

circulate the draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT) to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention prepared by the Working Group should be included.

173. The Working Group decided that at its next session it should determine which rules on validity of contracts of international sale of goods should be included in the draft Convention and to complete, if possible, its work in respect of the revision of the Uniform Law on the Formation of Contracts for the International Sale of Goods and its work on validity of such contracts.

174. In preparation of that session the Secretariat

was requested to analyse the UNIDROIT text 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. The Working Group invited any representatives or observers to submit their views to the Secretariat on the matter. The Secretariat was also requested to review the text of ULF as approved by the Working Group at this session and to suggest to the Working Group the modifications which might be made in the text in the various language versions to render the style of drafting consistent, to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles. The Working Group also requested the Secretariat to prepare a commentary on the text as it had been approved by the Working Group at this session similar to the commentary which had been prepared on the draft Convention on the International Sale of Goods.

**B. 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<sup>1</sup> (A/CN.9/128, annex I)\***

*[Article one (alternative No. 1)]*

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

*[Article one (alternative No. 2)]*

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

(a) When the States are Contracting States; or

(b) When the rules of private international law lead to the application of the law of a Contracting State.

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

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

(a) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;

(b) By auction;

(c) On execution or otherwise by authority of law;

(d) Of stocks, shares, investment securities, negotiable instruments or money;

(e) Of ships, vessels or aircraft;

(f) Of electricity.

(4) This Convention does not apply to the formation of contracts in which the predominant part of the

obligations of the seller consists in the supply of labour or other services.

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

(6) For the purposes of this Convention:

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

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

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

*Article 2*

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

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

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

*[Article 3 (alternative No. 1)]*

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

\* 3 February 1977.

<sup>1</sup> Those matters which are still unresolved by the Working Group are in square brackets.

*[Article 3 (alternative No. 2)]*

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

*Article 3A*

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

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

*Article 4*

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

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

*Article 5*

(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

(2) The offer can be revoked if the revocation is communicated to the offeree before he has dispatched his acceptance [, shipped the goods or paid the price].

(3) However, an offer cannot be revoked:

(a) if the offer expressly or impliedly indicates that it is firm or irrevocable; or

(b) if the offer states a fixed period of time for [acceptance] [irrevocability]; or

(c) if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.

*Article 6*

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

*Article 7*

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

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

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

*Article 8*

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

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

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

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

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

*Article 9*

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

[(2) If however the acceptance is communicated

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

*Article 10*

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

*Article 11*

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

*Article 12*

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

*Article 13*

Usage means any practice or method of dealing of which the parties knew or had reason to know and

which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned.

*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].

**C. Report of the Secretary-General: formation and validity of contracts for the international sale of goods (A/CN.9/128, annex II)\***

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INTRODUCTION

1. At its seventh session (Geneva, 5 to 16 January 1976) the Working Group on the International Sale of Goods requested the Secretariat to prepare, in consultation with UNIDROIT, one or more studies that would:

"(a) Submit to a critical analysis the 1964 Hague

Uniform Law on the Formation of Contracts for the International Sale of Goods and the UNIDROIT draft law on the validity of contracts of international sale of goods, and

"(b) Examine the feasibility and desirability of dealing with both subject-matters in a single instrument" (A/CN.9/116, para. 114; yearbook . . . , 1976, part two, I, 1).

2. This report is issued pursuant to that request. An-

\* 3 February 1977.