



UNITED NATIONS  
GENERAL  
ASSEMBLY



Distr.  
LIMITED

A/CN.9/WG.2/WP.28  
24 August 1977

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON  
INTERNATIONAL TRADE LAW  
Working Group on the International  
Sale of Goods  
Ninth session  
Geneva, 19-30 September 1977

ANALYSIS OF UNRESOLVED MATTERS IN RESPECT OF THE  
FORMATION AND VALIDITY OF CONTRACTS FOR THE  
INTERNATIONAL SALE OF GOODS

Report of the Secretary-General

CONTENTS

	<u>Page</u>
Introduction . . . . .	2
I. Draft commentary on article 14 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 . . .	3
II. Validity of contracts . . . . .	11
III. Additional subjects which might be included in the draft Convention on the Formation of Contracts for the International Sale of Goods . . . . .	16
IV. Reorganization of provisions of the draft Convention . . . . .	18

## INTRODUCTION

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a commentary on the text of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group at that session. 1/ A draft commentary on the first 13 articles appears in document A/CN.9/WG.2/WP.27. A draft commentary on article 14 is set out in part I of this report.
2. The Working Group also requested the Secretariat to analyse the UNIDROIT text of a draft law for the unification of certain rules relating to validity of contracts of international sale of goods "and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contract should be included in the draft Convention". 2/ This analysis is contained in part II of this report.
3. In addition, during the course of the session it was suggested that the Secretariat might consider whether there were any additional subjects which might profitably be added to the present draft Convention on the Formation of Contracts for the International Sale of Goods. Some suggestions along these lines are contained in part III of this report. Suggestions on these matters which were communicated to the Secretariat by the German Democratic Republic are contained in the annex to document A/CN.9/WG.2/WP.30.
4. The Working Group also requested the Secretariat to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles. 3/ This suggested reorganization is contained in part IV of the report.

---

1/ Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174.

2/ Ibid.

3/ Ibid.

I. DRAFT COMMENTARY ON ARTICLE 14 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

"Article 14

(1) /Communications, statements and declarations by and acts of / the parties are to be interpreted according to their actual common intent where such an intent can be established.

(2) If the actual common intent of the parties cannot be established, /communications, statements and declarations by and acts of / the parties are to be interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

(3) If neither of the preceding paragraphs is applicable, /communications, statements and declarations by and acts of the parties / are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 /may/ /is to/ be determined in the light of the circumstances of the case including the /preliminary/ negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages /of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned./"

PRIOR UNIFORM LAW

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), articles 4(2), 5(3).

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

COMMENTARY

5. At its eighth session the Working Group on the International Sale of Goods decided to delete the two provisions on interpretation found in ULF and requested the Secretariat to prepare a draft text on interpretation based on articles 4(2) and 5(3) of ULF and articles 3, 4 and 5 of the draft Law on Validity. 4/

---

4/ A/CN.9/128, para. 155.

6. The Working Group, after considering a draft proposed by the Secretariat, agreed that a provision on interpretation was important and should be included in the draft text. However, in view of the lack of time to discuss fully all the important issues raised by this text, and because other important matters of interpretation had not been included in it, the Working Group decided to place the provision in square brackets and requested the Secretariat to prepare a commentary on this article that included practical examples. <sup>5/</sup>

7. This commentary on article 14 has been written in response to that request. Because of the tentative nature of the current text of article 14, this commentary is not limited to the issues raised by that text.

8. In this discussion two general questions are raised:

- whether the text should be limited to the interpretation of the statements and acts of the parties in order to determine whether a contract has been concluded or whether the text should also apply to interpretation of the contract.
- what rules of interpretation should be included in the text.

These two questions are interrelated. However, some preliminary remarks in respect of the scope of application of the rules of interpretation should first be made.

#### Scope of application

9. The text of article 14 standing by itself would seem to provide that the rules of interpretation contained therein apply to the various communications, statements, and declarations by and acts of the parties for the purpose of determining the content of the contract once concluded as well as for the purpose of determining whether those communications, statements, declarations and acts were sufficient to constitute a contract. However, article 1 of the present draft Convention in both its alternatives provides that "This Convention /including article 14/ applies to the formation of contracts ...". Therefore, unless an exception was made to the general rules on the scope of application of this draft Convention, it would appear that article 14 would by necessity be limited to the determination of whether a contract was concluded.

10. This restricted function of article 14 as currently drafted is consistent with the functions of articles 4(2) and 5(3) of ULF, which gave rules of interpretation for determining whether a particular communication constituted an offer and whether or not the offer was irrevocable. Article 14 is, however, more restricted in its functions than were articles 3, 4 and 5 of the draft Law on Validity.

11. Articles 3, 4 and 5 of the draft Law on Validity were intended "to describe ... the steps (and thereby to exclude others) that must be taken in order to ascertain

---

<sup>5/</sup> Ibid., paras. 156, 158.

the existence of a contract and its precise content". 6/ If the application of the rules of interpretation in articles 3 and 4 showed that no agreement between the parties could be established, "there is no contract". 7/ However, if by application of those rules of interpretation a contract was found to exist, the same rules of interpretation were to be applied to determine its content.

12. Some of the difficulties in restricting the application of article 14 as it is currently drafted to the question as to whether a contract has been concluded arise out of the fact that its substantive rules of interpretation are taken directly from articles 3 and 4 of the draft Law on Validity. The Working Group may wish, therefore, to consider whether it should either replace article 14 with provisions similar to articles 4(2) and 5(3) of ULF which would be limited to certain narrow questions relating to the formation of the contract or expand the scope of application of the rules on interpretation so that they would apply to the interpretation of the contract.

#### Content of the rules in article 14

13. The rules of interpretation currently in article 14 give primacy to the subjective actual common intent of the parties. If such an actual common intent cannot be determined, the subjective intent of one of the parties is to be followed if the other party knew or ought to have known what that intent was. Upon the failure of either of these two tests to produce a result, an objective standard of interpretation is to be applied, "the intent that reasonable persons would have had in the same circumstances".

14. A fourth possible rule, one which is not found in article 14, would be that the words and actions of the parties are to be interpreted as would a reasonable third person not in the same situation as the parties. Such a test is sometimes referred to as the "plain meaning rule". The principal difference between such a rule and the rule in article 14(3) is that the reasonable persons in 14(3) are to be treated as being "in the same circumstances" as the parties. In the context of a commercial sale, it would appear that the "reasonable persons" would be merchants who dealt in the trade concerned rather than intelligent non-merchants. Furthermore, according to article 14(4), they are reasonable persons who are aware of all the negotiations of this transaction, any practices these parties have established between themselves, any conduct of these parties subsequent to the conclusion of the contract and usages relevant in the trade.

15. Therefore, if it was an industry practice that a provision in the contract that the goods were to be "50 per cent pure" was met by goods that were 49.5 per cent

---

6/ Explanatory report of the Max-Planck Institut für Ausländisches und Internationales Privatrecht (hereafter referred to as the Max-Planck report) (UNIDROIT document: ETUDE XVI/B, Doc. 22 (English and French only), p. 23). All page references given in the foot-notes pertain to the English language version of the report.

7/ Article 5.

pure, this industry practice would be used in the interpretation of the contract under article 14(3), as being indicative of the intent that reasonable persons in the same circumstances as the parties would have had. However, this industry practice would not be used under the "plain meaning" rule because it would not accord with the understanding that intelligent individuals who were not engaged in this particular trade would give to these words.

16. It would also seem to be the case that as a result of the rule in article 14(3) the substance of article 9(3) of the Uniform Law on the International Sale of Goods (ULIS) would be introduced into this Convention as a supplementary rule of interpretation. Article 9(3) of ULIS reads:

"3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

17. Where the contract is commercial, reasonable persons in the same circumstances as the parties, i.e. in the trade concerned, would have the intent to use the meaning usually given in that trade to an expression, provision or form of contract commonly used in that trade. However, in contrast to article 9(3) of ULIS, article 14(3) is clearly subordinate to rules of interpretation which put the primary emphasis on the subjective intent of the parties. 8/

18. To a certain degree the fact that the "reasonable person" rule of article 14(3) is phrased in terms of reasonable persons in the same situation as the parties, makes the order in which the three rules are to be applied of minor importance. What is important is that the "plain meaning" rule is not to be applied. This point is well illustrated by the example used in the Max-Planck report accompanying the draft Law of Validity.

"The seller may agree with the buyer to indicate a purchase price of 50,000 in his invoice in order to reduce the broker's fees, although they are agreed that the true price is to be 100,000. The true contract of the parties (which may or may not be void for other reasons) is for 100,000, while the feigned contract is for 50,000. The latter contract is void, according to the common intent of the parties. In these cases of 'simulated contracts' the common intent of the parties is to prevail." 9/

---

8/ Article 9(3) was deleted from the revision of ULIS by the Working Group at its sixth session (A/CN.9/100, para. 38, UNCITRAL Yearbook, vol. VI: 1975, part two, I.1). A proposal to reintroduce that provision, or one similar in content, was rejected by a narrow margin at the tenth session of the Commission (Report of the United Nations Commission on International Trade Law on the work of its tenth session, Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 86).

9/ Max-Planck report, p. 23.

/...

19. As stated in the Max-Planck report, the actual common intent of the parties, which is made the governing intent by article 14(1) (article 3(1) of the draft Law on Validity), was that there should be a contract and that the contract should be for 100,000. The same result is achieved under article 14(3) because reasonable persons in the same situation as the parties would have intended the contract to be for 100,000. In fact, it is difficult to imagine a situation in which reasonable persons in the same situation as the parties with full knowledge of the transaction would have had an intent different from the actual common intent of the parties, if such an intent existed. On the other hand, application of the "plain meaning" rule would lead to the conclusion that a contract existed and that that contract was for 50,000.

20. Normally, the function of rules of interpretation such as those in article 14 is to determine the meaning of a contract. There are, however, several situations in which their function is to aid in the determination as to whether a contract exists. The most obvious case is that in which the purported words of contract, such as an exchange of telegrams in which the first one reads "Will send 100" and the reply says simply "Agreed", do not by themselves state a contract. Usually such a cryptic exchange of messages can be given a clear meaning from the prior negotiations or prior conduct of the parties and would be held to be a contract to sell specific goods at a specific price. If the application of the rules in article 14 does not give adequate meaning to the exchange of telegrams, no contract would exist.

21. A second example in which the rules of interpretation must be used to determine whether a contract exists arises when the words used by the parties appear to express agreement but there is a latent ambiguity in the words which were used. This situation is illustrated by the famous English case of Raffles v. Wichelhaus. 10/

22. In that case the parties agreed upon the sale of cotton to arrive "ex Peerless" from Bombay without either party realizing that there were two ships named "Peerless" leaving Bombay several months apart. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December.

23. Accordingly, there was no manner by which the contract could be interpreted to arrive at the intent of the parties. They had no common intent. Neither party knew or had any reason to know of the other party's intent. A reasonable person in the same circumstances would have fared no better than the parties and there was no plain meaning of the words to help determine which of the two ships was intended. In this situation the only question left was whether the identity of the ships on which the cotton was to be shipped was an essential point on which they had to agree in order to conclude a contract, a question answered in the affirmative by the court.

24. A third situation in which the rules of interpretation might be applied to determine whether a contract existed would be where the parties exchanged words

---

10/ (1864) 2 H and C 906.

which were, standing by themselves, sufficient to constitute a contract although the parties did not as yet intend to conclude a contract. For example, the parties might agree that 100 units would be sold by the seller to the buyer at 20 per unit. Such an agreement would be sufficient to constitute a contract. However, if it could be shown from prior conduct that the parties never considered a contract to have been concluded until they subsequently agreed on the time and place of delivery, the application of the rules of interpretation in article 14 would lead to the conclusion that there was as yet no contract.

25. A different result would appear to follow from a strict application of the "plain meaning" rule of interpretation since the words used would be sufficient to constitute a contract. Unless some exception to the rule was adopted, it would not be possible to show, under article 4(1) of the draft Convention, that the purported offer does not indicate "the intention of the offeror to be bound in case of acceptance".

Examples illustrating the application of the rule of interpretation

26. At its eighth session the Working Group requested the Secretariat to prepare practical examples that would illustrate the practical effect of the rules of interpretation in article 14. The following examples have been prepared in accordance with that request.

27. Example 1. A seller from the United States agreed to sell to a buyer from Egypt 1,000 "tons" of ore. This was the first contract between the two parties. The seller meant a ton as understood in the United States, i.e. 2,000 lbs. (or 907.2 kilograms). The buyer meant a ton as understood in Egypt, i.e. 1,000 kilograms (or 2,204.6 lbs.). Neither party knew nor had any reason to know the other party's intention.

28. In this case neither article 14(1) nor article 14(2) can be applied since there was no actual common intent and neither party knew nor ought to have known of the other party's intention. Therefore, it is necessary to determine what intent "reasonable persons would have had in the same circumstances" in the light of the circumstances of the case.

29. In making this determination the most significant matters could be expected to be the practices in the trade and the price. These factors may also be relevant in applying the test in article 14(2), i.e. one of the parties "knew or ought to have known" what the other party intended.

30. It is unlikely that a tribunal would rule that it could not determine whether reasonable persons in the circumstances would have intended a ton of 2,000 lbs. or a ton of 1,000 kilograms. However, even if it so ruled, it would have to conclude that there was no contract since the quantity of goods to be delivered is an essential part of the contract and there are no rules in CISG to determine the quantity if the parties have not reached agreement on the point (unless the case came within article 4(2) of the present text).



31. Example 2. The same facts as in example 1 except that it was an industry practice to sell the ore by units of metric tons. However, the seller was new to the trade and did not know of this industry practice.
32. In such a case, even though this seller could show that he did not know of the industry practice to sell ore by units of metric tons, he ought to have known of that practice. Since the buyer intended a metric ton and the seller ought to have known that the buyer intended a metric ton, the application of the rule in article 14(2) results in a contract for 1,000 metric tons of ore.
33. Alternatively, a tribunal might apply article 14(3). Thus, reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton. Use of the "plain meaning" rule would lead to difficulties, since the word "ton" has more than one meaning (and particularly in an international context), unless the plain meaning was to be determined according to the specific meaning used in the trade.
34. Example 3. The facts are the same as in example 1 except that, while the seller meant a ton of 2,000 lbs., he knew that it was the industry practice to sell in units of metric tons. The buyer, on the other hand, did not know of the industry practice of selling in units of metric tons but, coming from a country which used the metric system, he assumed that the word ton meant a metric ton.
35. There was no actual common intent of the parties in this case. However, the buyer intended that the contract be for 1,000 metric tons. The seller ought to have known that the buyer intended the contract to be for 1,000 metric tons but the reason he ought to have known this was not the reason the buyer had such an intention. Nevertheless, a tribunal would probably hold on the basis of article 14(2) that there was a contract and that it was for 1,000 metric tons.
36. As in example 2, the tribunal might apply article 14(3), to the effect that reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton.
37. Example 4. The buyer's printed purchase order form contained a clause providing for arbitration of any dispute arising out of the contract. The seller's printed confirmation form contained a clause providing that the commercial court where the seller had his place of business had exclusive jurisdiction over any dispute arising out of the contract. Neither party objected to the provision in the other party's form.
38. This case will not be settled according to the rules of interpretation in article 14 but by application of the provisions of article 7 of the draft Convention. If it is determined that the provision in the seller's confirmation form conferring jurisdiction of any dispute arising out of the contract on the commercial court at his place of business is a material alteration of the terms of the offer, no contract would arise out of the exchange of purchase order and confirmation form. If it is determined not to be a material alteration, a contract is concluded which includes the term in the seller's form.

39. Example 5. There was an agreement for the sale of goods "FOB". As a consequence of this trade term the risk of loss would normally pass when the goods were handed over to the ocean carrier. 11/ However, the negotiations between the parties show that the price was adjusted to compensate for the fact that the seller's blanket insurance policy was to cover the goods during shipment.

40. Notwithstanding the normal meaning of an FOB term, it may be found that the actual common intent of the parties was that the seller should bear the risk during transit.

---

11/ Draft Convention on the International Sale of Goods, article 65(1), Report of the United Nations Commission on International Trade Law on the work of its tenth session, Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17), para. 35. According to Incoterms, in an FOB contract the risk passes when the goods pass the ship's rail.

## II. VALIDITY OF CONTRACTS

41. In the report of the Secretary-General prepared for the eighth session of the Working Group it was "suggested that the draft Convention to be prepared not include any provisions in respect of validity of contracts based on the /draft Law on Validity/". 12/ This conclusion was reached after an analysis of the practical need for a text on the validity of contracts of international sale of goods and of the text of the draft Law on Validity itself.

42. At its eighth session the Working Group decided to prepare a new provision on interpretation based upon articles 3, 4 and 5 of the draft Law on Validity as well as on articles 4(2) and 5(3) of ULF. As to the rest of the draft Law on Validity, the Working Group requested the Secretariat to analyse the remainder of the text in the light of the discussions which had taken place and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contracts should be included in the draft Convention. 13/

43. In addition, the Working Group invited any representatives or observers to submit their views to the Secretariat on the matter. 14/ Observations were submitted by the representative of the United Kingdom 15/ and a suggestion in respect of the validity of contracts was received from the German Democratic Republic. 16/

Analysis of the draft Law on Validity

44. The Secretariat has reviewed the text of the draft Law on Validity in the light of the discussions at the eighth session of the Working Group and of the observations of the German Democratic Republic and of the representative of the United Kingdom. On the basis of this review the Secretariat would suggest that of the articles of the draft Law, other than those concerned with interpretation, the Working Group consider for inclusion in the draft Convention only articles 9 and 16.

45. Of the articles not recommended for inclusion, the most important is article 6 which states the main policy choices of UNIDROIT in respect of the law of mistake. In the report of the Secretary-General issued in preparation for the eighth session of the Working Group it was stated that it was doubtful if the text would lead to a uniform body of interpretation. 17/ It is believed that that conclusion was

---

12/ A/CN.9/128, annex II, para. 27.

13/ A/CN.9/128, para. 174.

14/ Ibid.

15/ Reproduced in document A/CN.9/WG.2/WP.29, annex.

16/ Reproduced in document A/CN.9/WG.2/WP.30, annex, para. 3.

17/ A/CN.9/128, annex II, commentary on article 6.

accurate. Furthermore, it does not seem that the problems lie in any particular deficiencies in the text as prepared by UNIDROIT which could be rectified by a new and different text. 18/

46. A decision not to include article 6 of the draft Law in the draft Convention implies that articles 7, 8, 10 and 15, all of which depend on the existence of a definition of mistake in article 6, will not be included. It is suggested that article 11 is not suitable for the reasons given in the previous report of the Secretary-General 19/ and in the observations of the representative of the United Kingdom. 20/ Articles 12, 13 and 14 deal with the mechanics of the avoidance of the contract under articles 6, 10 or 11 and are not necessary if those articles have not been included in the draft Convention.

47. However, even though articles 9 and 16 assume the existence of the provisions on mistake, they do not depend on the existence of those articles and the Working Group may wish to consider their inclusion in the draft Convention. In each case the article specifies which of several possible remedies may be available to a party who has not received that which he expected in the transaction.

Limitation on rights to avoidance for mistake

48. Article 9 of the draft Law on Validity provides:

"The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

49. If the goods which are the subject-matter of the contract do not conform to the contract and this non-conformity existed at the time of the conclusion of the contract, it would be possible to hold that the seller has breached the contract in respect of the conformity of the goods. Accordingly, the buyer would have the rights under the substantive law of sale of goods which follow upon such a breach. It would also be possible to hold that the buyer was mistaken as to the quality of the goods at the time of contracting and that his rights were those which follow upon such a mistake.

50. Article 9 provides that where the substantive law of sales affords the buyer a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods, the buyer may not avoid the contract on the ground of mistake.

---

18/ See also the detailed observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, paras. 3-13).

19/ A/CN.9/128, annex II, commentary on article 11.

20/ A/CN.9/WG.2/WP.30, annex, para. 15.

51. This provision was originally seen as supplementing articles 34 and 53 of ULIS, which limited the buyer to the rights provided by ULIS and excluded all other remedies where there was a lack of conformity of the goods or where the goods were subject to a right or claim of a third person. <sup>21/</sup> Even though these provisions have been deleted from the draft Convention on the International Sale of Goods, the Working Group may wish to conclude that it would be appropriate in a draft Convention on the formation and validity of contracts of international sale of goods to include a provision similar to article 9, whether or not the draft Convention includes substantive provisions on the law of mistake.

52. The current text of article 9 would seem to say that the right to avoid the contract on the ground of mistake is precluded only if there is in fact a remedy available to the buyer. However, the Max-Planck report which accompanies the text of the draft Law states that "Article 9 is meant to cover also those cases in which the buyer might have relied on a remedy under ULIS if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice, ...)". <sup>22/</sup>

53. In order to achieve the result suggested by the Max-Planck report, a result which would seem to be appropriate, <sup>23/</sup> it may be sufficient to delete the words "if the circumstances on which he relies afford him a remedy". This would leave to the substantive law of sales all cases in which the buyer alleged that the seller had breached the contract because the goods did not conform to the contract or that third parties had rights in the goods. If the Working Group were to adopt this approach, the text would read as follows:

"The buyer may not avoid the contract on the ground of mistake based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

54. Article 16 of the draft Law on Validity provides:

"1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

55. Article 16 is similar to article 9 in that it specifies that in two particular cases the party who alleges that the other party failed to perform the contract must rely on the substantive law of sales rather than avoid the contract for mistake. These two situations are:

---

<sup>21/</sup> Max-Planck report, p. 37.

<sup>22/</sup> Pp. 37 and 39.

<sup>23/</sup> This view is also expressed in the observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, para. 16, foot-note a).

- the performance of the assumed obligation was impossible at the time of the conclusion of the contract, and
- the goods sold did not belong to the seller.

56. The Max-Planck report points out that, "following judicial practice and advanced modern doctrines"

"there appears to be no reason to make the validity of the contract depend upon the accidental fact that the object sold has perished before or after the conclusion of the contract. The impossibility of delivery of the perished goods should leave the door open, to determine the rights and obligations of the parties according to the flexible rules on non-performance." 24/

57. In the critical analysis of the draft Law prepared by the Secretary-General 25/ it was suggested that the difficulty with article 16 was that it assumed that the doctrines of non-performance in the applicable substantive law of sales would apply to an impossibility of performance existing at the time of the conclusion of the contract. However, it was noted that according to the Max-Planck report "most legal systems declare a contract of sale to be void if the specific object sold had already perished at the time of the conclusion of the contract". Similarly, it was noted that article 50 of the draft CISG as the text then existed proceeded on the basis that the impediment to performance which exempts the non-performing party from liability in damages for his non-performance must have occurred after the conclusion of the contract.

58. The Working Group may wish to consider whether this conclusion remains valid. During the tenth session of the Commission article 50 of CISG (now article 51) was changed in a manner which no longer supports the prior conclusion that that text would not apply to an impossibility of performance which occurred prior to the conclusion of the contract. 26/ Furthermore, the Working Group might conclude that a legal system which adopted this Convention, including a provision such as that in article 16, would adapt to its requirements by providing that the law in respect of impossibility of performance applied to those events which occurred prior to the conclusion of the contract as well as to those events which occurred after the conclusion of the contract.

---

24/ P. 49.

25/ A/CN.9/128, annex II, commentary on article 16.

26/ The text was changed in relevant part from "if he proves that it was due to an impediment which occurred without fault on his part" to "if he proves that the failure was due to an impediment beyond his control". Under the original wording the provision was open to the interpretation that the impediment must have occurred after the conclusion of the contract since the Convention generally concerned itself with the relationship of the buyer and seller after the contract of sale was concluded. The revised text removes this interpretation by concentrating on the failure to perform.

59. The Max-Planck report explains the purpose of paragraph 2 of article 16 as follows:

"Paragraph 2 excludes the rule of certain countries that deem a contract of sale void if the seller did not own the sold object. While art. 9 of the draft excludes avoidance of the contract, in such a case, on the ground of mistake, a special provision is necessary to save the contract from nullity per se. The rights and duties of the parties are to be determined by the rules of the applicable law relating to a valid contract of sale, especially those on performance and non-performance." 27/

Other proposals in respect of validity

60. During the eighth session of the Working Group the representative of Hungary submitted the following proposal, 28/ the consideration of which was deferred by the Working Group to its ninth session:

"I

In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. /Conduct violating these principles is devoid of any legal protection/.

II

The exclusion of liability for damage caused intentionally or with gross negligence is void."

61. The German Democratic Republic has suggested that the following paragraph be added to the proposal of the representative of Hungary:

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it." 29/

---

27/ P. 51.

28/ A/CN.9/WG.2/VIII/CRP.8.

29/ A/CN.9/WG.2/WP.29, annex, para. 3.

III. ADDITIONAL SUBJECTS WHICH MIGHT BE INCLUDED IN THE  
DRAFT CONVENTION ON THE FORMATION OF CONTRACTS FOR  
THE INTERNATIONAL SALE OF GOODS

62. During the eighth session of the Working Group it was suggested that the Secretariat consider whether there were any additional subjects within the general scope of the draft Convention which might profitably be added to the current text. One such subject is suggested. In addition, the German Democratic Republic has communicated a number of suggestions which are contained in the annex to document A/CN.9/WG.2/WP.30.

Termination of an offer by rejection

63. Article 7(1) provides that "A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Although not explicitly stated, the provision seems to assume that an offer can no longer be accepted by the offeree once it has been rejected by him.

64. Such a rule appears to exist in most, if not all, countries in respect of a revocable offer.

65. However, it appears that there are different rules in various countries as to whether the rejection of an irrevocable offer terminates the power of an offeree to accept the offer after such a rejection but prior to the date on which the offer would otherwise lapse. In many of the civil law systems an offer, even though irrevocable, is terminated by a rejection, although the time during which the offer could have been accepted has not yet expired. In most of the common law systems, on the other hand, an irrevocable offer is probably not terminated by rejection. However, if the offeror has materially changed his position in reliance upon such a rejection, the offeree may be precluded from subsequently accepting. 30/

66. The practical effect of these rules is not only determined by the formal rule itself but by the willingness of a tribunal to find that the offeree's reply to the offer was or was not a rejection of the offer. The problem arises most acutely when an offeree who is not willing simply to accept an offer as made inquires about possible changes in the terms or proposes different terms. In either case a tribunal might find that the reply constituted a rejection of the offer, as in article 7(1), or it might find that it was an independent communication which did not constitute a rejection of the offer.

67. It would probably not be possible to draft a rule more explicit than that already in article 7(1) to the effect that "A reply to an offer containing

---

30/ The discussion in this section relies upon Rudolf B. Schlesinger, ed., Formation of Contracts: A Study of the Common Core of Legal Systems (Dobbs Ferry, NY, Oceana Publications, Inc., 1968) sect. B-3, which contains an analysis of the law of a number of countries throughout the world.



additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." However, the Working Group may believe that it would be useful to have a rule as to whether, after the rejection of an offer, the offer can still be accepted by the offeree.

68. If the Working Group does wish to adopt such a rule, it would have a choice between several major possibilities, e.g.:

- rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer.
- explicit or implicit rejection of an offer terminates the offeree's power to accept unless the offer was irrevocable and the offeree paid the offeror to make the offer irrevocable or the offer was part of a larger transaction such as a concession agreement.
- rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer.
- rejection of an irrevocable offer does not terminate the offeree's power to accept the offer, unless there is a change in position by the offeror in reliance on the rejection.
- rejection of an irrevocable offer does not terminate the offeree's power to accept the offer.

69. There is nothing in the doctrinal structure of articles 1 to 13 of the draft Convention which leads to a clear choice among these alternatives. It could as easily be said that the power to accept has been terminated because a party can always act unilaterally to waive his unilateral rights as it could be said that the power to accept cannot be terminated unilaterally by the offeree because the irrevocable offer is - or is of the nature of - a contract which can be terminated only by mutual agreement.

70. It is also difficult to choose between the alternatives on the basis of policy. On the one hand the fact that the offer was made irrevocable by the offeror suggests that there were good reasons for doing so at the time and that those reasons may still exist. Certainly an offeree should not lightly lose the benefits of irrevocability because he wished to negotiate for better terms. On the other hand the offeror should be free to contract with someone else - or to reorder his affairs so that he has no need to contract with anyone - once he has a clear indication that the offeree does not wish to contract on the basis of the offer.

71. It may be that a reasonable rule in this situation would be the third alternative suggested above, i.e. a rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer. If the Working Group were to adopt such a rule, it may wish to consider whether any modification of article 7(1) of the draft Convention would be desirable.

/...

## IV. REORGANIZATION OF PROVISIONS OF THE DRAFT CONVENTION

72. The Working Group on the International Sale of Goods at its eighth session requested the Secretariat to suggest a reorganization of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods and to prepare titles for each article. 31/ This suggested reorganization has been prepared in response to that request.

<u>Proposed numbering</u>	<u>Current numbering</u>	<u>Proposed titles of each provision</u>
(Chapter I. Sphere of application)		
1	1	Scope
2	2	Autonomy of parties
(Chapter II. General provisions)		
3	3	Form
4	14	Interpretation
5	13	Usage
6	12	Communication
7	11	Death or incapacity of a party
(Chapter III. Formation of the contract)		
8	4	Offer
9	5(1)	Time of effect of offer
10	5(2) + 5(3)	Revocability of offer
11	8(1), 8(1 <u>bis</u> ) 8(1 <u>ter</u> )	Acceptance
12	7	Additions or modifications to the offer

31/ Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174.

/...

<u>Proposed numbering</u>	<u>Current numbering</u>	<u>Proposed titles of each provision</u>
13	8(2), 8(3)	Times fixed for acceptance
14	9	Late acceptance
15	10	Revocation of acceptance
16	6	Time of conclusion of contract
17	3A	Modification and rescission of contract

-----