MANTILLA-MOLINA (Mexico).

A/CONF.97/C.2/SR.9

*The meeting was called to order at 10.05 a.m.*

**CONSIDERATION OF THE DRAFT PROVISIONS PREPARED BY THE SECRETARY-GENERAL CONCERNING IMPLEMENTATION, DECLARATIONS, RESERVATIONS AND OTHER FINAL CLAUSES AND OF THE DRAFT PROTOCOL TO THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS PREPARED BY THE SECRETARY-GENERAL (agenda item 3) (A/CONF.97/6) (continued)**

**Draft Protocol to the Convention on the Limitation Period in the International Sale of Goods (A/CONF.97/C.2/L.26/Add.2, L.27, L.28) (continued)**

*New article VI bis (A/CONF.97/C.2/L.27)*

1. Mr. PIRC (Czechoslovakia) said that countries such as his own, which had specific legal systems governing the sphere of application or conclusion of agreements regarding international trade and which had ratified the 1974 Prescription Convention, might have considerable difficulty — for reasons of national legislation — in accepting the amended version of article 3 of that instrument. For that reason, his delegation proposed (A/CONF.97/C.2/L.27) the inclusion in the draft Protocol of a provision that any State might declare, at the time of the deposit of its instrument of accession, that it would apply the Protocol only to contracts of sale of goods between parties having their places of business in different Contracting States.

2. The CHAIRMAN suggested that, in order to expedite the work of the Committee, its members might agree that, during the discussion of the Czechoslovak proposal and of any further proposal concerning the draft Protocol, rule 24 of the rules of procedure would be deemed to apply. In other words, in addition to the proposer of the motion, two representatives might speak in favour of, and two against, the motion, after which it would be put to the vote immediately.

3. *It was so agreed.*

4. Mr. TARKO (Austria) said he did not think that the Committee had a mandate to consider the Czechoslovak proposal. Recalling that a similar proposal by the same delegation (A/CONF.97/C.2/L.7) concerning article C of the draft Contracts Convention had been rejected by a substantial majority,\* he said that the Committee's task was merely to ensure, by means of the provisions of the draft Protocol, that the texts of the Prescription Conven-

tion and the draft Contracts Convention were in harmony; it was not empowered to modify the substantial decisions which had already been taken in respect of the latter, although those decisions might, of course, be contested in a plenary meeting of the Conference.

5. Article I of the draft Protocol (A/CONF.97/C.2/L.28) reflecting, *inter alia*, the Committee's earlier decision that the Contracts Convention should apply if the rules of private international law made the law of a Contracting State applicable to the contract of sales, carried that provision over into the Prescription Convention, whose sphere of application would thereby be extended. The Protocol as such was, however, merely a working instrument for the harmonization of the two Conventions and had no sphere of application *per se*.

6. Moreover, the reservation which the Czechoslovak delegation was proposing would be of no assistance to States which had difficulty in accepting the sphere of application of the draft Contracts Convention. States which had ratified the 1974 Prescription Convention would be free to accept, or not to accept, the Protocol thereto; their attitude to the sphere of application of the Contracts Convention was quite a different matter.

7. Mr. WAGNER (German Democratic Republic) said that, as his delegation had pointed out on numerous occasions, the possibility of reservations concerning relations with parties in non-Contracting States was of particular interest to countries such as his own and Czechoslovakia, which had special legislation with regard to foreign trade contracts.

8. That was particularly true as far as the Prescription Convention was concerned, in that the relatively long prescription periods could be applied only on a basis of reciprocity.

9. With those considerations in mind, he supported the Czechoslovak proposal.

10. Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) said that the interests of a party with his place of business in a Contracting State would not be impaired, as far as prescription was concerned, by the fact that the other party's place of business was in a State which had lodged a reservation of the type proposed by Czechoslovakia. Moreover, the interests of a party with his place of business in a non-Contracting State would not suffer from such a situation either, since the rules of private international law rather than the provisions of the Convention would apply.

11. As many States as possible should be encouraged and assisted to accede to the Protocol, and thus the Czechoslovak proposal should be adopted.

\* See A/CONF.97/C.2/SR.2, paras. 7—18.

12. Mr. SAM (Ghana) said he agreed with the arguments of the representative of Austria. It seemed to him, moreover, that the "only . . . or" proviso in the text which the Committee had adopted for article I of the draft Protocol made the Czechoslovak proposal unnecessary.

13. *The Czechoslovak proposal for a new article VI bis (A/CONF.97/C.2/L.27) was rejected by 11 votes to 5, with 3 abstentions.*

*The revised draft Protocol (A/CONF.97/C.2/L.28, L.26, L.26/Add.2)*

14. Mr. ENDERLEIN (Secretary of the Committee), introducing document A/CONF.97/C.2/L.28, which had been submitted by the Secretariat in compliance with a request made by the Committee at its 8th meeting, said that the annex to that document contained the text of the draft Protocol amending the 1974 Prescription Convention as revised to take account of the Committee's decisions at its 6th, 7th and 8th meetings.

15. Mr. KAI (Japan) said that, although the text of the amended provisions of article 37 of the 1974 Prescription Convention, as contained in article V of the draft Protocol (A/CONF.97/C.2/L.28), reflected a decision taken by the Committee at its 8th meeting,\* his delegation proposed in effect (A/CONF.97/C.2/L.26/Add.2) the deletion from that text of the phrase "or which may be entered into". It did not, however, insist on that proposal.

16. After Mr. PLANTARD (France), Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) and Mr. SAM (Ghana) had queried the authenticity of the various language versions of the text contained in article V, Mr. ENDERLEIN (Secretary of the Committee) recalled that the Committee's earlier decision had been to align the text of article 37 of the Prescription Convention with that of article D of the draft Contracts Convention. More specifically, it had been decided to replace the words "conventions" and "convention" in the first and last lines of the former by the term "international agreement" and the word "agreement".

17. The Secretariat had based itself on the English texts of those articles when preparing document A/CONF.97/C.2/L.28.

18. The CHAIRMAN, noting that the representative of Japan did not insist on his proposal, suggested that the Committee should endorse the text of article 37, as contained in the English text of article V (A/CONF.97/C.2/L.28), on the understanding that the other language versions would be aligned accordingly.

19. *It was so decided.*

20. Mr. KAI (Japan) said, with reference to article XIII (3) which stated that a Contracting State that had denounced the Protocol should continue to be bound by the provisions of article XII of the same instrument, that, while article XII as a whole reflected general inter-

national law, the provisions of the Protocol itself would cease to have effect under such circumstances. If his view of the position was correct, the phrase "and with article XII of this Protocol" might be deleted.

21. Mr. SAM (Ghana) and Mr. PLANTARD (France) agreed with the previous speaker.

22. *The phrase referred to by the representative of Japan was deleted.*

23. Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) said that, when the Committee had adopted the Austrian proposal that was reflected in the current wording of article XI,\* it had been understood that the article should be interpreted as meaning that the Protocol would be open for accession by any State.

24. In the light of that decision, however, it was necessary to amend the first paragraph of article VIII (A/CONF.97/C.2/L.28) by deleting the second part of the sentence, after the words "all States". That amendment would not only convey the real meaning of the Austrian proposal but would also be in accordance with article 40 of the Vienna Convention on the Law of Treaties, paragraph 3 of which read: "Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended".

25. He wondered furthermore whether the words "which is not a Contracting Party to the Convention" in article XI were really necessary. Accession to the Protocol was open to any State, regardless of whether it was a party to the 1974 Convention or not, accession by a non-Contracting Party having the effect of accession to the Convention as amended by the Protocol. He also felt that the article should be moved, and should either become a subparagraph of article VIII or appear as a separate article immediately after it.

26. In connection with article XIV, he felt that it would be desirable for certified copies of the Protocol to be transmitted to as wide a range of States as possible. He suggested, therefore, that copies should be sent not merely to the Contracting Parties and signatories in respect of the 1974 Convention but to all the States that had been invited to attend the Conference.

27. The CHAIRMAN invited the Committee to consider the first proposal by the representative of the Soviet Union, that article XI should be incorporated in or placed after article VIII.

28. Mr. PIRC (Czechoslovakia) said he thought that the Soviet amendment to article XI would enable the greatest possible number of States to accede to the Protocol or to the 1974 Convention, and would thus improve the Convention. He was also in favour of placing the amended article XI after article VIII.

29. Miss O'FLYNN (United Kingdom) said she agreed with the representative of the Soviet Union that there was a discrepancy between article VIII and article XI. Under article XI, accession to the Protocol was open to States

\* See A/CONF.97/C.2/SR.8, paras. 61—70.

\* See A/CONF.97/C.2/SR.6, paras. 78—85.



that were not Contracting Parties to the main Convention. The statement in article VIII, therefore, that the Protocol was open for accession by States that were Contracting Parties or signatories in respect of the 1974 Convention, was not appropriate. Accordingly, she supported the Soviet representative's proposal to delete the last part of paragraph 1 of article VIII.

30. On the other hand, she could not support that representative's suggestion with regard to article XI. If the words "which is not a Contracting Party to the Convention" were deleted, it would mean that accession to the Protocol by any State, including a State which had already acceded to the 1974 Convention, would have the effect of accession to the Convention, a completely absurd situation.

31. Mr. TARKO (Austria) said that the Committee had taken a formal decision on the wording of article XI, as proposed by his delegation, and it was thus not open to amendment.

32. However, he endorsed the proposal that paragraph 1 of article VIII should end with the words "by all States", and that article XI should follow immediately after article VIII.

33. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that, in view of the doubts expressed by the representatives of United Kingdom and Austria regarding his proposed deletion from article XI, he would not press the proposal.

34. Mr. PLANTARD (France) said that the Soviet representative had drawn the Committee's attention to a genuine anomaly, namely a contradiction between the terms of article VIII (1) and those of article XI. The simplest way of rectifying it would be to incorporate article XI into article VIII, either as a second sentence, following immediately after "this Protocol should be opened for accession by all States", or as a separate paragraph.

35. Mr. SAM (Ghana) said that he had, at an earlier stage, pointed out the inconsistency between the Austrian proposal and the tenor of article VIII. He therefore supported the proposal by the representative of France as making the whole procedure more logical.

36. Mr. SAMI (Iraq) said he agreed with the observations of the representative of the Soviet Union and with the proposal by the representative of France to make article XI a part of article VIII.

37. The CHAIRMAN said that the general feeling in the Committee seemed to be that article XI should be transferred to article VIII as a second paragraph. He took it that the Secretariat should note the proposal and see to it that the change was made.

38. *It was so agreed.*

39. Miss O'FLYNN (United Kingdom) said that there was a discrepancy between article XI and article XII which was perhaps of slightly more than a drafting nature. Article XI contained the unqualified statement

that a State acceding to the Protocol would thereby accede to the Convention as amended. In article XII — which admittedly dealt with an unusual situation — that statement was qualified by the provision that a State which became a Contracting Party to the amended Convention also became a Contracting Party to the unamended Convention in relation to any Contracting Party to the latter which was not yet a Contracting Party to the Protocol. It might be advisable, therefore, to preface article XI by a form of words such as "Subject to the provisions of article XII".

40. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that the United Kingdom representative had proposed a logical link between article XI, which stated that accession to the Protocol would have the effect of accession to the amended Convention, and article XII, which provided that accession to the Convention as amended would indicate accession to the unamended Convention also, provided there was no notification of a contrary intention. It would be useful to introduce a clarification along the lines that she had suggested in order to ensure that the two articles were properly understood.

41. The CHAIRMAN invited the Committee to vote on the proposal that the words "Subject to the provisions of article XII," should be inserted before the words "accession to this Protocol by any State" in the second paragraph of the amended article VIII.

42. *The proposal was adopted by 8 votes to 1, with 13 abstentions.*

43. Mr. PLANTARD (France) said that a large number of delegations had abstained, his own delegation being among them. It had abstained from voting because, while article XII, which was based upon a similar article in the Vienna Convention on the Law of Treaties, obviously had a meaning in a classic convention of international public law, it was not altogether appropriate in the Protocol, which was concerned with the position of Contracting States in respect of contracts of private law. His own impression, which had been accentuated by the discussion and subsequent vote, was that article XII as drafted was a pointless, if not actually confusing, provision which could well be deleted. He reserved the right, therefore, after discussion with like-minded delegations, to propose its deletion in a plenary meeting.

44. The CHAIRMAN asked the representative of the Soviet Union to clarify his proposal that the words "the Contracting Parties and signatories in respect of the Convention of 12 June 1974", in the first paragraph of article XIV should be replaced by a form of words that would ensure that copies of the Protocol were transmitted to a greater number of States.

45. Mr. NOVOSSILTSEV (Union of Soviet Socialist Republics) said that, since article XIV appeared too narrow, he had proposed that all the States invited to the Conference should receive certified true copies of the Protocol.

46. Mr. ENDERLEIN (Secretary of the Committee)



said that the Secretariat regarded the USSR proposal as a useful one and suggested that there should be a wide distribution in respect of paragraph 1 of article XIV and a more restricted distribution in respect of paragraph 2 of that article. He suggested that the text might be changed to read:

"(1) The depositary shall transmit certified true copies of this Protocol to all States.

"(2) When this Protocol enters into force in accordance with article IX, the depositary shall prepare a text of the Convention of 12 June 1974 as amended by this Protocol and shall submit certified true copies to all States Parties to the said Convention as amended by this Protocol."

47. The CHAIRMAN said that, if there were no objection, he would take it that the Committee wished to amend the text of article XIV as suggested by the Secretariat.

48. *It was so decided.*

49. Mr. DABIN (Belgium) said that his delegation had been convinced by the French arguments in favour of deleting article XII and would wish to invite delegations, perhaps in a plenary meeting, to consider whether article XII should be retained in the Protocol.

50. The CHAIRMAN said that the Committee had taken note thereof.

**Titles and order of draft articles concerning implementation, declarations, reservations and other final clauses (A/CONF.97/C.2/L.24)**

51. Mr. ENDERLEIN (Secretary of the Committee), introducing the statement by the Secretary-General concerning the titles and order of the draft articles (A/CONF.97/C.2/L.24), said that, although some delegations might think that the matter was not one of substance, it had not yet been decided whether or not the articles were to have titles. Consequently, it was a question not of approving the titles as such but merely of taking note of the manner in which the Secretariat had arranged the final provisions and of the order in which the articles would appear in the report of the Committee to the plenary Conference.

52. Mr. TARKO (Austria) said that, in order to avoid any confusion, the first foot-note to the Secretary-General's statement should be deleted, since article Y had already been adopted by the Committee.

53. The CHAIRMAN said that the Committee had taken note of the document and that the foot-note in question would be deleted.

*The meeting was suspended at 11.30 a.m. and resumed at 11.55 a.m.*

**CONSIDERATION OF THE REPORT OF THE DRAFTING COMMITTEE TO THE COMMITTEE (agenda item 4)**

54. The CHAIRMAN said that, since the report of the

Drafting Committee was not yet available and the Second Committee was to hold no further meetings, he suggested that the Drafting Committee should submit its report direct to the plenary Conference.

55. *It was so decided.*

**CONSIDERATION OF THE REPORT OF THE COMMITTEE TO THE PLENARY CONFERENCE (agenda item 5) (A/CONF.97/C.2/L.25 and Add.1-3)**

56. Mr. KUCHIBHOTLA (India), Rapporteur, introduced the Committee's draft report (A/CONF.97/C.2/L.25 and Add.1-3).

57. Mr. ROSENBERG (Union of Soviet Socialist Republics) said that his delegation was perfectly satisfied with the draft report, which correctly reflected the course of the discussion and its results.

58. However, before the Committee began its detailed consideration of the draft report, he wished to remark that his delegation hoped that the Rapporteur, with the help of the Secretariat, would ensure that the texts reproduced in the report corresponded exactly to those which the Committee had forwarded to the Drafting Committee.

59. Moreover, the Russian text of the draft report required a number of corrections, which he would, with the Chairman's consent, transmit direct to the Secretariat so as not to take up the Committee's time.

60. The CHAIRMAN agreed that the first point made by the Soviet representative was well-founded. As for corrections to the translated versions of the draft report, he suggested that all those delegations which used working languages other than English should submit any comments they might have direct to the Secretariat.

61. He invited the Committee to examine the draft report paragraph by paragraph.

**Document A/CONF.97/C.2/L.25**

**1. Introduction**

**Paragraphs 1, 2 and 3**

62. *Paragraphs 1, 2 and 3 were approved.*

**Paragraph 4**

63. The CHAIRMAN said that paragraph 4 should be completed to read:

"The Second Committee held nine meetings, between 17 March and 1 April 1980."

64. *Paragraph 4, as completed, was approved.*

**Paragraphs 5, 6 and 7**

65. *Paragraphs 5, 6 and 7 were approved.*

- II. *Consideration by the Second Committee of the draft Convention on Contracts for the International Sale of Goods: draft articles concerning implementation, declarations, regulations and other final clauses*

*Paragraphs relating to article [A]*

66. The paragraphs relating to article [A] were approved.

*Paragraphs relating to article [B]*

67. The paragraphs relating to article [B] were approved.

*Paragraphs relating to article [C bis]*

68. The paragraphs relating to article [C bis] were approved.

*Paragraphs relating to article [C bis and C ter]*

69. The paragraphs relating to article [C bis and C ter] were approved.

*Paragraphs relating to article [X]*

70. Mr. ROSENBERG (Union of Soviet Socialist Republics) reminded the Committee that it had decided, at its 3rd meeting, that the language of article [X] should be harmonized with the language employed in other parts of the draft Convention, and that the Drafting Committee should be entrusted with that task. He proposed that a paragraph 8 to that effect should be added to the relevant section of the draft report.

71. It was so decided.

72. The paragraphs relating to article [X], as amended, were approved.

*Paragraphs relating to articles [D], [F] and [G]*

73. The paragraphs relating to articles [D], [F] and [G] were approved.

*Document A/CONF.97/C.2/L.25/Add.1*

*Paragraphs relating to article [C]*

74. The paragraphs relating to article [C] were approved.

*Paragraphs relating to article [E]*

75. Mrs. BELEVA (Bulgaria) reminded the Committee that, at its 4th meeting, her delegation had proposed that the order of paragraphs 1 and 2 of article [E] should be reversed. A further drafting amendment in respect of article [E] (2) had been submitted at the same meeting by the Netherlands delegation.

76. The CHAIRMAN said that the Secretariat would make the necessary changes in the section relating to article [E].

77. On that understanding, the paragraphs relating to article [E] were approved.

*Paragraphs relating to articles [H], [J] and [K]*

78. The paragraphs relating to articles [H], [J] and [K] were approved.

*Paragraphs relating to article Y*

79. The CHAIRMAN pointed out that paragraph 3, which had been accidentally omitted, would be inserted between the heading "(i) Meetings" and paragraph 4.

80. On that understanding, the paragraphs relating to article Y were approved.

*Paragraphs relating to the Testimonium*

81. The paragraphs relating to the Testimonium were approved.

82. Mr. ENDERLEIN (Secretary of the Committee) said that the draft articles would be submitted to the plenary Conference in the order in which they appeared in the annex to document A/CONF.97/C.2/L.24.

83. In reply to a question by Miss O'FLYNN (United Kingdom), he confirmed that the Committee had taken no decision regarding the advisability of assigning titles to the articles. The matter would be dealt with by the Drafting Committee.

*Document A/CONF.97/C.2/L.25/Add.2*

- III. *Consideration by the Second Committee of the draft Protocol to the Convention on the Limitation in the International Sale of Goods*

*Paragraphs relating to the Preamble and article IV*

84. The paragraphs relating to the Preamble and article IV were approved.

*Paragraphs relating to articles V, VI, VII, VII bis, VIII and IX*

85. Mr. NOVOSILTSEV (Union of Soviet Socialist Republics) said that decisions taken earlier at the current meeting with regard to the draft Protocol should be reflected in the text of the draft report. He suggested that the Secretariat should be requested to make the necessary changes.

86. Miss O'FLYNN (United Kingdom) said that her delegation also would be happy to leave that task to the Secretariat.

87. The CHAIRMAN said he noted that the last two speakers appeared to express the general view of the Committee.

88. The paragraphs relating to articles V, VI, VII, VII bis, VIII and IX were approved, subject to changes in those articles made earlier in the meeting.

*Paragraphs relating to the Testimonium*

89. *The paragraphs relating to the Testimonium were approved.*

*Document A/CONF.97/C.2/L.25/Add.3*

*Paragraphs relating to articles I and seq. of the draft Protocol*

90. *The paragraphs relating to articles I and seq. of the draft Protocol were approved.*

*Paragraphs relating to article VIII bis*

91. Mr. TARKO (Austria) suggested that paragraph 4 should be amended to include a reference to the proposal made by the Japanese delegation earlier in the meeting.

92. *It was so decided.*

93. *The paragraphs relating to article VIII bis were approved, subject to that change.*

*Paragraphs relating to titles and order of draft articles concerning implementation, declarations, reservations and other final clauses*

94. The CHAIRMAN said that paragraph 4 should be amended so as to indicate that the Committee had merely noted the titles proposed by the Secretary-General.

95. *It was so decided.*

96. *The paragraphs relating to titles and order of draft articles, as amended, were approved.*

97. *The draft report, as amended, was adopted.*

**ANY OTHER BUSINESS (agenda item 6)****Statement by the representative of Japan**

98. Mr. KAI (Japan) recalled that his delegation had indicated at an earlier meeting that certain clarifications were needed before article C was adopted. Since articles C and J had since been adopted by the Committee, his delegation wished to place on record the fact that its difficulties related to the effect of a declaration made under paragraph 2 of article C when the former non-Contracting State which was the object of that declaration itself became a Contracting State.

99. From the time that the former non-Contracting State deposited its instrument until the date of entry into force of the Convention in its respect, a 12 months' period of time would elapse under article J. It was unclear what the status would be during that interim period of the old unilateral declaration initially made by the first Contracting State under paragraph 2 of article C.

100. His delegation's interpretation was that, in such a case, the declaration initially made by the first Contracting State under paragraph 2 of article C would continue in effect until the Convention had entered into force for the new Contracting State. Otherwise there would be a 12 months' gap during which uncertainty would prevail as to the regime applicable between the two States concerned.

101. The CHAIRMAN assured the Japanese representative that his statement would be duly noted.

*The meeting rose at 12.45 p.m.*

*Part Three*

**COMPARATIVE TABLE OF THE NUMBERING  
OF THE ARTICLES OF THE CONVENTION**



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<sup>4</sup> Uniform Law on the Formation of Contracts for the International Sale of Goods annexed to the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (The Hague, 1 July 1964), United Nations, *Treaty Series*, vol. 834, No. 11930, p. 107.

Number of the article in United Nations Convention on Contracts for the International Sale of Goods	Number of article			Meeting at which discussed			Number of article of draft Convention on International Sale of Goods (A/32/17)	Draft article prepared by UNCITRAL Working Group on the International Sale of Goods				Article of Uniform Law adopted at the Hague, 1 July 1964	
	In UNCITRAL draft provisions (A/CONF.97/5) (A/33/17)	In final provisions as prepared by Secretary-General (A/CONF.97/6)	As prepared at the Conference	Plenary	First Committee	Second Committee		A/CN.9/142/Add.1	A/CN.9/116, Annex I	A/CN.9/100, Annex I	A/CN.9/87, Annex I	U.L.I.S.	U.L.F.
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28	26			7	13, 36		12		12	12	16, 42(1), 71(2)	16	
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43		40 <i>bis</i>	21, 22, 37	24, 25(1), 26(3)				
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Number of the article in United Nations Convention on Contracts for the International Sale of Goods	Number of article			Meeting at which discussed			Number of article of draft Convention on International Sale of Goods (A/32/17)	Draft article prepared by UNCITRAL Working Group on the International Sale of Goods				Article of Uniform Law adopted at the Hague, 1 July 1964	
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