IV. PROGRAMME OF WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

A. Report of the Secretary-General (A/CN.9/149* and Corr. 1 and 2)

CONTENTS

INTRODUCTION

1. The Commission, at its ninth session (1976), noted that it had completed, or would soon complete, work on many of the priority items included in its programme of work and that it was therefore desirable to review, in the near future, its long-term work programme. In the Commission's view, the establishment of a long-term programme of work would enable its secretariat to begin the necessary preparatory work in respect of items which it might wish to take up. The Commission instructed its secretariat to submit a report at its eleventh session (1978) after appropriate consultations with international organizations and trade institutions as to its contents.

2. The General Assembly, at its thirty-first session, welcomed the decision of the Commission to review its long-term programme of work and requested the Secretary-General to invite Governments to submit their views and suggestions on such a programme. (General Assembly resolution 31/99 of 15 December 1976.)

3. This report is submitted in compliance with the decision taken by the Commission at its ninth session (1976). The report seeks to do the following:

(*a*) To give an account of the programme of work, as originally agreed upon by the Commission at its first session and as subsequently expanded (chap. I);

(*b*) To give an account of the subject-matters falling within the priority topics that have been completed (chap. II);

(*c*) To give an account of the subject-matters falling within the priority topics that have not yet been completed (chap. III);

(*d*) To give an analytical compilation of the proposals made by Governments and international organizations in respect of a new work programme (chap. IV); and

(*e*) Finally, to raise issues of working methods (chap. V).

In order to facilitate the discussion of items to be retained in the work programme of the Commission, there is set out, immediately after this introduction, a list of those subject-matters that were included in the first programme of work but have not yet been taken up and those that have been suggested by Governments and international organizations for inclusion in the future work programme.

4. The secretariat gratefully acknowledges the opportunity given to it by the Council for Mutual Economic Co-operation (CMEA) which kindly made arrangements for consultations between its member States and the Commission's secretariat. These consultations took place at the headquarters of CMEA in Moscow on 16 and 17 January 1978. The secretariat also gratefully acknowledges the opportunity to exchange views on the Commission's work programme with the member States of the Asian-African Legal Consultative Committee (AALCC), through the intermediary of Standing Sub-Committee on International Trade Law Matters of AALCC. These consultations took place at Doha from 19 to 23 January 1978. The resolution of the AALCC containing its proposals on the Commission's

* 4 May 1978.

** Notes by the Secretariat on subjects which may be included in the programme of work are reproduced in annexes I to III.

work programme is set forth in document A/CN.9/155.*

5. Steps have been taken to consult on the Commission's programme of work also with other international bodies representing other regions of the world. The secretariat expects to have such consultations with the member States of the Organization of American States and with the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe. An account of these consultations, if held before the eleventh session of the Commission, will be set forth in an annex to this report.

6. With respect to co-ordination of work, the Secretary of the Commission attended a meeting, held in Rome, on 27 and 28 February 1978, of a consultative group composed of the representatives of the secretariats of the Commission, UNIDROIT and the Hague Conference on Private International Law. A memorandum on this meeting is set forth in document A/CN.9/154.

List of subject-matters for possible inclusion in the future work programme[1]

I. *Issues relating to international trade law*

1. Preparation of a code of international trade law (FP, NP; paras. 3 and 4)
2. Preparation of uniform conflict of law rules (NP; paras. 5 and 6)
3. Preparation of international contracts
   Work directed to the unification of:
   - (i) Contracts of warehousing (NP; para 7 (*a*));
   - (ii) Contracts of barter (NP; para. 7 (*b*));
   - (iii) Contracts for the supply of labour, or contracts where the party who orders the goods supplies a substantial part of the materials (NP; para. 7 (*c*);
   - (iv) General conditions on the erection and technical servicing of machines and industrial plant (NP; para. 7 (*d*));
   - (v) Contracts of leasing (NP; para. 7 (*e*));
   - (vi) Standard contract terms (FP, NP; para. 8);
   - (vii) Consequences of frustration (FP);
   - (viii) *Force majeure* clauses (FP, NP; para. 10);
   - (ix) Penalty clauses (NP; para. 11);
   - (x) Certain contractual issues of general application (e.g. set-off, suretyship assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages, application of usages) (NP; paras. 12 and 13);
   - (xi) Contracts for quality control (NP; para. 14);
   - (xii) Public tenders (NP; para. 15).
4. International payments
   Preparation of uniform rules relating to:
   - (*a*) Electronic funds transfers (NP; para. 17);
   - (*b*) "Standby" letters of credit (NP; para. 18);
   - (*c*) Clauses protecting parties against fluctuations in the value of currency (NP; para. 19);
   - (*d*) Collection of commercial paper (NP, para. 20).
5. International commercial arbitration
   - (*a*) Study of means to make the UNCITRAL Arbitration Rules more effective (NP; para. 22 (a));
   - (*b*) Formulation of provisions for situations which cannot be dealt with by bilateral agreements (NP; para. 22 (*b*));
   - (*c*) Proposal relating to article V (1) (*e*) of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NP; para. 23).
6. Transport[2] and transport insurance
   - (*a*) Drafting a convention on multimodal transport (NP; para. 24);
   - (*b*) Consideration of the law of charter parties (NP; para. 25);
   - (*c*) Consideration of legal issues relating to transport by container (NP; para. 26);
   - (*d*) Consideration of the law of transport insurance (NP; para. 27);
   - (*e*) Preparation of uniform rules relating to contracts for the forwarding of goods (NP; para. 28).
7. Agency
   Legal issues arising out of agency contracts concluded for commercial purposes (FP, NP; para. 29).
8. Insurance (FP, NP; para. 30).
9. Products liability (FP, NP; para. 31).
10. Company law
    The establishment and operation of commercial companies (NP; para. 32).
11. Intellectual property (FP)[3]
12. Legalization of documents (FP)[4]

II. *Issues arising from a possible reordering of international economic relations*

1. Legal implications of the new international economic order (NP; paras. 33 and 34).
2. Multinational enterprises (FP, NP; para. 35).

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

[1] In the list that follows, the letters "FP" indicate that the topic was formerly proposed for inclusion in the programme of work of the Commission, either at its first session or at a subsequent time. The letters "NP" indicate that the topic is a new proposal made for the purposes of deciding on a new programme of work. It will be noted that in several instances, former proposals have been repeated. The list does not include priority topics in respect of which work is not yet completed. These are set forth in chap. III of this report. The paragraph number noted after a topic indicates the relevant paragraph in the analysis of proposals of Governments and international organizations (chap. IV of this report) where the proposal relating to that topic is considered.

[2] It was proposed at the first session of the Commission that "transportation" be placed on the work programme of the Commission.

[3] The Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, 1967, states that the objectives of that organization are, *inter alia*, to promote the protection of intellectual property throughout the world through co-operation among States, and, where appropriate, in collaboration with any other international organization. WIPO became a specialized agency of the United Nations in December 1974.

[4] The Convention abolishing the requirement of legalization for foreign public documents, The Hague, 5 October 1961, has been concluded under the auspices of the Hague Conference on Private International Law.

3. Transfer of technology (NP; para. 36).

4. Elimination of discrimination in laws affecting international trade (FP, NP; para. 37).

CHAPTER I. THE FIRST PROGRAMME OF WORK OF THE COMMISSION

A. *General list of topics*

1. At its first session, held at New York from 29 January to 26 February 1968, the Commission, following informal consultations between its members, unanimously accepted a working paper (A/CN.9/L.1/Rev.1) which read as follows:

I. *List of topics*

During the general debate the following topics were suggested by several delegations. A great number of delegations considered that all these topics should form the future work programme of the Commission. This list of topics is not exhaustive.

(1) International sale of goods:
- (*a*) In general;
- (*b*) Promotion of wider acceptance of existing formulations for unification and harmonization of international trade law in this field including the promotion of uniform trade terms, general conditions of sale and standard contracts;
- (*c*) Different legal aspects of contracts of sale like:
  - (i) Limitations;
  - (ii) Representation and full powers;
  - (iii) Consequences of frustration;
  - (iv) *Force majeure* clauses in contracts.

(2) Commercial arbitration:
- (*a*) In general;
- (*b*) Promotion of wider acceptance of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

(3) Transportation.

(4) Insurance.

(5) International payments:
- (*a*) Negotiable instruments and banker's commercial credit;
- (*b*) Guarantees and securities.

(6) Intellectual property.

(7) Elimination of discrimination in laws affecting international trade.

(8) Agency.

(9) Legalization of documents.

II. *Priorities*

The Commission decided that priority should be given to the following topics:
- (i) International sale of goods;
- (ii) International payments;
- (iii) Commercial arbitration.

III. *Methods of work*

Methods of work should be suitable to the particular topic under consideration.

IV. Working groups, or sub-committees or other appropriate bodies of the Commission, should be appointed during the present session to deal respectively with the topics mentioned in paragraph II and submit their reports to the Commission at its next session.

V. The Commission endorses the statement of the Chairman that it should take its decisions as far as possible by a consensus, failing which by a vote, as under the rules of procedure for the subsidiary organs of the General Assembly.

B. *Priority topics*

2. In the course of the same session, the Commission established a working group to advise it on the methods of work that should be followed in dealing with the three topics that had been given priority. The Working Group submitted a paper entitled "Methods of work for priority topics" (A/CN.9/L.3). After discussion, the Commission took a number of decisions on the methods of work for priority topics. These decisions are recorded in document A/CN.9/9, and may be summarized by reproducing the following passages:

International sale of goods

During the general debate the following items, falling within the scope of international sale of goods, were suggested by delegations:

(*a*) International sale of goods in general;

(*b*) Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods;

(*c*) Hague Convention of 1955 on the Law Applicable to International Sale of Goods;

(*d*) Elaboration of a commercial code;

(*e*) Contracts of sale;

(*f*) Different legal aspects of contracts of sale:
- (i) Time-limits and limitations (prescription) in the field of international sale of goods;
- (ii) Agency;*
- (iii) Consequences of frustration;
- (iv) *Force majeure* clauses in contracts;

(*g*) General conditions of sale, standard contracts, Incoterms and other trade terms."

Selected items

In view of the wide scope and complex nature of the concept of international sale of goods as laid down above, at this early stage the Commission found it impractical to deal with all the facets of the subject at the same time. Accordingly, the Commission selected some of the main items within the topic, i.e.:

(*a*) The Hague Conventions of 1964;

(*b*) The Hague Convention on Applicable Law of 1955;

(*c*) Time-limits and limitations (prescription) in the field of international sale of goods;

(*d*) General conditions of sale, standard contracts, Incoterms and other trade terms.

. . .

International payments

During the general debate the following topics, falling within the scope of international payments, were suggested by delegations:

(*a*) Negotiable instruments;

(*b*) Bankers' commercial credits;

(*c*) Guarantees and securities.

. . .

Rather than making a comprehensive study of international payments as a whole, the Commission found it convenient . . . to deal separately with (i) negotiable instruments; (ii) bankers' commercial credits and (iii) guarantees and securities. Consistent with the object of the Commission, i.e. the progressive harmonization and unification of the law of international trade, it was agreed that the consideration of these items by the Commission should relate primarily to international transactions.

* Under this item it is intended to deal both with the common law concept of "agency" and the concepts of "*représentation*" (in French) and "full powers" in other systems.

...

International commercial arbitration

The Commission decided . . . to request the Secretary-General, in consultation with the organs and organizations concerned, to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject.

International legislation on shipping

3. At its second session (1969), the Commission decided to include international legislation on shipping among the priority items in its programme of work and established a working group, requesting it to indicate the topics and method of work on this subject. The Working Group submitted a report to the Commission at its fourth session (1971), recommending a programme of work in this area (A/CN.9/55).* After considering the Working Group's report, the Commission decided to examine "the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the Protocol to amend that Convention (the Brussels Protocol 1968). . . with a view to revising and amplifying the rules as appropriate. . .".

Chapter II. Work completed by the Commission

(a) *International sale of goods*

(i) *Draft Convention on the International Sale of Goods*

1. The text of this draft Convention was approved by the Commission at its tenth session (1977).

(ii) *Draft Convention on the Formation and Validity of Contracts for the International Sale of Goods*

2. It is expected that the Commission will approve the text of this Draft Convention at its eleventh session, and will then also have considered the question whether the provisions on the formation and validity of contracts should be the subject-matter of a separate convention.

3. The General Assembly, by resolution 32/145 of 16 December 1977, expressed the view that both draft Conventions should be considered by a conference of plenipotentiaries at an appropriate time, to be decided at its thirty-third session (1978) in the light of the recommendations to be submitted by the Commission.

(iii) *Prescription (Limitation) in the International Sale of Goods*

4. A Convention on the subject was adopted by a Conference of Plenipotentiaries held at New York from 20 May to 14 June 1974.

(b) *International payments*

Bankers' commercial credits

5. The Commission, at its eighth session (1975), commended the use of the 1974 revision by the International Chamber of Commerce of "Uniform Customs and Practice for Documentary Credits" in transactions involving the establishment of a documentary credit.

(c) *International commercial arbitration*

6. The Commission, at its ninth session (1976), adopted the UNCITRAL Arbitration Rules. The General Assembly, by resolution 31/98 of 15 December 1976, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to such arbitration rules in commercial contracts.

(d) *International legislation on shipping*

7. The United Nations Convention on the Carriage of Goods by Sea (the "Hamburg Rules") was adopted by a Conference of Plenipotentiaries held at Hamburg from 6 to 31 March 1978.

Chapter III. Priority topics in respect of which work is not yet completed

1. Among the so-called "priority topics" referred to in chapter I of this report, the following matters have not yet been completed:

(a) *International sale of goods*

(i) *1955 Hague Convention on the Law Applicable to the International Sale of Goods*[5]

(ii) *General conditions of sale and standard contracts*

2. The Commission, at its tenth session (1977), decided to postpone work on "general" general conditions and to review the matter at its eleventh session in the context of its new programme of work.

(b) *International payments*

(i) *Draft Convention on International Bills of Exchange and International Promissory Notes*

3. It is expected that the Working Group on International Negotiable Instruments will need one or two more sessions to complete its work. Consequently, a draft Convention together with a commentary and the observations of Governments and interested international organizations will probably be placed before the Commission at its thirteenth session (1980).

(ii) *Uniform Rules applicable to international cheques*

4. The Commission, at its fifth session (1972), requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question of whether this can best be achieved by extending the application of the draft [convention on international bills of exchange and international promissory notes] to international cheques or by drawing up a separate uniform law on interna-

* Yearbook. . . 1971, part two, III.

[5] It is noted that the consideration of this Convention, for the purpose of establishing a more widely acceptable text, is within the original mandate of the Working Group on the International Sale of Goods set up by the Commission at its second session (1969).

tional cheques, and to report its conclusions to the Commission at a future session."

5. The Working Group requested the Secretariat, in consultation with the UNICITRAL Study Group on International Payments, to make inquiries regarding the use of cheques in international payments and the problems presented, under current commercial and banking practices, by divergencies between the rules of the principal legal systems. The Working Group is expected to take up the question of cheques upon termination of its work on bills of exchange and promissory notes.

(iii) *Security interests in goods*

6. The Commission, at its tenth session (1977), requested the Secretariat to submit, at its twelfth session (1979), a further report on the feasibility of uniform rules on security interests and on their possible content and, in particular, to ascertain the practical need and relevance of an international security interest for international trade.

(c) *International commercial arbitration*

7. In accordance with a decision taken by the Commission at its tenth session (1977), the Secretariat is preparing studies regarding the recommendations by the Asian-African Legal Consultative Committee[6] and is conducting consultations in this regard. A report on this matter will be submitted to the Commission at its twelfth session (1979).

Chapter IV. Analysis of proposals by Governments and international organizations on the future work programme of the Commission[7]

1. *Issues relating to international trade law*

A. *Completion of existing work programme*

1. The Byelorussian SSR, Czechoslovakia, German Democratic Republic and Union of Soviet Socialist Republics propose the completion of work on the items included in the programme of work drawn up at the first session of the Commission.

2. The Asian-African Legal Consultative Committee (AALCC), Hungary and the United States propose continuance of the work on security interests. AALCC and the United States note the importance of security interests in international trade.[8]

B. *Preparation of a code of international trade law*

3. Czechoslovakia, Bulgaria (CMEA), Hungary (CMEA) and Poland (CMEA) propose the preparation of a code of international trade law.

4. Czechoslovakia, while recognizing that the preparation of such a code would be a long-term project, notes that the commencement of preparatory work is desirable for the following reasons. The present system of unifying special areas of international trade law can eventually produce a lack of harmony between the various instruments of unification, both because the instruments might contain potential conflicts, and because the same problems may be resolved differently in different instruments. Further, areas will remain where divergent national laws would apply.

C. *Preparation of uniform conflict of law rules*

5. Bulgaria (CMEA), the Byelorussian Soviet Socialist Republic, Czechoslovakia, the German Democratic Republic, Hungary (CMEA), Poland (CMEA) and the Union of Soviet Socialist Republics propose the preparation of uniform rules to resolve conflict of law issues arising out of an international trade transaction.

6. Czechoslovakia notes that, until a uniform code of international trade law is widely adopted, conflicts of potentially applicable national laws will arise in relation to international trade transactions, and that therefore the unification of the relevant conflict of law rules would enhance legal security in international trade.

D. *Uniform rules relating to international contracts*

(i) *Uniform rules for certain types of contracts*

7. It is proposed that the formulation of uniform rules be undertaken on the following:

(*a*) The contract of warehousing[9] (German Democratic Republic, Germany, Federal Republic of,[10] (CMEA) and Hungary (CMEA));

(*b*) Contracts of barter[11] (AALCC, Czechoslovakia and USSR (CMEA)). It is noted that such contracts are becoming increasingly important in transactions between developing and developed countries (AALCC), and that they are not regulated by the draft Convention on the International Sale of Goods (Czechoslovakia);

(*c*) Contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services, and contracts for the supply of goods

[6] These recommendations are set forth in a note by the Secretary-General (A/CN.9/127) (Yearbook . . . 1977, part two, III).

[7] The proposals of Governments were sent in response to a request for such proposals made in a note verbale of the Secretary-General dated 1 February 1977. The Secretariat held consultations at Moscow with the Council for Mutual Economic Assistance on the future work programme on 16 and 17 January 1978, and the proposals made by States members of CMEA at those consultations were transmitted by the CMEA secretariat by letter dated 25 January 1978. In the analysis set forth below, the proposal of a State which was so transmitted is identified by placing the abbreviation "CMEA" in parentheses after the name of the State. It may be noted that some of the States participating in those consultations have sent independent replies to the note verbale dated 1 February 1977.

[8] At its tenth session (1977) the Commission requested the Secretary-General to submit to the Commission at its twelfth session a report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and suggestions made in the Commission, and to carry out further work on the subject in consultation with interested organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade UNCITRAL, report on the tenth session (A/32/17), para. 37; Yearbook . . . 1977, part one, II, A).

[9] UNIDROIT is currently examining the feasibility of formulating draft uniform provisions on the liability of persons other than the carrier having custody of the goods before, during or after the transport operation. A "Preliminary report on the Warehousing Contract" (ref.: Study XLIV—Doc. 2, 1976) was issued, and circulated for comments by Governments and interested organizations. In May 1977, a study group was established on this subject.

[10] The proposal of the German Democratic Republic (CMEA) was that the responsibility for goods before and after transport be considered, and this would involve consideration of the liability of warehousemen.

[11] See annex II to this report, containing a note by the Secretariat on the international contract of barter.

to be manufactured or produced where the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production (AALCC and Czechoslovakia). It is noted that such contracts are important (AALCC), but excluded from the scope of the draft Convention on the International Sale of Goods (Czechoslovakia);

(*d*) General conditions on the erection and technical servicing of machines and industrial plant (Byelorussian SSR and USSR);

(*e*) The contract of leasing in international trade (Hungary).

(ii) *Standardization of contractual terms or clauses*

8. The United States and AALCC note the value of standard contract provisions, or trade terms, accepted on a wide basis, in the solution of contractual problems in international trade. It is noted that such provisions can resolve problems not capable of solution by legal principles of general application (United States) and that they can also foster the establishment of legal norms acceptable to both developing and developed countries (AALCC).

"General" general conditions

9. Czechoslovakia and Hungary (CMEA) note that the feasibility of drafting "general" general conditions for use in international trade should be considered.[12]

"Force majeure" clauses

10. Bulgaria (CMEA), the Byelorussian SSR, Hungary (CMEA), Poland (CMEA) and the USSR propose the formulation of standard clauses regulating the effect of the failure to fulfil his obligations by a party to an international trade contract due to an impediment beyond his control ("force majeure" clause).

Penal clauses

11. Poland proposes the formulation of standard clauses regulating the imposition of fines and penalties in international trade contracts.[13]

(iii) *Unification of the rules on certain contractual issues arising in relation to all types of contracts*

12. Czechoslovakia notes the desirability of drafting uniform rules on certain contractual issues of general application, such as set-off, suretyship, assignment, transfer of property rights, formation of contracts in general, representation and full powers, frustration, damages and application of usages. It notes that such unification would be a preparatory step towards the eventual formulation of an international trade code.

13. The Byelorussian SSR and the USSR propose the unification of rules on the transfer of property rights.

(iv) *Unification of rules for certain needs ancillary to the formation or performance of contract*

Contracts for quality control

14. Czechoslovakia notes the need for uniform rules for contracts regulating the relations between an agency which checks the quality of goods, and the party who employs such an agency, because of the importance of such contracts, and the current lack of uniform rules on that subject.

Public tenders

15. Czechoslovakia also proposes the formulation of uniform rules regulating public tenders, as such tenders are important in connexion with the formation of contract, and the draft Convention on the Formation of Contracts for the International Sale of Goods does not deal with such tenders.

E. *International payments*

16. The following proposals are made in relation to this subject.

Electronic funds transfers

17. The United States proposes the study of legal issues arising from the transmission of funds and the making of payments by electronic means. It notes that, while there is increasing use of electronic fund transfers, there has been insufficient development of rules to resolve the legal problems thereby created.[14]

"Standby" letters of credit

18. Australia proposes the formulation of uniform rules regulating the issue of "standby" letters of credit, used to secure the performance of a borrower's obligations under an international loan which is independent of any sales transaction. Under such "standby" letters of credit, the banker reimburses the lender in the event of the borrower's default. In support of this proposal, Australia notes:

(*a*) The increasing use of such letters of credit in international trade; and

(*b*) That, in the absence of uniform rules as to the conditions under which payment has to be made under such letters, there is a possibility of abuse by dishonest beneficiaries.

Clauses protecting parties against fluctuations in the value of currency

19. Hungary (CMEA) and Poland (CMEA) propose the formulation of clauses which would protect a party to whom monetary obligations are owed against fluctuations in the value of currency.

[12] At its tenth session (1977), the Commission decided "to postpone work on 'general' general conditions and to review the matter when it considers, at its eleventh session, the proposals of the Secretary-General for its long-term programme of work" (A/32/17, para. 36). It may be noted that the Asian-African Legal Consultative Committee has prepared a standard form of FOB and FAS Contract for use in sales of certain types of commodities, and is currently preparing a standard form of CIF (maritime) Contract for sales of light machinery and durable consumer goods.

[13] See annex I to this report, containing a note by the Secretariat on liquidated damages and penalty clauses.

[14] See annex III to this report, containing a note by the Secretariat on electronic funds transfer.

Collection of commercial paper

20. Czechoslovakia proposes the consideration of uniform rules for the collection of commercial paper.[15]

Bank guarantees

21. Czechoslovakia proposes the consideration of problems arising out of bank guarantees.[16]

F. *International commercial arbitration*

22. The United States and AALCC propose further study on measures to promote international commercial arbitration. It is proposed that attention should be given:

(*a*) To means whereby the UNCITRAL Arbitration Rules can be made more effective (United States);

(*b*) To formulating provisions which, while maintaining the principle that arbitration as a means of dispute settlement depended on the will of the parties, would remedy situations which cannot be dealt with by bilateral agreement (United States);

(*c*) To the specific proposals already submitted by AALCC to the Commission (AALCC).[17]

23. ICC proposes that, if the Commission were to examine the possibility of revising the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, it should consider the effect of article V(1)(e) of that Convention. Under that provision, recognition and enforcement of an award may be refused if it has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. The ICC notes that, as a result, even if an award is set aside or suspended by a competent authority because of a particular local rule, the award could not be enforced in countries in which it would otherwise be valid, and that this creates difficulties in arbitration practice.

G. *Transport*

Multimodal transport

24. The United States notes that, after the Commission's work in preparing a draft Convention on the Carriage of Goods by Sea, it appears to be the appropriate body to prepare a draft Convention on multimodal transport.[18]

Charter-parties

25. Czechoslovakia (CMEA), the Byelorussian SSR and the USSR propose the consideration of the law relating to charter-parties.[19]

Transport by container

26. Hungary proposes that work be undertaken on legal issues relating to transport by container.[20]

Transport insurance

27. The Byelorussian SSR, Czechoslovakia (CMEA) and the USSR propose the consideration of the law of transport insurance.[21]

Contracts for the forwarding of goods

28. The Byelorussian SSR, Czechoslovakia and the USSR propose that work be undertaken in relation to contracts for the forwarding of goods in international transport.[22]

H. *Agency*

29. Bulgaria (CMEA), the German Democratic Republic, Hungary, Poland (CMEA) and the USSR propose the examination of legal issues arising out of contracts of agency concluded for commercial purposes, including brokerage contracts and contracts for commercial representation.[23]

J. *Insurance*

30. Hungary proposes the examination of legal problems in insurance.

K. *Products liability*

31. Mexico proposes that further work be under-

[15] The International Chamber of Commerce has published "Uniform Rules for the Collection of Commercial Paper" (1967).

[16] The International Chamber of Commerce is currently drafting uniform rules on contract guarantees.

[17] For these specific proposals, see document A/CN.9/127 (Yearbook. . . 1977, part two, III).

[18] In pursuance of resolution 1734 (LIV) of the Economic and Social Council, the Trade and Development Board, by its decision 96 (XII) of 10 May 1973, established an Intergovernmental Preparatory Group to elaborate a preliminary draft of a convention on international intermodal transport. The work of this Group is not yet completed.

[19] The UNCTAD Working Group on International Shipping Legislation, at its first session (1969), adopted the subject of charter-parties as part of its programme of work. At its fourth session (1975), the Working Group considered a study by the UNCTAD secretariat on this subject, and requested the secretariat to make additional studies. It is expected that that Working Group will again consider this subject in 1979 in the light of the additional studies.

[20] In response to decision 6 (LVI) of the Economic and Social Council, the Trade and Development Board has, by its decision 118 (XIV) of 13 September 1974, established an *Ad Hoc* Intergovernmental Group on Container Standards for International Multimodal Transport. The work of this Group is not yet completed.

[21] The UNCTAD Working Group on International Shipping Legislation, at its first session (1969), adopted the subject of marine insurance as part of its programme of work. The UNCTAD secretariat is currently preparing a study on legal and commercial problems in this field, and it is expected that the Working Group will consider this study in 1978.

[22] UNIDROIT prepared in 1966 a draft Convention on the contract of international forwarding agency of goods.

[23] (*a*) A Committee of Governmental Experts, established under the auspices of UNIDROIT, completed in 1972 a draft convention providing a uniform law on agency of an international character in the sale and purchase of goods. This draft Convention will be submitted to a diplomatic Conference in 1979.

(*b*) The Commission of the European Communities has commenced work toward harmonization of the laws of States members of the European Economic Community (EEC) concerning the practice of the profession of "commercial agent". A draft directive on the subject was prepared and submitted by the Commission to the Council of Ministers of the EEC in December 1976.

(*c*) The Hague Conference on Private International Law has adopted a Convention on the Law Applicable to Agency. This convention determined the law applicable to relationships of an international character arising where the agent has the authority to act, acts or purports to act on behalf of a prinicipal in dealing with a third party. The Convention covers (*a*) the relationship between principal and agent, and (*b*) the relationship of both principal and agent with third parties arising from the agent's activities.

taken on liability for damage caused be defective products.[24]

L. *Company law*

32. Bulgaria (CMEA) and Madagascar propose that work be undertaken on the establishment and operation of commercial companies.[25]

2. *Issues arising from a possible re-ordering of international economic relations*

A. *Legal implications of the new international economic order*

33. The Asian-African Legal Consultative Committee (AALCC) proposes that the Commission should draw up its programme of work with due regard to the policies underlying the new international economic order.[26] It notes that, in respect of items included by the Commission in the programme of work established at its first session, the Commission had carried out its work within the context of existing legal frameworks and that, for this reason, its work did not in every instance fully reflect the interests of the world community as a whole nor the relevant resolutions of the sixth and seventh special sessions of the General Assembly concerning the new international economic order. It further suggests the establishment of a working group to study the implications for international trade law of the new international economic order.

34. Czechoslovakia, Hungary and Yugoslavia also propose that work should be undertaken on issues arising from the re-ordering of international economic relations, including legal issues relating to the new International Economic Order. They note that such work would lead to the resolution of international economic problems, and a strengthening of trade relations between States.

Multinational enterprises

35. Czechoslovakia, the German Democratic Republic, Hungary and Poland (CMEA) propose the consideration of legal problems arising from the activities of multinational enterprises. The German Democratic Republic notes that these activities have an adverse effect on the economies of developing countries.[27]

Transfer of technology

36. Czechoslovakia proposes that work be undertaken on the transfer of technology.[28]

B. *Elimination of discrimination in laws affecting international trade*

37. Czechoslovakia, Hungary, Poland (CMEA) and the USSR propose the consideration of legal issues arising from the principle of non-discrimination in international trade. Bulgaria (CMEA), Hungary (CMEA), Poland (CMEA) and the USSR (CMEA) specifically note that attention should be given to the application in international trade of the principles underlying the most-favoured-nation clause.[29]

CHAPTER V. ISSUES RELATING TO THE ESTABLISHMENT OF A NEW PROGRAMME OF WORK

The mandate of the Commission

1. The mandate of the Commission is defined in section I of General Assembly resolution 2205 (XXI) of 17 December 1966 as "the progressive harmonization and unification of the law of international trade, in accordance with the provisions set forth in section II[30] below". When the current work programme was established at the first session of the Commission, attention was directed to a definition of the law of international trade as "the body of rules governing commercial relationships of a private law nature involving different countries". However, there was general agreement that the formulation of a definition was not essential at that stage of the work of the Commission.[31] While the work so far completed by the Commission has exclusively related to commercial relationships of a private law nature, some proposals for the future work programme (such as work on legal issues related to the new international economic order) will involve subjects of a public economic law nature. In its comments on the future work programme, Yugoslavia has noted the utility of considering the mandate of the Commission in

[24] At its tenth session (1977) the Commission decided not to pursue work on this subject, and that the matter be reviewed in the context of its future programme of work at a future session if one or more member States of the Commission should take an initiative to that effect. (A/32/17, para. 44).

[25] The Commission of the European Communities is working on the harmonization of the company law of the member States of EEC. This projected harmonization covers such issues as the merger of companies (societés anonymes), the structure of such companies and their accounts, and the contents and dissemination of prospectuses containing stock offerings. In addition, an *ad hoc* working group of the Council of Ministers of EEC will examine the draft Statute for European Companies (le statut des sociétés anonymes européennes) which is aimed at the creation of a community-wide law on companies (droit communautaire des sociétés anonymes).

[26] On the new international economic order, see General Assembly resolutions 3201 (S-VI) of 1 May 1974, entitled "Declaration on the Establishment of a New International Economic Order", and 3202 (S-VI) of 1 May 1974, entitled "Programme of Action on the Establishment of a New International Economic Order"; resolution 3281 (XXIX) of 12 December 1974, entitled "Charter of Economic Rights and Duties of States, and resolution 3362 (S-VII) of 16 September 1975 entitled "Development and International Economic Co-operation". The resolution of AALCC embodying its proposal relating to the new international economic order is contained in document A/CN.9/155 (Yearbook . . . 1971, part two, III).

[27] For the previous decision of the Commission on this subject and an exchange of letters pursuant to that decision with the Commission on Transnational Corporations, see document A/CN.9/148. It may also be noted that para. 4 (g) of General Assembly resolution 3201 (S-VI) noted above and section V of General Assembly resolution 3202 (S-VI) noted above, relate to the regulation and control of the activities of transnational corporations.

[28] This subject is under consideration by an UNCTAD Intergovernmental Group of Experts on an International Code of Conduct on Transfer of Technology. It may also be noted that paragraph 4 (*b*) of General Assembly resolution 3201 (S-VI) noted above, and section IV of General Assembly resolution 3202 (S-VI) noted above, relate to the transfer of technology.

[29] The subject of the most-favoured-nation clause is under consideration by the International Law Commission, which at its twenty-eighth session (1976) adopted draft articles on this subject. The draft articles have been circulated to Governments for their comments, and it is expected that the International Law Commission will, at its thirtieth session (1978) consider the draft articles in the light of the comments submitted, and complete its work.

[30] Section II of the resolution sets forth the organization and functions of the United Nations Commission on International Trade Law.

[31] UNCITRAL, report on the first session, (A/7216), paras., 23 and 24 (Yearbook . . . 1968-1970, part two, I, A).

view of the possible inclusion in the work programme of subjects of this nature.

Co-ordination of work of other organizations

2. General Assembly resolution 2205 (XXI) states that the Commission shall further the progressive harmonization and unification of the law of international trade by, *inter alia*,

(i) Co-ordinating the work of organizations active in this field and encouraging co-operation among them;

(ii) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;

(iii) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade.[32]

3. The object of these provisions appears to be to make the Commission the body responsible for organizing and directing all work connected with the unification of international trade law. However, up to the present stage of the Commission's work this object has not been fully realized. While the work of some organizations is to some extent carried on in collaboration with the Commission, other organizations both within the United Nations family and outside it sometimes work in areas of international trade law without any reference to the Commission. Several factors may have contributed to this. In some instances, the programme of work of other organizations was established at about the same time the Commission was established, and accordingly there was no proper opportunity for co-ordination. Again, certain organizations do not appear readily to acccept the pre-eminence of the Commission in the field of international trade law. Furthermore, the Commission has been mainly concerned with working on its priority subjects, and has directed less attention to co-ordination. It would, however, be appropriate at this stage to examine the question of co-ordination, not only because it has been stressed by some Governments,[33] but because a lack of assertion by the Commission of its proper role could have unfortunate consequences: duplication of work, and a gradual erosion of the area of competence of the Commission. The Commission may therefore wish to consider the methods by which a better co-ordination of work can be achieved.

Methods of work

4. In carrying forward its work, the Commission has adopted a variety of working methods, i.e. established working groups or study groups, entrusted work to a Special Rapporteur, authorized the engaging of consultants, and requested studies to be made by the Secretariat. These working methods have proved adequate in relation to the current programme of work where the method of work most appropriate to the subject in question has been selected. The Commission may wish to consider whether any modifications to these working methods are desirable, with particular reference to the future programme of work.

Possible scope of the future work programme

(i) *Period of projection of the future work programme*

5. In its comments on the future work programme, the United States notes that it is undesirable to include in the future work programme projects that would take many years to complete, since the current rapid growth and change in international trade might result in the projects when completed being of little utility. Certain proposals, however, such as the drafting of a Trade Code, involve work extending over many years. The Commission may wish to consider this issue.

(ii) *Establishment of working groups*

6. Owing to financial restrictions, the Commission is not free to establish more than three working groups at any one time. At present, the working group on negotiable instruments has yet to complete its work. It is expected that this work in so far as it relates to the preparation of a draft convention on international bills of exchange and international promissory notes, will be completed in 1979.

[32] Para. 8, subparas. (*a*), (*f*) and (*g*) of the resolution.

[33] Czechoslovakia and the German Democratic Republic, in their comments on the future work programme, note the need for closer co-ordination. Czechoslovakia stresses the need for close co-ordination with other United Nations bodies, in particular with UNCTAD and the International Law Commission, and notes the possibility of collaborating with UNCTAD in its work on charter-parties and marine insurance. It also notes the desirability of co-ordination with UNIDROIT and the Hague Conference on Private International Law. The importance of co-ordination was also stressed during the deliberations leading to the establishment of the first work programme of the Commission (A/7216, paras. 25-28).

ANNEX I*

Note by the Secretariat: liquidated damages and penalty clauses

1. The United Nations Commission on International Trade Law at its tenth session requested the Secretary-General

> "to consider, as part of the study on the future long-term programme of work of the Commission which is to be presented at the eleventh session of the Commission, the feasibility and desirability of establishing a uniform régime governing liquidated damage clauses in international contracts".[a]

This report is written in response to that request.

2. The request by the Commission arose out of a proposal submitted during the course of the tenth session that the draft Convention on the International Sale of Goods include a provision on liquidated damages and penalty clauses[b] in contracts for the international sale of goods. During the ensuing discussion, it became apparent that there was considerable support for the idea behind the proposal, i.e. that uniform rules regulating liquidated damages and penalty clauses would be an important contribution to the facilitation of international

* Originally issued as A/CN.9/149/Add.1 on 1 May 1978.

[a] UNCITRAL; report on the tenth session A/32/17, annex I, para. 513 (Yearbook . . . 1977, part one, II, A).

[b] A significant difficulty in terminology exists which goes to the substance of the subject-matter of this report. In the French, Russian and Spanish languages the technical name for the type of clauses under discussion is "penalty clause". Common law countries distinguish "penalty clauses" from "liquidated damages clauses" for purposes of determining the validity of such clauses. Other legal systems which recognize the validity of clauses which serve as a means of encouraging performance of the contract we well as of those intended as an estimate of damages nevertheless use different terms to describe such clauses and differentiate between them in regard to their legal consequences. Since the choice of terminology in a given legal system sometimes leads to expectations as to the consequences arising out of the use of such a clause, it was thought best, at this stage of the Commission's consideration, to use terminology which minimized these expectations.

trade and commerce. However, it was generally considered that establishing a unified régime was a complex problem which warranted more attention than could be given at that stage of the deliberations in respect of the draft Convention. Furthermore, liquidated damages and penalty clauses were also important in many types of contracts which were outside the scope of the draft Convention. For all these reasons, it was suggested that it would be preferable to deal with liquidated damages and penalty clauses in a separate instrument which could be applied to a wider range of international contracts and not be restricted to contracts for the international sale of goods.[c]

Desirability of unification

3. Clauses or stipulations providing for the payment of damages or of a penalty on default are in wide use in commercial contracts. Their purpose is to determine in advance the amount of damages in the event of a breach of contract or, by imposing a penalty for such breach, to encourage performance of the obligations under the contract. Frequently such clauses or stipulations are intended to serve both purposes.

4. Such clauses are attractive to merchants and their lawyers. If the sum stipulated in the clause is high enough, it increases the likelihood that the other party will perform his obligations at the time and in the manner agreed. If the other party does not perform in conformity with the contract, the clause gives an easy, rapid and clear calculation of the compensation for that breach. This is true whether the clause was intended to make an accurate estimate of the actual damages, to encourage performance by stipulating by way of penalty a sum higher than the estimated damages, or to limit damages by stipulating a sum less than the estimated damages. As a result, the likelihood of controversy between the two parties is reduced, along with the costs directly involved in settling any dispute and the danger of rupturing the business relationship between the parties.

5. These advantages of the clauses would seem to be even more significant in a contract between parties from two different countries. The possibilities for delay or failure of performance are greater, the informal pressures which can be exerted to encourage performance by the other party are less effective, and access to a foreign legal system—which would be necessary for at least one of the parties in case of litigation—is more difficult and expensive than when the contract is between two parties from the same country.

6. Nevertheless, various restrictions are placed by different legal systems on the use of such clauses. In some jurisdictions, a court will not enforce a clause in a contract unless it is construed as providing for liquidated damages rather than as providing for a penalty. In some other jurisdictions, a court may revise a clause which sets the compensation either substantially higher or substantially lower than the estimated damages. This result may reflect the view that the dominant purpose of such clauses is a pre-estimate of future damages in cases of breach or may reflect the view that the clause might have been imposed by the economically stronger party. As a result most legal systems appear to authorize the courts either to disregard such a clause or to lower the amount stipulated in it if the amount stipulated appears to be excessively high, and, in some legal systems, to raise the amount stipulated in the clause if that amount appears to be excessively low.

7. Even within legal systems which have the same underlying philosophy towards the use of these clauses there are often important differences in the law in respect of such questions as to whether damages may be awarded in addition to the stipulated sum, whether the sum may be stipulated in terms other than money, and whether a party who is not liable for damages for failure to perform his obligations because that failure was due to an impediment beyond his control is also by that impediment absolved from liability to pay the sum stipulated.

8. Since some legal systems restrict the freedom of the parties to contract in respect of liquidated damages and penalty clauses, the merchant community cannot overcome the diversity of legal régime by agreement amongst themselves. It is therefore submitted that, if unification is to be achieved, it must be by international legislation.

[c] A/32/17, annex I, paras. 510-512.

Feasibility of unification

9. Although there are important differences in public policy which lie behind the rules in respect of liquidated damages and penalty clauses in the various countries, it would appear that these differences can either be minimized or avoided. This is particularly true in respect of the rules which have developed in some countries to protect consumers from the abusive use of such clauses. The elimination of all consumer transactions from the eventual unified régime should reduce the difficulties of introducing rules which may be different from those which have been developed in the national legal systems to govern consumer as well as non-consumer contracts.

10. In addition, less opposition is to be expected to a change in the law where the clause is stipulated in a contract between parties from different States. In such a case, and in the absence of uniform legislation, rules of private international law come into operation to determine whether and to what extent a liquidated damages or penalty clause will be enforced by the foreign court that is seized of the suit. It is thus possible that, in a case before a foreign court, a party will have a penalty clause enforced against him though under the domestic law of that party's State such a clause would have been held invalid or would have been modified by reducing the damages stipulated. Conversely, a party may not be able to obtain enforcement of such a clause even though in the court of his own State adjudication would have led to a recognition of the rights stipulated in that clause.

11. It is not possible within the scope of this report to analyse the kinds of contract for which a unified régime in respect of liquidated damages and penalty clauses might be adopted. Nevertheless, in view of the fact that the common law systems and the civil law systems are in agreement that such clauses can serve a useful function but that they can be utilized to take unfair advantage of the other party, it seems reasonable to conclude that agreement could be reached on rules in respect of liquidated damages and penalty clauses for use in a wide range of contracts used in international trade.

ANNEX II*

Note by the Secretariat: international barter or exchange

1. In the course of consultations with international organizations on the future programme of work of the Commission, attention was drawn to the growing importance of transactions by barter or exchange. Such transactions can be distinguished from sale transactions in that the goods sold are not to be paid for by money, but by other goods or some other valuable consideration.

2. Legal systems approach the contract of barter or exchange in different ways. In general, civil law systems provide expressly that the provisions on sale apply, by analogy, also to barter,[a] and specify that each of the parties to a contract of barter is considered the seller of the goods which he transfers and the buyer of the goods which he receives. A similar approach is found in the Uniform Commercial Code of the United States of America which, in section 2-304, provides that "the price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer."

3. The approach of common law countries that follow the English Sale of Goods Act, 1893 is different. Section 1 of that Act restricts the meaning of a contract of sale to a contract "whereby the seller transfers or agrees to transfer the property of goods for money consideration". Where the consideration for the transfer of goods is not money, there is a contract of exchange that is distinguished from a contract of sale, and the Sale of Goods Act has no direct application to such a contract.[b] Apparently, the common law principles applicable to sales of goods are ordinarily applicable to exchanges.[c]

* Originally issued as A/CN.9/149/Add.2 on 12 May 1978.

[a] E.g. Brazil, Codiglio Civil, art. 1164; Ethiopia, Civil Code, art. 2409; France, Code civil, art. 1707; Germany, Federal Republic of, BGB1. art. 515; Hungary, Civil Code, art. 386; Italy, Codice Civile, art. 1552-1555; Netherlands, Civil Code, art. 1582; Russian Soviet Federated Socialist Republic, Civil Code, art. 255; Switzerland, Code des obligations, art. 237. See also International Trade Code of Czechoslovakia, art 425.

[b] Benjamin; *Sale of Goods*, 1st ed. (1974), p. 29; Cheshire and

4. That the law relating to barter or exchange transactions is relatively undeveloped may be due to the fact that, on the domestic level, such transactions are apparently not very frequent. Where they do so occur, the provisions on sale will be made applicable by analogy in some countries or, in other countries, the comon law principles applicable to sales will apply. However, there is evidence that international barter or exchange transactions are now quite frequent and that their economic function and importance may be considerable. Thus, so-called "compensation" transactions, amounting to an exchange of goods, are often resorted to in order to ease foreign exchange difficulties.

5. It is submitted that the international barter or exchange transaction is of sufficient commercial importance to warrant further study. Such a study would probably show that a unified régime in respect of international barter transactions could not be satisfactorily established by merely widening the scope of application of the draft Convention on the International Sale of Goods so as to include such transactions. First, the provisions of that draft Convention do not, in every instance, meet the issues that are inherent in a barter transaction, and difficult problems of interpretation would arise because of the fact that goods or another consideration, not being money, are substituted for the purchase price in money. Second, the régime of remedies for non-performance would have to be adapted, in particular in connexion with the remedy which consists in a reduction of the price. Third, the sales provisions do not contain provisions relating to the supply of technical services and documentation in respect of the goods sold; under many international exchange contracts part of the consideration consists in the supply of such services and documentation.

6. It is suggested that the Commission retain provisionally the contract of international barter or exchange in its programme of work, pending a study by the Secretariat on the scope and contents of a possible uniform régime. Such a study could be submitted to the Commission at its twelfth session in 1979.

ANNEX III*

Note by the Secretariat: some legal aspects of international electronic funds transfer

INTRODUCTION

Background

1. At the Commission's fifth session (1972), in connexion with the consideration of the item "International payments", attention was drawn to the significant changes in international banking practices brought about by recent developments in electronic payment methods and procedures and the hope was expressed that the Commission's work in the field of international payments would take account of such developments.[a] At its third session, in connexion with its assessment of the desirability of preparing uniform rules applicable to international cheques, the Commission's Working Group on International Negotiable Instruments requested the Secretariat "to obtain information regarding the impact, in the near future, of the increased use of telegraphic transfers and of the development of telecommunication systems between banks on the use of cheques for settling international payments".[b]

2. The present note, prepared in the context of the Commission's impending consideration of its future programme of work, seeks to outline those legal issues in international electronic funds transfer with respect to which the Secretariat's inquiries among banking and commercial circles have revealed a need or a desire for action on the international level. It may be noted in this connexion that this subject was considered at some length at the last session of the UNCITRAL Study Group on International Negotiable Instruments (19-22 September 1977), a summary of which deliberations is included in this note (see paras. 36-48 below).[c]

The existing system

3. Electronic funds transfer (EFT) is a general term by which is comprehended all those developments in the field of payments which have as their objective, or effect, the total or partial elimination of the ordinary paper-transmitted order and the substitution therefor of machine-processible electronic impulses.

4. A numerous variety of electronic funds transfer systems (EFTS) have been developed or may be contemplated, many of which are currently in use in various countries, though largely for domestic rather than international transfers. These range from a simple system in which paper-born data is encoded by the first bank on to a magnetic tape for automatic processing by itself and subsequent banks to which the tape is delivered to such fully automatic and computerized system as the so-called point-of-sale transfer system; in the latter, the system's computer link-ups enable an authorized user, by inserting a plastic card into a terminal located at a payee-merchant's premises and punching the requisite entry in the keys, to cause funds to be transferred from his account at a bank to the merchant's account at the same or other participating bank almost instantaneously (i.e. in "real time", as it is referred to).

5. In the context of international payments, however, the two most common "electronic" means of transfer at present are still transfer by cable or by telex. These two modes of transfer may be illustrated by the following simple example. A buyer, B, wishing to transmit funds to a seller, S, in another country approaches bank X where he maintains an account and requests it to transmit for his account a specified amount to S. Bank X, having debited B's account for the amount in question or being otherwise put in funds, sends an order by cable or by telex to bank Y, its correspondent bank in the place where payment is to be made, requesting it to pay S the specified amount and debit bank X's account. Bank Y carries out the order by paying the amount personally to S, by forwarding a bank cheque to him or by depositing the amount in his bank account in bank Z, where this is known.

6. It may be observed with respect to these modes of transfer that they are at best only quasi-electronic, particularly as regards the cable transfer, in that the end-product contemplated is a piece of paper in which the payment order to bank Y is embodied and which is not directly susceptible of electronic processing by bank Y.

Future trend

7. The future trend is towards further reduction, if not eventual elimination, of the mediating role of paper in such transactions. This would not only speed up the process considerably but would lower costs by facilitating retrieval of information and by eliminating tedious manual checking of documents as well as opportunities for clerical error. A fully electronic transfer system would, in the example given above, envisage a link between the computers of banks X and Y and possibly Z either directly or, where such operates, indirectly, via a message-switching network embracing a large number of other banks. The payment order could then be executed almost instantaneously by means of credit and debit actions by the computers involved in response to electronic messages originating from the X bank computer.

8. A further requisite of a fully automatic and integrated EFTS is an arrangement for clearing of the transactions between originating and receiving banks such as is exemplified by the "automatic clearing houses" (ACH) which operate in the United States of America. These are regional associations of banks and other financial institutions each of which maintains facilities through which are channelled

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Fifoot, *Law of Contract*, third Australian edition, by J. G. Starke and P. F. P. Higgins, p. 211.

[c] Halsbury, *Laws of England*, vol. 29, 3rd ed. (1960), p. 387.

* Originally issued as A/CN.9/149/Add.3 on 1 May 1978.

[a] UNCITRAL, report on the fifth session (A/8717), para. 57 (Yearbook . . . 1972, part one, II, A).

[b] Report of the Working Group on International Negotiable Instruments on the work of its third session (1975), (A/CN.9/99), para. 136 (Yearbook . . . 1975, part two, II, 1).

[c] Attention may also be drawn to the fact that at least one State (United States of America) has formally proposed the inclusion of the item on electronic funds transfer in the Commission's future programme of work. See chap. IV, para. 17, of the present report.

all electronic funds transfer communication between and among its members. Each such message is received, recorded and forwarded electronically by the ACH, which on the basis of such records effects settlement, according to the association rules, between the members' accounts either immediately or, more commonly, at the close of each busines day or on the day following.

9. The automatic clearing function may, of course, also be performed by a bank, such as a central bank, at which all other banks maintain deposits. This is the case, for example, with the Federal Reserve System in the United States which for long has performed automatic clearing functions for banks on a regional basis and most recently has decided to link up these regional clearing facilities into a national network.[d] A similar automatic clearing function is performed in France by Banque de France. It does seem doubtful, however, that direct automatic clearing facilities between private banks could be easily established on the international level in view of the enormous political and economic policy questions that must first be resolved. Such a system is, however, feasible among central banks and others so permitted by the law of their own domiciliary States such as the banks members of the Bank for International Settlements.

10. Although no fully integrated and automatic funds transfer system exists so far at the international level, a noteworthy development along these lines is SWIFT—Society for World-Wide Interbank Financial Telecommunications. SWIFT, which is based in Brussels, is an association of several hundred banks including a number of central banks, in Europe and North America. Its principal function is to maintain facilities for automatic message transmission between its subscriber-banks via an electronic network linking the members' computers and other data-processing devices. While SWIFT does not itself function as an automatic clearing-house, its effect is nevertheless to provide such rapid communication between and among all the banks involved that near-instantaneous crediting and debiting of accounts maintained at such banks becomes feasible, subject only to subsequent settlement between the banks in an agreed manner.

Analysis

11. Two levels of issues arise in relation to electronic funds transfer in international payments: the first is of a general nature and the second relates to the legal relationship between specific parties to an EFT transaction.

Issues of a general nature

12. One concern that features prominently in any discussion of this subject is that of the security of EFTS from unauthorized, and particularly fraudulent, access. This concern is accentuated by the following generally recognized facts. Firstly, a computer-based system is extremely vulnerable to manipulation by anyone with the necessary expertise and access; many apprehended embezzlers, especially employees, have often indicated that they had been tempted to try by the seeming simplicity of the process and the large reward that could be reaped in a computer-aided fraud. Secondly, it seems very doubtful that a system could be devised that is completely fraud-proof, although the level of sophistication required of the thief could be made very high indeed. Thirdly, whereas computer fraud is relatively easy to commit, its detection can be very difficult and costly not only because there is no physical paper to examine for alterations, etc. but also because the computer can itself be commanded to "forget" (i.e. erase) any traces of the fraudulent transactions, leaving, as it said, no "audit trail".[e]

13. The problem of security is presumably made more difficult by the international linkages required to effectuate international funds transfer by electronic means. There are more points at which access can be gained to the system, the level of effective security available at the various points may be quite uneven, especially if, as is often the case, lines have to be leased from public carriers in the various countries linked; and such breaches of the security of the system as do occur may become even harder to track down.

14. A second concern frequently expressed relates to the effect which the development of computerized electronic data processing, of which EFT is an aspect, may have on the enjoyment of the right to privacy. The computer's immense capacity for gathering, storing, retrieving and extrapolating from, data about any and all subjects poses the risk, it is said, that no fact about participants in an EFT scheme could remain private and secure. This goes not only for the bank's customers but also for the bank itself.[f]

15. Such concern has led in many jurisdictions to strict laws regulating not only the kinds of information which may be collected or retained, but also the conditions for their use or publication. A recent example is the Federal Republic of Germany's Federal Data Protection Act of 27 January 1977.[g] The problem here for the international transaction, quite apart from the substantive one of the protection of privacy, is that individual jurisdictions may enact privacy laws which are divergent not only in the duties imposed on operators of an EFTS but also in the level of protection from dissemination accorded particular kinds of financial information. This would not only complicate the compliance situation of the banks involved but would make for uncertainty in a field which above all requires certainty, confidentiality and finality of transactions. Information which under the law of one jurisdiction was protection from disclosure might, by reason of a bank's involvement in EFT transactions with a bank in a different jurisdiction which did not accord similar protection to such information, become publicly available.

16. One other source of difficulty which would require cooperation on the international level relates to the legal status, particularly in litigation, of records generated by an EFTS. The large sums of money which may be at stake in such a litigation could make this issue a quite important one.

17. The problem arises because in place of the written paper record, the system substitutes in whole or in part electronic data stored only in machine-readable code form on magnetic or paper tapes, computer cards and memory devices. While this in general causes no problem under the civil law systems, which it appears, would have no difficulty admitting in evidence a properly-authenticated computer print-out, a different consequence may attach to this form of record under a common law or common-law derived legal system. First of all, business records are in general admissible only as an exception to the hearsay rule[h] and then only under certain strict conditions, such as that of entries in question must have been made contemporaneously with the event recorded, by a person who has personal knowledge of the transaction and is unavailable as a witness. The question thus is whether a computer-kept record can meet these conditions. Where, for example, one computer (the receiving bank's computer) is triggered to make complicated calculations and entries, even generate conclusions, by another computer (e.g. the ACH computer) which itself is activated by entries made in the terminal of a third computer (the originating bank's computer) at some far-off location, is the resulting record made by a person? What about the elements of personal knowledge of the entry and of availability of the maker as a witness?

18. Similarly the common law best evidence rule requires produc-

[d] See *The New York Times*, 17 April 1978, p. D1.

[e] Thus, in one case which occurred in the United States, access was gained by a competitor to a company's highly valuable trade secret by "tapping" from outside of the company's premises, the line by which the company's central computer communicated with equipment at an outside location. This example also makes the point that companies often have a proprietary interest in the security of their electronic communication system extending beyond simple protection of their funds.

[f] The fear that this would give central banking authorities a new source of information with which to monitor the international banking community is cited as one reason for the decision not to make of SWIFT a full-blown clearing system. See article by W. Hall in the June 1973 issue of the London magazine *The Banker*.

[g] Gesetz zum Schutz vor Missbrauch personenbezogener Daten bei der Datenverarbeitung (Bundesdatenschutzgesetz-BDSG) vom 27.1.1977 (BGB1. I S.201).

[h] The hearsay rule holds inadmissible in court any testimony or written evidence of a statement made out of court offered to establish the truth of the matter asserted in the statement. See Richardson, *On Evidence*, §200 *et seq.* (10th ed., Prince) (New York, Brooklyn Law School). Since a computer print-out is in fact a written statement made out of court it is hearsay evidence and as such inadmissible, save as an exception, to establish the truth of what is therein contained.

tion of the original entry in order to prove the contents of a writing.[i] Since in the case of a computer-kept record the original entry consists of patterns of electronic impulses captured on tape or in the computer's memory devices, none of which can be apprehended by human beings, except in the form of print-outs, the argument could be made that such print-outs are not "original" records and so are inadmissible as the best evidence of the matter therein contained. There is the point, furthermore, of the self-serving nature of a computer print-out generated specifically as evidence in the dispute at hand.

19. The difficulties which can arise in this context may be illustrated by the following example. Company A, domiciled in State X, a jurisdiction in which computer print-outs are admissible as evidence of the matter therein contained, is in dispute with Company B, domiciled in State Y, a jurisdiction which is strict about the inadmissibility of such evidence. Under the rules of private international law, matters of evidence and procedure are governed by the rules of the forum (*lex fori*). Suppose then that either State X or State Y would have jurisdiction to entertain an action on this matter. The consequence, assuming no other source of evidence, would be that a different result would be arrived at depending on whether the action was brough in State X or in State Y. Furthermore, Company B would be in a position of being able to assert against Company A in State X a claim or defence, based on the print-out, which Company A could not assert against Company B in State Y.

20. Although some attempt has been made in a number of common law jurisdictions to resolve certain of these issues either by statute or by pragmatic judicial interpretation of the rules of evidence,[j] it is doubtful whether the underlying problem can be resolved short of some form of international agreement on the issue.

Specific legal questions

21. A number of questions arise as to the legal relationship of parties to an EFT transaction. Before considering some of these issues in detail reference should be made to a conceptual question of some practical significance. This is the debate which is taking place in a number of countries as to the category of legal rules under which electronic funds transfer operations should be subsumed: the special rules governing the bank collection process or some other régime such as the general law of contracts or, as some have advocated, a specially-enacted EFT law? This debate has generally taken place against the background of demands for greater consumer protection in response to the fact that banks have so far conducted their EFT activities under private contractual arrangements between themselves and the other parties concerned, including their customers, who, it is said, may be too weak to secure equitable terms for themselves.

22. The importance of this debate for the international payment situation is that it can well be expected to lead to EFT legislation in individual countries which, if not harmonized, will tend to complicate the position of banks engaging in international electronic funds transfer, especially if such banks have operations in many countries. Even the mere fact that the domestic EFT transaction is subject to one régime of rules while the international transaction is subject to a different régime could require costly adaptation in many cases.

23. As far as the international transaction is concerned, it will in all likelihood continue for the time being to be regulated, at least as regards the relationship between the financial institutions involved, by private contract. This raises the question as to the adequacy of private contract to provide solutions to all the problems that may possibly arise in EFT operations. While recognizing the wisdom of leaving it to private parties to run their own private commercial affairs, especially where such parties are sophisticated financial institutions, one may nevertheless draw attention to certain limitations of private contract in this regard. Firstly, whilst a contractual arrangement may provide an excellent régime for resolving disputes between the parties thereto, it generally is of limited value in resolving questions as to rights and obligations of third parties. Thus, for example, in an EFT transaction involving a transferor, A, his bank, B_1, a clearing-house, C, the transferee, D, and the transferee's bank, B_2, contractual agreements between A and B_1, between B_1, C and B_2 and between D and B_2 would have very little to contribute on the question of whether C or B_2 may be liable to A, or whether C or B_1 may be liable to D. Secondly, even as between the parties involved, a contract may be silent as to a particular issue, e.g. as to who, as between B_1, C and B_2, bears the risk for an unexplained computer error causing loss.

24. These considerations would thus tend to favour the idea of a comprehensive, international legal framework for electronic funds transfer, even if this were only optional or supplementary to private contract.

25. Turning now to legal issues that may arise in a specific EFT situation when something goes wrong and the need arises to allocate responsibility and consequent loss among the parties involved, it should be observed that, quite apart from fraudulent and other unauthorized tampering with the system—matters already alluded to above—any number of things could go wrong in an EFT system. As a result, say, of computer malfunction, the payer's account might be debited with too much or too little; the account of the intended payee might be debited while that of the intended payee might be credited; the account of a third party involved in the transaction might get debited or credited; or the transfer order might go unexecuted altogether or be only partially executed. The possibilities might be illustrated by the following hypothetical examples.

Bank-customer relationship

Case I: responsibility for error, mistake, computer malfunction.

26. A, a businessman in country X, instructs his bank to transmit a substantial sum of money to B, a businessman in country Y. Part of the money was in payment for goods shipped by B and part A's contribution to a fund for joint exploitation of a highly lucrative business opportunity. Payer bank transmits transfer order by electronic medium through an ACH to B's bank. Because of slight malfunctioning of ACH computer order to B's bank to credit his account omits special security code, so it is discounted by the bank's computer as not being genuine though the order could have been easily verified. By the time the error is discovered, it is too late. The business opportunity on which A had been relying to rescue his business from financial difficulties has fallen through and A is in bankruptcy. B must take his place in line with other creditors.

27. *Quaere*: (1) What, if any, is liability of A's bank:

(*a*) To A? Could A argue that the bank had chosen the means by which it was going to carry out the transfer and so should be accountable for any errors?

(*b*) To B? Could a payee in such circumstances have a claim against the originating bank or is the absence of a direct contractual relationship between the two fatal to such claim? (Cf. cases of transfer of funds by cable or telegraph where in some countries the payee has generally been unable to maintain a claim against the originating bank when something has gone wrong.)

(2) What, if any, is liability of ACH:

(*a*) To A? Is ACH assimilated to legal position of originating bank vis-à-vis A?

(*b*) To B? Is ACH's legal position similar to that of a telegraph company or other message carrier used to transmit long-distance transfer orders between banks?

(3) What, if any, is liability of B's bank:

(*a*) To A? Is legal status of receiving bank vis-à-vis A that of subagent?

(*b*) To B? Is legal relationship between B and his bank as regards the transaction in question of creditor-debtor?

Case II: time and finality of payment issues.

28. A and B both maintain accounts at the same branch of a foreign bank X. A, having received value from B, instructs X to transfer an agreed amount from A's account to B's account as of a

[i] See Richardson, *op. cit.* §297.

[j] See, for example, as to the United States, the Uniform Business Records as Evidence Act, 28 U.S.C. (United States Code) 1732 (a), the Uniform Photographic Copies of Business and Public Records Act, New York Civil Practice Law and Rules, rule 4539 and also *Transport Indemnity Co.* v *Seib*, 132 N.W. 2d 871 (Nebraska, 1965); and, as to the United Kingdom, the Civil Evidence Act, 1968, S.5.

specified date. X, upon receipt of A's instructions, sets in motion the computer process whereby A's account will be debited and B's credited with the stated amount. Under X's internal EFT procedures, a customer's final balance with respect to in-house transactions is determined as of the day following such transactions, leaving the possibility of reversing erroneous entries at that time without the customer's knowledge. Subsequent to the debit-credit instructions to its computer, but on the same day, X learns of A's insolvency and on the next day reverses the debit-credit entry in the accounts of A and B since on the basis of that transaction A's account is in a net debit situation.

29. *Quaere*: (1) What is the legal position of X vis-à-vis B? Could B claim repayment of the amount in question on the ground that payment was complete as soon as the payment instructions were accepted and the process commenced, or, at any rate, as soon as the credit entry was actually made? Could X, on the contrary, argue, by analogy to the cheque-collection situation, that any credit entry must remain provisional and conditional until it had actually "collected" the requisite funds from the payer, A; or alternatively, that the transfer was not complete until B had received notice of the credit in his favour?[k]

(2) When in general is payment "final" or "complete" in an electronic payments situation? Since in a fully computerized system execution of the transfer order in terms of the appropriate debiting and crediting could be accomplished in a matter of minutes at most (the projected time for a typical SWIFT message from one end to the other is one minute), how are factors such as bankruptcy, death, incapacity, revocation of collecting bank's authority and stop-payment orders, etc. which might ordinarily interrupt the payment process, to be accommodated in an EFTS? What about bank errors, including computer and clerical errors? Should all EFT entries be considered provisional or should a general and independent power be recognized in the bank to reverse, and so undo, entries subsequently discovered to have been erroneous?

Case III: the problem of "float".

30. A instructs his bank, X, to transfer a very substantial sum of money to B's account in a foreign branch of the same bank to reach B by a certain date. A assumes that the transfer will be effected by cable and, wishing to be very cautious, allows more than the usual number of days between the date he issues his order and his account is debited and the date when he expects the payment to reach B. X, however, transmits the funds on the last day by which B must receive payment through an EFT network of which it has just become a subscriber.

31. *Quaere*: (1) Can A claim from X interest on the transmitted funds from the time his account was debited to the time when it actually was credited to B?

(2) Can B claim interest on the same funds for the same period on the ground that the transaction should have been transmitted electronically on the first day, or alternatively, from the time when the payment could have reached him if effected by cable promptly on receipt of the transfer order to the time when it actually was credited to his account?

(3) Who in general is entitled to the benefit of the "float" in an EFT operation?

Interbank relationship

32. As with the bank-customer relationship, many questions can arise with respect to the legal relationship between banks involved in an EFT operation. These questions tend in the main to relate to the allocation of responsibility, and hence the distribution of the consequent loss, when something has gone wrong in the transfer operation. Thus, for example, suppose that in the hypothetical case put above (case I, para. 26 above) the fault lay in the failure of the receiving bank to credit its customer's account with items properly communicated to it and the originating bank incurs liability as a result? A question would arise as to what remedy, if any, the originating bank had against the receiving bank? Similarly, the receiving bank could incur liability as a result of acting on instructions emanating from the originating bank's malfunctioning computer or as a result of fraudulent tampering with the computer programme by employees of the originating bank who, it is claimed, were negligently given access to the originating bank's terminals. In addition cases may arise in which there is admitted error but it is not clear as to where in the system the malfunction occurred, how it occurred, or who is to blame for it.[l]

33. All these matters would in a typical EFTS be regulated by private agreement between the banks concerned, or where there is an intermediary association, such as a clearing-house, by the rules of the association and by the established customs and practices of banks in their relations among themselves. The sole question then is whether these consensual rules and the established practices provide an adequate and satisfactory regulatory régime for a phenomenon of such far-reaching implications as electronic funds transfer bearing in mind especially the limitations to self-regulation some of which were discussed above (para. 23).

34. One might also recall in this connexion the various other aspects of the subject of automatic data processing in international trade evidenced by such developments as the current study by the International Chamber of Commerce of the possibility of replacing negotiable documents of title (bills of lading, warehouse receipts, etc.) by electronic data communication, the related project under study by the Economic Commission for Europe and the commonly-held view that negotiable instruments in general—bills of exchange, promissory notes, cheques, etc.—should one day be replaced in their international payment function by EFT. All of this would seem to speak to the necessity for a comprehensive, uniform and integrated legal framework for electronic data processing (including EFT) in international trade.

35. Many of the other interbank and interinstitutional issues as, for example, the kinds of institutions which may engage in EFT business, the question of fair access to any EFT facilities for smaller institutions, the existence or otherwise of any anticompetitive aspects to EFT operations are essentially domestic law matters and will not be discussed in this paper. It may, however, be observed that if, as it now seems realistic to suppose, one EFT organization were to emerge as the sole or primary medium for international electronic funds transfer, interest would surely grow and pressure mount for bringing what was effectively a monopoly of a vital aspect of international trade under a regulatory régime other than private contract.[m] Such pressure would undoubtedly increase if the EFT system in question were at any point to add any clearing function to its services.

SUMMARY OF DELIBERATIONS OF THE UNCITRAL STUDY GROUP

36. At a recent session of the UNCITRAL Study Group on International Payments (19 to 22 September 1977) the issues outlined in paragraphs 37 to 48 below were identified as requiring study with respect to the role of EFT in international payments.

37. *Time of payment. When is payment final?* The Group was of the view that this was an issue of paramount importance in international electronic funds transfer.

38. The Group reached the preliminary conclusion that there appeared to be a case for a uniform international rule on this question.

39. *Allocation of liability for errors, mistake and fraud.* It was

[k] It will be recognized that these were the basic facts and issues in the English case of *Momm and Others* v. *Barclays Bank International Ltd.* [1976] 3 All E.R. 588. In that case the court held that payment was complete once X decided to accept A's transfer order and set in motion the computer process for effecting such transfer and B could, therefore, reclaim the sum in question from X. It is widely recognized that the decision in this case could quite conceivably have gone the other way and might still if the same issues came up in a different jurisdiction. The significance of the case in this context is that it points up how ill-defined, unclear and uncertain the rules regarding EFT still are and the potential for divergent developments under individual national laws in the absence of an internationally-sanctioned uniform legal framework. It also underlines the essential insufficiency of the régime of private contract to regulate electronic funds transfer operations in all their aspects.

[l] Freak atmospheric occurrences (e.g. lightning) have been said sometimes to cause changes such as erasures on computer magnetic tapes.

[m] A recent report indicates that SWIFT, with a current membership of over 500 institutions on both sides of the Atlantic and plans to extend operations to Japan and South America in the near future, could well become such a medium.

noted that such questions were generally regulated by private agreement among the parties to an EFT operation. A question was raised in this connexion as to how much autonomy the law should allow the parties not only as regards their rights *inter se* but also as regards their legal position vis-à-vis third parties. It was suggested that, by analogy to the through-cargo rules proposed by UNCTAD under which the originating carrier remained responsible to the shipper for the safety of the cargo and proper performance of the carriage throughout the entire voyage, regardless of the use of intervening carriers, the originating bank in an EFT transaction should be likewise accountable to the customer-transferor for the proper and timely payment of the sum to the transferee irrespective of the role of any intervening banks.

40. It was also suggested that with respect at least to fraud a rule might be adopted for EFT similar to that followed for the paper-based transfer, namely, that liability should rest on the person who "enabled" the fraud to be committed.

41. The Study Group reached the preliminary conclusion that there was also a *prima facie* case for work in this area with a view to arriving at a common international position with respect to these issues. It was suggested that this could be done by way either of uniform rules or of general conditions regulating bank-customer relations in an EFT transaction.

42. *Privacy with respect to EFT data.* Two aspects of privacy were noted by the Study Group: the protection of a customer's EFT records from access by public authorities or third parties without due process of law, and the need to ensure that only data strictly relevant to the business purpose was gathered and/or stored by operators of EFT systems.

43. No common position emerged in the Study Group as to the proper international response on this issue. Some members would leave this matter to national law whereas others pointed to the ensuing difficulty should individual national laws diverge on the kinds of data which should be protected and the level of protection to be granted them where the data in question could physically be retrieved in any of the countries linked by an EFT network.

44. *Usefulness to the customer of computer-produced records.* Concern was expressed as to the effect which computerization and the consequent elimination of the traditional paper-based record might have on the availability to the customer of adequate and legally admissible records of his transactions. The customer might require such records both as proof of payment and for official (e.g. tax) and other purposes. Apart from the admissibility problem in common law jurisdictions, there was the fact that unlike in the paper-based system where the customer had in his hands a piece of paper evidencing his transactions with a bank, the evidence in an EFT situation was often in the memory of the computer of the same bank against whom the customer may have a dispute. The customer must then depend on his adversary to obtain the evidence he needs.

45. The Study Group again did not arrive at any consensus as to the appropriate international response, if any, on this question and recommended that the question be not pursued at this stage.

46. *"Float" within the EFTS; who is entitled to benefit?* The Study Group noted that under current bank EFT practices, it was customary to draw a distinction between customer-to-customer and interbank transfers: crediting was effected as soon as possible in the latter situation whereas in the former there was generally a time-lag (sometimes of up to two days) between debiting the transferor and crediting the transferee during which the bank took advantage of the interest and "float" of the funds.

47. The Group noted, however, the difficulty of establishing uniform banking rules or practices on this matter. As the experience with regard to the rules on documentary credit had shown, banking practices varied so much from country to country; banking practice in one country might consider 24 hours a reasonable time-lag while in others a period of 10 days or even three weeks would be considered normal. Account had also to be taken of the varying stages of development with respect to electronic technology attained in different countries.

48. The Group did not arrive at any recommendation with respect to this issue.

Conclusions

49. While it is true that most of the existing and operational EFT schemes are still small in scope, seen from the point of view both of the number of participants and the amounts involved as well as of the services offered, and that the more ambitious schemes are still only projections, there appears to be universal agreement that electronic funds transfer could in due course become the principal payments mechanism in and between the most advanced economic systems. Certainly, as the SWIFT project indicates, a major role can be anticipated for EFT in the field of international commercial transactions, not only because of the speed and greater reliability which it would impart to such transactions, but also because of its promise of cost-savings through the standardization of message elements and media and the reduction or elimination of such costly factors as delay, clerical errors, loss or misplacement of items, etc., which seem to be unavoidable features of the paper-based system.

50. The regulatory régime of private contract under which present international EFT operations are carried on may be said to have worked well enough so far and furthermore may be acknowledged to possess features such as flexibility and adaptability which would be desirable in any régime. Even so, its inherent limitations, as, for example, in the matter of third-party rights, as well as the enormous implications for international trade of electronic data processing in all its aspects, would appear to enjoin the elaboration, not perhaps immediately, but at some appropriate point in the future, of an international legal framework to provide certainty and uniformity in this key area of international commercial transactions.

B. Note by the Secretary-General: recommendations of the Asian-African Legal Consultative Committee (A/CN.9/155)*

1. The Asian-African Legal Consultative Committee (AALCC),[1] at its nineteenth session held at Doha, Qatar, from 16 to 23 January 1978, considered the possible composition of the future programme of work of the Commission.

2. At the conclusion of its deliberations, AALCC adopted the resolution concerning the future programme of work of the Commission that is set forth as an annex to this note.

ANNEX

Decision by the Asian-African Legal Consultative Committee on the future programme of work of the Commission

(Taken at its nineteenth session, Doha, Qatar, 16-23 January 1978)

The Asian-African Legal Consultative Committee,

Having considered at its nineteenth session the request of the General Assembly of the United Nations that Governments submit their views and suggestions on the long-term programme of work of the United Nations Commission on International Trade Law (UNCITRAL) (resolution A/31/99);

Having noted the views expressed in this respect by its Sub-Committee on International Trade Law Matters;

Being convinced that it is important that UNCITRAL, when drawing up its new programme of work, should give due considera-

* 4 May 1978.

[1] The membership of AALCC consists of 35 States of the Asian-African region.