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WORKING PAPER ON THE HAGUE CONVENTIONS OF 1964

Note submitted by the International Institute for the
Unification of Private Law (UNIDROIT)

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Introduction

The draft resolution concerning the work of UNCITRAL proposed by the Sixth Committee of the General Assembly of the United Nations expresses the General Assembly's appreciation of the establishment of Working Groups on international sales and "endorses the Commission's desire, where necessary, to obtain the services of consultants or organizations with special expertise in technical matters dealt with by the Commission". Towards the end of the resolution, it is recommended further "that the Commission should continue to collaborate fully with international organizations active in the field of international trade law".

In the same spirit of collaboration as is evidenced by the draft resolution, and in conformity with the agreement between the United Nations and UNIDROIT, the Secretariat of UNIDROIT has the honour to submit the present note to the Secretary-General of the United Nations, for the information of the Working Group to be convened in New York in January 1970. In this note, UNIDROIT, as the author of the original draft submitted to the first Diplomatic Conference at The Hague in 1951, which was subsequently redrafted by a Special Commission appointed by the Conference, offers some information and explanations concerning the origin of, and the reasons for, those provisions which have been criticized by Governments.

In preparing the document, the secretariat of UNIDROIT has disregarded both observations of a general nature and those relating to questions of minor importance. Among the material excluded are criticisms concerning the terminology employed in the two Uniform Laws, since it is felt that, firstly, it is impossible to draw up an international instrument on so complex a subject calculated to satisfy all countries with regard to the language, and, secondly, Governments wishing to adopt the Uniform Laws can always, when incorporating them in their legislation, make purely formal changes in order to adapt them to the legal and commercial terminology of their countries. For example, if the English text of the Uniform Laws were adopted by the United States it could, in the opinion of the UNIDROIT secretariat, be adapted to the legal and commercial terminology in use there, provided that such adaptation does not affect the substance of the rules of the Uniform Law.

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The note by the secretariat of UNIDROIT is based on the observations set forth in the analysis of the replies of Governments to the questionnaire from the Secretary-General of the United Nations (document A/CN.9/17 of 3 February 1969) and those mentioned in the report of UNCITRAL on the work of its second session (document A/7618, Supplement No. 18).

The secretariat of UNIDROIT has endeavoured to explain the arguments in favour of the texts of the Conventions and of the Uniform Laws annexed thereto; the responsibility for defending them lies with Governments which have signed the Conventions - primarily those which have ratified them - and the possibility always remains of improving them at a later stage.

I. Observations on the Convention relating to a Uniform Law
on the International Sale of Goods

With regard to article I of the Convention, some Governments have observed that the obligation which that article imposes on each State to incorporate the Uniform Law on Sales into its own legislation either in one of the authentic texts or in a translation into its own language is too rigid and that States should be at liberty to shape the Uniform Law according to their own legal structures, including the addition to their domestic law of matters which might go beyond the scope of the Uniform Law, without being inconsistent with it.

The question how the Uniform Law should be incorporated into national legal systems was discussed at length at the Hague Conference. Delegations were unanimously of the opinion that every Contracting Party should undertake to incorporate the "actual text" of the Uniform Law into its own legislation, so as to avoid the danger that the process of incorporation might lead to a substantial alteration of the text of the Law. It was recognized, however, that alterations might take place accidentally during the process of translation of the Uniform Law into the languages of various parties but that that was an inevitable danger.^{1/}

The words "translation into its own language" could, in the opinion of the secretariat of UNIDROIT, be interpreted broadly enough to include also such editorial changes as might be required to bring the Uniform Law into line with the legal terminology peculiar to each country, even in the case of a country whose language is one of those in which the Conventions were drafted.

The need to incorporate the Uniform Law in its entirety derives from the very nature of the subject-matter of the Law, which is not of a kind that can be governed by divergent rules.

Moreover, the disadvantages arising from the rigidity of the system are largely mitigated by the fact that the rules of the Uniform Law are entirely non-mandatory. Moreover, any Governments which might be reluctant to adopt the Uniform Law without qualification could avail themselves of the reservation provided for in article V of the Convention.

^{1/} Records and Documents of the Conference, vol. I, pp. 246 and 247.

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States will therefore have two alternatives: either to accept the full text of the Uniform Law, with such unavoidable adaptations as are involved in translating it into the national language (or in bringing it into line with national legal terminology), or to accept it as a model contract, in pursuance of article V.

The idea, suggested by one Government, that once the Uniform Law had been incorporated into national legislation other matters not inconsistent with the Uniform Law might be added to it should, it is felt, be excluded. It does sometimes happen, in the practice of international conventions relating to uniform laws, that domestic law goes beyond the scope of the uniform law, but it is understood in such cases that the additional provisions will apply solely to domestic legal relationships.

The observations on article IV of the Convention will be discussed jointly with those on article 2 of the Uniform Law (see below, pp. 8 et seq.), since the two articles are closely interrelated.

Article V of the Convention has been criticized by a number of Governments on the grounds that it reduces considerably the value of the Uniform Law, extends even further the principle of freedom of contract recognized in article 3 of the Uniform Law on Sales, and potentially affects attempts to solve problems arising in connexion with the international sale of goods.

The inclusion of this article was proposed by the United Kingdom delegation and was strongly opposed by a number of delegations. As the United Kingdom delegation explained, an instrument as complex as the Convention on Sales, negotiated between a large number of States with widely diverse legal systems, was bound to be something of a compromise between conflicting points of view and therefore was hardly likely to be regarded as completely satisfactory by any Government. It must accordingly be recognized that it would be particularly difficult for Governments to accept as part of their domestic law an instrument which they might regard as departing to a considerable extent from their normal legal traditions and legislative standards. The United Kingdom delegation expressed the view that the Uniform Law would be given the best chances of success if it were made possible for States which were reluctant to accept it in its entirety to give it partial acceptance in the first instance, proceeding to full

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acceptance later when traders, lawyers and Parliamentarians had had a chance to become more familiar with it and with the very idea of a Uniform Law.^{2/}

The plenary session found the arguments adduced by the United Kingdom delegation convincing and adopted the proposal by 17 votes to 2, with 6 abstentions. One of the comments made in support of it was that the United Kingdom, by signing with a reservation, was already giving litigants a guarantee: a British judge who had to deliver judgement in a case regarding a contract in respect of which the parties had acceded to the Uniform Law would not be able to do otherwise than recognize that Law as valid, since, having been ratified, it was presumed to be in conformity with the principles of public policy governing English law.

It should be added that the United Kingdom and Belgium availed themselves of the reservation in article V when they ratified the Convention.

By adopting the Uniform Law in this limited manner, these States associated themselves with those which had complained that article I was too rigid and had wanted a more flexible method of adoption.

The criticisms of articles IX to XIII are of an essentially political nature. At the Hague Conference, an amendment was submitted by one delegation with a view to permitting the accession of "all States not represented at the... Conference". This amendment was voted on and was rejected by 20 votes to 3, with 2 abstentions. A proposal by one delegation to delete article XII was also rejected, by 15 votes to 3, with 5 abstentions.

^{2/} Records and Documents of the Conference, vol. I, pp. 312 and 313.

II. Observations on the Uniform Law on the International Sale of Goods

Two types of criticism have been levelled at article 1 of the Uniform Law, concerning the sphere of application of the law. Some Governments find the definition of the sphere of application given in that article too restrictive and consider that the subjective criterion - i.e., the domicile of the parties - should be combined with the purpose of the sale - i.e., resale of the goods or their use in other commercial activities of the buyer. Other Governments foresee difficulties of interpretation in connexion with the requirement that the goods are to be carried from the territory of one State to the territory of another. In particular, they state that it is not clear whether the contract of sale, in order to fall within the sphere of application of the Uniform Law, must contain a provision or information to the effect that the goods are to be sent to another country, or whether it is sufficient that the seller understands that the goods are to be sent out of the country.

With regard to the first type of criticism, it should be noted that the UNIDROIT draft (the so-called Rome draft) laid down, in principle, only the subjective requirement concerning the domicile of the parties in different territories. Moreover, since the purpose of the Law is to avoid conflict of laws, provision was made for two reservations in the case of sales which do not give rise to such conflict because they are not truly international, namely, those involving countries which apply to sales the same or closely related legislation, and those where all the acts constituting the offer and the acceptance have been effected within one country in which delivery and payment is to be made.

The revised draft, prepared by the Special Commission appointed by the first Hague Conference for the unification of law governing the sale of goods, substantially amended the original UNIDROIT text by combining the subjective system with certain objective factors or, in other words, by requiring that the contract itself should satisfy certain factual criteria which, in combination with the subjective factor, would give it its international character. This amendment, which has the effect of limiting the sphere of application of the Uniform Law, was motivated by a desire not to make the sphere of application unduly extensive. The

report of the Special Commission states: "In suggesting this system the Commission considered that there is an international sale only if the parties have their places of business within the territories of different States, and if, moreover, it can be shown that there is either movement of the goods themselves across frontiers, or an exchange of consents across frontiers, or at the least a delivery of the goods in a country other than that where the exchange of consents took place."

The approach suggested in the Commission's draft was adopted by the Diplomatic Conference without any serious opposition.

It should also be noted that article 4 of the Uniform Law, which states that the Law shall apply where it has been chosen as the law of the contract by the parties, allows the sphere of application of the Uniform Law to be extended well beyond the limits set by article 1.

The proposal, in one Government's reply to the Secretary-General of the United Nations, that the commercial character of the sale should be stressed seems to conflict with the principle embodied in article 7, whereby all distinction between civil sales and commercial sales has been jettisoned, in line with a general trend which has become apparent in national laws and in international agreements relating to private international law.

With regard to the difficulties of interpretation which some Governments believe would be caused by the wording of article 1, paragraph 1 (a) - where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another - it should be noted that the original UNIDROIT draft did not contain this provision. It was adopted by the Commission appointed by the first Hague Conference, for the reasons stated in the explanatory report.

The words "where the contract involves" seem broad enough to cover both the case where the contract contains a provision to the effect that the goods are to be sent to another country and the case where this requirement follows from the circumstances (negotiations between the parties, commercial practices followed in their reciprocal relations).

Article 2 has given rise to a number of comments, both at the Diplomatic Conference and in the replies of Governments to the questionnaire from the

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Secretary-General of the United Nations. It may be useful to begin with a brief outline of the history of this provision.

The article was not in the original draft submitted to the Netherlands Government by UNIDROIT in 1951 or in the text drawn up by the Special Commission appointed by the Hague Conference for the unification of law governing the sale of goods, which was submitted to the 1964 Conference. It appears for the first time in the second report of the Working Group set up by the Conference (Records and Documents of the Conference, vol. II, p. 251), as the outcome of the two conflicting proposals submitted respectively by the Swedish delegation and by the delegations of the Federal Republic of Germany and Belgium.

The report states that the Swedish delegation, with the support of other delegations, proposed that it should be stated that the Uniform Law "does not derogate from the rules of private international law". In favour of that amendment, the Swedish delegation pointed out:

- "1. that recourse to the rules of conflict of laws is inevitable in the field not covered by the Uniform Law, and particularly as regards capacity and consent of the parties and transfer of ownership;
- "2. that prior recourse to these rules ensures the parties that the judge will only apply the Uniform Law to them if there is a certain connection between this law and the parties;
- "3. that the rules of conflict, despite their variations from one country to another, in principle have their basis in experience and equity, and with the development of international relations, they have a tendency gradually to move closer together;
- "4. that if the Uniform Law, as we all hope, is adopted by many countries, the interplay of the rules of conflict will in any case lead to the application of the Uniform Law."

The German and Belgian delegations, on the other hand, suggested that, in countries in which the Uniform Law was adopted, it should exclude any prior recourse to the said rules of conflict.

They pointed out:

- "1. that the essence of the proposed Uniform Law is to substitute substantive rules for the repeated interplay of the rules of conflict, which only indicate the country to whose law recourse is to be made, and of the municipal rules of that country;

- "2. this constitutes an advance as compared with the traditional use of the rules of conflict, and that to decide otherwise would be a backward step in contrast to the current evolution of law;
- "3. that the Uniform Law, if applied not only as the law of the judge of the court before whom the case is brought but as the foreign law of the country designated by the rules of conflict, gives rise to difficulties of translation, interpretation and verification, which disappear in the opposite event."

A subsidiary proposal was made by a number of States bound by earlier Conventions relating to conflict of laws in contractual matters, whereby the Convention would make provision for formal reservations on the part of States in that position to the effect that they would apply the Uniform Law only in cases where the rules of conflict laid down by Conventions previously ratified by them refer to the law of a Contracting State.

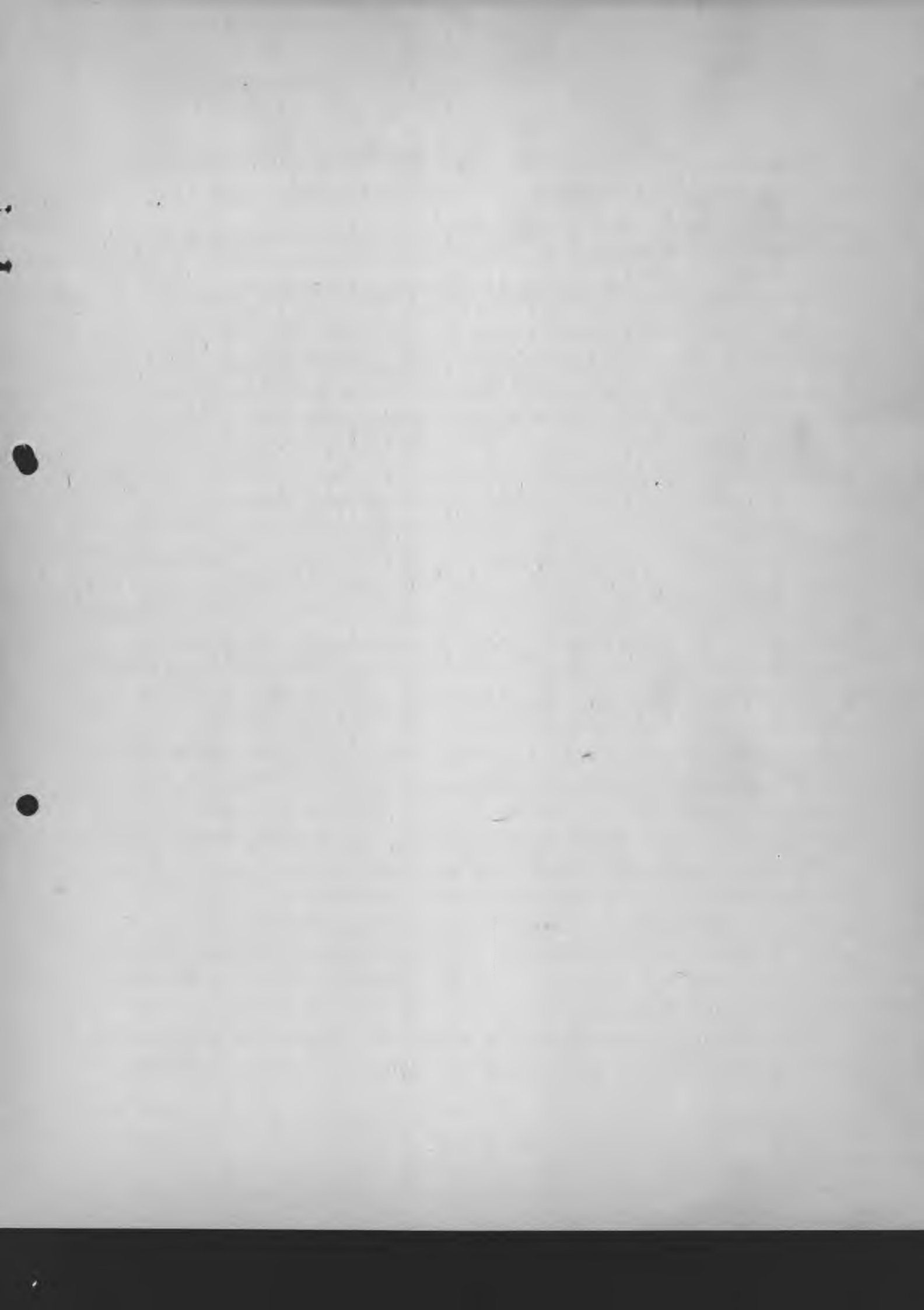
At the end of the discussion in plenary session, it was decided to retain article 2 and to permit the reservation which became the subject of article IV of the Convention.

To supplement this outline of the history of article 2, reference may be made to the following points.

There are at least two possible solutions to the question of determining the sphere of application of a uniform law text. First, the uniform law text may contain no independent criterion for determining its sphere of application; in this case, since the scope of any legal rule must necessarily be defined, the sphere of application of the uniform law can be determined, in the municipal law of each contracting State, only by reference to the rules of private international law applied by each of those States. A case in point is the Uniform Law on Bills of Exchange and Promissory Notes annexed to the Geneva Convention of 7 June 1930.

Alternatively, the uniform law text may contain, in addition to the substantive uniform rules, a rule whose specific purpose is to determine the sphere of application of the text concerned. Unlike most other rules of uniform law, this application rule is not a substantive rule. Like the rules of private international law, the application rule is a procedural rule or, to be even more precise, an instrumental rule, because its purpose is to set in motion the substantive rules and not actually to deal with the categories of events or relationships covered by the law. Most uniform law conventions, and in particular all the conventions concerning carriage (the 1929 Warsaw Convention, the

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Article 2 of the Uniform Law therefore merely sets down in writing a solution which would have to be applied even without the article, unless there was an expressly worded provision to the contrary.

Article 3 of the Uniform Law, embodying the principle of freedom of contract, was extensively criticized both at the Conference and in replies to the inquiries made by the Secretary-General of the United Nations.

The UNIDROIT draft (the Rome draft), while respecting the principle of freedom of contract, set a limitation on it, in a desire to ensure certainty as to the applicable law. Article 12 of that draft states that the parties may entirely exclude the application of the Uniform Law, provided that they explicitly indicate the municipal law to be applied to their contract, and that they may derogate in part from the provisions of the Law, provided that they agree on alternative provisions, either by setting them out explicitly or by stating clearly to what specific rules other than those of the said Law they intend to refer. That rule was retained, with minor changes of a purely drafting nature, by the Commission appointed by the first Hague Conference.

Two solutions were discussed at the second Conference: the solution whereby the parties to a contract would be given absolute freedom, it being stated clearly that the application of the Uniform Law might be excluded as regards all or some of its provisions, and the solution incorporated in the Special Commission's draft.

The replies to the questionnaire from the Secretary-General of the United Nations and the comments made at the second session of UNCITRAL show a definite cleavage of opinion both among Governments which favour the Uniform Law and among those which oppose it. On the one hand, reference is made to the interests of traders, which would be sacrificed if the rules were too rigid, and to the fact that the Uniform Law, as an international law, is ill-suited to provide the parties to a contract with a comprehensive set of legal rules that will apply unless the parties derogate from them. On the other hand, it is feared that the non-mandatory nature of the Uniform Law might produce the result that the will of the stronger party prevailed.

The difficulty of reconciling these two opposing arguments was apparent when the vote was taken on the amendment submitted by the United Kingdom delegation,

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which was adopted by 11 votes to 10.^{3/} The debate could continue indefinitely, since there are undoubtedly sound legal, social and practical arguments in favour of each of the two views.

Where article 5, paragraph 2, is concerned, two Governments have expressed some doubt about its interpretation but this doubt is not shared by other Governments. It has been pointed out that this article seems to invite an interpretation a contrario, namely that only the mandatory provisions of national law relating to the protection of a party to an instalment sales contract are not affected by the Uniform Law.

This provision, which was not in either the UNIDROIT draft or the Special Commission's draft, was inserted as the result of an amendment proposed by one delegation in the Conference's Committee on Sale. A proposal in plenary session to delete the provision was rejected by 19 votes to 1, with 4 abstentions.

The original aim of the amendment proposal was completely to exclude instalment sales from the sphere of application of the Uniform Law, on the ground that in municipal law such sales are governed by different rules than apply to ordinary sales. The view which prevailed in the Committee on Sale was that instalment sales should be covered in the final text but that the mandatory provisions of national law enacted to protect the buyer should be respected.

It will be seen from this brief background history that the provision should be interpreted to mean that only the mandatory rules designed to protect the buyer in instalment sales are not affected by the Uniform Law. Any other mandatory rule in the national laws of the Contracting States concerning contracts for the sale of goods has no bearing on the provisions of the Uniform Law. This interpretation is confirmed by article 4 of the Uniform Law, which states that the Uniform Law shall apply where the parties to the contract have chosen it, "to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law", thus indicating that mandatory provisions have no bearing on the Uniform Law in countries where it has been introduced.

Article 9, concerning the relationship between the Uniform Law and usage, has been criticized on various counts. Some Governments have criticized the principle whereby, in the event of conflict with the Law, usages shall prevail over the Law.

^{3/} Records and Documents of the Conference, vol. I, p. 276.

Others have called for a definition of the word "usage", which is employed in several articles of the Uniform Law.

In the report explaining the Special Commission's draft, the relationship between the Law and usages is defined as follows: "Wishing throughout to respect the intent of the Contracting Parties, the Commission has allowed that in the case of conflict between usages and certain provisions of the Uniform Law, usages ought to prevail, exactly as the will of the parties prevails in the Draft over the legal rules: are not usages presumed to enter into the intent of Contracting Parties? Although, however, usages are to be given effect by the courts, it is nevertheless necessary that they display certain characteristics which are defined in Article 14 of the Draft; they must be usages to which the parties have made express or implied reference or usages which persons in the position of the Contracting Parties commonly consider to form one of the terms of their contract."

It is clear from these explanations that the precedence of usages over the Uniform Law derives not from any actual authority of usages but from the express or implied reference which the parties have made to usages in their contract. This provision is therefore consistent with the principle that the intent of the parties shall prevail. This is expressly stated at the end of paragraph 2 of article 9 in the stipulation "unless otherwise agreed by the parties".

It would be difficult to find a definition of "usage" which would be acceptable to all countries. Moreover, the problem will be less important if the term is interpreted in the sense and within the limit indicated in article 9, paragraphs 1 and 2. The courts will simply need to seek in the contract and in the trade in which the Contracting Parties usually engage customary norms to which they have explicitly referred or are deemed to have referred.

It should be noted that this article was adopted unanimously by the Diplomatic Conference.

With regard to article 15, some Governments have suggested that the rule contained therein should be amended to require a written contract for international sales. Other Governments have opposed that suggestion. One Government has noted that the article appears to prohibit certain requirements as to form prescribed in national legislation for legal transactions by persons suffering from physical or mental infirmity or standing in close relationship to each other.

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The Special Commission explained this article in the following terms:
"Departing from the principle according to which the Draft does not govern conditions relating to the formation of the contract, the Commission has agreed that contracts of sale governed by the Uniform Law should be concluded without formalities and that they can be proved by witnesses. It is essentially a question of commercial contracts and the Commission has adhered to affirming that commercial relations ought to be free of all formalism."

At the Conference, there was a difference of opinion between the representatives of some socialist countries where, in accordance with a rule of public policy, foreign trade organizations are required to conclude their contracts in writing and other representatives who, in view of the common practice in international trade of concluding contracts by telecommunication, were in favour of retaining the provision. The latter view prevailed and the article was adopted by a large majority.

Against this background, it seems very unlikely that States would be able to support a text requiring written contracts. On the other hand, the complete deletion of the article would leave the matter in doubt and detract considerably from the effectiveness of the Uniform Law.

The difficulties noted by one Government with regard to the possible effect of the article on provisions of municipal law designed to protect special categories of persons (contracts between spouses or close relatives, contracts concluded by deaf mutes) hardly seem to exist; for, apart from the fact that such contracts will very seldom be concluded internationally, these difficulties do not really stem from the form of the contract of sale as such but, rather, from the requirements for the formation of contracts in general (capacity of the parties, etc.), which are not affected by the Uniform Law.

The reference in article 17 to "the general principles on which the present Law is based" as a source of guidance to supplement the Uniform Law has been criticized by some Governments as being too vague and by others on the ground that it prohibits supplementary application of municipal law.

The first criticism is easily answered by the explanations given in Professor Tunc's commentary. After noting that the Law is itself very detailed, so that true omissions will doubtless be rare, Professor Tunc states that because

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the Law contains a large number of provisions it will ordinarily be easy to extract its general principles; this task will be facilitated by consulting the reports which accompanied the drafts of 1956 and 1962 and the report of the proceedings of the 1964 Conference. He concludes by saying that it may be surmised that an international body of case law will be formed and that it will carry de facto authority, even in the absence of a supra-national jurisdiction to give effect to the Uniform Law. The measures provided for in Recommendation I annexed to the Final Act of the Convention will assist to that end.

It seems quite natural and logical (and this will serve as an answer to the second criticism) to give priority to these principles, when seeking guidance to supplement the Uniform Law. It follows that the primary source of guidance for interpreting and supplementing the Uniform Law - the result of the common desire of States to unify their laws concerning certain legal relationships - with regard to the matters within its purview should be the law itself in its entirety and that national laws, which are all based on different principles, should be kept as a supplemental source of guidance.

Despite the "relative autonomy" of this branch of law, however, it is still subject to the principles of municipal law, whenever the primary sources just mentioned cannot be used to interpret it. Moreover, when interpreting any law - including the Uniform Law - the courts have to apply the hermeneutic rules of their own legal system.

It should be pointed out that the provision contained in article 17 of the Uniform Law was included both in the UNIDROIT draft and in that of the Special Commission. The Working Group established by the Conference agreed almost unanimously that the article should clearly state the need to interpret the Uniform Law in itself and by itself.^{4/}

The observations made on articles 18 and 19 mainly concern the definition of "delivery". The difficulties mentioned by some Governments are due primarily to the translation of the articles into languages other than French and English, in which the Uniform Law was drafted. The main difficulty is how to translate "handing over", inasmuch as the word "delivery" was used only in a conventional sense.

^{4/} See Records and Documents of the Conference, vol. I, p. 23.

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In this connexion, Spain's suggestion that the words "handing over" should be translated "puesta a disposición" ("placing at the disposal") does not seem to conflict with the concept of "delivery" which emerges from articles 18 and 19, read in conjunction with article 56. In its explanatory report on the draft of the Uniform Law, the Special Commission said that delivery - which in the Rome draft was represented as being exclusively the fulfilment of an obligation imposed on the seller, with no reference to the reciprocal obligation of the buyer - should be regarded as the act by which the seller physically delivers the goods to the buyer or to the carrier responsible for delivering them to the buyer; in turn, the buyer would be required to participate by taking delivery of the goods. "It is by these two actions", states the Commission's report, "that the goods will cease to be under the control of the seller and pass under that of the buyer".

The expression "placing at the disposal" thus seems to be equivalent to "handing over", as intended by the drafter of the Uniform Law, provided that placing the goods at the disposal of the buyer actually makes them physically available to him.

On the subject of article 25, one delegation observed that this provision, which would seem fair in the case of commodities of which the price fluctuated rapidly, might not be justified in the case of industrial products where the price tended to be more stable.

In response to this observation, it may be said that the buyer is deprived of the right to require performance of the contract only if "it is in conformity with usage and reasonably possible" for him to purchase goods to replace those to which the contract relates. This is therefore a quite exceptional case, since the usages applicable under the terms of the Uniform Law are those which the parties have expressly indicated or which must be known to them by reason of their situation and character.

Loss of the right to require performance, in the case envisaged in article 25, therefore occurs only when the buyer, knowing the usage of obtaining goods by means of a replacement purchase, has voluntarily accepted that usage.

Moreover, in the case of industrial products, such usages are reportedly very rare.

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The remark made by one delegation concerning the last paragraph of article 33, which states that no difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material, does not seem to relate to the substance of the provision. It is only the expression "not material" which is considered too vague and capable of resulting in abuses to the detriment of the buyer.

Mr. Tunc's commentary explains that the provision "contemplates a case of non-fundamental breach which is so slight as not to be considered as a breach" of the contract.

In its draft, the Special Commission worded this provision more clearly by adding after the words "not material" the words "to the interests of the buyer", which to some extent limited the discretionary power of the court.

One delegation stated that article 35, which establishes the criteria for determining whether the goods are in conformity with the contract, should also deal with the question of the seller's responsibility with regard to goods covered by a guarantee under the contract (e.g., in the case of purchase of plant, machinery, etc.).

In this connexion, it is noted that the guarantee of the conformity of the goods, which is dealt with in sub-section 2 of the Uniform Law, concerns only the physical characteristics of the goods sold (quantity, quality) and not the rights and privileges pertaining to the goods. These are dealt with in section III, on the transfer of property.

The obligation of the buyer to examine the goods, or cause them to be examined, "promptly", imposed by article 38, paragraph 1, was objected to by one delegation, which felt that this provision could give rise to difficulties in the case of the buyer who was a middleman between the manufacturer and the user, or one of the middlemen in a chain of contracts. The delegation in question did not suggest any alternative solution.

It is noted that, according to article 11 of the Uniform Law, the term "promptly" means that the act is required to be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed. This definition of "promptly" enables a judge to moderate the rigour of the law by taking into account the content of each contract and the special situation of the buyer.

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Furthermore, since the rules of the Uniform Law are completely non-mandatory, the parties to a contract who are in the special situations mentioned above would be free to adopt a different rule in their contractual relations.

With regard to article 42, paragraph 1, one delegation expressed the view that the buyer should exercise the right to require the remedying of defects only if to remedy them would not cause the seller unreasonable expense or unreasonable inconvenience, and that the delivery of other goods which were in conformity with the contract or of the missing part or quantity should be required only if the failure of the goods to conform to the contract was of an essential nature.

On the first point, it is noted that the right of the buyer to require that defects in the goods sold should be remedied, is granted when the sale relates to goods to be produced or manufactured by the seller. It is therefore reasonable to assume that the seller, being the producer or manufacturer of the goods, will be able to remedy the defects without unreasonable expense or unreasonable inconvenience. As to the second point, if article 42 is compared with article 43, it will be seen that the legislator's intention was to reserve the most radical remedy, namely, avoidance, for cases involving fundamental breaches of the contract.

On the other hand, when it is possible to require performance of the contract, in the cases provided for in article 16 of the Uniform Law, by remedying defects in the goods or by delivering other goods, it was not thought necessary to restrict the exercise of that right only to cases involving a fundamental breach.

With regard to article 44, paragraph 2, one delegation expressed the desire that the exercise of the buyer's right to declare the contract avoided at the expiration of the additional period fixed by him for the further delivery should be restricted to cases involving a fundamental breach of the contract.

In this connexion, it is noted that the practical effects of the remedy of avoidance of the contract which is granted to the buyer by this provision are greatly moderated by the fact that the seller is allowed to deliver other goods or to remedy the defect in the goods within the "period of time of reasonable length" which the buyer is to grant him. A fair balance is thus struck between the interests of the seller and those of the buyer.

Furthermore, within the general context of the Uniform Law, a breach always becomes "fundamental" when the party in breach has been invited by the other party

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to the contract to perform his obligation within a certain period and the obligation has not been performed (see articles 27, 31, 62 and 66).

One delegation considered that, according to the wording of article 57, the buyer would be obliged to pay the price generally charged by the seller at the time of the conclusion of the contract even if that price was much higher than the usual price for such goods. Furthermore, according to the rule laid down in the Uniform Law, the contract of sale would have no legal effect where the purchase price had not been agreed upon either expressly or, by reference to the seller's general price lists, tacitly.

This very pertinent observation ties in with the solution which the UNEDROIT draft provided for this problem. Article 58 of that draft, which on the whole was accepted by the Special Commission, provides that, where a sale is concluded but no price is fixed, the buyer shall be bound to pay the price demanded by the seller; however, if the buyer demonstrates that this price is inflated, he is to pay "the normal price charged by the seller; should the seller fail to indicate such price, the buyer must pay a reasonable price determined, if possible, on the basis of the current market price". According to the explanatory report, this solution supplements the provisions of Anglo-American law and the analogous provisions of German and Scandinavian law, under which the contract is deemed to be valid even when no determined or determinable price has been fixed and the buyer must in such cases pay a reasonable price.

The Diplomatic Conference did not adopt that solution, for the reasons given in Mr. Tunc's commentary, which states that "it... seems impossible if there is no price ordinarily charged by the seller to impose on the buyer a price which would be fixed unilaterally by the seller or even a price which would be fixed at the discretion of a Court or arbitral tribunal unless it appears from the circumstances that the parties had accepted this method of determining the price".

Each of the two solutions has its advantages and disadvantages. That adopted by the Conference is, perhaps, less likely to give rise to litigation, although it means that the contract is invalid when the price is neither determined nor determinable.^{5/} However, such cases are fairly rare in

^{5/} At the second session of UNCITRAL, two delegations objected to recognizing the validity of a contract of sale where the price or the means of determining it had not been clearly stated.

international trade, since the buyer's first step is to ascertain the price of the goods.

The provision of article 73, paragraph 2, which grants the seller the right to prevent the handing over of the goods to the buyer, after they have been dispatched was criticized by two delegations as being in conflict with provisions of municipal and international law concerning the carriage of goods, in that it regulated the obligations of the carrier also, and as being potentially damaging to the interests of the developing countries because it enabled one of the parties to suspend the performance of his obligations unilaterally.

With regard to the first objection, it is noted that the power given to the seller to stop the goods in transitu is subject to the tacit proviso that the seller shall, under the law regulating the contract of carriage or the special clauses inserted in that contract, have retained a right of disposal over the goods during transit. This was stated explicitly in article 72, paragraph 2, of the UNIDROIT draft. A similar proviso appeared in article 81 of the Special Commission's draft. Although the proviso was eliminated in the text adopted by the Conference, the Secretariat of UNIDROIT considers that it is implied, since the authors of the Uniform Law never intended to modify the principles regulating the contract of carriage. Moreover, this line of reasoning is confirmed by paragraph 3 of the article under discussion, which safeguards the rights of a third person who is a holder of a document of carriage which entitles him to obtain the goods.

Mr. Tunc's commentary and the observations made by three delegations at the second session of UNCITRAL seem to have allayed the fears expressed by the delegation which raised the second objection. It was explained that there should be no fear that stoppage of the goods in transitu would be left to the unilateral choice of one party; if the buyer challenged the action of the seller, it would be for the courts to decide whether the seller's decision had been warranted; if the seller had abused his right, he would run the risk of being compelled to pay damages to the injured party.

With regard to the provision of article 84 which states that, in case of avoidance of the contract, damages shall be equal to the difference between the

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price fixed by the contract and the current price on the date on which the contract is avoided, one delegation observed that it would make it possible for the party avoiding the contract by declaration to engage in speculation and that the applicable date should be the date on which the goods were delivered or should have been delivered.

On that point, both the UNIDROIT draft and the Special Commission's draft had used wording less concise than that adopted by the Hague Conference. In both drafts, damages were to be calculated on the basis of "the current price prevailing on the date on which the right to declare the contract avoided could have been exercised or upon which the contract has ipso facto avoided".

Even with the wording adopted, however, the danger of speculation by the party avoiding the contract is reduced by the provisions of article 88, which requires the party who relies on a breach of the contract to adopt all reasonable measures to mitigate the loss resulting from the breach and threatens him with a reduction in the damages if he fails to adopt such measures.

III. Observations on the Uniform Law on the Formation of Contracts
for the International Sale of Goods

Among the general observations which some Governments have made, there is one that should be gone into; it criticizes the Uniform Law for having left aside the most important questions in connexion with the formation of contracts, namely, the time and place at which the contract came into being.

With regard to this, it should be noted that the first text prepared by UNIDROIT in 1936, entitled "Preliminary Draft of a Uniform Law on International Contracts made by Correspondence", was designed primarily to determine the place and the moment of the conclusion of international contracts in order to eliminate the inconveniences caused by the divergencies existing among laws relating to contracts made by correspondence. The draft adopted a mixed system based on the main theories of dispatch, reception and knowledge. It specified that the place and the moment of the conclusion of the contract are determined by the place and the moment the acceptance is dispatched (article 8).

The second version of the UNIDROIT draft, submitted to the Government of the Netherlands in 1958, extended the sphere of application of the uniform rules to contracts inter praesentes and therefore eliminated any reference to the "place" of conclusion. However, article 12 contained an explicit reference to the "moment" of conclusion.^{6/} The explanatory report states that the question of the moment when the contract is deemed to have been concluded - a question of very great importance for the application of the Uniform Law on Sales - was resolved by rules which are in fact merely corollaries of the rules relating to offer and acceptance, and the moment of the formation of the contract should be that at which the acts which form the contract irrevocably link the two parties.

^{6/} "The moment of the conclusion of a contract shall be the moment when an acceptance is communicated to the offeror; nevertheless if the acceptance is not communicated in the time fixed, but must, according to article 8, be considered as having arrived in due time, the contract shall be deemed to have been concluded on the expiration of the period in which the acceptance should have been communicated to the offeror. If the acceptance consists of an act other than a declaration the contract shall be concluded by the performance of such act, according to the conditions laid down in the present law and at the moment of such performance."

In reviewing the UNIDROIT draft, the Special Commission came to the same conclusions, specifying in article 12 that "the moment of the conclusion of a contract shall be the moment when an acceptance is communicated to the offeror", subject to the reservations which follow.

At the Diplomatic Conference, two schools of thought emerged, one in favour of deleting article 12 and the other in favour of retaining it. Those who advocated its deletion advanced the following arguments: that article 12 was simply a repetition of what was contained in earlier articles and that, besides, the definition of the moment of conclusion of the contract as given in that article could not be accepted in relation to most of the articles in the Uniform Law on Sales;^{7/} that the contract existed even if the moment of its conclusion could not be specified; moreover, it was not very important to be able to specify the moment of conclusion, in view of the differences arising from the diversity of individual situations. The delegations which were in favour of retaining the article expressed the view that it would be a good thing, for the sake of those who were not lawyers, to give a definition of the moment of conclusion of the contract, even though that was implied in the other articles of the Law.

The result of a preliminary vote on this point was 8 votes for deletion and 10 for retention. The result of a second vote, on the proposal submitted by the Working Group, was 9 votes for deletion and 5 for retention. In the plenary session, no objections were made to the deletion of article 12.

One delegation noted that the provision of article 2, paragraph 2, of the Uniform Law, stating that "a term of the offer stipulating that silence shall amount to acceptance is invalid", might lead to the conclusion a contrario that the provisions contained in the offer and reply could have effect even when established unilaterally. The fear expressed by this delegation seems unfounded. The authors of the draft considered it necessary to state explicitly that a term of this kind would be invalid because it threatened to destroy the structure of the Uniform Law, which is based on a double manifestation of intention, by introducing a principle that would be very dangerous to international commercial transactions. This cannot be interpreted as implying recognition of the validity of any other unilateral clauses which are not accepted by the other party.

^{7/} The articles of the Uniform Law on Sales which would be particularly affected by article 12 were said to be articles 45, 47, 62, 82 and 84 (Records and documents of the Conference, vol. I, page 229.)

With regard to article 4, paragraph 1, one delegation expressed the view that the offer should contain the essentials of the future contract.

This requirement seems to be implied in the wording of the article, which states that the offer must be "sufficiently definite to permit the conclusion of the contract by acceptance" and must indicate "the intention of the offeror to be bound".

During the debate in the Committee on Formation at the Hague Conference, one delegation observed that it was not necessary for the communication to contain all of the exact details for it to be an offer, since the terms of the eventual contract arose not only from the offer but also from the terms of the international law on sales, the course of dealing and commercial usage.^{8/}

The provisions of article 7 were criticized by two delegations, for two different reasons. According to one delegation, the rule in that article would be a source of disputes and difficulties; the other delegation considered that the possibility of regarding a contract as having been concluded when the acceptance contained additions to, or limitations or modifications of, the offer should be clearly excluded, even if the acceptance contained "additional or different terms which do not materially alter the terms of the offer".

The original UNIDROIT draft (1936 version) regarded as a new offer any acceptance containing additions to or limitations or modifications of the offer, without drawing a distinction between those which materially altered the terms of the offer and those which did not. With a view to facilitating the conclusion of contracts, the second version of the UNIDROIT draft allowed a derogation to this rigid rule by making it possible for the author of the (original) offer to consider the modified offer valid, provided that he so informed the other side without undue delay.

In preparing the definitive text for the Conference, the Special Commission decided to retain this derogation but to restrict it to cases where the modifications made by the acceptor are of small importance to the offeror. The explanatory report observes that the offeror "should have the choice of treating the reply as an acceptance, provided that he informs the other party without undue delay".

^{8/} Records and Documents of the Conference, vol. I, p. 203.