

**United Nations  
Commission on  
International  
Trade Law**

**YEARBOOK**

**Volume II: 1971**



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# NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

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## INTRODUCTION

The object and functions of the United Nations Commission on International Trade Law (UNCITRAL) as well as the purpose of its *Yearbook* are explained in the introduction to the first volume of the *Yearbook*.<sup>1</sup> Suffice it to say in this second volume that the object of the Commission is the progressive harmonization and unification of the law of international trade, and that the purpose of the *Yearbook* is to make the work of the Commission more widely known and more readily available beyond the forum of the United Nations.

It may be recalled that the first volume of the *Yearbook* covers the period from the creation of UNCITRAL to the end of the third session of the Commission in April 1970. This second volume covers the period from April 1970 to the end of the fourth session of the Commission, in March 1971.

The present volume consists of two parts. Part One completes the presentation of the documents relating to

the Commission's report on the work of its third session by including comments and action with respect to the report which were not available when the manuscript of the first volume was prepared. The major portion of this part, however, is devoted to the report of the Commission on the work of its fourth session.

Part Two, following the pattern of the first volume, reproduces most of the documents relating to the priority subjects which were considered at the fourth session of the Commission: international sale of goods; international payments, and international legislation on shipping.<sup>2</sup> These documents include reports of the working groups, analyses of replies; comments and proposals by Governments, representatives of members of the Commission and banking and trade institutions, and reports of the Secretary-General. In the interest of comprehensive coverage, references to documents which have not been included in this volume are given at the end of each relevant section.

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<sup>1</sup> *Yearbook of the United Nations Commission on International Trade Law, Volume I, 1968-1970* (United Nations publication, Sales No.: E.71.V.1).

<sup>2</sup> International commercial arbitration, a priority subject, was not considered at the Commission's fourth session, pending the report of the Special Rapporteur on the subject, which will be submitted to the fifth session of the Commission.

**Part One**

**REPORTS OF THE COMMISSION ON ANNUAL SESSIONS;  
COMMENTS AND ACTION THEREON**

## I. THE THIRD SESSION (1970); COMMENTS AND ACTION WITH RESPECT TO THE COMMISSION'S REPORT

### A. Extract from the report of the Trade and Development Board, United Nations Conference on Trade and Development, 24 September 1969-13 October 1970 \*

#### C. *Progressive development of the law of international trade: report of the United Nations Commission on International Trade Law on the work of its third session*

229. In accordance with General Assembly resolution 2205 (XXI), the Board had before it the report of the United Nations Commission on International Trade Law (UNCITRAL) on the work of its third session.<sup>44</sup> The General Assembly resolution provided that any comments or recommendations which the Board might wish to make on the report, including suggestions on topics for inclusion in the work of the Commission, should be transmitted to the General Assembly in accordance with the relevant provision of General Assembly resolution 1995 (XIX). The report of UNCITRAL included an account of the action taken in respect of its work on international shipping legislation and the co-ordination of this work with the related activities of UNCTAD.

230. The representative of a developing country expressed satisfaction with the work done by UNCITRAL at its third session, held in New York in April 1970, and welcomed its work programme on the subjects of international sale of goods, international payments and international commercial arbitration. In particular he welcomed the approach approved by UNCITRAL to take up consideration of articles 1 to 17 of the Uniform Law on International Sale of Goods on a systematic and thorough basis.

231. On the subject of international shipping legislation, he stressed the need for co-ordination of the efforts of the working groups of UNCTAD and UNCITRAL and welcomed the procedure evolved at the third session of UNCITRAL whereby the Chairman of its Working Group would attend the meetings of the UNCTAD Working Group on the subject. This was in line with the Board's recommendation at the first part of its ninth session that there should be continued close co-operation between UNCTAD and UNCITRAL in the field of international legislation on shipping. He suggested that the member Governments of the UNCITRAL Working Group could simultaneously undertake the preliminary work of collecting information on the items included in the work programme of the UNCTAD Working Group and make preliminary studies of existing conventions and other regulations on the subjects, taking into account the work done by other bodies in those fields, so that as and when the UNCTAD Working Group was able to make its recommendations, the UNCITRAL Working Group could, without any loss of time, apply itself to the task of drafting the requisite legislation.

#### *Action by the Board*

232. The Board took note with appreciation of the report of the United Nations Commission on International Trade Law on the work of its third session, taking note also of the comments made thereon in the course of the debate.

<sup>44</sup> *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017).*

### B. Report of the Sixth Committee \*\*

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\* *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1).*

\*\* *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 86, document A/8146.*

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### I. INTRODUCTION

1. At its 1843rd plenary meeting, on 18 September 1970, the General Assembly included the item entitled "Report of the United Nations Commission on International Trade Law on the work of its third session" as item 86 on the agenda of its twenty-fifth session, and allocated it to the Sixth Committee for consideration and report.

2. The Sixth Committee considered this item at its 1194th to 1199th meetings, held from 8 to 14 October 1970 and at its 1201st and 1205th meetings, held on 15 and 22 October 1970.

3. At its 1194th meeting, on 8 October 1970, Mr. Albert Lilar (Belgium), Chairman of the United Nations Commission on International Trade Law at its third session, introduced the Commission's report on the work of that session (A/8017).<sup>1</sup> The Sixth Committee also had before it a note by the Secretary-General (A/C.6/L.794) setting forth the comments on the Commission's report by the Trade and Development Board of the United Nations Conference on Trade and Development (UNCTAD).

4. At the 1201st meeting, on 15 October 1970, the Rapporteur of the Sixth Committee raised the question whether the Sixth Committee wished to include in its report to the General Assembly a summary of the views expressed during the debate on agenda item 86. After referring to paragraph (f) of the annex to General Assembly resolution 2292 (XXII), of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Committee decided that, in view of the nature of the subject-matter, the report on agenda item 86 should include a summary of the representative trends of opinion.

### II. PROPOSAL

5. At the 1205th meeting, on 22 October 1970, the representative of Belgium introduced a draft reso-

lution the sponsors of which, including those announced by the Chairman at that meeting were Australia, Belgium, Brazil, Greece, Haiti, Hungary, India, Indonesia, Iran, Japan, Morocco, Nigeria, Norway, Pakistan, the Philippines, Romania, Rwanda, Singapore and Zambia (A/C.6/L.798).

[For the text of the draft resolution see section C below: General Assembly resolution 2635 (XXV) of 12 November 1970.]

### III. DEBATE

6. The main trends of the opinions expressed in the Sixth Committee are summarized in sections A to I below. Sections A and B concern the observations on the role and functions of the Commission and its working methods. The succeeding sections, relating to more specific topics, are set out under the following headings: international sale of goods, international payments, international commercial arbitration, international legislation on shipping, publications of the Commission, training and assistance in the field of international trade law and questions relating to future work.

#### A. The role and functions of the United Nations Commission on International Trade Law

7. Many representatives expressed satisfaction at the progress that the Commission had already made towards the progressive unification and harmonization of international trade law. The view was expressed that the Commission had a significant role to play in the elimination of obstacles which hinder the flow of international trade and consequently in the maintenance of peace and the furtherance of the economic well-being of all peoples. Special reference was made to the needs of developing and land-locked countries.

8. The view was expressed that the primary function of the Commission was to co-ordinate the activities of existing international organizations active in the field of progressive harmonization and unification of international trade law. Several representatives stated that this approach would unduly restrict the terms of reference of the Commission embodied in General Assembly resolution 2205 (XXI) of 17 December 1966. In

<sup>1</sup> This presentation was pursuant to a decision taken by the Sixth Committee at its 1096th meeting, on 13 December 1968. See *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 88, document A/7408, para. 3.

the opinion of these representatives, such a restrictive view of the Commission's function was undesirable in view of the representation in the Commission of the regions and the principal economic and legal systems of the world. While emphasizing the necessity of co-ordinating the work of, and co-operation with, those organizations, these representatives agreed that, in the proper performance of its duties, the Commission should undertake, whenever necessary, the task of formulating new uniform rules and conventions. Some representatives observed that, without such a creative function, the Commission would serve only as an instrument for maintaining existing legal rules to the detriment of developing nations.

9. Some representatives expressed the opinion that the Commission should also direct its efforts towards the elimination of all forms of discriminatory norms and practices presently encountered in the field of international trade. Other representatives were of the opinion that the success so far achieved by the Commission was due in large measure to its avoidance of political controversies, and that this approach was consistent with the understanding at the time of the establishment of the Commission that its work would be directed to the body of rules governing international commercial relationships of a private law nature.

#### *B. The working methods of the United Nations Commission on International Trade Law*

10. Most representatives who took the floor commended the working methods adopted by the Commission. These working methods were characterized as efficient, constructive and pragmatic. Many representatives expressed appreciation of the extensive analytical preparatory work undertaken by the Commission with a view to assessing commercial norms and practices existing in different parts of the world as well as identifying the problems encountered in various fields of international trade law. In the opinion of many representatives, this approach would ensure that the Commission's solutions were based on solid foundations and developed with due care. One representative, however, cautioned against excessive preparatory work which might interfere with prompt and dynamic action.

11. Many representatives welcomed the manner in which the Commission utilized the expertise of its members in the preparation of technical specialized studies and the drawing up of parallel draft articles and conventions. In this respect, special tribute was paid to the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods for the expeditious way in which it performed its task. Many representatives also commended the Commission for the effective manner in which it had delegated authority to the Working Group on the International Sale of Goods and for the various measures adopted in order to systematize and streamline its work in this field.

12. Most representatives expressed satisfaction with the level of co-operation that the Commission had established with international organizations at work in the field of international trade law. Special reference

was made to the co-operation received in developing and analysing commercial practices with respect to negotiable instruments. Some representatives expressed the hope that the Commission would broaden the scope of its co-operation and make even more use of the expertise available in international organizations.

13. Many representatives also expressed their appreciation of the fact that the Commission continued to reach its decisions by consensus without voting. In the opinion of these representatives, the consensus method was conducive to achieving a large measure of co-operation among countries having different legal, economic and social systems. It was noted that differing views with respect to the approach to specific problems were inevitable and the hope was expressed that the consensus method would not be allowed to block the solutions to these problems.

#### *C. International sale of goods*

14. All representatives who spoke on the issue stressed the importance and significance of the unification and harmonization of the substantive rules governing the international sale of goods. Most representatives welcomed the Commission's mandate to the Working Group on Sales to continue the systematic examination of the Hague Conventions of 1964 to which were annexed the Uniform Law on the International Sale of Goods and the Uniform Law on the Formation of Contracts for the International Sale of Goods. In the view of several representatives, the Hague Diplomatic Conference on the Unification of Law governing the International Sale of Goods, at which these conventions were drawn up, was not fully representative of the membership of the United Nations; specific reference was made to the lack of adequate representation of the developing nations.

15. Some representatives, while welcoming the revision of these conventions, were of the opinion that the Commission's work should not discourage their acceptance pending later revision. In this respect, it was pointed out that under the terms of recommendation II, annexed to the Final Act of the Diplomatic Conference, acceptance or ratification of these conventions did not preclude the possibility of their future revision.

16. All representatives who spoke on the question noted with appreciation that a preliminary draft of a uniform law on time-limits and limitations had been prepared by a Working Group. While some representatives expressed the opinion that these uniform rules should form an integral part of a convention on uniform rules governing the international sale of goods, others preferred a separate convention on time-limits and limitations.

17. Several representatives from developing countries stressed the need for general conditions of sale and standard contracts in order to enable their countries to negotiate international sales transactions on a footing of parity with developed nations. Importance was therefore attached to the study the Secretary-General was requested to undertake (see A/8017, para. 102) on the feasibility of developing general conditions of sale embracing a wider scope of commodities than those

covered by the formulations of the Economic Commission for Europe.

#### D. *International payments*

18. Many representatives commended the Commission's approach to the progressive harmonization and unification of the law relating to negotiable instruments. In their opinion, the Commission's decision to continue to investigate the feasibility of drawing up a convention setting forth uniform rules governing a special negotiable instrument for optional use in international transactions was well calculated to circumvent the difficulties arising from the divergencies between the common law and the civil law rules governing negotiable instruments. Some representatives pointed out that recent developments militated in favour of standardization and greater rationalization of practices, and that such matters as the form of an instrument became increasingly important in the context of automated processing.

19. Many representatives noted with appreciation that the Commission had gathered and skilfully analysed an impressive volume of data on the practices of banking and trade institutions in all parts of the world, and had also obtained the views and suggestions of Governments and banking institutions on the possible content of the uniform rules governing the proposed negotiable instrument. There was general agreement that such an analytical inquiry was an important step in ensuring that the proposed uniform rules would meet the practical needs of international commerce.

20. Several representatives expressed satisfaction with the decisions taken by the Commission in respect of bankers' commercial credits and guarantees and securities. In particular, these representatives welcomed the opportunity given to Governments and to banking and trade institutions not represented in the International Chamber of Commerce (ICC) to state their views in respect of the forthcoming revision of the "Uniform Customs and Practices for Documentary Credits", drawn up by ICC.

#### E. *International commercial arbitration*

21. Many representatives expressed agreement with the conclusion reached by the Commission that, with regard to international commercial arbitration, the best course, for the time being, was for the Commission to concern itself with the problems of interpretation and application of the existing conventions. In this connexion, the representatives who spoke on the subject paid tribute to the work of the Special Rapporteur, Mr. Ion Nestor (Romania), and welcomed the extension of his mandate to the fifth session of the Commission.

22. Several representatives also approved the Commission's decision to promote the acceptance of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958<sup>2</sup> by the largest possible number of States. Some representatives stated that, in response to the Commission's recommendation, their Governments had recently taken or were contemplating

taking affirmative action towards ratification of this Convention.

23. The suggestion was made that the Commission might consider the compilation and dissemination of texts of arbitral awards or judicial decisions in the field of international trade law. Another representative suggested that the Commission might find it useful to collect and publish in a future volume of the *Register of Texts* the main multilateral agreements relating to international commercial arbitration and to list the current signatories of these conventions.

24. With reference to the rising cost of arbitration, it was suggested that the setting up of regional arbitration tribunals by the regional economic commissions might help reduce these costs and encourage wider use of the arbitration procedure for the settlement of commercial disputes.

#### F. *International legislation on shipping*

25. Several representatives stressed the importance of fair and equitable international shipping legislation to the economic development of their countries. Representatives of the developing countries pointed out that the existing international legislation on shipping continued to reflect interests of ship-owners at the expense of shippers in general. They were therefore gratified that the Commission, at its second session, had added international shipping legislation to the priority topics included in its programme of work and expressed the hope that the Commission would promptly undertake critical examination of existing international legislation.

26. Most representatives emphasized the importance of co-ordinating the Commission's efforts with those of other international organizations with special competence in this field; in this regard, reference was made to UNCTAD, the Inter-Governmental Maritime Consultative Organization and the International Maritime Committee. These representatives took note, with appreciation, of the organizational measures taken at the third session to co-ordinate the work in this area with UNCTAD's Working Group on Shipping. However, several representatives regretted that the Commission had not yet carried out substantive work on this important subject and expressed the hope that, at its fourth session, the Commission would consider the matter in depth. Some representatives, while accepting the view that co-ordination with UNCTAD and other bodies concerned was essential, were of the opinion that the critical reappraisal and improvement of the existing international legislation on shipping by the Commission should not be delayed by problems relating to the allocation of functions between the Commission and UNCTAD.

27. Some representatives recommended that the Commission should, for the time being, concentrate its efforts in specific areas, such as the law relating to carriers' liabilities to shippers with special reference to standard clauses in bills of lading and charter parties.

#### G. *Publications of the United Nations Commission on International Trade Law*

28. Many representatives noted with appreciation

<sup>2</sup> United Nations, *Treaty Series*, vol. 330 (1959), No. 4739, p. 3.

that a volume of the *Register of Texts* and the first volume of the *Yearbook of the United Nations Commission on International Trade Law* would soon be published in all working languages of the General Assembly. Several representatives stressed the importance of the continued publication of both the *Register of Texts* and the *Yearbook* in order to provide Governments, universities and practitioners with basic source material on international trade law, and to make the work of the Commission more widely known beyond the forum of the United Nations.

29. Some representatives expressed the view that these publications occupied the time of the Commission's secretariat with editorial work and burdened the budget of the United Nations. These representatives expressed the hope that the cost of future publications would be substantially reduced.

#### H. *Training and assistance in the field of international trade law*

30. Many representatives stressed the importance for the Commission to develop local expertise in the field of international trade law, particularly in the developing countries, and welcomed its decision to continue and intensify the existing programme of training and assistance.

31. Some representatives suggested that a new programme of training and assistance, with emphasis on substantial periods of practical training, including apprenticeship with organizations or institutions actively engaged in work in the area, should be developed by the Commission. It was noted that such a programme should not involve additional cost to the United Nations.

32. Other representatives stressed the importance of establishing chairs or regional institutes on international trade law within a university or academic institution in developing countries, and expressed the hope that ways to implement this programme could be found.

#### I. *Questions relating to future work*

32. Other representatives stressed the importance of the proposal, submitted by the delegation of France at the third session of the Commission, calling for the conclusion of a basic convention to establish a common body of international trade law. Under this proposal, new uniform rules approved by the Commission would come into effect in a State that adopted the basic convention unless that State expressly rejected all or part

of the uniform rules within a specified period. It was suggested that, by this approach, unified rules for international trade would more rapidly come into force than by the traditional system of ratification of separate conventions.

34. Many representatives, however, expressed doubt as to the feasibility of the proposal because of its inconsistency with the constitutional practice of many States. Some representatives also mentioned that the proposal might encroach upon sovereignty of States.

35. The view was expressed that the constitutional difficulties which might arise from acceptance of the proposal were perhaps not insurmountable; similar procedures had been adopted to implement the regulations of other international organizations. It was also stated that the proposal involved no infringement on national sovereignty of States because States were free to decide whether to adhere to the initial basic convention. Furthermore, a State which had adhered to the basic convention was at liberty to reject any of the uniform rules developed subsequent to the basic convention.

36. Several representatives endorsed the Commission's recommendations relating to the desirability of making provision for it to obtain, where necessary, the services of consultants with special expertise in specific matters, and to staff adequately the Commission's secretariat. On the other hand, some representatives stressed that full implementation of these recommendations would be inappropriate because of financial considerations and that the work of the Commission should be done without any supplementary expenses.

#### IV. VOTING

37. At the 1205th meeting, on 22 October 1970, the Sixth Committee unanimously adopted the draft resolution submitted (A/C.6/L.798).

38. Explanations of vote were given before the voting by Sierra Leone, the United States of America and the Union of Soviet Socialist Republics.

#### *Recommendation of the Sixth Committee*

[The text of the recommendation, not included here, contained a draft resolution which was adopted by the General Assembly without change as resolution 2635 (XXV), reproduced in section C below.]

#### C. General Assembly resolution 2635 (XXV) of 12 November 1970

2635 (XXV). REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

*The General Assembly,*

*Having considered* the report of the United Nations Commission on International Trade Law on the work of its third session,<sup>1</sup>

*Recalling* its resolution 2205 (XXI) of 17 December

1966 establishing the United Nations Commission on International Trade Law and defining the object and terms of reference of the Commission,

*Recalling* its resolution 2502 (XXIV) of 12 November 1969 with respect to the report of the United Na-

<sup>1</sup> Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017).

tions Commission on International Trade Law on the work of its second session, in which the General Assembly recommended that the Commission should keep its programme of work under constant review, bearing in mind the important contribution that the progressive harmonization and unification of international trade law can make to economic co-operation among all peoples and, thereby, to their well-being,

*Noting* the forthcoming publication of the *Register of Texts*<sup>2</sup> and of the first volume of the *Yearbook of the United Nations Commission on International Trade Law*,<sup>3</sup>

*Noting* that the Trade and Development Board, at its tenth session, expressed its appreciation of the report of the United Nations Commission on International Trade Law,<sup>4</sup>

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on its third session and of the progress made in its work;

2. *Notes with appreciation* that the desire, expressed in General Assembly resolution 2502 (XXIV), that there be the widest possible participation by the members of the United Nations Commission on International Trade Law in the preparatory work to be done by working groups has been fulfilled, and that this participation has substantially advanced the work of the Commission;

3. *Endorses* the desire expressed by the United Nations Commission on International Trade Law to obtain, where necessary, the services of consultants or organizations with special expertise in technical matters dealt with by the Commission, it being understood that re-

course to such services is made only in special circumstances;

4. *Expresses the hope* that, in accordance with the desire set forth in the report of the United Nations Commission on International Trade Law, it will prove possible to staff the Commission's secretariat appropriately so as to cope with any increases in the workload involved in servicing the Commission, provided that this does not entail supplemental appropriation;

5. *Recommends* that the United Nations Commission on International Trade Law should:

(a) Continue its work on the topics to which it has decided to give priority, that is, the international sale of goods, international payments, international commercial arbitration and international legislation on shipping;

(b) Continue to give attention to ways and means of promoting training and assistance in the field of international trade law;

(c) Continue to collaborate fully with international organizations active in the field of international trade law;

(d) Continue to develop working methods which will enhance the efficiency of working groups and ensure full consideration of the commercial practices and needs of all regions;

(e) Continue to give special consideration, in promoting the harmonization and unification of international trade law, to the interests of developing and land-locked countries;

6. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussions on the Commission's third report at the twenty-fifth session of the General Assembly.

1903rd plenary meeting,  
12 November 1970.

<sup>2</sup> United Nations publication, Sales No.: E.71.V.3.

<sup>3</sup> United Nations publication, Sales No.: E.71.V.1.

<sup>4</sup> See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 15 (A/8015/Rev.1 and Rev.1/Corr.1)*, part two, para. 232.



## II. THE FOURTH SESSION (1971)

### A. Report of the Commission \*

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\* Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*.

## INTRODUCTION

The present report of the United Nations Commission on International Trade Law covers the Commission's fourth session held in Geneva from 29 March to 20 April 1971.

Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

## CHAPTER I

## ORGANIZATION OF THE SESSION

A. *Opening*

1. The United Nations Commission on International Trade Law (UNCITRAL) opened its fourth session on 29 March 1971. The session was opened by the Representative of the Secretary-General.

B. *Membership and attendance*

2. Under General Assembly resolution 2205 (XXI), by which UNCITRAL was established, the Commission consists of twenty-nine States, elected by the Assembly. The present members of the Commission, elected by the Assembly on 30 October 1967 and 12 November 1970, are the following States:<sup>1</sup>

Argentina \*  
Australia \*  
Austria  
Belgium \*  
Brazil \*  
Chile  
Congo (Democratic Republic of) \*  
France  
Ghana  
Guyana  
Hungary \*  
India \*  
Iran \*  
Japan  
Kenya \*  
Mexico \*  
Nigeria  
Norway  
Poland  
Romania \*  
Singapore  
Spain \*

<sup>1</sup> Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. However, with respect to the initial election, the terms of fourteen members, selected by the President of the Assembly, expired at the end of three years (31 December 1970). Accordingly, the General Assembly, at its twenty-fifth session, elected fourteen members to serve for a full term of six years, ending on 31 December 1976. The terms of the fifteen members marked with an asterisk will end on 31 December 1973. The terms of the other fourteen members will end on 31 December 1976.

Syria \*

Tunisia \*

Union of Soviet Socialist Republics

United Arab Republic

United Kingdom of Great Britain and Northern Ireland

United Republic of Tanzania

United States of America \*

3. With the exception of the Democratic Republic of the Congo, Guyana and Kenya, all members of the Commission were represented at the session.

4. The following United Nations organs, specialized agencies, intergovernmental and international non-governmental organizations were represented by observers:

(a) *United Nations organs*

United Nations Conference on Trade and Development (UNCTAD); United Nations Economic Commission for Europe (ECE).

(b) *Specialized agencies*

Inter-Governmental Maritime Consultative Organization (IMCO); International Monetary Fund (IMF).

(c) *Intergovernmental organizations*

Asian-African Legal Consultative Committee; Bank for International Settlements (BIS); Commission of the European Communities; Council for Mutual Economic Assistance (CMEA); Council of Europe; European Free Trade Association (EFTA); Hague Conference on Private International Law; International Institute for the Unification of Private Law (UNIDROIT); Organization of American States (OAS); World Intellectual Property Organization (WIPO).

(d) *International non-governmental organizations*

International Bar Association; International Chamber of Commerce (ICC); International Chamber of Shipping (ICS); International Law Association (ILA).

C. *Election of officers*

5. At its 63rd and 65th meetings, on 29 and 30 March 1971, the Commission elected the following officers<sup>2</sup> by acclamation:

Chairman: Mr. Nagendra Singh (India);

Vice-Chairman: Mr. Nehemias Gueiros (Brazil);

Vice-Chairman: Mr. Joaquín Garrigues Diaz-Cañabate (Spain);

Vice-Chairman: Mr. Jerzy Jakubowski (Poland);

Rapporteur: Mr. Joseph Diekola Ogundere (Nigeria).

D. *Agenda*

6. The agenda of the session as adopted by the Commission at its 64th meeting, on 29 March 1971, was as follows:

<sup>2</sup> In accordance with a decision taken by the Commission at the second meeting of its first session, the Commission shall have three Vice-Chairmen, so that each of the five groups of States listed in General Assembly resolution 2205 (XXI), section II, paragraph 1, will be included among the officers of the Commission (see report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216)*, para. 14 and *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1), part two, chapter I).

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International legislation on shipping.
5. International payments:
  - (a) Negotiable instruments;
  - (b) Bankers' commercial credits;
  - (c) Bank guarantees;
  - (d) Security interests in goods.
6. International sale of goods:
  - (a) Uniform rules governing the international sale of goods;
  - (b) General conditions of sale and standard contracts;
  - (c) Time-limits and limitations (prescription) in the field of the international sale of goods.
7. Yearbook of the Commission.
8. Register of texts.
9. Bibliography on international trade law.
10. Training and assistance in the field of international trade law.
11. Future work.
12. Promotion of ratification of UNCITRAL conventions.
13. Date of the fifth session.
14. Adoption of the report of the Commission.

#### E. Decisions of the Commission

7. At the 66th meeting of the Commission, on 30 March 1971, the Chairman recalled that the Commission, at its first session, had agreed that its decisions should, as far as possible, be reached by consensus, and that it was only in the absence of consensus that decisions should be taken by a vote as provided for in the rules of procedure relating to the procedure of Committees of the General Assembly.

8. The decisions taken by the Commission in the course of its fourth session were all reached by consensus.

#### F. Adoption of the report

9. The Commission adopted the present report at its 91st meeting, on 20 April 1971.

### CHAPTER II

#### INTERNATIONAL LEGISLATION ON SHIPPING

10. The Commission, at its second session, included international legislation on shipping among the priority items in its programme of work and set up a Working Group, which was requested to indicate the topics and methods of work in this field. In response to a decision taken during the Commission's third session, the Working Group met from 22 to 26 March 1971, following the session of the UNCTAD Working Group on International Shipping Legislation, and recommended a programme of work in this area. The programme was considered by the Commission at the present session,<sup>3</sup> and its decision appears at paragraph 19 below.

<sup>3</sup> The Commission considered the subject in the course of its 65th to 68th meetings, held on 30 and 31 March 1971, and also briefly at its 70th, 73rd and 77th meetings, held on 1, 5 and 7 April 1971. For the Commission's prior action on the subject, see the report of the United Nations Commission on Inter-

11. The Commission had before it the report of the UNCITRAL Working Group on International Legislation on Shipping on the work of the session held in Geneva from 22 to 26 March 1971 (A/CN.9/55). The Commission also had before it the following documents: working paper prepared by the Secretariat containing suggestions for a work programme in the area (A/CN.9/WG.3/WP.2); report by the Chairman of the UNCITRAL Working Group on International Legislation on Shipping on his participation as special representative at the session of the UNCTAD Working Group on International Shipping Legislation (A/CN.9/WG.3/WP.3); report of the UNCTAD secretariat on bills of lading (TD/B/C.4/ISL/6); report of the UNCTAD Working Group on International Shipping Legislation on its second session (TD/B/C.4/86).

12. Members of the Commission expressed their appreciation for the work achieved by the UNCITRAL Working Group on International Legislation on Shipping in reaching a unanimous recommendation on a programme of work. Representatives also expressed their appreciation for the report transmitted to the UNCITRAL Working Group by Mr. Eugenio Cornejo Fuller (Chile), who had been the Commission's special representative at the second session of the UNCTAD Working Group on International Shipping Legislation.

13. Several representatives noted that the report of the UNCTAD secretariat on bills of lading had been valuable to the Working Groups of both UNCTAD and UNCITRAL and, in their opinion, should be useful in the future. One representative expressed the view that the economic aspects had not yet been fully studied.

14. The Commission considered and approved the recommendation of the Working Group that the subject of "bills of lading" should be considered by the Commission. Most representatives were of the opinion that for the present the Commission should concentrate its work on bills of lading. One representative, however, took the view that the Commission should not restrict its work to bills of lading, and suggested that work on other subjects should be undertaken concurrently.

15. Several representatives stated that the subject decided upon was complex and that the assistance of experts in the field and in such related fields as insurance and banking would be necessary. Some representatives suggested that members of the Working Group should volunteer to prepare studies within the area of work to be carried out. It was also felt that the assistance of other organizations active in the field would be desirable. In this connexion satisfaction was expressed by several representatives that substantial co-operation had been achieved between the Commission and the United Nations Conference on Trade and Development.

national Trade Law on the work of its second session (*Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), paras. 114-133 and *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970*, part two, chapter II); report of the Commission on the work of its third session (*ibid.*, *Twenty-fifth Session, Supplement No. 17* (A/8017), paras. 157-166 and *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970*, part two, chapter III).

16. The view was generally held that a new working group on international legislation on shipping should be established and that its membership should be larger than that of the first one. It was also agreed that the composition of the new working group should be determined primarily by criteria of geographic distribution and of representation of the various economic interests involved, but that consideration should also be given to providing representation for the various legal systems, such as those of the common law and the civil law.

17. Most representatives expressed their views in respect of the size of the new working group. Some representatives suggested that, for all geographic regions and economic interests to be represented, it would be necessary to establish a working group of the whole, that it was probable that a larger working group would attract more authority than a smaller one, which they considered would be less representative. This view was opposed by other representatives who feared that efficiency would be lost if the working group were to be too large and that one with a membership of from fourteen to twenty-one would adequately represent the various interests while offering greater efficiency. The discussion in respect of the size and composition of the working group revealed that special circumstances needed to be taken into account. Consensus was reached that the working group should consist of twenty-one members of the Commission, but it was noted that neither the size nor the composition agreed upon should constitute a precedent for future working groups.

18. At the 68th meeting of the Commission, on 31 March 1971, the representative of India, on behalf of Chile, India, the Union of Soviet Socialist Republics, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America, submitted a proposal for a resolution (A/CN.9/IV/CRP.3). In the discussion that followed, some representatives considered that the use of the term "bills of lading" might give rise to a misunderstanding with respect to the terms of reference for the new working group. In this connexion, various suggestions were made for modifying the designation of the subject to be examined, such as "Bills of lading with respect to transport by sea", "Ocean bills of lading", "Contracts of international transport of goods by sea under bills of lading", and "Contracts of international transport of goods by sea". Most representatives, however, were of the opinion that it was desirable to retain the term "bills of lading" without modification, which had been used throughout the discussion of the subject in UNCTAD and UNCITRAL; the substitution of a different term could lead to confusion. In any event, the field of inquiry was clearly defined by the detailed provisions of the resolution of the UNCTAD Working Group, which is quoted in the Commission's resolution. Following discussion on this matter, it was agreed to retain the term "bills of lading".

#### *Decision of the Commission*

19. The Commission, having considered the draft resolution at its 68th, 70th and 73rd meetings, on 31 March and 5 April 1971, and having heard a state-

ment on financial implications by the representative of the Secretary-General, adopted unanimously the following resolution:

#### *"The United Nations Commission on International Trade Law,*

*"Taking note of the resolution on bills of lading adopted by the Working Group on International Shipping Legislation established by the United Nations Conference on Trade and Development,<sup>4</sup> in which the Commission has been invited to undertake the examination of the rules and practices concerning bills of lading as referred to in paragraph 1 of that resolution and, as appropriate, to prepare the necessary draft texts, taking into account the reports of the Working Group of the United Nations Conference on Trade and Development and that of its secretariat;*

*"Noting with appreciation the report of the Commission's Working Group on International Legislation on Shipping,<sup>5</sup>*

#### *1. Decides:*

*"(a) That within the priority topic of international legislation on shipping, the subject for consideration for the time being shall be bills of lading;*

*"(b) That within the subject of bills of lading, the topics for consideration should include those indicated in paragraphs 1 and 2 of the resolution adopted by the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development at its second session,<sup>6</sup> reading as follows:*

*"1. Considers that the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924)<sup>7</sup> and in the Protocol to amend that Convention (the Brussels Protocol 1968), should be examined with a view, to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations.*

*"2. Further considers that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:*

*"(a) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;*

*"(b) The scheme of responsibilities and liabilities, and rights and immunities, in-*

<sup>4</sup> TD/B/C.4/86, annex I.

<sup>5</sup> A/CN.9/55. See part two, III, below.

<sup>6</sup> TD/B/C.4/86, annex I.

<sup>7</sup> League of Nations, *Treaty Series*, vol. CXX (1931-1932), No. 2764.

corporated in Articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

"(c) Burden of proof;

"(d) Jurisdiction;

"(e) Responsibility for deck cargoes, live animals, and trans-shipment;

"(f) Extension of the period of limitation;

"(g) Definitions under Article 1 of the Convention;

"(h) Elimination of invalid clauses in bills of lading;

"(i) Deviation, seaworthiness and unit limitation of liability.";

it is noted that, by its terms, paragraph 2 of the resolution does not confine consideration to those areas listed in sub-paragraph (a) through (i);

"2. *Decides* to establish a new and enlarged Working Group on International Legislation on Shipping consisting of the following twenty-one member States of the Commission: Argentina, Australia, Belgium, Brazil, Chile, Congo (Democratic Republic of), France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Spain, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and the United States of America; these members should be represented on the Working Group by persons specially qualified in the field of law which was referred to the Working Group for consideration; the Secretary-General is requested to invite members of the Commission not represented on the Working Group and intergovernmental and non-governmental organizations active in the field to attend the meetings of the Working Group as observers, and is also requested to invite the Chairman of the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development to attend the meetings of the Working Group;

"3. *Requests* the Working Group:

"(a) To meet during the fourth session to consider the organization of its work;

"(b) To consider at this meeting the Working Paper prepared by the Secretariat<sup>8</sup> with special reference to the portions dealing with the programme of work; and

"(c) To take into account the recommendations made by the first Working Group at its second session as set forth in sub-paragraphs (6) and (7) of paragraph 13 of its report<sup>9</sup> and to plan its programme and methods of work in such a way that the examination of the topics referred to in paragraph 1 (b) above may be undertaken as quickly as possible;

"4. *Further requests* the Working Group to hold a further meeting in advance of the fifth session of

the Commission and to submit a report to the Commission on the progress of its work;

"5. *Requests* the Secretary-General to provide the Working Group with the material that may be necessary for the performance of its work; in this connexion, members of the Commission are requested to draw the Secretariat's attention to such relevant material.

20. An oral report was presented to the Commission at its 77th meeting on 7 April 1971 concerning a sessional meeting of the new Working Group on International Legislation on Shipping that was held on 6 April 1971 to consider the organization of its work, in accordance with paragraph 3 of the above resolution. Mr. Nagendra Singh (India), who had been elected Chairman of the Working Group, reported to the Commission that Mr. G. Colombres (Argentina) had been elected Vice-Chairman, and that the terms of office would continue through the first regular session of the Working Group. The election of a Rapporteur was deferred until the first regular session of the Working Group.

21. The Chairman of the Working Group stated further that after a full discussion of the agenda, and the annotations to the agenda submitted by the Secretariat, in which were included proposals regarding the programme and methods of work, the Working Group unanimously adopted a decision which provides for positive and specific steps to carry the work forward. Thus, the Working Group had complied with the Commission's request that the Working Group plan its programme and methods of work in such a way that the examination of the topics for consideration might be undertaken as quickly as possible.

22. The decision thus reported to the Commission was as follows:

"In response to the request, set forth in paragraph 3 of the resolution by the Commission adopted at the 73rd meeting, on 5 April 1971,<sup>10</sup> that the Working Group plan its programme and methods of work in such a way that the examination of the topics for consideration within the subject of bills of lading, as defined in paragraph 1 of the resolution, may be undertaken as quickly as possible, the Working Group *decides*:

"(a) That with respect to the items defined in paragraphs 2 (a), 2 (d) and 2 (e) of the resolution adopted by the UNCTAD Working Group on International Shipping Legislation at its second session (TD/B/C.4/86, annex I) and embodied in the resolution adopted by the Commission at its 73rd meeting, on 5 April 1971, the Secretary-General be invited to prepare a report setting forth proposals, indicating possible solutions, for consideration by the UNCITRAL Working Group;

"(b) That, with respect to the other areas within the field of work as defined by paragraph 1 of the Commission's resolution, the Secretary-General be requested to prepare a report analysing alternative

<sup>8</sup> A/CN.9/WG.3/WP.2.

<sup>9</sup> A/CN.9/55. See part two, III, 1, below.

<sup>10</sup> See paragraph 19 above.

approaches to the basic policy decisions that must be taken in order to implement the objectives, set forth in paragraph 2 of the UNCTAD resolution and quoted in paragraph 1 of the Commission's resolution, with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier;

"(c) That the Secretary-General be requested:

"(i) To circulate the reports requested in subparagraphs (a) and (b) above to the members of the Working Group at least two months prior to the date for the first regular meeting;

"(ii) To the extent necessary for the preparation of the above reports, to invite comments and suggestions from Governments and from international intergovernmental and non-governmental organizations active in the field;

"(d) That the members of the Working Group be invited to prepare studies and proposals within the subject, as defined by the above resolution of the Commission, and to transmit such studies and proposals to the Secretary-General for use in the preparation of the reports requested in subparagraphs (a) and (b) and for transmission to the members of the Working Group, as appropriate; and

"(e) That the Secretary-General be requested to convene the first regular meeting of the Working Group in January or February 1972."

23. After considering the Chairman's report and the decision of the Working Group on International Legislation on Shipping, the Commission took note of the report and decision, with approval.<sup>11</sup>

### CHAPTER III

#### INTERNATIONAL PAYMENTS

##### A. *Negotiable instruments*

24. The Commission continued its consideration of measures for the harmonization and unification of the law of negotiable instruments.<sup>12</sup> At its second and third sessions, the Commission had decided that work in this field should be directed towards ascertaining the desirability and feasibility of preparing uniform rules applicable to a special negotiable instrument for optional use in international transactions.<sup>13</sup> To that end, the Secretary-General was requested to prepare a questionnaire designed to obtain relevant information from Gov-

ernments and banking and trade institutions. Consequently, the Secretary-General circulated a questionnaire requesting specific information on present international payment practices and on problems encountered in settling international transactions by means of negotiable instruments; the questionnaire also invited suggestions regarding the possible content of uniform rules applicable to the proposed instrument. The Secretary-General was further requested to carry out the work on this subject in consultation with interested international organizations.

25. At the present session, the Commission had before it reports of the Secretary-General (A/CN.9/38 and Add.1 and A/CN.9/48) containing analyses of ninety-three replies to the above-mentioned questionnaire. The Commission also had before it a report of the Secretary-General entitled "Suggestions as to future work on negotiable instruments" (A/CN.9/53), which set forth a brief history of the subject and tentative conclusions and suggestions with respect to further work in this field.

26. The Commission expressed its appreciation for the work carried out by the Secretariat in accordance with the directives laid down by the Commission at its second and third sessions. In this connexion, the Commission acknowledged the valuable contribution by interested international organizations which had been consulted by the Secretariat at successive stages of its work.<sup>14</sup>

27. The Commission gave further consideration to the approach it had approved at its third session, that is, the preparation of uniform rules applicable to a special negotiable instrument to be used optionally in international transactions; there was general agreement that this approach would provide the most feasible solution to the problems and difficulties in this field of international payments. The essential feature of that approach was that unification would be confined to payment transactions that were international in character and that, consequently, the proposed uniform rules would not supersede national laws and practices in so far as those laws and practices related to domestic transactions. Moreover, the uniform rules would apply only to international transactions where the drawer of a negotiable instrument had opted for the application of the uniform rules by the use of an international instrument bearing an appropriate label or designation.

28. Most representatives who spoke on the subject expressed the view that the replies to the Secretary-General's questionnaire had shown that the problems encountered in this area were sufficiently important to justify continuation of work on this subject. First, problems had resulted from the divergencies between the rules of different legal systems; these included problems

<sup>11</sup> The Chairman of the Commission announced that, following informal consultations, it was decided that the Working Groups on the International Sale of Goods and on International Legislation on Shipping, should meet consecutively at Geneva, in 1972, from 17 to 28 January and from 31 January to 11 February, respectively.

<sup>12</sup> This subject was considered by the Commission at its 69th, 70th and 72nd meetings, held on 1 and 2 April 1971.

<sup>13</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter II, para. 87 and *ibid.*, part two, chapter III, para. 112.

<sup>14</sup> The following international organizations participated in meetings convened by the Secretariat for purposes of consultation: International Monetary Fund (IMF), Organization of American States (OAS), International Institute for the Unification of Private Law (UNIDROIT), Hague Conference on Private International Law, International Bank for Economic Co-operation (IBEC), Bank for International Settlements (BIS) and International Chamber of Commerce (ICC).

connected with the form and content of negotiable instruments, the conditions under which a person could acquire an instrument free of claims and defences of other parties to the instrument, the effect of forged instruments and endorsements, lost instruments, and protest for non-acceptance or non-payment of an instrument. Secondly, problems had arisen from the existence of widely prevailing rules that were no longer suited to modern practices and requirements of international trade. Thirdly, bankers and lawyers encountered difficulties in understanding the rules and requirements of legal systems fundamentally different from their own. However, one representative stated that, in the view of the authorities in his country, the need for new uniform rules had not been proved and that international payment transactions by instruments governed by existing laws took place without serious problems or difficulties.

29. The Commission took note with appreciation of the work carried out by the Secretariat in examining the feasibility of preparing new uniform rules applicable to a special negotiable instrument for optional use in international transactions. It was observed that useful work had been done by identifying the main points of conflict between the two principal systems of negotiable instruments law and in analysing possible means of reconciling the conflicting rules under the systems represented, on the one hand, by the United Kingdom Bills of Exchange Act, 1882, and the United States Uniform Commercial Code and, on the other hand, by the Geneva Convention of 1930 providing a Uniform Law for Bills of Exchange and Promissory Notes and the Geneva Convention of 1931 providing a Uniform Law for Cheques. The Commission noted with satisfaction that encouraging progress had been made in the consideration of possible solutions, and that further information had been sought and obtained concerning international practices that were considered relevant in developing tentative solutions in respect of certain important issues.

30. Many representatives stressed the importance of carrying out the work with due regard to the requirements of present-day payment methods and practices, and it was suggested that the proposed rules should take into account the fact that new electronic data processing techniques were being developed in many countries. One representative suggested that banking and trade institutions should be asked whether it was desirable that the proposed international instrument should be preprinted with an agreed system of machine-readable symbols, where certain notations should be placed, and how the papers could be electronically processed. The same representative further suggested that attention should be paid to payment transfers by cable, since these accounted for more than half of the volume of dollar exchange in the world.

31. Several representatives made observations with respect to the economic functions of the proposed international instrument. One representative pointed out that the preparatory work by the Secretariat had been mainly concerned with bills of exchange and cheques and had not given sufficient attention to promissory notes. As that type of negotiable instrument was becoming

increasingly prominent in international trade, this development had special importance in connexion with carriage of goods by air and short-distance land transport, where the seller's bank often instructed the buyer's bank to make payments by means of a promissory note since payment by this means was less onerous and less complicated than payment by means of a bill of exchange. Another representative took the view that the needs of international commerce would best be served by a type of instrument that would fulfil the functions of a bill of exchange as understood in the countries following the Geneva system, that is, a credit instrument permitting deferred payment for international transactions. The observer of the bank for International Settlements stated that the institutions consulted by the Bank were unanimous in urging that the desirability and feasibility of a new type of promissory note should also be studied. The role of the promissory note, although at present less important than that of the bill of exchange, was increasing substantially, particularly in the field of export credit. In addition, in some countries institutions concerned with international trade were prepared to issue promissory notes, but would not accept bills of exchange drawn on them. Furthermore, as in the case of cheques, the various procedures involved in handling promissory notes could be more easily computerized than those involved in handling bills of exchange. These technical aspects might have a bearing on the content of some of the proposed uniform rules and would, in his view, merit detailed study.

32. With respect to the methods of future work, there was consensus that a working group on negotiable instruments should be established at an appropriate stage in the development of the work programme. It was generally considered that the subject of negotiable instruments was not one which gave rise to conflicting economic interests and that, consequently, a working group of between four and seven members, representing the principal systems of negotiable instruments law, should suffice, it was further considered that such a small group would work more efficiently on the basis of a draft of uniform rules governing the proposed international negotiable instrument. For this reason, the Commission agreed that the working group should only be constituted at its fifth session, after such a draft had been prepared and circulated to the members of the Commission. After discussion, the Commission decided that it should request the Secretary-General to prepare a preliminary draft of uniform rules. In this connexion, the Commission stressed the importance of continued co-operation with experts connected with the various international organizations that had participated in the preparatory work already carried out. It was also noted that the assistance of consultants might be required in special circumstances. The Commission took note of the intention of the secretariat that the results of the preparatory work that had already been performed, as well as the work to be done in preparation of draft uniform rules would be made available to the working group to be set up by the Commission at its fifth session.

33. The observer of the Organization of American States (OAS) informed the Commission that, at the

request of the Council of the OAS, two draft Inter-American Conventions on Bills of Exchange and Cheques for International Circulation had been prepared for consideration by the Inter-American Juridical Committee.

34. Observers of organizations who had been co-operating with the Secretary-General in the work indicated their willingness to continue such co-operation.

#### *Decision of the Commission*

35. At the 72nd meeting of the Commission, on 2 April 1971, the representative of Australia, on behalf of Australia, Brazil, Hungary, India and the United Kingdom of Great Britain and Northern Ireland, submitted a proposal for a decision (A/CN.9/IV/CRP.4). At the same meeting, the Commission, after considering the foregoing proposal and having heard a statement on its financial implications by the Representative of the Secretary-General, adopted unanimously the following decision:

#### *"The United Nations Commission on International Trade Law"*

"1. *Decides* to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions;

"2. *Requests* the Secretary-General:

"(a) To prepare a draft of such rules accompanied by a commentary and to present the draft and commentary to the Commission at its fifth session;

"(b) To carry out the work after consultation with interested international organizations, including banking and trade organizations and, where special circumstances so require, with the assistance of consultants, and for these purposes to convene meetings as required;

"3. *Expresses the hope* that the necessary funds will be made available to enable the Secretary-General to carry out the work requested in paragraph 2 above;

"4. *Decides* to establish at its fifth session a small working group entrusted with the preparation of a final draft to be submitted to the Commission.

#### *B. Bankers' commercial credits*

36. This subject is concerned primarily with standardized procedures and standard contract provisions employed with respect to instruments (often called letters of credit) used to assure payment in transactions such as the sale of goods. This subject was included by the Commission in its work programme at the first session, and was further considered at the second and third sessions of the Commission.<sup>15</sup> At these sessions, the Commission attached particular importance to the "Uniform Customs and Practice for Documentary Credits", drawn up by the International Chamber of

Commerce (ICC) in 1933 and revised in 1951 and 1962.

37. In the discussion of this item at the present session,<sup>16</sup> it was recalled that, at the Commission's third session, it had been stated on behalf of the International Chamber of Commerce (ICC) that it had appointed a working party for the revision of the 1962 version of the "Uniform Customs and Practice for Documentary Credits" ("Uniform Customs (1962)").<sup>17</sup> In view of the widespread use of the "Uniform Customs (1962)" and the desirability that the views of countries not represented in ICC should be taken into account in the work of revision, the Commission decided to invite Governments and interested banking and trade institutions to communicate their observations on the operation of the "Uniform Customs (1962)"<sup>18</sup> to the Secretary-General, for transmission to ICC.

38. The Commission was informed by its Secretary that a number of replies setting forth comments on difficulties encountered in the use of "Uniform Customs (1962)" had been received and that these replies had been transmitted to ICC.

39. The observer of ICC informed the Commission that the Executive Committee of ICC, in response to the views of the ICC's Commission on Banking Technique and Practice, had decided in December 1970 that a revision of "Uniform Customs (1962)" was desirable. Comments received from various countries showed that the wording of certain articles of "Uniform Customs (1962)" could be improved to facilitate interpretation and application of the Uniform Customs, and that, in some instances, basic principles should be reviewed in the light of present-day commercial practices. For such as the combined carriage of goods and transport example, recent developments with respect to transport, by containers, necessitated a revision of the present text of Uniform Customs. However, this particular aspect of the work of revision depended largely on the outcome of the work in respect of a convention on the contract for the international combined carriage of goods (TCM Convention) which might give rise to a new transport document replacing the traditional bill of lading. The observer of ICC stated that ICC might possibly submit a report on the revision of "Uniform Customs (1962)" to the Commission at its fifth session. He stated that ICC appreciated the assistance in their work on the subject received from the Commission and the Secretariat.

40. Several representatives referred to the discussion that had taken place during the third session of the Commission regarding the participation of countries not represented in ICC in the work of the revision of "Uniform Customs (1962)". They expressed disappointment that ICC had not encouraged such participation, although it had been stated on behalf of ICC that it would

<sup>16</sup> The Commission considered this subject at its 67th meeting, on 31 March 1971.

<sup>17</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter III, para. 121.

<sup>18</sup> *Ibid.*, para. 126.

<sup>15</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter I, paras. 23 and 28; *ibid.*, part two, chapter II, paras. 90-95, and *ibid.*, part two, chapter III, paras. 119-126.



give the fullest consideration to devising a procedure enabling such participation.<sup>19</sup> These representatives noted that the "Uniform Customs (1962)" were in everyday use by banking and trade institutions in a great many countries, including countries not represented in ICC, and expressed the opinion that responding to questionnaire was inadequate and that a more direct method for participation was required. One representative pointed out that the information from the observer of ICC created uncertainty as to the implementation by ICC of the decisions of the third session of the Commission and expressed the hope that the Secretariat would be able to encourage ICC to implement the decisions of the Commission.

41. The observer of ICC stated that, under the statute of the International Chamber of Commerce, the right to participate in their deliberations was limited to the National Committees of Chambers of Commerce that were members of ICC. Furthermore, the statute did not provide for setting up joint committees with other organizations. An East-West liaison committee, including all European Chambers of Commerce, had been set up, but this was due to special circumstances and did not necessarily constitute a precedent.

42. Several other representatives expressed their disappointment at the failure of ICC to find appropriate procedures that would ensure effective co-operation. Some representatives suggested that a joint committee of the Commission and ICC should be set up to enable members of the Commission, whose countries were not represented in ICC, to state their views at all stages of the work of the revision. Other representatives suggested that the Commission might delegate some of its members to attend ICC's meeting at which the revision of the Uniform Customs would be under consideration. It was pointed out that co-operation could not be one-sided and that organizations with which the Commission co-operated should reciprocate by inviting members of the Commission and its secretariat to be present at, and participate in, their meetings when questions of mutual interest were being discussed.

43. The observer of ICC assured the Commission that ICC had no intention of withholding its co-operation in any way and he stated that a formula for effective co-operation between the Commission and ICC on matters of mutual interest would be submitted in the near future to the secretariat of the Commission. The Commission took note of this statement and decided to consider the subject further at its fifth session.

#### C. Bank guarantees

44. The Commission, at its third session, took note of the fact that the International Chamber of Commerce had initiated work on the subject of certain types of guarantees and had addressed a questionnaire in respect of performance, tender and repayment guarantees to its national committees. In view of the importance of these guarantees for international trade, the Commission decided to request the Secretary-General to address the questionnaire to Governments, and also to banking

and trade institutions in countries not represented in ICC, and to transmit the observations and suggestions received in response to that questionnaire to ICC.<sup>20</sup> The Commission also decided to invite ICC to prepare a further questionnaire in respect of payment guarantees, which would be circulated by the Secretary-General to Governments and banking and trade institutions.<sup>20</sup>

45. At the present session,<sup>21</sup> the Commission was informed by the Secretary of the Commission that the replies received in response to ICC's questionnaire on performance, tender and repayment guarantees had been transmitted to ICC. With respect to guarantees of payment, no action had yet been taken in view of the fact that ICC had not yet transmitted the questionnaire to the Secretary-General.

46. The Commission took note of a statement by the observer of ICC that its Commission on Banking Technique and Practice had completed its analysis of the information submitted in respect of performance guarantees, tender guarantees and repayment guarantees. The next stage of the work would be the preparation of a preliminary draft of uniform rules and customs on the subject of "contractual guarantees", a term which ICC's Commission had preferred to the term "banking guarantees" because the guarantee was in many cases not given by a bank. The preliminary draft would be transmitted to the Secretary-General.

47. With regard to guarantees of payment, it was reported that a draft questionnaire had been prepared by ICC in March 1971. The questionnaire would be circulated to the National Committees of ICC and transmitted to the Secretary-General.

48. The Commission also took note of the statement by the observer of ICC that adequate procedures of collaboration with the Commission in the field of guarantees would be developed by ICC.

49. The Commission decided to continue its consideration of the subject at its fifth session.

#### D. Security interests in goods

50. During the discussion of this subject,<sup>22</sup> it was recalled that the Commission, at its third session, had decided to invite Governments to submit information on security interests in goods, under their national laws and practices, that were relevant to international transactions.<sup>23</sup> It was also recalled that, at the same session, the Commission had taken account of the difficulty of securing the adoption of uniform legislation in this area and had accordingly concluded that it should concentrate on the gathering and dissemination of information.<sup>24</sup>

<sup>20</sup> *Ibid.*, para. 138.

<sup>21</sup> The Commission considered this subject in the course of its 67th meeting, held on 31 March 1971.

<sup>22</sup> The Commission considered this subject in the course of its 67th meeting held on 31 March 1971.

<sup>23</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter III, para. 145.

<sup>24</sup> *Ibid.*, para. 141.

<sup>19</sup> *Ibid.*, para. 124.

51. The Commission was informed by its Secretary that a number of replies had been received in response to the above inquiry and that other replies were expected. It was noted that the replies would be useful in preparing the study which the Commission requested at the third session; it was reported that the Secretary-General hoped to be able to submit this study to the Commission at its fifth session. One object of the study would be to ascertain whether the replies provided the basis for identifying the ingredients of security devices or arrangements that would facilitate international trade; it was suggested that this analysis might be useful to Governments in framing national rules in this area.

52. One representative drew attention to studies submitted to a conference held in 1969 at McGill University in Montreal on the possibility of formulating a body of law on security agreements of an international character. Another representative referred to a study, sponsored by the Asian Development Bank, on the legal aspects of development financing; this study was concerned with various types of legal guarantees and securities in the countries of the region. The observer of the International Institute for the Unification of Private Law (UNIDROIT) drew attention to a study, made at the request of the Council of Europe, on the subject of security interests in goods. That study covered the laws and practices of the member States of the Council of Europe in this field. The subject was at present under consideration by the European Committee on Legal Co-operation.

53. The Commission decided to continue its consideration of the subject at a future session after the study to be prepared by the Secretary-General had been submitted.

#### CHAPTER IV

#### INTERNATIONAL SALE OF GOODS

##### A. *Uniform rules governing the international sale of goods*

54. The Commission, at its second session, set up a Working Group on the International Sale of Goods ("Working Group on Sales"). One of the tasks given to this Working Group was to ascertain which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render that Convention capable of wider acceptance, or whether it would be necessary to elaborate a new text for the same purpose.<sup>25</sup> The Working Group held its first session in January 1970 and submitted its report (A/CN.9/35) to the Commission at its third session. At that session, the Commission decided that the Working Group should consider ULIS systematically, giving priority to articles 1 to 17, and that, before the new text of a uniform law on sales or the revised text of ULIS was completed, the Working Group should only submit questions of prin-

ciple to the Commission for consideration.<sup>26</sup> The Working Group on Sales held its second session from 7 to 18 December 1970, and prepared a report (A/CN.9/52) for submission to the Commission at its fourth session.

55. The Commission had before it the report of the Working Group on its second session and a note by the Secretariat on the consideration of that report. The Commission also had before it the comments by Spain on the report of the Working Group on Sales and proposals by delegations submitted during the session on various articles of ULIS (A/CN.9/IV/CRP.1, 5, 8, 9, 11 and 12).

56. The Working Group on Sales concluded that articles 15 and 17 of ULIS presented questions of principle which should be referred to the Commission for consideration. In the Secretariat note, it was observed that the Working Group on Time-limits and Limitations (Prescription) had recommended that rules on the scope of the uniform law on prescription should be the same as in the uniform law on sales and that, to make this possible, the Working Group on Sales and the Commission should give priority to this issue.<sup>27</sup> For this reason, it was suggested that the Commission should also consider questions of principle presented by the sphere of application of the law (articles 1 to 7 of ULIS). The Commission decided to consider questions of principle presented by rules on the sphere of application of the law (articles 1 to 7 of ULIS) and by articles 15 and 17 of ULIS, and also to consider the recommendations of the Working Group concerning its future work.<sup>28</sup> One representative suggested that article 9 of the text prepared by the Working Group should be re-examined. Some representatives observed that the fourth paragraph of this article presented questions of principle on which no consensus had been reached.

##### 1. *Sphere of application of the law*

57. The Commission gave attention to the recommendations set out in the report of the Working Group concerning the sphere of application of the uniform law with respect to the following two issues: (a) the required international character of the transaction (A/CN.9/52, paragraphs 14 to 31), and (b) the required contact between the sales transaction and a State that had adopted the Convention (A/CN.9/52, paragraphs 32 to 35).

##### (a) *International character of the transaction*

58. The Working Group on Sales reported that it had been possible to simplify and clarify the rules of ULIS with respect to the required international character of the transaction. Article 1 of ULIS sets forth two basic requirements for the applicability of the law. The first of these is the requirement that the parties to the contract of sale have their "places of business in the territories of different States". The second requirement is that the transaction comply with one of the

<sup>25</sup> *Ibid.*, part two, chapter III, paras. 72 (b) and 72 (f).

<sup>27</sup> A/CN.9/50, annex II, comment following article 4. See part two, I, C, 2, below.

<sup>28</sup> The Commission considered the item entitled "Uniform rules governing international sale of goods" at its 71st to 78th meetings, on 2 and 5 to 8 April 1971.

<sup>25</sup> *Ibid.*, part two, chapter II, para. 38, subpara. 3 (a).

tests set forth in subparagraphs 1 (a), 1 (b) or 1 (c) of article 1 of ULIS; these three subparagraphs set forth tests stated in terms of the international movement of the goods or the international character of the offer and acceptance. The Working Group on Sales recommended that the first requirement—that the parties have their places of business in the territories of different States—be retained as the one basic requirement with respect to the international character of the transaction. The Working Group concluded that the second set of requirements, set forth in subparagraphs 1 (a), 1 (b) and 1 (c) of article 1 of ULIS, in many situations left in doubt the question of whether the transaction was governed by the law, and recommended that these requirements be deleted (A/CN.9/52, paragraphs 14 to 21). In the Report of the Working Group, it was noted that this recommendation, standing alone, would appear to broaden the scope of the law; but it was observed that this recommendation must be considered in relation to the further recommendation of the Working Group that sales to consumers should be totally exempted from the law (A/CN.9/52 paragraphs 22 and 57). For these reasons, the Working Group reported a proposed revision of articles 1 and 2 of ULIS (A/CN.9/52, paragraph 13).

59. A large number of representatives agreed that the proposed revised text of articles 1 and 2 of ULIS, as recommended by the Working Group on Sales, led to the simplification of the original text. Many representatives were of the opinion that the text recommended by the Working Group was preferable to articles 1 and 2 of ULIS. Some of these representatives expressed the view that it was important to achieve simplicity and clarity in the uniform law, and stressed the importance of clarity with respect to the basic rules on the scope of application. It was also observed that no solution had been found for the problems of ambiguity in the application of subparagraphs 1 (a), 1 (b) and 1 (c) of article 1 of ULIS to which reference had been made in the report of the Working Group.

60. A number of representatives objected to the recommendation of the Working Group that there should be only one basic test for the application of the law, that is, that the parties to a contract shall have their places of business in different States. They emphasized that the simplification of article 1 was more apparent than real and that the application of this article would be difficult mainly in view of the provisions added to paragraphs 2 (a) and (b) of article 2. Some of these representatives suggested that it would be sufficient if the above basic test were supplemented by one further test requiring carriage of goods from the territory of one State to the territory of another State, as provided for in subparagraph 1 (a) of article 1 of ULIS. Other representatives proposed the re-introduction in the recommended text of the three tests set forth in subparagraphs 1 (a), (b) and (c) of article 1 of ULIS and to supplement these tests by a provision relating to goods in stock. One representative proposed the exclusion from the sphere of application of the law of contracts for the sale of goods which were intended to remain in the country where they were located at the time of the contract and in which all the acts of offer and acceptance had occur-

red; he suggested that this would result in a much simpler text which would have the same effect as the re-introduction of subparagraphs 1 (a), 1 (b) and 1 (c) of article 1 of ULIS. In support of these suggestions, attention was drawn to the possibility that representatives of parties having their place of business in different States might conclude a sales contract in a single State, and the goods might be delivered in that State without international shipment; it was suggested that the fact that the parties had their places of business in different States should not be sufficient basis for the applicability of the uniform law and that if this single criterion were retained, local sales would fall within the scope of ULIS. On the other hand, it was observed that in such transactions payment for the goods would normally involve funds or credits in more than one State and that, if controversy should arise, one of the parties would in most cases have to deal with a legal system with which he was unfamiliar.

61. Several representatives suggested that a distinction should be made between the definition of an international sale of goods and the sphere of application of the law.

62. Proposals relating to the sphere of application of the law were introduced in writing by some representatives; other proposals were suggested orally in the course of the debates. With reference to a written proposal made by four representatives, these representatives were invited to undertake a study, to be sent to the Secretariat, which would show, with the aid of examples, the differences in practice between their proposals and those made by the Working Group; they agreed to do so. One representative suggested that the study by these representatives should be accompanied by reasons which would respond to the considerations set forth in paragraphs 17 to 20 of the report of the Working Group (A/CN.9/52). It was also suggested that paragraph 1 of article 6 of the recommended text was not clear enough and should, therefore, be revised.

(i) *Rules regarding the "place of business"*

63. The Working Group on Sales reported that under article 1 of ULIS, applicability of the law could depend on whether the parties had their "places of business in the territories of different States", but that no provision was made for the circumstance where one party had two or more places of business. The Working Group, in its proposed revision of article 2, set forth a provision to deal with this question; thus, the proposed article 2 (b) established as the basic test the location of the party's "principal place of business".

64. All of the representatives who spoke on the question were of the view that a provision should be included in the uniform rules to deal with the problem presented when a party had multiple places of business. Most of the representatives who spoke agreed, in general, with the Working Group's recommendation. Several representatives, however, suggested that the criteria in the final clause of proposed article 2 (b) included subjective elements that would be difficult to apply.

65. Several representatives also called attention to article 2 (a), pursuant to which the law would not apply if "the parties neither *knew nor had reason to know*

that the place of business of the other party was in another State". Some representatives suggested that the subjective element of this provision was particularly difficult to apply and that this provision was of little practical relevance. They suggested that article 2 (a) should either be deleted or replaced by a more objective provision. In support of article 2 (a), it was observed that in some countries many transactions were made by agents or brokers who were acting on behalf of foreign principals, but who did not make this fact known to the other party.

(ii) *Exclusion of sales to consumers*

66. During the consideration of article 5 of the Working Group's draft, which dealt with the exclusion of certain transactions and types of goods from the sphere of application of the law, many representatives commented on paragraph 1 (a), which provides for the exclusion of sales to consumers. The Commission unanimously agreed, in principle, with the recommendation of the Working Group that sales to consumers should be excluded from the scope of the law. Some representatives made suggestions on drafting improvements of article 5, paragraph 1 (a), and these suggestions were referred to the Working Group for its consideration. One representative pointed out that, if the original version of article 1 of ULIS were retained, most of these sales would automatically be excluded from the sphere of application to the law.

(b) *The required contact between the sales transaction and a State that had adopted the Convention*

67. The Working Group noted that under ULIS the law could be applicable even though there was no contact between the sales transaction and a contracting State. Thus article 1 of ULIS refers to contracts between parties whose places of business are in "different States"; this provision does not require that either of these States has adopted the law. In addition, article 2 of ULIS provides:

"Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law".

68. The Commission, at its third session, decided on the substance of a revision which should be used as a basis for future work of the Working Group on Sales.<sup>29</sup> In response to this decision, the Working Group proposed (A/CN.9/52, para. 13) that article 1 should provide as follows.

"1. The present law shall apply to contracts of sale and goods entered into by parties whose places of business are in different States:

"(a) When the States are both Contracting States; or

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

"2. The present law shall also apply where it has been chosen as the law of the contract by the parties."

69. The Commission reaffirmed its approval of the approach reflected in the above draft. Suggestions made by representatives for the improvement of the wording of this provision were referred to the Working Group for its consideration. Two representatives expressed the opinion that these formulæ made it practically impossible for a businessman to know when his contract would be subject to the uniform law. Another representative stated that the system recommended by the Working Group, in his opinion, could be accepted as a compromise if, as a consequence, all of the reservations appearing at present in the Convention relating to a Uniform Law on the International Sale of Goods could be avoided.

2. *Form of contracts*

70. The Working Group found that a question of principle was presented by article 15 of ULIS, which provides:

"A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses."

71. In the report of the Working Group, it was noted (A/CN.9/52, paragraphs 116 and 117) that in a number of countries the written form was required for certain types of sale, including foreign trade transactions. It was also noted that the required character of the "writing", and of other formalities connected with the transaction, varied from country to country and that the legal rules also varied with respect to the consequences of failure to comply with these requirements.

72. The Working Group (A/CN.9/52, paragraph 123) referred to the Commission the following questions of principle:

(a) Should article 15 be maintained?

(b) If so, should the present text of article 15 of ULIS be modified in order to accommodate rules of national law requiring particular contracts to be in writing?

(c) If so, what approach should be followed in making such accommodation?

73. The Commission agreed that the relationship between the uniform laws and national rules requiring certain contracts to be in writing presented a serious problem and that an attempt should be made to enable the uniform law to accommodate the requirements of countries whose national law required a written form. It was stated in this connexion that there were two basic approaches with respect to the form of contracts: the commercial approach left the parties free to choose the form of their contracts (including the oral form); the other approach, specially applicable in some countries to foreign trade contracts, required a writing and in some instances certain other formalities. It was stated by some representatives that national laws often required a written form with respect to contracts concluded by

<sup>29</sup> Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, part two, chapter III, paras. 26-30.

Governments, government agencies or state-owned trading organizations; it was also reported that large business enterprises often informed the other party with whom negotiations were under way that authorization to conclude the contract was limited to specified officers who may exercise their authority only in a specified form of writing. It was suggested that the uniform law should take the above practices and rules into consideration. In this connexion, several representatives stressed the increasing use of modern means of communication in business transactions and expressed the view that the use of these means required the maintenance of the freedom of the parties with respect to the form of the contract. Some representatives proposed that in order to reconcile the principle of autonomy of will, which governs the subject-matter in many countries, with the mandatory rules of national statutes prohibiting oral contracts, article 15 should be retained, but should be preceded by these words: "Unless otherwise agreed by the parties or provided by a mandatory rule of the national law of any of the parties. . .".

74. The question was also raised whether the uniform rules should take account of certain national rules that modifications of the contract or the cancellation of a contract must be in writing or at least in the same form as the original contract. One observer expressed the view that international trade would be hampered by requirements of the written form for instructions concerning delivery, correction of defects, payment and the like.

75. Many representatives noted that it was not clear whether the written form was required for the validity of an agreement or only for the introduction of the agreement in evidence. A number of representatives also expressed the view that the rule of article 15 was inconsistent with article 8, which provides that the law is not concerned with the formation of the contract nor with its validity.

76. Several suggestions were submitted with respect to article 15. Some representatives were of the opinion that the article should be retained in its present form; it was suggested in this connexion that if the national legislation of a country required a written form, parties to a contract who were bound by such legislation could always avail themselves of article 3 and exclude the application of article 15. Another representative suggested that article 15 should refer to article 9, paragraph 1, providing for the application of certain usages and practices, an article based on that idea would cover both the legal requirements of contracts in written form and the prevailing practices of various countries and individual merchants. One representative proposed that article 15 should either be supplemented by the provision contained in paragraph 115 of the report of the Working Group (A/CN.9/52) or be deleted.

77. Other representatives drew attention to the proposal, noted in the report of the Working Group (A/CN.9/52, paragraph 118), whereby Contracting States which require that a contract of international sale shall be in writing should lodge a declaration to this effect at the time of the ratification of the law. One representative who supported this proposal expressed

the view that countries making such a reservation could specify that only national enterprises or agencies would be subject to that requirement, leaving private merchants free to choose the form of their contracts. The proposed provision for a reservation was opposed by other representatives who held that businessmen had no access to the list of reservations and therefore would not know which contracts were required to be in writing.

78. According to another proposal, a rule should be drafted whereby a party in a country whose legislation required contracts to be in writing would be required to give advance notice of those requirements to the other party or, alternatively, to undertake to put the contract into writing in such a way as to comply with the requirements of his national law. It was also suggested that, in any event, the consequences of non-compliance with the written form should be specified. A different approach was proposed by another representative, who suggested that article 15 should state a basic rule requiring contracts to be in writing and specify certain exceptions to this rule. Other representatives objected to this proposal. It was further noted that defining the circumstances in which a writing would not be required and specifying the consequences of the lack of writing would require rules of excessive detail and complexity.

79. Many representatives considered that in view of the relationship to the Uniform Law on the Formation of Contracts and in view of the provisions of article 8 of ULIS, article 15 could be deleted. Other representatives, however, were of the opinion that the deletion of the article would not solve the problem which would arise again when questions of the formation of contracts were discussed. It was also noted that, if article 15 were deleted, difficult problems of determination of the applicable law would arise, since the question of form might be governed by the national law of the seller or of the buyer, or by the law of the *forum*, depending on the rules of conflict of the *forum*.

80. The Commission concluded that the entire problem should be given further consideration by the Working Group.

### 3. Principles of interpretation

81. Article 17 of ULIS provides:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

82. The Working Group on Sales recommended (A/CN.9/52, paragraph 127) that the foregoing provision be deleted and that the following language be employed:

"In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application]."

83. The Working Group on Sales reported (A/CN.9/52, paragraph 128) that this provision had been adopted by the Working Group on Time-limits and Limitations (Prescription) in the International Sale

of Goods; it was noted that this provision omitted the reference in article 17 of ULIS to "the general principles on which the Law is based", a provision that had been criticized as vague and illusory since the law did not specify or indicate the general principles on which it was based. It was also noted (A/CN.9/52, paragraph 130) that the proposed new language expressed two considerations not mentioned in the original article: (a) the international character of the law, and (b) the need for uniform interpretation and application.

84. Most representatives were satisfied with the above provision of article 17 proposed by the Working Group. Some representatives, however, made suggestions for its improvement.

85. At the meeting of the Working Group, it was suggested that the above revised provision for article 17 should be supplemented by a provision dealing with gaps in the law. The Working Group considered two proposals for addition to the proposed revision of article 17. A majority of the Working Group did not approve either proposal, but agreed that these proposals presented questions of principle that should be referred to the Commission.

86. One proposal (A/CN.9/52, paragraph 131) would supplement the above revised text of article 17 with the following:

"Questions concerning matters governed by the present Law which are not expressly settled by it shall be settled in conformity with its underlying principles and purposes."

87. Several representatives suggested that the reference in this proposal to the "underlying principles and purposes" of the Law presented problems similar to those raised by the original language of article 17 of ULIS. These representatives expressed the view that the Uniform Law not state "underlying principles and purposes" and such "principles and purposes" would be difficult to determine. On the other hand, two representatives held that such principles and purposes were evident in the law and that the most important of these was the underlying principle of good faith.

88. The second proposal (A/CN.9/52, paragraph 133) would supplement the above revised text of article 17 with the following:

"Private international law shall apply to questions not settled by the Uniform Law."

89. Many representatives were of the opinion that gaps in the Law should be settled on the basis of rules of private international law; some of these representatives held the view that article 17 should contain such a provision. Other representatives expressed the view that the rules of private international law would be invoked in appropriate cases even if the Uniform Law contained no provision in that regard.

90. One representative submitted a written proposal suggesting that the Uniform Law should contain a subsidiary uniform rule on conflict of laws specifying which national law would be applied in cases where the Uniform Law did not provide an answer to the question at issue. Other representatives objected to any attempt to specify rules of private international law in

the proposed Uniform Law. One representative suggested that the law should clearly state that no recourse to national laws were admitted.

91. The Commission concluded that it was not practicable to reach a decision on these questions at the present intermediate stage of the revision of the uniform rules. It was suggested that such problems could be resolved more readily when a text proposed by the Working Group was reviewed as a whole. For these reasons, it was concluded that the observations made at the present session of the Commission should be referred to the Working Group for its consideration at an appropriate time.

#### 4. Future work

##### *Decision of the Commission*

92. The Commission considered the recommendations of the Working Group on Sales concerning its future work.<sup>30</sup> On the basis of these recommendations and taking into consideration the opinions of representatives expressed in the course of the session with respect to future work, the Commission adopted the following decision:

##### *"The United Nations Commission on International Trade Law"*

##### *"1. Decides that:*

*"(a) The Working Group on the International Sale of Goods should continue its work under the terms of reference set forth in paragraph 3 (a) of the resolution adopted by the Commission at its second session;<sup>31</sup>*

*"(b) The Working Group should determine and improve where necessary its own working methods and programme of work;*

*"(c) Until the new text of a uniform law or the revised text of ULIS has been completed, the Working Group should submit a progress report on its work to each session of the Commission, and, any comments or recommendations which representatives may make at the sessions on issues set out in the progress reports shall be considered by the Working Group in the preparation of the final draft; the Commission will take its decisions on the substantive issues which may arise in connexion with provisions of a new uniform law or the revised text of ULIS when it has before it, for approval, the final text and accompanying commentary prepared by the Working Group;*

*"(d) In accordance with paragraph (c) above, the Working Group, when preparing its final draft, should take into consideration the comments and opinions voiced by representatives in connexion with the items considered at the fourth session of the Commission.*

*"2. Authorizes the Working Group to request the Secretary-General to prepare studies and other*

<sup>30</sup> A/CN.9/52, para. 139. See part two, I, A, 2, below.

<sup>31</sup> Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, part two, chapter II, para. 38.

documents which are necessary for the continuation of its work.

93. It was reported that Norway had indicated that it was relinquishing its membership in the Working Group on the International Sale of Goods in order to accommodate the inclusion of a new member in the Working Group. Under a unanimous agreement the Commission appointed Austria to membership in the Working Group.

#### B. *General conditions of sale and standard contracts*

94. The Commission continued its consideration of the item entitled "General conditions of sale and standard contracts".<sup>32</sup> At its second session, the Commission decided to start its work in this field of law by promoting a wider use, in other regions, of the ECE general conditions relating to plant, machinery, engineering goods and lumber, which had been prepared by the United Nations Economic Commission for Europe (ECE). To that end, the Commission requested the Secretary-General to invite the regional economic commissions to seek the opinions of Governments and of interested trade circles of the respective regions on the desirability of extending the use of those ECE general conditions, in their original version or in a modified form, in the regions concerned and as to whether it would be desirable to formulate other general conditions for products of special interest to those regions. The Governments and trade circles were also invited to submit their suggestions regarding the desirability of convening regional meetings for the consideration of questions concerning the use of the ECE general conditions.<sup>33</sup> The report of the Secretary-General on the result of his inquiries (A/CN.9/34) was submitted to the Commission at its third session.

95. At the third session, the Commission requested the Secretary-General to continue with the implementation of its decision made at the second session. It further requested the Secretary-General to begin a study on the feasibility of developing general conditions embracing a wider scope of commodities.<sup>34</sup>

96. At the present session, the Commission had before it a report by the Secretary-General (A/CN.9/54) on this subject in which he informed the Commission of the replies received in response to his inquiries (part I of the report) and presented the first part of a study (part II of the report) which had been commenced pursuant to the decision of the commission referred to in paragraph 55 above. The Commission gave particular attention to the following: general considerations, promotion of the use of the ECE general conditions and the preparation of "general" general conditions.

#### 1. *General considerations*

97. Almost all representatives who spoke on the subject expressed the view that general conditions of sale and standard contracts played an important role in international trade and that the work that had been started in this field should be continued. One representative held the view that in the practice of international trade, general conditions drawn up by organizations other than trade associations would not be accepted unless they were the product of a proved need emanating from the particular trade associations concerned.

98. Several representatives made observations with respect to the role that the Commission should play in the preparation of general conditions. Some representatives expressed the view that the Commission would have to undertake the task of drafting such general conditions; others were of the opinion that the Commission's main task in this field should be the co-ordination of, and assistance in, the work of trade associations concerned with respect to the preparation of such formulations. It was also suggested that the Commission should not undertake drafting work itself, but should entrust this task to trade associations or individual experts.

#### 2. *Promotion of the use of the ECE general conditions*

99. The Commission agreed that it was necessary to continue with the implementation of the decision taken at its second session, namely, to ascertain whether the ECE general conditions satisfied the needs of regions outside Europe or whether they should be adapted to such specific needs. The view generally held was that the inquiry referred to in that decision should be addressed directly to national chambers of commerce, trade associations and other organizations concerned. Some representatives, however, suggested that the inquiry should also be addressed to Governments.

100. With respect to the possibility of convening regional meetings for the consideration of the question of whether the ECE general conditions met the needs of a specific region or whether they should be modified in order to satisfy those needs, all representatives who spoke on the issue agreed that it would be premature to encourage the holding of such meetings before the fifth session of the Commission. One representative expressed the view that such meetings might lead to the hardening of attitudes with respect to regional interests and thus make a world-wide acceptance of the ECE general conditions more difficult.

#### 3. *Preparation of "general" general conditions*

101. Several representatives spoke against the preparation of "general" general conditions, that is, general conditions relating to a wide scope of commodities. It was noted in this connexion that such general conditions would have to meet an infinite variety of situations relating to an infinite number of commodities. Some representatives thought that the needs of international trade were better served by existing formulations for particular commodities which reflected extended trade practice in that commodity in a particular region.

<sup>32</sup> This subject was considered by the Commission at its 84th and 85th meetings, held on 14 April 1971.

<sup>33</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter II, para. 60.

<sup>34</sup> *Ibid.*, part two, chapter III, para. 102.



Attention was drawn to the fact that trade associations had found it necessary to prepare separate general conditions not only for particular commodities, but also for subdivisions of those commodities. One representative suggested, therefore, that the Commission should start a commodity-by-commodity approach; at a later stage, this might lead to a more general approach.

102. On the other hand, many representatives were of the opinion that the preparation of some kind of "general" general conditions was feasible. Attention was drawn in this respect to the General Conditions of Delivery, prepared by the Council for Mutual Economic Assistance, which had been successfully used in the trade among the member countries of CMEA for more than twelve years. It was also noted that "general" general conditions would embrace basically the same issues as those covered by the Uniform Law which was also intended to apply to all commodities; the preparation, however, of a set of such general conditions could be accomplished in a much shorter time than that of a uniform law.

103. One representative suggested that, instead of drawing up "general" general conditions, the Commission should prepare general provisions for use by trade associations and other organizations in the preparation of general conditions on specific goods. A similar proposal was made by an observer, who was of the opinion that the Commission should draw up a model contract. One representative, in support of the proposal, added that this model contract should be drawn up in conformity with the rules contained in the uniform law on the international sale of goods.

104. Several representatives pointed out that the use of general conditions prepared by the Commission would be optional, that is, businessmen would be free to apply or not to apply them. It was also held that the preparation of "general" general conditions would not exclude the preparation of general conditions relating to specific commodities or groups of commodities. It was suggested by several representatives that in case the Commission should decide to draw up any kind of general conditions, this task should be accomplished with the active co-operation of lawyers, economists, financial and other experts. It was further suggested that the Commission should avail itself of the experience gained in this field by the Economic Commission for Europe and establish contacts with the Contracting Parties to the General Agreement on Tariffs and Trade and the United Nations Conference on Trade and Development.

105. The Commission noted that it was not expected to take a decision on the substantive issues involved at its present session, but merely to indicate whether it wished that the Secretariat study should be continued. On this point, there was general agreement that the Secretariat should continue along the lines it had suggested, taking into account the views expressed at the present session.

#### *Decision of the Commission*

106. "The United Nations Commission on International Trade Law

#### *"Requests the Secretary-General:*

"(a) To continue with the programme of implementation of the decision taken by the Commission at its second session concerning the promotion of the wider use of the general conditions prepared under the auspices of the Economic Commission for Europe and to address inquiries, designed to obtain information on the questions set forth in the Commission's decision, directly to Governments, national chambers of commerce, trade associations and other trade organizations, and to submit a report on the replies that have been received to the Commission at its fifth session;

"(b) To continue its study on the feasibility of developing general conditions embracing a wider scope of commodities and to submit the study, if possible, to the Commission at its fifth session.

#### *C. Time-limits and limitations (prescription) in the field of the international sale of goods*

107. The Commission at its second session established a Working Group on Time-limits and Limitations (Prescription) and requested it to study the subject of time-limits and limitations (prescription) in the field of the international sale of goods.<sup>35</sup> The Working Group held its first session in August 1969 and submitted a report (A/CN.9/30) to the third session of the Commission. The Commission requested the Working Group to prepare a preliminary draft Convention, setting forth uniform rules on the subject and to submit this draft to the fourth session.<sup>36</sup> The Commission also decided that a questionnaire should be addressed to Governments and interested international organizations to obtain information and views regarding the length of the limitation period and other relevant issues.<sup>37</sup> The Working Group held its second session from 10 to 21 August 1970 and prepared a preliminary draft of a Uniform Law on Prescription (Limitation) in the International Sale of Goods (herein referred to as the preliminary draft).

108. At the present session, the Commission had before it the report of the Working Group on its second session (A/CN.9/50) and a note by the Secretariat on the consideration of that report. The report of the Working Group contained the text of the preliminary draft (annex I), a commentary on it (annex II) and the text of the questionnaire on the length of the limitation period (annex III). The Commission also had before it proposals by Austria submitted during the session (A/CN.9/IV/CRP.2).<sup>38</sup>

109. The Commission commended the Working Group for its working methods and for its rapid progress in preparing a preliminary draft. The view was generally expressed that the present divergencies among

<sup>35</sup> *Ibid.*, part two, chapter II, para. 46.

<sup>36</sup> *Ibid.*, part two, chapter III, para. 97.

<sup>37</sup> *Ibid.*, para. 89.

<sup>38</sup> The Commission considered the subject "Time-limits and limitations (prescription) in the international sale of goods" at its 80th-83rd meetings, on 13 and 14 April 1971.



the national rules in this area caused serious confusion with respect to international trade, and that the preparation of the uniform rules was a matter of importance and urgency. Several representatives also stated that, in order to facilitate the prompt completion of a uniform law, they were prepared to take an affirmative and flexible approach to the proposed uniform rules and to accept compromises that involved departures from the rules of their national legal systems.

110. The Commission considered the method and approach it should follow in examining the preliminary draft. It was observed that further replies to the questionnaire concerning the length of the limitation period and related issues were expected and the Commission concluded that the Working Group should consider these replies prior to any decision concerning the length of the limitation period. It was also observed that several important provisions of the preliminary draft were closely related to the length of the limitation period and that the report of the Working Group suggested alternative approaches to these provisions pending a decision on the length of the period of limitation.

111. In view of these considerations, the Commission concluded that it would be premature to take decisions at this session concerning the provisions of the preliminary draft. Instead, the Commission decided that views expressed by representatives with respect to the preliminary draft, as reflected in the summary records, should be taken into account by the Working Group at its next session in formulating a final draft of a uniform law. It was also agreed to invite representatives to put any proposals they might have into written form in time for consideration by the Working Group at its next session.

#### 1. *Sphere of application*

112. Special attention was given to the relationship between the sphere of application of the proposed uniform rules on prescription and the sphere of application of the proposed uniform rules on the international sale of goods. Most representatives were of the view that it would be desirable to provide the same scope of application for the two uniform laws and that the Working Group should give consideration to rules that were in the course of development for the uniform law on sales.<sup>39</sup> It was recognized that the uniform law on sales could not be finalized within the period allotted to the preparation of the proposed uniform law on prescription; for this reason, it was noted that the two sets of rules on scope of application might diverge.

113. Some representatives expressed the view that, under the circumstances, identical rules on the scope of application for the two uniform laws were not essential; it was also noted that, if necessary, the uniform law on prescription could be revised after the completion of the revision of ULIS. For these reasons, and in view of the importance of preparing a final text of the uniform law on prescription within the time schedule established by the Commission, it was suggested that

rules on the scope of application should be prepared for the uniform law on prescription with due consideration for the rules on scope of application for the uniform law on sales that are in the course of elaboration. On the other hand, the observer of the International Institute for the Unification of Private Law expressed the view that the uniform law on prescription should employ the rules on the sphere of application set forth in ULIS and that any deviation from these rules should await the final revision of this uniform law.

114. Some representatives suggested that the sphere of the application of the uniform law on prescription need not be precisely defined and that it might be satisfactory to state, in general terms, that the uniform law would apply to the international sale of goods. It was noted that, except in relatively rare borderline cases, the lack of definition would not give rise to difficulties. On the other hand, other representatives considered that a more precise definition of the scope of application was essential. It was observed that confusion would result from lack of certainty as to whether the national rules or the uniform law would apply to transactions which, in the absence of a definition, might be subject to conflicting views as to their international character. One representative pointed out that if a definition were given, it would be necessary to afford States that had acceded to the 1964 Convention on the International Sale of Goods the opportunity to retain the definition in article 1 of ULIS.

115. Some representatives suggested that the sphere of application of the uniform law on prescription, especially with regard to problems of conflict of laws, presented considerations that were different from those presented by the uniform law on sales, and that these considerations should be taken into account by the Working Group. Some representatives also pointed out that the proposed uniform law on prescription should be concerned solely with actions based on the non-performance of the contract and not with actions based on nullity of the contract.

#### 2. *Other comments on the issues presented by the preliminary draft*

116. Representatives also made comments on various other issues presented by the preliminary draft. These included:

(a) The commencement of the limitation period, including the basic tests that should be employed, the effect of the discovery of defects in goods after they have been received by the buyer, the rules governing the starting point for the period when goods are shipped to the buyer and the effect of an express guarantee;

(b) The effect of acknowledgement by the debtor of his debt, including the effect of acknowledgement after the expiration of the limitation period;

(c) Extension of the limitation period, including the possibility of an extension where negotiations are broken off shortly before, or after, the expiration of the limitation period, the effect of circumstances that prevent the institution of judicial proceedings and the effect of refusal by a court to recognize or enforce a foreign judgement;

<sup>39</sup> For the Commission's consideration of the sphere of application of the uniform rules on sales, see paragraphs 57 to 69 above.

(d) Modification of the limitation period, including the effect of an agreement by the parties to extend or shorten the basic limitation period; and

(e) The international effect to be given to the rules set forth in the uniform law.

The discussion also included several suggestions on problems of drafting and style and means to co-ordinate the work on the proposed uniform laws on sales and on prescription.

117. The observer of the Council of Europe informed the Commission that the Council had completed its work for the preparation of European Rules on Extinctive Prescription in Civil and Commercial Matters; these Rules cover the whole field of extinctive prescription. He expressed the hope that the Working Group would continue to take these Rules into account in finalizing its draft.

#### *Decision of the Commission*

#### 118. *The United Nations Commission on International Trade Law*

"1. *Invites* members of the Commission to submit to the Secretary-General by 30 June 1971, in writing, any proposals or observations they might wish to make with respect to the Preliminary Draft Uniform Law on Prescription (Limitation) for transmission to the Working Group on Time-limits and Limitations (Prescription);

"2. *Requests* the Secretary-General to analyse the replies received to the questionnaire which was circulated to Governments and interested international organizations in September 1970 and to transmit this analysis to the members of the Working Group in advance of its third session;

"3. *Requests* the Working Group to prepare a final draft of the Uniform Law on Prescription (Limitation) for submission to the Commission at its fifth session taking due account of the views expressed during the discussion of this subject at the fourth session of the Commission, the analysis by the Secretariat of replies to the questionnaire and any proposals or observations communicated to the Working Group before its next session.

119. It was noted that the expiration, on 31 December 1970,<sup>40</sup> of Czechoslovakia's membership in the Commission created a vacancy in the membership of the Working Group on Prescription. The Commission unanimously appointed Poland to membership in the Working Group.

#### CHAPTER V

#### YEARBOOK OF THE COMMISSION

120. The General Assembly of the United Nations, by resolution 2502 (XXIV), approved in principle the

establishment of a Yearbook of the Commission and authorized the Secretary-General to establish such a Yearbook in accordance with the decisions and recommendations of the Commission. At its third session, the Commission requested the Secretary-General to publish materials relating to the first three sessions of the Commission<sup>41</sup> in the first volume of the *Yearbook*, which was published in accordance with this decision and placed before the Commission at its fourth session.

121. At the third session, the Commission requested the Secretary-General to submit to it at its fourth session a report on the publication of a second volume of the *Yearbook*.<sup>41</sup> The report (A/CN.9/57) submitted in response to this request contained suggestions regarding the contents for a second volume of the *Yearbook*, covering the fourth session of the Commission's work, and set forth the financial implications of such a publication. The report also set forth suggested guidelines with respect to the timing and contents of future volumes of the *Yearbook*.<sup>42</sup>

122. Representatives, in commenting on the first volume of the *Yearbook*,<sup>43</sup> expressed appreciation for this volume and stated that the *Yearbook* would be very useful in making the Commission's work more widely known and generally available.

123. The Commission considered the most appropriate time for the publication of further volumes of the *Yearbook*. Several representatives expressed the view that the *Yearbook* should be published every two or three years; others were of the opinion that annual publication was appropriate so that the work of the Commission could become widely available at an early date.

124. After an exchange of views, the Commission concluded that a second volume covering the work of the fourth session should be published as soon as possible. It was further concluded that a decision concerning the timing for the publication of future volumes should be postponed until the fifth session.

#### *Decision of the Commission*

#### 125. *"The United Nations Commission on International Trade Law"*

"1. *Requests* the Secretary-General to include in the second volume of the *Yearbook of the United Nations Commission on International Trade Law* the material on the work of the fourth session of the Commission;

"2. *Further requests* the Secretary-General to publish the second volume as soon as practicable in English, French, Russian and Spanish, following in general the outline set forth in annex I to the report of the Secretary-General on the timing and content

<sup>40</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter I, para. 3. With respect to the election of the new members, see *Official Records of the General Assembly, Twenty-fifth Session, Plenary Meetings*, 1903rd meeting.

<sup>41</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, chapter III, paras. 201-209.

<sup>42</sup> The questions concerning publication of the *Yearbook* were considered by the Commission in the course of its seventyninth meeting, held on 8 April 1971.

<sup>43</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970.

of the *Yearbook*<sup>44</sup> and taking due account of the suggestions made during the discussion of this subject;

"3. Approves the guidelines for the contents of future volumes of the *Yearbook*, as set forth in the Secretary-General's report;

"4. Decides to take its final decision at its fifth session concerning the timing of the publication of future volumes of the *Yearbook*.

## CHAPTER VI

### REGISTER OF TEXTS

126. The Commission, at its first session, decided to publish a compilation of texts of conventions and similar instruments within the area of international trade law.<sup>45</sup> At the second session, the Commission decided that the first volume should include instruments within the following priority topics of the work programme: (1) international sale of goods and (2) international payments.<sup>46</sup> Volume one of the *Register of Texts*<sup>47</sup> was published in response to this decision and copies were placed before the members of the Commission at the fourth session.

127. At its third session,<sup>48</sup> the Commission requested the Secretary-General to submit to it at its fourth session a report on the proposed contents of a second volume of the *Register of Texts*. The report (A/CN.9/56), which was placed before the Commission, indicated the financial implications of publishing the volume, and, in an annex, set forth tentative lists of instruments falling within the remaining priority topics of the Commission's work: international legislation on shipping and international commercial arbitration.<sup>49</sup>

128. Representatives, commenting on the publication of the first volume of the *Register of Texts*, expressed the view that the volume would be very useful to the Commission in its work and would also provide Governments, universities, organizations, commercial circles and similar bodies with readily accessible texts of international instruments.

129. All representatives who spoke on the question stated that they looked forward to the publications of a second volume, and expressed the view that it should follow the general outlines indicated in the Secretary-General's report. Suggestions were made with respect to the titles of various parts of the volume, items to be

included or excluded, as well as the exact title of certain instruments.

130. One representative stated that the information set out in the *Register of Texts* concerning ratifications or accessions by Governments was valuable and suggested that consideration might be given to the possibility of keeping this information up to date.

### Decision of the Commission

131. The Commission adopted the following decision:

*"The United Nations Commission on the International Trade Law*

*"Requests the Secretary-General:*

*"(a) To publish a second volume of the Register of Texts of Conventions and Other Instruments Concerning International Trade Law, setting forth the texts of conventions and other existing international instruments in the fields of international commercial arbitration and international legislation on shipping;*

*"(b) To publish the second volume as soon as practicable in English, French, Russian and Spanish, following in general the outline set forth in the report of the Secretary-General<sup>50</sup> taking into account the suggestions made by members of the Commission during the discussion of this subject.*

## CHAPTER VII

### BIBLIOGRAPHY ON INTERNATIONAL TRADE LAW

132. The Commission, at its third session, requested the Secretary-General to ascertain what possibilities existed to prepare or make available bibliographic information on international trade law.<sup>51</sup>

133. At the present session,<sup>52</sup> the Commission had before it a report of the Secretary-General (A/CN.9/L.20) informing the Commission of the action he had taken in response to that request. One of the steps taken was the preparation of a "Survey of bibliographies relating to international trade law" (A/CN.9/L.20/Add.1) describing current publications, which are in several languages, giving thereby bibliographic information relating to the priority topics included in the Commission's programme of work.

134. Several representatives commented that the "Survey of bibliographies" was a very useful means for access to publications relevant to the Commission's work.

135. It was generally considered that work on bibliographic material relating to subject matter included in the Commission's programme of work should continue, but that, for the present, such material should be obtained through voluntary contributions by institutions

<sup>44</sup> A/CN.9/57.

<sup>45</sup> *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, part two, chapter I, para. 60.*

<sup>46</sup> *Ibid.*, part two, chapter II, para. 140.

<sup>47</sup> *Register of Texts of Conventions and other Instruments Concerning International Trade Law* (United Nations publication, Sales No.: E.71.V.3).

<sup>48</sup> *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, part two, chapter III, para. 178.*

<sup>49</sup> The question concerning the publication of the *Register of Texts* was considered by the Commission in the course of its seventy-ninth meeting, held on 8 April 1971.

<sup>50</sup> A/CN.9/56, annex.

<sup>51</sup> *Yearbook of the United Nations Commission on International Trade Law, vol. I: 1968-1970, part two, chapter III, para. 186.*

<sup>52</sup> The Commission considered this item in the course of its 86th meeting, on 16 April 1971.

or organizations. In this connexion, the Secretary of the Commission reported that several members of the Commission had informed the Secretary-General, in response to his request, that certain institutions in their countries would be willing to provide bibliographies on one or more of the subject matters dealt with by the Commission. Several representatives stated that they intended in the near future to submit such bibliographies to the Secretary-General.

136. Some representatives took the view that the Commission, in deciding on future work in respect of bibliographies, should not be influenced solely by the desire to avoid expenditure. In their view, the essential issue should be whether the periodic publication of bibliographies would assist the Commission in its work and be of general interest to outside circles concerned with international trade. It was further observed that the "Survey of bibliographies" and the development of bibliographies through the programme of voluntary assistance mentioned above would be adequate for the time being. However, other representatives emphasized that the work was important but could not be carried out for lack of funds.

#### *Decision by the Commission*

137. After deliberation, the following decision was adopted:

#### *"The United Nations Commission on International Trade Law*

*"Requests the Secretary-General:*

*"(a) To invite members of the Commission to provide him with bibliographies relating to subject matters included in the programme of work of the Commission;*

*"(b) To publish such bibliographies as documents of the Commission;*

*"(c) To consider, at an appropriate time, bringing up to date the "Survey of bibliographies relating to international trade law".<sup>53</sup>*

#### CHAPTER VIII

#### TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

138. The Commission, at its third session, requested the Secretary-General to continue and intensify the activities on training and assistance in the field of international trade law that had been undertaken pursuant to the Commission's decision at the second session, and to consult with appropriate institutions on the feasibility of developing teaching materials in this field and of giving a larger share to the teaching of the law of international trade in the programmes of those institutions.<sup>54</sup>

139. At the present session the Commission had before it a report of the Secretary-General (A/CN.9/58)

regarding action undertaken pursuant to the above decision, an addendum to that report (A/CN.9/58/Add.1) setting forth information regarding a proposed programme of assistance to developing countries in the field of laws and regulations applicable to ships and shipping; this programme would be under the joint auspices of the Commission, the Inter-Governmental Maritime Consultative Organization (IMCO), the United Nations Conference on Trade and Development (UNCTAD), and, possibly, other organizations within the United Nations system. In this connexion, the observer of IMCO, with which the proposal had originated, informed the Commission that the proposed programme was inspired by the report of the Sixth Committee of the General Assembly on the report of the United Nations Commission on International Trade Law on the work of its third session.<sup>55</sup> That report suggested the development of a new programme of training and assistance that would emphasize substantial periods of practical training, including apprenticeship with organizations or institutions actively engaged in work in the area. The proposal of the IMCO secretariat recognized the fact that international maritime transport involved legal, technical, commercial and economic aspects of shipping and would therefore fall within the field of competence of several organizations within the United Nations system. This justified the joint development of a programme of training and assistance to be sponsored, if possible, by the United Nations Development Programme (UNDP).

140. Representatives who spoke on the subject welcomed the IMCO proposal and suggested that similar programmes should be developed in respect of other subjects within the field of international trade law. Some representatives suggested that the Secretariat could pursue the possibility of arranging for training programmes in these subjects on the lines of the commercial policy course conducted by GATT, or, alternatively, on the lines of training programmes for candidates from developing countries in developed countries, arranged by the UNCTAD/GATT International Trade Centre.

141. Several representatives suggested that further attention should be given to the establishment of chairs of international trade law. In this connexion, the Secretary of the Commission reported that efforts to secure the funds necessary for such chairs had been unsuccessful and that there seemed little prospect for success from continued efforts in this direction. Moreover, it was observed that even in most of the developed countries provision had not yet been made for courses in international trade law at universities and institutions and it would seem desirable that initial efforts should be made in these countries towards developing methods of teaching international trade law and assembling the appropriate teaching materials. It was generally considered that the Commission should welcome the development of studies in international trade law and the establishment of professional chairs for such studies in the institutions of higher learning in all countries, particularly in the developing countries. A number of

<sup>53</sup> A/CN.9/L.20/Add.1. See p. 143 below.

<sup>54</sup> *Yearbook of the United Nations Commission on International Trade Law*, vol. 1: 1968-1970, part two, chapter III, para. 200.

<sup>55</sup> *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 86, document A/8146.

representatives, however, considered it inappropriate to establish chairs until the field of international trade law has been sufficiently crystallized and properly defined.

142. Some representatives stressed the need for lawyers and merchants in developing countries to gain practical experience through secondment to commercial and financial establishments in developed countries, such as large corporations active in international trade, banking institutions, patent offices and insurance companies. In this connexion, several representatives stated that they would be willing to ascertain which organizations or corporations in their countries would be prepared to receive trainees from developing countries and that such information would be relayed to the Commission in due course.

143. It was suggested that lawyers schooled in only the common law system or in the civil law legal system should be enabled to familiarize themselves with the principles and legal techniques of the other legal system; the desirability of the publication of a standard works on international trade law was also noted. In response to a suggestion regarding the organization of seminars in connexion with the sessions of the Commission, similar to those organized by the International Law Commission, the Commission requested the Secretary-General to prepare a report on this matter to be considered at its fifth session.

144. The observer of the International Institute for the Unification of Private Law (UNIDROIT) informed the Commission that the Institute would be disposed to accept selected fellows for training at their headquarters.

#### *Decision of the Commission*

145. The Commission, after deliberation, adopted the following decision:

#### *"The United Nations Commission on International Trade Law*

*"Requests the Secretary-General to continue consultations with other interested organizations with a view to developing programmes of training and assistance in matters related to international trade law and, in particular, to consider means whereby practical experience in international trade law could be made available through the co-operation of trading institutions and similar bodies.*

#### CHAPTER IX

#### PROMOTION OF RATIFICATION OF CONVENTIONS PREPARED BY THE COMMISSION

146. At the second session of the Commission the representative of France submitted a proposal for a new procedure under which States, pursuant to a general convention, would agree that certain legal rules would be binding upon them, unless they expressly declined to accept those rules.<sup>56</sup> At the third session of the Com-

mission, the representative of France gave further details on the proposal of his delegation.<sup>57</sup>

147. At the present session,<sup>58</sup> the Commission had before it a document entitled "Proposal by the French delegation for the establishment of a Union for *jus commune*" (A/CN.9/60), which sets forth a preliminary draft of an international convention establishing a Union for *jus commune* in matters of international trade; the document includes a statement of reasons supporting the proposal. In introducing the proposal, the representative of France pointed out that the present state of the law of international trade was most unsatisfactory. First, in the absence of uniform rules, nobody could foresee which national law would be applied to a legal relationship containing a foreign element. A good illustration was provided by the European Convention on International Commercial Arbitration (1961)<sup>59</sup> according to which the arbitrators are called upon to apply the national law, as determined by the national system of conflicts of law which they consider as being applicable to the case. Secondly, it was a matter of the utmost difficulty for a judge or arbitrator to know or to apply most national laws. Thirdly, the existing national laws were developed and conceived for the sole purpose of governing domestic transactions, and frequently needed to be adapted to the needs of international trade. Fourthly, conventions providing uniform rules were, with few exceptions, inoperative through lack of ratifications. No satisfactory remedy for this stage of affairs had yet been found. The attempt to achieve harmonization of the law by means of model laws had also largely failed, except within States with a federal form of government and among a few countries that had close historical or economic links.

148. The representative of France explained that the purpose of the proposal was to revive and promote the development of a new *jus commune*. The proposal recognized two basic principles: (i) the regulation of trade transactions that are international in character is within the competence of international bodies such as UNCITRAL, and (ii) the sovereignty of States requires that States must be permitted to reject rules of *jus commune* whenever they consider, for any reason, that they should not accept such rules. It was further suggested that the *jus commune* would be developed by a Union to which States would adhere by means of a convention. Adherence to the Union by a State would imply that rules applicable to international trade that had been given the status of *jus commune* would take effect in that State after a certain period of time unless that State expressly declined to apply such rules. The French proposal envisaged the establishment of a new international organ, the "General Conference", which would function as the governing body of the Union.

149. The representative of France suggested that, at the present session, the Commission should not discuss

<sup>57</sup> *Ibid.*, part two, chapter III, para. 213.

<sup>58</sup> The proposal of the delegation of France was considered by the Commission at its 87th meeting and 88th meeting, held on 16 and 19 April 1971.

<sup>59</sup> United Nations, *Treaty Series*, vol. 584 (1966), No. 7041.

<sup>56</sup> *Yearbook of the United Nations Commission for International Trade Law*, vol. I: 1968-1970, part two, chapter II, paras. 169-170.

the text of the preliminary draft convention submitted by his delegation or set up a working group to consider the proposal. Instead, the Commission should have a general exchange of views and invite Governments to submit observations on the proposal. The Commission would then be able to continue the discussion of the subject at its fifth session on the basis of a report analysing the observations received from Governments.

150. All representatives who spoke congratulated the French representative for the excellent introduction of the subject and expressed their agreement with the proposal's objective to promote the wider acceptance of uniform rules in the field of international trade law. Some representatives suggested that the adoption of the French proposal would help to eliminate divergencies between the rules applicable to international trade. One representative stated that acceptance of the proposal would increase the efficiency of the work of UNCITRAL. Some representatives also supported the proposal on the ground that only a radical solution could remedy the present situation.

151. Some representatives pointed out that the proposal might raise difficult problems with respect to the constitutional practices of many countries, the sovereignty of States and other matters. Attention was also drawn to the report of the Sixth Committee to the General Assembly at its twenty-fifth session on this item<sup>60</sup> which stated that many representatives doubted the feasibility of the proposal because of its inconsistency with the constitutional practice of many States, but that the view was also expressed that those difficulties were perhaps not insurmountable. On the other hand, it was pointed out that States were in a position, in the period allotted to them, to consult their Parliaments on the position to be taken by them; moreover, the period could be raised, for example, to seven years. According to another procedure, States could be asked to submit to their Parliaments the texts of *jus commune* within a certain period of time; this latter procedure was applied in the International Labour Organisation (ILO) and did not seem to have given rise to any objection of a constitutional nature.

152. Questions were also raised with respect to whether the proposal would be effective in achieving its objectives. Some representatives doubted that many States would be in a position to consider the French proposal with all the attention it deserved within a short period of time, such as a year, because of the shortage of legal staff or because of the many time-consuming interests and the number of State organs that should be consulted before a State's reply to relevant questionnaires could be formulated and forwarded to the Commission. It was suggested that although the proposal sought to make proposed legal texts binding without the affirmative action of a State, such legal texts would still require implementing legislation to incorporate them into the national law of some States. One representative observed that States facing expiration of

the deadline set forth in the draft Convention might avoid automatic adherence by rejecting the proposed uniform law, and that this action might inhibit later affirmative action. The question was also raised as to whether the proposed Union would have jurisdiction to prepare or revise conventions in the field of international trade law; if so, this jurisdiction would lead to duplication of the work of the Commission.

153. Some representatives raised the question whether consideration of the proposal was compatible with the tasks of the Commission. While some other representatives were of the opinion that the proposition fell within the terms of reference of the Commission, others pointed out that it was not only the Commission that was concerned with the preparation of international conventions; therefore, only a body with larger responsibilities would have competence to deal with the proposal. After deliberation, the Commission agreed that, since the French proposal was directed towards the promotion of international trade law, it had competence to undertake its examination.

154. It was the general view of the representatives who spoke on the question that the Commission should seek the opinion of States on the French proposal. Some representatives were of the opinion that all States Members of the United Nations should be invited to indicate their position with respect to the proposal, others expressed the view that, for the time being, only members of the Commission should be invited to do so.

#### *Decision of the Commission*

155. The Commission adopted the following decision:

#### *"The United Nations Commission on International Trade Law*

#### *"Requests the Secretary-General:*

"(a) To communicate to members of the Commission the proposal of the French delegation for the establishment of a Union for *jus commune*,<sup>61</sup> together with the Commission's report on the subject, and to invite the members of the Commission to indicate before 1 October 1972:

- "(i) Their comments and suggestions with respect to the French proposal;
- "(ii) Whether the French proposal is consistent with the existing constitutional rules or practices of the Member States and, if not, whether it would be feasible to modify such constitutional rules or practices to accommodate the above proposal;
- "(iii) Whether the subject should be included among the priority topics in the Commission's work programme;

"(b) To submit the replies to this inquiry, together with an analysis thereof, to the Commission at its sixth session.

<sup>60</sup> Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 86, document A/8146, paras. 34-35.

<sup>61</sup> A/CN.9/60. See part two, IV, below.

## CHAPTER X

## FUTURE WORK

156. The Commission considered its future work at its 89th meeting, held on 19 April 1971. It had before it General Assembly resolution 2635 (XXV) on the report of the Commission on the work of its third session and the annotated agenda which included a discussion of this item.

157. One representative suggested that, after the conclusion of the consideration of the item "Time-limits and limitations (prescription) in the field of international sale of goods", the Commission might start consideration of draft uniform laws relating to the international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT), such as those on the validity of contracts of the international sale of goods and on the protection of the buyer in good faith. The observer of UNIDROIT reported that its Governing Council would shortly decide whether these draft uniform laws should be approved and whether they should be referred to the Commission. There was an exchange of views in which emphasis was placed on the importance of completing present projects in which the Commission was engaged before considering the inclusion of any new items in the agenda.

158. The Commission took note of the work done by UNIDROIT and of the above suggestion.

159. The Commission reaffirmed the opinion expressed at its second and third sessions that the preparatory work, to be done by intersessional working groups, special rapporteurs and the Secretariat, should be aided by the active contribution of Governments through the submission, at the request of the Commission, of detailed information on subject matters included in the Commission's programme of work. The Commission also considered it desirable that provision should be made, in special circumstances, to obtain the services of consultants or organizations with special expertise in matters dealt with by the Commission.

160. The Commission also agreed that the Secretariat should be adequately staffed to cope with the increased work-load involved in servicing the Commission.

161. The Commission further considered that it could establish a detailed programme of work for the coming year only, and agreed that the Secretariat should prepare the necessary budget and planning estimates for subsequent years in order to enable the Commission to carry out its work in the light of the considerations set forth in paragraphs 159 and 160 above.

*Date of the Fifth Session*

162. The Commission decided at its 87th meeting on 16 April 1971 that its fifth session, to be held at the United Nations Headquarters in New York, should meet from 10 April to 3 May 1972. The Commission requested the Secretary-General to make arrangements under which the session could be extended, if necessary, until 5 May 1972.

## ANNEX I

## Representatives of Members of the Commission

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Dr. Erich SCHINNERER, Professor, University of Vienna

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Mr. Paul R. JENARD, Director of Administration, Ministry of Foreign Affairs and Foreign Trade

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## TUNISIA

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## UNION OF SOVIET SOCIALIST REPUBLICS

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Mr. Georgii S. BURGUCHEV, Chief, Legal and Treaty Department, Ministry of Foreign Trade

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## UNITED ARAB REPUBLIC

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Miss Margaret MURRAY, Solicitor's Department, Department of Trade and Industry

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*Alternate*

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## UNITED STATES OF AMERICA

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*Alternate*

Mr. Richard D. KEARNEY, Ambassador, Department of State; Member, United Nations International Law Commission

*Advisers*

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Mr. Edward G. MISEY, Legal Adviser Permanent Mission of the United States of America to the United Nations, Geneva  
Mr. Norman PENNEY, Professor of Law, Cornell Law School  
Mr. Robert E. DALTON, Office of the Legal Adviser, Department of State

## ANNEX II

## Secretariat of the Commission

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Mr. John HONNOLD, Secretary of the Commission, Chief of the International Trade Law Branch  
Mr. Peter KATONA, Assistant Secretary of the Commission, Senior Legal Officer, International Trade Law Branch  
Mr. Willem Vis, Assistant Secretary of the Commission, Senior Legal Officer, International Trade Law Branch  
Mr. Kazuaki SONO, Legal Officer, International Trade Law Branch  
Mr. Gabriel WILNER, Legal Officer, International Trade Law Branch

## ANNEX III

## Observers

## A. UNITED NATIONS ORGANS

*United Nations Conference on Trade and Development*

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*Economic Commission for Europe*

Mr. Henri CORNIL, Trade and Technology Division

## B. SPECIALIZED AGENCIES

*Inter-Governmental Maritime Consultative Organization*

Mr. Thomas A. MENSAH, Head of the Legal Division

*International Monetary Fund*

Mr. Robert C. EFFROS, Counsellor for Legislation in the Legal Department

## C. INTERGOVERNMENTAL ORGANIZATIONS

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Mr. B. SEN, Secretary-General

*Bank for International Settlements*

Mr. Henri A. E. GUIAN, Legal Adviser

*Commission of the European Communities*

Mr. Daniel VIGNES, Adviser to the Legal Service

Mr. Thierry CATHALA, Principal Administrator

Dr. W. M. A. HAUSCHILD, Head of Division, Directorate-General of Internal Market and Harmonization of Legislation

*Council for Mutual Economic Assistance*

Mr. Mikhail Koudriashev, Head, Legal Department

*Council of Europe*

Mr. Alexandre PAPANDREOU, Principal Administrator Directorate of Legal Affairs

Mr. Gerhard VVSHKA, Adviser

*European Free Trade Association*

Mr. Dennis THOMPSON, Legal Adviser

Mr. Eskil PERSSOW, Deputy Head, General and Legal Department

*Hague Conference on Private International Law*

Mr. M. H. VAN HOOGSTATEN, Secretary-General

Mr. Georges DROZ, Deputy Secretary-General

C. INTERGOVERNMENTAL ORGANIZATIONS (*continued*)*International Institute for the Unification of Private Law*

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Mr. Jean-Pierre PLANTARD, Deputy Secretary-General

*Organization of American States*

Mr. Gerardo J. SCHAMIS, European Representative

Mr. Carlos V. VIOLA, Assistant to the European Representative

*World Intellectual Property Organization*

Mr. Roger HARBEN, Counsellor

Mr. Farag MOUSSA, External Relations Officer

Mr. F. EISEMANN, Legal Director

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Mr. Lars A. E. HJERNER, Professor of Law

## ANNEX IV

## List of documents before the Commission

[Annex not reproduced; see check list of UNCITRAL documents  
at the end of this volume.]B. List of relevant documents not reproduced  
in the present volume

<i>Title or description</i>	<i>Document reference</i>
Provisional agenda and annotations: note by the Secretary-General	A/CN.9/51
Register of texts: report by the Secretary-General	A/CN.9/56
Timing and content of the UNCITRAL Yearbook: report of the Secretary-General	A/CN.9/57 and Corr.1 <sup>1</sup>
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/58 and Add.1
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	A/CN.9/59 and Corr.1
Provisional agenda and annotations: note by the Secretary-General	A/CN.9/IV/CRP.7
Draft report on the work of the fourth session	A/CN.9/IV/CRP.13 and Add.1, 2, 3, and 4.
Summary records of the fourth session of the Commission (1971)	A/CN.9/SR.63-91

<sup>1</sup> In English only.

**Part Two**

**STUDIES AND REPORTS ON SPECIFIC SUBJECTS**

# I. INTERNATIONAL SALE OF GOODS

## A. Uniform rules on substantive law

### 1. *Analysis of comments and proposals relating to articles 1-17 of the Uniform Law on International Sale of Goods (ULIS) 1964: note by the Secretary-General (A/CN.9/WG.2/WP.6) \**

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\* 19 November 1970.

## I. INTRODUCTION

1. The United Nations Commission on International Trade Law at its third session determined the working methods which it decided to apply with respect to uniform rules of the international sale of goods. The decision of the Commission<sup>1</sup> provides, *inter alia*, as follows:

"72. The Commission *decided*, on the recommendation of the Working Group, to adopt the following working methods with respect to uniform rules of the international sale of goods:

"(a) The Working Group on the International Sale of Goods, established at the second session of the Commission, should continue its work under the terms of reference set forth in paragraph 3 (a) of the draft resolution adopted by the Commission at its second session;

"(b) Instead of considering selected items, the Working Group should consider ULIS systematically, chapter by chapter, giving priority to articles 1-17;

"(c) Members of the Working Group are requested to submit their proposals in writing and in time to allow the Secretary-General to circulate such proposals prior to the meeting;

"(d) Representatives of members of the Working Group, alone or in co-operation with representatives of other members, should be entrusted, if so willing, with the examination and redrafting of the articles referred to in paragraph (b) above, and any other provisions of ULIS related to those articles. Such representatives should take into consideration the relevant suggestions of Governments, the documents mentioned in the report of the Commission on the work of its third session, and the decisions taken at that session as well as the practices of international trade;

"(e) The representatives entrusted with the tasks referred to in paragraph (d) above shall submit the result of their work, including explanatory comments on each article, to the Secretary-General not later than 30 June 1970. The Secretary-General is requested to transmit these reports to other members of the Working Group on Sales for comments. The comments which reach the Secretary-General before 31 August 1970 shall be transmitted to the forthcoming session of the Working Group. The Secretary-General is also requested to submit his observations to the Working Group, whose report should contain explanatory comments on each issue or article of ULIS recommended for approval."

2. Pursuant to the above decision, the Working Group on the International Sale of Goods met during the third session of the Commission and entrusted rep-

resentatives of its members with the examination and redrafting of the first 17 articles of the Uniform Law on the International Sale of Goods (ULIS). Representatives of other members of the Working Group were requested to act as consultants with respect to this examination of specified articles. All the representatives who were entrusted with the examination of an article of ULIS have submitted reports giving the results of their examination; some of these reports also set forth the opinions of the consultants. In accordance with subparagraph (c) of the Commission's decision, quoted in paragraph 1 above, the Secretary-General has circulated the reports and observations received from members of the Working Group to the other members of the Working Group for comments. Several such comments were submitted.

3. The following reports, observations, proposals and comment relating to articles 1 to 17 of ULIS have been submitted to the Secretary-General and are annexed to this analysis:<sup>2</sup>

*On article 1*

1. Report by the representative of the United States of America. This report also deals with the observations made by the representative of the USSR, separately listed under 2 below (annex I).
2. Observations and proposal by the representative of the USSR (annex II).
3. Revision of article 1 by the representative of the United Kingdom (annex III).

*On article 2*

4. Report by the representative of Japan. This report also deals with the observations made by the representative of Mexico and, in addition to article 2, it affects article 1 and the question of reservations and declarations relating to the field of application of the law (annex IV).

*On article 3*

5. Report by the representative of the United Kingdom. The report also includes comments by the representatives of Tunisia and Kenya (annex V).

*On article 5*

6. Report by the representative of Norway (annex VI).
7. Comment by the representative of France (annex VII).

*On article 9*

8. Draft revision of the article and explanatory comments by the representative of Hungary (annex VIII).

*On articles 10 to 13 and 15*

9. Draft revision of the articles and explanatory comments by the representative of the USSR (annex IX).

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)* (hereinafter referred to as UNCITRAL report on third session (1970). *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, III, A, para. 72.

<sup>2</sup> For the annexes (original language version only), see A/CN.9/WG.2/WP.6/Add.1; not reproduced in this volume.

10. Comments on articles 10-13 and 15 by the representative of France (Comments on the proposal of the USSR listed under item 9 above) (annex X).
11. Note on the proposal of the USSR for the amendment of article 15 (item 9 above) by the representative of the United Kingdom (annex XI).
12. Comment on articles 10-13 by the representative of the United Kingdom (annex XII).
13. Draft revision of articles 10 and 15 and comments on articles 11-13 by the delegation of Ghana (annex XIII).

#### On article 17

14. Report by the representative of France (annex XIV).
4. Several of the reports discuss a number of distinct issues that are also the subject of comments and proposals in other reports. This report brings together and analyses the proposals and comment on specific issues to facilitate their consideration by the Working Group.

## II. ANALYSIS OF THE COMMENTS AND PROPOSALS

### A. ARTICLES 1 AND 2: PROBLEMS OF SCOPE OF APPLICATION OF THE LAW

5. The subjects of article 1 and article 2 are related and some representatives have suggested the consolidation of these two articles. In approaching these problems, it may be helpful to follow the following order: (1) problems concerned primarily with the definition of international sale (article 1 of ULIS); (2) problems concerned with the applicability of the Law with special reference to the contact between a contracting State and the parties to a transaction (article I-1 (introduction) and article 2 of ULIS); (3) problems of arrangement, including possible consolidation of the solutions reached under (1) and (2) above.

#### 1. *The definition of international sale (article 1 of ULIS)*

6. Article 1 of ULIS reads as follows:

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

"(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:

"(b) where the acts constituting the offer and the acceptance have been effected in the territories of different States;

"(c) where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

"2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

"3. The application of the present Law shall not depend on the nationality of the parties.

"4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

"5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", if a valid declaration to that effect made under Article II of the Convention dated the first day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect of them.

7. The Commission at its third session approved<sup>3</sup> the conclusion of the Working Group that, "in general, the definition set forth in article 1 of ULIS was satisfactory".<sup>4</sup> However, several comments were made suggesting improvements in the definition. Some of the proposals are of a basic character, suggesting the elimination of parts of article 1, extensions of the coverage, and other changes in substance. Other proposals involve drafting refinements directed to the present language of article 1. Adoption of the basic proposals directed to the substance of the article would make many of the drafting refinements irrelevant; the Group may therefore wish to start with the proposals for basic changes.

#### (a) *Proposed basic changes*

##### (i) *Elimination of tests other than international character of offer and acceptance*

8. The study submitted by the representative of the United Kingdom<sup>5</sup> suggested that difficulties of interpretation are presented by the following tests now contained in article 1: (i) the international character of the parties (paras. 1 and 5); (ii) international shipment (para. 1(a)); and (iii) offer and acceptance in one State and delivery in another (para. 1(c)).

9. Consequently, this study suggested that the one test for applicability (apart from agreement of the parties should be the international character of the offer and acceptance. This proposal which also implements another United Kingdom proposal referred to in paragraph 46 below, was embodied in the following draft:

"1. This law shall apply

'(i) to the extent that it is appropriate to any contract if the parties thereto have chosen it as the law of the contract; and

'(ii) to any contract for the sale of goods (irrespective of the nationality or places of business of the parties) if the acts constituting the offer and acceptance have been effected in the territories of different Contracting States neither of which had adhered to the Convention

<sup>3</sup> UNCITRAL Report on third session (1970, para. 51; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III.

<sup>4</sup> A/CN.9/35. Report of the Working Group on the International Sale of Goods on its first session, paras. 41 and 43; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

<sup>5</sup> Annex III.

governing this Law subject to a reservation under Article V.'

- "2. Same as paragraph 4 of the present text of article 1.
- "3. Same as paragraph 5 of the present text of article 1."

The study noted that paragraph (i) is designed to incorporate the first part of article 4 of ULIS. It was suggested further that account should be taken of the last three lines of article 4 ("it does not affect the application of any mandatory provision of law which would have been applicable if the parties had not chosen the Uniform Law") in relation to an article in the above suggested form.<sup>6</sup>

10. The study by the representative of the United Kingdom expressed the view that it would be difficult to produce any clear formulation extending the law beyond that proposed in paragraph 9 above. However, it was noted that consideration might be given to the concept of extending the law's ambit to cases "where the parties who effected their contract within the territory of a single Contracting State each did so in the clear knowledge that their contract was of an international character in that it was a contract between business concerns in different Contracting States".<sup>7</sup>

(ii) *Deletion of tests related to offer and acceptance (paras. 1 (b) and 1 (c))*

11. In connexion with the above proposal it would be appropriate to consider the contrasting proposal set forth in the study by the USSR. This study stressed the fortuitous nature of the place of offer and acceptance, and therefore proposed that the tests relating to offer and acceptance in paras. 1 (b) and 1 (c) of ULIS be deleted.<sup>8</sup> Accordingly, only the tests relating to (a) the international character of the parties and (b) the international shipment of the goods would be maintained. It was proposed that article 1, para. 1 of ULIS read as follows:

"*Alternative I.* 'The present Law shall apply to contracts of sale of goods entered into by the parties whose places of business are in the territories of different States, where the contract contemplates that the goods are at the time of the conclusion of the contract or will be subject to transport to the territory of a given State from abroad or that the goods have been subject to such transport, but remained unsold prior to the conclusion of the contract'.

"*Alternative II.* 'The present Law shall, apply to contracts of sale of goods entered into by the parties, whose places of business are in the territories of different States, where the parties at the time of the conclusion of the contract knew or ought to have known that the goods are at this time or will be subject to transport to the territory of a given State from abroad or that the goods have been subject to such transport but remained unsold prior to the conclusion of the contract'." <sup>9</sup>

<sup>6</sup> *Ibid.*, paras. 13 and 14.

<sup>7</sup> *Ibid.*, para. 19.

<sup>8</sup> Annex II, paras. II.1 (a) and (d).

<sup>9</sup> *Ibid.*, article IV.

This language also implements certain other proposals that are considered in paragraphs 13 and 15 below.

12. The text proposed by the USSR is similar to that proposed by the Norwegian representative at the first session of the Working Group.<sup>10</sup> The Norwegian draft text reads as follows:

"The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, where the contract contemplates transport of the goods from the territory of one State to the territory of another."

(iii) *Under the international shipment test, extension to include international shipment prior to the contract and shipment of goods taken or purchased on high seas*

13. In connexion with the last suggestion, it is appropriate to consider the further proposal in the USSR study that international shipment by the seller to the buyer's country prior to the contract should be given effect. The study discusses two types of situations: (a) goods brought by the seller to the buyer's country and thereafter sold to the buyer from demonstration halls or seller's warehouses; (b) the transactions in which contract gives the seller the choice to deliver from stocks in buyer's country or to deliver by international shipment.<sup>11</sup> These two situations may be distinguishable: under (a) the contract may require delivery of goods then in the buyer's country, while under (b) the international shipment may be consistent with, but perhaps not required (or "contemplated") by the contract. Language proposed by the representative of the USSR is set forth under para. 11, *supra*.

14. The study submitted by the representative of the United States<sup>12</sup> noted a problem of duration of transport that had been mentioned at the first session of this Working Group.<sup>13</sup> It was noted that when a seller has brought goods into a buyer's country, and held them in a bonded warehouse or similar place prior to sale, the further transportation of the goods to the buyer might be part of the international shipment, and thus bring the transaction within ULIS. It was noted that this question was related to the USSR proposal with respect to sale of goods after their arrival in buyer's country, and that the two issues could conveniently be considered together.

15. At the first session of this Working Group it was noted that the phrase "carried from the territory of one State to the territory of another" might exclude commodities (such as fish) taken on the high seas and carried into a State.<sup>14</sup> The representative of the USSR in his study proposed language (quoted in para. 11 *supra*) referring to transport of goods "to the territory of a given State from abroad". The study notes that

<sup>10</sup> Working Group report, annex V, annex B; *op. cit.*, *supra*, foot-note 4.

<sup>11</sup> Annex II, para. II.1. See also Working Group report, annex V, paras. 5-7.

<sup>12</sup> Annex I, para. (I)(2).

<sup>13</sup> Working Group report, annex V, para. 8; *op. cit.*, *supra*, foot-note 4.

<sup>14</sup> *Ibid.*, para. 44.

this language would meet the problem presented by contracts of sale of commodities which originate outside the territory of any State.<sup>15</sup>

(iv) *Exclusion of contracts for the construction and installation of a complete works (industrial plant and machinery)*

16. The USSR study suggested that contracts for the erection and installation of industrial plants presented problems that called for rules different from the usual sales contract. It was therefore proposed that the following exception be added to ULIS:

"The present Law shall not apply to contracts of supply of complete works and installations, unless agreed upon by the parties to a contract."<sup>16</sup>

17. The representative of the United States, commenting on the above proposal, expressed the view that since most sales of plant and machinery were the subject of detailed contracts, the impact of the uniform law, even if it should apply, would probably be slight in such a transaction. He thought therefore that no such provision was needed; it could be left for the courts to decide borderline cases where the contract had not included an express choice of the governing law.<sup>17</sup>

(b) *Proposed drafting changes*

18. As referred to in para. 8 above, the Working Group on Sales, at its first session, concluded that "in general, the definition set forth in article 1 of ULIS was satisfactory". However, certain problems of drafting were considered but not resolved at that session. The Commission, at its third session, approved the report of the Working Group "in so far as the Group approved the structure of article 1 of ULIS". The Commission further decided to refer recommendations for improvements in drafting to this Working Group. Further changes in drafting were suggested in the studies and comments relating to article 1 of ULIS. The principal problems of drafting are briefly noted below.

(i) *More than one place of business*

19. The problem related to the identification of the "place of business" of a party (art. 1-1) when business is conducted in two or more States. The problem was considered at the second session of the Commission,<sup>18</sup> and at the first session of this Working Group.<sup>19</sup> The problem has been further considered in the studies submitted to this session by the representatives of the United States<sup>20</sup> and of the United Kingdom.<sup>21</sup> As has been noted, the latter study suggests that difficulties of interpretation call for the selection of this test.

20. The study submitted by the representative of the United States suggested that article 1 of ULIS should

point to that place of business that is relevant to the transaction in question, and that this would not necessarily be the principal place of business. It was consequently proposed that the word "relevant" be inserted in the introductory part of paragraph 1 before the words "place of business" and that a new sub-paragraph be added to paragraph 1, explaining the word "relevant". This new sub-paragraph would read:

"Where a party has places of business in the territory of more than one State, the relevant place of business shall be that place of business that has the closest relationship to that aspect of the transaction that is relied upon under (a), (b) or (c) of the preceding sub-paragraph to make the present Law applicable."<sup>22</sup>

(ii) *Appropriateness of the use of the word "involves" in article 1, para. 1 (a)*

21. The Working Group at its first session noted that the English text of paragraph 1 (a) did not correspond with the French text, and suggested the following wording as a more accurate translation of the original French text:

"(a) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another,"<sup>23</sup>

22. At the third session of the Commission, Japan suggested the elimination of the word "contemplates" from the above text. It based its proposal on the view of the proper meaning of the French word "*implique*" in para. 1 (a) stated in the report of the Working Group on its first session<sup>24</sup> and suggested the substitution of the following equivalent for the French word "*implique*":

"... It may be objectively believed that the parties expect that... and this expectation need not be expressed in the contract, ...".<sup>25</sup>

23. The study submitted by the representative of the USSR also suggested the elimination of the word "contemplates" from the text quoted in sub-paragraph (a) above and the use of the following expression:

"... where the parties at the time of the conclusion of the contract knew or ought to have known. ...".<sup>26</sup>

24. The representative of the United States in his report on article 1 of ULIS, noted that the word "contemplates" may not be an accurate translation of the French "*implique*"; he suggested, however, that the word "contemplates" be retained in the English text, with an appropriate note in the legislative history that the term was used in an objective sense. It was further suggested that in the French version, instead of "*implique*", the word "*envisage*" be used to conform to article 74 (2) of ULIS.<sup>27</sup>

<sup>15</sup> Annex II, para. III.

<sup>16</sup> *Ibid.*, para. V.

<sup>17</sup> Annex I, para. (I)(3).

<sup>18</sup> UNCITRAL report on second session (1969); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A, annex I, para. 31 (Japan).

<sup>19</sup> Working Group report, annex I, para. (I)(1); op. cit. *supra*, foot note 4.

<sup>20</sup> Annex I, para. (I)(1).

<sup>21</sup> Annex III, paras. 4(i) and 8-12.

<sup>22</sup> Annex I, para. I.1.

<sup>23</sup> Working Group report, para. 32, op. cit. *supra*, foot-note 4.

<sup>24</sup> *Ibid.*, para. 33.

<sup>25</sup> UNCITRAL/III/CRP/5.

<sup>26</sup> Annex II, para. IV.

<sup>27</sup> Annex I, para. III.3.



- (iii) *Appropriateness of the use of the word transport in the French version of article 1, para. 1 (a)*

25. The representative of the United States noted<sup>28</sup> that there was a problem of translation, if not of language itself, with respect to the word *transport* as used in the French text of sub-paragraph 1 (a). In the opinion of this representative, sub-paragraph 1 (a) "is intended to apply where the movement of the goods is to be accomplished not by an independent carrier but by the seller himself. . . or in appropriate circumstances by the buyer himself. . .". It was suggested that in the English version the word "transport" be used to cover this meaning as distinct from "carriage" used in other articles of ULIS while in the French text the word *transport* be replaced by a more appropriate word since in other articles of ULIS (19(2), 23(1), 38(2), 54(1)(2), 82(1)) the same word used as having the meaning of "carriage by an independent carrier".

2. *Problems concerned with the applicability of the Law with special reference to the contact between a Contracting State and the parties to a transaction*

- (a) *Proposed changes in the text of articles 1 and 2 of ULIS with respect to the applicability of the Law*

26. The present text of article 2 of ULIS reads as follows:

"Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law."

27. At the third session of UNCITRAL a revision of article 2 was proposed by Working Party I. The Commission decided that the substance of this revision should be the basis for future work by the Working Groups on Sales.<sup>29</sup> The proposed text reads as follows:

"The present Law is applicable (a) irrespective of any rules of private international law when the place of business of each of the contracting parties is in the territory of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract; (b) when the rules of private international law indicate that the applicable law is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract."

28. It will be noted that paragraph (a) of the above provision deals with the issue covered in the opening sentence of article 1, paragraph 1 of ULIS. Under the present text of ULIS (art. 1, para. 1), the Law is applicable without reference to rules of private international law, when the places of business of the parties to an international sale (paras. 1 (a) (b) and (c)) are in the territories of "different States"; neither of the States need be a "Contracting" State. In contrast, sub-paragraph (a) of the above text restricts such application of the Law to contracts where each of the parties has his place of business "in the territory of a Contracting State". The

proposals of Mexico and Japan set forth in the next succeeding paragraph also support of this restriction.

29. The representatives of Mexico and Japan suggested a redrafting of articles 1 and 2. Both proposals are based on the above-quoted proposal of Working Party I that was approved in substance by the Commission at the third session. Certain differences in wording and arrangement are, however, proposed. Thus, both propose the use of the phrase "different contracting States". The proposal by the representative of Mexico reads as follows:

"Article 1. The present Law shall apply to the contracts of sale of goods entered into by parties whose place of business are located in a territory of different Contracting States, which have accepted the law without submitting a reserve which excludes its application to the contract, in any one of the following cases:"

"... [para. 1, sub-para. (a), (b) and (c)—unchanged paras. 2-5—unchanged.]

"Article 2. In the absence of the requisite set forth under paragraph first of the foregoing article, the present Law shall also apply when the provisions of private international law indicate that the applicable legislation is the one of a Contracting State which has adopted this Law without submitting a reserve which excludes its application to the contract."<sup>30</sup>

30. The proposal of the representative of Japan, *inter alia*, implements a suggestion made at the third session of the Commission, that the provisions on applicability commence with a reference to "contracts of international sale of goods", followed by a definition of this term.<sup>31</sup>

The proposal is as follows:

"Article 1

"(1) The present Law shall apply to contracts of international sale of goods entered into by parties whose places of business are in the territories of different Contracting States which have adopted the present Law without any reservation which would preclude its application to the contract, in each of the international sales defined in Article 2.

"(2) When the place of business of any of the parties to a contract of international sale of goods is not in the territory of any Contracting State, the rules of private international law shall apply in determination of the applicable law. When the rules of private international law indicate that the law applicable to the contract is the law of a Contracting State which has adopted the present Law without any reservation which would preclude its application to the contract, or when the law of such a Contracting State or the national legislation enacting the present Law, is chosen by the parties as the law applicable to the contract, the present Law shall apply to the contract."

"... [(3) Same as art. 1, para. 2 of the present text.

"(4) Same as art. 1, para. 3 of the present text.]

<sup>28</sup> Annex I, para. 1.2.

<sup>29</sup> UNCITRAL report on third session (1970), para. 30; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>30</sup> Annex IV, para. 5.

<sup>31</sup> UNCITRAL report on third session (1970), para. 31; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III.

"(5) For the purpose of determining whether the parties have their places of business or habitual residence in 'different Contracting States' any two or more States shall not be considered to be 'different Contracting States' if a valid declaration to that effect made under article II of the Convention dated . . . is in force in respect of them." <sup>32</sup>

The representative of Japan proposed further that a new article 2 should provide for the definition of "international sale" as distinguished from domestic sale of goods, based on article 1, paras. 1 (a), (b), (c) and 4 of ULIS. <sup>33</sup>

(b) *Proposals relating to provisions for reservations and declarations*

31. The sessional Working Party appointed by the Commission at its third session reported that the Convention providing for a uniform law should include the following:

"Any State may, at the time of the deposit of its instrument of ratification of, or accession to, the present Convention or, having become a party to the Convention, at any time after the Convention has entered into force, declare, by a notification addressed to the Government of . . . that, notwithstanding the provisions contained in article 2 of the Uniform Law, it will apply the Uniform Law to all contracts of sale of goods covered by the Uniform Law.

"If the declaration has been made at the time of the deposit of its instrument of ratification of or accession to the present Convention, it shall be effective from the date on which the Convention enters into force for that State.

"If the declaration has been made at any time after the Convention has entered into force, it shall be effective six months after the date of notification of such declaration." <sup>34</sup>

32. With respect to the provisions for reservations set forth in articles II through IV of the Hague Conventions of 1964 the Working Party recommended that: (1) article II should be retained; (2) article III should be deleted if the recommendations set forth in paragraphs 27 (revision of article 2 of ULIS) and 31 (provisions for declaration) above should be adopted; (3) action on article IV should be postponed until it was seen whether and to what extent the uniform law would conflict with the 1955 Hague Convention. The Working Party noted further that it had reached no conclusion as to the retention of article V of the Convention. <sup>35</sup>

33. The Commission, as a whole, took no position as to the proposals contained in paras. 31 and 32 above.

34. The representative of Tunisia, who acted as consultant in the preparation of the study on article 2 by the representative of Japan, came to the conclusion

that the provision permitting declaration by States, proposed by the Working Party, quoted in para. 31 above, might become an obstacle to a wide adoption of the uniform law and it would be better therefore not to include the declaration into the Convention. <sup>36</sup> The representative of Japan supported that view and pointed out that States were free to change their rules of private international law in order to make the uniform law applicable by their courts to all contracts of sale covered by that Law, without having recourse to the Convention. <sup>37</sup>

3. *Changes in arrangement*

35. The text of article 2 quoted in paragraph 27 above embodies the opening part of article 1, paragraph 1 of ULIS.

36. The proposals of the representatives of Mexico and Japan quoted in paragraphs 29 and 30, respectively, above suggest the rearrangement of articles 1 and 2 in the quoted form.

37. The proposal of the representative of the United Kingdom, quoted in paragraph 9 above embodies the suggestion that the power of the parties to choose the uniform law, now covered in article 4, be included in article 1. <sup>38</sup>

38. The USSR study proposed amalgamation of the provisions on sphere of application in article 1, article 5 and article 6. <sup>39</sup>

B. ARTICLE 3: EXCLUSION OF THE APPLICATION OF THE LAW BY THE PARTIES

39. Article 3 of ULIS provides as follows:

"The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied."

40. The study prepared by the representative of the United Kingdom <sup>40</sup> on this article also includes comments by the representatives of Tunisia and Kenya who acted as consultants in the preparation of the study. The representative of Norway, in the study on articles 5 and 7 of ULIS, also touched upon article 3 and suggested the adoption of a revised text.

41. The representative of Tunisia, in the comments noted above, expressed the view that it would be preferable to delete article 3, or to modify it in such a manner that the parties would not have the right to modify essential elements of the contract which should be set out explicitly in the Uniform Law. <sup>41</sup> He based his opinion on the understanding that in recent years the principle of the autonomy of the parties had noticeably lost much of its value since in all economic systems the State had been intervening more or less directly in the relations of the individuals who were only free to

<sup>32</sup> *Ibid.*, para. 6.

<sup>33</sup> *Ibid.*, para. 6, sub-para. 4.

<sup>34</sup> UNCITRAL report on third session (1970), para. 27; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>35</sup> *Ibid.*, para. 28.

<sup>36</sup> Annex IV, para. 8.

<sup>37</sup> *Ibid.*, para. 9.

<sup>38</sup> Annex III, para. 5.

<sup>39</sup> Annex II, para. 1.

<sup>40</sup> Annex V.

<sup>41</sup> *Ibid.*, para. 9.

conclude contracts which took account of the imperative economic and financial rules of their States. In the opinion of the representative of Tunisia the maintenance of article 3 would also make it possible for the stronger party to impose its will on the weaker one and finally it would involve the risk that the aim of the uniform Law to apply in all countries uniform rules to the international sale of goods would not be achieved.<sup>42</sup>

42. The representative of the United Kingdom suggested in his study to retain article 3 in its present form.<sup>43</sup> The representative of Kenya came to the same conclusion.<sup>44</sup>

43. The study prepared by the representative of the United Kingdom distinguished between express exclusion and implied exclusion, and also between exclusion of all of the Law and exclusion of only part of the Law. As to express exclusion, the study, in response to the arguments advanced by the representative of Tunisia, expressed the view that this article would not absolve the parties to the contract from complying with the mandatory or imperative rules of public policy and that the substitution of the law of the stronger party would not necessarily lead to unjust result since every national law attempted to strike an equitable balance between the rights of the buyer and those of the seller. It was emphasized that free negotiations were still the basis upon which international trade was conducted, and that abolition of freedom of contract would frustrate the natural evolution of commercial practice to meet changing situations and new demands, and thereby impede the development of international trade.<sup>45</sup> As to exclusion of the Law by implication it was mentioned that partial exclusion was more likely to occur by implication as in cases where the parties made reference to well-recognized terms of sale (such as c.i.f., f.o.b., etc.) which express understandings and practice that often differ from rules stated in the Law. The rules applied generally in respect of sales by documents, and payment by means of bills of exchange or bankers' commercial credits were also not consistent with some of the provisions of the Law.<sup>46</sup>

44. The representative of Norway, in his study on articles 5 and 7 dealing primarily with the sale of consumer goods,<sup>47</sup> suggested that provisions of national law providing for the protection of consumer buyers should not be subject to exclusion by the parties. To conform with proposal amendments to this effect, he suggested that article 3 should open as follows: "Except when otherwise expressly provided in the present Law, . . .".<sup>48</sup>

#### C. ARTICLE 4: APPLICATION OF THE LAW BY CHOICE OF THE PARTIES

45. Article 4 of ULIS provides as follows:

<sup>42</sup> *Ibid.*, para. 3.

<sup>43</sup> *Ibid.*, para. 8.

<sup>44</sup> *Ibid.*, para. 7.

<sup>45</sup> *Ibid.*, para. 4.

<sup>46</sup> *Ibid.*, para. 6.

<sup>47</sup> Annex VI. See also chapter D, below.

<sup>48</sup> *Ibid.*, annex II.

"The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, 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."

46. The representative of the United Kingdom expressed the view that under article 4 the circumstances in which the parties could choose the Law were unclear. Was this choice limited to circumstances where the Law was otherwise inapplicable for the sole reason that the parties did not have places of business in different States or different Contracting States? Or could the parties choose to apply the Law where the sales transaction had no international element (article 1-1), or where the Law was inapplicable for some other reason not mentioned in article 4.<sup>49</sup> It was therefore suggested that article 4 should be incorporated in the revised text of article 1.<sup>50</sup> The suggested text is reproduced in paragraph 9 above.

#### D. ARTICLE 5: APPLICABILITY OF MANDATORY RULES OF NATIONAL LAWS; CONSUMER PROTECTION

47. Article 5 of ULIS provides as follows:

"1. The present Law shall not apply to sales:

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

"(b) Of any ship, vessel or aircraft, which is or will be subject to registration;

"(c) Of electricity;

"(d) By authority of law or on execution or distress.

"2. The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments."

48. No comment was made with respect to paragraph 1 of this article. The representative of Norway submitted a study that discusses paragraph 2 of article 5 and also article 7.<sup>51</sup> Comments on the study by Norway were submitted by the representative of France.<sup>52</sup>

49. The study of the representative of Norway is primarily concerned with consumer sales which under this study was defined as sales which contemplate "the purchase of goods (primarily) for personal, family or household purposes". The study notes that consumers are usually in a weak negotiating position in relation to the professional seller; for this reason many States have enacted rules of law and other measures for their protection. The rules providing for such protection

<sup>49</sup> Annex III, para. 4 (v).

<sup>50</sup> *Ibid.*, para. 5.

<sup>51</sup> Annex VI.

<sup>52</sup> Annex VII.

implement public policy and have a mandatory character similar to those mentioned in article 5, paragraph 2, relating to sale by instalments, but are not protected by article 5. Underlying this discussion is an issue of general significance, not confined to sales to consumers. Thus, attention was drawn to the provision of article 8 that the Law shall not "be concerned with... the validity of the contract or of any of its provisions...". It was suggested that the scope of this provision was subject to various questions. Although national rules on validity would apparently control contract provisions where the Uniform Law had no rules supporting the contract provision, it was questionable whether national rules would override contract provisions supported by the Law; a similar question might arise with respect to rules applied by the Law in the absence of a contractual provision (e.g. article 34, cf. article 33-3). There was also a question as to whether national mandatory rules would be preserved as rules concerning "the validity" of the contract or its provisions, where the national rule afforded a party (such as a consumer) rights or privileges supplementing (rather than invalidating) the contract. The study notes that the Report of the Special Commission states that "the Uniform Law does not in any way affect the imperative rules of municipal law",<sup>53</sup> but concludes that a prevalent view inclines towards the opinion that mandatory provisions of national laws which are not expressly upheld by special provisions in ULIS<sup>54</sup> will be overridden by the provisions of ULIS. The study suggests that article 5, paragraph 2 and paragraph 8 are not sufficient to protect the buyer in a consumer sale. It therefore suggests to insert a new provision in ULIS which can unambiguously give consumer buyers sufficient protection.<sup>55</sup>

50. The study sets out three principal alternatives for amending ULIS to assure consumer protection: (1) to broaden the exception in article 5, paragraph 2, concerning sales by instalments, to cover all applicable mandatory rules of national law for the protection of a consumer buyer; (2) to make certain provisions of ULIS themselves mandatory; and (3) completely to exclude consumer sales or all civil non-commercial sales from ULIS.<sup>56</sup>

51. As the first alternatives which would secure consumer protection, the representative of Norway suggested the following text to replace the present text of article 5, paragraph 2:

"The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of [consumer] goods by that party [primarily] for personal, family or household purposes."<sup>57</sup>

<sup>53</sup> Diplomatic Conference on the Unification of Law governing the International Sale of Goods, The Hague, 1964. Records and Documents of the Conference. Ministry of Justice of the Netherlands, 1966. Vol. II, p. 30.

<sup>54</sup> There are only two such provisions in ULIS: article 4 and article 5, paragraph 2.

<sup>55</sup> Annex VI, paras. 3-10.

<sup>56</sup> *Ibid.*, para. 11.

<sup>57</sup> *Ibid.*, at annex II, alternative A.

52. The representative of France supported the above language, subject to deletion of the words in brackets.<sup>58</sup>

53. The study submitted by the representative of Norway noted the comment, made at the third session of the Commission, that a general reference to mandatory rules of domestic legislation would be difficult to apply, since different legal systems follow widely varying approaches in deciding what rules are mandatory.<sup>59</sup> The study noted, however, that this objection was not serious in connexion with consumer sales, since the volume of such sales governed by ULIS would not be great, and uniformity would not be important in this field.

54. As another alternative, the representative of Norway suggested the insertion of a new paragraph 2 defining the expression "consumer sale" (for the text, see para. 59 below) in article 7, and of mandatory provisions for the protection of consumers in articles 26, 27, 39, 41, 43 and 44.<sup>60</sup>

55. The study by the representative of Norway indicated that the amendment to article 5, paragraph 2, quoted in paragraph 51 above, provided the first preference in dealing with the problem of consumer purchases. However, as has been noted, a third alternative would be the complete exclusion of consumer sales from the Law. This alternative will be considered further in relation to specific proposals addressed to article 7. (The Working Group may wish to consider whether it would be efficient to consider whether consumer sales should be totally excluded before considering possible revision of article 5, para. 2.)

#### E. ARTICLE 7: COMMERCIAL AND CIVIL CHARACTER OF THE TRANSACTION

56. Article 7 of ULIS reads as follows:

"The present Law shall apply to sales regardless of the commercial or civil character of the parties or of the contracts."

57. The representative of the United Kingdom, in his study on article 1 of ULIS, expressed the view that while purchases of tourists travelling abroad were governed by the local domestic law such purchases would fall under ULIS if the purchased goods were requested to be sent directly to the buyer's home abroad. Accordingly, it was suggested by the United Kingdom representative that "any additional case to be covered by any new draft should be limited to transactions between persons who are contracting commercially"<sup>61</sup> If accepted by the Working Group the suggestion would call for appropriate modification of article 7.

58. The question of limitation of the sphere of application of the Uniform Law to commercial transactions was also touched upon by the representative of

<sup>58</sup> Annex VII.

<sup>59</sup> UNCITRAL report on third session (1970), para. 63; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>60</sup> Annex VI, at annex II, alternative 3.

<sup>61</sup> Annex III, para. 18.

France. He stated that although in the practice the Uniform Law would mainly apply to transactions between parties of commercial character, nevertheless, in his opinion, the determination of the character of the merchant might raise some difficulties in several countries, e.g. in France. He therefore would prefer the present text to stand as it is.<sup>62</sup>

59. The representative of Norway suggested that in case the Commission would adopt his suggestion relating to consumer protection quoted in paragraph 51 above, the following text be added to article 7 as new paragraph 2:

"For the purpose of the present Law, the expression 'consumer sale' means a sales contract which contemplates the purchase of [consumer] goods by the contracting buyer [primarily] for personal, family or household use."<sup>63</sup>

#### F. ARTICLE 9: USAGES

60. Article 9 of ULIS reads as follows:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.

"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."

61. The Commission, at its third session, decided to refer the proposals made in respect of article 9 to the Working Group.<sup>64</sup> During the session the following proposals were made:

(a) The sessional Working Group established by the Commission for the revision of article 9 recommended that paragraphs 2 and 3 of the article be replaced by the following text:

"2. The usages which the parties shall be considered to have impliedly made applicable to their contract shall include any usage of which the parties are or should be aware and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved.

"3. Where terms, clauses or standard forms of contracts commonly used in commercial practice are employed, they shall be interpreted according to the meaning intended to be given to them by the parties. In the absence of any such intention, they shall be

interpreted according to usage as provided in the preceding paragraph."<sup>65</sup>

(b) According to another proposal, paragraph 2 of article 9 should be revised to read as follows:

"The usages which the parties shall be considered to have impliedly made applicable to their contract shall include any usage which is widely known in international trade and regularly [and generally] observed by parties to contracts of the type involved and of which the parties to the contract either are aware or should, because it is so widely known and regularly [generally] observed, be [have been] aware."<sup>66</sup>

(c) One representative proposed the following wording of paragraph 2:

"It is considered that the parties are impliedly bound by any usage which is widely known in international trade and which is regularly observed by parties to contracts of the type involved."<sup>67</sup>

62. Pursuant to the decision of the Commission at its third session to entrust representatives of members of the Working Group with the examination and redrafting of articles of ULIS, the representative of Hungary was requested to examine article 9. As a result of the examination he submitted the following revised text of article 9:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly [and generally] observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.

"3. In the event of conflict with the present law the usages shall prevail unless otherwise agreed by the parties.

"4. 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."<sup>68</sup>

63. As to the question whether in paragraph 2 of the above text the expression "regularly" or "generally" should be used, the Hungarian representative noted that in his opinion the proof of regular use, i.e. permanent repetition of application of a certain usage would be easier than the proof of "general" use which involved

<sup>62</sup> Annex X.

<sup>63</sup> Annex VI, at annex II.

<sup>64</sup> UNCITRAL report on third session (1970), para. 42; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>65</sup> *Ibid.*, para. 38.

<sup>66</sup> *Ibid.*, para. 40.

<sup>67</sup> *Ibid.*, para. 41.

<sup>68</sup> Annex VIII. It will be noted that paras. 1, 3 and 4 are the same as provisions in ULIS.

not only regular but also broad geographical application of the usage.<sup>69</sup>

#### G. ARTICLE 10: DEFINITION OF FUNDAMENTAL BREACH

64. Article 10 of ULIS reads as follows:

##### "Article 10

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects."

65. The representative of the USSR submitted comments addressed jointly to proposed revisions of articles 10, 11 and 13 of ULIS. This study expressed the view that the expression "a reasonable person in same situation" used in articles 9 and 10 might, to a certain extent, cause fundamental differences in the interpretation of several articles and definitions contained in ULIS. He therefore suggested that in articles 10, 11 and 13 it should specify "the extent of awareness and prevision which a merchant engaged in international commerce should possess in the same situation". In the opinion of the USSR representative this would promote uniform interpretation of definitions contained in ULIS relating to such concepts as "fundamental breach", "a party know or ought to have known", "promptly", "within a reasonable time".<sup>70</sup>

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental in all cases when it has been provided so, as well as in those cases when the party in breach knew, or ought to have known at the time of the conclusion of the contract that a merchant engaged in international commerce, being in the same situation as the other party, and in the same circumstances would not have entered into the contract if he had foreseen the breach and its effects."<sup>71</sup>

67. The representative of the United Kingdom in his comments on article 10, noted that the USSR text would require the court or arbitrator to consider what "a merchant engaged in international commerce" would have done irrespective of the fact that "the other party" might not have contracted in a commercial capacity.<sup>72</sup>

68. The representative of France noted that, according to article 7, the Uniform Law did not apply only to merchants. He further expressed the opinion that the changes in the text as suggested by the USSR representative were not necessary since the words "in the same situation" could only relate to a person engaged in international trade while the expression "engaged in international commerce", as suggested by the USSR

representative, would exclude the more general idea of "a reasonable person in the same situation".<sup>73</sup>

69. The representative of the United Kingdom noted in his comments that, from the point of view of English law there was no difficulty whatsoever about the interpretation or application of article 10. In his opinion, therefore, article 10 is satisfactory as it stands. Should, however, the wording of the article be changed because of the difficulty it might cause in non-common-law systems, the actual ideas contained in the article would have to be maintained. Such ideas are the concept of "fundamental breach", the necessity of an objective test to determine whether or not the breach was fundamental and the freedom of the parties to stipulate that certain breaches should be treated as fundamental or as non-fundamental.<sup>74</sup>

70. The delegation of Ghana suggested that the concept of fundamental breach as used in certain common law countries was different from the defined in article 10. He therefore suggested to replace the word "fundamental" by the word "major". He further suggested the elimination of the speculative and uncertain test of foreseeability used in the present definition of fundamental breach. The text proposed by the Ghanaian delegation reads as follows:

"For the purposes of the present law, a breach of contract shall be regarded as a major one when such breach substantially derogates from the attainment or the main purpose of the contract, as objectively determined by the Court."<sup>75</sup>

#### H. ARTICLE 11: DEFINITION OF THE EXPRESSIONS "PROMPTLY" AND "WITHIN A REASONABLE TIME"

71. Article 11 reads as follows:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible, in the circumstances, from the moment when the act could reasonably be performed."

72. The representative of the USSR suggested changes in the text of this article in accordance with his general considerations referred to in paragraph 65 above. He also suggested the addition to the present text of a new paragraph 2 defining the expression "within a reasonable time". The proposed text is as follows:

"1. Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible, in the circumstances, from the point of view of a merchant engaged in international commerce, starting from the moment when the act could reasonably be performed.

"2. Where under the present Law an act is required to be performed within a reasonable time or any similar expression is used, it shall be regarded as one to be performed within a period normally

<sup>69</sup> *Ibid.*, explanatory comment.

<sup>70</sup> Annex IX, commentaries to articles 10, 11 and 13: general considerations.

<sup>71</sup> *Ibid.*

<sup>72</sup> Annex XII, para. A.9.

<sup>73</sup> Annex X.

<sup>74</sup> Annex XII, paras. A.8 and 9.

<sup>75</sup> Annex XIII, para. A.

required in the circumstances from the point of view of a merchant engaged in international commerce.”<sup>76</sup>

73. From the point of view of English law the representative of the United Kingdom did not find it necessary to effect any change in article 11 or to add to the present text a definition of the expression “within a reasonable time”. In his opinion, however, if such definition would be required by other legal systems, the USSR proposal would merit careful consideration.<sup>77</sup>

#### I. ARTICLE 12: DEFINITION OF THE EXPRESSION “CURRENT PRICE”

74. Article 12 reads as follows:

“For the purposes of the present Law, the expression ‘current price’ means a price based upon an official market quotation, or, in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price.”

75. The representative of the USSR commenting on the article suggested that the expression “current price” be determined rather as “the price prevailing in the market concerned” than as “a price *based* upon an official market quotation” as determined by the present text. The reason for this change is that the “prevailing price” is always determined in accordance with the established practices and usages while the “price based upon the quotation” means that the interested party in proving the current price would have, in each case, to take into account not only the official quotation but also usages and methods of price calculation established in the given market. It is not clear, therefore, why official quotation should be given priority before the usual methods of price calculation.<sup>78</sup>

76. On the basis of the above considerations and taking also into account the provisions of article 84, para. 2 of ULIS, the USSR representative suggested that article 12 should read as follows:

“For the purposes of the present Law, the expression ‘current price’ means a price prevailing in a given market and calculated in accordance with the methods of calculation established in that market.”<sup>79</sup>

77. The representative of the United Kingdom suggested that article 84, para. 2, was really a gloss on the definition in article 12, and further that the expression “current market price” would be more informative and less confusing than “current price”. It was therefore suggested that:

“(i) Article 12 be omitted and such definition of current price as may be thought necessary be included in article 84; and

“(ii) Consideration be given to the question whether article 84.2 does not require amendment to ensure that the comparison to be

made is effectively a comparison between the contract price and the price which the buyer would have to pay or the seller receive if, on the date on which the contract was avoided, he bought or sold like quantities of like goods for delivery on the same date on identical terms and conditions, being a price based wherever possible upon a market quotation.”<sup>80</sup>

#### J. ARTICLE 13: MEANING OF THE EXPRESSION “A PARTY KNEW OR OUGHT TO HAVE KNOWN”

78. Article 13 reads as follows:

“For the purposes of the present Law, the expression ‘a party knew or ought to have known’, or any similar expression, refers to what should have been known to a reasonable person in the same situation.”

79. In accordance with the considerations referred to in para. 65 above the representative of the USSR suggested the following revised text:

“For the purposes of the present Law, the expression ‘a party knew or ought to have known’, or any similar expression, refers to what should have been known in the same circumstances to a merchant engaged in international commerce.”<sup>81</sup>

80. The comments on article 11 made by the representative of the United Kingdom, referred to in paragraph 73 above, also apply to this article.<sup>82</sup>

#### K. ARTICLE 15: FORM OF THE CONTRACT; REQUIREMENT OF WRITING

81. Article 15 reads as follows:

“A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.”

82. To satisfy requirements of legislation of a number of countries in which a written form of foreign trade contracts was obligatory, the representative of the USSR suggested that article 15 should be revised as follows:

“No requirements are made with regard to form of a contract of sale. In particular, it may be proved by means of witnesses. The contract, however, shall be in writing, if so required by laws of at least one of the countries, in the territories whereof the parties to the contract have their places of business.”<sup>83</sup>

83. The delegation of Ghana suggested that the present text of article 15 be retained but the following text be added to it to accommodate the demands of the countries which require their foreign trade contracts to be in writing:

<sup>76</sup> Annex IX.

<sup>77</sup> Annex XII, para. B.

<sup>78</sup> Annex IX, commentaries to article 12.

<sup>79</sup> *Ibid.*

<sup>80</sup> Annex XII, para. C.

<sup>81</sup> Annex IX.

<sup>82</sup> Annex XII, para. D.

<sup>83</sup> Annex IX.



"However, where the municipal law of a contracting State requires that an international contract of sale shall be in writing and such contracting State, at the time of the ratification of the present Law, lodges a declaration with the Government of . . . to this effect, contracts with traders in such contracting State shall comply with the writing requirement."<sup>84</sup>

84. The representative of the United Kingdom submitted comments on the proposal of the USSR representative, quoted in paragraph 82 above. (The comments also seem relevant to the text proposed by the delegation of Ghana, set out in paragraph 83 above.) According to these comments, the character of "writing" may vary from country to country; in addition, when legal proceedings in connexion with contracts of an international character are brought in a court of a third country, the observance of the provisions of a foreign law requesting the contract to be in writing would greatly depend on the conflict of law rules of the forum. If, e.g., these rules characterize the above-mentioned provisions of foreign law as being of an evidentiary character, the court presumably would ignore those provisions. The same could happen in countries the law of which considers a contract valid if it fulfils the requirements as to form either of the law of the place of contracting or of the proper law. For this reason the study expresses the opinion that the inclusion in the Uniform Law of the text proposed by the USSR representative would not make the relevant provisions of the national law automatically applicable. Consequently, the USSR proposal is opposed. At the same time, the study expresses the view that if any amendment to article 15 is made, it would be necessary to introduce further provisions which would (a) define the meaning of the concept "in writing"; (b) draw a distinction between evidentiary and substantive requirements of form and (c) specify the consequences of a non-compliance with the requirement of written form.<sup>85</sup>

#### L. ARTICLE 17: QUESTIONS NOT GOVERNED BY THE LAW

85. Article 17 reads as follows:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

86. At the third session of the Commission no agreement was reached on the article. The Commission decided to refer the question to the Working Group for further consideration in the light of the views and

proposals expressed at the session.<sup>86</sup> The report of the Commission on its third session notes that several representatives supported the retention of article 17 in its present form or with minor clarifying amendments. Others supported the proposal in para. 66 of the report of the Working Group on its first session to supplant article 17 with the following: "Private international law shall apply to questions not settled by ULIS". It was also suggested that the general principles be rendered explicitly in the preamble of a future convention on the Uniform Law. Others suggested that reference to private international law should be added, at the end of a general rule of interpretation, to deal with the problem of gaps in the law. Finally one representative proposed the deletion of the article.<sup>87</sup>

87. A detailed study on article 17 was submitted by the representative of France. The study deals with most of the criticisms of the article made by representatives at meetings of the Commission and the Working Group, respectively, and comes to the conclusion that the principle established by article 17 may be considered indispensable in some form or another. In the view of the author of the study the application of domestic law or of the law indicated by the conflict rules of the *lex fori* would amount to precluding the application of the Uniform Law in many cases which the legislator and the parties themselves had wanted the law to cover. The application of the national law of the court hearing the case, as suggested at the previous session of the Working Group would also render unachievable the desire that the rights and obligations of the parties be defined without recourse to a court, even a court of arbitration. Recourse to the law designated by the rules of private international law would have the same effect and would introduce an additional element of uncertainty.<sup>88</sup>

88. As a solution, the representative of France suggested in his study the addition to article 17 of the idea that the interpretation of the Uniform Law must be as harmonious as possible at the international level or, more specifically, that in interpreting the Uniform Law one should consider the interpretations placed on it in other countries. He accordingly supported the adoption of the text proposed at the first session of the Working Group, that reads:

"The present law shall be interpreted and applied so as to further its underlying principles and purposes, including the promotion of uniformity in the law of international sales."<sup>89</sup>

<sup>86</sup> UNCITRAL report on the third session (1970), para. 55; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>87</sup> *Ibid.*, para. 54.

<sup>88</sup> Annex XIV.

<sup>89</sup> Working Group report, para. 63; *op. cit. supra*, footnote 4.

<sup>84</sup> Annex XIII, para. B.

<sup>85</sup> Annex XI.



**2. Working Group on the International Sale of Goods; report on the work of the Second Session,  
7-18 December 1970 (A/CN.9/52) \***

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\* 5 January 1971.

**I. INTRODUCTION**

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session, held in March 1969. The Working Group consists of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Under paragraph 3 of the draft resolution adopted by the Commission at its second session,<sup>1</sup> the Working Group shall:

"(a) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-General... in order to ascertain

which modifications of the existing texts [the Hague Conventions of 1964 relating to a Uniform Law on the International Sale of Goods and to a Uniform Law on the Formation of Contracts for the International Sale of Goods] might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(b) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;"

2. The Working Group held its first session at the United Nations Headquarters in New York from 5 January to 16 January 1970 and submitted its report<sup>2</sup> to the third session of the Commission.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969) (hereinafter referred to as UNCITRAL, Report on Second Session [1969]), para. 38; Yearbook of the United Nations Commission on International Trade Law (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A.

<sup>2</sup> A/CN.9/35; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

3. The Commission, at its third session, decided:<sup>3</sup>

"(a) The Working Group on the International Sale of Goods, established at the second session of the Commission, should continue its work under the terms of reference set forth in paragraph 3 (a) of the draft resolution adopted by the Commission at the Working Group should meet, for at least ten working days, before the fourth session of the Commission.

"(b) Instead of considering selected items, the Working Group should consider ULIS systematically, chapter by chapter, giving priority to articles 1-17.

"(c) Members of the Working Group are requested to submit their proposals in writing and in time to allow the Secretary-General to circulate such proposals prior to the meeting.

"(d) Representatives of members of the Working Group, alone or in co-operation with representatives of other members, should be entrusted, if so willing, with the examination and redrafting of the articles referred to in paragraph (b) above, and any other provisions of ULIS related to those articles. Such representatives should take into consideration the relevant suggestions of Governments, the documents mentioned in the report of the Commission on the work of its third session, and the decisions taken at that session as well as the practices of international trade.

"(e) The representatives entrusted with the tasks referred to in paragraph (d) above shall submit the result of their work, including explanatory comments on each article, to the Secretary-General not later than 30 June 1970. The Secretary-General is requested to transmit these reports to other members of the Working Group on Sales for comments. The comments which reach the Secretary-General before 31 August 1970 shall be transmitted to the forthcoming session of the Working Group. The Secretary-General is also requested to submit his observations to the Working Group, whose report should contain explanatory comments on each issue or article of ULIS recommended for approval.

"(f) Before the new text of a uniform law or the revised text of ULIS is completed, the Working Group should only submit questions of principle to the Commission for consideration.

"(g) Members of the Commission are requested to submit their proposals related to the report of the Working Group in writing preferably in advance of the fourth session of the Commission.

"(h) The Secretary-General is requested to render assistance to the Working Group in the performance of its task, in particular, by preparing, either at the request of the Working Group or on his own motion, studies and other preparatory documents (with the

assistance of experts, if necessary, within the limits permitted by the budget) and by submitting proposals for consideration."

4. The Working Group held its second session at the United Nations Office at Geneva from 7 December to 18 December 1970. All the members of the Working Group were represented. The list of representatives is contained in annex I to this report.

5. The session was also attended by observers from Belgium and Romania and from the following inter-governmental and international non-governmental organizations: The Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT), and the International Chamber of Commerce (ICC).

6. The documents placed before the Working Group were:

(a) Provisional agenda (A/CN.9/WG.2/WP.7)

(b) Analysis by the Secretary-General of reports, containing comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS), submitted by representatives of members of the Working Group (A/CN.9/WG.2/WP.6)

(c) Annexes (I-XIV) to the above Analysis, setting forth the texts of the reports submitted by representatives of members of the Working Group (A/CN.9/WG.2/WP.6/Add.1)

(d) Note by the secretariat of UNIDROIT on the concept of "delivery" ("délivrance") in the drafting of the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.5).

7. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Consideration of articles 1 to 17 of ULIS
4. Future work
5. Adoption of the report.

8. At its first and third meetings, held on 7 and 8 January 1970, the Working Group, by acclamation, elected the following officers

Chairman: Mr. Jorge Barrera Graf (Mexico)

Rapporteur: Mr. Dileep Anant Kamat (India).

9. With respect to item 3 of this agenda, the Working Group decided to take the above Analysis by the Secretary-General (A/CN.9/WG.2/WP.6) as a basis for its discussions, and to consider the issues involved in the first seventeen articles of ULIS in the order in which they were presented in this Analysis.

10. The Working Group set up Working Parties to consider the drafting of certain articles.

## II. CONSIDERATION OF ARTICLES 1 TO 17 OF ULIS

### ARTICLES 1 AND 2: BASIC RULES ON THE SPHERE OF APPLICATION OF THE LAW

11. The actions of the Working Group with respect to articles 1 and 2 of ULIS are discussed together. These two articles establish the basic rules on the

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (hereafter referred to as UNCITRAL report on third session [1970]), para. 72; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>4</sup> Reproduced in para. 1 above.

sphere of application of the Law; the structure can best be viewed as a whole.<sup>5</sup>

12. Articles 1 and 2 of ULIS are as follows:

#### ARTICLE 1

"1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

"(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;

"(b) Where the acts constituting the offer and the acceptance have been effected in the territories of different States;

"(c) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance have been effected.

"2. Where a party to the contract does not have a place of business, reference shall be made to his habitual residence.

"3. The application of the present Law shall not depend on the nationality of the parties.

"4. In the case of contracts by correspondence, offer and acceptance shall be considered to have been effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them have been sent and received in the territory of that State.

"5. For the purpose of determining whether the parties have their places of business or habitual residences in "different States", any two or more States shall not be considered to be "different States" if a valid declaration to that effect made under article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods is in force in respect of them."

#### ARTICLE 2

"Rules of private international law shall be excluded for the purposes of the application of the present Law, subject to any provision to the contrary in the said Law."

13. The Working Group recommended that these articles be replaced by the following:

#### Article 1

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:

(a) When the States are both Contracting States; or

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

2. The present Law shall also apply where it has been chosen as the law of the contract by the parties.

<sup>5</sup> Other provisions, establishing certain exceptions and modifications of these basic rules, will be discussed under articles 3-8, *infra*.

#### Article 2

For the purpose of the present Law:

(a) The parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(b) Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(c) Where a party does not have a place or business, reference shall be made to his habitual residence;

(d) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration.

(e) A "Contracting State" means a State which is Party to the Convention dated... relating to... and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(f) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated... relating to... is in force in respect of them.

#### 1. International character of the transaction

14. This revision substantially simplifies the Law by reducing the number of independent tests for the Law's applicability.

15. More specifically, the revision eliminates the tests set forth in article 1 of ULIS in sub-paragraphs 1 (a), 1 (b) and 1 (c). Each of these sub-paragraphs qualifies the basic test (which has been retained) that the parties to a sale of goods shall have their places of business in different States.

16. Paragraph 1 (a) of article 1 lays down a test based on whether the contract "involves" the sale of goods that at the time of the contract are in the course of carriage, or will be carried from one State to another. Under this test, serious problems have arisen because of the difficulty in defining the relationship between the obligations of the contract and the movement of goods from one State to another.

17. In many cases the contract will clearly require international carriage of the goods, but in many other cases this matter will be left in doubt. The buyer often will not be directly concerned with the point of origin of the goods; his principal interest is in receiving goods of a specified quantity and quality. In other cases, the buyer may provide transportation in trucks or in ships he dispatches to the seller's place of business or to a nearby shipping-point; such arrangements may be made under quotations like "Ex Works" or "f.o.b." at the seller's factory or at a dock in the seller's country. In such cases the seller is not concerned with the destination of the goods; his concern is with receiving the price. Plans about the origin or destination may not

be required or even mentioned in the contract. Even if the contract refers to plans for the international movement of goods, such a reference may not be part of the obligation of the contract, frequently plans for shipment will be developed informally after the conclusion of the contract in the form of shipping instructions.

18. Consideration was given to various ways to solve this problem by revision of paragraph 1 (a). These included provision that the contract "contemplates" or the parties "contemplated" or "expected" the requisite international movement. These alternative tests, however, turn on facts concerning matters that are not part of the obligations under the contract, and consequently are difficult of application.

19. Paragraph 1 (b) of article 1 of ULIS lays down a test dependent on whether "the acts constituting the offer and acceptance have been effected in the territories of different States". Under this test, the offer (and acceptance) may be a communication that is dispatched in one State and received in another; this problem is dealt with in paragraph 4 of article 1. The more serious problem is that, in the course of negotiation, a series of communications may gradually ripen into agreement, and the agreement may be wholly or partially embodied in a document executed by the parties in one State. In such cases it will be difficult to know when the stage of negotiation has ended, or which are the communications, under articles 1-4, "which contain" the "offer" and "acceptance".

20. Paragraph 1 (c) of article 1 of ULIS provides a third test that combines the place of "delivery" of the goods with the place of "offer" and "acceptance". This test involves some of the same problems of application that have been outlined above.

21. The revision removes the qualifications which sub-paragraphs 1 (a), 1 (b) and 1 (c) added to the basic test that the parties have their places of business in different States. This basic test is retained in paragraph 1 of article 1.<sup>6</sup>

22. This simplification of article 1, considered alone, would broaden the scope of the Law's applicability. However, this revision was made in relationship to another significant change narrowing the scope of the Law. Trouble some questions have arisen with respect to the relationship between the rules of ULIS and various types of national laws designed to protect ordinary consumers. In some areas, purchases by consumers from sellers in other States are of significant volume, and may increase. It was decided that the best solution to the problem was wholly to exempt consumer sales from the Law; this is done by article 5-1 (a). With this restriction in scope, it was considered that the qualifications imposed by sub-paragraphs 1 (a), 1 (b) and 1 (c) could be removed without unduly increasing the scope of the Law.

23. The basic requirement, that the parties have their "places of business in different States", is defined

by the provisions of article 2. This test, as it appeared in article 1 of ULIS, contained no provision dealing with problems presented when a party has places of business in more than one State. Since many business enterprises have branches in different States, doubts as to which place of business was relevant for the applicability of the Law presented problems that required a solution. Paragraph (b) of article 2 is addressed to this question. This paragraph, as the basic rule, points to the party's "principal place of business". In pointing to a "place of business", the rule excludes centres of only formal significance, such as a place of incorporation which is not a place of "business".

24. It was recognized that in some cases the transaction may be centred at a place of business which is not the "principal place of business"; where such a place is in the same State as the place of business of the other party, failure to take account of this fact would lead to excessive extension of the scope of the Law.<sup>7</sup> Therefore the basic test is qualified, under paragraph (b), where "another place of business has a closer relationship to the contract and its performance". This paragraph states that, in applying this test, regard should be given "to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". This latter language excludes aspects of the making of the contract (such as supervision by another office) or of performance (such as foreign origin or destination of the goods) that are known only to one party and which thus are outside the "circumstances known to or contemplated by the parties at the time of the conclusion of the contract".

25. Paragraph (a) of proposed article 2 is designed to add to the definiteness of the basic test and to prevent undue extension of the Law by excluding from consideration a place of business where "one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State". This section would be applicable, for example, where a transaction of sale was effected through a broker or other agent who did not disclose that he was acting for a foreign principal.

26. One representative proposed that the Law should also exclude transactions where "the offer, the acceptance, and the delivery of the goods have been effected in the State where the goods are, unless otherwise agreed by the parties". It was concluded that such a provision would not be necessary in view of the exclusion of consumer sales and would be difficult of application for the reasons given for the deletion of paragraph 1 (b) and (c) of article 1 of ULIS, as discussed above in paragraphs 19-22.

27. The Working Group recognized that it is not possible to avoid all doubts that may arise under the application of these tests. It was concluded, however, that the central idea was sufficiently clear for application, and that the rule proposed in paragraph (b) of

<sup>6</sup> Questions of applicability of the Law dependent on whether the relevant States have adopted the Uniform Law will be considered at paragraphs 33-35, *infra*. The effect of an agreement by the parties that the Law shall apply will be considered at paragraphs 36-42, *infra*.

<sup>7</sup> Undue extension might also result, in some circumstances, where the centre of the transaction is in a non-contracting State and the other party has his principal place of business in a Contracting State. See article 1-1 (a) and (b) and paragraphs 32-35, *infra*.

article 2 substantially narrowed the area of doubt that arises under the undefined reference to "places of business" in the original version of ULIS.

28. An observer suggested that more precision would result if it were added that, in order to be a place of business, a "permanent organization" should be maintained there and that the controlling test should be which organization took care of the conclusion of the contract. He proposed the following language, which was supported by another observer:

"Where a party to a contract also has a place of business in another State than that of his principal place of business, such other place of business shall not be considered his place of business unless the party at that place maintains a permanent organization [including an office and personnel of his own] and the contract was concluded exclusively through the intermediary of such organization."

29. An observer also noted his reservations concerning the definitions set forth in paragraphs (a) and (b) of article 2. Paragraph (a), in his opinion, would pose problems of proof and provided the possibility for improper steps to apply or to escape from the Law. It was also suggested that paragraph (b) could encourage litigation over applicability of the Law. It was noted that when a businessman situated in State A bought goods which were found there (for instance for equipping his offices) it was strange that ULIS might be applicable to this contract. Generally, this observer considered that the former text of article 1, which defined the international sale, was preferable.

30. One delegate proposed the rearrangement of paragraphs (a) and (b) and drafting changes in paragraph (b). The Working Group concluded that these changes should not be made at the present time.

31. It may be noted that paragraph (d) of article 2 of the proposed revision is based on article 3 and article 7 of ULIS. These provisions of ULIS, and article 2 (d) of the revision proposed by the Working Group, do not modify other provisions of the Law, but are designed to avoid misinterpretation which otherwise might arise from the practices of some legal systems. This is particularly true of the provision, drawn from article 7 of ULIS, that consideration shall not be taken of "the civil or commercial character of the parties or the contract". This provision was moved to this section to emphasize its relationship to questions of applicability of the Law.

## 2. *Applicability of the Law with reference to the contact between a Contracting State and the parties to a transaction*

32. Article 1 of ULIS refers to contracts between parties whose places of business are in "different States"; this provision does not require that either of these States had adopted the Law. In addition, article 2 of ULIS provides:

Rules of private international law shall be excluded for the purposes of the application of the present Law subject to any provision to the contrary in the said Law.

33. At sessions of the Commission and at the first session of the Working Group, attention was given to the broad scope that these provisions gave to the Law. Attention was also given to the problem of "forum-shopping", since the applicability of the Law might depend on whether a party could institute litigation in the *forum* of a Contracting State.<sup>8</sup> At the third session, the Commission decided on the substance of a revision which should be used as a basis for future work of the Working Group on Sales.<sup>9</sup> This decision has been implemented in paragraph 1 of article 1 of the proposed revision. Thus, where the parties to a contract have their places of business in different States, under article 1-1, the Law shall apply:

"(a) When the States are both Contracting States; or

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

34. The above reference in paragraph (a) to "Contracting States" is supplemented by provisions in paragraphs (e) and (f) of article 2. Paragraph (e) takes account of the possibility that a new convention might provide for reservations, such as those permitted under article V of the Hague Convention of 1964, whereby the Law is applicable only when it is chosen as the applicable law by the parties. Paragraph (f) refers to reservations such as those permitted under article II of The Hague Convention of 1964.

35. Under paragraph (b) of the proposed article 1, when the parties have their places of business in different States and the rules of private international law point to the law of a Contracting State, the rules of law applicable are those of the Uniform Law and not the rules applicable (e.g.) to domestic transactions.

## 3. *Applicability based on choice by the parties*

36. Paragraph 2 of the proposed article 1 provides:

"2. The present Law shall also apply where it has been chosen as the law of the contract by the parties."

37. This language is the same as the opening phrase of article 4 of ULIS.

38. The closing phrase of article 4 of ULIS states:

"To the extent that it does not effect the application of any mandatory provisions of Law which would have been applicable if the parties had not chosen the Uniform Law."

39. The Working Group concluded that the substance of the above provision concerning mandatory rules should be reserved for later action. This provision was not added to paragraph 2 of article 1 because this problem calls for a general provision. Thus, the effect of national mandatory rules should not be dealt with solely in connexion with the applicability of the law resulting from the choice by the parties; the problem

<sup>8</sup> See UNCITRAL report on second session (1969), annex I, para. 40. See also report of the Working Group on the international sale of goods on its first session held at New York from 5 to 16 January (A/CN.9/35), paras. 10-29.

<sup>9</sup> See UNCITRAL report on third session (1970), para. 30; *op. cit.*, *supra*, foot-note 3.

of national mandatory rules may also arise when the law is automatically applicable under article 1-1.

40. The provisions touching this problem in other sections of ULIS were found to be incomplete. Thus, article 5-2 preserves certain mandatory rules only with respect to purchases involving payment of the price by instalments. Article 8 excludes questions of "validity" of the contract from the scope of the law, but this provision might not preserve regulatory provisions restricting or supplementing provisions of a contract, since these might not be deemed to constitute matters of "validity".

41. The Working Group consequently decided that attention should be given to a general provision on the relationship between the Law and mandatory rules of national law.

42. Several representatives put it on record that while they agreed to recommend the new revised text of article 1 which omitted any reference to 1 (a), (b) or (e) of ULIS, this did not mean that they or their Governments were committed to the change of structure involved in the new text. They would need time to reflect on this change, and whatever agreement was signified in adopting the revised text of article 1 was *ad referendum*. The Working Group decided that the recommendation made in this report about the revision of article 1 did not involve a commitment on the part of the representatives.

#### ARTICLE 3: EXCLUSION BY THE PARTIES

43. Article 3 of ULIS provides:

"The parties to a contract of sale shall be free to exclude the application thereto of the present Law either entirely or partially. Such exclusion may be express or implied."

44. The Working Group recommended that this article be revised to read as follows:

"The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions."

45. The proposed revision is the same in substance as the first sentence of article 3 of ULIS, subject only to drafting changes that will be explained below. The principal point of the revision is the omission of the second sentence. Some representatives were concerned lest the special reference to "implied" exclusion might encourage courts to conclude, on insufficient grounds, that the Law had been wholly excluded. Other representatives were of the opinion that there was no ground for such concern, but agreed to the deletion of the second sentence since the Law does not ordinarily attempt to establish special rules for construing agreements.

46. The proposed revision makes certain drafting changes in the first sentence of article 3 of ULIS. The revision more clearly expresses the thought that the article deals with two types of problems. One is the exclusion of the entire system of rules embodied in the Uniform Law; this is dealt with by the words "the parties may exclude the application of the present Law...". A second is the relationship between the

agreement of the parties and particular provisions of the Uniform Law. Article 3 of ULIS and of the proposed revision both emphasize that the provisions of the Uniform Law are supplementary and yield to the agreement of the parties. This may take many forms; in the language of the proposed revision, the parties may "derogate from or vary the effect of" any of the provisions of the present Law and thus effect a partial exclusion of the Law.

#### ARTICLE 4: APPLICATION BY PARTIES

47. Article 4 of ULIS provides:

"The present Law shall also apply where it has been chosen as the law of the contract by the parties, whether or not their places of business or their habitual residences are in different States and whether or not such States are Parties to the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods, 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."

48. The substance of the opening phrase of this article was incorporated in the newly recommended text of article 1 (2). With respect to the closing phrase, the Working Group had decided, for reasons explained in connexion with articles 1 and 2,<sup>10</sup> that the problem of defining the relationship between the Uniform Law and national mandatory rules should be dealt with, at a later stage, by a general provision.

49. The Working Group consequently recommended that article 4 of ULIS be deleted.

#### ARTICLE 5: EXCLUSION OF CERTAIN TRANSACTIONS AND TYPES OF GOODS

50. Article 5 of ULIS reads as follows:

"1. The present Law shall not apply to sales:

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

"(b) Of any ship, vessel or aircraft, which is or will be subject to registration;

"(c) Of electricity;

"(d) By authority of law or on execution or distress.

"2. The present Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments."

51. The Working Group recommended that this article be redrafted as follows:

"1. The present Law shall not apply to sales:

"(a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller knew that the goods were bought for a different use;

"(b) By auction;

"(c) On execution or otherwise by authority of law.

<sup>10</sup> See paragraphs 38-42, *supra*.

"2. Neither shall the present Law apply to sales:

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

"(b) Of any ship, vessel or aircraft [which is registered or is required to be registered];

"(c) Of electricity."

52. The proposed revision sets forth two groups of exclusions from the scope of the Law. Paragraph 1 contains exclusions based on the special character of the transaction of sale. Paragraph 2 contains exclusions based on the special character of certain types of goods.

53. Paragraphs 2 (a) and 2 (c) of the proposed revision are the same as the provisions in article 5, 1 (a) and (c) of ULIS.

54. Paragraph 1 (c) of the proposed revision excludes sales "on execution or otherwise by authority of law". This provision, in substance, is the same as paragraph 1 (d) of article 5 of ULIS, but makes a drafting change by omitting the reference to "distress". It was noted that the concept of "distress" is not known outside the common law countries and is merely a specific example of sale by authority of law. In the French language there is no equivalent for this word and, therefore, it does not appear in the French text. The proposed text does not make special reference to sales on distress since the text "otherwise by authority of law" would include such sales also.

55. Paragraph 2 (b) of the proposed revision deals with the exemption "of any ship, vessel or aircraft"; the words "which is registered or is required to be registered" were placed in square brackets to indicate that these words present a problem for further drafting. Several representatives pointed out the fact that States may have different rules as to the kind of ships or vessels that are subject to registration. The intention is not to exclude smaller boats from the Law, even though these boats may be subject to municipal or other local registration for purposes of taxation or safety; the provision is concerned with larger ships for purposes of taxation or safety; the provision is concerned with larger ships and vessels which are normally subject to national registration. Nor was it the intention to make the exclusion depend on whether the vessel was actually registered or required to be registered at the time of the sale; the intent was to exclude the type of vessels which, in normal course, would become subject to national registration. It was considered necessary to examine the nature of such registration so that the intention could be expressed more precisely.

56. The Working Group introduced two new exceptions. One of them is the sale of consumer goods, the other is sales by auction.

57. As has been noted in connexion with article 1,<sup>11</sup> problems have been presented with respect to the relationship between the rules of ULIS and various types of national mandatory rules for the protection of consumers. This was an important reason which led to the exclusion of consumer sales from the Law. In

addition, this exclusion permitted the simplification of the rules on applicability of the Law in article 1. This exclusion was considered appropriate for the further reason that, in the usual case, a sale to a consumer was not regarded as an important aspect of international trade. The exception of consumer goods from the field of application of the Law is intended to cover most of those cases where one of the parties, usually the seller, does not know or cannot be aware of the fact that the other party has his place of business or habitual residence in another country. Such sales usually occur where tourists or other foreigners buy goods in retail shops or where a foreigner offers for sale goods "of a kind and in a quantity ordinarily bought by an individual for personal, family or household use". Under this language, the exception does not depend on whether the seller or buyer knew that the place of business of the other party is in another country. If, however, the goods were bought for a different use, i.e. not for personal, family, household or similar use and the seller knew of this fact, then the Law applies, provided, of course, that the parties have their places of business in different States.

58. The second new exception recommended by the Working Group is that of sales by auction. At auctions, buyers may not be identified. But even if the place of business of the successful bidder should be known to the seller, the applicable law could not depend on that circumstance since at the opening of the auction the seller could not know which buyer would make the purchase and hence could not know whether ULIS would apply. It was concluded, therefore, that ULIS should only apply to sales by auction if the parties agreed to apply it to their contract.

59. For reasons explained in connexion with articles 1 and 2,<sup>12</sup> the problem of mandatory rules requires a general provision. The special provision in article 6 5 (2) of ULIS concerning instalment sales was inadequate for the purpose. Consequently, the Working Group decided to delete paragraph 2 of the present text and to defer consideration of the applicability of mandatory rules of national laws to a later session.

60. An observer expressed the view that in light of the new draft of article 1, the exceptions in article 5 should be broadened so that local sales would not fall within ULIS. He proposed the exclusion of sales at places of business open to the public and where the buyer ordinarily takes delivery at the time of the contract.

#### ARTICLE 6: MIXED CONTRACTS

61. Article 6 of ULIS provides:

"Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production."

<sup>11</sup> See paragraph 22, *supra*.

<sup>12</sup> See paras. 40-42, *supra*.



62. The Working Group recommended that a new paragraph be inserted in the article and that the present text be maintained as paragraph 2. The proposed new paragraph 1 reads as follows:

"1. The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods."

63. The proposed new paragraph 1 is designed to deal with contracts which combine sale of goods with other obligations which lie outside the scope of ULIS. Examples of the latter include the construction of buildings and the supply of services, such as installation of machinery or supervision of such installation. The recommended text lays down the test for determining whether the Uniform Law shall apply to a contract which combines obligations relating to those of a seller and a buyer with other obligations which are lacking in such a character.

64. In a typical contract for the sale of goods, the basic obligation of a seller is the delivery of goods (including in some cases storage and transportation), and that of the buyer is the payment for the goods. Therefore the controlling test, laid down in paragraph 1, of the proposed text, is whether the obligations of the parties under the mixed contract, taken as a whole, are "substantially other than the delivery of and payment for goods". In such a case the contract is not considered a contract for the sale of goods and consequently ULIS will not apply.

65. Whether the obligations of the parties under the mixed contract are "substantially other than the delivery of and payment for goods" is a question of fact in each case. The Working Group considered that this controlling test was sufficiently clear for national courts to decide the character of the contract.

66. This paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two contracts. This question (sometimes termed the "severability" of the contract) is left outside the scope of ULIS to be decided by national courts in accordance with the rules of the applicable law.

67. It should be noted that, in contracts excluded by this paragraph, the parties are free to provide for the applicability of ULIS under the provision set forth in paragraph 2 of the recommended text of article 1.

#### ARTICLE 7: COMMERCIAL OR CIVIL CHARACTER OF THE PARTIES OR OF THE CONTRACT

68. Article 7 of ULIS provides:

"The present Law shall apply to sales regardless of the commercial or civil character of the parties or of the contracts."

69. For reasons explained in connexion with articles 1 and 2,<sup>13</sup> the substance of this article was incorporated in the newly recommended text of article 2 (d). The Working Group consequently recommended that article 7 of ULIS be deleted.

#### ARTICLE 8: THE SCOPE OF THE LAW

70. Article 8 of ULIS provides:

"The present Law shall govern only the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage."

71. No comments or proposals having been made in connexion with this article, the Working Group recommended that it be adopted without change.

#### ARTICLE 9: USAGES

72. Article 9 of ULIS provides:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. They shall also be bound by usage which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, usages shall prevail unless otherwise agreed by the parties.

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

73. The Working Group recommended that this article be revised to read as follows:

"1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"2. The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.

"3. In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.

"4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties."

74. According to the original wording of the article, the parties to a contract are bound by two types of usages: (a) those usages which the parties expressly or impliedly made applicable to their contract and (b)

<sup>13</sup> See para. 31, *supra*.



those usages which "reasonable persons" in the same situation as the parties usually consider to be applicable to their contract.

75. A sessional Working Party, established by the Commission at its third session to consider this article, came to the conclusion that the wording of this article was unsatisfactory in two main respects. The first was the lack of a definition of the circumstances in which the parties would be considered as having impliedly made usages applicable to their contract. The second was the reference to "reasonable persons" in paragraph 2 of this article. It was concluded that this provision could give rise to doubts and uncertainty; since usages relating to the same type of contract might differ from one region to another, "reasonable persons" from different parts of the world might consider different usages as applicable to the contract. Consequently, the sessional Working Party recommended the deletion of paragraph 2 of article 9 and submitted a text which attempted to define usages which the parties shall be considered to have impliedly made applicable to the contract. They also recommended a revision of paragraph 3.<sup>14</sup> This text was referred by the Commission to the Working Group for consideration.

76. The text recommended by the Working Group for adoption is largely based on the text submitted by the sessional Working Party referred to above. Paragraph 1 introduces no change in paragraph 1 of the original article 9 of ULIS; the parties are bound by those usages which they have expressly or impliedly made applicable to their contract. Paragraph 2 is ancillary to paragraph 1, and is designed to define the usages which the parties shall be considered as having impliedly made applicable to their contract. These are of two types: (a) usages of which the parties are actually aware and, (b) usages of which the parties should have been aware. Two tests—one subjective and the other objective—are therefore employed. But in both cases they should be usages which are widely known to and regularly observed by parties to contracts of the type involved.

77. One representative stated that, in the case of a usage of which the parties are aware, it should not be necessary to show that the usage was widely known to and regularly observed by parties to contracts of the type involved.

78. One representative suggested that, in the recommended text of paragraph 2, the phrase "of which the parties are aware and" should be deleted. This representative observed that such a strict requirement was not necessary for usages to which the parties refer tacitly, and that the revised text should employ an *objective* rather than a *subjective* approach.

79. Some representatives considered that in paragraph 2 of article 9 the word "generally" should be included, in addition to the word "regularly", with regard to the usages observed by parties to contracts of the type involved. This would ensure that the usages

which are impliedly made applicable are those which are observed on a wide geographical basis.

80. Paragraph 3 of the recommended text introduces no substantive change in the original article. It gives expression to the principle of the autonomy of the parties which is given effect in article 3 and other provisions of ULIS. Since the usages that are given legal effect under the recommended text are only those which are or may be considered as constituting part of the agreement of the parties, they should prevail over the Uniform Law in case of conflict: This is consistent with the recommended text of article 3 which confers on the parties a power to "exclude the application of the present Law or to derogate from or vary the effect of any of its provisions". This principle is also expressed in the phrase "unless otherwise agreed by the parties" that concludes paragraph 3 of the recommended text. The parties therefore may, if they so wish, make the Law prevail over usages in case of conflict.

81. Paragraph 4 of the recommended text is designed to introduce a rule of interpretation relating to expressions, provisions or forms of contract commonly used in commercial practice. Where such terms or standard contracts are employed, they shall be given the meaning "widely accepted and regularly given to them in the trade concerned". Where the parties expressly or in the course of their dealings establish a meaning, for these terms, expressions or forms of contract, that is different from that which is "widely accepted and regularly given to them in the trade concerned", the parties may be considered as having agreed to adopt that special meaning in their contract. This agreement would be given effect under the phrase "unless otherwise agreed by the parties".

82. Some representatives disagreed with the wording of paragraph 4 as recommended by the Working Group on two grounds: The first ground is that the language attempts to draw a line between the effect of usages (a) for the purpose of supplementing or qualifying terms and (b) for the purpose of interpreting terms. In their view, this distinction is artificial and will pose practical difficulties. The second ground is that paragraph 4 binds a party to an international usage even though that party did not know and had no reason to know of it. In their opinion, this is undesirable. The representatives, therefore, proposed that paragraph 4 should either be deleted or be redrafted to read:

"4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, the meaning usually given to them in the trade concerned shall be used in their interpretation in accordance with the provisions of paragraphs 1 and 2."

#### ARTICLE 10: DEFINITION OF "FUNDAMENTAL BREACH"

83. Article 10 reads as follows:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the same situation as the other

<sup>14</sup> See UNCITRAL report on third session (1970), para. 38; *op. cit.*, *supra*, foot-note 3.

party would not have entered into the contract if he had foreseen the breach and its effects."

84. The Working Group decided to defer consideration of this article to a later session when the relevant substantive rules of the Uniform Law are discussed.

85. In advance of the meeting, some representatives had submitted proposals and comments with respect to this article.<sup>15</sup> Most of these related to the term "reasonable person"; several suggestions were made to replace or avoid the use of this term.

86. At the meeting several other proposals were advanced to replace the term "reasonable person" by a more precise expression such as "a merchant engaged in international commerce"; "most persons engaged in international trade"; "a person engaged in international trade in the same situation as the other party"; a party of goodwill engaged in international trade"; or by the addition of the word "ordinarily" before the words "entered into the contract". It was also suggested that the term "reasonable person" be maintained and the interpretation of this term should be left to the Courts. Others, however, expressed the view that this would lead to different interpretations by the Courts in different countries.

87. During the debate, it was also suggested that the definition contained in this article was too complex for effective application.

88. On the suggestion of several representatives, the Working Group came to the conclusion that it was premature to discuss the definition of fundamental breach before the Working Group considered the substantive provisions of the Law in which that term was used; in addition, at the present stage it was difficult to decide whether to maintain the concept of fundamental breach.

#### ARTICLE 11: DEFINITION OF "PROMPTLY"

89. Article 11 of ULIS reads as follows:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as possible in the circumstances from the moment when the act could reasonably be performed."

90. The Working Group recommended that this article be redrafted as follows:

"Where under the present Law an act is required to be performed 'promptly', it shall be performed within as short a period as is practicable in the circumstances."

91. It was considered that the present text of the article was not clear. The definition refers to two periods: (1) a period "as short... as possible in the circumstances" and (2) a period starting from "the moment when the act could reasonably be performed". This structure was found to be unnecessarily complex. Taken literally, this provision could mean that in cases where an act is required to be performed promptly, it would

have to be performed only after the time when it could reasonably be performed. Therefore the definition did not reflect the urgency that was intended by the word "promptly". The provision of two periods of time extended unduly the time for action. Furthermore, it was stated that this definition could not well be applied to several of the articles in which the term was used since those articles had already indicated a starting point (e.g. article 39-1) other than that set forth in article 11.

92. The recommended text is intended to make the definition clear and more easily applicable to the articles in which the term is used. The word "practicable" in the English version is intended to point more to what is possible in practice than to what is convenient in practice.

93. The proposed new definition does not indicate anything regarding the starting point of the period. Consequently, the Working Group recommended that the question of a starting point should be considered in connexion with the articles that do not already indicate such a starting point, e.g., article 38.

94. One representative proposed that this article should refer to what would be deemed "prompt" from the point of view of persons engaged in international trade.<sup>16</sup> Since the Uniform Law applied irrespective of the commercial or civil character of the parties, the lack of this reference might lead to different approaches by courts through the application of domestic (rather than international) or subjective (rather than objective) criteria, particularly when a contracting party was of "civil" status. He further considered it necessary to have a definition of the term "reasonable time" which appeared in many articles of ULIS. In some countries, the above is not used as a legal term; the absence of a definition thus may give rise to difficulties for the courts of these countries.

95. An observer doubted the usefulness of the recommended text of article 11.

#### ARTICLE 12: DEFINITION OF "CURRENT PRICE"

96. Article 12 of ULIS provides:

"For the purposes of the present Law, the expression 'current price' means a price based upon an official market quotation, or in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price."

97. The Working Group recommended that this article be deleted. The subject-matter of this article should be considered along with the provisions of article 84, which is the only article in ULIS which employs the expression "current price". (Cf. article 87).

98. Some representatives found the definition of "current price" in article 12 to be complex and misleading. Attention was drawn to the use of the words "based upon an official market quotation". The requirement that reference be made first to an official market

<sup>15</sup> See document A/CN.9/WG.2/WP.6, paras. 65-70; see also part two, I, A, 1 above.

<sup>16</sup> *Ibid.*, para. 72.

quotation raises questions as to what is "an official market quotation". It was suggested that the essential idea should be the price prevailing in a given market or the current market price.

99. The Working Group considered that it was inappropriate to set up a general definition for a term which was used in only one operative article of ULIS. Including a definition of "current price" in article 84 would not unduly burden the provisions of that article.

ARTICLE 13: DEFINITION OF "A PARTY KNEW OR OUGHT TO HAVE KNOWN"

100. Article 13 of ULIS provides:

"For the purposes of the present Law, the expression 'a party knew or ought to have known', or any similar expression, refers to what should have been known to a reasonable person in the same situation."

101. The Working Group recommended that this article be deleted.

102. The first part of the term "a party knew" relates to a question of fact and is not defined. The purpose of this article is to define the phrase "ought to have known". In defining this phrase, article 13 employs two concepts: (1) the reference to a "reasonable person", and (2) placing the reasonable person "in the same situation" as the party in question.

103. The concept of a "reasonable person", which exists in some legal systems, is unknown to others. Representatives of legal systems in which this term is not used find it difficult to introduce it into their law. A literal translation of the term "reasonable man" as a person who can reason or who is rational, is not the same meaning as that given to that expression in legal systems where this term is used. The actual legal meaning which these systems give to that expression is somewhat obscure, but the central idea is to suggest a standard of conduct.

104. The crucial question is how high or strict is the standard imposed. The concept of the "reasonable man" has an important function in common law systems in connexion with the law of torts (or delict) in suggesting the standard of care required to be taken to avoid inflicting damage. However, the same standard is difficult to apply to what a party to an international sales transaction should have known in different situations.

105. Since the definition in article 13 was based on the standard of an abstract "reasonable person", it was necessary to bring the test back to the real problem at hand. This was done by the second element—a reference to a reasonable person "in the same situation" as the party to the transaction of sale. Thus, in substance, this definition brings us back to what a *party* ought to have known and as a general proposition, this definition appears to be rather unhelpful.

106. This article also applies the same definition to "any similar expression". This attempt at a single definition appeared all the more inappropriate in view of the variety of situations in which expressions are used in ULIS to refer to the knowledge required. For instance,

articles 36 and 40 (in the context of defects in goods) refer to facts of which a party "could not have been unaware". However, these references to facts of which a party "*could not have been unaware*" seem to set a standard approximating actual knowledge and this does not seem "similar" to the term defined in article 13.

107. In other places, ULIS employs expressions that are perhaps "similar" to the particular expression defined in article 13. Article 39-1, in connexion with notice of lack of conformity, refers to the time when the buyer "*ought to have discovered*" the defect. In a similar context, article 52-4 refers to the time the buyer "*ought to have become aware*" of the right or claims of a third person. Somewhat farther removed from the definition are articles 82 and 86, which refer to losses that a party ought to have "foreseen".

108. The only articles in ULIS using the precise expression defined in article 13 are articles 99-2 and 100. Article 99-2 deals with the unusual circumstances that the goods had already been lost or had deteriorated at the time of the making of the contract; article 100 deals with a similar problem.

109. Consideration was given to a standard expressed in terms of the obligations of "a merchant engaged in international commerce". Some representatives of "a merchant engaged in international commerce". Some representatives considered that most of the transactions governed by ULIS will involve merchants engaged in international commerce, but the scope of the law is not confined to such parties. Various types of parties and situations are governed by the different articles in question. Greater flexibility is therefore required than might be possible under a single overriding standard. In particular those representatives considered it dangerous to create the possibility that a person who is not a merchant would be subjected to the standard appropriate for merchants.

110. Finally, it was decided that article 13 should be deleted. It was also decided that in reviewing the different articles containing an obligation concerning the knowledge of a party, attention should be given to the question whether the language appropriately expressed the standard of investigation required of the party in the particular circumstances of that case. In this review, attention should also be given to the possibility of obtaining greater uniformity of expression.

ARTICLE 14: COMMUNICATIONS

111. Article 14 of ULIS provides:

"Communications provided for by the present law shall be made by the means usual in the circumstances."

112. No comments or proposals having been made with respect to this article, the Working Group recommended that it be adopted without change.

ARTICLE 15: FORM OF CONTRACTS

113. Article 15 reads as follows:

"A contract of sale need not be evidenced by writing and shall not be subject to any other require-

ments as to form. In particular, it may be proved by means of witnesses."

114. The Working Group reached no agreement on this article.

115. One representative proposed adding to the present text of article 15 the following provision:

"The contract, however, shall be in writing if so required by the laws of at least one of the countries in the territories whereof the parties have their place of business."

116. It was noted that in a number of countries the written form for foreign trade contracts was obligatory; the above provision was proposed to accommodate this requirement. One representative stated that this proposal might also have some bearing on article 14 of ULIS.

117. In opposition to the above proposal, it was suggested that the character of "writing" and the legal consequences of its absence vary from country to country. Some legal systems require the contract to be in writing, while others provide that it may be evidenced by a writing, which could even be a memorandum following an oral agreement. Some legal rules require that the contract be signed by both parties, while others are satisfied by exchange of cables or telex. As to the legal consequences of non-compliance with the requirement of writing, some countries consider the contract null and void, while others entitle the parties to have them declared null and void if the other party has not signed a writing. In yet other countries the contract is valid but it is not enforceable against a party who has not signed a writing or memorandum. Therefore if the requirement of a "writing" is made part of ULIS it would be necessary (a) to provide for the meaning of "in writing"; and (b) to supply rules for a number of problems on the consequences of non-compliance with the requirement.

118. Another representative proposed that the present text of article 15 should be supplemented by the following provision:

"However, where the municipal law of a contracting State requires that an international contract of sale shall be in writing and such contracting State, at the time of the ratification of the present Law, lodges a declaration with the Government of . . . to this effect, contracts with traders in such contracting State shall comply with the writing requirement."

119. The above proposal was offered to accommodate the legal requirements mentioned in paragraph 116 above; it was thought that requiring a declaration (or reservation) would more clearly identify the countries where a writing would be required. Other representatives stated that businessmen and even lawyers would have no access to the list of reservations and therefore they would not be aware of the requirement of written form; even if they had such access, it would be a considerable burden on their part to find out the provisions relating to the concept of "writing" required by the national law of the State that made the reservation.

120. Several other proposals were advanced to accommodate the requirement of writing. One of these

proposals was to commence the present text of the article with the phrase: "Unless otherwise agreed by the parties . . .". This proposal was opposed on the ground that the application of a mandatory rule of the national law cannot depend on the agreement of the parties. Another representative suggested the use of the words: "Unless one of the parties has notified the other before the conclusion of the contract to the contrary . . ." and thereby alerted the other party to the requirement of a writing. The notice requirement was also opposed on the ground that the mandatory rules should not be subject to action by one party. Similar objections were raised against the further proposal that written form should be required if it resulted from preliminary negotiations or practices established between the parties.

121. It was also suggested that article 15 be deleted. It was noted that this article deals with the formation and the validity of the contract, both of which are excluded from the scope of the Law. It was also mentioned that article 3 of the Uniform Law on Formation contains the same provision as article 15 of ULIS and therefore there was no need to repeat it in the latter. Some representatives, however, expressed the opinion that there was need for a provision on the form of the contract in the Law because otherwise States which do not ratify the Uniform Law on Formation would have no uniform rule to guide them on this issue.

122. One observer saw a connexion between the requirement of a written form and the problem of national mandatory rules of law discussed in connexion with articles 1 and 2.<sup>17</sup>

123. No consensus could be reached by the Working Group. The matter was deemed to present a question of principle. Therefore the Working Group decided to refer the question to the Commission for consideration.<sup>18</sup>

Thus, it was recommended that the Commission decide the following issues:

- (a) Should article 15 be maintained?
- (b) If so, should the present text of article 15 of ULIS be modified in order to accommodate rules of national law requiring particular contracts to be in writing?
- (c) If so, what approach should be followed in making such accommodation?

#### ARTICLE 16: SPECIFIC PERFORMANCE

124. Article 16 of ULIS provides:

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."

<sup>17</sup> See paras. 40-42, *supra*.

<sup>18</sup> See UNCITRAL report on third session (1970), para. 7 (b); *op. cit.*, *supra*, foot-note 3.

125. No comments or proposals having been made with respect to this Article, the Working Group recommended that it be adopted without change.

#### ARTICLE 17: PRINCIPLES OF INTERPRETATION

126. Article 17 of ULIS provides:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

127. The Working Group recommended that the present article 17 be deleted and that the following language, for the present, be adopted:

"In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application]."

128. A similar provision was adopted unanimously at the August 1970 meeting of the Working Group on Limitation (Prescription), and appears now as article 5 of the preliminary draft of the Uniform Law on Prescription (Limitation) in International Sale of Goods (A/CN.9/50). The brackets have, however, been placed around the last five words to raise the question whether words are not repetitions and could therefore be deleted when an over-all review on questions of style is undertaken.

129. The proposed revision omits from article 17 the reference to "the general principles on which the present Law is based". This provision was criticized by several representatives on the ground that it was vague and illusory, since the Law did not specify or indicate the general principles on which it was based; such a reference would lead to uncertainty and possibly to a Court's use of its own national rules on the assumption that these were the general principles underlying the Uniform Law.

130. The formula adopted by the Working Group on Limitation (Prescription) expresses two considerations not mentioned in the original article: (1) the international character of the law, and (2) the need for uniform interpretation and application. These considerations were emphasized since some courts might otherwise give local meanings to the language of the Law—an approach that would defeat the law's objective to produce uniformity. It was also suggested that the provision would contribute to uniformity by encouraging recourse to foreign materials, in the form of studies and court decisions, in constructing the Law. This language might also help courts in some countries to make reference to *travaux préparatoires* and other materials on the legislative history of the Law which they may not be otherwise able to do.

131. Several representatives were of the view that the above provision should be supplemented by a provision concerning gaps in the law. Some representatives suggested that a second paragraph should be added which would read as follows:

"Questions concerning matters governed by the present Law which are not expressly settled by it

shall be settled in conformity with its underlying principles and purposes."

132. Representatives supporting this language noted that it dealt only with questions concerning "matters governed by the present Law"; this language consequently could not be used to extend the Law's field of application. It was suggested that the provision would be helpful in dealing with problems for which no answer was explicitly provided but which could be solved by reference to the Law's "underlying principles and purposes". One source of these principles would be generalizations that appear from the examination of various specific provisions of the Law; another source would be the course of evolution of the Law. In spite of the fear that the provision might not always be applied and that, in exceptional cases, the judge might have a tendency to apply his national law, it would at any rate be preferable to provide the judge with this guidance than to leave the matter in complete uncertainty; such uncertainty would leave the judge free to apply national law whenever a question is not expressly settled by the Uniform Law.

133. Some other representatives suggested that the provision approved by the Working Group should be supplemented by the following:

"Private international law shall apply to questions not settled by the Uniform Law."

134. These representatives supported the view, outlined above, that it was difficult and dangerous to attempt to solve problems by reference to unstated general principles. The question of dealing with gaps in the Law should be expressly dealt with. It was suggested that the above provision would discourage finding gaps in the Uniform Law. It would also make irrelevant the difficult distinction between matters governed but not settled by the Uniform Law and matters not so governed.

135. Other representatives were of the view that such a provision would encourage courts to find gaps in the Law. The provision also could lead to disputes concerning rules of private international law and concerning the provisions of foreign law; such litigation was expensive and led to uncertain results.

136. Some representatives considered any provision concerning gaps in the Law unnecessary. These representatives noted that where the Uniform Law did not apply, courts could always have recourse to rules of private international law, but the decision on this question should be left to the *forum*.

137. The members of the Working Group agreed that the above points of view involved questions of principle that should be decided by the Commission.

#### III. FUTURE WORK

138. The Working Group at its 17th meeting held on 17 December 1970 considered its future work under item 4 of its agenda. It had before it document A/CN.9/WG.2/WP.7 which dealt, *inter alia*, with this item.

139. The Working Group recommended that the Commission should:

(a) Request the Secretary-General to prepare an analysis of the use of the concept of "delivery" in ULIS, and a study of the concept of "*ipso facto* avoidance" and to circulate the same to the members of the Working Group by 31 August 1971;

(b) Decide that the Working Group, at its third session, should consider chapter III of ULIS (articles 18-55) and related provisions.

140. The Working Group further decided:

(a) To invite the participants to analyse any problems encountered in articles 18-55 and, if possible, to make known the results of their analysis to the Secretariat for circulation to other participants in advance of the fourth session of the Commission;

(b) To hold a meeting during the fourth session of the Commission to consider the comments mentioned in paragraph 3 (a) above and for a general exchange of views on articles 18-55 of ULIS and to decide what further preparatory work might be necessary for the accomplishment of its task at its third session;

(c) To recommend that its third session be held in early January 1972 in New York or Geneva, as the Secretary-General may decide.

## ANNEX I

### List of participants

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#### A. GOVERNMENTS

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##### *Romania*

Mr. Ion PAH, Government official, Geneva

#### B. INTERGOVERNMENTAL ORGANIZATIONS

##### *Hague Conference on Private International Law*

Mr. Matthijs VAN HOOGBRATEN, Secretary-General

##### *International Institute for the Unification of Private Law*

Mr. Jean-Pierre PLANTARD, Deputy Secretary-General

## C. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATION

*International Chamber of Commerce*

Mr. Lars A. E. HJERNER, Professor of International Law, Rapporteur to the ICC Commission on Law and Commercial Practices

Mr. Frédéric EISEMANN, Director, Juridical Matters and Commercial Practices Department

*Secretariat of the World Group*

Mr. John HONNOLD, Chief, International Trade Law Branch, Office of Legal Affairs

Mr. Peter KATONA, Secretary of the Working Group, Senior Legal Officer

Mr. Hassan O. AHMED, Assistant Secretary of the Working Group, Legal Officer

## ANNEX II

## Text of revised Articles 1-17 of the Uniform Law

*Article 1*

1. The present Law shall apply to contracts of sale of goods entered into by parties whose places of business are in different States:

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

2. The present Law shall also apply where it has been chosen as the law of the contract by the parties.

*Article 2*

For the purpose of the present Law:

(a) The parties shall be considered not to have their places of business in different States if, at the time of the conclusion of the contract, one of the parties neither knew nor had reason to know that the place of business of the other party was in a different State;

(b) Where a party has places of business in more than one State, his place of business shall be his principal place of business, unless another place of business has a closer relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract;

(c) Where a party does not have a place of business, reference shall be made to his habitual residence;

(d) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration;

(e) A "Contracting State" means a State which is Party to the Convention dated ... relating to ... and has adopted the present Law without any reservation [declaration] that would preclude its application to the contract;

(f) Any two or more States shall not be considered to be different States if a declaration to that effect made under article [II] of the Convention dated ... relating to ... is in force in respect of them.

*Article 3*

The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions.

*Article 4*

[Deleted <sup>1</sup>]

<sup>1</sup> See article 1 (2) and the report of the Working Group at paragraphs 37-41.

*Article 5*

1. The present Law shall not apply to sales:

(a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family, household or similar use, unless the seller knew that the goods were bought for a different use;

(b) By auction;

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

2. Neither shall the present Law apply to sales:

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

(b) Of any ship, vessel or aircraft [which is registered or is required to be registered];

(c) Of electricity.

*Article 6*

1. The present Law shall not apply to contracts where the obligations of the parties are substantially other than the delivery of and payment for goods.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

*Article 7*

[Deleted <sup>2</sup>]

*Article 3*

The present Law shall govern only the obligations of the obligations of the seller and the buyer arising from a contract of sale. In particular, the present Law shall not, except as otherwise expressly provided therein, be concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage. [Unchanged.]

*Article 9*

1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

2. The usages which the parties shall be considered as having impliedly made applicable to their contract shall include any usage of which the parties are aware and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved, or any usage of which the parties should be aware because it is widely known in international trade and which is regularly observed by parties to contracts of the type involved.

3. In the event of conflict with the present Law, such usages shall prevail unless otherwise agreed by the parties.

4. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning widely accepted and regularly given to them in the trade concerned unless otherwise agreed by the parties.

*Article 10<sup>3</sup>*

[For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion

<sup>2</sup> See article 2 (d).

<sup>3</sup> Deferred for later consideration; see report of the Working Group on this article at paragraphs 83-88.

of the contract, that a reasonable person in the same situation as the other party would not have entered into the contract if he had foreseen the breach and its effects.]

#### Article 11

Where under the present Law an act is required to be performed "promptly", it shall be performed within as short a period as is practicable in the circumstances.

#### Article 12

[Deleted <sup>4</sup>]

#### Article 13

[Deleted <sup>5</sup>]

#### Article 14

Communications provided for by the present Law shall be made by the means usual in the circumstances. [Unchanged.]

<sup>4</sup> See report of the Working Group on this article at paragraphs 96-99.

<sup>5</sup> See report of the Working Group on this article at paragraphs 100-110.

#### Article 15 <sup>6</sup>

[A contract of sale need not be evidenced by writing and shall not be subject to any other requirements as to form. In particular, it may be proved by means of witnesses.]

#### Article 16

Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgement providing for specific performance except in accordance with the provisions of article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods. [Unchanged.]

#### Article 17

In interpreting and applying the provisions of this law, regard shall be had to its international character and to the need to promote uniformity [in its interpretation and application].

<sup>6</sup> Referred to Commission; see report of the Working Group on this article at paragraphs 113-123.

### 3. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Consideration of the report of the Working Group on the International Sale of Goods: note by the Secretariat	A/CN.9/R.4
Memorandum to the Working Group on the International Sale of Goods by the delegation of Ghana	A/CN.9/IV/ CRP.12
Report by Mr. E. Allan Farnsworth, the representative of the United States of America, on article 1 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex I
Observations and proposals by Mr. G. S. Burguchev, the representative of the USSR, relating to the definition of the sphere of application of the Uniform Law on the International Sale of Goods	A/CN.9/WG.2/ WP.6/Add.1 — Annex II
Comments by the representative of the United Kingdom on article 1 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex III
Report by Professor S. Michida, the representative of Japan, on article 2 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex IV
Report by Professor A. G. Guest, the representative of the United Kingdom, on article 3 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex V
Report by Mr. Stein Rognlien, the representative of Norway, on articles 5 and 7 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex VI
Comments by Professor André Tunc, the representative of France, on Mr. S. Rognlien's report on articles 5 and 7 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex VII
Draft revision of article 9 of ULIS and explanatory comments by Professor L. Reczei, the representative of Hungary	A/CN.9/WG.2/ WP.6/Add.1 — Annex VIII
Draft revision of articles 10-13 and 15 of ULIS and explanatory comments by Mr. G. S. Burguchev, the representative of the USSR	A/CN.9/WG.2/ WP.6/Add.1 — Annex IX



Comments by Professor André Tunc, the representative of France, on Mr. G. S. Burguchev's draft revision of articles 10-13 and 15 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex X
Comments by the representative of the United Kingdom on the proposal of the USSR for the amendment of article 15 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex XI
Comments by the representative of the United Kingdom on articles 10 to 13 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex XII
Draft revision of articles 10 and 15 and comments on articles 11-13 of ULIS by the delegation of Ghana	A/CN.9/WG.2/ WP.6/Add.1 — Annex XIII
Report by Professor André Tunc, the representative of France, on article 17 of ULIS	A/CN.9/WG.2/ WP.6/Add.1 — Annex XIV
Note by the secretariat of UNIDROIT on the concept of "delivery" ("délivrance") in the drafting of the Uniform Law on the International Sale of Goods	A/CN.9/WG.2/ WP.5

## B. General conditions of sale and standard contracts

### 1. Implementation of the Commission's decisions relating to general conditions of sale and standard contracts: report of the Secretary-General (A/CN.9/54) \*

#### INTRODUCTION

1. The United Nations Commission on International Trade Law at its third session decided to request the Secretary-General:

"(a) To continue with the programme of implementation of the Commission's decision made at its second session,<sup>1</sup> and to submit to the fourth session of the Commission a progress report thereon including, if possible, an analysis of the comments made by the regional economic commissions and by States on the General Conditions of the Economic Commission for Europe, the General Conditions of 1968 of the Council for Mutual Economic Assistance and Incoterms, 1953;

"(b) To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, *inter alia*, the conclusions in the report, referred to in paragraph 1 above, and the analysis

of the General Conditions of the Economic Commission for Europe, to be submitted by the representative of Japan."<sup>2</sup>

"(b) To request the Secretary-General to make the aforementioned general conditions available in adequate number of copies and in the appropriate languages; the general conditions should be accompanied by an explanatory note describing, *inter alia*, the purpose of the ECE general conditions, and the practical advantages of the use of general conditions in international commercial transactions;

"(c) To request the regional economic commissions, on receiving the above-mentioned ECE general conditions, to consult the Governments of the respective regions and/or interested trade circles for the purpose of obtaining their views and comments on: (i) the desirability of extending the use of the ECE general conditions to the regions concerned; (ii) whether there are gaps or shortcomings in the ECE general conditions from the point of view of the trade interests of the regions concerned and whether, in particular, it would be desirable to formulate other general conditions for products of special interest to those regions; (iii) whether it would be desirable to convene one or more committees or study groups, on a world-wide or more limited scale, whereby with the participation (if appropriate) of an expert appointed by the Secretary-General, matters raised at a regional level would be discussed and clarified;

"(d) To request the other organizations to which the ECE general conditions are transmitted to express their views on point (i), (ii) and (iii) of sub-paragraph (c) above ;".

\* 8 March 1971.

<sup>1</sup> At its second session the Commission decided:

"1. (a) To request the Secretary-General to transmit the text of the ECE general conditions relating to plant, machinery, engineering goods and lumber to the Executive Secretaries of the Economic Commission for Africa (ECA), the Economic Commission for Asia and the Far East (ECAFE), and the Economic Commission for Latin America (ECLA), as well as to other regional organizations active in this field;

<sup>2</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970); *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, III, A, para. 102.

## I. IMPLEMENTATION OF THE COMMISSION'S DECISION WITH RESPECT TO THE ECE AND CMEA GENERAL CONDITIONS AND INCOTERMS 1953

2. Pursuant to the decision of the Commission set out in paragraph 1 above, the Secretary-General, in his letters of 15 and 19 June 1970, requested the United Nations Economic Commissions for Africa, Latin America, and Asia and the Far East to inform the Governments of the States in their region of the decision of the Commission and to invite them to transmit their views and comments on the questions relating to the ECE General Conditions, contained in the Commission's decisions adopted at its second session,<sup>3</sup> and on the 1968 General Conditions of CMEA, and Incoterms 1953. He also requested the Economic Commissions to submit their own views and comments on the said instruments.

3. No comments were received from the Economic Commissions of the United Nations on the general conditions of sale and standard contracts set out in the Commission's decision. However, consultations have been opened by the secretariat of ECA on the possibility of a meeting for the detailed review of certain ECE General Conditions that are of special significance for sellers and buyers in Africa.

4. In response to the inquiries from the Economic Commissions described in paragraph 2, *supra*, Ceylan, China, Cuba, Fiji and Surinam have made comments. The substantive parts of these comments are reproduced in annex I to this report.

5. It should, however, be noted that the Asian-African Legal Consultative Committee, an intergovernmental organization, has shown considerable interest in the subject of general conditions of sale and standard contracts. At its twelfth session held in January 1971 in Colombo, Ceylon, the subject was entrusted to a sub-committee to determine whether, in the light of ECE and CMEA general conditions, it was desirable to adopt standard or model contracts in respect of commodities of special interest to buyers and sellers of the Asian-African region. On the recommendation of this sub-committee, the Committee decided to investigate the need for developing model contracts for the sale of specific commodities such as rubber, timber, rice, textiles, machinery, oil and coconut products; following this investigation, the Committee plans to consider the convening, in collaboration with United Nations agencies, of an international conference of legal and commercial experts of the Afro-Asian region.

## II. FEASIBILITY OF DEVELOPING GENERAL CONDITIONS EMBRACING A WIDER SCOPE OF COMMODITIES

### A. Organization of the study

6. With respect to the Commission's decision quoted in paragraph 1 above, requesting the Secretary-General to commence a study on the feasibility of developing general conditions embracing a wider scope of com-

modities, it was thought that the first step in implementing that decision should be an analysis of existing general conditions and standard contract forms,<sup>4</sup> especially those not restricted to specific commodities. This analysis is being made in two phases:

(a) The first phase of the study is a preliminary study directed towards the identification of issues that are dealt with in existing general conditions relating to a wide scope of commodities (hereinafter referred to as "general" general conditions").

(b) It is planned that the second phase of the study will be an analysis of the provisions of existing general conditions relating to the above issues. The purpose of both phases of the analysis would be to investigate the possibility of formulating appropriate provisions that could be applied to a wide scope of commodities. This preliminary report is a commencement of the first phase of the study indicated in (a) above.

7. On the basis of the above considerations, the Secretariat invited the representatives of the members of the Commission to supply information concerning general conditions of sale and standard contracts, used in international trade, which were prepared by, or under the auspices of national organizations, trade associations and commodity exchanges. The representatives were requested to send copies of those documents where available. The Secretariat also requested chambers of commerce, trade associations and other organizations all over the world to inform it of the existence of such documents and to send copies thereof. As a result, the Secretariat succeeded in collecting more than two hundred sets of general conditions of sale and standard contract forms relating to a great variety of commodities.

### B. Survey of the collected general conditions

8. Taking also into account the general conditions prepared by the Economic Commission for Europe, and CMEA, the general conditions of sale and standard contract forms collected by the Secretariat might be categorized as applicable to:

- (A) a certain kind of commodity (e.g., groundnuts) or a particular type of commodity (e.g., West African groundnuts);
- (B) a certain group of commodities (e.g., cereals);
- (C) all commodities without exception.

It should be noted that the same formulating agency often draws up separate general conditions for the sale of a certain kind of commodity or group of commodities according to the terms of the sale (e.g., f.o.b., c.i.f.) or other feature of the sale (e.g., conditions final at shipment of condition guaranteed at discharge, etc.).

9. The greatest number of general conditions belongs to category A, especially to agricultural products. There is a much smaller but nevertheless significant number of instruments applicable to the sale of machinery and other engineering goods, chemicals, etc. A list of the

<sup>3</sup> See para. 1 (c) of the decision in foot-note 1 above.

<sup>4</sup> Hereinafter referred to as "general conditions", "forms", "formulations" or "instrument".

commodities to which the collected general conditions relate is set out in annex II to this report.

10. Of the instruments received only a few have been drawn up by intergovernmental organizations, i.e. ECE and CMEA. ECE has prepared sixteen standard contract forms for the sale of cereals and a number of general conditions for the supply and erection of plant and machinery as well as for the sale of miscellaneous other commodities.<sup>6</sup> ECE is now working on the preparation of further such instruments. CMEA has drawn up the "General Conditions of Delivery of 1968" that applies, without restriction as to type of commodity, to all sales among member countries of CMEA;<sup>6</sup> CMEA has also drawn up standard contract forms for the sale of oil, coal and foundry-coke. All other such instruments were drawn up by national chambers of commerce, international and national commodity associations and federations of either sellers or buyers, commodity exchanges and the like. Some of the instruments were agreed upon by trade associations or similar organizations of sellers and buyers belonging to two or more countries.

### C. Instruments under consideration

11. This preliminary report analyses the issues dealt with in instruments that can be considered as falling within the scope of "general" general conditions. These instruments, which will be made available to the Commission in a separate document (A/CN.9/R.6), are the following:

- A. CMEA General Conditions of Delivery (1968)
- B. Terms and conditions of the Commodity Association of the Hamburg-exchange (1970)
- C. General conditions of sale on c.i.f. basis for the products of Madagascar (coffee excepted)
- D. Standard Form of Contract for sale of Burma products on c.i.f. basis
- E. Standard Form of Contract for sale of Burma products on f.o.b. basis
- F. (a) Sino-Japanese Trade Import Contract (import to Japan)
- (b) Sino-Japanese L-T. Trade Import Contract (import to Japan)
- (c) Sino-Japanese Trade Export Contract (export from Japan)
- G. General terms and conditions for the sale of sundries (Japan International Trade Arbitration Association)
- H. Contract of sale form between China and Viet-Nam
- I. General conditions of sale for imported goods (Chambre

<sup>6</sup> A list of the ECE General Conditions was attached to document A/CN.9/18 as annex III; UNCITRAL Yearbook, vol. I: 1968-1970, part three, C, 1.

<sup>6</sup> Pursuant to the decision of the Commission at its second session (Report of UNCITRAL on its second session (1969) (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A), para. 60 (2) (b), the Secretary-General has submitted copies of the CMEA General Conditions of 1968 to the members of the Commission and the United Nations regional economic commissions for information, and requested the latter to transmit copies to Governments and interested trade circles in their region.

syndicale des négociants importateurs de matériel de travaux publics et de manutention)

- J. Conditions governing the trade in ships' stores, provisions and supplies (ISSA conditions) (international Ship Suppliers Association)
- K. Contract form of the Foreign Transaction Company of Iran
- L. Conditions of Sale of f.o.b. contracts generally (Ceylon Chamber of Commerce)

12. The scope of application of none of the above general conditions is expressly restricted to a certain group or kind of commodity; their text, however, indicates that most of them are intended to apply either to agricultural products or to manufactured goods. Thus, the forms listed in paragraph 11 above, as B, C, D, E, F/a, F/b, H and K seem to apply primarily to agricultural goods while F/c, G, I and J apply mainly to manufactured goods. The texts or general conditions A and L do not point to any special kind of commodity.

### D. Identification of the issues

13. In the following paragraphs, this report identified the issues that are dealt with in general conditions referred to in paragraph 11 above. Specific reference (e.g. by section or paragraph number) to the relevant provisions of the general conditions under consideration are given. Issues that are dealt with only in one or in a few of the formulations are also included in this report whenever they are considered relevant to a scheme of "general" general conditions. On the other hand, issues which do not seem suitable to such a scheme have been disregarded.

#### Formation of contract

14. The formation of contract is only dealt with in formulation A (§§ 1-3). This instrument states the time when the contract is deemed to be concluded (§ 1), the binding effect of offers (§ 1(2)(3)), the form of the contract (§ 2) and the legal character of appendices to the contract (§ 3).

#### Definitions

15. Several of the formulations in question contain provisions with respect to trade terms. Some of them (A and B) provide for interpretation of a number of such terms. Instrument "A" sets forth the interpretation of "f.o.r. border of the seller's country"—§ 5—; "by road"—§ 6—; "f.o.b.", "c.i.f.", "c and f"—§ 7—; "by air"—§ 8—; "by mail"—§ 9—. Instrument "B" provides for the interpretation of "franco"—§ 41(1)—; "f.o.b." and "fas"—§ 41(2)—; "f.o.r."—§ 41(3)—; "free wagon"—§ 41(4)—; "ex warehouse"—§ 41(5)—; "ex quai"—§§ 59-69—; "cleared"—§ 70—; "by rail over frontier"—§§ 45-58—etc. Other forms which were drawn up for f.o.b. (E) or c.i.f. (C, D) sales contain independent provisions on freight, passing of risk, insurance, etc. Formulation "L" may be regarded as an interpretation of the term "f.o.b.". Instrument "G" (para. 17) defines trade terms by references to "Incoterms 1953", an interpretation of nine trade terms

prepared by the International Chamber of Commerce, which is widely used and accepted in many countries.<sup>7</sup>

16. Some other definitions contained in the above formulations should be noted. Thus, forms "A" (§ 107) and "B" (§ 2) define which day should be considered to be the last day of a period if such day falls on a holiday. Form "B" also contains a definition of the terms "business-day" (§ 1) and "circa" (§ 8).

#### *Quality of goods*

17. Several general conditions stipulate the quality required of the goods when the required quality is not stipulated in the contract. Thus, according to instrument "A" (§ 15) they have to be of "usual average quality existing in the seller's country for the delivery of the given type of goods and corresponding to the purpose mentioned in the contract"; formulation "B" (§ 14) requires "average quality of the prevailing harvest", formulation "C" (art. 1.1) "fair and marketable quality, good average of the type of the place of origin at the time of shipment". Instrument "J" (para. 5) provides for "standard quality or... prime quality as rated at the place of delivery" and general conditions "K" (article 2) for "international standard".

18. A quality control, or inspection before shipment, of the goods is provided for in general conditions "A" (§§ 26, 27), "D" (para. 10), "F/a" (§ 6) "F/b" (§ 10), "G" (para. 5), "H" (term: Inspection) and "L" (para. 2). Of these formulations "A", "F/a", "F/b", and in certain cases "G", require quality control by the seller or an official quality control organization while the others provide for inspection by the buyer or his representative.

19. In addition to the quality control before shipment, referred to in paragraph 18 above, general conditions "A" (§ 26(3)(4)), "F/a" (§ 6), "F/b" (§ 10) and "H" stipulate that a certificate of quality be issued by the seller, or by the controlling organization and submitted to the buyer. Formulation "F/c" (para. 17) confers a right on the seller to issue such a certificate guaranteeing quality, quantity and/or weight of the goods.

#### *Quantity of goods*

20. The quantity of goods to be considered as delivered is dealt with in general conditions "A" (§ 18), "B" (§§ 4, 6), "C" (art. 12), "D" (para. 10) and "E" (para. 10). Formulations "B", "C", "D" and "E" provide for the determination of the weight of the goods, form "A" provides also for the number of packages or pieces delivered.

21. The formulations which relate primarily to the sale of agricultural goods with the exception of instrument "B", allow the seller, within certain limits, to deliver more or less than the quantity agreed in the contract. According to formulations "C" (art. 2(1)), "F/a" (para. 5 (2)), "F/b" (paras. 8, 11(3)) and "G"

(para. 8) the maximum amount of that tolerance is 5 per cent while under formulations D (para. 3) and E (para. 3) that maximum is to be agreed upon by the parties within the limit of 2 to 5 per cent. General conditions of the Economic Commission for Europe drawn up for the sale of agricultural products (Nos. 1-8 series on cereals, No. 312 on citrus fruit and No. 410 on soft wood) also provide for a tolerance at seller's option in the quantity of the delivered goods, varying from 3 to 10 per cent.

#### *Packing*

22. Some of the formulations contain provisions on the packing that is required if the contract does not stipulate otherwise. Formulation "A" (§ 20) requires that the goods be shipped "in packing used for export goods in the seller's country, which would assure safety of the goods during transportation, taking into account possible transshipment, under proper and usual handling of the goods". General conditions "I" (chapter: Packing) refers to the "best interests of the client" while form "J" (para. 5) to "the packing customary at the place of delivery, subject to any special requirements the purchaser may have in view of the destination of ship and/or goods".

#### *Passing of risk*

23. According to formulation "A" (§§ 5(b), 6(b), 7(2b), (3b), 8(b), 9(b)), the risk passes—at the time when delivery is effected. Similar provisions are contained in formulation "I" (chapter: Delivery) as well as in the formulation "B" with respect to sales "by rail over frontiers" (§ 47) and "ex quai" (§ 60). On the other hand, under instrument "B", in cases of "ex warehouse" sales (§ 29) the risk passes from the seller to the buyer at the end of the period within the buyer has to take delivery of the goods. General conditions C (art. 18(1)) provides for the risk to pass from the seller to the buyer at the time of shipment. Under formulation "F/b" (para. 12) risk passes at the time when the goods have been delivered on board, and under general conditions "H" (para. 1) at the time when the Bill of Lading is issued.

#### *Passing of property*

24. Some formulations also determine the time when the right in property passes from the seller to the buyer. According to instrument "A" (§§ 5(b), 6(b), 7(2b)(3b), 8(b), 9(b)), the property passes when delivery is effected, while according to instrument "C" (art. 17(1)), when the goods are put on ship's board. In view of the fact that formulation "C" relates to sales on c.i.f. basis, the two provisions are basically identical. Formulations "B" (§§ 44) and "J" (para. 12c) adopt a different approach by stipulating that the goods remain the property of the seller until the whole price has been paid.

#### *Delivery of goods*

25. The problem of the time when delivery is effected is dealt with in most general conditions; in many cases place of delivery is implicit in the provision determining time of delivery.

<sup>7</sup> See document A/CN.9/14. Promoting the wider use and acceptance of Incoterms. Report submitted to the second session of the United Nations Commission on International Trade Law by the International Chamber of Commerce.

26. As to deliveries by ship, the date of delivery is considered to be:

(a) Under form "A": the date of the on board bill of lading or the river waybill (§ 7(2c)(3c)) and in case where under an f.o.b. contract, where the buyer is late in providing the necessary space on board a vessel, within twenty-one days from the date of arrival of the goods at the port of shipment, the date of delivery is the date of certificate of the warehouse to which storage of goods has been entrusted (§ 41(7));

(b) Under formulation "C": the date of "loaded" or "on board" Bill of Lading (art. 5(3));

(c) Under formulation "G": the date of the Bill of Lading or of similar document (art. 6(b));

(d) Under formulations "B" (§ 35(3)) and H (para. 1)): the date of the Bill of Lading;

(e) Under formulation "J" providing for deliveries on f.a.s. term: the date of the arrival of the seller's craft or vehicle alongside the ship (para. 3(c));

(f) Under formulation "B", in cases where the goods are sold "floating": the time of the conclusion of the contract (§ 36(4)).

27. In case of delivery by means other than ship, the date of delivery is considered to be:

(a) In case of transport by rail "f.o.r. border of the seller's country": the date when the goods are transferred from the railway of the seller's country to the railway which receives the goods (A, § 5(c));

(b) In case of carriage by road: the date of the document confirming receipt of the goods by the buyer's means of transport (A, § 6(c));

(c) In case of carriage by air: the date of the air waybill (A, § 8(c));

(d) In case of postal dispatch: the date of the postal receipt (A, § 9(c)).

28. A general provision as to the time of delivery is contained in formulation "I". According to this provision delivery is considered to be effected either by delivery of the goods directly to the buyer or by simple notification of putting the goods at his disposal (chapter: *Livraison*, para. 2).

29. In connexion with delivery of goods, general conditions "A" (§ 12) and "B" (§§ 28, 52) also touch upon the question whether or not *preliminary and partial deliveries* are allowed.

#### Payment

30. The method of payment is dealt with in all instruments. Most of these provide for payment by letter of credit opened by buyer in favour of seller (D, para. (12); E, para. (12); F/a, para. 2; F/b, para. 8; F/c, para. 13; G, para. 8; H, condition: Payment; K, art. 5). Methods of payment provided for by other formulations are: "collection with subsequent acceptance (collection with immediate settlement)" (A, §§ 49-66); cash against documents (B, § 54; C, art. 8; L, para. 3); cash (I, *Conditions de paiement*); cash without discount (B, § 13); cash within thirty days (J, para. 12/a).

#### Insurance

31. Several formulations prescribe which of the

parties has to insure the goods and/or pay the premium. Some also provide for the risks and the amount to be covered. The following provisions are of interest: in c.i.f. (C, art. 14; D, para. 13; G, para. 9) and C and I (G, para. 9) sales, marine insurance is to be provided for by seller while in C and F (G, para. 9; K, art. 3, note 1) and f.o.b. (E, para. 13; G, para. 9) sales, marine insurance is to be provided by buyer. Formulations "F/b" (para. 12) and "I" (chapter: *Transport, Assurance*) simply state that buyer shall assume cost of insurance, while under "A" (§ 10) the seller is not obliged to insure the goods unless this has been expressly agreed in the contract. Special risks, such as breakage, leakage, etc. are covered at buyer's expense (D, para. 13; H, para. 3); coverage for strikes and war risks is also at buyer's expense (C, arts. 15, 16; G, para. 9); insurance against war risk under formulation G (para. 9), may be taken out by seller if he deems it necessary. Formulations "C" (art. 14) and "G" (para. 9) also provide for the amount to be covered by the policy.

#### Taxes, custom duties, charges, etc.

32. The allocation to the seller or the buyer of the above expenses incurred in connexion with foreign trade transactions may be made implicitly by the use of a standard trade term (e.g., "c.i.f. as interpreted in Incoterms 1953"); a number of the formulations contain specific provisions concerning such expenses. These formulations ("A", § 109; "B" § 46; "C", art. 4; "D", para. 14; "E", para. 14; "K", art. 3, note 1 and art. 4) agree that taxes, custom duties, charges and similar expenses arising in seller's country shall be borne by seller and those arising in buyer's country by buyer. Formulations "A" (§ 109) and "C" (art. 4, para. 3) provide that such expenditures arising in transit countries are also at buyer's expense. Finally, general conditions "C" (art. 4, para. 3) and, in case of delivery in buyer's country, general conditions "B" (§ 13, para. 1) provide that any change in the above expenditures after the conclusion of the contract, which arise in buyer's country will be at buyer's expense or profit, as the case may be.

#### Notification of shipment

33. Provisions that buyer be notified by seller of the expected or actual date of shipment are contained in formulations "A" (§§ 41-45, 48), "B" (§§ 37, 51), "C" (art. 7), "D" (para. 6(c)), "F/a" (para. 5(1)), "F/b" (paras. 7, 11 (4)) and "F/c" (para. 16). With respect to f.o.b. contracts, notification of seller by buyer of the arrival of the ship is required in general conditions "A" (§ 41(3)) and "E" (para. 6). Some of these formulations also provide for the contents of such notifications.

#### Time-limits

34. The following must be distinguished: (a) time-limits for inspection of the quantity and/or the quality of goods, (b) time-limits for submission to the seller of claims for non-conformity of the goods with the contract and (c) prescriptive limits for bringing action because of breach of contract. All these types of time-limits and limitations appear in the general conditions under consideration. Time-limits for the inspection of

the goods bought and submission of claims to buyer for lack of quantity and quality are dealt with in formulations "A" (§§ 72, 88), "B" (§§ 3, 4, 18, 38, 55, 56), "F/b" (para. 10), "G" (para. 13 (a)), "H" (para. 4) and "J" (para. 8). Limitation on the time for bringing action before a court are provided for in general conditions "A" (§§ 93-107), "B" (§ 4(1)), and "C" (art. 21, para. (1)).

### Remedies

35. Remedies which, under the general conditions referred to in para. 11 above, can be claimed in case of breach of contract are as follows:

- (a) Rejection of goods (D, para. 10; K, art. 7);
- (b) Penalty (A, §§ 31(5), 75 (4), 77, 80 (3), 83, 84, 86, 88, 89; C, art. 6(1); para. 15; F/c, para. 19; I, chapter: *Livraison*; K, art. 11);
- (c) Price reduction (A, § 31(6)(7), 72 (2)(5)(6); B, § 18);
- (d) Elimination of defects or replacement of defective goods (A, §§ 31(1-4), 32, 33, 75 (2-4); B, § 19; F/c, para. 17(2));
- (e) Compensation for damages (B, § 38; F/c, para. 17(2); K, art. 7, 8/a, b);
- (f) Cancellation of the contract (A §§ 31(8), 75(7), 77, 85; B, §§ 18, 38; C, arts. 6(1), 18(2); J, para. 8; K, art. 8/a).

### Relief

36. Under all general conditions referred to in para. 11 above, *force majeure* relieves the parties from responsibility. Several of these general conditions contain a definition of "force majeure" (A, § 68, D, para. 15, E, para. 15, F/a, para. 9, F/c, para. 18, G, para. 12, H, para. 5, I chapter: *Livraison* and J, art. 13). Many formulations require that the party who is unable to fulfil his contractual obligations or can only fulfil them belatedly owing to causes of *force majeure*, should notify the other party of the occurrence of such causes (A, § 69; B, § 3(5); F/a, para. 9; F/c, para. 18) and submit appropriate certification thereof (A, § 69(2); F/a, para. 9; F/b, para. 14; F/c, para. 18). There are provisions which, as a consequence of *force majeure*: extend time-limits (A, § 70; B, § 3(5); C, art. 6(2); F/b, para. 14; G, para. 12; J, para. 13; K, art. 13); allow the cancellation of the contract (A, § 70; C, arts. 6(2), 18(2); F/a, para. 9; F/b, para. 14; G, para. 12; J, para. 13; K, art. 13); or consider the contract as cancelled or null and void (D, para. 15; E, para. 15; H, para. 5).

### Arbitration

37. An arbitration clause can be found in almost all general conditions attached to this report (A, §§ 90-91; B, § 43; C, art. 21(5); D, para. 16; E, para. 16; F/a, para. 8; F/b, para. 13; F/c, para. 20; G, para. 15; H, para. 6 and J, para. 15(a)). Most of these formulations require that cases be referred to a specified institutional arbitration tribunal (A, F/a, F/b, F/c, G, J) while others call for *ad hoc* arbitration (C, D, E, H). The only formulation according to which disputes are

to be settled by an ordinary court is general condition "I" (chapter: *Contestations*) under which the competent commercial court in seller's country has jurisdiction.

38. Some of the formulations also determine the applicable law. They provide for the application of the substantive law of the seller's country (A, § 110) or the law of the country of the formulating agency (C, art. 19; G, paras. 15, 17).

### Miscellaneous issues

39. There are several other issues dealt with in the general conditions annexed to this report which, although applicable to a great variety of goods, could not be applied to all kinds of commodities. Examples are certain provisions on guarantee (A, §§ 28-38; F/c, para. 17(2); I (chapter: *Garanties*), hidden defects (A, §§ 71(2); 82, B, § 57; J, paras. 7, 10), technical documentation (A, §§ 24-25; I, chapter: *Etudes et projets*)).

### E. Conclusions

40. The issues contained in the analysed general conditions determine the principal rights and obligations of sellers and buyers arising from an international sales transaction.

41. Although not all the issues are contained in every set of general conditions, including conditions embracing all commodities, every issue is covered by at least one instrument that relates primarily to main groups of commodities, such as agricultural goods and manufactured goods. It may be concluded, therefore, that the issues listed above, with the exceptions of those in paragraphs 21 and 39, could be dealt with in a scheme of "general" general conditions.<sup>8</sup>

42. Although some of the issues do not necessarily relate to all kinds of commodities, this circumstance does not necessarily prevent the inclusion of such provisions in a scheme of "general" general conditions. For example, if it is clearly expressed in the text of the general conditions that a certain provision only relates to a particular kind of commodity, such a provision would permit the applicability of the instrument also to that particular kind of commodity without preventing the use of the instrument for other commodities.

43. The same applies to other competing provisions, e.g., interpretations of trade terms such as f.o.b., c.i.f., f.a.s., etc. The interpretations of all these trade terms may be included in the same set of general conditions, and the parties would choose which of these

<sup>8</sup> Most of the issues listed in this report are also dealt with in other general conditions such as those prepared by the United Nations Economic Commission for Europe. Thus, e.g., ECE General Conditions No. 730 for the import and export of durable consumer goods and of other engineering stock articles provides, *inter alia*, for the formation of contract, packing, passing of risk, place and time of delivery, payments, remedies, reliefs, guarantee, arbitration, applicable law. ECE General Conditions No. 410 for export and import of sawn softwood contains provisions on the same issues and also on the quality and quantity of the goods, notification of shipment, payment of taxes, duties or fees, insurance, etc.

terms should apply to their contract. Under this approach, it would be unnecessary to draw up separate sets of general conditions for sales concluded on the basis of each trade term.

44. On the basis of these considerations, it might be concluded that the feasibility of drawing up general conditions does not depend on the question which issues should be covered in such a scheme but rather on whether it is possible to find a proper provision on each issue, reflecting the interests of both buyer and seller, that would be applicable to all kinds of commodities. The ascertainment of this possibility would require the continuation of this study, taking also into account the general conditions drawn up by ECE and the analysis of these formulations by the representative of Japan,<sup>9</sup> as well as other selected instruments relating to the sale of specific goods.

45. It is suggested that as the study develops, consideration should be given to the following alternatives: (a) the preparation of general conditions applicable to all commodities; (b) the preparation of separate sets of general conditions for the major groups of commodities, such as agricultural products, manufactured goods, engineering goods, perishable goods; (c) the supplementing of the approach under (a) above, with provisions for specific commodities or groups of commodities.

### III. FUTURE WORK

46. With respect to implementation of the Commission's decision set out in paragraph 1 (a) above concerning the extension of the use of certain ECE general conditions, it is considered that national chambers of commerce, trade associations and other trade organizations, rather than Governments, may be more directly concerned with the possible extension of the use of ECE general conditions of sale and standard contracts to their regions. This may be borne out by the fact that it was the trade circles which played a predominant role in the drawing up of the ECE general conditions. The secretariat of the United Nations Economic Commission for Africa has also suggested seeking the views of national trade organizations on this question. The Commission may, therefore, wish to request the Secretary-General to send the inquiry, contained in the Commission's decision, in respect of ECE general conditions also to national chambers of commerce, trade associations and other trade organizations. The Commission may also wish to give preliminary consideration to the advisability of convening regional meetings for consideration of possible extension of the use of ECE general conditions to other regions.

47. With respect to the feasibility of developing general conditions embracing a wide scope of commodities, the Commission might wish to request the Secretary-General to continue his examination of the

subject in consultation, if feasible, with chambers of commerce, trade associations and organizations concerned, and to submit a report of his findings to the fifth session of the Commission.

## ANNEX I

### CEYLON

[Original: English]  
30 October 1970

"It would be a desirable objective to extend the use of the existing ECE General Conditions of Sale and Standard Contracts to all regions, as this would help to standardise international commercial practices and thus assist the development of international trade. However, any region accepting these general conditions and standard contracts will have to displace its own system being applied at present. For example, in Ceylon, the conditions regarding formation of contracts contained in these general conditions will have to be preferred to the Rules of Private International Law prevailing in the country. It had, however, not been possible to examine the full legal implications of such a change.

"Ceylon would support the proposal to set up committees or study groups that could examine, discuss, and clarify these matters, with the help of experts to be appointed by the Secretary-General of the United Nations."

### CHINA

[Original: English]  
4 February 1970

"... the provisions in the aforesaid documents are quite in line with general practices in international trade."

### CUBA

[Original: Spanish]  
22 January 1970

"1. The use of the ECE general conditions should be extended to the regions of Asia, Africa and Latin America. Despite their limitations, the general conditions may promote uniformity of international commercial usage and practices and eventually the establishment of international legal standards governing trade.

"2. There are obviously gaps and shortcomings in the general conditions, both from the technical and legal viewpoints and from the point of view of Cuba's trade interests. Nevertheless, it might be useful to formulate new general conditions, with certain changes and adaptations, which would apply to specific products of special interest to the underdeveloped countries, subject to the principle of equal rights.

"3. The Government of Cuba therefore believes that it would be desirable to convene committees or study groups, on a world-wide scale, so that matters raised at a regional level can be discussed and clarified."

### Fiji

[Original: English]  
24 December 1969

"... there appear to be no significant gaps or shortcomings in the ECE conditions and they appear to be generally acceptable from the point of view of present trade interests.

"It is considered that a meeting of a study group or committee may be desirable as a forum for discussing and clarifying such matters as may be raised at the regional level."

<sup>9</sup> The representative of Japan has prepared the first part of a comparative study of a number of ECE general conditions. This study was distributed to the members of the Commission at the third session.

## SURINAM

[Original: English]  
18 August 1970

"...the Government of Surinam can accept the ECE general conditions. The civil and trade law in Surinam is generally speaking similar to the law presently in force in the Netherlands where the ECE general conditions are already applied. The application of these general conditions in Surinam will therefore not encounter any difficulty."

## ANNEX II

List of commodities governed by general conditions of sale  
and standard contracts collected by the Secretariat

## A. AGRICULTURAL PRODUCTS

Barley	Ginger seeds
Benniseeds	Grains
Cassava	Ground-nuts
Castor seeds	Linseed
Cereals	Hemp seeds
Cattle food	Herbs
Cocoa	Herbage seeds
Coffee	Jute
Copra	Kapok
Corn	Maize
Cotton	Manioc
Cotton seeds	Mesta fibre
Flax seeds	Millet
Fruits	Palm kernels
Forest trees seeds	Poppy seeds
Ginger	Potatoes

Rape seeds  
Rice  
Rye  
Seeds in general  
Skins and hides  
Sorghum  
Soya beans

Spices  
Sunflower seeds  
Tapioca  
Tea  
Vegetables  
Wheat

## B. PROCESSED GOODS

Chemicals	Palm oil
Coconut oil	Seeds oil and cake
Greases	Soya bean oil
Ground-nut oil	Turpentine and other industrial oil
Gum and wood resin	Vegetable oil
Kernel oil	Whale oil
Lard	Wood oil
Linseed oil	
Olive oil	

## C. MANUFACTURED GOODS

Construction and engineering goods	Paper
Locomotives and railway railings	Pipes
Machinery	Ships
Machine-tools	Shoes
Machines for paper industry	Tiles and bricks
Office machines	Textiles and fabrics: cotton, wool and silk
	Textile machinery

## D. OTHERS

Coal	Silk
Oil	Tallow
Raw wool	Timber and wood
Rubber	

## 2. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
General conditions of delivery of goods between organizations of the member-countries of the Council for Mutual Economic Assistance (GCD CMEA 1968)	A/CN.9/R.6 —Annex A
Terms and conditions of the Commodity Association of the Hamburg-Exchange (1970) [text in German]	A/CN.9/R.6 —Annex B
General conditions of sale on C.I.F. basis for the products of Madagascar (coffee excepted) (Fédération nationale des syndicats d'importateurs et d'exportateurs de l'Afrique orientale) [text in French]	A/CN.9/R.6 —Annex C
Standard form of contract for sale of Burma products on c.i.f. basis	A/CN.9/R.6 —Annex D
Standard form of contract for sale of Burma products on f.o.b. basis	A/CN.9/R.6 —Annex E
Sino-Japanese Trade Contracts:	A/CN.9/R.6
(a) Friendly Trade Import Contract (Import to Japan)	—Annex F
(b) L-T Trade Import Contract (Import to Japan)	
(c) Friendly Trade Export Contract (Export to Japan)	
General terms and conditions for the sale of sundries (Japan International Trade Arbitration Association)	A/CN.9/R.6 —Annex G



Contract of sale form between China and Viet-Nam	A/CN.9/R.6 —Annex H
General conditions of sale for imported goods (Chambre syndicale des négociants importateurs de matériel de travaux publics et de manutention)	A/CN.9/R.6 —Annex I
Conditions governing the trade in ships' stores, provisions and supplies (International Ship Suppliers Association)	A/CN.9/R.6 —Annex J
Contract form of the Foreign Transaction Company of Iran [Incomplete]	A/CN.9/R.6 —Annex K
Conditions of sale of f.o.b. contracts generally (Ceylon Chamber of Commerce)	A/CN.9/R.6 —Annex L

### C. Time-limits and limitations (prescription) in the field of international sale of goods

#### 1. Analysis of studies and proposals relating to a uniform law on limitation (prescription): working paper by the Secretariat (A/CN.9/WG.I/WP.9) \*

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## INTRODUCTION

1. At the third session of the United Nations Commission on International Trade Law (UNCITRAL), the Commission provided for a second session of the Working Group on Time-limits and Limitation (Prescription).<sup>1</sup> The Commission requested that a working paper be prepared for use at this session.

2. In response to this request, the present document seeks to co-ordinate the past discussion and action by the Working Group and by the Commission with the issues presented by the documents that have been prepared for this session by the members of the Working Group. These documents are as follows:

(a) *Preliminary drafts of a uniform law:*

- (i) Draft and explanatory text by Professor Gervasio R. Colombres, Representative of Argentina to UNCITRAL.<sup>2</sup>
- (ii) Draft by Professor Anthony Guest, Represen-

tative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL.<sup>3</sup>

- (iii) Draft by Dr. Ludvik Kopac, Representative of Czechoslovakia to UNCITRAL.<sup>4</sup>

(b) *Reports on specific subjects:*

- (i) Effects of prescription with respect to liens, guarantees and other security interests, by Professor Mohsen Chafik, Representative of the United Arab Republic to UNCITRAL.<sup>5</sup>
- (ii) Limitations and arbitration proceedings, by Professor Anthony Guest, Representative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL.<sup>6</sup>
- (iii) Judicial proceedings and interruption of prescription, by Professor Shinichiro Michida, Representative of Japan to UNCITRAL.<sup>7</sup>
- (iv) Impossibility to sue by reason of force majeure; conflicts of laws and the uniform rules, by Dr. Ludvik Kopac, Representative of Czechoslovakia to UNCITRAL.<sup>8</sup>

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session (1970) (herein cited as UNCITRAL report on the third session (1970)), *United Nations Commission on International Trade Law, Yearbook, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.) (hereinafter cited as *Yearbook*, vol. I), part two, chapter III, A, para. 97.

<sup>2</sup> A/CN.9/WG.1/WP.1 (herein cited as WP.1).

<sup>3</sup> A/CN.9/WG.1/WP.3 (herein cited as WP.3).

<sup>4</sup> A/CN.9/WG.1/WP.6 (herein cited as WP.6).

<sup>5</sup> A/CN.9/WG.1/WP.2 (herein cited as WP.2).

<sup>6</sup> A/CN.9/WG.1/WP.4 (herein cited as WP.4).

<sup>7</sup> A/CN.9/WG.1/WP.5 (herein cited as WP.5).

<sup>8</sup> A/CN.9/WG.1/WP.7 (herein cited as WP.7).

- (v) Report on the relationship between the uniform law on prescription and other conventions relating to international sale of goods, by Mr. Paul Jenard, Representative of Belgium to UNCITRAL.<sup>9</sup>

3. This working paper is organized on the basis of the principal divisions that appeared from the above three preliminary draft uniform laws. This system of organization does not imply that all of the issues can best be discussed in this order, or that all these issues are suitable for discussion at this session. Thus, the Working Group may conclude that some issues should be postponed until after action by the Working Group on Sales, and that others present problems of detail that are related to larger issues which should first be resolved by the Working Group. Nor does this present analysis purport to be exhaustive; the Working Group may well decide that it should examine problems other than those listed herein.

# I. SPHERE OF APPLICATION

## A. Definition of international sale

4. One draft uniform law<sup>10</sup> closely follows the definition set forth in article 1 of ULIS.<sup>11</sup> The other drafts<sup>12</sup> leave the definition open. The Commission at the third session approved the structure of article 1 of ULIS but referred certain drafting questions to the December 1970 meeting of the Working Group on Sales.<sup>13</sup> In view of this action, the Working Group may wish to postpone further work on this definition until after the review of this question by the Working Group on Sales.

## B. Types of commodities and transactions

5. One draft<sup>14</sup> sets forth two provisions on scope of application based on ULIS. Thus, the provision on goods to be manufactured<sup>15</sup> is based on article 6 of ULIS; exclusion of investment securities, ships, etc.<sup>16</sup> is based on article 5(1) of ULIS. The other drafts<sup>17</sup> do not include these provisions but do not suggest that they should be rejected. This Working Group at its first session agreed to follow the approach of article 5 of ULIS.<sup>18</sup> The group may wish to decide whether these sections of ULIS should be included, tentatively within the structure of the uniform law, subject to reconsideration if modifications should result from the recommendations of the Working Group on Sales.

<sup>9</sup> A/CN.9/WG.1/WP.8 (herein cited as WP.8).

<sup>10</sup> WP.1, art. 1.

<sup>11</sup> WP.1, chap. 1, para. 1.

<sup>12</sup> WP.3, art. 3; WP.6, art. 3.

<sup>13</sup> UNCITRAL report on the third session (1970), paras. 50-51 and 77-78 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>14</sup> WP.1.

<sup>15</sup> WP.1, art. 2.

<sup>16</sup> WP.1, art. 3.

<sup>17</sup> WP.3 and WP.6.

<sup>18</sup> A/CN.9/30, para. 11 (IV) (*Yearbook*, vol. I, part three, chapter I, D).

## C. Obligation to pay price embodied in certain instruments

6. One draft provides that the Law shall not apply to claims that arise "from any bill or exchange, cheque or promissory note".<sup>19</sup> This provision may be compared with article 5(1) of ULIS, which excludes "sales (a) of . . . negotiable instruments or money" (emphasis added). It will be noted that article 5(1) of ULIS excludes "sales" of such instruments; the draft provision would appear to exclude from the Law the enforcement of claims under "any bill of exchange, cheque or promissory note" when the instrument has been given in payment for an international sale of goods.<sup>20</sup> The two provisions thus appear to be distinct.<sup>21</sup> It will also be noted that ULIS article 5(1) refers to "negotiable" instruments whereas the draft provision<sup>22</sup> is not so qualified. The group may wish to consider whether the concept "promissory note" needs qualification or definition in view of the possibly broad scope of non-negotiable notes under some legal systems.

## D. Documents subject to immediate enforcement or execution

7. The same draft also provides for the exclusion of claims based on a "document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such judgement or execution is sought."<sup>23</sup> The other drafts do not contain an explicit provision on the matter.<sup>24</sup>

## E. Claims based on judgement or award made in legal proceedings

8. The same draft<sup>25</sup> also excludes the above claim. Another draft<sup>26</sup> sets forth no explicit provision on this matter.<sup>27</sup>

(a) The third draft<sup>28</sup> sets forth two alternatives: Alternative A provides: "If a right is granted in a final judgement or arbitral award the period of prescription is interrupted". (The question might arise as to whether this provision permits a second suit on the original claim within the prescriptive period, or whether the stated period is applied to enforcement of the judgement.) Alternative B sets forth a ten-year period for the enforcement of the judgement.

(b) The report on judicial proceedings and interruption of prescription considers two alternatives:

<sup>19</sup> WP.3, art. I(3)(d).

<sup>20</sup> *Ibid.*

<sup>21</sup> See A/CN.9/16, para. 97.

<sup>22</sup> WP.3, art. 1(3)(d).

<sup>23</sup> WP.3, art. 1(3)(c).

<sup>24</sup> e.g., WP.1, art. 7 ("right to claim the performance of any obligations under a contract" which under art. 1(1) is a "contract of sale of goods"); WP.6, art. 2(1) (rights and duties "under the contract for international sale of goods") (emphasis added).

<sup>25</sup> WP.3, art. 1(3)(a).

<sup>26</sup> WP.1.

<sup>27</sup> Note the general language on scope in WP.1, art. 7, quoted in foot-note 24, *supra*.

<sup>28</sup> WP.6, art. 12.

A, exclusion of judgements; B, the establishment of a ten-year period.<sup>29</sup> This report suggests reasons for preferring alternative B.

9. Closely related issues are presented by the provision for exclusion in one draft.<sup>30</sup>

*F. Applicability of law to third persons: successors, assigns, guarantors*

10. Draft provisions on this matter are contained in all three proposals.<sup>31</sup> In addition, the subject is analysed in the report on liens, guarantees and other security interests.<sup>32</sup>

11. This Working Group at its first session proposed a draft provision<sup>33</sup> on the question which the Commission approved in principle.<sup>34</sup>

12. The language proposed by the first session of the Working Group and by the current drafts would apply the prescriptive period to third persons closely related to the parties.<sup>35</sup>

13. The report on liens, guarantees and other security interests concludes that the uniform law should not govern the question of the effect of prescription on the various types of securities and guarantors.<sup>36</sup> This study, *inter alia*, examine rules regarding (i) guarantors and sureties<sup>37</sup> and (ii) documentary credits (letters of credit).<sup>38</sup>

14. The foregoing proposals may lead to the following questions:

(a) Would the extension of the prescriptive period to persons who "guarantee the performance" of the parties cover the undertaking by a bank under a letter of credit?<sup>39</sup>

(b) The report on liens, guarantees and other security interests indicates that a personal guaranty is incidental to the debt so that when the debt is barred

the guaranty is necessarily barred.<sup>40</sup> Is this view sufficiently universal to make it unnecessary to have an explicit provision extending the uniform rules on prescription to the guarantor? If so, is it equally clear that relations between the creditor and the guarantor would automatically be subject to the uniform rules on commencement of the period, on interruption (acknowledgement, part payment) and on extension?

*G. Civil or commercial character: personal injury*

15. One draft<sup>41</sup> preserves ULIS article 7, making the law applicable without regard to "the civil or commercial character of the parties or of the contracts". The other drafts do not reproduce this provision.

16. Questions with respect to this and related provisions have been raised in the first session of the Working Group<sup>42</sup> and in the third session of the Commission.<sup>43</sup> At the third session of the Commission, the representative of Norway circulated to the members of this Working Group the following proposal:

"The Convention shall not apply to any personal injury or to physical damage caused to property belonging to any other person than the parties to the contract of sale, their successors and assigns, regardless of whether the rights and duties arising from such injury or damage may be qualified as being contractual or delictual."

The representative of Norway has also submitted a memorandum on a related question for consideration at the December meeting of the Working Group on Sales. Therefore, this present Working Group may wish to defer action on this question.

17. For similar reasons, it may be advisable to defer action on the proposed provision that the law "shall not apply to personal injury or physical damage caused by the goods sold".<sup>44</sup>

*H. Principles on choice of law: applicability of the rules to parties and suits in non-contracting States*

18. Attention is directed to the draft proposed for uniform rules on international sales, the substance of which had been approved by most representatives at the third session of the Commission.<sup>45</sup>

19. The above approach is followed in two of the drafts.<sup>46</sup> A different approach is followed in the third draft.<sup>47</sup>

<sup>29</sup> WP.5, part IV.

<sup>30</sup> WP.3, art. 1(3)(b) (compromise or settlement in the course of legal proceedings).

<sup>31</sup> WP.1, art. 5; WP.3, arts. 1(2) and 4(2) (definition of "buyer" and "seller"); and WP.6, art. 2, art. 6(4) (sureties and guarantors) and art. 6(5) (change in persons affected by prescription).

<sup>32</sup> WP.2, paras. 23-37, 44-45 and 47.

<sup>33</sup> A/CN.9/30, para. 13 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>34</sup> UNCITRAL report on the third session (1970), para. 80 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>35</sup> The following minor variations in drafting may be noted: (i) A/CN.9/30, para. 13 (*Yearbook*, vol. I, part three, chapter I, D): "successors and assigns and persons who guarantee their performance"; accord: WP.3, art. 4(2).

(ii) WP.1, art. 5: "successors and guarantors".

(iii) WP.6, art. 2(1): "successors and assigns and persons who guarantee their performance". Art. 2(2) (relating to "damages"): extends only to "successors and assigns". Art. 6(4): claims against "surety or other persons who guarantee a performance" not to be prescribed before the prescription of the right against the debtor.

<sup>36</sup> WP.2, para. 47.

<sup>37</sup> WP.2, paras. 23-26.

<sup>38</sup> WP.2, paras. 27-37.

<sup>39</sup> See WP.2, para. 30, noting that the bank's undertaking is independent from the sales contract.

<sup>40</sup> WP.2, paras. 24-26.

<sup>41</sup> WP.1, art. 4.

<sup>42</sup> A/CN.9/30, para. 36 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>43</sup> UNCITRAL report on the third session (1970), paras. 79 and 80 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>44</sup> WP.1, art. 5; also see WP.3, art. 1(2) and WP.6, art. 2(2).

<sup>45</sup> See UNCITRAL report on the third session (1970), paras. 22-32 (especially 26 and 29) (*Yearbook*, vol. I, part two, chapter III, A).

<sup>46</sup> WP.1, art. 6 (explanatory note in chapter I at para. 2(c)), and WP.6, art. 1. Also see WP.7.

<sup>47</sup> WP.3, art. 2 (para. 2: "Rules of private international law shall be excluded. . .").

20. The above provisions present the following questions:

(a) Which approach to choice of law should be the basis for further work for the purpose of the present law?

(b) If the Working Group should decide to follow the proposal of the Working Party presented at the third session of the Commission, should the present Working Group deal with the problems of drafting,<sup>48</sup> or should these matters be left to the December meeting of the Working Group on Sales?

#### I. *Applicability to claims other than for breach of contract; restitution*

21. At the first session of the Working Group, it was suggested that consideration be given to the applicability of the convention to claims under invalid sales contracts.<sup>49</sup> The following question might arise: if a sales contract is invalid or otherwise unenforceable, would the convention's period of prescription apply to claims for restitution of benefits conferred, such as return of a down-payment or compensation for the value of goods retained by the buyer? In this connexion, it might be noted that the question of validity of the contract may often be in dispute. Therefore, the question of validity might be settled only at the conclusion of litigation in which the plaintiff presents alternative claims (1) for breach of a contract which the plaintiff contends is valid and enforceable, and (2) (in the alternative) for restitution of benefits conferred.

22. The scope of two of the drafts<sup>50</sup> might not extend to such claims for restitution.

23. The scope of the other draft is considerably broader.<sup>51</sup>

24. If claims for restitution or other claims in connexion with the transaction should be included, it may be necessary to supplement the present drafts on the commencement of the period. One draft contains a provision which seems to be addressed to this problem.<sup>52</sup>

#### J. *Other problems concerning sphere of application*

25. The Working Group may wish to consider whether claims arising in connexion with an international sale are covered when the plaintiff (a buyer) includes in his case evidence that a defect in goods resulted from careless manufacture. (Under some legal

rules, this questions may be relevant to the amount of damages allowed for breach of contract.)

26. The Working Group may also wish to bear in mind the conclusion at its first session that sales of goods by documents (such as bills of lading) should be governed.<sup>53</sup>

### II. COMMENCEMENT OF THE PERIOD OF PRESCRIPTION

#### A. *Theory for commencement*

27. The Working Group at its first session considered three alternative formulas for the commencement of the period.<sup>54</sup> The Commission did not consider this problem.

28. The basic formula used in all three drafts is the date of the breach of contract.<sup>55</sup> The Working Group may wish to decide:

(a) Whether to use the date of the breach of contract as a basis for further drafting.

(b) Whether to adopt the qualification of commencement at end of year, as proposed by one draft.<sup>56</sup>

(c) If the Working Group agrees on the general approach, it may wish to designate a small drafting party to reconcile the minor stylistic differences among the three drafts.

29. With respect to the effect of the time of giving notice, the Working Group may wish to recall the proposal that "no account shall be taken of any period within which a notice of default may be required to be given by one party to another."<sup>57</sup> Although the substance of the above proposal was approved, it was suggested that in later drafting it be made clear that the "no account shall be taken" phrase will be understood as providing that the running of the prescriptive period would not be affected by the time of giving notice.<sup>58</sup> The above proposal is embodied in two drafts<sup>59</sup> (no explicit provision appears in the other draft.)<sup>60</sup> If the Working Group decides to continue the above approach, it may wish to request a small drafting party to prepare a single text.

#### B. *Specific rules for claims based on defects in delivered goods*

30. The Commission considered the following proposal:

<sup>48</sup> The problems of drafting are summarized in UNCITRAL report on the third session (1970), para. 31 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>49</sup> A/CN.9/30, para. 14 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>50</sup> WP.1, art. 7 (rights "under a contract") and WP.6, art. 5(1) ("breach of contract") (emphasis added).

<sup>51</sup> WP.3, art. 1(1) (or arising in connexion with the conclusion of, or failure to conclude, such a contract) (emphasis added) and art. 4(3) (even though one of the parties alleges that no contract exists or that the contract is void or otherwise unenforceable). Query: Does this provision apply where both parties agree that the contract is invalid?

<sup>52</sup> WP.3, art. 7.

<sup>53</sup> A/CN.9/30, para. 11 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>54</sup> *Ibid.*, paras. 17-22.

<sup>55</sup> WP.1, art. 9 and explanatory note, chapter III, para. 1; WP.3 art. 6(1); and WP.6, art. 5(1) ("end of the calendar year in which the breach of contract occurred").

<sup>56</sup> WP.6, art. 5(1) (commencement at the end of the calendar year in which the breach of contract occurred). Also see A/CN.9/16, para. 81; not reproduced in this volume.

<sup>57</sup> A/CN.9/30, para. 46 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>58</sup> *Ibid.*, para. 47.

<sup>59</sup> WP.1, art. 10, and WP.3, art. 6(2).

<sup>60</sup> WP.6.

"Where goods are delivered, the period for claims relying on a lack of conformity of the goods shall run from the date of delivery [without regard to the date on which the defect is discovered or damage therefrom ensues]."<sup>61</sup>

Opinion was divided as to whether this special rule should be included in the interest of definiteness, or whether the approach would be unfair to buyers who could not discover the defect until after delivery. (A possible intermediate position might be the provision for a brief additional period following discovery of the defect.)<sup>62</sup> The Commission finally postponed action so that attention could first be given to the length of the period.<sup>63</sup>

31. Two drafts<sup>64</sup> follow the general approach approved above.<sup>65</sup> On the other hand, the other draft follows a different approach for claims for compensation of "damages": the period runs from the date the party "learns or could learn of the whole damage caused to him".<sup>66</sup> Relevant to this provision are questions with respect to the applicability of the convention to injury to the person or to other property of the buyer, and the applicability of the convention to sales to consumers.<sup>67</sup>

32. The Commission approved the recommendation of the Working Group that if such a special rule should be employed, the drafting should avoid a legal concept of delivery (*délivrance*) and instead should refer to a physical event.<sup>68</sup> All of the drafts have followed the drafting approach approved by the Commission, but with somewhat different language.<sup>69</sup>

33. If (subject to later action concerning the scope of this convention) the Working Group should decide to continue the approach recommended at the first session,<sup>70</sup> a small drafting party might be requested to prepare a single draft.

### C. Effects of express guarantee

34. The recommendation of the Working Group at its first session<sup>71</sup> was accepted in substance by most representatives at the Commission's third session.<sup>72</sup>

<sup>61</sup> A/CN.9/30, paras. 29-33 (see draft approved at para. 32) (*Yearbook*, vol. I, part three, chapter I, D).

<sup>62</sup> Cf. WP.6, art. 6(2).

<sup>63</sup> UNCITRAL report on the third session (1970), paras. 81-84 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>64</sup> WP.1, art. 12; WP.3, art. 6(3) and (4). Cf. WP.6, art. 5(2).

<sup>65</sup> Para. 30, *supra*.

<sup>66</sup> WP.6, art. 6(2).

<sup>67</sup> See paras. 15-17, *supra*.

<sup>68</sup> A/CN.9/30, para. 31 (*Yearbook*, vol. I, part three, chapter I, D). UNCITRAL report on the third session (1970), para. 84 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>69</sup> WP.1, art. 12 ("physical delivery"); WP.3, art. 6(3) (reference to the time when goods are "at the disposition of the buyer"). Cf. art. 6(4) (in cases of carriage, reference to the time when "goods are handed over to the buyer by the carrier"). WP.6, art. 5(2) (when the goods "arrive at the place of destination agreed upon or are handed over by the seller to the buyer").

<sup>70</sup> A/CN.9/30, paras. 29-33 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>71</sup> *Ibid.*, paras. 37-40.

35. All three drafts contain provisions based on the above recommendation:<sup>73</sup>

(a) The provisions of the three drafts are similar except with respect to the starting point of the period related to a guarantee.<sup>74</sup>

(b) At the third session of the Commission, the representative of Norway circulated to members of the Working Group the following proposal:

"However, if the contract contains an *express guarantee* relating to the state of the goods for a particular period, specified by time or otherwise, the period of limitation in respect of any claim [based on] arising out of the guarantee shall run from the date when the buyer discovered or ought to have discovered the fact on which the claim is based, but shall at the latest expire 3(5) years after the expiration of the period of guarantee." (emphasis added).

36. Two drafts provide alternative periods of one or two years<sup>75</sup> and three or five years.<sup>76</sup> The Working Group may wish to include a question relevant to this issue in the questionnaire on the length of the period. If so, the Working Group may wish to postpone action on the length of the period, and consider only the drafting of a provision on this question subject to later insertion on the period of years.

### D. Cancellation ("rescission") with respect to future performance: anticipatory breach; instalment contracts

37. For clarity in analysing these problems, some of the typical factual situations may be identified as follows: (All contracts are made on 1 January 1970.)

(a) Delivery of the goods is due on 1 December 1970. On 1 February 1970, the seller notifies the buyer that unless the buyer agrees to pay a higher price, the seller will not perform the contract. On 1 March 1970, the buyer refuses to pay a higher price and states that he is going to hold the seller responsible in damages for his refusal to deliver. (Conversely: on 1 February 1970, the buyer notifies the seller that unless the seller reduces the price, the buyer will not accept the goods. The seller refuses to do so, and the buyer states that he will not accept the goods.)

(b) The contract calls for the buyer to establish a letter of credit on 1 February 1970, to assure payment for a machine that the seller was to manufacture and deliver on 1 December 1970. The buyer establishes a letter of credit on 1 February, but the seller contends that its provisions are inadequate. The buyer does not

<sup>72</sup> UNCITRAL report on the third session (1970), para. 93 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>73</sup> WP.1, art. 8; WP.3, art. 6(7); and WP.6, art. 5(3).

<sup>74</sup> (i) WP.1 and WP.6—the expiration of the time specified in the guarantee;

(ii) WP.3—the date the buyer first notified the seller of the claim. (This approach would tend to shorten the period when the buyer notifies the seller of a claim early in the period covered by the guarantee. Presumably, delay in giving notice could lead to loss of the claim under the applicable substantive law of sales. Cf. ULIS, art. 39.)

<sup>75</sup> WP.1.

<sup>76</sup> WP.3.

agree. On 1 March 1970, the seller notifies the buyer that he will not manufacture or deliver the machine. (Conversely: The seller agreed to provide a working model on 1 February. The buyer notifies the seller that the model so provided was inadequate, but the seller does not agree. On 1 March, the buyer notifies the seller that he will not accept the machine to be manufactured by the seller.)

(c) The contract calls for delivery of part of the goods on 1 February 1970, and the remainder on 1 December 1970. The buyer claims that the goods delivered in February are seriously defective. The seller does not agree. On 1 March 1970, the buyer declares that he will not accept the December delivery. (Conversely: The seller claims that the buyer's payment for the February shipment was late. The buyer does not agree. On 1 March, the seller notifies the buyer that he will not make the December delivery.)

38. It will be noted that in each of the above cases, a dispute developed before the time for final performance. The basic problem is whether the prescriptive period for either (or both) parties should start to run at the time of the event that precipitated the dispute (1 February), the time of notification of cancellation (1 March), or the time agreed for performance (1 December).

39. Provisions dealing with these questions were prepared at the first session of the Working Group.<sup>77</sup> The Commission did not consider those questions.

40. One draft provision follows Alternative A suggested at the first session of the Working Group.<sup>78</sup> Substantially the same provision appears in another draft,<sup>79</sup> in addition, that draft also contains a provision,<sup>80</sup> on instalment sales similar to a section of Alternative C suggested at the first session of the Working Group.<sup>81</sup> At the third session of the Commission, the representative of Norway circulated to members of the Working Group the following proposal:

"Where as a result of a breach of contract by one party before performance (in whole or part of it) is due, the other party exercises his right to treat the contract as discharged (cancelled), or to regard the obligation as having become due, the prescription period shall run from the date of the breach on which such right is based. If such right is not exercised, the breach of contract mentioned shall be disregarded for the purpose of determining the commencement of the prescription period. If the right to treat the contract as discharged (cancelled) is exercised on the basis of a breach as to an instalment delivery or payment, the period shall run from the date of such a breach, even in respect of any con-

nected previous or subsequent instalment covered in the contract."

41. All drafts reflect a policy to start the running of the period at the time of the event or that led to the cancellation (1 February), rather than at the later date for performance set in the contract (1 December).

42. These drafts apply only where the notice of cancellation was *rightful*.<sup>82</sup> The Working Group may wish to consider whether this approach may lead to difficulties in application. As the above examples indicate, the rightfulness of the cancellation will often be disputed by the other party. In such cases, the pending drafts might require a decision on the merits of the claim.

43. One draft contains a provision on the effect of breach of the obligation to pay an instalment.<sup>83</sup> In light of the explanatory note contained in that draft,<sup>84</sup> it appears that this provision deals with a more specialized problem than that of cancellation of future performance, which has just been discussed. The situation in question may be presented by the following facts:

(a) In a sale made on 1 January 1970, the buyer agrees to pay the price in twelve monthly instalments. The buyer fails to pay the instalment due on 1 February.

(b) Under the draft, the period of prescription starts to run on 1 February. In considering the problem, the following questions might be considered:

(i) When does the period start running with respect to the instalments due in succeeding months? Does the period start to run regardless of whether the contract provides that failure to pay one instalment makes the later instalments due at once, and regardless of whether the seller notifies the buyer that all instalments are due?

(ii) Should there be a provision dealing with the failure of the buyer to pay an instalment of the price separately from the failure of the seller to deliver an instalment of the goods?

### III. LENGTH OF THE PERIOD

#### A. *The number of years*

44. This question has already been discussed at length.<sup>85</sup> Provisions concerning the number of years appear in each of the three drafts.<sup>86</sup>

45. In view of the decision to issue a questionnaire concerning this problem, the Working Group probably will wish to postpone discussion as to the number of years. The Working Group may, however, wish to

<sup>77</sup> A/CN.9/30, para. 20, alternative A, sub-para. 3, and para. 22, alternative C, sub-para. 6 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>78</sup> WP.1, art. 11. See foot-note 77, *supra*.

<sup>79</sup> WP.3, art. 6(5).

<sup>80</sup> WP.3, art. 6(6).

<sup>81</sup> A/CN.9/30, para. 22, alternative C, sub-para. 6, second sentence (*Yearbook*, vol. I, part three, chapter I, D).

<sup>82</sup> WP.1, art. 11 ("exercises his *right* to treat the contract as discharged") (emphasis added); WP.3, art. 6(5) and (6) ("becomes entitled to").

<sup>83</sup> WP.1, art. 13.

<sup>84</sup> WP.1, explanatory note, chapter III, para. 5.

<sup>85</sup> A/CN.9/30, paras. 49-54 (*Yearbook*, vol. I, part three, chapter I, D). UNCITRAL report on the third session (1970), paras. 85-89 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>86</sup> WP.1, art. 7; WP.3, art. 5(1); and WP.6, art. 6(1). Cf. WP.6, art. 6(3) (claims secured by mortgage—10 years) and art. 12 (Alternative B) (final judgement or award—10 years).

include in its draft a basic provision with the number of years blank. For this purpose, drafting might be facilitated by the use of language that does not imply answers to difficult questions, covered elsewhere in the draft, concerning the legal effect of the running of the period.<sup>87</sup> Neutral forms of expression in connexion with the length of the period may be found in two of the drafts.<sup>88</sup>

B. *Method of computation: first and last days; holidays*

46. This Working Group at its first session approved the recommendation that the day of the event instituting the prescriptive period shall not be counted.<sup>89</sup> The proposed drafts deal with the problem of computation as follows:

(a) One draft implements the substance of the recommendation by providing that (in the absence of interruption or suspension) the period expires "at midnight on the day corresponding to the date of the breach of contract".<sup>90</sup> Thus, if the breach occurred on 9 February 1970, a five-year period would expire at midnight on 9 February 1975. Other articles of that draft determine the computation where there has been interruption or suspension.<sup>91</sup>

(b) Another draft contains a provision excluding the first day and including the last.<sup>92</sup>

(c) The other draft avoids the counting of the first and last days by making the period run in terms of calendar years following the year in which the breach occurred.<sup>93</sup>

47. A majority of Working Group representatives approved the view that the period should not be extended because of holidays.<sup>94</sup> The current drafts approach the problem as follows:

(a) One draft provides no extension for holidays.<sup>95</sup>

(b) Another draft extends the period when the last day falls on a "public holiday or other *dies non* . . ." <sup>96</sup>

(c) In the other draft, the computation in terms of calendar years provides no extension for holidays.<sup>97</sup>

IV. THE LEGAL ACTION NECESSARY TO SATISFY ("INTERRUPT") THE PERIOD OF PRESCRIPTION

A. *Nature of the problem*

48. The proposed convention is concerned with the time within which a legal action may be brought for

the enforcement or redress of a claim: If the action is brought too late, the running of the prescriptive period may be invoked to defeat or bar the action. Under this approach, it would be possible to state the issue (and draft the controlling rule) in relatively simple terms: Has the legal action in question been instituted within the stated prescriptive period?<sup>98</sup>

49. It has been noted that legal actions may be instituted in different ways, and may be brought to court only after a series of preliminary steps, some of which may not require judicial action. For example, the first step in an action may be the serving of a formal notice (or "summons") which need not set forth the claim and which, in some jurisdictions, may be served on the defendant by the plaintiff or (in actual practice) by his attorney. In some of these jurisdictions the documents may not be filed in court until after the plaintiff has served on the defendant a formal legal document (a "complaint" or "declaration") stating the claim, and the defendant has served on the plaintiff his formal answer. Although these exchanges of documents may occur without the intervention of the court, these proceedings are regulated by the State's rules of civil procedure, and are regarded as instituting a legal action for the purpose of satisfying the State's statute of limitations. In other jurisdictions, satisfaction of the statute of limitations occurs only when the plaintiff has filed his claim in court. Consequently, the Working Group has been concerned with this question: What test should determine whether a legal action has been instituted before the expiration of the period?

B. *The test determining whether a legal action has been instituted within the prescriptive period*

50. The above question was considered at the first session of this Working Group. Most members supported the conclusion that, in view of variations in local procedure, the convention should refer to the rules of the *forum* in which the action was brought and in which the prescriptive period was invoked.<sup>99</sup>

51. The three draft uniform laws in some situations prescribe the stage the proceedings must reach, and in others refer to local procedural rules.<sup>100</sup>

<sup>98</sup> In some of the discussions and in some of the drafts the issue has often been stated in broader terms: What legal action is necessary to "interrupt" (*i.e.*, recommence) the running of the period? Some of the questions presented by this approach (dismissal of actions; the bringing of successive actions after the running of the initial period) are discussed in paras. 56-57, *infra*. Only the narrower issue, stated above, will be discussed at this point.

<sup>99</sup> A/CN.9/30, paras. 82-89 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>100</sup> (i) WP.1, art. 16(c): "*pleads his right or invokes it as a defense*..." (emphasis added); for other actions, reference is made to the law of the jurisdiction where such action takes place. (*Cf.* art. 20, which suspends the period in certain arbitration proceedings. See explanatory note, chap. VI.)

(ii) WP.3, art. 8(1): for judicial or administrative proceedings, reference is made to local law; art. 9: for arbitration proceedings, the steps necessary for interruption are defined. The reasons for the latter provision are set forth in the report on limitation and arbitration proceedings (WP.4).

(iii) WP.6, art. 10(1): "*asserts his claim in court*"; "*assertion of a right in arbitration proceedings*" (emphasis added).

<sup>87</sup> See WP.1, explanatory note, chapter II, first paragraph.

<sup>88</sup> WP.3, art. 5(1) and WP.6, art. 6(1).

<sup>89</sup> A/CN.9/30, paras. 56-57 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>90</sup> WP.1, art. 25 and explanatory note, chapter X, situation (a).

<sup>91</sup> WP.1, arts. 26-28.

<sup>92</sup> WP.3, art. 5(2).

<sup>93</sup> WP.6, art. 5(1).

<sup>94</sup> A/CN.9/30, paras. 58-59 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>95</sup> WP.1, art. 27 ("In the calculation of the period, holidays shall be taken into account").

<sup>96</sup> WP.3, art. 11.

<sup>97</sup> WP.6, art. 5(1).



52. The problem is discussed in the report on judicial proceedings and interruption.<sup>101</sup> This report proposes that the convention should provide that its period of prescription would be satisfied by "any action or act recognized, under the law of the jurisdiction where such action or act takes place, as constituting legal grounds for the purpose of interruption". The report suggests that this test should apply to all types of proceedings, including bankruptcy, corporate reorganization or other insolvency proceedings.<sup>102</sup>

C. *Dismissal of legal action because of lack of jurisdiction or other procedural grounds*

(a) *Lack of jurisdiction*

53. At the first session of the Working Group, the prevailing view was that if a tribunal ultimately decided that it was without jurisdiction to decide the merits of the claim, suspension of the period would be warranted.<sup>103</sup> The approach of the current drafts is as follows:

(1) One draft<sup>104</sup> sets forth no explicit provision on this problem. Under one article, however, it might be concluded that where the obligee "pleads his right or invokes it as a defense" (emphasis added), even in a tribunal that lacks jurisdiction, the period is interrupted so that the period begins to run afresh. On the other hand, if the tribunal lacks jurisdiction it might be contended that this action was not brought "before a judicial authority".<sup>105</sup>

(2) Under another proposal,<sup>106</sup> where the tribunal is incompetent to adjudicate, the period is extended to one year from the date of the declaration of incompetency.<sup>107</sup>

(3) The other draft is similar to the preceding proposal, except that the extended period is six months rather than one year.<sup>108</sup> The proposed rule on this matter in the report on judicial proceedings and interruption of prescription is in accord with the extended period of six months.<sup>109</sup>

(b) *Other ground for dismissal*

54. Questions may arise when an action to enforce a claim fails to reach a decision on the merits for reasons other than the incompetency of the tribunal. Under some legal systems, a court that is "competent" may

decline to exercise jurisdiction on grounds such as *forum non conveniens* or the selection of an inappropriate venue. In addition, actions may be dismissed because of procedural difficulties such as a flaw in the service of legal process, the attempt to sue a business unit that lacks the legal capacity to be sued, and the like. The Working Group may wish to consider whether some provision, such as suspension or extension of the period, would be appropriate for actions that fail to lead to a decision on the merits because of procedural barriers.<sup>110</sup>

(c) *Voluntary withdrawal*

55. One draft specifically provides that no "interruption" occurs if the claimant withdraws his claim or discontinues the proceedings.<sup>111</sup> In accord is the proposal contained in the report on judicial proceedings and interruption.<sup>112</sup> Another draft may reach a similar result because of the requirement that the obligee "continues the commenced proceedings" (emphasis added).<sup>113</sup> If no interruption or suspension is intended in cases of voluntary withdrawal, it may be necessary to make specific provision to that effect in any draft that provides for "interruption" from "instituting" proceedings.<sup>114</sup>

(d) *Consequences of "interruption" by bringing action*

56. Providing that the institution of legal action starts the prescriptive period running afresh ("interruption"), literally construed, might raise questions such as these:

(1) If the obligee sues in the last year of the prescriptive period and prevails, may he sue on the original claim (not by way of enforcement of the judgement) within [five] years later? Would there be any limit to the number of such suits, if each "interrupts" the period? Is the doctrine of "merger" of a claim in the judgement sufficiently established in all jurisdictions to avoid such problems?

(2) Suppose the obligee loses. May he sue on the original claim in a different state within [five] years because the prescriptive period was "interrupted" by the first suit? Can the obligor rely on *res judicata* in all jurisdictions to block such action?

(3) While the original suit is pending, can the obligee institute a second suit in another jurisdiction after the initial prescriptive period has expired, on the ground that the bringing of the first action started the period running afresh? Should the convention on prescription provide a bar to bringing a series of such actions? Are local procedural rules adequate to cope with the problem?

57. The above complications lead to the question whether the concept of "interruption" needs to be employed in connexion with the bringing of action on a claim. Thus, consideration might be given to the

<sup>101</sup> WP.5, part I.

<sup>102</sup> WP.5, part I, para. 3. Also see WP.3, art. 10.

<sup>103</sup> A/CN.9/30, para. 73, vol. I, part three, chapter I, D).

<sup>104</sup> WP.1.

<sup>105</sup> WP.1, art. 16(c).

<sup>106</sup> WP.3, art. 14.

<sup>107</sup> Under WP.3, art. 14(1), extension is provided when the court or administrative tribunal "has declared itself or been declared incompetent" (emphasis added). The question might arise as to whether the underscored phrase refers to a declaration (a) by a tribunal within the same judicial system or (b) a tribunal in a different state where enforcement of the judgment is sought. Presumably the former interpretation is intended in view of the complications that could arise from determinations of incompetency by tribunals that would lack final authority to determine the question.

<sup>108</sup> WP.6, art. 10(2).

<sup>109</sup> WP.5, part III.

<sup>110</sup> See draft proposed by WP.5, part III.

<sup>111</sup> WP.1, art. 16(c), last sentence.

<sup>112</sup> WP.5, part III, first paragraph.

<sup>113</sup> WP.6, art. 10(1).

<sup>114</sup> Cf. WP.3, art. 8(1).

adequacy of stating the basic rule in the simpler terms suggested above:<sup>115</sup> Has the action to enforce a claim been instituted within the stated prescriptive period? If not, the bar of prescription may be invoked in that action.

#### V. SUSPENSION OR PROLONGATION OF THE PERIOD BECAUSE OF IMPOSSIBILITY TO INSTITUTE ACTION

##### A. *External circumstances preventing legal action* (force majeure)

58. This problem was examined at the first session of this Working Group; certain basic questions of approach were decided but no statutory language was drafted.<sup>116</sup>

59. The report on impossibility to sue by reason of *force majeure* sets forth a draft text, with reasons for the provisions adopted.<sup>117</sup> Provisions on this subject also appear in all three drafts.<sup>118</sup>

60. One question of approach is whether the statute should (a) employ a brief, general formula<sup>119</sup> or (b) include specific instances to illustrate and make more definite the contours of the general rule.<sup>120</sup>

61. Related to the above question of technique is the question of the breadth of grounds for suspension.

(a) Under one approach, only impediments of a widespread and drastic character would justify suspension.<sup>121</sup> A second approach is drafted in terms of the ability of the individual obligee to take legal action.<sup>122</sup>

(b) An intermediate position provides a general formula that excludes impediments that are individual or peculiar to the obligee.<sup>123</sup>

62. It has been suggested that suspension should be limited to impediments that persist during the latter part of the period. All three drafts give effect to this view by providing that the period should not expire before the expiration of one year from the date on which the relevant impediment ceased to exist.<sup>124</sup>

##### B. *Legal action prevented by misconduct of obligor; concealment*

63. A majority of the Working Group at the first session tentatively approved a draft dealing with this question.<sup>125</sup>

64. The drafts presented to the Working Group illustrate two approaches:

(a) A single provision designed to include both (i) problems considered under A, *supra* (e.g., *force majeure*) and (ii) misconduct of the obligor preventing legal action.<sup>126</sup>

(b) A separate provision on specified misconduct by the obligor that delays action.<sup>127</sup>

#### VI. MODIFICATION OF THE PERIOD BY AGREEMENT OF THE PARTIES AND RELATED PROBLEMS

##### A. *The general power to modify by agreement*

65. The problem was discussed by the Working Group<sup>128</sup> and by the Commission at its third session.<sup>129</sup> Divergent views have been expressed, particularly on whether the parties should have the power to shorten the period. Some expressed the view that the solution should depend upon the length of the basic period. Most members agreed at the first session of the Working Group that any modification to be effective must be in writing.

66. Solutions proposed by the drafts:

(a) *Can the period be extended?*

All three drafts permit extension;<sup>130</sup> however, one of the drafts limits the extension to the maximum of two years in addition to the statutory period.<sup>131</sup>

(b) *Can the period be shortened?*

One draft forbids,<sup>132</sup> but another draft permits<sup>133</sup> the period to be shortened by agreement. The other draft<sup>134</sup> makes such an agreement null and void.<sup>135</sup>

(c) *Formality, need the agreement be in writing?*

Only one draft calls for writing.<sup>136</sup> Another draft states that "such an agreement need not be evidenced by writing" and further provides that it "shall not be subject to any other requirements as to form".<sup>137</sup>

67. The Working Group may also wish to consider whether the parties can agree outside the court not to invoke the prescriptive period (as contrasted with an

<sup>115</sup> Para. 48, *supra*.

<sup>116</sup> A/CN.9/30, paras. 63-66 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>117</sup> WP.7, first part.

<sup>118</sup> WP.1, art. 17 and explanatory note, chapter VI; WP.3, art. 12; and WP.6, art. 8 (as explained in WP.7, first part).

<sup>119</sup> WP.1, art. 17, and WP.6, art. 8.

<sup>120</sup> WP.3, art. 12(2).

<sup>121</sup> Cf. WP.3, art. 12(2).

<sup>122</sup> WP.1, art. 17. Cf. art. 19 on moratorium.

<sup>123</sup> WP.6, art. 8.

<sup>124</sup> WP.1, art. 17; WP.3, art. 12(1); and WP.6, art. 8.

<sup>125</sup> A/CN.9/30, para. 70 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>126</sup> WP.6, art. 8, as explained in WP.7, first part.

<sup>127</sup> WP.1, art. 18, and WP.3, art. 13, both of which closely follow A/CN.9/30, para. 70 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>128</sup> A/CN.9/30, paras. 93-107 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>129</sup> UNCITRAL report on the third session (1970), paras. 87-88 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>130</sup> WP.1, art. 14; WP.3, art. 16(1); and WP.6, art. 7.

<sup>131</sup> WP.6, art. 7.

<sup>132</sup> WP.1, art. 15.

<sup>133</sup> WP.3, art. 16(1).

<sup>134</sup> WP.6, art. 7.

<sup>135</sup> But see A/CN.9/30, paras. 96 and 98 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>136</sup> WP.6, art. 7.

<sup>137</sup> WP.3, art. 16(1); cf. WP.3, art. 16(2).

agreement to extend the period) and whether the court must honour such an agreement when the obligor ignores it and asserts the expiration of the prescriptive period. This question is distinct, although closely related in effect, from the question of the parties' general power to modify the prescriptive period by agreement. In this connexion, it may be noted that one draft provides that the obligor may at any time *declare to the obligee* that he will not invoke prescription.<sup>138</sup>

68. Representatives have noted that the solution to these problems may be affected by the length of the basic period of prescription. The Working Group consequently may wish to postpone its action on this issue until the replies to the questionnaire have been received.

#### B. Prolongation during negotiation

69. The Working Group agreed that "a provision dealing with this general problem would be useful". It was further agreed that such agreements extending the period should be in writing.<sup>139</sup> The third session of the Commission did not take a decision on this issue and impliedly left the issue to the questionnaire.<sup>140</sup>

70. The three drafts do not specifically refer to prolongation during negotiation. But their provisions on the general power to modify the period by agreement<sup>141</sup> would enable the parties to agree to prolong (extend) the period during negotiation. All three drafts permit such extension.<sup>142</sup>

71. A different approach is followed in the report on judicial proceedings and interruption of prescription.<sup>143</sup> This report proposes a one-year automatic suspension [extension] from the day on which the latest demand was made [within the statutory prescriptive period]. Under this formula, the existence of the *agreement* by the parties to extend the period would not be necessary.

72. The foregoing may lead to the following questions:

(a) Whether the provision on the general power to extend the period by agreement<sup>144</sup> will be sufficiently broad to cope with the "negotiation" situation, or

(b) Whether the approach proposed by the report on judicial proceedings and interruption of prescription<sup>145</sup> is needed, in addition to the general power to extend the period by agreements, in order to facilitate negotiation when the parties cannot reach an agreement to extend the period.

73. For the reasons indicated in paragraph 68, *supra*, the Working Group may wish to refer action on

<sup>138</sup> WP.3, art. 16(2) (writing and signature required); *cf.* WP.3, art. 16(1).

<sup>139</sup> See A/CN.9/30, paras. 105-107, especially rule 17(2) of the Draft European Rules quoted in para. 105 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>140</sup> UNCITRAL report on the third session (1970), paras. 87 and 88 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>141</sup> See paras. 65-68, *supra*.

<sup>142</sup> WP.1, art. 14; WP.3, art. 16(1); and WP.6, art. 7.

<sup>143</sup> WP.5, paras. 3 and 4.

<sup>144</sup> Paras. 65-68, *supra*.

<sup>145</sup> WP.5.

this issue until the replies to the questionnaire are received.

#### C. Whether the issue of prescription should be raised by the Court suo officio or only at the instance of the parties

74. At the first session of the Working Group, there was general agreement that prescription may be invoked only by a party concerned (including a guarantor); *i.e.*, the court should not be authorized to raise it *suo officio* in the course of a judicial proceedings.<sup>146</sup> The Commission did not consider this issue.

75. The three proposed drafts differ on this point:

(a) Under one draft,<sup>147</sup> the prescription shall be applied *suo officio* by court when the place of business of the parties to the contract is in the territory of a Contracting State; otherwise, obligor must invoke.<sup>148</sup> Under this draft, however, obligor must always invoke prescription in case of arbitration proceedings.<sup>149</sup>

(b) Under the other two drafts:<sup>150</sup> obligor must invoke.

76. As to who can invoke prescription, two proposals<sup>151</sup> mention only "debtor", while the other draft<sup>152</sup> has a broader provision ("any other person having a legally recognized interest therein").<sup>153</sup>

### VII. ACKNOWLEDGEMENT OF THE OBLIGATION; PART PERFORMANCE

#### A. Acknowledgement

77. The Commission accepted in principle the Working Group's recommendation that if the debtor acknowledges the debt the prescriptive period would start to run afresh from the date of acknowledgement.<sup>154</sup> All three drafts give acknowledgement to the effect of interruption as described above.<sup>155</sup> However, the drafts differ with respect to certain aspects of the problem.

##### (a) The requirement of a writing

78. A majority of the Working Group at the first session was of the view that only acknowledgements in writing should be effective.<sup>156</sup> Two drafts follow this

<sup>146</sup> A/CN.9/30, paras. 122-123 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>147</sup> WP.1.

<sup>148</sup> WP.1, art. 23.

<sup>149</sup> WP.1, art. 23. See WP.1, explanatory note, chapter IX.

<sup>150</sup> WP.3, art. 17(1) and WP.6, art. 4.

<sup>151</sup> WP.1, arts. 23-24, and WP.3, art. 17(1).

<sup>152</sup> WP.6, art. 4.

<sup>153</sup> See A/CN.9/30, para. 122 (to be invoked by the party concerned (including a guarantor) (*Yearbook*, vol. I, part three, chapter I, D).

<sup>154</sup> *Ibid.*, paras. 74-77; and UNCITRAL report the third session (1970), para. 94 (*Yearbook*, vol. I, part two, chapter III, A).

<sup>155</sup> WP.1, art. 16(a); WP.23, art 15; and WP.6, art 11(1).

<sup>156</sup> A/CN.9/30, para. 77 (*Yearbook*, vol. I, part three, chapter I, D).

view.<sup>157</sup> In contrast, the other draft states that "before the expiration of the period", there is interruption "if the debtor recognizes *in any way* his obligation to the creditor...";<sup>158</sup> however, the same draft requires a "writing" for an acknowledgement "of a *prescribed* right".<sup>159</sup> (Emphasis added.)

79. If the Working Group decides that a "writing" is required, it may wish to consider whether the term "writing" requires a definition.<sup>160</sup> Thus, questions may arise with respect to telex and telegraphic communications and with respect to the requirement of a signature.

(b) *Clarity of the identification of obligation and the amount still due*

80. The drafts differ in their approach to this problem:

- (i) One draft states a brief general rule: "acknowledgement in writing of the obligation" (emphasis added).<sup>161</sup>
- (ii) Another draft requires that the debtor acknowledge that the claim is "well founded in substance and in amount".<sup>162</sup>
- (iii) The other draft contains the language, "recognizes in any way *his obligation*" (emphasis added).<sup>163</sup> Another part of the draft provides that if only a part of a right is recognized [acknowledged], the interruption shall take effect only with respect to that part.<sup>164</sup>

81. The Working Group may wish to ascertain whether these differences in the wording would produce different results.<sup>165</sup> In this connexion it might be considered whether one draft ("well founded... in amount") might exclude certain<sup>166</sup> types of acknowledgement by the seller, such as an acknowledgement of an obligation to repair a defective machine. After preliminary discussion of questions of policy, the Working Group may wish to establish a small Drafting Group to reconcile stylistic differences among the three drafts.

B. *Part performance*

(a) *Part payment*

82. The Working Group at its first session agreed on the general proposition that an acknowledgement of a claim could be effected by a payment stated as a part payment of a larger obligation [the obligation in question].<sup>167</sup>

83. Two drafts follow this approach.<sup>168</sup> The other draft provides that "the payment of an instalment or interest or any other conduct of the debtor which indicates that he does not contest his obligation", shall be considered as acknowledgement.<sup>169</sup>

84. The Working Group may wish to consider whether the *amount* of total debt must be stated or identifiable in connexion with the part payment.

(b) *Payment of interest*

85. The Working Group may wish to consider the effect of the payment of interest under the current drafts:

- (i) One draft does not specifically refer to payment of interest.<sup>170</sup>
- (ii) Another draft provides that payment of interest shall be treated as "payment in respect of the principal debt";<sup>171</sup> the basic rule for the part payment of a principal debt is provided elsewhere in the same article.<sup>172</sup>
- (iii) The other draft provides that payment of interest is a recognition of the obligation.<sup>173</sup>

(c) *Part performance other than payment (e.g., part performance by the seller as acknowledgement)*

86. One draft treats "*part performance* of a larger obligation (emphasis added) as a cause of interruption."<sup>174</sup> This could include part performance other than part payment; thus, part performance of both the seller and buyer are treated equally. Another draft would also include the seller's part performance.<sup>175</sup> It would be more difficult to reach this construction under the other draft.<sup>176</sup>

87. The Working Group at its first session concentrated its discussion on part *payment* but there was no indication that part performance by the seller should not be given similar effect.<sup>177</sup> The Working Group may wish to consider whether the rule on part performance should be sufficiently broad to include conduct such as the seller's attempt to repair a defective machine.

88. If the Working Group should decide to give effect to part performance other than part payment, it may also wish to consider whether this approach presents problems of identification of the larger obligation.

<sup>157</sup> WP.1, art. 16(a) and WP.3, art. 15.

<sup>158</sup> WP.6, art. 11(1).

<sup>159</sup> WP.6, art. 11(2).

<sup>160</sup> See A/CN.9/30, para. 77 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>161</sup> WP.1, art. 16(a). See A/CN.9/30, para. 76, second sentence (*Yearbook*, vol. I, part three, chapter I, D).

<sup>162</sup> WP.3, art. 15(1).

<sup>163</sup> WP.6, art. 11.

<sup>164</sup> WP.6, art. 11(1), last sentence.

<sup>165</sup> Cf. A/CN.9/30, para. 76 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>166</sup> WP.3, art. 15(1).

<sup>167</sup> A/CN.9/30, para. 81 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>168</sup> WP.1, art. 16(b) and WP.3, art. 15(2).

<sup>169</sup> WP.6, art. 11(1).

<sup>170</sup> WP.1. Cf. art. 16 (b): "Performance stated as part performance of a *larger obligation*" (emphasis added).

<sup>171</sup> WP.3, art. 15(3).

<sup>172</sup> WP.3, art. 15(2).

<sup>173</sup> WP.6, art. 11(1), second sentence.

<sup>174</sup> WP.1, art. 16(b).

<sup>175</sup> WP.6, art. 11(1), second sentence ("any other conduct...").

<sup>176</sup> WP.3, art. 15(2): "part *payment* of a *debt*" (emphasis added).

<sup>177</sup> A/CN.9/30, para. 81 (*Yearbook*, vol. I, part three, chapter I, D).

C. *Acknowledgement or performance after expiration of the prescriptive period*

(a) *Acknowledgement*

89. At the first session of the Working Group, a majority supported the view that an acknowledgement subsequent to the expiration of the prescriptive period would be effective.<sup>178</sup>

90. Two drafts set forth a specific rule implementing this view.<sup>179</sup> The unqualified language of the other draft<sup>180</sup> could also support the same rule.<sup>181</sup>

(b) *Performance after expiration of the period; restitution*

91. Two drafts deal specifically with performance of an obligation after expiration of the prescriptive period; both deny restitution or recovery of the performance even if the obligor did not know at the time of performance that the prescriptive period had expired.<sup>182</sup> This issue was considered at the first session of the Working Group but consensus was not reached.<sup>183</sup> The Commission did not discuss the issue.

92. The Working Group may conclude that its approach to the effect of acknowledgement subsequent to the expiration of the period would be relevant to the present issue of the effect of performance subsequent to the expiration of the period.

VIII. RECOURSE TO BARRED CLAIMS BY COUNTER-CLAIM OR SET-OFF

A. *Counter-claims: cross action*

93. The Working Group at its first session agreed that the use of claims barred by prescription to establish *affirmative recovery* against the other party should not be permitted.<sup>184</sup> This result would probably be reached under two of the drafts.<sup>185</sup> The other draft is to the same effect where a counter-claim is based on a claim on which the prescriptive period has already expired;<sup>186</sup> the draft treats counter-claim in the same way as the recourse to barred claims by set-off.<sup>187</sup>

B. *Set-off*

94. At the first session of the Working Group, set-off was understood to be such a situation where claims by two parties against each other might be deemed to have cancelled each other or where the

smaller claim might be deemed to have reduced the larger opposing claim.<sup>188</sup> (The term "set-off" may have a narrower meaning in some legal systems.) On the question whether recourse to set-off should be allowed for barred claims, it was agreed that there should be some opportunity, but that this opportunity should be limited.<sup>189</sup> The Working Group, however, did not reach consensus on the detailed implementation of this general position. The Commission did not consider the question.

95. Two of the drafts follow different approaches,<sup>190</sup> while the other is silent on this issue.<sup>191</sup>

(a) Under one draft, (i) the claim used for set-off must have arisen out of "the same legal relationship", and (ii) the opportunity to use the claim for set-off must have arisen before that claim was barred by prescription.<sup>192</sup>

(b) Under the other draft, the claim made by way of set-off is deemed to be a separate claim and consequently must be asserted before the expiration of the prescriptive period in respect of that claim.<sup>193</sup> (The claim used for set-off is, however, deemed to have been asserted on the same date the suit was brought against one who is asserting the set-off.)<sup>194</sup>

96. A difference between the approaches of the two drafts<sup>195</sup> may be illustrated by the following example: Assume the prescriptive period is five years. A's claim against B arises in 1970 and B's claim against A arises in 1968. A institutes an action against B in 1974.

(a) Under one draft,<sup>196</sup> the two rights had automatically cancelled each other before 1973. Consequently, in spite of the fact that five years had expired with regard to B's claim at the time A brought suit in 1974, B may use his claim to diminish or extinguish A's recovery. However, an important limitation to the availability of the set-off under this proposal is that the claims used for set-off must have arisen out of "the same legal relationship". (Query: Would this be construed as referring to the legal relationship resulting from a single sale? Or would the relationship from a series of sales be included?)

(b) Under the other draft,<sup>197</sup> the two claims are "separate", and, therefore, B's claim may not be asserted by way of set-off. However, if A institutes an action against B *before* 1973, by virtue of a separate article of the proposal,<sup>198</sup> B may assert his claim in this

<sup>178</sup> *Ibid.*, paras. 78-80.

<sup>179</sup> WP.3, art. 15(6) and WP.6, art. 11(2).

<sup>180</sup> WP.1, art. 16(a).

<sup>181</sup> But *cf.* WP.1, art. 7 (the right is "extinguished").

<sup>182</sup> WP.1, art. 21 and WP.3, art. 18(1).

<sup>183</sup> A/CN.9/30, paras. 119-121 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>184</sup> *Ibid.*, paras. 116-118.

<sup>185</sup> WP.6 (no specific provision), and WP.1, art. 22 (reference only to set-off).

<sup>186</sup> WP.3, art. 17(3); for a minor variation, *cf.* WP.3, art. 8(2).

<sup>187</sup> See paras. 95-96.

<sup>188</sup> A/CN.9/30, para. 117 (*Yearbook*, vol. I, part three, chapter I, D).

<sup>189</sup> *Ibid.*, para. 118.

<sup>190</sup> WP.1 and WP.3.

<sup>191</sup> WP.6.

<sup>192</sup> WP.1, art. 22. See WP.1, explanatory note, chapter VIII (the wording of art. 22, if literally construed, may lead to a different conclusion).

<sup>193</sup> WP.3, art. 17(3).

<sup>194</sup> WP.3, art. 8(2).

<sup>195</sup> WP.1 and WP.3.

<sup>196</sup> WP.1, art. 22.

<sup>197</sup> WP.3, art. 17(3).

<sup>198</sup> WP.3, art. 8(2).

action after 1973. (The extent of delay allowed in asserting a set-off or counter-claim in a pending action would presumably be subject to local procedural rules.)

It will be noted that this draft<sup>199</sup> (unlike the other proposal<sup>200</sup>) does not require that the opposing claims arise out of the same legal relationship.

<sup>199</sup> WP.3.

<sup>200</sup> Foot-note 196, *supra*.

**2. Working Group on Time-limits and Limitations (Prescription); report on the work of the second session (including text of a preliminary draft of a uniform law on prescription and commentary thereon), 10-21 August 1970 (A/CN.9/50) \***

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## INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session, held in March 1969, established a Working Group of seven members of the Commission. This Working Group was requested to study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention.<sup>1</sup> The proposed convention would establish a general period of extinctive prescription by virtue of which claims arising from the international sale of goods would be extinguished or barred unless presented to a tribunal within a specified limitation period.

2. The Working Group held its first session in August 1969. At this session the Working Group analysed the basic issues involved in the preparation of a Uniform Law on this subject and prepared a report (A/CN.9/30)<sup>2</sup> which was considered by the Com-

mission at its third session in April 1970. The Commission requested the Working Group to hold a second meeting to prepare a tentative draft convention setting forth uniform rules on the subject for submission at its fourth session.<sup>3</sup> The Commission also decided that a questionnaire should be addressed to Governments and to interested international organizations, in order particularly to ascertain the views of those engaged in business in relation to the length of the period of limitation and any other relevant issue.<sup>4</sup>

3. The Working Group held its second session at the United Nations Office at Geneva from 10 to 21 August 1970. The following members of the Working Group were represented: Argentina, Czechoslovakia, Japan, Norway, the United Arab Republic and the United Kingdom of Great Britain and Northern Ireland. The meeting was also attended by observers from the Council of Europe, the Hague Conference on Private International Law and the International Institute for the Unification of Private Law (UNIDROIT). The list of participants is contained in annex IV.

4. The Working Group had before it preliminary drafts of a uniform law submitted by Argentina, Czechoslovakia, and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.1, 3 and 6) and reports on specific subjects submitted by Belgium,

\* 1 February 1971.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969) (herein cited UNCITRAL, report on second session (1969); all numbered references are to paragraphs), 46; *Yearbook of the United Nations Commission on International Trade Law* (hereafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A.

<sup>2</sup> Report of the Working Group on Time-limits and Limitations. (Prescription) in the International Sale of Goods, on its session held at Geneva from 18 to 20 August 1969 (A/CN.9/30) (herein cited report of the Working Group on its first session (1969); all numbered references are to paragraphs); UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its third session, (1970), (herein cited UNCITRAL, report on third session (1970); all numbered references are to paragraphs), 97; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>4</sup> *Ibid.*, 89.

Czechoslovakia, Japan,, Norway, the United Arab Republic and the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.1/WP.2, 4, 4/Add.1, 5, 7, 8 and 10). The Working Group had also before it a working paper by the Secretariat (A/CN.9/WG.1/WP.9) The document and working papers before the Working Group are listed in annex V.

5. The Working Group elected the following officers:

Chairman: Mr. Stein Rognlien (Norway).

Rapporteur: Mr. Ludvik Kopác (Czechoslovakia).

#### ACTION WITH RESPECT TO UNIFORM LAW

6. At this session, the Working Group prepared a Preliminary Draft of Uniform Law on Prescription (Limitation) in International Sale of Goods. The text of the Law is contained in annex I.

7. Instead of reporting in detail the progress of discussions during the session, the Working Group requested the Secretariat to prepare a Commentary on provisions of the Preliminary Draft. This Commentary was prepared by the Secretariat after the meeting, taking into consideration the discussion at the session, and was modified in response to suggestions received from a

member of the Working Group. The Commentary is contained in annex II.

8. As the title states, this is a Preliminary Draft; significant problems remain unsolved.<sup>5</sup> In addition, problems of drafting and style will, of course, receive attention in the preparation of succeeding versions. However, the presentation of this draft for criticism and comments is a necessary step towards the improvement and perfection of the Uniform Law.

9. The Working Group also approved the substance of a questionnaire on the length of the prescriptive period and related matters. The questionnaire, which was addressed to Governments and to international organizations, is reproduced in annex III. Pending the receipt of the information requested in the questionnaire the length of the limitation period is stated in the alternative in the preliminary draft Law.<sup>6</sup>

<sup>5</sup> See, e.g. commentary to article 1 at para. 15, comments following articles 3 and 4; commentary to article 5 at paras. 2 and 3, commentary to article 10 at para. 7, comment following article 14, commentary to article 18, at para. 3, and comment following article 25.

<sup>6</sup> See art. 6. Also see comment following article 14 and commentary to article 18 at para. 3.

### ANNEX I

#### Text of a preliminary draft of a Uniform Law on Prescription (Limitation) in International Sale of Goods (August 1970)

(Prepared by the UNCITRAL Working Group on Prescription at its second session held in Geneva, 10-21 August 1970)

#### SPHERE OF APPLICATION OF THE LAW

##### Article 1

(1) This Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller arising from a contract of international sale of goods as defined in article 4 of this Law or from a guarantee incidental to such a contract, or arising by reason of the breach, termination or invalidity of such a contract or guarantee.

(2) In this Law "the limitation period" means the period within which the rights of the parties may be enforced in legal proceedings or otherwise exercised.<sup>a</sup>

(3) This Law shall not affect a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party [or upon the occurrence of an event] or upon the performance of an act other than the exercising of the right within a certain period of time.

(4) In this Law:

(a) "Buyer" and "seller" means persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or duties under the contract of sale;

(b) "Party" and "parties" means the buyer and seller and persons who guarantee their performance;

(c) "Guarantee" means a personal guarantee given to secure

the performance by the buyer or seller of an obligation arising from the contract of sale;

(d) "Creditor" means a party seeking to enforce a right, whether or not such right is for a liquidated sum of money;

(e) "Debtor" means a party against whom the creditor seeks to enforce such a right;

(f) "Legal proceedings" includes judicial, administrative and arbitration proceedings;

(g) "Person" includes any corporation, company, or other legal entity;

(h) "Writing" includes telegram and telex.

##### Article 2

This Law shall not apply to rights based upon:

(a) Liability for the death of, or injury to the person of, the buyer;

(b) Liability for nuclear damage caused by the goods sold;

(c) A lien, mortgage or other security interest in property;

(d) A judgement or award made in legal proceedings;

(e) A document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;

(f) A bill of exchange, cheque, or promissory note;

(g) A documentary letter of credit.

##### Article 3

[Conflict of Laws]

##### Article 4

[Definition of "a contract of international sale of goods" and related matters.]

<sup>a</sup> RESERVATION IN CONVENTION

Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare that it will apply the Uniform Law only to the enforcement of rights asserted in legal proceedings and in consequence may delete the words "or otherwise exercised" in the definition of "the limitation period in article 1, paragraph 2 of the Uniform Law".

**Article 5**

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

**THE LIMITATION PERIOD****Article 6**

The limitation period shall be [three] [five] years.

**COMMENCEMENT OF THE LIMITATION PERIOD****Article 7**

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 9, the limitation period in respect of any right arising out of a breach of the contract of sale shall commence on the date on which such breach of contract occurred.

(2) Where one party is required as a condition for the acquisition or enforcement of such a right to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a right arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the date on which such defects or other lack of conformity are discovered or damage therefrom ensues.

(4) Where the contract of sale contemplates that the goods sold are at the time of the conclusion of the contract in the course of carriage, or will be carried, to the buyer by a carrier, the limitation period in respect of rights arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are duly placed at the disposition of the buyer by the carrier, or are handed over to the buyer, whichever is the earlier.

(5) Where, as a result of a breach by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which such breach of contract occurred, irrespective of any subsequent failure by the party in default to perform on the date when performance is due; otherwise the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which breach of contract occurred, irrespective of any other breach of the contract in relation to prior or subsequent instalments; otherwise the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

**Article 8**

Subject to the provisions of article 9, where a right arises out of a contract of sale or a guarantee incidental thereto, or where a right arises by reason of termination or invalidity of such a contract or guarantee, but does not arise out of a breach of a contract, the limitation period shall commence on the date on which the right could first be exercised.

**Article 9**

Where the contract of sale contains an express undertaking on the part of the seller relating to the goods and such undertaking is stated to have effect for a period of time, whether

expressed in terms of a specific period of time or otherwise, the limitation period in respect of a right relating to any matter covered by the undertaking shall commence on the date on which the buyer first informed the seller of such right; provided that the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking.

**INTERRUPTION OF THE LIMITATION PERIOD:  
LEGAL PROCEEDINGS; ACKNOWLEDGEMENT****Article 10**

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

- (i) As instituting judicial proceedings for the purpose of obtaining satisfaction of his right; or
- (ii) If judicial proceedings have already been commenced by the creditor against the debtor in relation to another right, as invoking his right in the course of those proceedings for the purpose of obtaining satisfaction of that claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the right against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

**Article 11**

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitration proceedings by requesting that the right in dispute be referred to arbitration in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

**Article 12**

(1) The provisions of this article shall apply where any legal proceedings are commenced upon the occurrence of any of the following events:

- (a) The death or incapacity of the debtor;
- (b) The bankruptcy or insolvency of the debtor;
- (c) Where the debtor is a corporation, company or other legal entity, the dissolution of such corporation, company or legal entity;
- (d) The seizure or transfer of the whole or part of the assets of the debtor.

(2) The limitation period shall cease to run when the creditor performs an act recognized under the law of the jurisdiction where such act is performed as the assertion of a right in those proceedings under that law for the purpose of obtaining satisfaction of his claim.

(3) Except as provided in this article, the limitation period shall not cease to run or in any other way be affected by the events referred to in paragraph 1 of this article.

**Article 13**

(1) Where the debtor acknowledges his obligation to the creditor, a new limitation period of [three] [five] years shall commence to run by reason of and from the date of such acknowledgement.



(2) The acknowledgement shall be evidenced in writing.

(3) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(4) Payment of interest shall be treated as payment in respect of the principal debt.

(5) The provisions of this article shall apply whether or not the limitation period prescribed by articles 6 to 9 has expired.

#### EXTENSION OF THE LIMITATION PERIOD

##### Article 14

[If the creditor and the debtor have entered into negotiations on the merits of the claim [without reserving the right to invoke limitation], and if the fact of such negotiations is evidenced in writing, the limitation period shall not expire before the end of one year from the date on which such negotiations have been broken off or otherwise come to an end, but at the latest one year from the date on which the period would otherwise have expired according to articles 6 to 9.]

##### Article 15

Where, as a result of a circumstance which is not personal to the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his right, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

##### Article 16

Where, by reason of the debtor's misstatement or concealment of his identity or address, the creditor is prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the creditor discovered the fact misstated or concealed, or could with reasonable diligence have discovered it.

##### Article 17

(1) Where the creditor has commenced judicial or arbitration proceedings in accordance with article 10 or 11, or has asserted his right in legal proceedings in accordance with article 12, but has subsequently discontinued the proceedings, or withdrawn his claim, the limitation period shall be deemed to have continued to run.

(2) Subject to the provisions of paragraph 1 of this article, if the court or arbitral tribunal has declared itself or been declared incompetent to adjudicate upon the claim of the creditor, or where any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended.

(3) Where an arbitration has been commenced in accordance with article 11, but it has been ordered that the arbitration shall cease to have effect or that the award shall be set aside, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such order was made.

#### MODIFICATION OF THE LIMITATION PERIOD

##### Article 18

(1) The limitation period cannot be modified or affected by

any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.

(2) The debtor may, at any time [after the commencement of the limitation period prescribed in articles 7 to 9], by a declaration to the creditor extend the limitation period or declare that he will not invoke limitation as a defence in legal proceedings; but such declaration shall in no event have effect beyond the end of three years from the date on which the period would otherwise expire or have expired in accordance with articles 6 to 9.

(3) The declaration referred to in paragraph 2 of this article shall be evidenced in writing.

(4) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or enforcement or continuance of a right is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

#### EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

##### Article 19

Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.

##### Article 20

(1) Subject to the provisions of paragraph 2 of this article and of article 19, no right which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his right as a defence for the purpose of set-off against a right asserted by the other party:

(a) If both rights relate to the same contract; or

(b) In other cases, if the rights could have been set-off at any time before the date on which the limitation period expired.

##### Article 21

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

##### Article 22

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interests on that debt.

#### CALCULATION OF THE PERIOD

##### Article 23

The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month.

##### Article 24

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 10 or asserts a right as envisaged in article 12, the limitation period shall be extended so as not to expire until the end of

the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction.

jurisdiction shall be held to have been barred by reason of the operation of this Law if the limitation prescribed in articles 6 to 9 commenced to run before the commencement of this Law in that jurisdiction.

#### PRESERVATION OF EXISTING RIGHTS

##### Article 25

[(1) No right asserted in any legal proceedings in any

(2) Nothing in this Law shall revive any right barred before the commencement of this Law in the jurisdiction where such right is relied on except in so far as a right may be revived by an acknowledgement or part performance made in accordance with the provisions of article 13.]

## ANNEX II

### Commentary on preliminary draft of a Uniform Law on Prescription (Limitation) in International Sale of Goods

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## Sphere of application of the Law

## Article 1

## [INTRODUCTORY PROVISIONS: DEFINITIONS] \*

(1) This Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller arising from a contract of international sale of goods as defined in article 4 of this Law or from a guarantee incidental to such a contract, or arising by reason of the breach, termination or invalidity of such a contract or guarantee.

(2) In this Law "the limitation period" means the period within which the rights of the parties may be enforced in legal proceedings or otherwise exercised.<sup>a</sup>

(3) This Law shall not affect a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party [or upon the occurrence of an event] or upon the performance of an act other than the exercising of this right within a certain period of time.

(4) In this Law:

(a) "Buyer" and "seller" means persons who buy or sell, or agree to buy or sell, goods, and the successors to and assigns of their rights or duties under the contract of sale;

(b) "Party" and "parties" means the buyer and seller and persons who guarantee their performance;

(c) "Guarantee" means a personal guarantee given to secure the performance by the buyer or seller of an obligation arising from the contract of sale;

(d) "Creditor" means a party seeking to enforce a right, whether or not such right is for a liquidated sum of money;

(e) "Debtor" means a party against whom the creditor seeks to enforce such a right;

(f) "Legal proceedings" includes judicial, administrative and arbitration proceedings;

(g) "Person" includes any corporation, company, or other legal entity;

(h) "Writing" includes telegram and telex.

## COMMENTARY

I. *Basic scope and objective of the Uniform Law*

1. This Law is concerned essentially with the period of time within which parties may bring legal proceedings to exercise their rights or claims arising from a contract of international sale of goods.

2. Divergencies in national rules governing the limitation of rights or claims create serious difficulties. Limitation periods under national laws vary widely. Some periods are short in relation to the practical requirements of international transactions, in view of the time that may be required for negotiations and for the institution of legal proceedings in a foreign and possibly distant country. Other periods are longer than are appropriate for transactions involving the international sale of goods—sometimes a consequence of the use of the same limitation period for a wide variety of differing transactions. Some of these periods fail to provide the essential protection that should be afforded by limitation rules. This includes protection from the loss of evidence necessary for the fair adjudication of claims and protection from the uncertainty and possible threat to solvency and to business stability from delayed settlement of disputed claims.

3. National rules not only differ, but in many instances are difficult to apply to international sales transactions. One difficulty arises from the fact, mentioned above, that some national laws apply a single rule on limitations to a wide variety of transactions and relationships. As a result, the rules are expressed in general and sometimes vague terms that are difficult to apply to the specific problems of an international sale. This difficulty is enhanced for merchants and lawyers who are unfamiliar with the implication of these general concepts and the techniques of interpretation used in a foreign legal system.

<sup>a</sup> RESERVATION IN CONVENTION

Any State may, at the time of the deposit of its instrument of ratification or accession to the present Convention, declare that it will apply the Uniform Law only to the enforcement of rights asserted in legal proceedings and in consequence may delete the words or otherwise exercised" in the definition of "the limitation period" in article 1, paragraph 2 of the Uniform Law.

\* Captions were not drafted at the session of the Working Group but are inserted for the ease of reference and should not be considered as parts of the text of the preliminary draft.

4. Perhaps even more serious is the uncertainty as to which national law applies to an international sales transaction. Apart from the problems of choice of law that customarily arise in an international transaction, problems of limitation (or prescription) present a special difficulty of characterization or qualification: some legal systems consider these rules as "substantive" and therefore must decide which law is applicable; other systems consider them as part of the "procedural" rules of the *forum*; still other systems follow a combination of the above approaches.

5. The result is an area of grave doubt in international legal relationships. The confusion involves more than the choice of the manner of approaching and describing a legal relationship. An unexpected or severe application of a rule of limitation may prevent any redress for a just claim; a lax rule of limitation may fail to provide adequate protection against stale claims that may be false or unfounded. The problems are sufficiently serious to justify the preparation of uniform rules for claims arising from the international sale of goods.

6. Under article 1 (1), the Law applies both to the "limitations of legal proceedings" and to "the prescription of the rights" of the parties. These two forms of expression were employed since different legal systems employ varying terminology with respect to the effect of delay in bringing legal proceedings to exercise rights or claims. Consequently, it is important to make it clear that the rules of this Law do not vary because of differing terminology of national law. This approach is vital in view of the international character of the Law and its objective to promote uniformity in interpretation and application.

7. Specific aspects of the Law's sphere of application will be discussed in relation to: (a) the parties governed by the Law; (b) the types of transactions and claims or rights that are subject to the period of prescription.

(a) *The parties*

8. Paragraph 1 of article 1 shows that the Law is directed to the rights or claims arising from the relationship between the "buyer" and "seller". These terms, as defined in article 1 (4) (a), includes the "successors to and assigns of their rights or duties under the contract of sale". The Law would thus embrace the succession of right or duties by operation of law (as on death or bankruptcy) and the voluntary assignment by a party of his rights or duties under a sales contract. One important type of "successor" would be an insurer who becomes subrogated to rights under a sales contract.

9. Paragraph 1 of article 1 provides that the Law also applies to rights or claims arising under "a guarantee incidental to" a sales contract; under article 1 (4) (c), "guarantee" extends only to a "personal" guarantee—i.e., an *in personam* undertaking as contrasted to an *in rem* or property interest. (See also article 2 (c) providing that the Law shall not apply to rights based on "a lien, mortgage or other security interest in property".) The provision in article 1 (1) specifying that the guarantee must be "incidental to" the sales contract, and the definition of "guarantee" in article 1 (4) (c) makes it clear that the Law does not apply to an undertaking which is independent of the sales contract. This principle is illustrated by article 2 (g) which specifically excludes documentary letters of credit, since the obligation under such letters of credit arises on the presentation of specified documents and does not depend on proof of performance under the contract of sale.

(b) *Transactions subject to the Law: types of claims or rights*

10. The Law applies to a contract of international sale of goods and to a guarantee incidental to such a contract. The definition of "international sale of goods" will be set forth in article 4.

11. Paragraph 1 of article 1 provides that the Law shall apply to rights or claims "arising from a contract" of international

sale of goods. The Law does not apply to claims that arise independent of the contract, such as claims based on tort or *delict*. The references in article 1 (1) to the "contract" and to the relationship between the "buyer and seller" also exclude claims against a seller by a person who has purchased the goods from someone other than the seller. For example, where a manufacturer sold goods to a distributor who resold the goods to the consumer, a claim by the consumer against the manufacturer would not be governed by the Law.

12. The Law embraces two basic types of rights or claims between the seller and buyer. One type is for enforcement or other remedy arising from "breach" of the sales contract; a second type concerns rights or claims arising by reason of the "termination or invalidity" of such a contract (articles 1 (1)).<sup>1</sup> For example, the buyer may have made an advance payment under a contract to the seller which the seller fails to perform because of impossibility, government regulation or similar supervening event. Whether this event will constitute an excuse for the seller's failure to perform may often be in dispute. Hence, the buyer may need to bring an action against the seller presenting in the alternative claims for breach and for restitution of the advance payment. Because of this connexion between the two types of claims, both are governed by this Law.<sup>2</sup>

13. Paragraphs 2 and 3 of article 1 are designed, *inter alia*, to make clear that this Law has no effect on certain rules of local law involving "time-limits" (*déchéance*); typical examples are requirements that one party give notice to another party within limited periods of time describing defects in goods or stating that goods will not be accepted because of defects. These requirements of notice by one party to the other party are designed to permit the parties to take prompt action in adjusting current performance under a sales transaction—such as making prompt tests to preserve evidence as to the quality of goods or taking control over and salvaging rejected goods.

14. The periods of time for such action are usually very brief, and often are stated in flexible terms. For example, article 39 (1) of the Uniform Law on the International Sale of Goods (ULIS) attached to the Hague Convention of 1964 provides that "the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given the seller notice thereof promptly after he has discovered the lack of conformity or ought to have discovered it". Other articles of ULIS provide that a party may avoid the contract if he makes such a declaration to the other party, under varying circumstances, "within a reasonable time" (articles 26, 30, 62 (1)) or "promptly" (articles 32, 43, 62 (2), 66 (2), 67, 75). These brief, flexible periods for special types of action by the parties are quite different from a general period of limitations.<sup>3</sup> Consequently, paragraph 3 of article 1 states, in part, that this Law shall not affect "a rule of the applicable law providing a particular time-limit by reason of which the acquisition or continuance of a right is dependent upon one party giving notice to the other party..."<sup>4</sup>

<sup>1</sup> Here and at other points, the discussion does not take full account of guarantees, which also are included within the scope of this Law under paragraph 1 of article 1.

<sup>2</sup> With respect to the interpretation of such terms to achieve uniformity, see article 5, and the discussion herein in paragraphs 6 and 18. For other provisions relating to claims by reason of the breach, termination or invalidity of a contract, see articles 7 and 8.

<sup>3</sup> Article 49 of ULIS provides: "The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in article 39, unless he had been prevented from exercising his right because of fraud on the part of the seller". Following suggestions that this provisions might be deemed not merely a "time-limit" but a limitation period, the Working Group recommended deletion of article 49 from the uniform rules on sales.

<sup>4</sup> As to the effect of a contract clause establishing a time-limit, see article 18 (4) and accompanying commentary at paragraph 6. Also see article 7 (2).

15. Paragraph 3 of article 1 also preserves rules of applicable law providing "a particular time-limit" by reason of which the acquisition or continuance of a right is dependent "[upon the occurrence of an event]<sup>5</sup> or upon the performance of an act other than the exercising of this right within a certain period of time". Thus, this paragraph would preserve various types of national rules which, while variously expressed, are not comparable to the general period of limitation governed by this Law.

16. The general definition of "limitation period" in paragraph 2 of article 1 is consistent with the more specific rules in paragraph 3. The reservation noted in foot-note<sup>a</sup> to article 1 (2) of the Uniform Law was inserted because of the

<sup>a</sup> In the draft Law, the words "upon the occurrence of an event" are set in brackets to indicate doubts as to whether this phrase should be retained, in view of questions as to whether this expression could be clearly understood in the setting of some legal systems. Thus, this language might be read as contradicting the view that national law (rather than the Uniform Law) should govern "rights" whose creation is dependent upon a future event.

difficulty for some legal systems in applying the phrase "or otherwise exercised".

## II. Definitions and undefined basic terms: uniform interpretation

17. The definitions of words contained in paragraph 4 of article 1 can best be considered in connexion with provisions that employ the word in question. For example, the definition of "legal proceedings" in paragraph 4 (f) can best be considered in connexion with articles 10 to 12.<sup>6</sup>

18. Certain other words used in this Law (such as "rights" and "claims") are not defined, since their meaning can best be seen in the light of the context in which they are used and the objectives of this Law. It is important to note that the construction of these words by reference to the varying conceptions of national law would be inconsistent with the international character of this Law and its objective to promote uniformity in interpretation and application.<sup>7</sup>

<sup>6</sup> Also see commentary to article 12 at para. 1, *infra*.

<sup>7</sup> See article 5 and accompanying commentary, *infra*.

## Article 2

### [EXCLUSIONS]

This Law shall not apply to rights based upon:

- (a) Liability for the death of, or injury to the person of, the buyer;
- (b) Liability for nuclear damage caused by goods sold;
- (c) A lien, mortgage or other security interest in property;
- (d) A judgement or award made in legal proceedings;
- (e) A document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought;
- (f) A bill of exchange, cheque, or promissory note;
- (g) A documentary letter of credit.

### COMMENTARY

1. Paragraph (a) excludes from the Law rights or claims based on the death or injury to the person of the buyer. If such a claim is based on tort (or *delict*) rather than on a sales contract, the claim would, in any event, be excluded from this Law by virtue of the provisions of article 1 (1) that the Law applies to rights or claims "arising from a contract of international sale of goods".<sup>1</sup> Under some circumstances claims for liability for the death or personal injury of the buyer might be based on the failure of the goods to comply with the contract; however, it was thought inappropriate to subject such claims to the same period of limitations as would be applicable to the usual type of commercial claims.<sup>2</sup> Where a claim by the buyer against the seller arises from the contract and is based on pecuniary loss from personal injuries to persons *other than himself*, such claim is not excluded from this Uniform Law.<sup>3</sup>

2. Paragraph (b) excludes "nuclear damage caused by the goods sold". The effects of such damage may not appear until a long period after exposure to radioactive materials. In addition, special periods for the extinction of such actions are contained

in the Vienna Convention on Civil Liability for Nuclear Damages of 21 May 1963.<sup>4</sup>

3. Paragraph (c) excludes rights based on "a lien, mortgage or other security interest in property". This exclusion is consistent with the basic provisions of article 1 (1) that the Law applies to claims or rights "arising from a contract of international sale of goods"; the exclusion is also consistent with the further provisions that guarantees brought within the Law are limited to "personal" guarantees (article 1 (4) (c))—i.e. claims *in personam*, as contrasted with *in rem* claims against property.<sup>5</sup> It will be noted that article 2 (c) excludes rights based not only on "lien" and "mortgage" but also "other security interest in property". This latter phrase is sufficiently broad to exclude rights asserted by a seller for the recovery of property sold under a "conditional sale" or similar arrangement designed to permit the seizure of property on default of payment. Of course, the expiration of the period of limitation applicable to a right or claim may have serious consequences with respect to the enforcement of a lien, mortgage or other interest securing that right or claim. However, for reasons given in connexion with article 20 (1) (commentary to article 20 at para. 2), this Law does not attempt to prescribe uniform rules with respect to such consequences, and leaves these questions to applicable national law; it may be expected that the tribunals of signatory States in solving these problems will give full effect to the basic policies of this Law with respect to the enforcement of stale claims.

4. Under paragraph (d), rights based on "a judgement or award made in legal proceedings" are excluded even though the judgement or award results from a claim arising from an international sale. In actions to enforce a judgement it may be difficult to ascertain whether the underlying claim arose from an international sale of goods and satisfied the other requirements for the applicability of this Law. In addition, the enforcement of a judgement or award involves local procedural rules (including rules concerning "merger" of the claim in the judgement) and thus would be difficult to subject to a uniform rule limited to the international sale of goods. (The view was expressed that if the enforcement of judgements should be

<sup>1</sup> See commentary to article 1 at para. 11, *supra*.

<sup>2</sup> See article 7 (3) on the date of the commencement of the limitation period for rights or claims relying on defects in or other lack of conformity of the goods.

<sup>3</sup> Alternative proposals by one delegate, related to the above provision are contained in appendix A to this annex. The first alternative would amend article 2 (a) by excluding claims in respect of physical damage or injury caused by the goods and other tangible property or to the person of the buyer or any other person. The second alternative would amend article 8 by providing a special rule on the commencement of the limitation period in such cases.

<sup>4</sup> See article VI (basic periods of ten or twenty years, subject to certain adjustments); article 1 (1) (k) (definition of "nuclear damage").

<sup>5</sup> See commentary to article 1 at para. 9, *supra*.

limitation period for such enforcement should be longer than that applicable to the underlying claim: consideration should be given to a period of ten years.)

5. Paragraph (e) excludes rights based on "a document on which immediate enforcement or execution can be obtained in accordance with the law of the jurisdiction where such enforcement or execution is sought". Such documents subject to immediate enforcement or execution are given different names and rules in various jurisdictions (e.g. the *titre exécutoire*), but they have an independent legal effect that differentiates them from claims that require proof of the breach of the contract of sale. On the problems of unification of enforcement actions under varying procedural systems, see the discussion of article 2 (d) (para. 4, *supra*). For the exclusion of rights based on documents having a legal identity distinct from the sales contract, see the discussion of article 2 (f) (para. 6, *infra*).

6. Paragraph (f) excludes rights based on "a bill of exchange, cheque or promissory note". This exclusion is significant for present purposes when such an instrument has been given (or

accepted) in connexion with the obligation to pay the price for goods sold in an international transaction subject to this Law. Such instruments are in many cases governed by international conventions or national laws that state special period of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transaction; and, the obligation under the instrument is distinct (or "abstracted") from sales transaction from which the instrument originated.<sup>6</sup> In view of these facts, rights under the instruments described in paragraph (f) are excluded from this Law. Contrast assignees of the sales contract (art. 1 (4) (a)).

7. Paragraph (g) excludes rights based on "a documentary letter of credit". The reason for this exclusion has been explained in the commentary to article 1 at paragraph 9, *supra*.

<sup>6</sup> Cf. the discussion of articles 1 (1) and 1 (4) (c) and commentary to article 1 at para. 8, *supra* with respect to guarantees.

### [Article 3]

#### [CONFLICT OF LAWS]

[No draft provision is proposed at this time to deal with the problems of the contact between an international sales transaction and a contracting State that is required for applicability of this Law (choice of law). In connexion with the proposed uniform rules of substantive law for the international sale of goods (ULIS), a draft provision was considered, and approved in substance, at the third session of UNCITRAL.<sup>1</sup> The Commission, however, requested the Working Group on Sales to re-examine this provision in the light of comments made at the third session. Pending this re-examination and action by the Commission at its fourth session, the Working Group on Prescription decided to defer action on this question. In preliminary consideration of this question it was noted that a general reference to rules on private international law (choice of law) could lead to confusion because of basic differences between the approaches of different legal systems concerning the characterization or qualification of problems of limitation (prescription). Thus, it was reported that, in common law legal systems, limitation is regarded primarily as a matter of procedure, so that the court of the forum will in any event apply its own domestic rules relating to limitation in any legal proceedings

instituted before it. In addition, in some common law systems, e.g. England, the court will also apply the limitation rules of the law applicable to the contract if the applicable law characterizes limitation as a matter of substance and not of procedure. Examples illustrating this point are set forth in the foot-note.<sup>2</sup> Some members of the Working Group were of the opinion that the rules on prescription might justify wider scope than the basic rules on sales, this question was left open for further consideration].

<sup>2</sup> Proceedings are instituted in an English court. The English limitation period (procedure) is six years:

- (i) The applicable law is that of France, where the limitation period is thirty years and treated as a matter of substantive law. The English court will hold the claim to be barred after six years;
- (ii) The applicable law is that of Greece, where the limitation period is five years and is treated as a matter of substantive law. The English court will have regard to the applicable law and hold the claim to be barred after five years;
- (iii) The applicable law is that of the State of X, where the limitation period is five years and is treated as matter of procedure. The English court will not have regard to the limitation rules of State X (since these are procedural) and will hold the claim barred after six years.

For an indication that States with common law background may not always apply rigorously the view that limitations are "procedural", see, *Guaranty Trust Co. v. York*, 326, U.S. 99 (1945).

<sup>1</sup> UNCITRAL report on third session (1970), 26-29.

### [Article 4]

#### [DEFINITION OF "A CONTRACT OF INTERNATIONAL SALE" AND RELATED MATTERS]

[The Working Group on Prescription at its first session concluded that certain rules on the scope of the uniform rules on prescription—the definition of international sale of goods and related matters—should, if possible, be the same as the comparable rules in the uniform rules on sales.<sup>1</sup> The Commission approved this approach and referred this question to the December 1970 meeting of the Working Group on Sales.<sup>2</sup> In view of this action, the Working Group on Prescription

postponed action with respect to the questions of sphere of application that are dealt with in the following articles of ULIS; article 1 (definition of the international sale of goods), article 5 (1) (exclusion of certain commodities and transactions); article 6 (contracts for the supply of goods to be manufactured or produced) and article 7 (civil or commercial character of the contract). The Working Group also reaffirmed the recommendation, made at its first session, that the Working Group on Sales and the Commission should give priority to these issues.]

<sup>1</sup> Report of the Working Group on its first session (1969) (A/CN.9/30), 11.

<sup>2</sup> UNCITRAL, report of third session (1970), 50-51, 77-78.

## Article 5

## [INTERPRETATION TO PROMOTE UNIFORMITY]

In interpreting and applying the provisions of this Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

## COMMENTARY

1. The desirability of conformity with the uniform rules on sales was noted under article 4 above. The Working Group on Prescription is of the view that conformity is also desirable with respect to principles of interpretation. At the same time, this Working Group believes it important for the present preliminary draft to emphasize principles of interpretation that would contribute to uniformity. National rules on prescription (limitation) are subject to sharp divergencies in approach and concept. It is especially important to avoid the construction of the provisions of this Law in terms of the varying concepts of national law.

2. To emphasize the importance of the uniformity of interpretation this preliminary draft includes the proposal set forth in article 5. This article is based on a proposal that received

substantial support at the third session of UNCITRAL.<sup>1</sup> It will be noted that the present article does not include the reference, contained in ULIS article 17, to "the general principles on which the present Law is based". Instead, article 5 refers to the international character of the Law and the need to promote uniformity in its interpretation and application. By its terms, this provision only applies to the interpretation and application of "the provisions of" this Law, and thus does not authorize the broadening of the scope of the Law.

3. The formulation of this article must, of course, be reconsidered in the light of the report of the Working Group on Sales and any action on this subject that may be taken by the Commission at its fourth session.

<sup>1</sup> Questions concerning the approach to the interpretation of uniform international legislation were considered by the Commission at its third session. The discussion centred on the provision of ULIS, art. 17. UNCITRAL report on third session (1970), 52-55. Suggestions for the revision of ULIS article 17 were referred to the Working Group on Sales. *Ibid.* 55.

## The limitation period

## Article 6

## [LENGTH OF THE PERIOD]

The limitation period shall be [three] [five] years

## COMMENTARY

1. The question of the length of the basic period of limitation was considered at the first session of the Working Group and at the third session of the Commission.<sup>1</sup> Most members of the Commission at the third session favoured a period within the

range of three to five years.<sup>2</sup> However, in view of the difference of opinion as to a choice within this range, the Commission decided that a questionnaire on the length of the period and related matters should be addressed to Governments and interested international organizations.<sup>3</sup> Consequently, pending the receipt of the information requested in the questionnaire the number of years is stated in the alternative in this preliminary draft.

<sup>1</sup> Report of the Working Group on its first session (1969) (A/CN.9/30), 49-50; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D. UNCITRAL report on the third session (1970), 85-89; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>2</sup> *Id.*, 85.

<sup>3</sup> *Id.*, 89.

## Commencement of the limitation period

## Article 7

## [BREACH OF CONTRACT]

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 9, the limitation period in respect of any right arising out of a breach of the contract of sale shall commence on the date on which such breach of contract occurred.

(2) Where one party is required as a condition for the acquisition or enforcement of such a right to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

(3) Subject to the provisions of paragraph 4 of this article, the limitation period in respect of a right arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are placed at the disposition of the buyer by the seller according to the contract of sale, irrespective of the date on which

such defects or other lack of conformity are discovered or damage therefrom ensues.

(4) Where the contract of sale contemplates that the goods sold are at the time of the conclusion of the contract in the course of carriage, or will be carried, to the buyer by a carrier, the limitation period in respect of rights arising from defects in, or other lack of conformity of, the goods shall commence on the date on which the goods are duly placed at the disposition of the buyer by the carrier, or are handed over to the buyer, whichever is the earlier.

(5) Where, as a result of a breach by one party before performance is due, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on

which such breach of contract occurred, irrespective of any subsequent failure by the party in default to perform on the date when performance is due; otherwise the limitation period shall commence on the date when performance is due.

(6) Where, as a result of a breach by one party of a contract for the delivery of or payment for goods by instalments, the other party thereby becomes entitled to and does elect to treat the contract as terminated, the limitation period in respect of any right arising out of such breach shall commence on the date on which such breach of contract occurred, irrespective of any other breach of contract in relation to prior or subsequent instalments; otherwise the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

#### COMMENTARY

##### I. Structure of the Law; basic rules

1. The present Law governs two types of claims: (a) those that arise from breach of contract and (b) those that arise from an event other than breach (i.e.: supervening invalidity of the contract may give rise to claims for restitution of advance payment).<sup>1</sup> The present article 7 deals with the commencement of the period of limitation with respect to the first of these two types of claims; article 8 deals with the second type.

2. With respect to claims arising out of breach of contract, article 7 (1) provides that the limitation period shall commence "on the date on which such breach of contract occurred". The application of this basic rule to certain special situations is provided in paragraphs 2 through 6 of article 7 and in article 9, *infra*.

##### II. Notices to the other party

3. The sole effect of article 7 (2) is to clarify the point in time for the commencement of the limitation period under this Law; this paragraph, of course, has no effect on rules of municipal law requiring such notices.<sup>2</sup> The breach of contract has occurred prior to such a notification; consequently, to delay the commencement of the period of limitation until the time of notification would be inconsistent with the basic approach adopted in article 7 (1) of the Law. Moreover, the time of notification may depend on the diligence with which the buyer inspects the goods and gives the notification. Consequently, it has been concluded that the commencement of the period would not be determined by the time of giving notice.<sup>3</sup>

##### III. Claims by buyers relying on non-conformity of the goods

4. Paragraphs 3 and 4 of article 7 are concerned with claims by buyers. To relate these provisions to the general structure of the Law, it may be helpful to consider the following two basic situations in which such claims by buyers may arise.

*Example 7A:* The sales contract required the seller to place goods at the buyer's disposition on 1 June 1970. The seller failed to supply or tender any goods in response to the contract on 1 June or on any subsequent date. The buyer asserts a right to enforce the contract or to recover damages for breach. When does the period of limitation commence?

On the above facts the basic rule of paragraph 1 of article 7 would determine the commencement of the period of limitation for the buyer's claim. Under paragraph 1, "the date on which [the] breach of contract occurred", in the above example, was 1 June, the date for performance required under the contract. (Cf. paras. 5 and 6 of art. 7, to be discussed, *infra*.)

*Example 7B:* On 1 June 1970 the seller placed goods at the disposition of the buyer. On 15 June the buyer notified the

seller that the goods were defective and that he rejected them. (In the alternative, on 15 June the buyer notified the seller that he accepted the goods but would hold the seller responsible for defects in the goods.) Under either alternative, a claim by the buyer against the seller "relying on defects in, or other lack of conformity" of the goods<sup>4</sup> falls within paragraph 3 of article 7. Consequently, the limitation period for such a claim commenced on 1 June 1970, "the date on which the goods are placed at the disposition of the buyer the seller according to the contract of sale...".

5. This last phrase "according to the contract of sale" cannot refer to full compliance by the seller with the contract, since all the cases arising under this subparagraph involve claims by buyers that the goods are defective. Instead, this language was designed to respond to the decision of the Commission that the drafting should avoid the ambiguities that had been encountered in connexion with the legal concept of "delivery".<sup>5</sup> ULIS article 19 (1) provides: "delivery consists in the handing over of goods which conform with the contract". As has been noted, all of the cases governed by this subparagraph involve claims which do not "conform with the contract". In addition, "handing over" would be inappropriate where the buyer refuses to receive the goods because of their defects or where he delays his receipt of the goods. For these reasons, article 7 (3) states that the period commences when the goods are placed "at the disposition of the buyer": the phrase, "according to the contract of sale" points to the circumstances which, under the contract, constitute placing the goods at the buyer's disposition.

6. The concluding phrase of article 7 (3), "irrespective of the date on which such defect or other lack of conformity is discovered or damage therefrom ensues", makes it clear that in cases like examples 7A and 7B, above, the period of limitation commences to run on the date the goods are placed at the disposition of the buyer (1 June 1970, in the above examples) even though the buyer does not discover the defect, or the defect does not result in damage to the buyer, until a later date. This provision reflects a significant choice of policy. The Working Group, at the first session, considered that "the law of limitation must, by its very nature, be definite in operation".<sup>6</sup> If the discovery of defects should start the running of a new limitation period for claims based on such defects, doubt could arise as to the commencement of the period: only the buyer would be in control of the evidence concerning his discovery of the defect and difficult questions of fact could arise as to when he first discovered (or should have discovered) the defect. In addition, claims might be pressed at such a late date that it would be difficult to produce trustworthy evidence on the true condition of the goods at the time they were first received by the buyer.

7. The rule of article 7 (3) can produce harsh results in some circumstances. But the over-all fairness of the Law needs to be considered in the light of the following factors: (a) the length of the basic period of prescription (article 6, *supra*)—yet to be finally decided; (b) exclusion from the Law (article 2 (a), *supra*) of rights based on "the death of, or injury to the person of the buyer"; (c) confining the Law's scope to rights based on contract—thereby excluding rights based on tort or *delict*. (Article 1, *supra*); (d) the special provisions (article 9, *infra*) for rights based on an express undertaking by the seller which is stated to have effect for a period of time.<sup>7</sup>

<sup>4</sup> The phrase "claims relying on defects in, or other lack of conformity of the goods" includes any respect in which the goods fail to comply with the requirements of the contract and this would include defects as to quality, quantity and the like.

<sup>5</sup> UNCITRAL report on third session (1970), 84; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>6</sup> Report of the Working Group on its first session (1969) (A/CN.9/30) 5; *op. cit.*, *supra*, note 3.

<sup>7</sup> For a proposal for amendment to other provisions of the Law related to the instant problem see commentary to article 8 at para. 3, *infra*, and appendix A to this annex.

<sup>1</sup> See the discussion in commentary to article 1 at para. 12, *supra*.

<sup>2</sup> Also article 1 (3) and its accompanying commentary paras. 13 and 14, article 18 (4) and its accompanying commentary para. 6.

<sup>3</sup> See report of the Working Group on its first session (1969) (A/CN.9/30) 46-47; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.



8. Paragraph 4 of article 7 provides for the application of the principle of paragraph 3 to a specific situation—contracts contemplating the carriage of goods. The basic policy of paragraph 4 is to postpone the starting of the period until the end of the carriage contemplated by the contract—i.e., the “date on which the goods are duly placed at the disposition of the buyer by the carrier”. The next phrase (“or are handed over to the buyer, whichever is the earlier”) deals with the possibility that the goods may be handed over to the buyer in a manner, or at a place or date other than that contemplated by the contract and therefore the goods would not be “duly placed at the disposition of the buyer”.

*Example 7C:* Seller in Santiago agreed to ship goods to the buyer in Bombay: the terms of shipment were “f.o.b. Santiago”. Pursuant to the contract, the seller located the goods on board a ship in Santiago on 1 June 1970. The goods reached Bombay on 1 August 1970, and on the same date the carrier notified the buyer that he could take possession of the goods. On 15 August the buyer took possession of the goods and on 20 August he discovered that the goods were defective and notified the seller of that fact.

Under these facts, the limitation period for the buyer's claim commenced to run on 1 August 1970, since that is the date on which the goods were “placed at the disposition of the buyer by the carrier”. This result is not affected by the fact that under the terms of the contract the risk of loss during the ocean voyage rested on the buyer. Nor is this result affected by the fact that, under some legal systems, it might be concluded that “title” or “ownership” in the goods passed to the buyer when the goods were loaded on the ship in Santiago. Alternative forms of price quotation (f.o.b. Seller's city, f.o.b. Buyer's city; f.a.s.; c.i.f. and the like) have significance in relation to possible changes in freight rates and the manner of arranging for insurance, but they have no significance in relationship to the commencement of the period of limitation. Where the contract contemplates that the goods will be carried to the buyer by a carrier, paragraph 4 of article 7 reflects the general policy that the limitation period in respect of rights arising from defects in or other lack of conformity of the goods should not start to run during the course of carriage. Of course, where the buyer takes effective control over the goods in the seller's city and thereafter ships the goods, neither the policy nor the provisions of this paragraph will apply to delay the commencement of the period of limitation.

#### IV. Breach before performance is due

9. Both paragraphs 5 and 6 deal with problems that arise when a breach of contract by one party affects future performance under the contract. Paragraph 5 establishes the basic general rule; paragraph 6 deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods, in instalments.

##### (a) Paragraph 5: the basic rule

10. The basic rule of paragraph 5 may be illustrated by the following:

*Example 7D.* A contract of sale made on 1 June 1970 calls for the seller to deliver the goods on 1 December. On 1 July the seller (without excuse) notifies the buyer that he will not deliver the goods required by the contract. On 15 July the buyer notifies the seller that in view of the seller's repudiation the contract is terminated.

11. In this example, the limitation period for the buyer's claim might conceivably commence on one of the following three events: (a) the breach (1 July); (b) the notification of termination (15 July); (c) the date for final performance (1 December).

12. On the stated facts the Law chooses alternative (a).<sup>8</sup>

<sup>8</sup> This assumes that under the applicable law the seller's action on 1 July (statement of non-performance) constitutes a breach.

Under article 7 (5), where a party “becomes entitled to and does elect to treat the contract as terminated”, the limitation period runs from “the date on which such breach of contract occurred”—1 July in the foregoing example.

13. It will be noted that under paragraph 5, the above result depends on a decision to “elect to treat the contract as terminated”. If, in the above instances such an election (e.g., by the notification of termination made on 15 July) had not occurred, the “limitation period shall commence on the date when performance is due”—1 December in the above example. The Law, however, does not provide any rule governing the time within which the right to elect the contract as terminated must be exercised. The solution to the question is left to the applicable law. Therefore, under some rules, it may be possible to elect the contract as terminated even if notification to this effect is made after the date when performance became due. In such a case, to the extent that the plaintiff elects to base his claim on the first breach, the limitation period for this claim arising out of such breach shall commence on the date of such breach.

14. In the interest of definiteness and uniformity the period will commence on the earlier (1 July) date only when a party positively “elects” to treat the contract as terminated. Thus, termination resulting from a rule of applicable law that on breach the contract shall be automatically (or *ipso facto*) terminated is not termination resulting from an “election” by a party within the meaning of paragraph 5.

##### (b) Paragraph 6: instalment contracts

15. The rules of paragraph 6 may be clarified by the following example:

*Example 7E.* A contract of sale made on 1 June 1970 requires the seller to sell the buyer 4 000 cwt. of sugar, with deliveries of 1 000 cwt. on 1 July, 1 August, 1 September and 1 October. The second instalment, delivered on 1 August, was so seriously defective that the buyer rightfully took two steps: he rejected the defective instalment and he notified the seller that the contract was terminated as to future instalments.

16. For the purposes of paragraph 6, the relevant action by the buyer was the buyer's election “to treat the contract as terminated” as to future instalments. Paragraph 6 provides that in this case “the limitation period in respect of any right arising out of such breach” shall commence “on the date on which such breach of contract occurred”—1 August in the above example. The provision adds that this rule applies “irrespective of any other breach of contract in relation to prior or subsequent instalments”. Thus, the failure of the seller to deliver sugar on 1 September and 1 October does not start periods of prescription running from those dates: a single period for the August, September and October instalments commences on the date of the breach that entitled the other party to terminate the contract.

17. Paragraph 6, like paragraph 5, leads to a different result when the innocent party does not elect to terminate the contract.

*Example 7F.* The contract is the same as in 7E, above. Each of the four deliveries is defective. The buyer complains to the seller of these defects but does not elect to terminate the contract.

18. On such facts, paragraph 6 provides that “the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred”. Thus, separate periods of limitation would run from the deliveries on 1 July, 1 August, 1 September and 1 October.

19. A proposal for the revision and consolidation of paragraphs 5 and 6 of this article is annexed to appendix B to this annex. Also see commentary to article 8 at para. 3, *infra*.

## Article 8

## [RIGHTS NOT ARISING OUT OF BREACH OF CONTRACT]

Subject to the provisions of article 9 where a right arises out of a contract of sale or a guarantee incidental thereto, or where a right arises by reason of termination or invalidity of such a contract or guarantee, but does not arise out of a breach of a contract, the limitation period shall commence on the date on which the right could first be exercised.

## COMMENTARY

1. The relationship between the scope of articles 7 and 8 has been introduced in the commentary to article 7 at paragraph 1, *supra*, and in the commentary to article 1 at paragraph 12, *supra*. As has been noted, "breach of contract" cannot be used as a starting point for certain types of claims. One such claim is for restitution of advance payments where the performance of the agreed exchange is excused under the applicable law because of impossibility of performance, *force majeure*, and the like. For such claims, article 8 provides that the limitation period shall commence on the date "on which the right could first be exercised".<sup>1</sup>

2. Whether such rights exist and what events will create a substantive right which can be exercised must, of course, be decided under the applicable rules of national law.

3. A proposal for an amendment to deal with physical damage caused by the goods sold to other tangible property, submitted by one delegate, is contained in appendix A to this annex. It is proposed that the period in respect of liability for such damage shall commence from the date on which the damage occurred.

4. One delegate proposed that the problem dealt with in paragraphs 5 and 6 of article 7 should be treated in a more general way. An explanation of the view, and a proposed article 8A dealing more generally with questions of anticipatory breach, instalment sales, and related matters is contained in appendix B to this annex.

<sup>1</sup> One representative proposed that this article provide that "the period shall run from the earliest day to which the creditor could have caused the obligation to become due". Also see report of the working group on its second session (1969) (A/CN.9/30) 22, Alt. C (5); UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, D.

## Article 9

## [EXPRESS UNDERTAKINGS FOR A PERIOD OF TIME]

Where the contract of sale contains an express undertaking on the part of the seller relating to the goods and such undertaking is stated to have effect for a period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period in respect of a right relating to any matter covered by the undertaking shall commence on the date on which the buyer first informed the seller of such right, provided that the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking.

## COMMENTARY

1. Article 9 provides an exception from the basic rules on commencement of the period contained in article 7, particularly the rule of article 7 (3) providing that the limitation period for claims relying on non-conformity of the goods shall commence on the date on which the goods are placed at the disposition of the buyer.<sup>1</sup> Under article 7 (3), the date on which non-conformity is discovered and the date on which damage occurs are both irrelevant. However, this approach has been considered inappropriate where the seller has given the buyer an express undertaking (such as a warranty or guarantee) relating to the goods, which is stated to have effect for a period of time.<sup>2</sup>

2. Consideration was given to a rule that would assure the buyer of a period of one year after the expiration of the time specified in the express undertaking.<sup>3</sup> Further consideration indicated that this period might be inadequate when the defect

appeared towards the end of the guarantee period; on the other hand, the period seemed excessive when the defect appeared shortly after the buyer received the goods. The rule of article 9 was designed to meet both objections.

3. Under this article, the basic prescriptive period of [3] [5] years commences to run on the date on which the buyer first informs the seller of his claim. The time of such notice was selected in the interest of definiteness. Consideration was given to the possible objection that any delay by the buyer in informing the seller would extend the buyer's period for bringing action, and alternative ways of dealing with the problem were considered. It was concluded, however, that in the setting of claims under express undertakings, such as warranties or guarantees, there was not practical likelihood that buyers would abuse this provision. The buyer's desire for prompt adjustment of his claim would lead to prompt notification; certainly no buyer would delay his opportunity for an adjustment in order to obtain the remote and speculative advantage of an extended period of limitation. It was also noted that applicable law or the provisions of the express warranty may prevent excessive delay in giving notice (*cf.* ULIS article 39). In addition, article 9 provides a final cut-off date that is applicable regardless of the date of notification: "the limitation period shall in any event expire [three] [five] years after the expiration of the period of the undertaking".

first session. Report of the Working Group on its first session (1969) (A/CN.9/30) 37.

"Where the contract contains an express guarantee relating to the goods which is stated to be in force for a specified time, the period of limitation in respect of any action based on the guarantee shall expire one year after the expiration of such time or [3] [5] years after the delivery of the goods to the buyer, whichever shall be the later."

<sup>1</sup> See commentary to article 7 at para. 4, *supra*.

<sup>2</sup> See report of the Working Group on its first session (1969) (A/CN.9/30) 37-40; UNCITRAL report on third session (1970) 93.

<sup>3</sup> The following was the rule proposed by the Working Group at its

## Interruption of the limitation period: legal proceedings; acknowledgement

## Article 10

## [JUDICIAL PROCEEDINGS]

(1) The limitation period shall cease to run when the creditor performs any act recognized under the law of the jurisdiction where such act is performed:

- (i) As instituting judicial proceedings for the purpose of obtaining satisfaction of his right; or
- (ii) If judicial proceedings have already been commenced by the creditor against the debtor in relation to another right, as invoking his right in the course of those proceedings for the purpose of obtaining satisfaction of that claim.

(2) For the purposes of this article, any act performed by way of counterclaim shall be deemed to have been performed on the same date as the act performed in relation to the right against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

## COMMENTARY

1. The general heading "Interruption of the limitation period" applicable to articles 10 to 13 is intended only to indicate the general character of the problem. The reference to "interruption" does not imply that the consequences of "interruption" under various national legal systems are imported into this Law. In some legal systems "interruption" implies renewal of the period; in other systems the results are different. The consequences under this Law are those specifically stated in each article under this title. Thus, the effect of instituting legal proceedings is that "the limitation period shall cease to run". (Articles 10, 11 and 12) (*cf.* article 13 [effect of acknowledgement]).

2. As was noted earlier (commentary to article 1 at para. 1), the Law is essentially concerned with the time within which the parties to an international sale of goods may bring actions for the redress of claims or rights. Article 6 states the length of the basic limitation period. Articles 19 to 22 state the effects of the expiration of the period; these include the rule (article 20 (1)) that no right for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To round out this structure, article 10 provides that the "limitation period shall cease to run" when a creditor institutes legal proceedings for the purpose of obtaining satisfaction of his claim. The net effect of these rules is substantially the same as providing that a legal proceeding for enforcement may only be brought before the limitation period has expired. However, the approach of this draft, in stating that the limitation period shall "cease to run" when legal action is instituted, provides a basis for dealing with problems that arise when the legal action fails to result in a decision on the merits or is otherwise abortive. See article 17.

3. The central problem of article 10 is to define the stage which judicial proceedings must reach before the expiration of the limitation period. In different jurisdictions, proceedings are instituted in different ways. In some jurisdictions a claim may be filed or pleaded in court only after the plaintiff has taken certain preliminary steps (such as the service of a "summons" or "complaint"). In some jurisdictions, these preliminary steps may be taken out of court by the parties (or their attorney); nevertheless these steps are governed by the State's rules on procedure, and may be regarded as instituting a legal action for the purpose of satisfying the State's rules on prescription or limitation. In other States, this consequence occurs at various later stages in the proceeding.

4. For these reasons it was not feasible to refer specifically to the procedural steps that would meet the purposes of this

article. Instead, paragraph 1 (i) refers to the performance by the creditor of "any act recognized under the law of the jurisdiction where such act is performed: (i) as instituting judicial proceedings for the purpose of obtaining satisfaction of his right". In the phrase "for the purpose of obtaining satisfaction of his right", the broad term "satisfaction" is employed in order to accommodate legal actions, permitted under some legal systems, for a declaratory judgement or similar judgement recognizing or establishing the right asserted by the plaintiff. Initiation by the creditor against the debtor of a criminal proceeding for criminal fraud would qualify under this article to stop the period only if, under the local law, this is regarded also as an institution of a proceeding "for the purpose of obtaining satisfaction of his right".

5. Paragraph 1 (ii) applies where the creditor adds a claim to a proceeding he has already instituted against the debtor. Here, as under paragraph 1 (i), the step in that proceeding that qualifies to stop the running of the limitation period depends on the law of the jurisdiction where the proceeding is brought. Under paragraph 1 (ii) the test is not when the proceeding has been instituted but when the creditor has performed an act recognized under the law of the *forum* as "invoking his right" in the pending proceedings.

6. While this Uniform Law gives great weight to procedural rules of the *forum*, does not go so far as to give effect to any act that is sufficient to satisfy local rules on limitation or prescription. For instance, under some legal systems a demand for payment sent by the creditor to the debtor may satisfy the applicable rule on limitations even though the demand does not institute judicial proceeding. In the interest of uniformity, this Law requires that the act be recognized as "instituting judicial proceedings" or as invoking a right in the course of "judicial proceedings" that have already been commenced.

7. One representative suggested that a special provision should deal with situations like the following: (a) *A* sells goods to *B* who resells the goods to *C*. *C* institutes proceedings against *B* on the ground that the goods are defective. In such a case, recovery on *C*'s claim against *B* may give rise to a recourse claim by *B* against *A*. (b) A similar situation can arise where *A* and *B* are jointly responsible on a sales contract to *C* and *C* sues only *B*. Here, also, *B* may have a recourse action against *A*. The suggestion dealt with the possibility that during the proceedings of *C* against *B*, *B* would notify *A* of these proceedings and that this notice (*litis denunciatio* or "vouching in the warranty") would have certain legal effects under the law of the jurisdiction where the proceedings took place. It was proposed that, under specified circumstances, such a notice would interrupt the running of the period of limitation for *B*'s claim against *A*.<sup>1</sup> It was suggested that in the absence of such a provision *B* would be compelled to institute formal judicial proceedings for the redress of the recourse claim against *A*, while the necessity for such redress is uncertain; this would not be in the interest of any party. The majority of the Working Group was not prepared to approve a special provision designed to deal with this situation, but considered that the problem should be given further consideration.

<sup>1</sup> The following was the text of this proposal:

The limitation period shall cease to run in respect of a recourse claim which a joint debtor may have against a co-debtor, provided that such joint debtor during proceedings in which he is a defendant, before the expiry of the limitation period for such recourse claim, has given the co-debtor due notice of the proceedings in accordance with the requirements under the law of the jurisdiction where the proceedings take place (*litis denunciatio*).

8. Paragraph 2 of this article deals with the point in time when a counter-claim<sup>2</sup> is deemed to be instituted. Its provisions may be examined in terms of the following example:

*Example 10-A.* The seller instituted suit against the buyer on 1 March 1970. In this proceeding, the buyer interposed a counter-claim on 1 December 1970. The prescriptive period governing the buyer's counter-claim would, in normal course, have expired on 1 June 1970.

9. In the above example, the crucial question is whether the buyer's counter-claim shall be deemed to be instituted (a) on

1 March, the time when the seller's action was instituted or (b) on 1 December 1970, when the buyer's counter-claim was in fact interposed in the pending action.

10. Under paragraph 2 of article 10, alternative (a) is chosen when the buyer's counter-claim arises out of the same contract as the seller's action. This result is adopted as the rule of this Law because it will promote efficiency and economy in litigation by encouraging consolidation of actions and avoid the hasty bringing of separate actions.

11. On the facts of the above example, the same benefit is not given to the buyer when his claim against the seller arises from a different contract than that which provided the basis for seller's claim against the buyer; in this event, the buyer must actually institute his counter-claim before the expiration of the period of limitation. The act which is regarded as instituting this counter-claim is determined under the approach employed in article 10 (1), discussed at paragraphs 4 and 5, *supra*.

<sup>2</sup> The meaning of "counter-claim" in paragraph 2, may be drawn from the reference in paragraph 1 (i) to "judicial proceedings" employed for the purpose of obtaining satisfaction of a right. Such judicial proceedings could lead to affirmative recovery by the defendant against the plaintiff as well as total or partial extinguishment of the plaintiff's claim. The question whether a counter-claim is acceptable procedure is, of course, left to the rules of the forum. The use of a claim "as a defence for the purpose of set-off" after the limitation period for that claim expired is governed by article 20 (2), *infra*.

## Article 11

### [ARBITRATION]

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitration proceedings by requesting that the right in dispute be referred to arbitration in the manner provided for in the arbitration agreement or by the law applicable to that agreement.

(2) In the absence of any such provision, the request shall take effect on the date on which it is delivered at the habitual residence or place of business of the other party, or, if he has no such residence or place of business, then at his last known residence or place of business.

(3) The provisions of this article shall apply notwithstanding any term in the arbitration agreement to the effect that no right shall arise until an arbitration award has been made.

#### COMMENTARY

1. Article 11 applies to arbitration based on an agreement to submit to arbitration.<sup>1</sup> Article 10 relies on national law to define the point in the institution of judicial proceedings when the limitation period shall cease to run. The same approach cannot be used in relation to arbitration proceedings under article 11 since in many jurisdictions the manner for instituting such proceedings is left to the agreement of the parties. Hence it is necessary for the Law to designate a stage of the proceed-

ings which would be compatible with normal arbitration practices; the stage so designated in paragraph 1 is the act of a party "requesting that the right in dispute be referred to arbitration..."

2. Any question as to what acts constitute such a request are to be answered under "the arbitration agreement or by the law applicable to that agreement" (para. 1). This provision that the request be made in the manner provided for by the agreement or applicable law refers, *inter alia*, to the person or institution to whom the request is to be made and the nature of the communication that constitutes such a request. If the agreement or the applicable law does not prescribe the manner of making such a request, under paragraph 2 the decisive point is the date on which the request is delivered at the habitual residence or place of business of the other party; if he has no such residence or place of business the request may be delivered at his last-known residence or place of business. Under paragraph 2, the request must be "delivered" at the designated place. Thus, risks during transmission fall on the sender of the request, but the sender need not establish that the request came into the hands of the other party.

3. Paragraph 3 deals with the effect of a term in the arbitration agreement that "no right shall arise until an arbitration award has been made". Under paragraph 3, such a contract term does not prevent the application of this article to the agreement; such a contract provision has no effect to suspend the running of the period of limitation or to determine the act that stops the running of the period under this Law. On the other hand, paragraph 3 does not indicate any rule of this Law concerning the validity of such agreements under national law.

<sup>1</sup> Article 11 deals with only voluntary (optional) arbitration. If a State provides for obligatory "arbitration" not based on an agreement, such proceedings would be characterized as "judicial" for the purpose of the Uniform Law. See articles 1 (4) (f) and 10. On construction of this Law to promote uniformity, as contrasted with the application of local terminology, see article 5 and accompanying commentary.

## Article 12

### [LEGAL PROCEEDINGS ARISING FROM DEATH, BANKRUPTCY, OR THE LIKE]

(1) The provisions of this article shall apply where any legal proceedings are commenced upon the occurrence of any of the following events:

- (a) The death or incapacity of the debtor;
- (b) The bankruptcy or insolvency of the debtor;
- (c) Where the debtor is a corporation, company or other legal

entity, the dissolution of such corporation, company or legal entity;

- (d) The seizure or transfer of the whole or part of the assets of the debtor.

(2) The limitation period shall cease to run when the creditor performs an act recognized under the law of the jurisdiction where

such act is performed as the assertion of a right in those proceedings under that law for the purpose of obtaining satisfaction of his claim.

(3) Except as provided in this article, the limitation period shall not cease to run or in any other way be affected by the events referred to in paragraph 1 of this article.

#### COMMENTARY

1. This article recognizes that in the situations described in paragraph 1, slightly different problems may arise than in connexion with the commencement of judicial proceedings. For example, the proceedings for the distribution of assets on death, bankruptcy or the dissolution of a legal entity, may not be instituted by an individual creditor. Instead, creditors may have

an opportunity to file claims in existing proceedings.<sup>1</sup> Consequently, for the types of proceedings listed in paragraph 1, a generalized test for commencement is provided in paragraph 2. The approach is similar to that employed in article 10, discussed in commentary to that article at paragraph 4, *supra*.

2. As has been noted (commentary to article 1 at para. 8, *supra*), this Law applies only to the prescription of rights or claims between the parties to an international sale. In the types of proceedings specified in this article involving the distribution of assets (as in bankruptcy) prescription may effect the rights of third parties. The nature of such effect, if any, is not regulated by this Law and is left to applicable national law.

<sup>1</sup> Under some legal systems, such proceedings might be "administrative" rather than "judicial". See article 1 (4) (f).

### Article 13

#### [ACKNOWLEDGEMENT BY DEBTOR]

(1) Where the debtor acknowledges his obligation to the creditor, a new limitation period of [three] [five] years shall commence to run by reason of and from the date of such acknowledgement.

(2) The acknowledgement shall be evidenced in writing.

(3) Partial performance of an obligation by the debtor to the creditor shall have the same effect as an acknowledgement if it can reasonably be inferred from such performance that the debtor acknowledges that obligation.

(4) Payment of interest shall be treated as payment in respect of the principal debt.

(5) The provisions of this article shall apply whether or not the limitation period prescribed by articles 6 to 9 has expired.

#### COMMENTARY

1. The basic purposes of prescription are to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree or certainty in legal relationships. An extension of the period of limitation when a debtor acknowledges his obligation to the creditor is consistent with the above purposes. Consequently, under paragraph 1 of the article, when such acknowledgement occurs, the period of limitation will begin to run afresh by reason of such acknowledgement.

2. Recommencing the period of limitation may have significant impact on the debtor's rights; consequently, paragraph 2 requires that the acknowledgement be evidenced in writing.<sup>1</sup> A writing by a debtor confirming an earlier oral acknowledgement would, of course, satisfy this requirement. The requirement of a "writing" is defined in article 1 (4) (h).

<sup>1</sup> One representative expressed doubt as to the suitability or efficiency of this requirement in view of the difficulty of defining the difference between an acknowledgement in the sense of the present Law and the creation of a new independent contractual obligation ("novation") which, in his view, is outside the Law and which under the applicable law often may be established by a simple oral statement.

3. A declaration made either before or after the expiration of limitation period (see article 13 (5) and para. 6, *infra*) can be an "acknowledgement" for the purpose of the Uniform Law. Under paragraph 2 of this article, such an acknowledgement will be subject to the requirement of a writing.

4. Paragraph 3 deals with "partial performance of an obligation" that has the same effect as an acknowledgement. The partial payment of a debt is the most typical instance, but the language is sufficiently broad to include partial performance of other obligations, such as the partial repair by a seller of a defective machine.

5. Acknowledgement (para. 1) and partial performance (para. 3, including the payment of interest [para. 4]) recommence the running of the period of the limitation only with respect to the obligation acknowledged by such action. Whether there was an acknowledgement and if so, the extent of the obligation so acknowledged are questions calling for the determination of the relevant facts in the light of the basic standard set forth in this article.

6. In view of the policies for prescription indicated in paragraph 1, *supra*, an acknowledgement made after the running of the period should be given the same effect as an acknowledgement made prior to the running of the period, and paragraph 5 of this article so provides. Of course, the rule of this Law that a claim is not barred by prescription, whether this result occurs before or after the claim is once barred, is not intended to affect rules under national law, such as taxation, bankruptcy or the like.

7. The majority of the Working Group was also of the view that the question of whether acknowledgement by the debtor binds joint debtors or guarantors should be left to the applicable law. One reason for not attempting to draft a uniform rule on this question was the danger of over-simplification; a single rule probably could not be adapted to the many and varied types of debtors and the relationships between debtors sharing an obligation.

## Extension of the limitation period

## [Article 14]

## [EXTENSION DURING NEGOTIATIONS]

[If the creditor and the debtor have entered into negotiations on the merits of the claim [without reserving the right to invoke limitation], and if the fact of such negotiations is evidenced in writing, the limitation period shall not expire before the end of one year from the date on which such negotiations have been broken off or otherwise come to an end, but at the latest one year from the date on which the period would otherwise have expired according to articles 6 to 9.]

This article is in square brackets because it was drafted on the assumption that the limitation period might be three years—a matter to be decided after the receipt of answers to the questionnaires. The majority of the Working Group was not

prepared to support the inclusion of such a provision if the limitation period was five years. The words “without reserving the right to invoke limitation” are placed in square brackets to indicate a difference of opinion concerning the appropriateness of this language. One member opposed the inclusion of the rule stated in article 14 regardless of the period. It was agreed that, should UNCITRAL accept in principle the approach expressed in article 14, consideration should be given, *inter alia*, to the clarity of the phrases “negotiations on the merits of the claim”, “evidenced in writing”, and the reference to the date on which negotiations have “broken off or otherwise come to an end”.]

## Article 15

## [EXTENSION WHERE INSTITUTION OF LEGAL PROCEEDINGS PREVENTED]

Where, as a result of a circumstance which is not personal to the creditor and which he could neither avoid nor overcome, the creditor has been prevented from causing the limitation period to cease to run, and provided that he has taken all reasonable measures with a view to preserving his right, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the relevant circumstance ceased to exist.

## COMMENTARY

1. This article provides for limited extension of the period of limitation when circumstances prevent a creditor from instituting legal proceedings. This problem is often considered under the heading of “*force majeure*” or impossibility; however, this article does not employ these terms since they are used with different meanings in different legal systems. Instead, the basic test is whether the creditor “has been prevented” from taking appropriate action.<sup>1</sup> To avoid excessive liberality, no extension is permitted when any one of the following restric-

<sup>1</sup> Under articles 10, 11 and 12, it is provided that the limitation period shall “cease to run” when legal proceedings are instituted. The present article in referring to facts preventing the creditor “from causing the limitation period to cease to run” refers to the actions described under articles 10 to 12.

tions is applicable: (1) the preventing circumstances may not be personal to the creditor”—i.e., a condition that affects only this individual creditor, such as illness, death, or the like; (2) the creditor could have avoided or overcome the occurrence of such circumstance; (3) the creditor has not taken reasonable measures with a view to preserving his right.

2. There is no reason to extend the limitation period when the circumstance preventing action ceased to exist a substantial period (e.g., a year) in advance of the end of the period. Nor is there reason to extend the period for a longer period than is needed to institute action to obtain satisfaction of the right. For these reasons, the limitation period is extended so as not to expire before the expiration of one year from the date on which the preventing circumstance is removed. For example, a preventing circumstance existing only in the first year of the prescriptive period would not lead to an extension. On the other hand, if a preventing circumstance exists during any part of the last year of the basic period, the limitation period would be extended. However, where a preventing circumstance ceases to exist before the end of the basic limitation period the availability of the extension of the period may depend upon whether the creditor could have taken “reasonable measures with a view to preserving his right” within the remaining period.

## Article 16

## [MIS-STATEMENT OR CONCEALMENT BY DEBTOR]

Where, by reason of the debtor’s mis-statement or concealment of his identity or address, the creditor is prevented from causing the limitation period to cease to run, the limitation period shall be extended so as not to expire before the expiration of one year from the date on which the creditor discovered the fact mis-stated or concealed, or could with reasonable diligence have discovered it.

## COMMENTARY

1. This article is concerned with one specific circumstance that prevents the creditor from instituting legal or arbitration

proceedings to secure satisfaction of his claim: “the debtor’s misstatement or concealment of his identity or address”. “Misstatement” does not require a dishonest or fraudulent intent. Regardless of intent (which would in any event be difficult to prove) the debtor has prevented action by the creditor and should not be permitted to take advantage of this fact. In this circumstance, the article provides for extension of the period. The rules governing the length of the extension are similar to those of article 15.<sup>1</sup>

<sup>1</sup> See commentary to article 15 at para. 2, *supra*.

## Article 17

## [DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS]

(1) Where the creditor has commenced judicial or arbitration proceedings in accordance with article 10 or 11, or has asserted his right in legal proceedings in accordance with article 12, but has subsequently discontinued the proceedings, or withdrawn his claim, the limitation period shall be deemed to have continued to run.

(2) Subject to the provisions of paragraph 1 of this article, if the court or arbitral tribunal has declared itself or been declared incompetent to adjudicate upon the claim of the creditor, or where any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended.

(3) When an arbitration has been commenced in accordance with article 11, but it has been ordered that the arbitration shall cease to have effect or that the award shall be set aside, the limitation period shall continue to run and shall be extended so as not to expire before the expiration of one year from the date on which such order was made.

## COMMENTARY

1. Article 17 is addressed to problems that arise when a creditor institutes legal proceedings that fail to secure an adjudication on the merits of his claim. Under articles 10, (1), 11 (1) and 12 (2), when a creditor institutes legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; in the absence of further provision, when a creditor institutes proceedings before the expiration of the limitation period, the limitation period would never expire. Supplementary rules are consequently required when such a proceeding does not lead to an adjudication on the merits of the claim. Paragraph 1 of article 17 deals with problems that arise when the creditor discontinues the proceedings or withdraws his claim. Paragraphs 2 and 3 deal with problems that arise when the failure to secure adjudication on the merits results from action by a tribunal.

## I. Discontinuance or withdrawal by the creditor

2. As was noted above, the rules of articles 10 (1), 11 (1) and 12 (2) which stop the running of the period, need to be supplemented where the creditor voluntarily discontinues the legal proceedings or withdraws his claim. For this situation, paragraph 1 of article 17 provides that the institution of the legal proceedings shall have no effect to stop the running of the period or to extend the length of the period; to produce this result, paragraph 1 provides that "the limitation period shall be deemed to have continued to run". This rule resulted from the view that the extension of the limitation period should not be left within the control of one of the parties and that a creditor who voluntarily discontinues legal proceedings should not be given special treatment.

3. The application of the rule may be clarified by an example (the limitation period is assumed to be four years):

*Example 17A.* A's claim against B arose and the limitation period commenced to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1972. A discontinued the legal proceedings or withdrew his claim on 1 June 1973.

Under the rule of article 17 (1), A has until 1 June 1974 to institute a second action. (If A had discontinued his action subsequent to 1 June 1974, his claim would already have been barred and no further legal proceedings would be possible.)

4. As has been noted, paragraph 1, is applicable when the creditor has "discontinued the proceedings, or withdrawn his claim". This rule is intended to include not only explicit discontinuance or withdrawal of the action but also such a failure to pursue the action that the court dismisses the action. Similarly, the provision is applicable when, because of failure to continue the proceedings, the action is automatically terminated by virtue of the procedural rules of the *forum*. In these situations, the proceedings terminated because of the choice of the creditor not to pursue the action; the rule of paragraph 1 consequently is applicable.

## II. Proceedings brought in a tribunal without jurisdiction; procedural defects preventing adjudication on the merits

5. As we have seen, paragraph 1 of article 17 deals primarily with the effect of voluntary action by the creditor—his discontinuance of legal proceedings or withdrawal of his claim. Paragraph 2 deals with the failure of legal proceedings to lead to a definitive decision on the merits of the claim when that failure results from the ruling of a tribunal. Paragraph 2 specifically refers to instances in which a court or arbitral tribunal has declared itself or been declared incompetent to adjudicate the creditor's claim. In addition, the paragraph also applies generally wherever "any legal proceedings have ended without a definitive judgement, award or decision on the merits of the claim". This language applies, *inter alia*, to instances in which the legal proceedings are terminated as a result of some other flaw or defect in the proceedings under circumstances that would not bar a second action on the same claim.<sup>1</sup>

6. Under paragraph 2 (as under paragraph 1) the limitation period is deemed to have continued to run. However, the article takes account of the possibility that the lack of jurisdiction or the procedural defect might be finally established a substantial period of time after the creditor instituted the legal proceedings. If this flaw is established after the running of the period of limitation, the creditor, in the absence of further provisions, would have no opportunity thereafter to institute a new action; if the flaw is established shortly before the expiration of the period the creditor may have insufficient time to institute a new action. To meet these problems, paragraph 2 further provides that the limitation period "shall be extended so as not to expire before the expiration of one year from the date on which such declaration was made, or, if no such declaration was made, from the date on which the proceedings ended".

7. The application of this rule may be illustrated by the following examples (The limitation period is assumed to be four years.):

*Example 17B.* A's claim against B arose and the limitation period started to run on 1 June 1970. A instituted legal proceedings against B on 1 June 1973. On 1 June 1975 the court in which A instituted the action held that it had no jurisdiction. A did not take an appeal.

On these facts under article 17, the period of limitation is extended until 1 June 1976.

*Example 17C.* The facts are the same as in Example 17B, except that following the 1 June 1975 decision of the lower court, A takes an appeal. On 1 June 1976 the decision of the appellate court sustaining the decision of lower court becomes definitive.

<sup>1</sup> Termination resulting from voluntary discontinuance or withdrawal is covered by paragraph 1.

On these facts, under article 17, the period of limitation is extended until 1 June 1977.

8. The extension of the period provided in article 17 (2) applies when the court or arbitral tribunal "has declared itself or been declared incompetent" to adjudicate upon the claims of the creditor. The expression "been declared" refers to declarations by tribunals within the same jurisdiction, and has special reference to review by a tribunal of higher authority within that jurisdiction. This language was not intended to refusals by courts in other jurisdictions to recognize or enforce a judgement or award. The problem of recognition of foreign judgements or awards is the subject of separate rules for which international conventions have been prepared, e.g., the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>2</sup>

9. The point may be illustrated by the following example:

<sup>2</sup> The Commission, at its second session, expressed the opinion that this Convention should be adhered to by the largest possible number of States. UNCITRAL report on second session (1969) 112; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A. This opinion was reaffirmed at its third session. UNCITRAL report on third session (1970) 156; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

*Example 17D.* States X and Y are both signatories of the convention implementing the present Law. A claim by A against B arose on 1 June 1970. On 1 June 1972 A brought an action in State X and on 1 June 1974 secured judgement on the merits of his claim. On 1 July 1974 A brought an action in State Y to enforce the judgement obtained in State X. The courts of State Y on 1 August 1974 refused to enforce this judgement on the ground that the court in State X was without jurisdiction.

On these facts, the ruling in State Y is not a ground to extend the period for A to institute a new action, even though Y is a signatory to the convention. It is true that if A needs to reach assets of B in States other than X, and these States do not recognize judgements of X, it may be necessary for A to institute parallel actions. This, however, is a problem that is more appropriately solved by national laws or by international conventions providing rules on recognition or enforcement of foreign judgements or awards.

10. Paragraph 3 of article 17 provides for extension similar to that of paragraph 2 when higher authority within the same jurisdiction (such as a court) orders that arbitration shall cease to have effect or that an arbitral award shall be set aside.

## Modification of the limitation period

### Article 18

#### [MODIFICATION BY THE PARTIES]

(1) The limitation period cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph 2 of this article.

(2) The debtor may, at any time [after the commencement of the limitation period prescribed in articles 7 to 9], by a declaration to the creditor extend the limitation period or declare that he will not invoke limitation as a defence in legal proceedings; but such declaration shall in no event have effect beyond the end of three years from the date on which the period would otherwise expire or have expired in accordance with articles 6 to 9.

(3) The declaration referred to in paragraph 2 of this article shall be evidenced in writing.

(4) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or enforcement or continuance of a right is dependent upon the performance by one party of an act other than the institution of judicial proceedings within a certain period of time, provided that such clause is valid under the applicable law.

#### COMMENTARY

1. Paragraph 1 of article 18 declares a general rule that this Uniform Law does not allow parties to modify the limitation period. Exceptions to this rule, provided in paragraphs 2 and 4, are explained below.

#### I. Extension of the limitation period

2. Paragraph 2 permits the parties to extend the limitation period to the maximum of three years from the date of expiration of the limitation period prescribed under articles 6 to 9. Such an extension of the period may be effected either before or after the expiration of the statutory period. The extension can be accomplished by a unilateral declaration by the debtor; an effective declaration may, of course, be part of an agreement by the parties.

3. As to the time when the debtor could make such a declaration, paragraph 2 places brackets around the words

"after the commencement of the limitation period prescribed in articles 7 to 9". The inclusion of this bracketed language in the statute would deny effect to attempts to extend the period made at early stages of the transaction; e.g., at the time of contracting and thereafter until the breach of contract or other event which under articles 7 to 9 commences the running of the limitation period. All members of the Working Group took the view that the words in brackets should be included if the statutory period is five years. This was based on the view that the five-year period provided sufficient time to institute a legal proceeding. In addition, it was considered that extensions at the time of contracting might be imposed by a party with stronger bargaining power or might be a part of a form contract to which the other party might not give sufficient attention. Allowance of extension after the commencement of the limitation period, on the other hand, may be useful to prevent the hasty institution of a legal proceeding close to the end of the period when the parties are still negotiating. A majority was also of the opinion that the words in brackets should be in the text even if the statutory period is three years. A minority was of the view that these words should be deleted if the statutory period is three years.<sup>1</sup>

4. It will be noted that, under paragraph 2, a debtor's declaration extending the period and a declaration that he will not invoke limitation as a defence are given the same legal effect. Consequently, any theoretical differences between the two forms of expression are unimportant; both are subject to the three-year limit set forth at the end of the paragraph.

#### II. Formality required for extension

5. Extension of the limitation period can have important consequences for the rights of the parties. An oral extension could be claimed in doubtful circumstances or on the basis of

<sup>1</sup> The position of the minority is indicated here in view of the interest shown in this issue at the third session of the Commission. UNCITRAL report on third session (1970) 88; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.



fraudulent testimony. Therefore, under paragraph 3, the declaration to extend the limitation period must be evidenced in writing. The use of the expression "evidenced" makes it clear that an oral declaration to extend the period will be effective if later confirmed in writing.

### III. Notices to other party; arbitration

6. One of the purposes of paragraph 4 of article 18 is to make clear that this article has nothing to do with the validity of a contract clause concerning a "time-limit by reason of which the acquisition or enforcement or continuance of a right is dependent upon one party giving notice to the other party".<sup>2</sup> A typical example would be modification of the length of period within which the buyer must give notice to the seller in order to preserve his rights when goods are defective.

7. Paragraph 4 of article 18 is also relevant to clauses in sales contract requiring that controversies under the contract be submitted to arbitration within a limited time. The paragraph refers to clauses in the sales contract "whereby the acquisition

or enforcement or continuance of a right is dependent upon the performance by one party of an act other than the institution of *judicial* proceedings within a certain period of time". Attention is directed to the phrase "*judicial* proceedings". "*Legal* proceedings", as defined in article 1 (4) (f), "includes judicial, administrative and arbitration proceedings"; "*judicial* proceedings" is narrower in scope. As a result, the provisions of article 18 are inapplicable to clauses in a contract of sale "whereby the acquisition or enforcement of continuance of a right" is dependent upon the act of one party submitting the controversy to arbitration within a certain period of time. This adjustment was considered advisable to accommodate contracts, often used in commodity markets, providing that any dispute must be submitted to arbitration within a short period—e.g. within six months. With respect to the possible abuse of such a clause, paragraph 4 concludes with the proviso that such clause must be valid under the applicable law.<sup>3</sup>

<sup>3</sup> One member of the Working Group reserved his position with respect to paragraph 4 because of doubts concerning the justification for a distinction between judicial and arbitration proceedings with respect to the effects of modification of the limitation period by the parties.

<sup>2</sup> See article 1 (3) and accompanying commentary at paras. 13 to 16.

## Effects of the expiration of the limitation period

### Article 19

#### [WHO CAN INVOKE LIMITATION]

**Expiration of the limitation period shall be taken into consideration in any legal proceedings only at the request of a party to such proceedings.**

#### COMMENTARY

1. The principal question to which article 19 is addressed is the following: If a party to legal proceedings does not assert that the action is barred by expiration of the period of limitation, may the tribunal raise this issue of its own motion (*suo officio*)? This Law answers this question in the negative: expiration of the period shall be taken into consideration "only

at the request of a party" to legal proceedings. The question, although answered differently in different legal systems, is not of large practical importance; a party who may interpose this defence will rarely fail to do so. Indeed, this provision does not prohibit a tribunal from drawing attention to the lapse of time, and inquiring whether the party wishes this issue to be taken into consideration. (Whether such is proper judicial practice is, of course, a matter for the rules of the *forum*.) In any event, the rules on limitation may only be invoked if a party requests. As to the effect of the parties' agreement or declaration not to invoke the limitation, see article 18 (2) and accompanying commentary at paragraph 4, *supra*.

### Article 20

#### [EFFECT OF EXPIRATION OF THE PERIOD; SET-OFF]

(1) Subject to the provisions of paragraph 2 of this article and of article 19, no right which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings.

(2) Notwithstanding the expiration of the limitation period, the creditor may rely on his right as a defence for the purpose of set-off against a right asserted by the other party:

- (a) If both rights relate to the same contract, or,
- (b) In other cases, if the rights could have been set-off at any time before the date on which the limitation period expired.

#### COMMENTARY

##### 1. Effect of expiration of the period

1. Paragraph 1 of article 20 emphasizes the Law's basic purpose to provide a limitation period within which the rights of the parties must be submitted to a tribunal. See article 1 (1). Once the limitation period expires, the right can no longer be recognized or exercised in any legal proceedings.

2. It will be noted that paragraph 1 is concerned with the recognition or enforcement of rights "in any legal proceedings". This Law does not attempt to solve all the questions, many of a theoretical nature, that might be raised with respect to the effect of the running of the period of limitation. For example, if collateral of the debtor remains in the possession of the creditor after the expiration of the period of limitation, questions may arise as to right of the creditor to continue in possession of the collateral or to liquidate the collateral through sale. These problems may arise in a wide variety of settings and the results may vary as a result of differences in the security arrangements and in the laws governing those arrangements. Consequently, these problems are to be left to the applicable rules apart from this Law. It may be expected, however, that the tribunal of signatory States in solving these problems will give full effect to the basic policy of this Law with respect to the enforcement of rights or claims barred by limitation. See also article 2 (c). As to the effect of voluntary performance of

an obligation after the expiration of the limitation period, see article 21 and accompanying commentary at paragraph 1, *infra*.

## II. Set-off

3. The rules of paragraph 2 can be illustrated by the following examples. (The period of limitation is assumed to be four years.)

*Example 20A.* An international sales contract required *A* to deliver specified goods to *B* on 1 June of each year from 1970 through 1975. *B* claimed that the goods delivered in 1970 were defective. *B* did not pay for the goods delivered in 1975, and *A* instituted legal proceedings in 1976 to recover the price.

On these facts *B* may set-off his claim against *A* based on defects of the goods delivered in 1970. Such set-off is permitted under paragraph (a) of article 20 (2), since "both rights relate to the same contract"; *B*'s set-off is not barred even though the limitation period for his claim expired in 1974, prior to his assertion of the claim in the legal proceedings and also prior to the creation of the claim by *A* against *B* for the price of the goods delivered in 1975. It will also be noted that under article 20 (2), *B* may rely on this right "as a defence". Thus, if *A*'s claim is \$1 000 and *B*'s claim is \$2 000, *B*'s claim may

extinguish *A*'s claim but it may not be used as a basis for affirmative recovery against *A*.<sup>1</sup>

*Example 20B.* On 1 June 1970, *A* delivered goods to *B* based on a contract of international sale of goods; *B* claimed the goods were defective. On 1 June 1973, under a different contract, *B* delivered goods to *A*; *A* claimed these goods were defective and in 1975 instituted legal proceedings against *B* based on this claim.

In these proceedings *B* may rely on his claim against *A* for the purpose of set-off even though *B*'s claim arose in 1970—more than four years prior to the time when the claim was asserted in court. Under paragraph (b) of article 20, the rights "could have been set-off" before the date when the limitation period on *B*'s claim expired—i.e. between 1 June 1973 and 1 June 1974. (As was noted in connexion with the preceding example, the set-off is available "as a defence"; *B*'s claim may extinguish *A*'s claim, but may not be used as a basis for affirmative recovery.)

<sup>1</sup> On legal proceedings calling for affirmative recovery by the defendant against the plaintiff, see article 10 (2). See also commentary to that article at paragraph 8 and its accompanying foot-note.

## Article 21

### [RESTITUTION OF PERFORMANCE AFTER PRESCRIPTION]

Where the debtor performs his obligation after the expiration of the limitation period, he shall not thereby be entitled to recover or in any way claim restitution of the performance thus made even if he did not know at the time of such performance that the limitation period had expired.

#### COMMENTARY

1. As has already been noted (commentary to article 20 at paragraph 2), expiration of the limitation period precludes the exercise or recognition of the rights of the parties in legal proceedings. Article 20 (1). This is due to the basic purpose of prescription to prevent the pressing of claims at such a late date that the evidence is unreliable, and to provide a degree of

certainty in legal relationships. These policies are not violated where the debtor voluntarily performs his obligation after the expiration of the limitation period. Article 21 accordingly provides that the debtor cannot claim restitution of the performance which he has voluntarily performed "even if he did not know at the time of such performance that the limitation period had expired". Of course, this provision deals only with the effectiveness of claims for restitution based on the contention that the performance could not have been required because the limitation period had run. The Uniform Law follows a similar approach with regard to the effect of acknowledgement by the debtor of his debt subsequent to the expiration of the limitation period. See article 13 (5).

## Article 22

### [INTEREST]

The expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt.

#### COMMENTARY

1. To avoid divergent interpretations involving the theoretical

question whether an obligation to pay interest is "independent" from the obligation to pay the principal debt, article 22 provides a uniform rule that "the expiration of the limitation period with respect to a principal debt shall have the same effect with respect to an obligation to pay interest on that debt".

## Calculation of the period

## Article 23

### [BASIC RULE]

The limitation period shall be calculated in such a way that it shall expire at the end of the day which corresponds to the date on which the period commenced to run. If there is no such corresponding date, the period shall expire at the end of the last day of the last calendar month.

#### COMMENTARY

1. One traditional formula for the calculation of a limitation period is to exclude the first day of the period and include the last. The concepts of "inclusion" and "exclusion" of days,

however, can be misunderstood by those who are not familiar with the application of this rule. Therefore, for the sake of clarity, article 23 adopts a different formula to reach the same result. Under this article, where a limitation period begins on 1 June, the day when the period expires is the corresponding day of the later year, i.e. 1 June. The second sentence of article 23 covers a situation which may occur in a leap year. That is, when the initial day is 29 February of a leap year, and the later year is not a leap year, the date on which the limitation period expires is 28 February of the later year.

2. Careful consideration was given to a proposal that the limitation period should be calculated in terms of calendar

years following the end of the year in which the breach occurred. For example, if a breach occurred in June of 1970 (or on any other date in 1970), assuming a basic four-year period is chosen, the limitation period would expire on 31 December 1974. The Working Group recognized that this approach would have the merit of avoiding many questions as to the precise day on which the period commenced. See articles 7, 8 and 9. But this approach gives claims arising early in the year a substantially longer period than claims arising late in the year. In addition, this approach is different from what is employed in most legal systems. Consequently, in spite of the gain in certainty, this approach was rejected because of possibility that it might interfere with adoption of the Law.

## Article 24

### [EFFECT OF HOLIDAY]

Where the last day of the limitation period falls on an official holiday or other "*dies non juridicus*" in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 10 or asserts a right as envisaged in article 12, the limitation period shall be extended so as not to expire until the end of the first day following that official holiday or "*dies non juridicus*" on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction.

#### COMMENTARY

1. This article deals with the problem that arises when the limitation period ends on a day when the courts and other tribunals are closed so that it is not possible to take the steps to commence legal proceedings as prescribed in articles 10 to 12. For this reason, the article makes special provisions "where

the last day of the limitation period falls on an official holiday or other *dies non juridicus* in the jurisdiction where the creditor institutes judicial proceedings". In such cases, the limitation period is extended "until the end of the first day following that official holiday or *dies non juridicus* on which such proceedings could be instituted or on which such a right could be asserted in that jurisdiction".

2. It is recognized that the curtailment of the total period that might result from a holiday is minor in relation to a period calculated in years. However, in many legal systems, an extension is provided and may be relied on by attorneys; in addition, attorneys in one country might not be in a position to anticipate holidays in another country. The limited extension set forth in this article will avoid such difficulties.

## Preservation of existing rights

### [Article 25]

[(1) No right asserted in any legal proceedings in any jurisdiction shall be held to have been barred by reason of the operation of this Law if the limitation prescribed in articles 6 to 9 commenced to run before the commencement of this Law in that jurisdiction.

(2) Nothing in this Law shall revive any right barred before the commencement of this Law in the jurisdiction where such right is relied on except in so far as a right may be revived by an acknowledgement or part performance made in accordance with the provisions of article 13.]

[This article deals with the time when the Law becomes operative with respect to rights or claims that arose before the

adoption of the Law. The current draft of article 25 is placed in square brackets because there are alternative formulations which the Working Group did not have time to consider at its second session. Further consideration should also be given to whether such a provision should be in the text of the Convention, as contrasted with the Uniform Law; the majority tentatively was of the view that inclusion in the Uniform Law was preferable. It was also suggested that the problem should be dealt with by a provision in the Convention that the Uniform Law should not become effective until [three]-[five] years after the Convention receives a specified number of ratifications or accessions.]

## APPENDIX A

### Proposal by Norway for portion of report on products liability

For the purpose of the report, the Norwegian representative submits the following:

1. With regard to claims for compensation of *damage caused by the goods sold* to tangible property outside the goods ("products liability"), one representative stated that, in many cases, it may be disputable whether a claim for such com-

pensation should be deemed to be contractual or extra-contractual. The qualification would also be different according to different national laws. It would be inconvenient for some States to adopt rules that would make it necessary for them to introduce distinctions in this field and to have different limitations according to whether the claim for damages was qualified as being in contract or in tort.

This representative therefore preferred to *exclude* from the scope of the present Uniform Law all claims for compensation of physical damage caused by the goods sold, whether or not such claims arise by way of contract or tort or by the application of any law or legal principle, and regardless of whether the debtor is a third person or a buyer or another party to the sales contract. This would be an extension of the solution adopted in article 2 (a) regarding personal injury.

2. If, nevertheless, the damage caused by the goods is to be included in the Uniform Law, this representative would *propose* that the prescriptive period should commence to run on the date when the damage occurred, this being also the first date on which the debtor could exercise his right to claim damages. This

proposal could therefore fit into article 8 as a new second full stop sentence, drafted as follows:

"The same rule shall apply to any claim for compensation of physical damage caused by the goods sold to other tangible property."

3. This representative would not object to supplementing the proposed rule with a provision to the effect that the limitation period in any event shall expire a certain period of time, for instance ten years, after the dates indicated in article 7, paragraphs 3 and 4, subject, however, to the special provision adopted for cases where a claim is based on an express guarantee on the part of the seller, article 9.

## APPENDIX B

### Proposal by Norway for portion of report on termination, etc., or other circumstance occurring before, performance is due

For the purpose of the report the Norwegian representative submits the following:

1. In article 7, paragraphs 5 and 6, the problem of *anticipatory breach* is regulated in relation to the period running from the date on which the breach of contract occurred (para. 1).

2. However, in the opinion of this representative, this problem is a more general one, which should be sought solved also in relation to cases where there is no breach of contract; see article 8.

3. It may be that certain events, according to the contract or the applicable law, will entitle the creditor to treat the contract or an obligation under the contract as terminated or as due and to exercise his right before the time which was originally fixed. One possibility is that such event will give the creditor an *option* in this respect. Another possibility is that such an event *automatically* will cause the obligation to become due or terminated, but that the parties nevertheless disregard this effect, which often may be more or less a void formula to be applied only in more extreme circumstances. It seems desirable to state more precisely and specifically in the Uniform Law when the limitation shall commence to run in such situations. Examples may be mentioned: the bankruptcy or other circumstances of financial importance, the death, illness, removal, emigration or any altered situation for one party or a third person. The event may sometimes be deemed to be an *anticipatory breach*, at other times not.

4. In the circumstances mentioned under the preceding paragraph 3, the creditor would, according to the contract or the applicable law, be entitled to exercise his right as soon as the relevant event occurred. This would mean that the limitation period, according to article 8, would commence to run at such premature time, even if the creditor did not avail himself of the right to treat the obligation as due or terminated (and neither the debtor regarded the situation to be such). Such a rule is as unreasonable in relation to article 8 as to article 7.

5. In the case where the creditor has an *option*, it might

perhaps be argued by analogy from the situation where a consequential obligation has not come into actual existence until the option has been exercised. This view would lead to the conclusion that in the meantime there would run a limitation period only in respect of the option, not in respect of the eventual claim based on the option when such option was to be exercised. This result is reasonable, but it should be confirmed by a precise provision in the Law. It would hardly follow from the present text, in the contemplated situations, where there already is an obligation in existence with a fixed time for performance, but where some event may give the creditor an option to claim advanced performance or to terminate the contract.

6. In order to solve the problem mentioned, this representative proposed to make the provisions on anticipatory breach and instalment sales more general and give them place in a separate article between the present articles 8 and 9. He suggested the following text:

#### Proposed article 8 A

(1) Where, as a result of a breach of contract or another circumstance occurring before performance is due, one party thereby becomes entitled to and does elect to treat the contract as terminated or due, the limitation period in respect of any claim based on such circumstance shall commence on the date on which the circumstance occurred. If not relied upon, such circumstance shall be disregarded, and the limitation period in respect of any other right shall commence on the date on which such right otherwise could first be exercised.

(2) If in case of a contract for the delivery of or payment for goods by instalments, one party becomes entitled to and does elect to treat the contract as terminated or due as a result of a breach of contract or other circumstance in relation to an instalment, the limitation period in respect of any right based on such circumstance shall commence on the date on which the circumstance occurred, even in respect of any connected previous or subsequent instalment covered by the contract. Otherwise, the limitation period in respect of each separate instalment shall commence on the date on which the particular breach or breaches complained of occurred.

## ANNEX III

## Questionnaire on the length of the prescriptive period and related matters

The United Nations Commission on International Trade Law (UNCITRAL) at its second session, held in March 1969, established a Working Group of seven members of the Commission. This Working Group was requested to study the topic of time-limits and limitations (prescription) in the field of international sale of goods with a view to the preparation of a preliminary draft of an international convention.<sup>1</sup> The proposed convention would establish a general period of extinctive prescription by virtue of which claims would be extinguished or barred unless presented to a tribunal within the specified period.

The Working Group met in August 1969 and prepared a report (A/CN.9/30) which was considered by the Commission at its third session in April 1970. The Commission's action with respect to the question of the length of the prescriptive period included the following:<sup>2</sup>

*"(e) Length of the prescriptive period: the basic rule*

85. Consideration was given to the recommendation of the Working Group in its Report that a single basic period should govern the claims by both parties to the contract, and that the period should be within the range of three to five years (paras. 49-50).

86. Nearly all of the representatives favoured a period within the range of three to five years. Many representatives favoured the three-year period partly to promote the settlement of disputes promptly and before the loss of evidence, and partly to protect a seller from late claims after his right to recover from his supplier had been barred by a shorter period under domestic law. Many other representatives expressed the view that a five-year period was preferable in view of the time required for investigation, negotiation and arrangements for bringing legal action, possibly in a distant State.

87. Several of the representatives indicated that their initial preference would be affected by future decisions with respect to other provisions of the convention. Such provisions included the ability of the parties to extend the period to permit further negotiation and extensions of the period while suit was impossible or was prevented by the other party.

88. In view of the varying views on the length of the period, many representatives suggested that a questionnaire be addressed to Governments and to interested international organizations, which should include a question as to whether the period of limitation could be extended or shortened [by agreement]; in other words, if the period of limitation be three years, whether it could be extended up to five years, and conversely, if the period of limitation be five years, whether it could be shortened to three years. Some representatives suggested that it would be appropriate to set a period that could be extended by agreement but could not be reduced by agreement.

89. *The Commission decided that a draft questionnaire on the length of the period and other problems should be prepared for consideration by the Working Group on Prescription at its next session, and should thereafter be addressed to Governments and interested international organ-*

*izations, in order particularly to ascertain the views of those engaged in business in relation to this and any other relevant issues, in accordance with the final instructions by the Working Group. The Commission consequently postponed its decision with respect to the length of the prescriptive period."*

The Working Group at its second session, held in August 1970, approved the substance of the questionnaire which follows. The Working Group also prepared a preliminary draft of a uniform law on this subject. This preliminary draft is annexed to show the setting in which specific questions arise and to provide an opportunity for any other comments which respondents may wish to submit.

This questionnaire consists of two parts. The questions contained in part I are primarily designed to obtain information on the existing national rules with respect to prescriptive limitations applicable to rights or claims arising from sales transactions. The questions in part II solicit opinions with respect to the uniform rules that would be most appropriate in the field of the international sale of goods. Thus, it is hoped that in part II the respondents will take account any special problems inherent in the international sale of goods and will express their opinions concerning the rules that would be most suitable for international trade.

## QUESTIONNAIRE

## PART I

*Note: The questions in part I request information of respondents concerning the rules of their national law governing the time within which claims arising out of a sale of goods must be presented to a tribunal. (If the national law provides special rules applicable to international sales of goods, it is requested that the replies so state, and respond in terms of such rules.)*

*1. What is the length of the prescriptive period within which buyers and sellers of goods must submit their claims to a tribunal or otherwise exercise their rights? If different periods are applicable to different types of rights or claims, please state the governing rules.*

*2. With respect to the point in time at which the prescriptive period starts:*

*(a) Is the commencement of the period governed by a general rule or principle (e.g., the time when action could be brought, the time when the performance has become due, the time of breach, or some other general rule)? If so, what is the applicable general rule or principle?*

*(b) With respect to rights or claims by buyers based on defects in, or other lack of conformity of goods, is the commencement of the period governed by the same rule as other rights or claims arising from sales transactions or is a special rule applicable? For such rights or claims, does the prescriptive period start to run from the time of shipment of the goods, placing the goods at the disposition of the buyer, receipt of the goods, discovery of the defect, the occurrence of damage, or some other point?*

*3. Can the length of the prescriptive period be varied by agreement of the parties?*

*(a) If so, please indicate whether there is any limit on the extent to which the parties can (i) extend or (ii) shorten the period.*

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its second session, 1969; *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), para. 46; *UNCITRAL Yearbook*, vol. I: 1968-1970, part two, II, A.

<sup>2</sup> Report of the United Nations Commission on International Trade Law on the work of its third session, 1970; *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8017), paras. 85-89; *UNCITRAL Yearbook*, vol. I: 1968-1970, part two, III, A.

(b) Also please indicate any difference in the parties' power to modify the period (i) by a provision in the contract of sale, as compared with (ii) an agreement subsequent to the making of the contract.

4. Assume that a right or claim has been asserted in a tribunal within the prescriptive period and the proceeding has been dismissed without reaching a decision on the merits. In such a case, is there any rule that suspends, extends or otherwise modifies the basic period, where the proceeding was dismissed:

(a) Because the tribunal was not competent to hear the case?

(b) Because of procedural defect or irregularity in the bringing or prosecution of the action?

(c) Because the proceeding for any other reason proves abortive and thereby fails to reach a decision on the merits?

5. What is the length of the period within which rights established by a final judgement or award can be enforced? If different periods are applicable to the enforcement of different types of judgements or awards, please state the governing rules.

## PART II

1. Attention is directed to article 6 of the preliminary draft of a uniform law which is annexed hereto. This article states a general prescriptive period, in the alternative, of three or five years. Which alternative do you prefer? If you prefer a

period other than the alternatives stated in the preliminary draft, please state the period which you prefer and the reasons therefor.

(a) If the information is readily available, please indicate or estimate the frequency with which claims arising out of international sales of goods (or similar transactions) are brought to a tribunal after the expiration of (i) three (ii) four or (iii) five years.

2. Articles 7 to 9 of the preliminary draft sets forth proposed provisions on the commencement of the period of prescription; article 7, paragraphs 3 and 4 state proposed rules with respect to rights or claims relying on lack of conformity of the goods. Do you approve of these proposed provisions? If a rule different from that set forth in the preliminary draft is preferred, please state the preferred rule and supporting reasons therefor.

3. Attention is directed to article 18 of the preliminary draft with respect to modification of the limitation period. In paragraph 2, language in brackets reflects two alternative views concerning the time when a declaration extending the period may be effective. Which alternative do you prefer? If a rule different from that set forth in article 18 is preferred, please state the preferred rule and the supporting reasons therefor.

4. Is there any provision of the preliminary draft which is not well adapted to the circumstances and needs applicable to international sales of goods, or which would interfere with adoption of a convention implementing the draft? If so, please state an alternative provision and supporting reasons therefor.

## ANNEX IV

### List of participants

#### MEMBERS

##### Argentina

H. Gervasio Ramón Carlos COLOMBRES, Professur à la Faculté de droit, Université de Buenos Aires

##### Czechoslovakia

Mr. Ludvik KOPAC, Legal Adviser, Ministry of Foreign Trade, Prague

##### Japan

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto  
Mr. Akira TAKAKUWA, Public Attorney, Ministry of Justice, Tokyo

##### Norway

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice, Oslo

##### United Arab Republic

Mr. Mohsen CHAFIK, Professor of Trade Law, Cairo University

##### United Kingdom

Mr. Anthony Gordon GUEST, Professor of Law, King's College, London

#### OBSERVERS

##### International Institute for the Unification of Private Law

Mr. Jean Pierre PLANTARD, Deputy Secretary-General

##### Hague Conference on Private International Law

Mr. Michel PELICHET, Secretary to the Permanent Bureau of the Conference

##### Council of Europe

Mr. Alexandre PAPANDREOU, Principal Administrative Officer, Directorate of Legal Affairs

#### SECRETARIAT

Mr. John HONNOLD, Chief, International Trade Law Branch, Secretary of the Working Group

Mr. Kazuaki SONO, Legal Officer, International Trade Law Branch, Assistant Secretary of the Working Group

## ANNEX V

### List of documents and working papers before the Working Group

[Not reproduced in the present volume]

### 3. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Preliminary draft of a uniform law on prescription (limitation) and explanatory text: by Mr. R. Colombres, representative of Argentina to UNCITRAL	A/CN.9/WG.1/WP.1
Report on effects of prescription with respect to liens, guarantees and other security interests: by Mr. Mohsen Chafik, representative of the United Arab Republic (Arab Republic of Egypt) to UNCITRAL	A/CN.9/WG.1/WP.2
Preliminary draft of a uniform law on prescription (limitation): by Mr. Anthony Guest, representative of the United Kingdom of Great Britain and Northern Ireland to UNCITRAL	A/CN.9/WG.1/WP.3
Report on limitation and arbitration proceedings: by Mr. Anthony G. Guest, representative of the United Kingdom to UNCITRAL	A/CN.9/WG.1/WP.4
Report on judicial proceedings and interruption of prescription: by Mr. Shinichiro Michida, representative of Japan to UNCITRAL	A/CN.9/WG.1/WP.5
Preliminary draft of a uniform law on prescription (limitation): by Mr. Ludvik Kopac', representative of Czechoslovakia to UNCITRAL	A/CN.9/WG.1/WP.6
Report on impossibility to sue by reason of <i>force majeure</i> and on conflicts of laws and the uniform rules: by Mr. Ludvik Kopac', representative of Czechoslovakia to UNCITRAL	A/CN.9/WG.1/WP.7
Report on the relationship between the uniform law on limitation (prescription) and other conventions relating to international sale of goods: by Mr. Paul Jenard, representative of Belgium to UNCITRAL	A/CN.9/WG.1/WP.8
Prescription of recourse actions between parties to a contract of international sale of goods; note by Mr. Stein Rognlien, representative of Norway to UNCITRAL	A/CN.9/WG.1/WP.10

## II. INTERNATIONAL PAYMENTS

### Negotiable instruments

#### 1. Analysis of replies received from Governments and banking and trade institutions to the questionnaire on negotiable instruments used for making international payments: report of the Secretary-General (A/CN.9/38/Add.1) \*

##### INTRODUCTION

1. At its third session (1970), the United Nations Commission on International Trade Law considered a report of the Secretary-General containing an analysis of the comments made by Governments and banking and trade institutions in response to the Secretary-General's questionnaire regarding (a) current practices followed in making and receiving international payments and (b) problems encountered in settling international transactions by means of negotiable instruments (A/CN.9/38). In view of the fact that several replies were received after the preparation of the analysis, the Commission requested the Secretary-General to analyse the later replies and to submit the analysis to its fourth session.<sup>1</sup>

2. The present report has been prepared in response to the above request of the Commission. It contains an analysis of the following replies:<sup>2</sup>

86	Netherlands	Government
87	Romania	Government
88	Turkey	Central Bank of the Republic of Turkey
89	Uruguay	Central Bank of Uruguay
90	Argentina	Central Bank of Argentina
91	Denmark	Government
92	Pakistan	State Bank of Pakistan
93	Ivory Coast	Government

3. The analysis of the initial seventy-eight replies included the questionnaire and a description of the general setting as to legal rules and banking practice to which the questions relate. This background material is not repeated in the present addendum, which, for a clearer understanding, should be read in conjunction with document A/CN.9/38.

Reference Number	Country of origin	Respondent
79	Bulgaria	Government
80	Bulgaria	National Bank of Bulgaria
81	Federal Republic of Germany	Deutscher Sparkassen und Giroverband E.V.
82	Finland	Government
83	France	Banque française et italienne pour l'Amérique du Sud
84	Iran	Central Bank of Iran
85	Italy	Banca d'Italia

##### Analysis of replies

4. The analysis of the earlier seventy-eight replies, considered by the Commission at its third session, made it apparent that problems or difficulties encountered in settling international transactions, in so far as they result from disharmony in the law, occur most frequently in certain specific areas of negotiable instruments law. These areas concern: (a) the form and content of negotiable instrument, (b) the effect of forged instruments and forged endorsements, and (c) the requirements as to the mode and time for protest and notice of dishonour.<sup>3</sup>

5. The additional replies examined in this addendum support that view. Indeed, the types of problems or difficulties referred to in these replies relate almost exclusively to the areas mentioned in (a), (b) and (c) above.

##### (a) Form and content of negotiable instruments<sup>4</sup>

6. Several replies point to difficulties that may arise as a result of divergencies in the rules in respect of the

\* 5 March 1971.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its third session, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8017), para. 118; *Yearbook of the United Nations Commission on International Trade Law* (hereafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, III, A.

<sup>2</sup> As in the analyses contained in documents A/CN.9/38 and A/CN.9/48, individual replies will be identified by numbers; seventy-eight replies were analysed in A/CN.9/38; UNCITRAL Yearbook, vol. I: 1968-1970, part three, A, 2. The reference numbers used in A/CN.9/38 and in this addendum correspond to those used in document A/CN.9/48 (analysis of comments regarding the possible content of uniform rules); see section 2 below.

<sup>3</sup> A/CN.9/38, para. 70.

<sup>4</sup> See A/CN.9/38, para. 43-44.



formal requisites of negotiable instruments or permissible stipulations on such instruments.<sup>5</sup>

7. More specifically, reference is made to difficulties that may result from the failure to insert the term "cheque" or "promissory note" in the body of the instrument,<sup>6</sup> or from divergent rules in respect of the stipulation of interest.<sup>7</sup>

(b) *Forgery*<sup>8</sup>

8. Several replies refer to problems occurring in connexion with forged signatures.<sup>9</sup> Some of these replies emphasize that the principal cause of legal differences is due to the sharp differences between legal systems.<sup>10</sup>

(c) *Protest and notice of dishonour*<sup>11</sup>

9. Several replies refer to problems that arise as a result of divergencies in the law concerning the form which protest must take and, in particular, the time within which protest must be made or notice of dishonour be given.<sup>12</sup>

<sup>5</sup> E.g., 81, 82, 85, 88, 93.

<sup>6</sup> E.g., 81, 82, 85. As to difference in this respect between the Geneva rules and Anglo-American law, see A/CN.9/38, foot-note 67.

<sup>7</sup> E.g., 87. And see A/CN.9/38, foot-note 71.

<sup>8</sup> See A/CN.9/38, paras. 51-52.

<sup>9</sup> E.g., 81 (indirectly), 85, 88, 89, 90, 92.

<sup>10</sup> See in this respect A/CN.9/38, foot-note 86.

<sup>11</sup> See A/CN.9/38, paras. 55-62, and foot-notes 91, 100 and 107.

<sup>12</sup> E.g., 81, 82, 84, 85, 87, 88, 92, 93.

10. One respondent notes that an instrument showing certain formal defects cannot, under the law of his country, be protested for non-acceptance or non-payment.<sup>13</sup>

(d) *Other problems*

11. Several respondents draw attention to the uncertainty which results from divergent rules on prescription of actions on an instrument.<sup>14</sup> These divergencies often made it difficult to ascertain whether action on an instrument can still be taken or is prescribed.<sup>15</sup>

12. One respondent points to difficulties that sometimes arise in connexion with the interpretation of foreign legal concepts.<sup>16</sup>

13. The same respondent raises the question whether parties to an instrument (i.e., a promissory note) are at liberty to agree on the application of certain provisions of a law other than that of the place of issuance.

14. Some respondents refer generally to problems that have arisen as a result of different rules concerning the rights and liabilities of parties to a negotiable instrument.<sup>17</sup>

15. Several replies report on the existence of problems occurring in connexion with lost instruments.<sup>18</sup>

<sup>13</sup> See 82.

<sup>14</sup> E.g., 84, 85, 93.

<sup>15</sup> See 85.

<sup>16</sup> See 81.

<sup>17</sup> E.g., 81, 85, 87, 88, 93.

<sup>18</sup> E.g., 81, 85, 88, 93.

**2. Analysis of replies of Governments and banking and trade institutions relating to negotiable instrument for optional use in international transactions: report of the Secretary-General (A/CN.9/48) \***

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## INTRODUCTION

1. At its third session, held in New York from 6 to 30 April 1970, the United Nations Commission on International Trade Law continued its consideration of the subject of international payments by means of negotiable instruments. The Commission had before it a report of the Secretary-General containing an analysis of the replies received from Governments and banking and trade institutions to a questionnaire on negotiable instruments used for making international payments (A/CN.9/38). That report analysed some seventy-five replies to questions eliciting information in two areas: (a) the current practices followed to making and receiving international payments, and (b) the problems encountered in settling international transactions by means of negotiable instruments.

2. The questionnaire addressed to Governments and banking and trade institutions was accompanied by an annex setting out questions concerning the possible content of uniform rules applicable to a special negotiable instrument for optional use in international transactions. Pursuant to the decision taken by the Commission at its third session,<sup>1</sup> the present report analyses the replies to those questions.

3. For the purpose of assisting the Commission in evaluating the various comments concerning the substance of possible uniform rules, the analysis of the replies to each individual question is preceded by a brief statement of the basic differences between the Geneva rules of 1930 (Uniform Law on Bills of Exchange) and the Anglo-American law (the United Kingdom Bills of Exchange Act (1882) and the Uniform Commercial Code of the United States). In addition, the analysis often notes the system under which the country of a respondent operates; this was deemed particularly useful in cases where a significant number of replies emanating from countries following the Geneva system expressed preference for a rule obtaining under the Anglo-American law, or vice-versa.

4. Because of the large number of references, individual replies will be identified by numbers as set forth in the list of respondents appearing below. In that list, the name of a country from which a reply emanated is followed by a letter or letters indicating the statute or uniform rules on which the law of negotiable instruments of that country is patterned. The abbreviations used in that list and in this report are as follows:

- BEA Bills of Exchange Act, 1882 (United Kingdom);  
 F Legislation influenced by the (pre-Geneva) French Commercial Code;  
 G Geneva Conventions of 1930 and 1931 (these Conventions are referred to separately as ULB and ULC; see below);  
 H Hague Uniform Regulations concerning Bills of Exchange and Promissory Notes of 1912;

- H-G Legislation based on Geneva Conventions and Hague Uniform Regulations;  
 NIL Negotiable Instruments Law (United States);<sup>2</sup>  
 S-F Legislation influenced by the Spanish and French Commercial Codes;  
 UCC Uniform Commercial Code (United States);  
 ULB Geneva Uniform Law on Bills of Exchange and Promissory Notes (1930);  
 ULC Geneva Uniform Law on Cheques (1931).

*List of respondents*

<i>Reference Number</i>	<i>Country of origin (legal system)</i>	<i>Respondent</i>
1.	Argentina (G)	Government
2.	Australia (BEA)	Australian Bankers' Association
3.	Austria (G)	Government (Federal Ministry of Justice)
4.	Austria (G)	Austrian National Bank
5.	Austria (G)	Association of Austrian Banks and Bankers
6.	Austria (G)	Oesterreichische Länderbank
7.	Barbados (BEA)	Government
8.	Barbados (BEA)	East Caribbean Currency Authority
9.	Belgium (G)	Government
10.	Belgium (G)	National Bank of Belgium
11.	Cambodia (G)	Government
12.	China (H)	Central Bank of China
13.	Cyprus (BEA)	Central Bank of Cyprus
14.	Czechoslovakia (G)	Government
15.	Czechoslovakia (G)	Czechoslovak National Bank
16.	Denmark (G)	Federation of Danish Banks
17.	Dominican Republic (F)	Central Bank of the Dominican Republic
18.	Ecuador (G)	Central Bank of Ecuador
19.	El Salvador	Central Bank of El Salvador
20.	Ethiopia (G)	Commercial Bank of Ethiopia
21.	Federal Republic of Germany (G)	Government (Ministry of Justice)
22.	Federal Republic of Germany (G)	German Federal Bank (Deutsche Bundesbank)
23.	Federal Republic of Germany (G)	German National Committee of the ICC
24.	Federal Republic of Germany (G)	Federal Association of German Banks

<sup>1</sup> A/8017, para. 118, sub (b); *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part two, III, A.

<sup>2</sup> A uniform law drawn up by a committee appointed in 1895 by the National Conference of State Boards of Commissioners for Promoting Uniformity of Legislation and recommended to the legislatures of the various states of the United States by the Conference in 1896; now replaced in the United States by relevant provisions of the Uniform Commercial Code.

<i>List of respondents (continued)</i>				
<i>Reference Number</i>	<i>Country of origin (legal system)</i>	<i>Respondent</i>		
			61.	Sweden (G) Government <sup>a</sup>
			62.	Sweden (G) Swedisch Bankers' Association <sup>b</sup>
			63.	Sweden (G) Post Office Bank <sup>b</sup>
			64.	Sweden (G) General Export Association of Sweden; Federation of Swedish Wholesale Merchants and Importers (Joint reply)
25.	Finland (G)	Finnish Bankers' Association	65.	Switzerland (G) National Committee of the ICC
26.	France (G)	Bankers' Association	66.	Thailand (H) Bank of Thailand
27.	France (G)	Banque de France	67.	Trinidad and Tobago (BEA) Central Bank of Trinidad and Tobago
28.	Greece (G)	Bank of Greece	68.	United States (UCC) Government
29.	Greece (G)	Greek National Committee of the ICC	69.	United States (UCC) Federal Reserve Bank
30.	Guatemala (H)	Bank of Guatemala	70.	Union of Soviet Socialist Republics Government
31.	Hungary (G)	National Bank of Hungary	71.	United Kingdom (BEA) Accepting Houses Committee
32.	Iceland (G)	Central Bank of Iceland	72.	United Kingdom (BEA) Association of British Chambers of Commerce
33.	India (BEA)	Foreign Exchange Dealers' Association	73.	United Kingdom (BEA) British Bankers' Association
34.	Iraq (G)	Government (transmitting reply of State Organization for Banks)	74.	Venezuela (H) Government (transmitting reply of the Central Bank of Venezuela)
35.	Iraq (G)	Central Bank of Iraq	75.	Bank for International Settlements (Basel, Switzerland)
36.	Ireland (BEA)	Central Bank of Ireland	76.	Inter-American Development Bank
37.	Italy (G)	Italian National Committee of the ICC	77.	International Bank for Economic Co-operation (Moscow, USSR)
38.	Japan (G)	Federation of Bankers' Associations of Japan	78.	International Bank for Reconstruction and Development (Washington, D.C., United States)
39.	Jordan (G)	Central Bank of Jordan	79.	Bulgaria (G) Government
40.	Republic of Korea (G)	Government	80.	Bulgaria (G) National Bank of Bulgaria
41.	Republic of Korea (G)	Bank of Korea	81.	Federal Republic of Germany (G) Deutscher Sparkassen und Giroverband C.V.
42.	Kuwait (G)	Government (transmitting reply of the Central Bank of Kuwait)	82.	Finland (G) Government
43.	Malawi (BEA)	Government		
44.	Malawi (BEA)	Reserve Bank of Malawi		
45.	Malaysia (BEA)	Government		
46.	Malta (BEA)	Central Bank of Malta		
47.	Mauritius	Bank of Mauritius		
48.	Mexico (H-G)	Government		
49.	Mexico (H-G)	Bank of Mexico		
50.	Morocco (G)	Government (Ministry of Finance)		
51.	Netherlands (G)	Netherlands Committee of the ICC		
52.	Norway (G)	Government		
53.	Philippines (NIL)	Central Bank of the Philippines		
54.	Poland (G)	Government		
55.	Portugal (G)	National Committee of the ICC		
56.	Sierra Leone (BEA)	Bank of Sierra Leone		
57.	Singapore (BEA)	Government (transmitting reply of Development Bank of Singapore)		
58.	Singapore (BEA)	Association of Banks in Malaysia-Singapore		
59.	Somalia	Somali National Bank		
60.	South Africa (BEA)	South African Reserve Bank		

<sup>a</sup> The Swedish Government states that the competent authorities fully concur in the replies given by the Swedish Bankers' Association, the Post Office Bank, the General Export Association of Sweden, and the Federation of Swedish Wholesale Merchants and Importers.

<sup>b</sup> Reply transmitted by the Central Bank of Sweden.

## LIST OF RESPONDENTS (continued)

Reference Number	Country of origin (legal system)	Respondent
83.	France (G)	Banque française et italienne pour l'Amérique du Sud
84.	Iran	Central Bank of Iran
85.	Italy (G)	Banca d'Italia
86.	Netherlands (G) <sup>c</sup>	Government
87.	Romania (G)	Government
88.	Turkey (G)	Central Bank of the Republic of Turkey
89.	Uruguay	Central Bank of Uruguay
90.	Argentina (G)	Central Bank of Argentina
91.	Denmark (G)	Government
92.	Pakistan (BEA)	State Bank of Pakistan
93.	Ivory Coast (G)	Government

<sup>c</sup> The Netherlands Government states that the reply of the Netherlands Committee of ICC (51) reflects its opinion.

## A. FORM AND CONTENTS

## I. Formal requisites

**Question A 1:** "Should the rules relating to a new negotiable instrument specify requirements as to its form and, if so, what should be the essential requirements?"

## (a) Basic rules

5. The Geneva uniform law (ULB) and the Anglo-American law (BEA, UCC) lay down that an instrument must conform to certain formal requisites.

6. The common grounds shared by the two systems are the requirements that such an instrument must:

(a) Contain an unconditional order to pay "a determinate sum of money" (ULB, article 1 (2)) or "a sum certain in money" (BEA, section 3 (1); UCC, section 3-104 (1) (b));

(b) Contain the name of the drawee (ULB, article 1 (3); BEA, section 3 (1), section 6; UCC, section 3-104 (1) (b) and section 3-102 (1) (b);

(c) Be signed by the drawer (ULB, article 1 (8); BEA, section 3 (1); UCC section 3-104 (1) (a)).

7. There is also a degree of similarity between the rules concerning the maturity date of a bill of exchange. Under the ULB (article 1 (4)), a bill must contain "a statement of the time of payment"; in the absence of such statement, a bill "is deemed to be payable at sight" (ULB, article 2). The BEA (section 3 (1)) provides that a bill may be payable "on demand or at a fixed or determinable future time". Under section 10 (1) (a) BEA, a bill is payable on demand: "(a) which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed".<sup>3</sup> The UCC (section 3-104 (1) (c)) provides that a bill may be payable "on demand or at a

definite time". Under section 3-108 (UCC), instruments payable on demand include "those payable at sight or on presentation and those in which no time for payment is stated".

8. However, the ULB, as compared with Anglo-American law, is more rigid in respect of maturities. Article 33 ULB provides that a bill of exchange may be drawn payable at sight, at a fixed period after sight, at a fixed period after date, or at a fixed date; it states expressly that bills at other maturities,<sup>4</sup> are null and void. In contrast, under Anglo-American law, bills may be drawn payable upon or after a specified act or event that is certain to occur (UCC, section 3-109 (1) (d)), or at a determinate future time (BEA, section 3 (1)); or by stated instalments (BEA, section 9 (1); UCC, section 3-106 (1)).<sup>5</sup>

9. The ULB imposes other formal requisites not found in Anglo-American law. Thus, the ULB requires that a bill of exchange should conform to the following requisites:

(a) The term "bill of exchange" must be inserted in the body of the instrument and expressed in the language employed in drawing up the instrument (ULB, article 1 (1));

(b) The date of issue must be stated (ULB, article 1 (7));<sup>6</sup>

(c) The place of issue must be stated (ULB, article 1 (7));<sup>7</sup>

(d) The "name of the person to whom or to whose order payment is to be made" must be mentioned (ULB, article 1 (6)).<sup>8,9</sup>

## (b) Analysis of replies

## (i) General

10. In reply to the question concerning the essential formal requirements of the proposed instrument, a significant number of respondents merely refer to, or

<sup>4</sup> e.g., a bill payable by instalments at successive maturity dates. See paragraph 24 under question A 2 (b).

<sup>5</sup> The expression "determinable future time" in section 3 (1) BEA means "something that is bound to happen in the future, although at the time the bill is drawn the actual date of the occurrence is unknown" Cf. F. R. Ryder, *Negotiable Instruments*, 1970, p. 19.

<sup>6</sup> Section 3 (4) (a) BEA provides that a bill is not invalid by reason that it is not dated. A similar provision is found in section 3-114 (1) UCC. Section 2 BEA permits the holder to insert the true date if maturity is governed by the date of issue.

<sup>7</sup> Section 3 (4) (c) BEA provides that a bill is not invalid by reason that it does not specify the place where it is drawn. A similar provision is found in section 3-112 (1) (a) UCC.

<sup>8</sup> This provision rules out a bill of exchange drawn payable to bearer. The Anglo-American law is less rigid: a bill may be made payable to bearer, and it suffices that the payee is indicated with reasonable certainty (BEA, section 7 (1); UCC, section 3-104 (1) (d) and section 3-110 (1)).

<sup>9</sup> Article 1 (5) ULB also provides that a bill of exchange must mention the place of payment. However, article 2 ULB provides that, in default of such mention, the place specified beside the name of the drawee (required by article 1 (7)) is deemed to be the place of payment. By section 45 (4) BEA, where no place of payment is specified in the bill, it is payable at the address of the drawee.

<sup>3</sup> And see section 14 BEA regarding "days of grace".

produce, the relevant provisions obtaining under their own law.<sup>10</sup>

11. One respondent from a country that has ratified the Geneva Conventions suggests that the formal requisites listed in the Geneva uniform law should be modified to meet the requirements of the common law countries.<sup>11</sup> Another respondent makes the general observation that the formal requirements should be flexible and be reduced to a strict minimum.<sup>12</sup>

12. Other respondents stress the necessity for a rule to the effect that an instrument, in which any of the formal requirements laid down by the proposed Convention is wanting, shall be invalid as a negotiable instrument within that Convention.<sup>13</sup>

13. There is consensus among respondents that the formal requisites to which the proposed instrument must conform should include the four requirements shared by the Geneva uniform law and the Anglo-American law; i.e., the instrument should:

- (a) Contain an unconditional order to pay a sum certain in money;
- (b) Be payable on demand (at sight) or at a specific time;
- (c) Contain the name of the drawee; and
- (d) Be signed by the drawer.

14. A few replies specify that the statement indicating the sum of money payable should be accompanied by a statement indicating the currency in which payment is to be made.<sup>14</sup>

15. As regards the time of payment, one reply raises the question whether the clause "upon arrival of ship" should be permitted under the new rules.<sup>15</sup> The same reply also suggests that thought should be given to the advantages of creating an instrument with fixed maturity dates only; the current type of bill would continue to be used in cases where it was necessary to stipulate payment at sight, or at a given time after sight.<sup>16</sup>

16. As regards the name of the drawee, some replies suggest that the drawee's name should be accompanied by his address.<sup>17</sup> One reply is in favour of the drawee being a bank only.<sup>18</sup>

## (ii) *Designation of the proposed instrument*

17. The Geneva uniform laws depart from the Anglo-American system in requiring on pain of invalidity, that the name of the type of the instrument appear on the instrument.<sup>19</sup>

18. It would appear that two separate issues arise in connexion with the insertion of a designating term in the body of the proposed instrument: (a) the insertion of such a term as an element of formal validity, and (b) the use of such a term for the purpose of identifying the proposed instrument.

19. The replies that would favour the insertion of a designating term in the body of the instrument, as an element of formal validity, emanate from countries operating under the Geneva system.<sup>20</sup> However, several respondents, including those from countries following the Geneva systems, express the view that the requirements as to form should be flexible and be reduced to a strict minimum.<sup>21</sup>

20. Some respondents advocate that the proposed instrument should be given a special designation in order to distinguish it from instruments governed by existing national laws.<sup>22</sup> Thus, it is suggested that the term "international bill of exchange"<sup>23</sup> or "international negotiable instrument"<sup>24</sup> should appear on the face of the proposed instrument, either in the text or separate from it as a heading.<sup>25</sup> In the view of these respondents, the use of a designating term should not be an essential requirement as to form, but merely serve to identify the proposed instrument for the sole purpose of subjecting it to the proposed uniform rules.

## (iii) *Name of payee*

21. There is a significant difference between the two systems in this respect. The ULB (article 1 (b)) requires that a bill of exchange "name the person to whom or to whose order payment is to be made" and does not therefore permit the issue of a bill payable to bearer.<sup>26</sup> Anglo-American law, however, allows that a bill be drawn payable to bearer.

<sup>19</sup> One reason for this requirement is that in most civil law countries, the cheque has developed different functions from the bill of exchange, giving rise to different rules in some instances. The obligatory designation of the type of instrument thus assists in distinguishing the two types of negotiable instruments more clearly.

<sup>20</sup> One possible exception (69).

<sup>21</sup> e.g., 9, 10, 36, 75 and 85.

<sup>22</sup> e.g., 8, 9, 15, 22 and 51.

<sup>23</sup> e.g., 69. But see 27: it is desirable to avoid the term "bill of exchange" ("lettre de change") in the proposed instrument.

<sup>24</sup> e.g., 26. See also 85: "tratta internazionale".

<sup>25</sup> e.g., 9.

<sup>26</sup> Article 1 (6) ULB has been criticized on the ground that article 12 ULB provides that endorsement to bearer is equivalent to an endorsement in blank. It is therefore possible for the drawer to circumvent the prohibition of article 1 (6) ULB by drawing a bill to his order and to endorse it subsequently in blank or to bearer (Cf. P. Lescot and R. Roblot, *Les Effets de Commerce*, 1953, vol. I, p. 199). A cheque may be drawn payable to bearer (ULC, article 5).

<sup>10</sup> Respondents of countries following the Geneva system expressing preference for article 1 ULB: e.g., 1, 6, 11, 16, 21, 24, 32, 39, 40, 41, 50, 58 and 87. Respondents of countries following the Bills of Exchange Act expressing preference for section 3 (1) BEA: e.g., 2, 7, 13, 33, 42, 45, 67, 71 and 72.

<sup>11</sup> See 82. See also 9: the formal requirements of the proposed instrument should be less stringent than those laid down by the Geneva uniform laws.

<sup>12</sup> See 10.

<sup>13</sup> e.g., 26 and 75. See also 22 and 87: the proposed rules should determine the consequences of failure to observe requirements as to form. Of course, the implications of the concept of invalidity may be subject to varying interpretations.

<sup>14</sup> e.g., 22, 27 and 48.

<sup>15</sup> See 75.

<sup>16</sup> *Ibid.*

<sup>17</sup> e.g., 26 and 73.

<sup>18</sup> See 60.

22. A significant number of replies, from countries that operate under the Geneva system, express preference for an instrument that could also be drawn payable to bearer.<sup>27</sup>

23. One respondent, from a country that has ratified the Geneva Conventions, states his opposition to the adoption of the Anglo-American rule permitting the issue of bills drawn payable to bearer.<sup>28</sup> The reply states that the issue of such bills would make it more difficult to enforce exchange control regulations.

24. Two replies from common law countries do not mention the possibility that the proposed instrument be also drawn payable to bearer.<sup>29</sup>

## II. Stipulation for interest

### Question A 2 (a): "Should the rules permit the instrument to stipulate that the principal amount will bear interest?"

#### (a) Basic rules

25. The ULB contains strict rules on interest. Article 5 ULB allows a stipulation for interest in the case of bills payable at sight or at a fixed period after sight, but such a stipulation is denied effect ("deemed not to be written") in the case of any other bill of exchange (i.e., bills payable on or at a fixed period after date). A stipulation for interest is also denied effect where the rate of interest is not specified. On the other hand, Anglo-American law (section 9 (1) BEA and section 3-106 (1) (a) UCC) provides that the sum payable by a bill is a sum certain in money, although it is required to be paid with interest, and permits therefore the stipulation of interest on any bill.

#### (b) Analysis of replies

26. Although several replies to this question cannot be interpreted with absolute certainty,<sup>30</sup> the replies show that the majority of respondents, including those from countries following the Geneva system, are in favour of a rule permitting the stipulation of interest.<sup>31</sup> The replies opposing such a rule<sup>32</sup> include two from countries whose national law is based on the Bills of Exchange Act, 1882.<sup>33</sup>

<sup>27</sup> e.g., 3, 5, 10 (implicitly), 14, 15, 20, 26 and 27.

<sup>28</sup> See 85.

<sup>29</sup> See 69 and 73.

<sup>30</sup> An affirmative reply without further specifications by respondents from countries operating under the Geneva system can be taken to mean preference either for the rule embodied in article 5 ULB or for a rule analogous to the Anglo-American provisions. Similarly, a negative reply by those respondents could indicate either opposition to the stipulation of interest, whatever the maturity date of the bill, or preference for the relevant rule of the Geneva Uniform law.

<sup>31</sup> Affirmative replies from countries operating under the Geneva system: 3, 9, 10, 11, 14, 15, 21, 28, 29, 31, 32, 39, 50, 51, 54, 62, 64, 70, 74, 79, 80, 87 and 92. Affirmative replies from countries operating under Anglo-American law: 2, 7, 8, 13, 33, 44, 45, 56, 58, 60, 69, 71 and 73. Affirmative replies from other countries: 12, 17, 48, 49, 66 and 74.

<sup>32</sup> e.g., 1, 5, 6, 16, 20, 22, 24, 25, 26, 27, 37, 40, 41, 64, 81, 82 and 88.

<sup>33</sup> See 36 and 42.

27. Some respondents justify their opposition to such a rule on the ground that it would create uncertainty regarding the sum payable<sup>34</sup> and therefore complicate negotiation of the instrument,<sup>35</sup> or on the ground that the calculation of interest on the principal amount would imply an important modification of commercial practice.<sup>36</sup> These respondents note that interest payable up to the maturity date can be included in the amount of the instrument and that, in accordance with current practice, any overdue interest as from the agreed maturity date ("delay interest") should be indicated in the collection schedule or in the commercial contract.<sup>37</sup> Another respondent, noting that the main advantage of the rule prohibiting the stipulation of interest would be that it avoids any uncertainty regarding the amount payable, considers nevertheless that the risks would not be excessive if that rule were abandoned.<sup>38</sup>

28. A few replies suggest that the uniform rules should provide for a uniform legal rate of interest that would be applicable in cases where interest is stipulated but no rate expressed.<sup>39</sup>

## III. Principal amount payable in instalments

### Question A 2 (b): "Should the rules permit the instrument to stipulate that the principal amount may be payable in instalments?"

#### (a) Basic rules

29. The ULB states that bills payable in instalments are deemed null and void (article 33). Anglo-American law is to the contrary; under section 9 (1) BEA, the sum payable by a bill is a sum certain, although it is required to be paid by stated instalments or "by stated instalments with a provision that upon default in payment of any instalments the whole shall become due". Section 3-106 (1) UCC provides that "the sum payable is a sum certain even though it is to be paid... by stated instalments".

#### (b) Analysis of replies

30. Respondents are about evenly divided on this question. The replies that oppose the possibility that a bill may be payable by instalments emanate largely from countries following the Geneva system.<sup>40</sup> Four replies from common law countries also express their opposition to such a rule.<sup>41</sup>

31. It is noteworthy, however, that a significant number of respondents, from countries operating under

<sup>34</sup> e.g., 22, 27 and 81.

<sup>35</sup> e.g., 22 and 27.

<sup>36</sup> e.g., 27 and 85.

<sup>37</sup> e.g., 22, 26, 27 and 81.

<sup>38</sup> See 75.

<sup>39</sup> See 27, 75 and 85.

<sup>40</sup> e.g., 3, 5, 6, 11, 12 (national law based on Hague Regulations), 14, 15, 16, 20, 21, 22, 24, 25, 26, 27, 28, 39, 40, 41, 43, 44, 49 (national law based on Hague Regulations and Geneva Uniform Law), 64, 66, 81, 82 and 88.

<sup>41</sup> See 2, 33, 36 and 56.

the Geneva system,<sup>42</sup> join the majority of respondents from common law countries<sup>43</sup> in permitting bills payable by instalments.

32. One respondent considers that to permit payment of the amount of the bill by instalments "would be contrary to the nature of a negotiable instrument".<sup>44</sup> Another respondent is of the opinion that this might lead to difficulties in enforcing payment of the amount of the bill.<sup>45</sup> It is further noted that any payment by instalments should be provided for outside the instrument, and that it would be preferable either to divide the amount to be paid at the outset among several instruments or to cancel the instrument for the full amount and replace it by a number of instruments with a different maturity date for each instalment to be received.<sup>46</sup>

#### IV. *Stipulation for effective payment in a foreign currency*

**Question A 2 (c):** "Should the rules permit the instrument to stipulate that the holder may demand payment in a specified currency which is not that of the place of payment?"

##### (a) *Basic rules*

33. The ULB and the UCC contain substantially similar provisions regarding payment of a bill drawn for a sum expressed in a currency which is not that of the place of payment. Article 41 ULB permits the drawer to stipulate that payment be made in a certain specified currency (the so-called "effective payment clause"), and section 3-107 (2) UCC states that if an instrument specifies a foreign currency as the medium of payment, the instrument is payable in that currency. No such rule is to be found in the BEA.

34. The ULB, the BEA and the UCC set forth provisions regarding the calculation of the rate of exchange where a bill is drawn in foreign currency. The ULB (article 41, the BEA (section 72 (4)), and the UCC (section 3-107 (2)) unite in permitting the drawer to specify the rate of exchange in the bill. If there is no express stipulation as to the rate of exchange, the bill drawn payable in a currency which is not that of the place of payment may be ULB, UCC) or shall be (BEA) paid in the currency of the place of payment:

(a) According to its value on the date of maturity (article 41 ULB);

(b) According to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (section 72 (4) BEA);

(c) At the buying sight rate for that currency on the day on which the instrument is payable or, if payable

on demand, on the day of demand (section 3-107 (2) UCC).

35. Unlike the BEA and the UCC, the ULB gives the holder an option if the debtor is in default. In such event, the holder may demand payment according to the rate prevailing on the date of maturity or that on the date of payment.

##### (b) *Analysis of replies*

36. Under a majority of replies, the holder should be empowered to demand payment in a specified foreign currency, provided that the proposed instrument is drawn for a sum expressed in that currency.<sup>47</sup> Several replies note, however, that this rule would necessarily be subject to the exchange control regulations of the country of the place of payment.<sup>48</sup> Other replies specify that the currency in which the instrument is drawn should be one regularly quoted in the country of payment<sup>49</sup> or be convertible.<sup>50</sup> One respondent qualifies his affirmative reply by the observation that practice has shown it to be undesirable to permit a stipulation for effective payment in a foreign currency.<sup>51</sup>

37. Two replies would limit the kinds of currency in regard to which such a stipulation would be effective. According to one reply, the stipulation should only be effective if the currency specified in the instrument is that of the country in which the instrument is drawn.<sup>52</sup> Another reply would allow an effective stipulation only when the instrument is drawn in the currency of the country either of the drawer, the origin of the goods, or the shipment of the goods.<sup>53</sup>

38. Some of the respondents who oppose the stipulation for effective payment in a foreign currency<sup>54</sup> explain their opinion by stating that bills with a so-called "effective payment clause" occur very seldom and that there will be, in actual practice, no need to provide for this possibility in respect of the proposed instrument.<sup>55</sup>

39. One reply<sup>56</sup> notes that the question of the "effective payment clause" should be considered under various aspects. An instrument denominated in a foreign currency will not generally be settled in that currency at the place of payment since settlement will be made either in local currency or by means of a banking operation cheque, credit of transfer). Moreover, once there is an action at law, the problem of conversion of the currency stated in the instrument into the currency

<sup>47</sup> e.g., 1, 2, 3, 5, 6, 8, 9, 10, 11, 13, 14, 15, 16, 20, 21, 24, 25, 26, 27, 28, 29, 31, 32, 36, 37, 39, 40, 41, 42, 44, 45, 48, 51, 54, 58, 60, 62, 69, 70, 79, 80, 81, 82, 84, 85 and 92.

<sup>48</sup> e.g., 13, 26, 40, 84 and 92.

<sup>49</sup> See 26. The comments referred to in foot-notes 49 to 51 might be considered as referring to preferred commercial practice rather than to legal requirements.

<sup>50</sup> See 60.

<sup>51</sup> See 51.

<sup>52</sup> See 2.

<sup>53</sup> See 8.

<sup>54</sup> e.g., 12, 17, 22, 23, 49, 50, 56 and 88.

<sup>55</sup> See 22.

<sup>56</sup> See 75.

<sup>42</sup> e.g., 1, 9, 10, 29, 31, 32, 50, 51, 54, 62, 70, 79, 80, 85, 87 and 92. See also 17, 48 and 75.

<sup>43</sup> e.g., 7, 8, 13, 45, 60, 69, 71 and 73.

<sup>44</sup> See 24.

<sup>45</sup> See 22.

<sup>46</sup> See 21, 24, 26 and 81.



of the forum arises.<sup>57</sup> The reply expressed the opinion, however, that these are not sufficient grounds for depriving the parties of the right to stipulate an effective payment clause. A second aspect concerns the rate of exchange to be adopted for the conversion into local currency.<sup>58</sup> The reply advocates the adoption of a rule similar to article 41 of the ULB, the principles of which are also embodied in the European Convention on Foreign Currency Bonds of 11 December 1967.

### V. The form of signature

**Question A 3:** "Should the rules specify the form of 'signature', e.g., written, facsimile, perforated, by symbols or otherwise?"

#### (a) Basic rules

40. The ULB and the BEA<sup>59</sup> do not define the term "signature". The UCC (section 3-401 (2)) provides that "a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature". Under section 1-201 (39 and 46) UCC, "'signed' includes any symbol executed or adopted by a party with present intention to authenticate a writing".

#### (b) Analysis of replies

41. Respondents are, with few exceptions,<sup>60</sup> in favour of a rule specifying the form of "signature". Most replies indicate the form which a signature should take.

42. The majority of these replies express preference for a signature written by hand.<sup>61</sup> The reason sometimes given is that forms other than a written signature are more susceptible to forgery.<sup>62</sup>

43. Some replies distinguish between the signature of:

- (a) The drawee or the giver of an aval; and
- (b) The drawer and the endorser.

In the former case, these replies would receive a signature in written form; in the case of the latter, a non-written form of signature should be permitted.<sup>63</sup> One reply stresses the importance of defining the term "written" if the new rule should require the signature to be written.<sup>64</sup>

<sup>57</sup> *Ibid.* See also 69; the courts of the country of the place of payment will normally render judgements expressed only in the currency of the place of payment.

<sup>58</sup> See also 73 and 85.

<sup>59</sup> See section 91, seal of corporation as signature; also see *George v. Surrey* (1830) M and M 516; 173 E.R. 1243 (signature by a mark admitted, provided there is evidence that the person signing by mark habitually so signs) and *Goodman v. J. Eban Ltd* (1954) 1 Q.B. 702 (signature by impressing a rubber stamp with the person's own facsimile signature on it admitted).

<sup>60</sup> See 16, 60 and 64.

<sup>61</sup> e.g., 1, 2, 3, 5, 6, 14, 15, 17, 20, 22 (with the proviso that "written" should be defined in the new rules), 28, 31, 32, 36, 37, 40, 41, 42, 49, 53, 54, 56, 58, 62, 70, 79 and 80.

<sup>62</sup> e.g., 2, 5, 28, 49, 58 and 79.

<sup>63</sup> See 26 and 27. See also 11; a handwritten signature should be mandatory, but an endorsement could be also effected by a stamp or special seal.

<sup>64</sup> See 22.

44. A number of replies note that there is a tendency favouring facsimile or other mechanical forms of signature on negotiable instruments and observe that the increased use of automated processes for the issuance of these instruments requires a flexible approach to the problem of signature. These replies generally favour a rule permitting the use of mechanically impressed signature,<sup>65</sup> or do not exclude a widening of possibilities in this respect.<sup>66</sup> One respondent notes that this would not necessarily be in conflict with the spirit of the ULB.<sup>67</sup> Other respondents are of the opinion that the reservations in respect of non-written signatures could disappear once the consequences are clearly established for the fraudulent use or forgery of signatures by mechanical means.<sup>68</sup>

### B. RIGHTS AND LIABILITIES OF PARTIES

#### VI. Claims and defences

**Question B 1:** "Should the rules specify the circumstances under which the holder of an instrument may acquire it free from:

(a) Claims of prior parties or holders; and

(b) Defences which would have been available to the defendant if the defendant had been sued by a prior party? If so, what should be the circumstances?"

#### (a) Basic rules

45. Inspired by the usages and customs of merchants, the three legal systems protect the *bona fide* holder of an instrument from claims and defences of prior parties. However, the legal systems differ in respect of the circumstances under which a holder acquires the instrument free from claims or defences of prior parties, and the nature of the claims and defences affected.

46. The Geneva Uniform Law (ULB) protects the *bona fide* or non-negligent possessor of a bill. In order to qualify for this protection, three conditions must be fulfilled: (a) possession of the instrument; (b) possession resulting from a series of endorsements (the fact that one or more of the endorsements are forged has no effect, as long as a claim of uninterrupted endorsements leads ostensibly to the holder), and (c) *bona fide* and (in some circumstances) free from gross negligence possession of the instrument (articles 16 and 17).

47. Under the BEA, in order to overcome claims and defences, a person must be a "holder in due course" (section 22). In order to be a holder in due course, the BEA, in addition to the condition of *bona fide* possession found in the ULB, requires that additional conditions be satisfied. The most important of those are the following three:

<sup>65</sup> e.g., 10, 24, 27, 45, 48, 69, 73, 74 (implied), 75 and 85.

<sup>66</sup> e.g., 51, 79, 81 and 92.

<sup>67</sup> See 85; it results from the verbatim records of the Geneva Conference (discussions under No. 8 of article 1) that the term "signature" should be interpreted in the widest possible sense.

<sup>68</sup> See 73, 75, 79, 81 and 82.

(a) The possessor of a bill must be a "holder". A forged instrument prevents subsequent parties from becoming a "holder" (as against parties who signed the instrument before the forgery); therefore a person who acquired an instrument through a forged endorsement cannot be considered a holder in due course;

(b) The bill must be acquired for value (consideration). A person who receives an instrument by way of gift is therefore not a holder in due course;

(c) The holder must have received possession of the bill before it was overdue (sections 29 and 36 (2)).

48. Like the BEA, the UCC gives protection only to the "holder in due course", who is defined as a holder who takes the instrument for value, in good faith and without notice that it is overdue or has been dishonoured (section 3-302). The effect of a forged endorsement and of lack of value is generally like under the BEA. However, the UCC resembles the ULB by providing that the mere fact that the instrument was taken when overdue does not prevent a person from being a holder in due course (knowledge that the instrument was overdue does prevent such protection).

49. From the foregoing analysis it will be seen that significant differences with respect to protection may arise under the legal systems when the instrument is acquired under the following circumstances:

- (a) Through a forged endorsement;
- (b) Without value (consideration);
- (c) After maturity.

50. It may be added that according to the BEA, as interpreted by the courts, the payee of an instrument may never qualify as a holder in due course. This may have important consequences when a bill is endorsed by the payee to an endorsee for collection, since the endorsee for collection will not acquire independent protection as a holder in due course. According to the UCC, the payee may be a holder in due course (see section 3-302 (2)). No distinction between the payee and other holders is made under the ULB.

51. The ULB generally imposes liability on anyone who signed an instrument, notwithstanding any defence or claim of previous parties. The fact that the obligation was incurred by way of fraud or mistake, or that a previous party lost possession by illegal means is no defence against the *bona fide* possessor of the bill. The fact that, for some reason, a previous party is not liable upon the instrument (i.e., through incapacity) will not constitute a defence against the other parties to the instrument (articles 16 and 17).

52. Protection under the BEA is more restricted. While a holder in due course is protected against certain important defences (fraud, absence or failure of consideration, duress, breach of trust (section 29)), there are circumstances under which even a holder in due course has no rights. These include mistake as to the legal character of the instrument ("*non est factum*") or other "real defences" and payment after maturity by the drawee (section 59).

53. The UCC's position is in between the ULB and the BEA, although the basic premises are similar to

those of the BEA. Like the BEA, the UCC provides that certain claims and defences are not available as against a holder in due course, i.e., the claim that the instrument was acquired by a previous party by some illegal means, the defence of fraud, breach of trust, conditional delivery, etc. (section 3-305). As under the BEA, there are circumstances in which even a holding in due course will be of no help, i.e., mistake as to the legal character of the instrument ("*non est factum*"), duress or illegality that renders the obligation of a party a nullity, etc. (section 3-307). Unlike the BEA, however, payment after maturity by the drawee is not a defence against a holder in due course (section 3-602).

54. From the foregoing analysis, it will be seen that significant differences exist between the legal systems in the following cases:

- (a) Mistake, duress, or illegality of the transaction that renders the obligation of the party a nullity; and
- (b) Payment after maturity by the drawee.

#### (b) Analysis of replies

55. The replies reveal that the question as to the circumstances under which a holder of an instrument may acquire it free from claims and defences was unclear to many of those questioned.<sup>69</sup> In addition, many respondents did not reply to this question.

56. The replies show a general adherence of respondents for rules based on their national law. Respondents whose law is based on the BEA indicate that the solutions embodied in that Act should be followed,<sup>70</sup> while those whose law is based on the Geneva uniform law indicate, directly or indirectly, that the rules obtaining under that law should be followed.<sup>71</sup>

57. One reply points out that the rules should specify as precisely as possible the operation and effect of the proposed instrument.<sup>72</sup> Other replies stress the importance of listing exhaustively the defences available to the defendant against the holder.<sup>73</sup>

58. A number of replies point out that the holder should acquire the instrument free from any defences available against prior parties,<sup>74</sup> with the exception of fraud<sup>75</sup> or lack of good faith.<sup>76</sup>

59. Several replies refer to some specific points that should be taken into account by the proposed uniform rules. Defences should not be excluded if the holder asserts a claim only for the account of the preceding party.<sup>77</sup> Another reply suggests that defences and claims should also be allowed against a holder who

<sup>69</sup> In some cases, this is stated expressly: e.g., 9 and 71. In other cases, this results from answers which do not relate to the question: e.g., 11, 12, 17, 34, 36, 37, 43, 44, 45, 50, 84 and 88.

<sup>70</sup> e.g., 2, 7, 8, 13, 33, 43, 44, 56, 57, 58, 59, 60 and 92.

<sup>71</sup> e.g., 1, 4, 6, 11, 16, 20, 24, 25, 27, 28, 29, 32, 39, 54, 61, 62, 66, 70, 79, 80, 82, 87, 91 and 93.

<sup>72</sup> See 72.

<sup>73</sup> e.g., 48 and 50.

<sup>74</sup> e.g., 14, 22, 24, 31, 38, 49 and 51.

<sup>75</sup> See 9, 22 and 24.

<sup>76</sup> e.g., 1, 3, 48 and 70.

<sup>77</sup> See 3.

takes the instrument "for collection only".<sup>78</sup> One reply suggests that the defences of fraudulent alteration and forged endorsement should be available against the holder.<sup>79</sup>

60. One reply attempts to bridge the Anglo-American law and the Geneva uniform law in the case of a forged endorsement. The suggestion is made that the proposed instrument be governed by a provision which allows for only one non-bank ("commercial") endorsement, and that all other endorsements should be by banks. It is emphasized that such a rule would not disturb commercial practice as, in fact, there is usually no more than the single endorsement.<sup>80</sup> The same reply suggests that it is possible to reconcile the concept of not "acting knowingly to the detriment of the debtor" with the concept of "holding in due course". It is asserted that both concepts rely on *dolus* and *bona fides* and that it is quite reasonable to distinguish between the case of a bill given for value and the case of a bill given by way of gift—a distinction recognized by the Anglo-American law, but also known to operate under the Geneva uniform law. Another reply points out that any solution to the "forged endorsement problem" should not impede the possibilities of the rediscounting of the bill by the Central Banks.<sup>81</sup>

61. As to the conditions which a holder must satisfy in order to overcome defences and claims of previous parties, respondents generally base their reply on their national law.

## VII. Types of endorsement

### Question B 2: "Should the rules specify permissible types of endorsement and, if so, what types?"

#### (a) Basic rules

62. The three legal systems do not differ substantially as regards the rules on endorsement. It is common to all that an endorsement must be in writing on the bill or on an *allonge* (BEA section 32; UCC section 3-202; ULB article 13). All three systems recognize the blank (or bearer) endorsement and the special (full) endorsement; an endorsement in blank specifies no endorses, and a bill so endorsed becomes payable to bearer (BEA section 34; UCC section 3-204; ULB article 12), while a special endorsement specifies to whom the bill is to be payable. The three legal systems provide that the endorsement must be of the entire bill. A partial endorsement has no effect as an endorsement (BEA section 32 (2); UCC section 3-202 (3); ULB article 12). All the systems allow the endorser to avoid liability upon the bill (BEA section 16; UCC section 3-302 (4); ULB article 15).

63. The three legal systems differ with respect to the effects of certain types of endorsements, namely,

endorsements "for collection", endorsement to pay "payee only", and endorsement "in pledge". All those are known under the BEA and UCC as "restrictive endorsement".

64. The most common example of a "restrictive endorsement" is an endorsement "for collection". The three systems regard this kind of endorsement as creating an agency relation between the endorser and the endorsee for collection enabling the latter to sue on the bill and collect it on behalf of the endorser (BEA section 35; UCC section 3-206; ULB 18). According to BEA, the endorsee for collection has no better right than his endorser. He can never be a holder in due course in his own right. He may negotiate the bill further only if, on the face of the bill, he is expressly authorized to do so. According to the UCC, the endorsee for collection can be a holder in due course. Furthermore, he may negotiate the bill (section 3-206). According to the ULB, the endorsee for collection may exercise all rights arising out of the bill, including the right to negotiate it, but in these cases he will endorse it in his capacity as an agent. The parties liable upon the bill can only set up against the holder defences which could be set up against the endorser (article 18).

65. Results also differ with respect to endorsements to pay "payee only". The BEA views it as a restrictive endorsement, and the rules mentioned above apply, namely, such endorsee has no better rights than his endorser, he cannot be a holder in due course, and he cannot transfer the bill (BEA section 35). According to the UCC such endorsement has no restrictive effect. The payee may be a holder in due course, and may negotiate the instrument (section 3-206). According to the ULB, such endorsement has a limited effect. It does not stop the negotiability of the bill, but the endorser gives no guarantee to the persons to whom the bill is subsequently endorsed (article 15).

66. The ULB (article 19) mentions a special kind of endorsement in "pledge" or in "security". Under such an endorsement the holder may exercise all the rights arising out of the bill, including further negotiation, but in this case the endorsement has the effects of an endorsement by an agent. The parties liable cannot set up against the holder defences founded on their personal relations with the endorser, unless the holder in receiving the bill, has knowingly acted to the detriment of the debtor. No such endorsement is mentioned specifically by the BEA or UCC, and it seems that the rules governing endorsement "for collection" will apply.

67. The three legal systems also differ slightly as far as a "conditional endorsement" (e.g., "pay on the arrival of ship *x* in port *y*") is concerned. According to the BEA, where a bill purports to be endorsed conditionally, the condition may be disregarded by the payer, and payment to the endorsee is valid whether the condition has been justified or not (section 33). According to the ULB, the endorsement must be unconditional and any condition to which it is made subject is without effect (article 12). The UCC contains no separate rule on conditional endorsements. Instead, such endorsements are treated as restrictive endorsements.

<sup>78</sup> See 26.

<sup>79</sup> See 67.

<sup>80</sup> See 85.

<sup>81</sup> See 75.

(b) *Analysis of replies*

68. The majority of respondents reply that the rules should specify permissible types of endorsement. Only two replies are negative; one without offering any reason<sup>82</sup> and the other on the basis that acceptable types of endorsement depends on the custom, usage and trade practices of each country.<sup>83</sup>

69. As to the types of endorsement, several respondents<sup>84</sup> refer to the relevant sections of their national law. However, most of the replies specify which types of endorsement should be permitted by the new rules.

70. Most replies consider it important to provide for the following types of endorsement:

(a) Full endorsement (also referred to as "special endorsement");<sup>85</sup>

(b) Blank endorsement;<sup>86</sup>  
Only one reply suggests that blank endorsement should not be allowed.<sup>87</sup>

(c) Endorsement for collection;<sup>88</sup>

(d) Endorsement in pledge;<sup>89</sup> one reply points out that there is no need for endorsement in pledge;<sup>90</sup>

(e) Power of attorney endorsement.<sup>91</sup>  
Only two replies referred to the legal effects of this endorsement; all other replies omit any references on this score.

71. Most replies suggest that endorsements should be as simple as possible.<sup>92</sup> Some replies consider that the proposed uniform law should not permit the following types of endorsement:

1. Partial endorsement;<sup>93</sup>

2. Conditional endorsement.<sup>94</sup>

72. Some replies suggest that the new rules should permit the restricted endorsement;<sup>95</sup> others consider that restrictive endorsement should be severely limited, if at all permitted.<sup>96</sup>

73. A few replies favour the endorsement "without recourse".<sup>97</sup>

74. One reply observes that it should be considered whether an endorsement after maturity should be specified as a separate type of endorsement.<sup>98</sup>

75. The following additional observations are made by respondents:

(a) An endorsement should require a signature that is subject to the same conditions as to validity as the signature of the drawer;<sup>99</sup> endorsement must take the form of a signature written on the instrument or on an *allonge*;<sup>100</sup>

(b) The use of a signature produced by mechanical means (a non-autographic signature) should be allowed.<sup>101</sup>

VIII. *Partial acceptance*

**Question B 3: "Should the rules provide that the holder be obliged to accept partial acceptance?"**

(a) *Basic rules*

76. The approach adopted on the issue by the BEA and the UCC differs sharply from that of the ULB. Under the BEA (section 44) and the UCC (section 3-412 (1)), the holder is given the option of taking or refusing the drawee's offer of partial acceptance. On the other hand, under the ULB (article 26), the holder of a bill is required to take a partial acceptance, at the drawee's option.

77. According to the BEA and the UCC, the holder may refuse partial acceptance; he may treat the bill dishonoured by non-acceptance and has immediate rights against the drawee and endorsers. On the other hand, he may decide to take partial acceptance; in this case, the BEA provides that the holder must give to the other parties to the bill due notice that he accepted partial acceptance (section 44 (2)). He may then exercise his rights immediately against the drawer and endorser as far as the amount not accepted is concerned. According to the UCC, if the holder decides to take partial acceptance, each drawer or endorser who does not affirmatively assent is discharged (section 3-412 (1)).

78. According to the ULB, as mentioned above, the holder is obliged to accept partial acceptance at the drawee's option (article 20). In such a case, he may either wait until maturity and then exercise his rights of recourse against the endorser, drawer and other parties for the part of the bill on which payment was not made, or he may exercise those rights immediately even before maturity (article 43).

(b) *Analysis of replies*

79. Nearly half the replies would favour a rule imposing on the holder the duty to accept partial acceptance<sup>102</sup> while the other half would oppose such a rule.<sup>103</sup> The balance is slightly in favour of dispensing with that duty.

<sup>99</sup> See 9.

<sup>100</sup> e.g., 13 and 66.

<sup>101</sup> See 36.

<sup>102</sup> e.g., 1, 7, 9, 10, 17, 20, 27, 32, 39, 42, 48, 49, 50, 54, 61, 62, 64, 76, 80, 82, 85 and 87.

<sup>103</sup> e.g., 2, 5, 8, 12, 13, 16, 22, 24, 26, 33, 36, 37, 40, 41, 43, 45, 51, 56, 57, 58, 60, 66, 67, 69, 70, 74, 71, 73, 81, 88, 89, 90, 92 and 93.

<sup>82</sup> See 3.

<sup>83</sup> See 25.

<sup>84</sup> e.g., 2, 8, 28, 42 and 56.

<sup>85</sup> e.g., 1, 5, 6, 12, 14, 15, 17, 20, 22, 24, 31, 32, 39, 41, 48, 49, 54, 57, 58, 60, 67, 70, 76, 82, 89 and 90.

<sup>86</sup> e.g., 1, 5, 7, 10, 11, 12, 13, 14, 15, 17, 20, 22, 31, 32, 40, 43, 44, 54, 57, 58, 60, 67, 70, 76, 89 and 90.

<sup>87</sup> See 88.

<sup>88</sup> e.g., 5, 14, 15, 20, 24, 25, 31, 48, 54, 62, 71, 82 and 85.

<sup>89</sup> e.g., 1, 20, 39, 48, 49, 54, 74, 85, 89 and 90.

<sup>90</sup> See 24.

<sup>91</sup> See 22.

<sup>92</sup> e.g., 69 and 70.

<sup>93</sup> e.g., 13, 54 and 71.

<sup>94</sup> e.g., 11, 13, 69, 70, 74, 71 and 90.

<sup>95</sup> e.g., 7, 12, 20, 43, 44, 58, 60 and 67.

<sup>96</sup> e.g., 69 and 70.

<sup>97</sup> e.g., 25, 43, 44, 62, 71 and 82.

<sup>98</sup> See 31.

80. One reply<sup>104</sup> points out that the need for partial acceptance is not very great. Another reply suggests that the question should be left to the initiative of the parties, and that no obligation to accept partial acceptance should be imposed.

81. Two replies suggest that the rules should provide that the holder is obliged to take partial acceptance (but on the condition that the acceptor is liable under the bill up to the amount of acceptance. Where acceptance is refused, the holder should have the right to exercise recourse prior to maturity of the bill).<sup>105</sup>

82. Another reply<sup>106</sup> points out that the rule should specify compulsory acceptance by the holder of partial acceptance, but the acceptor should not be permitted to stipulate any other condition for acceptance. One reply<sup>107</sup> suggests that no partial acceptance should be allowed when there are endorsers. If no endorsers exist, then partial acceptance could be made.

### IX. Partial payment

**Question B 4:** "Should the rules provide that the holder be obliged to accept partial payment?"

#### (a) Basic rules

83. According to the BEA (section 47) and the UCC (cf. 3-603), the holder is not obliged to accept partial payment. He has an option: he may accept partial payment, in which case the bill will be discharged *pro tanto*; or he may refuse partial payment, in which case the bill is considered dishonoured by non-payment. According to the ULB, the holder may not refuse partial payment (article 39). This, of course, does not discharge his rights upon the bill for the part unpaid.

#### (b) Analysis of replies

84. A significant number of respondents would favour a rule imposing on the holder the duty to accept partial payment,<sup>108</sup> but an almost equal number oppose such a rule.<sup>109</sup>

85. One reply<sup>110</sup> suggests that the question should be left to the initiative of the parties. Another reply<sup>111</sup> points out that, according to its national law, acceptance of partial payment can only take place with the authorization of a judge. Two replies,<sup>112</sup> which answered the question affirmatively, add that the holder should not forego the right to exercise his rights under the bill up to the amount of the part outstanding.

<sup>104</sup> See 25.

<sup>105</sup> e.g., 14 and 15.

<sup>106</sup> See 31.

<sup>107</sup> See 34.

<sup>108</sup> e.g., 1, 3, 4, 9, 10, 12, 14, 20, 22, 24, 25, 31, 32, 39, 42, 43, 44, 48, 49, 50, 51, 54, 61, 62, 64, 70, 79, 80, 81, 82, 85 and 90.

<sup>109</sup> e.g., 2, 5, 7, 8, 13, 16, 26, 33, 36, 37, 40, 41, 45, 56, 57, 58, 60, 66, 67, 69, 73, 74, 88, 89, 92 and 93.

<sup>110</sup> See 1.

<sup>111</sup> See 17.

<sup>112</sup> e.g., 14 and 15.

86. One reply<sup>113</sup> points out the relation between partial payment and partial acceptance. The holder should be obliged to accept partial payment only if the bill specifically permits partial acceptance, and such partial acceptance does not make the partial payment a full discharge. Another reply<sup>114</sup> suggests that no partial payment should be allowed when there are endorsers. If no endorsers exist then partial payment could be made permissible.

### X. Stipulation by drawer restricting liability

**Question B 5:** "Should the rules provide that the drawer shall have a right to restrict his liability to the holder?"

#### (a) Basic rules

87. There is a sharp difference between the BEA and the UCC, on the one hand, and the ULB, on the other concerning this question. According to the BEA (section 16) and the UCC (section 3-413 (2)), the drawer may negative or limit his liability to the holder. The ULB on the other hand makes a distinction between the drawer's release from his guarantee of acceptance and his release from his guarantee of payment. It is provided that the drawer may release himself from guaranteeing acceptance, but he is not allowed to release himself from guaranteeing payment: every stipulation by which the drawer releases himself from the guarantee of payment is "deemed not to be written" (article 9).

#### (b) Analysis of replies

88. The greater part of the replies would oppose a rule to that effect.<sup>115</sup> The remainder of the replies would have no objection.<sup>116</sup>

89. One reply<sup>117</sup> suggests that it should be left to the will of the parties to the contract whether or not the drawer could restrict his liability.

90. One reply<sup>118</sup> suggests that, in principle, the drawer cannot restrict his liability, and that the final solution would depend upon his place in the legal relationship involved in the instrument.

### C. PRESENTMENT AND DISHONOUR

### XI. Place of presentment

**Question C 1:** "Should the rules permit alternatives as to the place of presentment?"

#### (a) Basic rules

91. The Geneva uniform law (ULB) requires that the place of payment be mentioned in a bill of exchange;

<sup>113</sup> See 71.

<sup>114</sup> See 34.

<sup>115</sup> e.g., 4, 8, 12, 14, 15, 16, 17, 20, 22, 24, 25, 26, 27, 28, 32, 34, 36, 37, 38, 42, 43, 44, 48, 56, 57, 58, 60, 67, 74, 71, 76, 79, 80, 81, 82, 85, 89, 90, 92 and 97.

<sup>116</sup> e.g. 1, 2, 5, 7, 13, 31, 40, 41, 50, 51, 54, 61, 62, 66, 69, 70, 73, 83 and 87.

<sup>117</sup> See 11.

<sup>118</sup> See 49.

the place of payment is the place expressly so indicated (ULB, article 1 (5)), or in default thereof, the place specified beside the name of the drawee, i.e., his place of domicile (ULB, article 2, (3)). Failure to indicate the place of payment in this manner makes the instrument invalid as a bill of exchange. The drawer may indicate as the place of payment the domicile of a third party (ULB, article 4).

92. Under the BEA and the UCC, failure to specify the place of payment does not affect the validity or negotiability of a bill. If the place of payment is indicated, the bill must be presented at that place (BEA, section 45 (4)); UCC section 3-504 (2) (c)). When no place of payment is specified, these laws provide rules for the proper place of presentment.<sup>119</sup>

(b) *Analysis of replies*

93. Many respondents appear to have interpreted this question to mean: should the rules permit the instrument to indicate alternative places of presentment? Other respondents have understood the question to mean: should the rules specify the proper place of presentment where no place of payment is indicated in the instrument? Consequently, the replies stating a mere "yes" or "no" cannot be interpreted with any certainty and are therefore not included in the analysis. The replies to the two questions as formulated above are analysed separately in the following paragraphs.

(i) *Should the rules permit the drawer to indicate in the instrument alternative places of presentment?*

94. Most respondents oppose a rule to that effect.<sup>120</sup> The reasons given are that alternatives as to the place of presentment would give rise to uncertainties<sup>121</sup> would complicate the rules in respect of dishonour,<sup>122</sup> might oblige the drawee to have funds available at two or more places at a time<sup>123</sup> or might result in the payment being misdirected and thus increase the danger of the instrument remaining unpaid.<sup>124</sup>

95. One reply notes that the problem of an instrument in which more than one place of payment is indicated has not been solved explicitly by the ULB.<sup>125</sup>

96. Several respondents indicate that they have no objection to a rule permitting the drawer to specify alternative places of presentment.<sup>126</sup> It is noted, in this respect, that the adoption of such a rule would require an extension of the time-limits for notice of dishonour and protests.<sup>127</sup>

(ii) *Should the rules specify the proper place of presentment where no place of payment is indicated in the instrument?*

97. Most of the replies to this question are affirmative.<sup>128</sup> Some replies express preference for a rule that would make the domiciliation at a bank obligatory.<sup>129</sup>

XII. *Domiciliation of the instrument at a bank*

**Question 2: "Should the rules permit that the instrument be payable only by, at, or through a bank?"**

(a) *Basic rules*

98. The replies suggest that this question may have been ambiguous. Some respondents appear to have understood the question to mean: may the drawer effectively stipulate that the instrument may only be paid by, at, or through a bank? Others have interpreted the question to mean: should the rules specify that the rules be applicable only to instruments payable by, at or through a bank?

99. The existing rules give effect to the drawer's stipulation as to the place for presentment (ULB, articles 4 and 27; BEA, section 45 (4) (a); UCC, section 3-120).

100. The second interpretation of this question would appear to raise an issue of policy and does not, therefore, involve the comparison of the two systems.

101. The replies will be analysed under each interpretation separately.

(b) *Analysis of replies*

(i) *May the drawer effectively stipulate that the instrument may only be paid by, at, or through a bank?*

102. Respondents are, with few exceptions,<sup>130</sup> in favour of a rule to that effect.<sup>131</sup> One respondent notes that such a rule should be complemented by a provision determining what the liability of the paying bank would be in such circumstances. Other respondents note that it would be necessary to define what is meant by "bank".<sup>132</sup>

<sup>125</sup> See 85, which refers in this respect to article 2 of the Italian law on negotiable instruments (*Regio Decreto 14 dicembre 1933*, n. 1669) according to which the holder of a bill of exchange in which several places of payment are indicated may present the bill in any of those places for acceptance and payment.

<sup>126</sup> e.g., 9, 10, 11, 12, 25 (?), 27 and 74.

<sup>127</sup> See 12 and 27.

<sup>128</sup> e.g., 2, 7, 8, 21, 43, 44, 46, 48, 49, 60, 69 and 79.

<sup>129</sup> See 26 and 37.

<sup>130</sup> e.g., 39, 43, 44 and 56.

<sup>131</sup> e.g., 1, 6, 8, 10, 15, 16, 17, 20, 21, 30, 32, 36, 42, 45, 48, 50, 51, 54, 58, 60, 62, 64, 66, 70, 73, 75, 79, 80, 82, 87, 88 and 89.

<sup>132</sup> e.g., 10 and 75.

<sup>119</sup> Section 45 (4) BEA provides that a bill is presented at the proper place: (a) at the address of the drawee or acceptor if the address is given in the bill; (b) if no address is given, at the drawee's or acceptor's place of business if known, if not, at his ordinary residence if known; (c) in any other case if presented at his last known place of business or residence. The UCC sets forth rules that are basically similar to those of the BEA. Presentment may be made at the place of payment specified in the bill, or, if no place of payment is specified, at the place of business or residence of the party to pay (UCC, section 3-504 (2)). Further rules in the UCC on presentment may be found in section 3-504 (4) (a draft made payable at a bank in the United States must be presented at such bank) and section 4-204 (3) (presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made).

<sup>120</sup> e.g., 2, 6, 14, 15, 22, 24, 29, 33, 42, 60, 79, 81 and 85.

<sup>121</sup> e.g., 24, 29, 33 and 81.

<sup>122</sup> e.g., 24.

<sup>123</sup> e.g., 6, 24 and 79.

<sup>124</sup> See 22.

103. One respondent, opposing such a rule, states that the law of his country does not so permit.<sup>133</sup>

- (ii) *Should the rules specify that the proposed rules would be applicable only to instruments payable by, at, or through a bank?*

104. A number of replies advocate the adoption of a rule to that effect.<sup>134</sup> Some respondents note that, under current practice, bills are usually domiciled with a bank<sup>135</sup> and that such a rule would facilitate collection and simplify the formalities of protest.<sup>136</sup>

105. Other respondents point out that such a rule, while having its advantages, would give rise to difficulties<sup>137</sup> or is "questionable".<sup>138</sup> Two respondents state that it is desirable that the proposed instrument be made payable only at a bank, but would not consider this a condition of its validity.<sup>139</sup>

106. It is relevant to note that an analysis of question 5 of the questionnaire on negotiable instruments addressed to governments and banking and trade institutes (to what extent are negotiable instruments drawn on a bank or a non-bank drawee?) shows that:

(a) Large numbers of bills of exchange are drawn on non-banks such as the buyers of goods;

(b) In most cases, if not regularly, bills of exchange are drawn on a bank when issued under a documentary credit, or when a bank intervenes directly in the financing of a transaction;

(c) The prevailing practice appears to be that bills of exchange are usually made payable ("domiciled") at a bank.<sup>140</sup>

### XIII. Protest on dishonour

**Questions C 3 and C 4:** "Should the rules provide that protest on dishonour be essential, or that a less formal kind of evidence is sufficient?"

**If protest is considered essential:**

- (a) For what reason is it considered essential?  
(b) Could present practice be simplified?"

(a) *Basic rules*

107. Under articles 44 and 46 ULB regarding default of acceptance or of payment, rights of recourse must be evidenced by an authenticating act (protest for non-acceptance or non-payment). However, the stipulation "*retour sans frais*", "*sans protêt*", or any other equivalent expression written on the instrument and signed,

may release the holder from having a protest drawn up in order to exercise his right of recourse (ULB, article 46). Such a waiver, if written by the drawer, is operative in respect of all persons who sign the bill; if written by an endorser or an avaliseur, it operates only in respect of such endorser or avaliseur (*ibid.*).

108. The BEA (section 51 (1) (2)) and the UCC (section 3-501 (3)) require protest only in the case of foreign bills.<sup>141</sup> It is relevant to note that "it is for the sake of uniformity in international transactions that by English law as in that of the United States only foreign bills must be protested".<sup>142</sup> Failure to protest will discharge the drawer and endorsers (BEA, section 51 (2); UCC, section 3-501 (3)). Like the ULB, the BEA and the UCC permit protest to be waived by the drawer or any endorser (BEA, section 51 (9) in conjunction with section 50 (2); UCC, section 3-511 (2) (a)). Unlike the ULB, which requires that the waiver be written and signed by the party to be charged, the BEA and the UCC allow the waiver to be implied or oral. It seems, however, that, under standard commercial usage, protest is usually waived by writing the words "protest waived" or "waiving protest" or some similar phrase on the instrument.<sup>143</sup>

109. Formalities of protest are treated in the Geneva Convention for the Settlement of Certain Conflicts of Law in connexion with Bills of Exchange and Promissory Notes, article 8 of which provides:

"The form of and the limits of time for protest, as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

110. Under section 51 (7) BEA, a protest must contain a copy of the bill, and must be signed by the notary making it; it must also specify the person at whose request the bill is protested, and the place and date of protest, the cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawer or acceptor could not be found (see also section 94 BEA: "householder's protest"). By section 3-509 UCC: "A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice-consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs". The protest must identify

<sup>133</sup> See 39.

<sup>134</sup> e.g., 11, 26, 27, 31, 37, 74, 81 and 85.

<sup>135</sup> e.g., 27 and 85.

<sup>136</sup> See 81.

<sup>137</sup> See 71.

<sup>138</sup> See 75.

<sup>139</sup> See 22 and 24. It might be noted that if the new rules should exclude instruments not made payable by, at, or through a bank, troublesome questions might arise as to the impact of the uniform rules on international negotiable instruments that in error use the identifying label invoking the rules.

<sup>140</sup> See A/CN.9/38, paras. 32-34.

<sup>141</sup> It follows from section 4 BEA that a foreign bill is a bill which is not (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Under section 3-501 (3) UCC, protest of dishonour is necessary to charge the drawer or endorsers of any draft which on its face appears to be drawn or payable outside of an area embracing the United States and related territories, dependencies and possessions. (The precise definition is subject to a current recommendation for amendment.)

<sup>142</sup> Cf. *Byes on Bills of Exchange*, 22nd ed., 1965, p. 170. See also *Uniform Commercial Code*, 1962 *Official Text*, Comment on section 3-501: "The requirement (of protest) is left as to such international drafts because it is generally required by foreign law, which this Article cannot affect".

<sup>143</sup> Cf. *Byes*, op. cit., p. 175; *UCC*, 1962 *Official Text*, Comment on section 3-511, sub. 3.



the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonoured by non-acceptance or non-payment.

111. Under the Anglo-American law, the dishonour of an inland bill may be evidenced by noting, i.e., the marking of the bill as noted for protest by a notary or other person authorized to certify dishonour by the law (BEA, section 51 (1) UCC, section 3-509 (5)). Under section 3-510 (b) UCC, "the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor" is admissible as evidence of dishonour and of notice of dishonour.

(b) *Analysis of replies*

112. Most respondents consider it essential that the fact of the dishonour of the proposed instrument be evidenced in a manner to be specified by the rules, but are virtually unanimous in considering that the present rules on protest should be simplified.

113. The majority view is that it should be possible to evidence dishonour by a certificate or attestation of non-acceptance or non-payment drawn up by a bank or clearing-house.<sup>144</sup> Some respondents link this suggestion with the suggestion that the proposed instrument should be payable only at or through a bank.<sup>145</sup> Some replies specify that a rule prescribing an attestation of non-payment by a bank in lieu of protest should be accompanied by the proviso that a more formal protest can be made later to have effect as of the date of the attestation.<sup>146</sup> One respondent states that it is questionable whether the bank entrusted with the collection of the instrument would be willing to issue an attestation having the effect of protest since this could be regarded as an action directed against its own client.<sup>147</sup>

114. The replies contain various suggestions as to procedures that could conveniently be substituted for the present practice of protest:

(a) The procedure provided for by article 46 ULB<sup>148</sup> should be reversed; i.e., protest should not be required unless there were an express stipulation to that effect, such as "with protest", "*avec frais*", etc.<sup>149</sup> It is noted that protest is frequently waived in commercial practice.<sup>150</sup>

(b) The practice of "noting" for protest, as known under Anglo-American law, should be adopted.<sup>151</sup> Some of these replies consider that the attestation by a bank, referred to in paragraph 113 above, if written on the instrument, should be adequate.

(c) If the rules must contain provisions on protest, they should be as per article 40 of the Geneva Uniform Law on Cheques which authorizes alternatives similar to the "noting" procedure.<sup>152</sup>

115. A few replies express the opinion that the present formalities of protest should not, or cannot, be simplified.<sup>153</sup>

#### XIV. *Notice of dishonour*

**Question C 5:** "In respect of notice of dishonour, what should the rules provide with reference to:

- (i) Its form?
- (ii) The persons by and to whom it should be given?
- (iii) The effects of failure to give notice within a specified time-limit?"

(a) *Basic rules*

(i) *The form of notice of dishonour*

116. The ULB, BEA, and UCC all permit great flexibility as to the form of notice of dishonour: "in any form whatever" (ULB, article 45), or "in any reasonable manner" (UCC, section 508 (3)). Both the BEA and the UCC specify that the notice may be oral or written, and be given in any terms which sufficiently identify the bill (BEA, section 49 (5); UCC, section 3-508 (3)). All three systems provide that the return of a dishonoured bill is deemed a sufficient notice of dishonour (ULB, article 45; BEA, section 49 (6); UCC, section 3-508 (3): sending an instrument bearing "a stamp, ticket, or writing stating that acceptance or payment has been refused", is one sufficient form of notice). The BEA and the UCC set forth certain additional provisions that are not found in the ULB (BEA, section 49 (7); UCC section 3-508 (3)).

(b) *Analysis of replies*

117. A significant number of respondents favour a rule that would conform to the rules obtaining under the Geneva system and the Anglo-American law, i.e., no particular form of notice should be required.

118. Some respondents, however, express preference for a standardized form of notice,<sup>154</sup> or advocate that notice should be given in writing<sup>155</sup> or be authenticated.<sup>156</sup>

119. Three replies set forth the view that notice of dishonour could be dispensed with: one reply would

<sup>144</sup> e.g., 3, 5, 6, 10, 13, 14, 16, 21, 22, 24, 26, 27, 32, 33, 37, 40, 41, 49, 62, 70, 75, 81 and 85.

<sup>145</sup> e.g., 3, 22 and 75.

<sup>146</sup> e.g., 70 and 85.

<sup>147</sup> See 15.

<sup>148</sup> See paragraph 107 above (the holder is released from having a protest drawn up when the stipulation "without protest", etc. is written on the instrument).

<sup>149</sup> See 22, 27 and 75.

<sup>150</sup> See 75 and 85.

<sup>151</sup> e.g., 6, 8, 20, 31 (implied), 43, 49 and 54.

<sup>152</sup> See 27 and 69. Article 40 ULC provided that the holder may exercise his right of recourse if the non-payment is evidenced by protest, or a declaration dated and written by the drawee on the cheque and specifying the date of presentment, or a dated declaration by a clearing-house stating that the cheque has been delivered in due time and has not been paid.

<sup>153</sup> See 28, 39, 43, 58, 60 and 82.

<sup>154</sup> See 27, 45, 66 and 71. See also 32: "... a specific term of notice should be required", and 49: "... the form of notice should be established by law".

<sup>155</sup> e.g., 8, 11 (registered letter), 12 (*idem*), 16, 33, 36, 40 (and return of the bill) 70, 73 (or telex message), 79, 81 and 88.

<sup>156</sup> See 1, 48 and 87.



replace notice of dishonour by a formal protest;<sup>157</sup> two other replies state that the new rules should provide that notice of dishonour would only have to be given if a stipulation to that effect was written on the instrument.<sup>158</sup>

(a) *Basic rules*

(ii) *The persons by and to whom notice should be given*

120. Under the ULB (article 45), the holder need give notice only to his immediate endorser and each endorser to his immediate endorser, until ultimately the drawer is notified by the first endorsee. On the other hand, the BEA and UCC require the holder or an endorser liable on the bill to notify any other party in the chain (or all parties) against whom he may wish to proceed.

121. Under the BEA, notice must be given by the holder, or by an endorser who, at the time of giving it, is himself liable on the bill (section 49 (1)) to the drawer and each endorser, and any drawer or endorser to whom notice is not given is discharged (section 48). Notice given by the holder operates "for the benefit of all subsequent holders and all prior endorsers who have a right of recourse against the party to whom it is given" (section 49 (3)). Similarly, notice given by the endorser who, at the time of giving it, is himself liable on the bill operates "for the benefit of the holder and all endorsers subsequent to the party to whom notice is given" (section 49 (4)).

122. The relevant provisions of the UCC are substantially similar to those of the BEA. Under section 3-508 (1), notice of dishonour may be given to any person who may be liable on the instrument by the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. Notice operates for the benefit of all parties who have rights on the instrument against the party notified (section 3-508 (8)).

123. The BEA and the UCC set forth other provisions concerning notice that are not found in the ULB, e.g., notice given by an agent, bankruptcy or insolvency of a party, death of a party.

(b) *Analysis of replies*

124. Respondents support, by and large, the rules obtaining under their country's system.

125. A few respondents note that, apart from the holder, the new rules should provide for notice of dishonour where the instrument is collected through banks; in such cases, notice of dishonour should be given by the last collecting bank, even if this were also the bank at which the instrument was made payable.<sup>159</sup>

(a) *Basic rules*

(iii) *The effects of failure to give notice within a specified time-limit*

126. There is a considerable difference in this respect between the Geneva uniform law and the Anglo-

American law. Under the BEA and the UCC, the giving of notice of dishonour within a specified time-limit is necessary to charge secondary parties to an instrument. Under the ULB, however, a party who fails to give notice within the specified time-limit does not discharge the prior endorsers' or drawer's undertaking with respect to the instrument but merely makes that party responsible for the damages resulting from such failure.

127. Article 45 ULB provides that a person who does not give notice within the specified time-limit does not forfeit his rights, but is "responsible for the injury, if any, caused by his negligence". However, the damages to be paid by such a person may not exceed the amount of the bill.

128. Section 48 BEA provides that any drawer or endorser to whom the required notice of dishonour is not given is discharged. However, where a bill is dishonoured by non-acceptance, the rights of a holder in due course subsequent to the omission are not prejudiced by the omission (section 48 (1)).

129. Section 3-502 (1) (a) UCC provides that any endorser is discharged where without excuse notice of dishonour is delayed beyond the time when it is due. The liability of a drawer or acceptor of a draft drawn on a bank is discharged only under certain narrow conditions (cf. section 3-502 (1) (b)).

(b) *Analysis of replies*

130. It will be recalled that some respondents in their reply to question C 5 (b) indicated their preference for a rule patterned on the rules obtaining under their national law. These respondents express the same preference in their replies to the present question.

131. One respondent, from a common law country, advocates a rule under which all parties who have not received notice within the specified time-limit are discharged, with the exception however of "the debtor".<sup>160</sup> On the other hand, one respondent from a country operating under the Geneva system, expressed preference for a rule whereby the party who fails to give due notice forfeits his right of recourse.<sup>161</sup>

132. Another respondent suggests that damages to be paid by a party who fails to give notice should be determined by the bank through which the instrument was made payable.<sup>162</sup>

XV. *Delay in presentment, protest, or giving notice of dishonour*

**Question C 6: "In what circumstances should delay in presentment, protest, or giving notice of dishonour be:**

**(i) Excused by the rules?**

**(ii) Dispensed with altogether by the rules?"**

(a) *Basic rules*

(i) *Excused*

133. The ULB, the BEA and the UCC provide for detailed rules concerning the circumstances in which

<sup>157</sup> See 51.

<sup>158</sup> See 9 and 10.

<sup>159</sup> See 22 and 26.

<sup>160</sup> See 73.

<sup>161</sup> See 80.

<sup>162</sup> See 74.

presentment or protest, or giving notice of dishonour are excused or dispensed with. The principal difference between the Geneva system and the Anglo-American system can be described as follows: Under the Geneva uniform law (ULB, article 54), delay in presentment or protest is excused when the delay is caused by an "insurmountable obstacle", i.e., *vis major* (ULB, article 54); under the Anglo-American law, when caused by circumstances beyond the control of the party concerned (BEA, section 46 (1); UCC, 3-511 (1)). However, under the Geneva law, facts which are "purely personal" to the holder (i.e., his death or illness) do not excuse delay, whereas under the Anglo-American rule such facts may constitute an excuse.

134. The ULB, BEA and UCC unite in requiring that, when the cause of delay ceases to operate, the presentment or protest must be made or the notice be given "without delay" (ULB, article 54: presentment and protest) or "with reasonable diligence" (BEA, section 46 (1): presentment; section 50 (1): notice of dishonour; section 51 (9): protest; UCC, section 3-511 (1): presentment, protest or notice of dishonour).

(ii) *Dispensed with*

135. Presentment, protest, or giving notice of dishonour may be waived by the party to be charged. The rules are, however, not identical under the three systems. Under article 46 ULB, protest by the holder is not required where the drawer, endorser or *avaliseur* wrote "*retour sans frais*", "*sans protêt*", or any other equivalent expression on the bill. Under the BEA, presentment for payment (section 46 (2) (e)), notice of

dishonour (section 50 (2) (b)) and protest (section 51 (9) and section 16) are dispensed with by waiver which may be express or implied. A similar rule is found in section 3-511 (2) (a) of the UCC ("expressly or by implication").<sup>163</sup>

(b) *Analysis of replies*

136. The replies indicate the preference of respondents for rules similar to those obtaining under their own system. Indeed, several replies merely cite the relevant provisions of either the Geneva uniform law or the Anglo-American statutes.<sup>164</sup>

<sup>163</sup> The ULB, BEA and UCC contain further provisions dispensing with the requirements concerning presentment, protest or notice of dishonour (UCC, articles 44 and 45; BEA, sections 46, 50, 87, 93 and 94; UCC, sections 3-511, 3-416 and 3-501).

<sup>164</sup> Under the translation of the question into French, several respondents replied to the following question:

"In what cases should the time-limits laid down for presentment, protest or notice of dishonour be:

(a) Made less stringent by the rules?

(b) Purely and simply be abolished by the rules?"

The replies to that question show that several respondents deem it desirable that the new rules take account of the fact that they are applicable to an instrument used in international transactions. Hence, these respondents favour time-limits that are more flexible than those presented by the existing rules (e.g., 9, 10, 11, 26, 27 and 50). It is noted that in some countries a bill may only be presented for payment on the date of maturity (see 27). This requirement is considered impracticable, and it is suggested that a uniform time-limit of, for instance, ten or fifteen days should be laid down. A similar time-limit is suggested for protest.

### 3. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Suggestions as to future work on negotiable instruments: report of the Secretary-General	A/CN.9/53
Security interests in goods; work in progress: note by the Secretary-General	A/CN.9/R.7

### III. INTERNATIONAL LEGISLATION ON SHIPPING

#### Working Group on International Legislation on Shipping; report on the work of the first session, 22-26 March 1971 (A/CN.9/55) \*

##### I. INTRODUCTION

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law at its second session, held in March 1969. The Working Group consists of the following seven members of the Commission: Chile, Ghana, India, United Arab Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, and the United States of America.<sup>1</sup>

2. The Working Group held its first meeting during the third session of the Commission and made certain recommendations which were included in the decision of the Commission on the subject:<sup>2</sup>

*"The Commission:*

*"Decides:*

"1. To request the Chairman of the Working Group on International Shipping Legislation to attend, as the Special Representative of the Commission, the session of the United Nations Conference on Trade and Development Working Group on Shipping Legislation to be held at Geneva in December 1970 or February 1971;

"2. To request the Special Representative:

"(a) To observe the session of the Working Group on Shipping Legislation of the United Nations Conference on Trade and Development;

"(b) To inform that Working Group of the course of the discussion in the Commission at the present session;

"(c) To express the Commission's desire to avoid duplication of work and to strengthen the close co-operation and effective co-ordination between the Commission and the United Nations Conference on Trade and Development in making progress in the study of shipping legislation, and invite their views on how this objective might best be achieved;

"(d) To submit a report on the session of the Working Group of the United Nations Conference on Trade and Development to the Commission's Working Group;

"3. That, at the request of the Special Representative, the Chairman of the third session of the Commission shall request the Secretary-General to convene a meeting of the Working Group on Shipping, it being understood that duplication between the Working Groups of the Commission and of the United Nations Conference on Trade and Development should be avoided;

"4. That the meeting of the Working Group shall be held in Geneva, for a period not longer than a week, after the session of the Working Group of the United Nations Conference on Trade and Development and before the opening of the fourth session of the Commission;

"5. That, if the Commission's Working Group meets after 1 January 1971, its composition shall be the following:

"(a) Members of the present Working Group whose membership continues, and those re-elected to the Commission;

"(b) For the remaining membership of the Working Group, the alternates as elected by the Commission at its present session, who shall become full members of the Working Group and will be designated as members;

"6. To request the Secretary-General to invite other members of the Commission, and intergovernmental and non-governmental organizations active in the field to be present as observers at the meeting of the Working Group;

"7. That the terms of reference of the Working Group at its meeting shall be the same as were

\* 26 March 1971.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its second session (1969), *Official Records of the General Assembly, Twenty-fourth session, Supplement No. 18 (A/7618)*, para. 133; *Yearbook of the United Nations Commission on International Trade Law* (hereinafter referred to as UNCITRAL Yearbook), vol. I: 1968-1970, part two, II, A. The current membership of the Working Group reflects a decision by the Commission at its third session making provision for the effect of the expiration in 1970 of membership in the Commission. Report of the United Nations Commission on International Trade Law on the work of its third session (1970), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017)* (hereinafter cited as UNCITRAL report on third session (1970), para. 165); UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

<sup>2</sup> UNCITRAL report on third session (1970), para. 166; *op. cit. supra*, note 1.

assigned to the Working Group under paragraph 3 of the resolution adopted at the second session, namely "to indicate the topics and method of work on the subject, ... giving full regard to the recommendations of the United Nations Conference on Trade and Development and any of its organs";

"8. That the Working Group will submit its report to the fourth session of the Commission;

"9. That the term of the Working Group on International Shipping Legislation will expire after it has submitted its report to the fourth session of the Commission, in view of the fact that it is anticipated that a new and larger Working Group will be set up at the fourth session of the Commission."

3. The Working Group held its second session at the Headquarters of the World Health Organization in Geneva from 22 to 26 March 1971 and considered the tasks assigned to it by the Commission, which were to indicate the topics and methods of work on the subject, giving full regard to the recommendations of the United Nations Conference on Trade and Development and any of its organs.

4. Six members of the Working Group were represented at the session.<sup>3</sup> The Chairman of the UNCTAD Working Group on International Shipping Legislation, Mr. Patriota (Brazil) participated as special representative of that Working Group. The session was also attended by observers from: Australia, Belgium, France, Mexico, Norway, the People's Republic of Poland, Spain, Syria, the United Republic of Tanzania and Trinidad and Tobago, and from the following inter-governmental and international non-governmental organizations: the United Nations Conference on Trade and Development and the International Chamber of Shipping.

5. The Working Group, by acclamation, elected the following officers:

Chairman: Mr. Rafael Lasalvia (Chile)

Rapporteur: Mr. Dileep A. Kamat (India).

6. The following documents were placed before the Working Group:

- (a) Provisional agenda (A/CN.9/WG.3/WP.1)
- (b) Working paper by the Secretariat (A/CN.9/WG.3/WP.2)
- (c) Report by the Chairman of the first session of the UNCITRAL Working Group on International Shipping Legislation on his participation as special representative at the session of the UNCTAD Working Group on International Shipping Legislation (A/CN.9/WG.3/WP.3)
- (d) Report by the UNCTAD secretariat: Bills of lading (TD/B/C.4/ISL/6)
- (e) Report of the UNCTAD Working Group on International Legislation on Shipping on its second session held at the Palais des Nations,

Geneva, from 15 to 26 February 1971 (TD/B/C.4/86).

7. The Working Group adopted the following agenda:

1. Election of officers.
2. Adoption of the agenda.
3. Report of the special representative from UNCITRAL on the second session of the UNCTAD Working Group on International Legislation on Shipping.
4. Statement by the Chairman of the second session of the UNCTAD Working Group.
5. Consideration of topics and methods of work on the subject of international legislation on shipping to be indicated to the Commission.
6. Adoption of the report.

8. The Chairman of the second session of the UNCTAD Working Group reported on that session which met from 15 to 26 February 1971. In this report he stressed the need for close co-operation between the UNCTAD and UNCITRAL Working Groups since these two groups have complementary mandates. He pointed out that the UNCTAD Working Group at its second session had discussed one main subject in depth, namely, bills of lading, on the basis of the UNCTAD Secretariat's report on bills of lading (TD/B/C.4/ISL/6). In conformity with its terms of reference, the Working Group reviewed the economic and commercial aspects of existing international legislation and practices related to bills of lading and gave particular attention to the needs of economic development of the developing countries. The result of that examination is reflected in the report of the Working Group (TD/B/C.4/86), and was the subject of a unanimous resolution.<sup>4</sup>

9. The Chairman of the UNCTAD Working Group summarized the Working Group's recommendations on the subject of bills of lading, and pointed out that the proposed examination by UNCITRAL of existing rules and practices should aim at the removal of such uncertainties and ambiguities as exist and also the establishment of a balanced allocation of risks between the cargo owner and the carrier. He referred to the recommendation of the UNCTAD Working Group that UNCITRAL should be invited to undertake the examination of those subjects referred to in the resolution and, as appropriate, to prepare the necessary draft texts. He stated that a sense of extreme urgency for improvement of the rules and practices governing bills of lading was generally voiced by representatives of developing countries who took part in the discussion on this matter. On the other hand, a number of representatives of the developed market economy countries members of the Working Group stressed that efforts to review this matter should proceed with great caution. However, these representatives and the representatives of socialist countries of Eastern Europe agreed that many of the provisions of the "Hague Rules" should

<sup>3</sup> The list of participants and observers is contained in annex I to this report.

<sup>4</sup> The resolution on bills of lading, adopted by the UNCTAD Working Group is reproduced in annex II to this report.

be reviewed in order to improve, clarify and simplify the law, to make their provisions more consistent with the rules prevailing in other international transport conventions, and to conform with present needs and conditions of international trade. He submitted that the caution recommended by some was not at all incompatible with the urgency and priority voiced by many members who advocated change in the existing rules and practices governing international shipping legislation.

10. The Chairman of the UNCTAD Working Group also reported that the UNCTAD Working Group on International Shipping Legislation, in another resolution, had decided to modify the order of priority in its programme of work. Accordingly, the UNCTAD Working Group at its next (third) session would consider the subject of liner conference practices, while the item concerning charter parties would be dealt with at its fourth session. He suggested that this Working Group may wish to take note of this change of priority on the work programme related to international shipping legislation, since it may have a bearing on the future activities of UNCITRAL on this field.

## II. TOPICS AND METHODS OF WORK

11. Pursuant to its mandate "to indicate the topics and method of work on the subject", giving full regard to the recommendations of UNCTAD and any of its organs, the UNCITRAL Working Group considered, first, the topics which might be taken up and, second, the methods of work which might be employed.

12. Possible topics and methods of work were considered during full and detailed discussions on the basis of the working paper prepared by the Secretariat (A/CN.9/WG.3/WP.2).

13. After thorough discussion by representatives of members of the Working Group and the observers, the Working Group decided as follows:

### *The Working Group*

#### *Recommends:*

(1) That within the priority topic of international legislation on shipping, consideration should be given to the subject of bills of lading. In view of the importance and scope of this subject it would not be practicable to consider other subjects for the time being;

(2) That within the subject of bills of lading, the topics for consideration should include those indicated in paragraphs 1 and 2 of the resolution of the UNCTAD Working Group on International Shipping Legislation adopted at its second session held on 15 to 26 February 1971. Paragraphs 1 and 2 of the resolution state:

"1. *Considers* that the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the protocol to amend that Convention (the Brussels protocol 1968), should be examined with a view to revising and amplifying the rules as appropriate, and that a

new international convention may if appropriate be prepared for adoption under the auspices of the United Nations;

"2. *Further considers* that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:

- "(a) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;
- "(b) The scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;
- "(c) Burden of proof;
- "(d) Jurisdiction;
- "(e) Responsibility for deck cargoes, live animals and trans-shipment;
- "(f) Extension of the period of limitation;
- "(g) Definitions under article I of the Convention;
- "(h) Elimination of invalid clauses in bills of lading;
- "(i) Deviation, seaworthiness and unit limitation of liability."

It is noted that, by its terms, paragraph 2 of the resolution does not confine consideration to those areas listed in subparagraphs (a) through (i).

(3) That the Commission establish a new and enlarged working group on international legislation on shipping and that the composition of the working group take account of the need to represent the various regions and economic interests.

(4) That the Commission request the new working group to meet during the fourth session of the Commission to consider the organization of its work.

(5) That the Secretariat be requested to provide the new working group with the material that may be necessary for the performance of its work.

(6) That the Secretariat be invited to prepare studies on the areas listed in paragraph 31 of the working paper with proposals indicating possible solutions for consideration by the new working group. It is understood that the reference in paragraph 31 of the working paper to subparagraph (g) of the UNCTAD resolution is intended to refer to those definitions that are relevant to subparagraphs (a), (d) and (e) of the UNCTAD resolution.

(7) That with regard to other areas, the new working group be requested to consider at its organizational session the most appropriate methods of work, including the preparation of studies by the Secretariat indicating possible solutions and the possibility of allocating particular topics to its members for reports and, as appropriate, the drafting of new texts for consideration by the working group so that the work on these areas can also be carried forward as quickly as possible.

14. One observer placed before the Working Group a proposal for the organization of work on the subject. He noted that this proposal was in many respects similar to the programme of work recommended by the Working Group but suggested that the new working group might find this proposal useful. This proposal appears as annex III.

15. Consideration was given to the size of the new working group that would assure representation to different geographic regions and economic interest and would also be compatible with efficient working methods. After discussion of various suggestions, it was agreed that this question should be referred to the Commission for decision at the fourth session.

16. Consideration was also given to the extent to which observers should be invited to meetings of the new working group. It was suggested that the Secretary-General might be requested to invite not only members of the Commission and international organizations active in the field but also other States. In view of the possibility that this suggestion might present administrative problems, it was concluded that this question should be referred to the Commission for further consideration at the fourth session.

17. Several representatives stated that the working paper prepared by the Secretariat (A/CN.9/WG.3/WP.2) had proved to be very useful in the deliberations of the Working Group. It was agreed that the working paper should be placed before the new working group for consideration, with special reference to the portions dealing with the programme of work.

18. In connexion with paragraph (5) of the above recommendation requesting the Secretariat to provide the new working group with the material that may be necessary for the performance of its work, it was agreed that all members of the Commission should be requested to draw the Secretariat's attention to such relevant material.

#### ANNEX I

##### List of participants

###### CHILE

###### Representative

Mr. Rafael LASALVIA, Profesor derecho comercial y director del departamento de derecho privado de la Universidad de Chile, Santiago

###### Alternate

Mr. S. MONSALVE, Secretaria Delegacion Permanente de Chile en Ginebra

###### INDIA

###### Representative

Mr. Dileep A. KAMAT, Assistant Legal Adviser, Ministry of External Affairs, New Delhi

###### UNITED ARAB REPUBLIC

###### Representative

Mr. Mohamed R. ABDEL-KADER, Commercial Secretary, Permanent Mission of the UAR to the United Nations, Geneva

###### UNION OF SOVIET SOCIALIST REPUBLICS

###### Representative

Mr. Sergei LEBEDEV, Assistant Professor of the Institute of International Relations, Moscow

###### Adviser

Mr. Nikolai KAZANTSEV, Adviser, "Sovinfot", Moscow

###### UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

###### Representative

Mr. Michael J. KERRY, Assistant Solicitor, Department of Trade and Industry, London

###### UNITED STATES OF AMERICA

###### Representative

Mr. Robert E. DALTON, Office of the Legal Adviser, Department of State, Washington, D.C.

###### Adviser

Mr. Ernest A. LISTER, Permanent Mission of the United States, to the United Nations, Geneva

##### Observers

###### A. GOVERNMENTS

###### Australia

Mr. S. F. PARSONS, Senior Assistant Secretary, Attorney-General's Department, Canberra

###### Belgium

Mr. Albert LILAR, Ministre d'Etat

###### France

Mr. Claude DOUAY, Conseiller juridique auprès du Secrétariat Général de la Marine Marchande, Paris

###### Mexico

Mr. Fernando de MATEO, Permanent Mission of Mexico to the United Nations, Geneva

###### Norway

Mr. Jens B. HEGGEMSNES, First Secretary, Permanent Mission of Norway to the United Nations, Geneva

###### Poland

Mr. Boleslaw FEDOROWICZ, Head, Legal Division, Ministry of Foreign Trade Warsaw

###### Spain

Mr. Enrique VALERA, Primer Secretario de Embajada, Delegación permanente de España en Ginebra

###### Syria

Miss S. NASSER, Troisième Secrétaire, Mission permanente de la République arabe syrienne auprès des Nations Unies, Genève

###### United Republic of Tanzania

Mr. Joseph S. WARIOBA, Attorney General's Chambers, Dar-es-Salaam

Mr. Nathaniel M. MAHUNDA, Third Secretary, Ministry of Foreign Affairs, Dar-es-Salaam

###### Trinidad and Tobago

Mr. Linston L. CUMBERBATCH, First Secretary, Permanent Mission of Trinidad and Tobago to the United Nations, Geneva

###### B. INTERGOVERNMENTAL ORGANIZATIONS

###### United Nations Conference on Trade and Development

Mr. Antonio PATRIOTA, Chairman, Working Group on International Shipping Legislation

Mr. M. SHAH, Chief, UN Office of Legal Affairs UNCTAD/Joint Shipping Legislation Unit

## C. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

*International Chamber of Shipping*

Mr. David W. TAYLOR, Assistant to Secretary of Maritime Law Committee, ICS, London

**Secretariat of the Working Group**

Mr. John HONNOLD, Secretary of the Working Group, Chief, International Trade Law Branch, Office of Legal Affairs

Mr. Gabriel M. WILNER, Assistant Secretary of the Working Group, Legal Officer, International Trade Law Branch

Mr. Thomas R. GRAHAM, Associate Legal Affairs Officer, UN Office of Legal Affairs/UNCTAD Joint Shipping Legislation Unit

## ANNEX II

**Resolution on Bills of Lading**<sup>1</sup> adopted at the second session of the Working Group on International Shipping Legislation of the United Nations Conference on Trade and Development (UNCTAD) 15-26 February 1971

*The Working Group on International Shipping Legislation*

*Taking note* with appreciation of the secretariat report entitled "Bills of Lading" (TD/B/C.4/ISL/6),

*Having examined and discussed* the existing rules and practices concerning bills of lading and their effect on cargo interests,

*Considering* that some of these rules and practices create uncertainties in the application of laws and the interpretation of terms and that the removal of these uncertainties is expected to reduce in various instances costs in international trade which are onerous for cargo-owners, especially in developing countries.

*Recalling* that the General Assembly, in its resolution 2205 (XXI) establishing the United Nations Commission on International Trade Law (UNCITRAL), in particular operative paragraphs 8 and 10 of part II thereof, provided for close co-operation between UNCITRAL and UNCTAD,

*Further recalling* that the Committee on Shipping, in its resolution 7 (III), having noted the decision of UNCITRAL to include international legislation on shipping among the priority items in its programme of work, included in the terms of reference of this Working Group a provision to the effect that it may make recommendations and prepare related documentation to be submitted to UNCITRAL for the drafting of new legislation or other appropriate action;

1. *Considers* that the rules and practices concerning bills of lading, including those rules contained in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Brussels Convention 1924) and in the protocol to amend that Convention (the Brussels protocol 1968),

should be examined with a view to revising and amplifying the rules as appropriate, and that a new international convention may if appropriate be prepared for adoption under the auspices of the United Nations;

2. *Further considers* that the examination referred to in paragraph 1 should mainly aim at the removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and the carrier, with appropriate provisions concerning the burden of proof; in particular the following areas, among others, should be considered for revision and amplification:

(a) Responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;

(b) The scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

(c) Burden of proof;

(d) Jurisdiction;

(e) Responsibility for deck cargoes, live animals, and trans-shipment;

(f) Extension of the period of limitation;

(g) Definitions under article I of the Convention;

(h) Elimination of invalid clauses in bills of lading;

(i) Deviation, seaworthiness and unit limitation of liability.

3. *Recommends* that, in the spirit of co-operation between UNCITRAL and UNCTAD enjoined by the above-mentioned resolutions of the General Assembly and the Committee on Shipping, UNCITRAL should be invited to undertake the examination referred to in paragraph 1 and, as appropriate, prepare the necessary draft texts, taking into account the report of this Working Group and the UNCTAD secretariat report (TD/B/C.4/ISL/6);

4. *Expresses the wish* that, in the same spirit of co-operation, the outcome of the work of UNCITRAL on the subject of bills of lading will be conveyed to this Working Group for its comments;

5. *Invites* the Chairman of this Working Group to attend, as its special representative, the meeting of the Working Group on International Legislation on Shipping of UNCITRAL which is scheduled to be held in Geneva from 22 to 26 March 1971 and to report on its proceedings to the Committee on Shipping at its fifth session and to this Working Group at its third session;

6. *Request* the UNCTAD secretariat, without prejudice to the consideration by the Committee on Shipping of this resolution, to convey it, together with the reports on the first and second sessions of this Working Group, to the UNCITRAL Working Group to be available to that Group at its next meeting.

## ANNEX III

**Suggestions submitted by the Representative of France (Observer)**

[Not reproduced in the present volume.]

<sup>1</sup> TD/B/C.4/86, annex I.

## IV. FUTURE WORK

### The establishment of a Union for *jus commune*; proposal by the French delegation (A/CN.9/60) \*

The French delegation had submitted to UNCITRAL at its second session a proposal relating to an outline convention concerning a "common" law for international trade. It was then invited by the Commission to submit a more detailed preliminary draft couched in the form of articles so that other delegations could see more clearly what its proposal would entail in practice.

#### STATEMENT OF REASONS

The law of international trade is at present in a deplorable state. Transactions which by their very nature demand international regulation are governed by national law. In very many cases it is quite impossible to know which national law is applicable. And even when it has been decided that a particular national law should apply, it is often hard to find out what that law says. Discouraged by the present anarchy and uncertainty, trade seeks a solution in resort to arbitration; but under present conditions this is hardly more than a procedure for settling disputes, and in the end it is not clear what rules of law will be applied.

There is no reason why such a situation should exist. Due as it is to the unsatisfactory organization of the international community, it bears no relation to the interests of States. In most cases it is of no great moment to a State whether one or another rule governing conflicts of laws is applied, for there is absolutely no certainty that the rule selected will in the end be favourable to its nationals.

The purpose of the French delegation's proposal is to clarify the issue by promoting the development of a new *jus commune*. To States which join the proposed Union, this *jus commune* will show what provisions are to be applied to the international transactions governed by it, and it will usually, therefore, become unnecessary to refer to the various national systems of law in order to discover what provisions govern these matters.

The provisions of *jus commune* can, of course, be either rules governing a conflict of laws or substantive rules, depending on the matter to which they relate.

There are two main principles underlying the French delegation's proposal. The first is that the rules applicable to transactions in international trade should be established, so far as possible, by agreement among States. The second is that in every case States must be

permitted to decline to apply the rules thus agreed upon wherever they consider that they jeopardize their interests or wherever for any other reason—which they cannot be called upon to state—they consider that they should not accept them.

Once these principles are accepted, many ways of applying them can be thought of. The French delegation is proposing a very simple system. It is prepared to consider any proposal to amend or supplement that system, in particular as regards the structure and powers of the suggested Union, its relations with UNCITRAL, the procedure for establishing *jus commune* and the procedure for making derogations from it.

This proposal is in no way prejudicial to the international organizations at present engaged in unifying law (rules governing conflicts of laws or substantive rules). Quite the reverse; it offers those organizations fresh prospects for an expansion of their work and its more successful conclusion. The Union to be established under the French proposal will undoubtedly use the existing institutions for the preparation of the legal instruments which it will afterwards declare to be *jus commune*.

Again, the French proposal imposes no obligation upon States. It merely requires them to face their responsibilities when a text is adopted as a rule of *jus commune*; if they do not approve of that text, they must—once they have agreed to join the Union—say so.

The French delegation is asking the United Nations Commission on International Trade Law to consider and complete the drafting of this proposal. In point of fact, the proposal falls within the far more general terms of reference given to UNCITRAL, which, under resolution 2205 (XXI) is to "further the progressive harmonization and unification of the law of international trade".

#### Preliminary Draft of an International convention establishing a union for *jus commune* in matters of international trade

[States],

Considering the multiplicity and diversity of national law and the resultant obstacles to any attempt to lay a reliable foundation for international trade transactions;

Convinced that the conditions prevailing in the modern world call for a fundamental review of the methods now being applied to improve the international trade system;

\* 13 March 1971.



Believing in the need to establish a truly international legal order governing international relations;

Persuaded, however, that all progress should be achieved in full respect for national sovereignty;

Paying a tribute to the many efforts made in various quarters, including particularly the United Nations, to improve the legal system governing international trade;

Basing itself on the example already provided in certain special sectors by various international organizations,

Have agreed to revive the idea of *jus commune*,

And, for this purpose, have adopted the following provisions:

#### Article I

There shall be established among the States acceding to this Convention a Union for *Jus Commune* (UJC).

The purpose of the Union shall be to establish, in full respect for the sovereignty of States, a new *jus commune* in matters of international trade.

#### Article II

Accession to the Union shall be open to all States Members of the United Nations or of the specialized agencies of the United Nations.

#### Article III

This Convention shall enter into force when . . . States have expressed their intention of acceding to the Union by a declaration addressed to the Secretary-General of the United Nations.

#### Article IV

All States may at any time withdraw from the Union by addressing a declaration to the Secretary-General of the Union.

Such declaration shall take effect one year after it has been made.

#### Article V

The governing body of the Union shall be the General Conference.

Every State shall have one vote in this Conference.

#### Article VI

The General Conference shall draw up its rules of procedure.

It shall elect the Secretary-General and the deputy secretaries-general of the Union.

It shall prepare the Union's programme of work and take all the necessary steps for carrying it out.

It shall approve texts designed to constitute, for the Union's members, the *jus commune* of international trade.

#### Article VII

A three-quarters majority shall be required at the General Conference to give a text the status of *jus commune*.

#### Article VIII

A decision thus adopted by the General Conference shall generally take effect three years after it has been passed.

The General Conference may by a simple majority prolong or extend this time-limit.

It may also, by a two-thirds majority, reduce it.

#### Article IX

On the expiry of the time-limit laid down in the preceding article, and subject to the provisions of article X, texts approved by the General Conference shall become valid law in the various States of the Union in the matters governed by them.

#### Article X

Any State may, however, declare at any time that it will not apply in its territory any particular rule declared *jus commune* by the General Conference.

Such declaration, addressed to the Secretary-General of the Union, shall take effect immediately if, under articles VIII and IX, the rule has not yet entered into force with regard to that State, and otherwise one year after such declaration has been made.

A State excluding the application of a provision of *jus commune* in its territory shall at the same time indicate, wherever possible, by what rule in its law that provision is replaced.

#### Article XI

The Secretary-General of the Union shall communicate to the various States without delay any declarations he may receive in conformity with articles IV and X.

He shall annually prepare an edition of the texts adopted by the General Conference, pointing out, in respect of each text, the States which have excluded it from application and, wherever possible, the rules which in these States are substituted for the provisions of *jus commune* which have been set aside.

## BIBLIOGRAPHIES

### 1. Survey of bibliographies relating to international trade law: \* report of the Secretary-General (A/CN.9/L.20/Add.1) \*\*

The current publications which give bibliographical information relating to the priority topics in the work programme of the United Nations Commission on International Trade Law can be divided into two major types: general legal bibliographies and national legal bibliographies.

#### GENERAL LEGAL BIBLIOGRAPHIES

Listed under this heading are bibliographies that contain materials from several countries. General legal bibliographies in the Spanish language are:

*Bibliografía jurídica de América Latina* (1810-1965). Alberto Villalón-Galdames. Editorial Jurídica de Chile, Santiago de Chile, 1965. Vol. I: Introduction. Bibliografía jurídica de América Latina: I: Argentina, II: Bolivia. 487 p. Supplement to vol. I: indexes. 320 p. It is meant to list references for books appearing in all Latin American States.

*Handbook of Latin American Studies*. Cambridge, Mass., 1937-1947. Gainesville, University of Florida Press, 1951. It is a yearbook prepared by the Hispanic Foundation of the Library of Congress. It contains a chapter on selected annotated publications on law by Helen L. Clagett.

General legal bibliographies in the English language are:

*Index to Legal Periodicals*. New York, H. W. Wilson, 1908 to date. This is the most inclusive index to English language legal periodicals. It indexes some 160 of the principal American, British and British Commonwealth periodicals, and many bar association publications. It is divided into author, book review and case indexes. It appears monthly except September. Up to 1925, it was cumulated annually. Since 1926 it has been cumulated both annually and triennially. It contains all important articles in English on unification of law and international trade law.

Since the index only lists periodical articles it should be supplemented for books in English by:

*Law books in print*. Meira G. Pimsleur and Jacobstein, J. Myron comp. and ed. (Consolidated edition—including books in English published throughout the world and in print as of December 1964.) Glanville Publishers, Inc. Dobbs Ferry, N.Y. 1965. 2 vols. 1065 p. This is a very comprehensive listing of books by subject. It has been kept up-to-date by yearly supplements for 1966, 1967 and 1968. A new consolidated edition will soon appear.

*Law books published*. Compiled and edited by Meira G. Pimsleur. Glanville Publishers. Dobbs Ferry, New York, 1969. This is a quarterly record of books published during the year, the fourth of which cumulates publications of the entire year.

A comprehensive bibliography of English language books and articles arranged by subject is:

*A bibliography on foreign and comparative law*. Charles Szladits comp. and annot. This is a bibliography of books and articles in English. Published for the Parker School of Foreign and Comparative Law by Oceana Publications, Inc. Dobbs Ferry, N.Y. Vol. 1 (1970 to 1 April 1953), New York, 1955. 508 p.; vol. 2 (1953-1959), Dobbs Ferry, 1962. 559 p.; vol. 3 (1960-1965), Dobbs Ferry; 1968. 855 p. Supplement 1966-1967. Dobbs Ferry, 1970. 242 p. It is kept up to date by annual supplements. It is arranged by subjects, and has a special heading for unification of law.

General bibliographies in English which give information both about English and non-English language publications are:

*Index to Foreign Legal Periodicals*. Published by the Institute of Advanced Legal Studies... in co-operation with The American Association of Law Libraries. London, 1960. It is published quarterly, the fourth quarterly issue of each year cumulates the other three (and cumulations): volumes 1-3 (1960-1962) 754 p., vols. 4-6 (1963-1965) 1027 p., vols. 7-9 (1966-1968) 773 p., vol. 10 (1969). It indexes about 260 foreign and some Anglo-American periodicals. Of particular interest is that it indexes the important international law journals, and contains most of the significant articles on the unification of law.

*Unification of Law*. (A general survey of work for the unification of private law.) International Institute for the Unification of Private Law. Rome, Ed. "UNIDROIT", vol. 1. 1926-1946 (1948), vol. 2. Actes du Congrès International de Droit Privé tenu à Rome... 1950 (1951), vol. 3. General survey 1953-1955 (1956), (continued) from 1956 as a Year Book. It contains (as part III or IV) a selected bibliography: "Bibliographical notes on the movement for the unification of law", dealing with both international and internal unification and comprising books and articles. It is very useful, although not comprehensive. Not all yearly volumes contain bibliographical notes.

*Nederlands Tijdschrift voor International Recht*. Netherlands International Law Review. Leiden, A. W. Sijthoff, 1953-1954. This quarterly periodical contains (three or four times a year) a "Survey of literature on public and private international law" which is a selected bibliography for a stated period (e.g., 1 February - 1 June 1954). It includes books and articles, as well as law reports and documents. The coverage for the Netherlands is quite comprehensive, and in general it contains the important articles and books from other countries.

A very useful special bibliography on publications on unification of law is:

*Index to proceedings and documents of the International Institute for the Unification of Private Law*. Ed. by Vaclav Mostecký. Harvard University. Law School. Library. Cambridge, Mass. 1967. 74 p.

\* This compilation was prepared by Professor Charles Szladits of the Parker School of Foreign and Comparative Law at Columbia University, New York.

\*\* 5 March 1971.

## NATIONAL LEGAL BIBLIOGRAPHIES

Many countries have comprehensive national legal bibliographies. These, however, appear at infrequent intervals and wherever possible should be supplemented by other current sources. Such supplementary sources are included together with the bibliographies, country by country. Complete enumeration is not attempted; the best and most helpful of available publications have been selected.

*Argentina*

A current source of bibliography is:

*Boletín de la Biblioteca del Congreso de la Nación.* Buenos Aires, Biblioteca del Congreso de la Nación. 1932. This quarterly bulletin of the Library of the National Congress contains bibliographies of books and pamphlets and includes a review of reviews, both domestic and foreign. It is probably not comprehensive.

*Austria*

The current bibliography of legal literature is:

*Index der Rechtsmittelentscheidungen und des Schrifttums.* Begründet von Dr. Franz Hohenecker, fortgeführt von Dr. Rudolf Stohanzl, Dr. Gerhard Friedl und Dr. Kurt Ringhofer. Manz, Wien, 1946. It consists of yearly volumes containing index-references to reports and articles from 48 Austrian legal and political science periodicals.

For books, this index may be supplemented by:

*Oesterreichische Bibliographie.* Verzeichnis des österreichischen Neuerscheinungen 1946-. Bearbeitet von der Österreichischen Nationalbibliothek. Wien, Hauptverband des österreichischen Buchhandels 1946-. A semi-monthly publication.

For articles, the index may be supplemented by:

*Bibliographie der deutschen Zeitschriftenliteratur.* (Internationale Bibliographie der Zeitschriften—literatur. Serie A.) F. Dietrich, Osnabruck, 1896. This is a semi-annual index which contains all periodical articles, contributions to yearbooks and collective works in German. It includes German, Austrian and Swiss publications. Since its use is cumbersome for German articles, the sources mentioned below should be used.

*Belgium*

The comprehensive bibliography of books and articles is:

*Répertoire bibliographique du droit belge* (1919-1945) par Henri Bosly, Charley del Marmol [et al]. Liège, Les Presses Universitaires, 1947. 456 p.; *Répertoire bibliographique du droit belge* (1946-1955), par Henri Bosly, Charley del Marmol [et al]. Liège, Presses Universitaires, 1957. 348 p.; *Supplément: 1956-1960* par J. M. Parisi [et al]. Liège, Faculté de Droit, 1962. 322 p.

The *Répertoire bibliographique* should be supplemented, until publication of a further volume or supplement, by:

*Annales de Droit.* Revue Trimestrielle de droit belge. Bruxelles, 1940. This is a quarterly, published under the auspices of the Law Faculty of the Catholic University of Louvain. It contains quarterly bibliographies (*Chronique Bibliographique Trimestrielle*) of books and articles.

*Bolivia*

The national bibliography (books) is:

*Mensuario bibliográfico*, 1944-.

*Brazil*

A bibliography published by the Ministry of Justice is:

*Jus Documentação*, Boletim Informativo, Ministério de Justiça e Negócios Informativo. Brasília. Departamento de Imprensa Nacional. This publication lists legislative acts, and also legal publications (books and articles) but it is not comprehensive. The national bibliography (books) is:

*Boletim Bibliográfico.* Biblioteca Nacional, Rio de Janeiro. 1951. This is published semi-annually.

*Bulgaria*

*Legal Sources and Bibliography of Bulgaria*, by Ivan Sipkov, New York, Praeger, 1956, 199 p. This is a very useful selective bibliography.

In the absence of current legal bibliographies the most useful and comprehensive general bibliographies should be used:

*Bulgarski knigopis.* 1897 to date. Since 1949, this has been published monthly. It lists by subject all books, pamphlets and new periodicals published in Bulgaria. It is published by the Cyril and Methodius National Library in Sofia.

*Letopis na periodichnita pechat.* 1952-, Sofia. This is a selective list published monthly by the National Library, and contains material appearing in periodicals.

*Chile*

The national bibliography (books) is:  
*Servicio bibliográfico chileno.* 1940-.

*Costa Rica*

The national bibliography (books) is:

*Boletín bibliográfico.* National publications issued during the years 1935-1938-, San José, 1939-.

*Cuba*

The national bibliography (books) is:

*Anuario bibliográfico Cubano* 1937, Habana, 1938.

*Czechoslovakia*

A very useful selective bibliography of books and articles is:

*Bibliography of Czechoslovak legal literature*, 1945-1958. Ceskoslovenska akademie ved. Ustav práva. Prague, Pub. House of the Czechoslovak Academy of Sciences, 1959. 261 p.

This bibliography can be supplemented by:

*Novinky Literatury Stát a Právo.* (Novinky Literatury-Společenské Vedy III. Rada.) Státní knihovna CSSR. Since 1966 a bibliographical survey is published in several series. Series III deals with "State and law". It lists not only Czechoslovak publications, but selected items from other countries. There are several issues (about 10) each year.

For books the bibliography published by the National Library should be consulted:

*Ceské knihy.* 1951-, Praha, Národní knihovna. This appears weekly.

*Denmark*

*Juridiske litteraturhenvisninger* ven Torben Lund. Kjøbenhavn, Busck, 1950, 229 p. Supplement 1950-1955. 1956. 94 p. This is a legal bibliography of books and articles for the period 1900-1949, with a supplement to 1955.

*Dansk juridisk litteratur.* J. Sønndergaard, Kjøbenhavn, Gad, 1960. This is a sales catalogue of the most important current legal work.

Quarterly surveys of current legal publications (books and articles) can be found in:

*Juristen.* Utgivet af Juristforbundet 1919. Nyt Nordisk Forlag, Kjøbenhavn.

A short survey of legal literature is also given in *Svensk Juristtidning* (see: Sweden).

*Dominican Republic*

The national bibliography (books) is:

*Anuario bibliográfico dominicano.* 1946. Ciudad Trujillo, 1947-.

*El Salvador*

The national bibliography (books) is:

*Boletín*. Biblioteca Nacional (de San Salvador). San Salvador, 1932.

*Finland*

A comprehensive legal bibliography of books and articles with table of contents and main headings in Finnish, Swedish and French is:

*Bibliographia Juridica Fennica*. Suomen Lainopillinen Kirjallisuus (Littérature juridique de la Finlande) Toimittaja (edited) Veikko Reinikainen. Helsinki, Suomalainen Lakimiesyhdistys, 1951-1959, vol. I: 1809-1948. 1047 p. vol. II. (Ed.: Marjatta Seppälä) 1949-1958. 456 p. Parts XXIV and XXV contain public and private international law respectively.

For a current article see:

*Suomen Aikauslehti-Indeksi* 1959-, (Index to Finnish periodicals). Turun Yliopiston Kirjasto. Aabo, 1959-; Svensk Juristtidning (see: Sweden).

For current books see:

*Suomen Kirjallisuus*. Aakkosellinen ja aineenmukainen luettelo. Finlands Litteratur. Alfabetisk och systematisk förteckning. (The Finnish national bibliography). Helsingin Yliopiston Kirjasto, Helsinki 1901. This is a comprehensive bibliography of books published in Finland. It appeared in intervals of a few years. Recent volumes are: 1944-1948, 1949-1951, 1952-1954, 1955-1957, 1958-1960, 1961-1963 (1964-1966 under publication).

*France*

A complete list of legal publications (books and articles) in French published between 1800 and 1951 (then discontinued) is:

*Bibliographie générale des sciences juridiques, politiques, économiques et sociales*. Arthur Grandin. Paris, Sirey, 1926. 3 volumes with annual supplement to 1951.

A selective bibliography is:

*Bibliographie du droit français 1945-1960*, by René David, Paris, Mouton, 1964. 252 p.

There is no current comprehensive legal bibliography for books and articles. The best source for current legal publications dealing with the subject-matters under consideration are:

*Revue Trimestrielle de Droit Civil*. Paris, Sirey, 1902. This is a quarterly which contains a bibliographical survey in each issue. Works on unification of law are generally found under the titles *droit international privé* and *droit comparé et droit uniforme*.

*Recueil Dalloz-Sirey*. Paris, Dalloz, 1845. This periodical, (published weekly), contains, at certain intervals, an extensive bibliography listing recent law books and articles.

*Germany (Democratic Republic)*

*Bibliographie für Staats-und Rechtsfragen*. V. 1, 1955—Berlin (Ost), Akademie Verlag. 6 issues a year. Vols. 1-6 as Bibliographischer Dienst. This is published under the auspices of the Deutsche Akademie der Staats-und Rechtswissenschaft "Walter Ulbricht".

*Germany (Federal Republic)*

*Deutsches Schrifttum über internationales und ausländisches Privatrecht*. Zusammenge stellt. . . von Hans Peter des Coudres. In: *Rabels Zeitschrift* for 1945-1950 vol. 1952, 111-121; for 1951-1953 vol. 1954, 733-750; for 1954-1956 vol. 1957, 668-691; for 1957-1959 vol. 1960, 658-683; for 1960-1962 vol. 1964, 494-562, for 1963-1965 vol. 1967, 82-167 (continued). Section B II *Rechtsvereinheitlichung* contains publications on unification. This is a comprehensive bibliography of German publications (books and articles).

This excellent bibliography can be supplemented by:

*Karlsruher Juristische Bibliographie*. Systematischer Titelnachweis neuer Bücher und Aufsätze in monatlicher Folge aus Recht, Staat, Gesellschaft . . . München, Beck, vol. 1: 1965. This is a monthly review of wide coverage of books and articles (it also includes dissertations). Unification of law is generally found under the titles *Rechtsvereinheitlichung* and *Internationales Privatrecht*.

*Guatemala*

The national bibliography (books) is:

*Boletín*. Biblioteca Nacional de Guatemala (1932 May—). Guatemala, 1932.

*Honduras*

The national bibliography (books) is:

*Revista del Archivo y Biblioteca Nacional de Honduras*. Tegucigalpa, 1904.

*Hungary*

An exhaustive bibliography of all books and articles on law published in Hungary is:

*Allam-és jogtudományi bibliográfia*. Magyar Tudományos Akadémia. Allam-és Jogtudományi Intézet. Comp. by Lajos Nagy. Budapest, Közgazdasági és Jogi Könyvtár, 1965—vols.: 1945-51 pub. 1958. 244 p.; 1953 pub. 1955. 150 p.; 1954-55 pub. 1956. 163 p.; 1956-57 pub. 1959. 185 p.; 1959-60 pub. 1961. 270 p.

A selective bibliography of books and articles is:

*Bibliography of Hungarian legal literature*, by Lajos Nagy, Budapest, Akadémiai Kiadó, 1966. 315 p. (Titles also given in English translation.)

This bibliography is kept up to date by a semi-annual bibliography of current literature of law books and articles in: *Acta Juridica Academiae Scientiarum Hungaricae*. Akadémiai Kiadó, Budapest, 1959.

*India*

A general legal bibliography for periodical articles is:

*Index to Indian Legal Periodicals*. Published by The Indian Law Institute. New Delhi, 1963—. It contains two numbers yearly. It indexes some 32 Indian law reviews.

This should be supplemented for books by:

*The Indian national bibliography*. Oct./Dec. 1957—Calcutta, Central Reference Library, 1958. This is a comprehensive bibliography of all books published in India.

A bibliography containing books published in English is:

*Books of India*, 1963—Bombay, Publisher's World, 1964.

Bibliographies of selected publications are:

*A bibliography of Indian law* by C. H. Alexandrowicz. Madras, 1958. 69 p.

*Indian Legal Materials, A Bibliographical Guide*, by H. C. Jain, Bombay, 1970, 123 p.

*Italy*

A compilation of articles from legal journals is:

*Dizionario bibliografico delle riviste giuridiche italiane su leggi vigenti*, Vincenzo Napoletano ed. (1865-1954). Milano, Giuffrè, 1956. 208 p. Appendice. 1—, 1956—. The first volume covers the period from 1865 to 1954. The supplementary volumes cover one year each. Since 1959 these volumes also contain bibliographies of books. Under "Diritto internazionale" in the index can be found all the important articles (or books) on unification of law.

This should be supplemented until the publication of the next volume by the monthly:

*Il Foro Italiano*. Vol. 1, 1876, Bologna, Soc. Ed. Foro Italiano. This is a collection of digest reports. However, it gives the bibliography of currently published books and articles under the respective subject headings. Most relevant titles will be under "Diritto internazionale", but other special subject headings should also be checked, e.g., "Vendita".

#### Japan

Legal bibliographies covering post-war materials are:

*Sengo hōgaku bunken sō-mokuroku*, Horitsu Jihō Henshū-bu (ed.), Tokyo, in two volumes published in 1954 and 1955 covers the period from 1945 to 1953; *Shihō-hen* published in 1966 covers the period from 1954 to 1962.

*Hōbun hōritsu zasshi kiji sakuin*, Saikō Saibansho Toshokan (Library of the Supreme Court), Tokyo, 1958.

A useful index to comments on judicial decisions is:

*Hanrei hihyō bunken sō-mokuroku*, Hanrei Jihō Henshū-bu (ed.), Tokyo. The 1959 volume covers the period from 1946 to 1961; the special issue of *Hanrei jihō* of 15 April 1969 covers the period from 1951 to 1966; an index to the comments on the decisions of the Court of Cassation (Daishin'in) covering the period from 1922 to 1946 is appended to the last issue.

Leading legal periodicals, such as *Jurisuto* (Yūhikaku, Tokyo) and *Hōritsu jihō* (Nihon Hyōron-sha, Tokyo), often contain extensive bibliographical surveys on current legal publications including articles and case notes. These should be resorted for current publications to fill the gap left by the general legal bibliographies.

In addition to the legal bibliographies described above, the following general bibliographies may be also used as secondary sources of information:

*Zasshi kiji sakuin: Jimmon kagabu hen*, Kokkai Toshokan (National Diet Library), Tokyo, 1950— This is a quarterly index of periodicals and government publications which relate to humanities and social sciences including law.

*Zen-Nihon shuppan-butsu sō-mokuroku*, Kokkai Toshokan (National Diet Library), Tokyo, 1951— This is a list of all publications deposited with the library. It is usually several years behind and should be supplemented by the publishers' yearbook for current publications: *Shuppan nenkan*, Shuppan Nyūsu-sha, Tokyo, 1951.

#### Lebanon

*Bibliographie juridique libanaise*, Albert Nassif, Beyrouth, 1958. 57 p.

#### Luxembourg

*Bibliographie du droit luxembourgeois*, Association Internationale des Sciences Juridiques, Comité National Luxembourgeois, Luxembourg, 1967. 240 p.

#### Mexico

The national bibliography (books) is:

*Bibliografía Mexicana*, Mexico, 1938—.

A bibliography on books is:

*Boletín Jurídico Bibliográfico de la Escuela Libre de Derecho* (de Mexico), Mexico, Jus, 1940—.

#### Netherlands

An annual bibliography of books and articles in some 16 periodicals is:

*Klapper ou de rechtspraak en de rechtsliteratuur*, 1952—, Zwolle, W. E. J. Tjeek Willink.

This bibliography supersedes *Overzicht van de rechtspraak-rechtsliteratuur administratieve beslissingen*, 1925-1951, Zwolle, Tjeenk Willink.

#### Nicaragua

The national bibliography (books) is:

*Bibliografía de trabajos publicados en Nicaragua*... (1943). Managua, Nuevos Horizontes, 1944—.

#### Norway

*Norsk juridisk litteratur 1962-1966*, Kaare Haukaas. Ein bibliografi. Universitets-forlaget. [Oslo], 1968. 90 p.

An index of periodicals is:

*Norsk tidsskriftindex*, 1918— Oslo, 1918—.

For current periodical literature see:

Sweden, *Svensk Juristtidning*.

The national bibliography is:

*Norsk bokfortegnelse*, Oslo, 1814 (superseded by a 5 yearly catalogue).

#### Panama

The national bibliography (books) is:

*Bibliografía de Panamá*, 1938— Comisión Nacional de Cooperación Bibliográfica, Panamá, 1939—. This appears in mimeographed form.

#### Peru

The national bibliography (books) is:

*Anuario Bibliográfico Peruano*... 1944— Lima, Ediciones de la Biblioteca Nacional, 1945—. This appears annually.

#### Philippines

*Philippine Legal Bibliography* by Frederico B. Moreno. 2nd ed. n.p. 1962. 139 leaves.

#### Poland

*Polska bibliografia Prawnicza*. (Bibliographie juridique polonaise). Ed. by Karol Koranyi. Polska Akademia Nauk. Instytut Nauk Prawnych. (Académie Polonaise des Sciences. Institut des Sciences Juridiques). Warszawa, 1962-1966. 5 vols. Vols. 1-3: 1944-1959, vols. 4-5: 1960-1964. This bibliography contains references from some 102 reviews. Parts 12 and 13 contain public and private international law respectively. Titles and headings are in Polish and French.

This bibliography should be supplemented for current publications with:

*Państwo i Prawo* (State and Law). Polska Akademia Nauk, Instytut Nauk Prawnych, Warszawa, 1946. Each monthly issue contains a bibliographical listing of legal publications; *Polska Bibliografia Prawnicza*, part I articles (artykuly) and part II books (ksiazki).

#### Portugal

Legal periodical articles can be found in:

*Boletim da Faculdade de Direito*, Universidade de Coimbra. Coimbra, 1914—. This annual bulletin contains a review of articles "Revista de revistas" in which the contents of all Portuguese legal journals are listed in alphabetic order.

No current listing of books on law is available, the national bibliography should be used:

*Biblioteca Nacional de Lisboa*. Boletim de bibliografia portuguesa Lisboa, 1935. This is a monthly publication.

#### Romania

An excellent selective legal bibliography is:

*Institutul de cercetari juridice al Academiei Republicii Socialiste România*. (Bibliographie juridique roumaine—Bibliografie juridica România.) 1944-1968... sous la direction du prof. dr. Trajan Ionesco. Editua Academiei Rep. Soc. România, Bucuresti, 1969. 410 p.

It can be supplemented by two comprehensive national bibliographies:

*Bibliografia periodicelor din Republica Populară Română*. Biblioteca Centrală de Stat. [București], 1953—. Semi-monthly. (Title varies—1956: *Buletinul bibliografic*. Seria B.) This contains all periodical articles published in Rumania.

*Bibliografia Republicii Populare Române*, carti, albume, harti, note muzicale. [București], 1945—. This semi monthly publication contains references to books and pamphlets.

#### Spain

An annual legal bibliography of books and articles:

*Bibliografía Jurídica Española*. Facultad de Derecho, Universidad de Madrid. 1956-1962. Madrid, 1958-1964.

Other than the above bibliography, which indexes some 78 periodicals, no current listing of legal periodical publications has been found. To supplement the bibliographies the national bibliography may be used. It contains references only to books:

*Bibliografía española*. Ministerio de Educación Nacional. Dirección General de Archivos y Bibliotecas. Madrid, 1958—. This consists of comprehensive annual volumes listing publications in Spain.

An earlier bibliography (though probably not comprehensive) is:

*Bibliografía Hispanica*. Madrid, Instituto Nacional del Libro Español, 1942-1957. This monthly publication contains "Repertorio bibliográfico clasificado por materias" for books published during the year or the previous year.

A quarterly publication which includes a summary of Spanish and Latin American periodicals is:

*Biblioteca Hispana*. (Revista de información y orientación bibliográficas.) Consejo Superior de Investigaciones Científicas. Madrid. 1943.

#### Sweden

A comprehensive legal bibliography of books and articles is: *Svensk juridisk litteratur, 1865-1956*. Nils Ivan Regner. Stockholm, Norstedt, 1957. 610 p.

This bibliography is kept up to date by:

*Svensk Juristtidning*. Stockholm, 1916. It is published monthly. Each volume contains a survey of Scandinavian periodical literature of the preceding year (under *Bibliografi: Ur nordiska tidskrifter*) and from 1959 (vol. 44) on, every two or three years a complete bibliography of Swedish legal literature by Nils Regner as a continuation of the bibliography listed above.

#### Switzerland

A comprehensive bibliography of legal books and articles from 1901 to the end of 1965, including also references to articles in *Festschriften*:

*Schweizerische Rechtsbibliographie*; *Bibliographie juridique suisse*; *Bibliografía jurídica suíza*. Hardy Christen. Zürich, 1966— 3 volumes loose-leaf.

This bibliography can be kept current by the following:

*Übersicht über schweizerisches Recht*. *Bibliographie juridique suisse* by B. Riggensbach. In: *Zeitschrift für Schweizerisches Recht* n.f. Bd. 1—; 1882—Basel, Helbing and Lichtenhahn. These bibliographies from vol. 23 (1882) onwards list by subject each year the books and articles published in Switzerland during the preceding year. They are also available in the form of reprints of bibliographies that have appeared since 1947. They give almost complete coverage, especially when used with Christen. From vol. 47 on the bibliographies are compiled by Alfred Müller.

#### Turkey

An annual survey containing bibliographies, articles, annotated cases is:

*Türk hukuk kronigi*. Istanbul, 1943/44—.

The national bibliography may be used to complete this bibliography with respect to books:

*Türkiye bibliyografyası*. Istanbul, Millî Egitim, Basimevi, 1934.

A monthly bibliography of articles published in Turkish periodicals is:

*Türkiye makaleler bibliyografyası*. (Bibliographie des articles parus dans les périodiques turcs.) Istanbul, Milli Kultuphane Bibliografya Entitüsü, 1952. Over 20 publications are covered in this bibliography.

A bibliography for books and articles is:

*Yirmi senelik Türk hukuk bibliyografyası*, 1935-1934. Rudvan Bübent Ercyes. Istanbul, Fakülteter Matbaası, 1956. 702 p.

#### Union of Soviet Socialist Republics

A selective bibliography of books and some important articles is:

*Literature on Soviet Law*. (Index of Bibliography). The USSR Academy of Science. The Institute of State and Law. The Publishing House of the USSR Academy of Science. Moscow, 1960. 279 p. The titles are in the original language with English translation added.

This selection may be supplemented by:

*Sovetskoe gosudarstvo i pravo* (Soviet state and law). Moscow, 1924-1941, 1946. This monthly publication is the major law journal edited by the Institute of State and Law of the Academy of Sciences of the USSR. It contains bibliographies on recent publications of books and articles on law in each issue.

These bibliographies may be supplemented by several national bibliographies:

*Ezhgodnik knigi SSSR; sistematicheskii ukazatel'* (Annual of books of the USSR; a classified index). Moscow, Izd-vo Vsesoiuznoi knizhnoi palaty. This is issued regularly by the All-Union Book Chamber. It is an annual accumulation of monographs listed in the weekly *Knizhnaia Letopis'* (book annals), except for standards, government documents, and continuing publications. It is published in 2 volumes, one covering humanities and social sciences, the other natural science and technology.

*Letopis' zhurnal' nykh statei* (Annals of articles in journals). Moscow, vol. I—, 1926. This weekly bibliography on articles is issued by the All-Union Book Chamber as an "Organ of the State Bibliography of the USSR". It is a bibliography of current articles and documentary materials in about 1400 selected Russian-language periodicals. They are listed in 31 major subject classes. There are quarterly author indexes.

#### Uruguay

A comprehensive legal bibliography has been published:

*Bibliografía Jurídica de Uruguay*. Anatolio Palamarchak and Victor Boccino Pons. Montevideo, Facultad de Derecho. 2 vols. 1956-1963. Vol. 1, 497 p., vol. 2, 791 p. Vol. 1 contains a bibliography of books up to 1956, and vol. 2 contains a bibliography of legal periodical articles up to 1963. However, it has not been kept up-to-date.

The national bibliography (books) is:

*Anuario bibliográfico uruguayo* (1946—) Montevideo, 1947—.

#### Venezuela

The national bibliography (books) is:

*Anuario bibliográfico venezolano 1942—*. Caracas, Biblioteca Nacional, 1944—.

## Yugoslavia

A selected bibliography of books and articles is:

*Bibliographie juridique yougoslave*. Elaborée et commentée par Borislav T. Blagojevic. Beograd, 1959, 262 p.

This bibliography is completed in supplements published in: *New Yugoslav law; bulletin of law and legislation in the Federal People's Republic of Yugoslavia*. Beograd, Union of Jurists' Associations of Yugoslavia, year 1—, May 1950—.

No comprehensive legal bibliography is published. However, excellent national bibliographies exist both for books and for periodical articles. They are:

*Bibliografija Jugoslavije*—Knjige, brosure i muzikalije. Jugoslovenski Bibliografski Institut. Beograd, Jugoslovenski Bibliografski Institut, 1950—. This is a bi-monthly publication of all books published in Yugoslavia. It contains indexes.

*Bibliografija Jugoslavije*—clanci i prilozu u casopisima, novinama i zbirmim delima. Jugoslovenski Bibliografski Institut. Serija A: Društvene nauke. Beograd, Jugoslovenski Bibliografski Institut, 1950. This is a bibliography of all articles and other contributions which appeared in periodicals published in Yugoslavia. Series A comprises social sciences and includes all articles on law. It is published monthly.

## 2. Bibliography on UNCITRAL \*

BURGUCHEV and ROSENBERG, The United Nations Commission on International Trade Law, *Trade Magazine*, No. 4, 1971.

DAVID, La Commission des Nations Unies pour le droit commercial international, *Annuaire français de droit international*, 1970.

GIULIANO, Le Nazioni Unite e il diritto commerciale internazionale, 25 *Comunita int.* 520 (luglio-ott 1970).

JAKUBOWSKI, onz a rozwój miedzynarodowego prawa handowego, *Prawo: Zycie*, No. 8, 1968.

KITAGAWA, General report on the unification or harmonization of law of trade at the global level, 30 *Hikakuhō Kenkyū*, 3; 1969 [in Japanese].

MICHIDA, Global unification of international trade law and the resolution of the United Nations General Assembly—The creation of the United Nations Commission on International Trade Law (UNCITRAL), *Shōjihō no Kenkyū* (Osumi Kanreki Kinen), 458-483; 1968 [in Japanese].

, Efforts for the unification of the law on international sale of goods by the United Nations, 30 *Hikakuhō Kenkyū*, 123; March 1969 [in Japanese].

, Activities of the UNCITRAL Working Group on Prescription; preparation of a draft convention on prescription (limitation) in the field of international sale of goods—A comparative study, *Jurisuto* Nos. 430, 432, 434; 1969 [in Japanese].

NESTOR, L'action des Nations Unies pour la diffusion de l'arbitrage commercial international, *Rivista del Diritto Internazionale privato e processuale*, premier volume de l'annuaire, 1969; also published in *Revue de l'Arbitrage*, 317-338, No. 4, 1969; also published in French in *Revue roumaine d'études internationales*, No. 2/8, 1970; also published in Romanian in *Revista romana de studii internationale*, 49, 2 (8), 1970 under the title of "Actiunea Natiunilor Unite pentru raspindirea arbitrajului comercial international".

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