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INTERNATIONAL SALE OF GOODS

DRAFT COMMENTARY ON ARTICLES 1 TO 13 OF THE DRAFT CONVENTION ON THE  
FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS AS  
APPROVED OR DEFERRED FOR FURTHER CONSIDERATION BY THE WORKING GROUP  
ON THE INTERNATIONAL SALE OF GOODS AT ITS EIGHTH SESSION

Report of the Secretary-General

INTRODUCTION

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a draft commentary on the draft Convention on the formation of contracts for the international sale of goods as approved or deferred for further consideration by the Working Group (A/CN.9/128, para. 174). This draft commentary has been prepared in response to that request.
2. Article 14 of the draft Convention has been considered in the report of the Secretary-General dealing with unresolved matters in respect of formation and validity of contracts (A/CN.9/WG.2/WP.28).
3. The draft commentary has been prepared on the text of the draft Convention as it appears in annex I to the report of the Working Group on the work of its eighth session (A/CN.9/128, annex I). Generally, the existence of square brackets has been ignored in the preparation of this draft commentary which seeks to explain the text as it currently exists.

DRAFT COMMENTARY ON ARTICLES 1 TO 13 OF THE DRAFT CONVENTION ON  
THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS  
AS APPROVED OR DEFERRED FOR FURTHER CONSIDERATION BY THE WORKING  
GROUP ON THE INTERNATIONAL SALE OF GOODS AT ITS EIGHTH SESSION 1/

"Article 1 (alternative 1)

This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods.]

Article 1 (alternative 2)

(1) This Convention applies to the formation of contracts of sale of goods entered into by parties whose places of business are in different States:

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

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

(3) This Convention does not apply to the formation of contracts of sale:

- (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;
- (b) by auction;
- (c) on execution or otherwise by authority of law;
- (d) of stocks, shares, investment securities, negotiable instruments or money;
- (e) of ships, vessels or aircraft;
- (f) of electricity.

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

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1/ Those matters which have not been resolved by the Working Group are in square brackets.

(5) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

(6) For the purposes of this Convention:

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

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

(c) neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration.<sup>7</sup>"

#### PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

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

Convention on the Limitation Period in the International Sale of Goods (Limitation Convention), articles 2, 3, 4, 6.

Draft Convention on the International Sale of Goods (CISG), articles 1, 2, 3, 5.

#### COMMENTARY

1. This article states the rules for determining whether this Convention is applicable to the formation of a contract of sale of goods and sets out those contracts the formation of which is excluded from the application of this Convention.

#### Text for use by those States which adopt CISG, alternative 1

2. Alternative 1 is for use by those States which adopt the proposed Convention on the International Sale of Goods (CISG).

3. In order to be sure that the same criteria are employed to determine whether the present Convention and the Convention on the International Sale of Goods would apply to a transaction, alternative 1 provides that if a contract of sale would be governed by CISG, the present Convention applies to the formation of the contract. As a result, if both parties to the proposed transaction were from States which had adopted CISG but only one of them had adopted the present Convention, the present

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Convention would apply to the formation of the contract in the courts of the State which had adopted the present Convention, but it would not apply to the formation of the contract in the State which had not adopted the present Convention unless a Court in that State or in a third State selected the law of a Contracting State as the applicable law to govern the formation of the contract.

Text for use by those States which do not adopt CISG [alternative 2]

4. Alternative 2 is for use by those States which do not adopt CISG. It reproduces articles 1, 2, 3 and 5 of CISG, with such minor changes as are necessary for it to apply to the formation of contracts rather than to the contract itself.

Action by the Working Group

5. The Working Group decided that these draft provisions should be placed in square brackets to indicate that they would have to be reconsidered in the light of any changes which the Commission might make to the scope of application of the draft CISG established by the Working Group at its seventh session (A/CN.9/116, annex I).

6. The Commission, at its tenth session in Vienna from 23 May to 17 June 1977, made no changes in substance to articles 1, 2, 3 and 5 of the draft CISG. It made two changes in presentation:

- article 6 (c) in the text as recommended by the Working Group on the International Sale of Goods (A/CN.9/116) became article 1 (3) of CISG. The equivalent text in the draft Convention on the Formation of Contracts for the International Sale of Goods is article 1 (6) (c).
- the words "did not know and had no reason to know" in article 2 (a) of the draft CISG (identical to article 1 (3) (a) of the draft Convention on the Formation of Contracts for the International Sale of Goods) were replaced by "neither knew nor ought to have known".

"Article 2

(1) The parties may [agree to] exclude the application of this Convention.

(2) Unless the Convention provides otherwise, the parties may [agree to] derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages.

(3) However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

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PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 2.

Limitation Convention, article 3 (3).

Draft CISG, article 4.

COMMENTARY

1. Article 2 states the extent to which the parties may exclude the application of this Convention and derogate from or vary the effect of any of its provisions.

Exclusion of the application of the Convention, paragraph (1)

2. Paragraph (1) states that the parties may exclude the application of the Convention as a whole. The most likely manner in which the parties would act to exclude the application of this Convention would be by the choice of a specific national law to govern the formation of the contract. It would be a matter of interpretation of the intention of the parties in a given case as to whether the choice of a specific national law to govern "the contract" was also a choice of that national law to govern the formation of the contract.

3. If the parties exclude the application of this Convention without specifying the national law to be applied, the rights and obligations of the parties in respect of the formation of the contract would be governed by the national law made applicable by the rules of private international law.

Derogations from the provisions of this Convention, paragraph (2)

4. Paragraph (2) enables the parties, unless the Convention otherwise provides, to derogate from or vary any of the individual provisions of the Convention. The paragraph indicates the sources from which this intention can be derived. The inclusion of practices which the parties have established between themselves would enable a Court to take account of the manner in which prior contracts between the parties have been formed.

5. Therefore, even though it may not be necessary for the parties to agree on such matters as the delivery date or the date of payment of the price for the offer to be sufficiently definite, if one of the parties insists on prior agreement on these points, no contract will be concluded until such agreement is reached.

6. Similarly, if the offeror specifies that the acceptance must be sent by air mail and that it must arrive by the end of the business day on 30 June, a purported acceptance which was delivered in person by the end of the business day on 30 June would not constitute an acceptance under the terms of paragraph (2), unless the terms of the offer were interpreted to mean only that the acceptance must arrive by the close of business on 30 June and that the term concerning air mail was used only to emphasize that a speedy reply was required.

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Silence as acceptance, paragraph (3)

7. Paragraph (3) states that a term of the offer which stipulates that silence shall amount to acceptance is invalid. This is the only specific restriction on the right of the parties either to modify the substantive provisions of this Convention or to specify the act which will constitute an offer or an acceptance.

8. It should be noted that silence may constitute acceptance if that mode of acceptance was agreed to in the negotiations, as a practice which the parties have established between themselves or is a mode of acceptance sanctioned by usage.

Example 2A. For the past 10 years the buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders the seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question the seller neither shipped the goods nor notified the buyer that he would not do so. The buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that the seller did not need to acknowledge the order and, in such a case, the silence of the seller constituted acceptance of the offer.

Example 2B. One of the terms in a concession agreement was that the seller was required to respond to any orders placed by the buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by the seller. On 1 July the seller received an order for 100 units from the buyer. On 25 July the seller notified the buyer that he could not fill the order. In this case a contract had been concluded on 15 July for the sale of 100 units because the concession agreement, as part of the preliminary negotiations, provided that a non-response from the seller would be deemed to be acceptance.

"Article 3 (alternative 1)

An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses.]

Article 3 (alternative 2)

Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means.]"

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 3.

Uniform Law on the International Sale of Goods (ULIS), article 15.

Draft CISG, article 11.

Actions of the Working Group and of the Commission

1. The Working Group decided to place both alternatives of article 3 in square brackets because the Commission would consider article 11 of the draft CISG (A/CN.9/116, annex I) at its tenth session.
2. The Commission at its tenth session adopted the following text of article 11 of CISG:

"Article 11

- (1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.
  - (2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention."
3. Article (X), to which article 11 of CISG refers, is as follows:

"Article (X)

A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing, may at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1) shall not apply to any sale involving a party having his place of business in a State which has made such a declaration."

4. For the purposes of this commentary it has been assumed that the Working Group will adopt article 11 of CISG as article 3 of this Convention with the exception that paragraph (2) would read: "Paragraph (1) of this article does not apply to the formation of a contract of sale ...".

General rule as to a writing, paragraph (1)

5. Paragraph (1) states a general rule that a contract of sale subject to this Convention need not be concluded in or evidenced by writing. This general rule would displace any otherwise applicable rule of national law that contracts of sale of particular kinds of goods or for more than a given monetary value must either

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be concluded in or evidenced by writing in order to be valid or enforceable between the parties.

6. The parties could, however, in accordance with article 2, agree that no communication is to be regarded as an offer or an acceptance unless it is in writing. The same result might occur because of the practices which the parties have established between themselves or because of a usage.

7. Moreover, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of exchange control regulations or otherwise, would still be enforceable against a party who concluded the non-written contract even though the contract itself would be enforceable between the parties.

The requirement as to form, paragraph (1)

8. The provision that an offer or an acceptance is not subject to "any other requirement as to form" refers to requirements such as the placing of seals on a document, its witnessing or authentication by a notary or the use of other special forms.

Proof by means of witnesses, paragraph (1)

9. The provision which enables the existence and content of the offer and the acceptance to be proved by any means including witnesses is intended to apply especially to those countries in which the requirement that there be a record of the contract in writing goes to the proof of the existence of the contract rather than to the proper form of the offer and acceptance. Article 3 might otherwise be interpreted in the courts of those countries in such a manner so as not to achieve the result intended by the first sentence of the article.

10. Although article 3 of ULF text could be interpreted to mean only that the existence of the offer and acceptance may be proved by means other than by a writing, it must be understood to mean also that the terms of the offer and acceptance may be proved by means of witnesses or any other appropriate means.

Declaration of non-application, paragraph (2)

11. Some countries consider it an important matter of public policy that contracts of sale be concluded in or evidenced by writing. Paragraph (2), therefore, provides that the general rule in paragraph (1) does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) to the effect that paragraph (1) shall not apply.

"Article 3A

(1) The contract may be modified or rescinded merely by agreement of the parties.

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

UNCITRAL Arbitration Rules, articles 1 and 30.

COMMENTARY

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

General rule, paragraph (1)

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

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

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

4. Although the present text of article 3 of this draft and article 11 of CISG provide that a contract need not be in writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing, can be modified or rescinded orally.

5. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 which provides that a contract governed by this

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Convention need not be evidenced by writing. However, article 3A (2) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

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

7. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or rescission to be in writing is precluded from doing so only to the extent that the other party has relied on actions of the first party and that, in so doing, he has suffered a detriment. If there has either been no reliance on the actions of the first party or no detriment in so relying, the first party would not be precluded from relying on the contract provision.

#### "Article 4

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

(2) An offer is sufficiently definite if expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

#### PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 4.

Draft CISG, article 37.

#### COMMENTARY

1. Article 4 states the conditions that are necessary in order that a proposal to conclude a contract constitutes an offer.

#### Addressee of an offer, paragraph (1)

2. Paragraph (1) provides that the proposal must be "addressed to one or more specific persons" in order to constitute an offer. These words are intended to

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exclude "public offers", in the sense of an offer to unnamed members of the general public, from the ambit of the Convention. This will reverse the law in some countries in which such "public offers" are considered as offers if they meet the other criteria of an offer.

3. It should be noted, however, that an offer can be made to a large number of persons simultaneously so long as those persons are "specific persons". Therefore, an advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specified persons", whereas the same advertisement or catalogue distributed to the public at large would not. However, such an advertisement or catalogue would constitute an offer only if, in addition, it indicated an intention of the sender to be bound and if it was sufficiently definite.

Intention to be bound, paragraph (1)

4. In order for the proposal for concluding a contract to constitute an offer, it must indicate "the intention of the offeror to be bound in case of acceptance". Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labeled by the parties as an "offer" or as an "acceptance". The requisite intention to be bound in case of acceptance can be established also from the surrounding circumstances or from the preliminary negotiations or usage. <sup>2/</sup>

5. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 5.

An offer must be sufficiently definite, paragraphs (1) and (2)

6. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. Paragraph (2) states that an offer is sufficiently definite if expressly or impliedly it

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<sup>2/</sup> Article 4 (2) of ULF made this clear. It enabled a proposal for concluding a contract to be "interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale". See also article 14 of the draft Convention prepared by the Working Group which is discussed in Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28).

- indicates the kind of goods, and
- fixes or makes provision for determining the quantity, and
- fixes or makes provision for determining the price.

The fact that the proposal for concluding a contract is sufficiently definite may be established from the surrounding circumstances or from the preliminary negotiations or usage. 3/

Quantity of the goods, paragraph (2)

7. Although, according to article 4 (2), the proposal for concluding a contract will be sufficiently definite to constitute an offer if it fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

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

9. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the sale of the goods considered to be ancillary provisions. In either case, the contract would be recognized as legally valid.

Price, paragraph (2)

10. Although the first sentence of article 4 (2) provides that the proposal for concluding a contract must fix or make provision for determining the price in order for it to constitute an offer, the second sentence indicates that this is not necessary "if the offer indicates the intention to conclude the contract even without making provision for the determination of the price". In such a case, the last portion of the second sentence repeats the language of article 37 of the draft Convention on the International Sale of Goods which provides the formula for determining the price.

11. It should be noted that the formula to be used if the second sentence of

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3/ Ibid.

article 4 (2) applies would determine the price on the basis of that prevailing at the time of the conclusion of the contract, i.e. "at the moment the indication of assent is communicated to the offeror". If at that moment there was no price generally charged by the seller or generally prevailing for such goods sold under comparable circumstances, the second sentence of article 4 (2) could have no effect and no legally effective offer would have been made.

"Article 5

- (1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer even if it is irrevocable.
- (2) The offer can be revoked if the revocation is communicated to the offeree before he has dispatched his acceptance or, shipped the goods or paid the price.
- (3) However, an offer cannot be revoked:
  - (a) if the offer expressly or impliedly indicates that it is firm or irrevocable; or
  - (b) if the offer states a fixed period of time for acceptance irrevocability; or
  - (c) if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 5.

COMMENTARY

1. Article 5 states the time at which an offer becomes effective and the conditions under which it can be revoked.

Time at which offer is effective, paragraph (1)

2. Article 5 (1) provides that an offer becomes effective when it has been communicated to the offeree. Until this time the offeree may not accept the offer and the offeror may withdraw it, even if it is irrevocable. Therefore, if the offeree, having learned of the dispatch of the offer by some means which did not constitute "communication" <sup>4/</sup> of the offer to him, purported to accept the offer, the offeror could nevertheless withdraw it until there was "communication".

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<sup>4/</sup> The concept of communication is defined in article 12.

Revocation of an offer, paragraph (2)

3. Article 5 (2) states that offers are in general revocable. However, the remainder of article 5 (2) and article 5 (3) state several situations in which the offer is or becomes irrevocable.

4. The three situations set forth in article 5 (2) which render a revocable offer irrevocable should be read in conjunction with article 8 (1 bis) and (1 ter). Article 8 (1 bis) states the general rule that an acceptance becomes effective at the moment it is communicated to the offeror. As applied to the situation in which the offeree does not dispatch an acceptance but instead commences performance by shipping the goods or paying the price, article 8 (1 ter) provides that the acceptance is effective at the moment notice of that acceptance is communicated to the offeror.

5. Because the receipt theory of acceptance set out in article 8 can cause the offeree to suffer loss if the offeror revokes the offer after the offeree has dispatched his acceptance, shipped the goods or paid the price, article 5 (2) states that once any one of those three acts has occurred the offer becomes irrevocable. However, the contract is not concluded until the offer has been accepted in accordance with article 8.

Irrevocable offers, paragraph (3)

6. Article 5 (3) sets forth three situations in which the irrevocability of the offer is a result of the nature of the offer. The first two would not seem to call for comment, i.e. that the offer cannot be revoked if it expressly or impliedly indicates that it is firm or irrevocable or if it states a fixed time for irrevocability. 5/

7. An alternative provision in article 5 (3) (b) provides that the offer cannot be revoked if the offer states a fixed time for acceptance. Therefore, if the offer states "you have until 1 June to accept this offer" or "if I have not received your acceptance by 1 June, I will send the goods to someone else", the offer is irrevocable until 1 June.

8. The third situation in which the offeror cannot revoke his offer under article 5 (3) is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

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5/ This statement is based, inter alia, on the second alternative text of article 5 (3) (b). The first alternative text is commented on in paragraph 7.

"Article 6

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

COMMENTARY

1. Article 6 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention and CISG which depend on the time of the conclusion of the contract.

2. On the other hand article 6 does not state a rule for the place at which the contract is concluded. Such a provision is unnecessary since no other provisions of this Convention or of the CISG depend upon the place at which the contract is concluded. Furthermore, the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. Therefore, it was thought best to leave this matter to the applicable national law.

"Article 7

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

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

[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.] ]"

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PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 7.

COMMENTARY

General rule, paragraph (1)

1. Article 7 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.
2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.
3. Although the explanation for the rule in article 7 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 7 (1), does not give desirable results. Articles 7 (2) and (3) create exceptions to article 7 (1) in regard to two of these situations.

Non-material alterations, paragraph (2)

4. Article 7 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which however do not materially alter the terms of the offer. For example, an offer stating that the offeror has 50 tractors available for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".
5. In most cases in which a reply purports to be an acceptance any additional or different terms in the reply will not be material and, therefore, under article 7 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the acceptance, further negotiations will be necessary before a contract is concluded.
6. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds

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to this reply by shipping the goods or paying the price, a contract may eventually be formed by virtue of article 8 (1 ter). <sup>6/</sup> In such a case the terms of the contract would be those of the counter-offer.

Confirmation of the conclusion of a contract, paragraph (3)

7. Typically, after the conclusion of an oral contract or after the conclusion of a contract by telegram or telex, one or both of the parties will send to the other a confirmation of the contract. The purpose of the confirmation is not only to produce a paper record of the transaction, but also to inform the other party of the terms of the contract as those terms were understood by the party sending the confirmation. In addition, it is common for invoices sent by the seller to contain general conditions of sale which were not discussed by the parties prior to the conclusion of the contract. Article 7 (3) recognizes an obligation on the part of the party receiving the confirmation or the invoice to verify whether those terms are consistent with his understanding of the contract and to object if they are not.

8. Article 7 (3) distinguishes between the additional or different terms in the confirmation or invoices which are printed and those terms which are not printed. The employees of both parties will seldom, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in. If those terms are in accord with their understanding of the contract as made orally, by telegram or telex, or if those terms contain only such additions as "ship immediately" or "ship draft against bill of lading inspection allowed", no objection will usually be made even if the printed terms contain important additions or modifications.

9. As to the non-printed terms, article 7 (3) adopts the same solution as that in article 7 (2), i.e. they become part of the contract unless they materially alter it, or notification of objection is given without delay after receipt of the confirmation or invoice.

10. On the other hand the printed terms in the confirmation form become part of the contract only if they are expressly or impliedly accepted by the other party. Such implied acceptance might be evidenced by showing a past practice of contracting on those terms or by showing actions in respect of this contract in a manner consistent with those terms. In any case, it would be the burden of the party who had sent the confirmation form to show that the other party had in some manner accepted the printed terms.

11. It should be noted that article 7 (3), unlike article 7 (2), does not place in question the existence of the contract. The contract would have been concluded by the prior oral, telegraphic or telex acceptance. Article 7 (3) governs only the question of the extent to which the additional or different terms in the confirmation become part of the contract.

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<sup>6/</sup> Under article 5 (2) the offer, i.e. the counter-offer in this example, becomes irrevocable upon the shipment of the goods or the payment of the price.

"Article 8

(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

(1 bis) Acceptance of an offer becomes effective at the moment the indication of assent is communicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror has fixed or if no time is fixed, within a reasonable time [, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

[(1 ter) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph (2) of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph (1 bis) of the present article.]

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, articles 6 and 8.

UNCITRAL Arbitration Rules, article 2 (2).

COMMENTARY

1. Article 8 sets out the conduct of the offeree which constitutes an acceptance and the moment at which the acceptance is effective.

Acts constituting an acceptance, paragraph (1)

2. Most acceptances are in the form of a declaration by the offeree indicating assent to an offer. However, article 8 (1) recognizes that other conduct by the offeree indicating assent to the offer also may constitute an acceptance. Articles 8 (1 bis) and 8 (1 ter) indicate that one particular form of other conduct which is envisaged is the communication to the offeree that the goods have been shipped or that payment has been made.

Time at which acceptance is effective, paragraph (1 bis)

3. Some legal systems consider the acceptance of an offer to be effective on dispatch of the notice of acceptance while other legal systems consider it to be effective only on receipt by the offeror. This Convention adopts the receipt theory by virtue of the definition of "communicated" in article 12.

4. Article 6 provides that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with article 8 (1 bis) and article 8 (1 ter).

5. The offeree's indication of assent to an offer can be communicated by a third party, such as a bank through whom payment has been made; it need not be communicated by the offeree himself.

6. Article 8 (1 bis) states the traditional rule that an acceptance is effective only if it is communicated, i.e., if it arrives, within the time fixed by the offeror or, if no such time is fixed, within a reasonable time. It should be noted, however, that article 9 provides that an acceptance which arrives late is, or may be, considered to have been communicated in due time. However, the sender-offeree still bears the risk of non-arrival of the acceptance.

Acceptance of an offer made irrevocable by shipment of the goods or payment of the price, paragraph (1 ter)

7. Article 5 (2) provides, in part, that once the offeree ships the goods or pays the price, the offer becomes irrevocable even though the offeree has not sent a declaration of acceptance to the offeror. However, article 8 (1 bis) provides the acceptance is not effective, and therefore, the contract is not concluded, until the offeror receives a notice of the acceptance.

8. The notice of the acceptance may consist of a declaration of acceptance pursuant to article 8 (1). However, it may also consist of a notice to the offeror that the goods have been shipped or that the price has been paid, such acts constituting "other conduct" as referred to in article 8 (1). Such a notice may come directly from the offeree or it may come from a third party, such as the bank which has paid or received the payment of the price.

9. The second sentence of article 8 (1 ter) is intended to preclude the

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possibility that an offeror would not know for an appreciable period of time that his offer, which had been revocable at the time made, was irrevocable because of the shipment of the goods or payment of the price by the offeree. Therefore, where the offer becomes irrevocable in that manner, the acceptance is not effective unless notice of the shipment or payment is given promptly after that fact. Notice given later than "promptly" would constitute a late acceptance with the consequences described in article 9.

Commencement of period of time to accept, paragraph (2)

10. Article 8 (2) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

11. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 8 (2) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the hour of the day the telegram is handed in for despatch".

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

"Article 9

(1) If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by dispatch of a notice.

(2) If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed."/>

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PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 9.

COMMENTARY

1. Article 9 deals with acceptances that arrive after the expiration of the time for acceptance.

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

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 9 (1) provides that the late acceptance becomes an effective acceptance if the offeror promptly informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to have arrived in due time.

3. Article 9 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance at the moment the original offeror informs the original offeree of his intention either orally or by the dispatch of a notice whereas under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

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

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment of the communication of the acceptance, unless the offeror promptly notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time, the offeror must send a notice to the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must send a notice to the offeree that he considers the acceptance to have arrived in due time.

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"Article 10"

An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance becomes effective."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 10.

COMMENTARY

Article 10 provides that an acceptance cannot be revoked after it has become effective. This provision is a consequence of the rule in article 6 that a contract of sale is concluded at the moment the acceptance becomes effective. 7/

"Article 11"

The formation of the contract is not affected by the death of one of the parties or by his becoming physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 11.

COMMENTARY

1. Article 11 provides that the normal rule to be applied is that an offer can be accepted and a contract can be concluded even though the offeror or the offeree has died or has become physically or mentally incapable of contracting before the acceptance became effective. In such a case the contract is concluded with the legal representative or successor of the person who died or became incapable of contracting. This rule reverses the rule in some legal systems that an offer can be accepted only if both the offeror and offeree are personally able to conclude the contract at the moment the acceptance would become effective.

2. It would appear that article 11 does not affect the rule that the offeror must have been capable of contracting at the time the offer was made. It is less clear whether the offeree must have been capable of contracting at that time.

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7/ Articles 8 (1 bis) and 8 (1 ter) state when an acceptance becomes effective.

3. The last clause of article 11 makes it clear that the offer cannot be accepted if the parties intended that the contract could be concluded only between themselves and not between one of them and a legal representative or successor of the other or if this would result from usage or from the nature of the transaction.

4. Article 11 does not relate to all the events which might occur between the making of an offer and its acceptance which would prevent the acceptance from being effective. In particular, it gives no rule for the eventuality that one or the other of the two parties would become bankrupt or that, if it was a legal person, it would cease to exist. The rules on bankruptcy are so complex and differ so widely between legal systems that it was thought not to be desirable at this time to attempt a unification of the law in respect of this one issue. Similarly, the termination of existence of a legal person for reasons other than bankruptcy is often associated with a reorganization of the corporate structure of that party. The extent to which a successor corporation should be bound by offers made by its predecessor or the extent to which it should be able to accept offers made to its predecessor was a matter thought to be better handled by direct negotiation between the two parties and, failing agreement, by the applicable national law.

#### "Article 12

For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is 'communicated' to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence."

#### PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 12.

#### COMMENTARY

1. Article 12 provides that any indication of intention is "communicated" when it is delivered, not when it is dispatched. Until the delivery has occurred, the indication of intention has no legal effect.

2. One consequence of this rule is that an irrevocable offer or an acceptance may be withdrawn until it is delivered. Furthermore, an offeree who learns of an offer from a third person prior to its delivery may not accept the offer until it has been delivered.

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

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"Article 13

Usage means any practice or method of dealing of which the parties knew or had reason to know and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 13.

Draft CISG, article 7.

COMMENTARY

1. Article 13 is modeled on article 7 of the draft CISG. However, it differs from the draft CISG in several respects.
2. Article 7 of the draft CISG is a substantive provision which states that any "usage of which the parties knew or ought to have known <sup>8/</sup> and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned" is made applicable to the contract. In this Convention, however, a "usage" is made applicable to the transaction by virtue of articles 2 (2), 11 and 14 (4). The function of article 13 is to define what constitutes a "usage" within the context of this Convention.

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<sup>8/</sup> The Commission at its tenth session replaced the words "had reason to know" by the words "ought to have known".