

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume III: 1972



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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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CONTENTS

	<i>Page</i>
INTRODUCTION	v
Part One. Reports of the Commission on annual sessions; comments and action thereon	
I. THE FOURTH SESSION (1971); 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, 14 October 1970- 21 September 1971	3
B. Report of the Sixth Committee (A/8506)	3
C. General Assembly resolution 2766 (XXVI) of 17 November 1971	7
II. THE FIFTH SESSION (1972)	
A. Report of the Commission (A/8717)	9
B. List of relevant documents not reproduced in the present volume	28
Part Two. Studies and reports on specific subjects	
I. INTERNATIONAL SALE OF GOODS	
A. Uniform rules on substantive law	31
1. "Delivery" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/WG.2/WP.8) ..	31
2. " <i>Ipso facto</i> avoidance" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/ WG.2/WP.9)	41
3. Analysis of comments and proposals relating to articles 18-55 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.10)	54
4. Analysis of comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.11)	69
5. Progress report of the Working Group on the International Sale of Goods on the work of its third session, held in Geneva from 17 to 28 January 1972 (A/CN.9/62, Add.1 and Add.2)	77
6. List of relevant documents not reproduced in the present volume ...	95
B. Time-limits and limitations (prescription) in the international sale of goods	96
1. Analysis of replies to the questionnaire, and comments made at the fourth session of the Commission by Governments, on the length of the prescriptive period and related matters: report of the Secre- tary-General (A/CN.9/70/Add.2, section 14)	96
2. Report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods on its third session, held in New York from 30 August to 10 September 1971 (A/CN.9/70)	109

	<i>Page</i>
3. Commentary on the Draft Convention on Prescription (Limitation) in the International Sale of Goods, May 1972 (A/CN.9/73)	115
4. List of relevant documents not reproduced in the present volume . .	142
 II. INTERNATIONAL PAYMENTS	
Negotiable instruments	145
1. Draft uniform law on International Bills of Exchange and commentary: report of the Secretary-General (A/CN.9/67)	145
2. List of relevant documents not reproduced in the present volume . .	192
 III. INTERNATIONAL COMMERCIAL ARBITRATION	
Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters: report by Mr. Ion Nestor (Romania), Special Rapporteur (A/CN.9/64)	193
 IV. INTERNATIONAL LEGISLATION ON SHIPPING	
Report of the Working Group on International Legislation on Shipping on the work of its third session, held in Geneva from 31 January to 11 February 1972 (A/CN.9/63 and Add.1)	251
Check list of UNCITRAL documents	307
Bibliography on UNCITRAL	311

INTRODUCTION

The object and functions of the United Nations Commission on International Trade Law, as well as the purpose of its Yearbook, have been explained in the first and second volumes of the Yearbook.¹ In introducing the third volume, it may be sufficient to recall that the object of the Commission is the progressive harmonization and unification of the law governing international trade, and that the purpose of the Yearbook is to disseminate the work of the Commission and to facilitate the timely evaluation of that work by business and legal circles in various parts of the world.

The preceding volume of the Yearbook covered the period from April 1970 to the end of the fourth session of the Commission, held in March and April 1971. This third volume covers the period from April 1971 to the end of the Commission's fifth session in May 1972.

The present volume, following the pattern established in the previous ones, consists of two parts. Part one completes the presentation of documents relating to the Commission's report on the work of its fourth session by including comments and action with respect to that report which were not available when the manuscript of the second volume was prepared. This part also includes, as its major component, the Commission's report on the work of its fifth session.

Part two reproduces most of the documents considered at the fifth session relating to the Commission's priority subjects: international sale of goods, international payments, international commercial arbitration and international legislation on shipping. These documents include reports of the Commission's Working Groups, analyses of replies, comments and proposals by Governments, and reports of the Secretary-General. At the end of each section are references to any documents which have not been included in this volume.

The reader may be interested to know that the bibliography section at the end of this volume includes references to those reviews of the first volume of the Yearbook that were available when the manuscript of this volume was prepared.

¹ *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1) and *Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4).

I. THE FOURTH SESSION (1971); 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, 14 October 1970-21 September 1971*

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

417. The Board considered this subitem at its 291st and 298th meetings, on 3 and 9 September 1971. The Board had before it the report of the United Nations Commission on International Trade Law on the work of its fourth session.⁶⁸ The report was submitted to the Board, in conformity with General Assembly resolution 2205 (XXI), paragraph 10, section II, for comments or recommendations.

418. The representative of a developed market economy country, a member of the Commission, stated that the dominant impression to be gathered from the report was that of the manifold tasks to be undertaken by that body which were of interest to all countries. He referred to the remark in chapter II of the report⁷⁰ which reflected the view of one representative in the Commission that the economic aspects had not yet been fully studied. While not criticizing the Commission's performance, he considered that this remark gave the key for an appraisal of the Commission's work: economic aspects ought most certainly to be taken into account in the study of international trade law. He added that the Commission had fully taken into account the report of the UNCTAD Working

Group on International Shipping Legislation, as was appropriate in view of the need for continued co-operation between the two bodies. He drew attention to chapter IV of the Commission's report concerning rules for the international sale of goods; these rules were of considerable importance also in trade between countries having different economic and social systems. With regard to comments by the Board on the Commission's report, he suggested that appreciation should be expressed for the contact established between the Commission and UNCTAD and that the subsidiary bodies of the Commission appointed to deal with specific matters should continue their efforts to work out solutions.

419. The representative of a developing country associated himself with the foregoing remarks. He added that the Commission should bear in mind in the future evolution of its work the principle of non-reciprocity in trade relations between developed and developing countries.

Action by the Board

420. At its 298th meeting, on 9 September 1971, the Board agreed to request the Secretary-General of UNCTAD to convey, through the appropriate channels, to the General Assembly the comments made during the debate on the report of the Commission on the work of its fourth session and to express satisfaction with the co-ordination of the work programmes of the Commission, on the one hand, and of the UNCTAD Working Group on International Shipping Legislation on the other.

⁶⁸ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), circulated to members of the Board under the symbol TD/B/371.

⁷⁰ Ibid., para. 13.

B. Report of the Sixth Committee (A/8506)**

CONTENTS

	Paragraphs
I. INTRODUCTION	1-4
II. PROPOSAL	5-6
III. DEBATE	7-36
A. General observations	8-10
B. Working methods of the United Nations Commission on International Trade Law	11-14

* Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 15 (A/8415/Rev.1).

** Official Records of the General Assembly, Twenty-sixth Session, Annexes, agenda item 87, document A/8506.

	<i>Paragraphs</i>
C. International legislation on shipping	15-17
D. International payments	18-23
E. International sale of goods	24-30
F. Publications of the United Nations Commission on International Trade Law	31-32
G. Training and assistance in the field of international trade law	33
H. Future work	34-36
IV. VOTING	37-39
	<i>Page</i>
RECOMMENDATION OF THE SIXTH COMMITTEE	7

I. INTRODUCTION

1. At its 1939th plenary meeting on 25 September 1971, the General Assembly included the item entitled "Report of the United Nations Commission on International Trade Law on the work of its fourth session" as item 87 on the agenda of its twenty-sixth session, and allocated it to the Sixth Committee for consideration and report.

2. The Sixth Committee considered this item at its 1247th to 1254th meetings, held from 27 September to 7 October 1971, and at its 1266th and 1267th meetings, held on 22 and 25 October 1971.

3. At its 1247th meeting, on 27 September 1971, Mr. Nagendra Singh (India), Chairman of the United Nations Commission on International Trade Law at its fourth session, introduced the Commission's report on the work of that session (A/8417).¹ The Sixth Committee also had before it a note by the Secretary-General (A/C.6/L.820) 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 1266th meeting, on 22 October 1971, 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 87. 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 87 should include a summary of the main trends of opinions expressed during the debate.

II. PROPOSAL

5. At the 1266th meeting, on 22 October 1971, the representative of India introduced a draft resolution sponsored by Australia, Austria, Guyana, Hungary, India, Japan and Romania (A/C.6/L.823). The draft resolution (see paragraph 40 below) was adopted by the Sixth Committee without amendment.

¹ This presentation was pursuant to a decision 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.

6. The financial implications of the recommendations contained in the draft resolution were set forth in document A/C.6/L.824.

III. DEBATE

7. The main trends of opinions expressed in the Sixth Committee are summarized in sections A to H below. Sections A and B deal with general observations on the role and functions of the Commission and its working methods. The succeeding sections, relating to specific topics discussed at the fourth session of the Commission, are set out under the following headings: international legislation on shipping (section C), international payments (section D), international sale of goods (section E), publications of the Commission (section F), training and assistance in the field of international trade law (section G) and future work (section H).

A. General observations

8. Most of the representatives who spoke on the subject were of the opinion that the Commission had made considerable progress towards the achievement of its goal—the unification and harmonization of international trade law. The view was expressed that, in removing or reducing legal obstacles to the flow of international trade, especially those affecting the developing countries, the Commission would significantly enhance the economic well-being of all nations.

9. Some representatives stated that the Commission should contribute to the elimination of trade barriers and restricted groupings, and should further the establishment of stable, economically justified trade relations among States with different social systems, based on the principles of universality and mutual benefits, without any discrimination. On the other hand, the view was expressed that the Commission's only objective was to deal with rules of a private law nature governing international trade.

10. Several representatives expressed the view that the primary function of the Commission was to formulate just and equitable rules for the regulation of international trade, taking into account the interests of developing and land-locked countries. The opinion was expressed, however, that the Commission's function was less to draw up new conventions itself than to co-ordinate the work of other organizations, col-

laborate with them and check whether the texts they produced met the needs of the international community.

B. Working methods of the United Nations Commission on International Trade Law

11. Most representatives commended the Commission's working methods. Satisfaction was expressed with the manner in which the Commission had successfully gathered and thoughtfully analysed comments and observations by Governments and interested organizations on current trade practices in order to ensure that the Commission's solutions were based on the needs of international trade in all regions. Special reference was made to the effective utilization of the expertise of representatives of members of the Commission and of organizations concerned.

12. Several representatives also commended the effective use of working groups and the expeditious manner in which those working groups were conducting their business. Special tribute was paid to the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods for drawing up a final draft Convention on Prescription (Limitation) in the Field of International Sale of Goods.² The view was expressed that, in determining the size and composition of working groups, a reasonable balance should be maintained between efficiency and fair representation of geographic regions, economic interests and legal systems.

13. Some representatives, however, cautioned against a tendency towards the excessive use of working groups, which was costly. Those representatives suggested that, instead, the Commission should make greater use of its own skills and other less expensive working methods, such as co-operation with competent international organizations.

14. Some representatives expressed the view that, in order to reduce the costs connected with the work of the Commission, inter-sessional working groups should, as a rule, hold their future meetings in New York. Other representatives, however, were of the opinion that the Commission should alternate the meetings of its working groups between New York and Geneva. It was also suggested that working groups should, as a rule, meet during regular sessions of the Commission.

C. International legislation on shipping

15. All representatives who took the floor welcomed the Commission's decision to examine the rules and practices concerning bills of lading, including those contained in the International Convention for the Unification of certain Rules relating to Bills of Lading, done at Brussels in 1924³ and in the Protocol to amend that Convention, done at Brussels in 1968.⁴ Many representatives considered that the existing rules and practices unduly favour ship-owners at the expense of shippers and, consequently, had an adverse effect on

the economic development of the developing countries. It was noted that the main object of the Commission's examination of the above rules and practices was to establish a fair and equitable allocation of risks between the cargo-owner and the carrier.

16. All representatives who spoke on the subject welcomed the harmonious working relationships in this field which were developed between the Commission and UNCTAD. In this connexion, some representatives suggested that close attention should be given to the economic aspects of international shipping to ensure that the reallocation of risks did not result in higher rates of freight. Hence the necessity of continued co-operation with UNCTAD, the Inter-Governmental Maritime Consultative Organization (IMCO) and other competent bodies was emphasized.

17. Many representatives welcomed the establishment of a new and enlarged Working Group on International Legislation on Shipping to achieve a balanced representation of geographic regions, economic interests and legal systems. Some representatives, however, had doubts whether the large size of the Working Group was conducive to efficiency. Other representatives urged that neither the size nor the composition of this Working Group should constitute a precedent for the future.

D. International payments

18. Many representatives reiterated their support for the Commission's decision to draw up uniform rules applicable to a special negotiable instrument for optional use in international transactions. In the opinion of those representatives, the Commission's approach to unification and harmonization of the law in this area was wise and imaginative.

19. Several representatives expressed satisfaction with the progress made in this field, commended the Secretariat for the preparatory work on preliminary draft uniform rules on bills of exchange and endorsed the Commission's decision to establish at its fifth session a small working group entrusted with the preparation of a final draft. One representative expressed the opinion that it was not proper to request the Secretariat to draft uniform rules; other representatives commended this approach as an efficient working method.

20. Several representatives expressed the hope that the uniform rules would be truly universal and would take account of modern technological developments such as the widespread use of cable transfers and the use of computers. Some representatives suggested that attention should also be given to promissory notes.

21. Several representatives noted with appreciation the level of co-operation that the Commission had established with competent international organizations and banking and trade institutions in all regions, and recommended that such co-operation be continued.

22. One representative stated that, in view of the fact that international payment transactions were taking place satisfactorily under existing conventions, it did not seem urgent for the Commission to undertake the formulation of a new convention. In the opinion of this representative, it would have been more profitable for the Commission to draw attention to the Geneva Conventions of 1930 and 1931 providing uniform laws

² A/CN.9/70, annex I.

³ League of Nations, *Treaty Series*, vol. CXX, 1931-1932, No. 2764.

⁴ See Société du Journal de la Marine marchande, *Le Droit maritime français*, 20^e année, No. 235 (July 1968), p. 396.

for bills of exchange and promissory notes and for cheques, respectively, and to appeal for more ratifications. In the meantime, the Commission could usefully attempt to fill the gaps in those conventions.

23. Several representatives endorsed the Commission's decision relating to bankers' commercial credits and bank guarantees. Several representatives expressed the hope that an effective formula for co-operation between the International Chamber of Commerce (ICC) and the Commission would soon be devised to enable members of the Commission, whose countries were not represented in ICC, to participate in the work of revision of the "Uniform Customs and Practices for Documentary Credits", of 1962, and in the preparation of uniform rules on bank guarantees. The Chairman of the Commission informed the Sixth Committee that ICC had recently expressed its desire to invite members of the Commission and of the Secretariat to attend meetings of the appropriate committees of ICC dealing with the above subjects.

E. *International sale of goods*

24. All of the representatives who spoke on the subject attached great importance to the unification and harmonization of the substantive rules governing the international sale of goods. Many representatives stated that The Hague Conventions of 1 July 1964 relating to a Uniform Law on the International Sale of Goods (ULIS) and to a Uniform Law on the Formation of Contracts for the International Sale of Goods were not acceptable to them in their existing forms. Satisfaction was expressed with the Commission's decision to undertake the revision of those Conventions with a view to making them acceptable to the largest possible number of States. Some representatives were of the opinion that the Commission should elaborate a new convention that would take account of the interests of all States.

25. Several representatives noted with satisfaction that the Working Group on the International Sale of Goods had systematically considered the first 17 articles of ULIS and submitted its recommendations to the Commission at its fourth session. Several comments were made on these recommendations especially those relating to the sphere of application, the form of the contract and the principles of interpretation. Consequently, the Working Group on the International Sale of Goods was requested to reconsider certain aspects of its recommendations in the light of those comments.

26. Many representatives agreed with the Commission's conclusion that it was not practicable to reach final decisions on these questions until a text proposed by the Working Group was reviewed as a whole; satisfaction was, therefore, expressed with the organizational measures adopted by the Commission for the acceleration of its work in this area.

27. It was also suggested that States should ratify The Hague Conventions of 1964 and, at the same time, assist the Commission in making modifications of these Conventions for adoption at a later date.

28. Many representatives also expressed the view that general conditions of sale and standard contracts played an important role in international trade, and agreed with the Commission that the work that had

been started in this field should be continued. Several representatives recommended that the Commission should co-operate closely with the Economic Commission for Europe (ECE) and the Council for Mutual Economic Assistance in view of their long experience in this area. It was recommended that regional meetings be convened to consider the feasibility of extending the use of certain ECE general conditions to regions other than Europe. Another representative suggested that the Commission should bear in mind trade practices, including those of commodity markets.

29. Many representatives took note with appreciation of the draft Convention on Prescription (Limitation) in the Field of International Sale of Goods that was drawn up by the Working Group on Time-limits and Limitations (Prescription) and expressed the hope that the Commission, at its fifth session, would be able to recommend to the General Assembly a final draft convention on this subject.

30. Several representatives recommended that the sphere of application of this convention should be the same as the sphere of application of ULIS. Some representatives recommended that the Commission should, at a future time, direct its efforts towards the unification of rules relating to time-limits (as distinct from limitations) in the field of international sale of goods.

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

31. Many representatives welcomed the publication of the first volume of the *Yearbook of the United Nations Commission on International Trade Law*.⁵ They also welcomed the publication of the first volume of the *Register of Texts of Conventions and Other Instruments concerning International Trade Law*⁶ and recommended the publication of the second volume.

32. Some representatives, while recognizing the value of the *Yearbook* and the *Register of Texts*, suggested that every effort should be made to minimize the cost of these publications.

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

33. Many representatives stressed the importance to developing countries of training and assistance in the field of international trade law and took note with appreciation of the decision of the Commission to consider means whereby practical in-service training could be made available to lawyers and government officials from developing countries. In this connexion, several representatives welcomed the initiative of IMCO to develop, jointly with the Commission and UNCTAD, a programme of assistance to developing countries in the field of laws and regulations applicable to ships and shipping. The hope was expressed that the Commission's programme of training and assistance would be accelerated.

H. *Future work*

34. Many representatives took note of the proposal by the French delegation for the establishment of a

⁵ United Nations publication, Sales No.: E.71.V.1.

⁶ United Nations publication, Sales No.: E.71.V.3.

union for *jus commune* in matters of international trade, which was designed to promote ratification of conventions in this field. Several representatives, while recognizing the constitutional and political difficulties that might be presented by the French proposal, agreed with the Commission's decision to circulate the proposal for consideration to its members; some representatives suggested that the circulation of this proposal should not be restricted to members of the Commission.

35. A number of representatives supported the suggestion that consideration should be given to including in the future work programme of the Commission the implications for international trade law of the conduct and activities of multinational corporations, which could have a profound impact on international economic relations. Some representatives, however, expressed the opinion that new subjects should not be included in the Commission's programme at the present time.

36. The suggestion was made that the Commission should introduce a definite system into the process of unification by aiming at gradually preparing a comprehensive code for international trade law and con-

centrating, at the initial stage, on the general principles applicable to all international trade transactions.

IV. VOTING

37. At its 1267th meeting, on 25 October, the Sixth Committee unanimously adopted the draft resolution submitted (A/C.6/L.823).

38. It was understood that the word "equality", at the end of the fourth preambular paragraph of the draft resolution, included the concept of equity.

39. Explanations of vote were given before the voting by Thailand, the United States of America and Uruguay, and, after the voting, by Belgium, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland.

Recommendation of the Sixth Committee

[The text of the recommendation, not included here, contained a draft resolution which was adopted unanimously by the General Assembly without change as resolution 2766 (XXVI), reproduced below.]

C. General Assembly resolution 2766 (XXVI) of 17 November 1971

2766 (XXVI). 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 fourth session,¹

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,

Further recalling its resolutions 2421 (XXIII) of 18 December 1968, 2502 (XXIV) of 12 November 1969 and 2635 (XXV) of 12 November 1970 on the reports of the United Nations Commission on International Trade Law on the work of its first, second and third sessions,

Reaffirming its conviction that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, would significantly contribute to universal economic co-operation among all peoples on a basis of equality and, thereby, to their well-being,

Noting that the Trade and Development Board, at its eleventh session, considered the report of the United Nations Commission on International Trade Law on its fourth session and expressed satisfaction with the co-ordination of the work programmes of the Commission and of the United Nations Conference on Trade and

Development in the field of international legislation on shipping,²

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its fourth session and commends its members for their contribution to the progress made in the work of the Commission;

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

(a) Continue, in its work, to pay special attention to 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) Accelerate its work on training and assistance in the field of international trade law, with special regard to developing countries;

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

(d) Continue to give special consideration to the interests of developing countries and to bear in mind the special problems of land-locked countries;

(e) Continue, in its use of working groups and other working methods, to seek to enhance its efficiency and to ensure full consideration of the needs of all regions;

(f) Keep its programme of work under constant review;

¹ Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417).

² Ibid., Supplement No. 15 (A/8415/Rev.1), part three, paras. 417-420.

3. *Notes with satisfaction* the publication of the first volume of the *Yearbook of the United Nations Commission on International Trade Law*³ and the first volume of the *Register of Texts of Conventions and Other Instruments concerning International Trade Law*⁴ and authorizes the Secretary-General to publish the second volume of the *Register of Texts* in accordance

with the decision of the Commission contained in paragraph 131 of its report;

4. *Requests* the Secretary-General to forward to the United Nations Commission on International Trade Law the records of the discussions at the twenty-sixth session of the General Assembly on the Commission's report on the work of its fourth session.

*1986th plenary meeting,
17 November 1971.*

³ United Nations publication, Sales No.: E.71.V.1.

⁴ United Nations publication, Sales No.: E.71.V.3.

II. THE FIFTH SESSION (1972)

A. Report of the Commission (A/8717)*

CONTENTS

	Page	Chapter	Paragraphs
INTRODUCTION	9	IV. INTERNATIONAL PAYMENTS	52-78
<i>Chapter</i>	<i>Paragraphs</i>	A. Negotiable instruments	52-62
I. ORGANIZATION OF THE SESSION	1-12	B. Bankers' commercial credits	63-66
A. Opening	1	C. Bank guarantees	67-78
B. Statement by the Secretary-General ..	2	V. INTERNATIONAL COMMERCIAL ARBITRATION ..	79-87
C. Membership and attendance	3-5	VI. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW	88-97
D. Election of officers	6	VII. YEARBOOK OF THE COMMISSION	98-104
E. Agenda	7	VIII. FUTURE WORK	105-115
F. Establishment of a Committee of the Whole	8-10	A. Methods of work	106-110
G. Decisions of the Commission	11	B. Letter from the Legal Counsel of the United Nations to the Chairman of the Commission	111-112
H. Adoption of the report	12	C. Legal texts prepared under the auspices of the International Institute for the Unification of Private Law	113-114
II. INTERNATIONAL SALE OF GOODS	13-43	D. Date of the sixth session	115
A. Draft Convention on Prescription (Limitation)	13-22		<i>Page</i>
B. Uniform rules governing the inter- national sale of goods	23-32	Annex: List of documents before the Commission	28
C. General conditions of sale	33-43		
III. INTERNATIONAL LEGISLATION ON SHIPPING	44-51		

INTRODUCTION

The present report of the United Nations Commission on International Trade Law covers the Commission's fifth session, held at United Nations headquarters in New York from 10 April to 5 May 1972.

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 fifth session on 10 April 1972. The session was opened on behalf of the Secretary-General by Mr. Constantin A. Stavropoulos, the Legal Counsel of the United Nations.

B. Statement by the Secretary-General

2. The Secretary-General of the United Nations addressed the Commission at its 112th meeting, on 25 April 1972.

C. Membership and attendance

3. Under General Assembly resolution 2205 (XXI), by which UNCITRAL was established, the Commission consists of 29 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:¹

¹ 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 14 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 14 members to serve for a full term of six years, ending on 31 December 1976. The terms of the 15 members marked with an asterisk will end on 31 December 1973. The terms of the other 14 members will end on 31 December 1976.

* Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*.

Argentina*	Norway
Australia*	Poland
Austria	Romania*
Belgium*	Singapore
Brazil*	Spain*
Chile	Syrian Arab Republic*
Egypt	Tunisia*
France	Union of Soviet Socialist Republics
Ghana	United Kingdom of Great Britain and Northern Ireland
Guyana	Ireland
Hungary*	United Republic of Tanzania
India*	United States of America*
Iran*	Zaire*
Japan	
Kenya*	
Mexico*	
Nigeria	

4. With the exception of Iran, Tunisia and Zaire, all members of the Commission were represented at the session.

5. 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).

(b) *Specialized agencies*

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

(c) *Intergovernmental organizations*

Commission of the European Communities; Council for Mutual Economic Assistance (CMEA); Council of the European Communities; Hague Conference on Private International Law; International Institute for the Unification of Private Law (UNIDROIT); League of Arab States; Organization of American States (OAS); World Intellectual Property Organization (WIPO).

(d) *International non-governmental organizations*

International Chamber of Commerce (ICC); International Chamber of Shipping; International Law Association (ILA); International Maritime Committee; International Union of Marine Insurance.

D. Election of officers

6. At its 92nd and 96th meetings, on 10 and 12 April 1972, the Commission elected the following officers² by acclamation:

Chairman	Mr. Jorge Barrera-Graf (Mexico)
Vice-Chairman . . .	Mr. L. H. Khoo (Singapore)

² 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)* and *Yearbook of the United Nations Commission on International Trade Law, Vol. 1: 1968-1970* (United Nations publication, Sales No.: E.71.V.1, part two, I, para. 14).

Vice-Chairman . . .	Mr. Roland Loewe (Austria)
Vice-Chairman . . .	Mr. Bernard A. N. Mudho (Kenya)
Rapporteur	Mr. Jerzy Jakubowski (Poland)

E. Agenda

7. The agenda of the session as adopted by the Commission at its 93rd meeting, on 10 April 1972, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda; tentative schedule of meetings.
4. International sale of goods:
 - (a) Draft convention on prescription (limitation) in the international sale of goods;
 - (b) Uniform rules governing the international sale of goods;
 - (c) General conditions of sale and standard contracts.
5. International legislation on shipping.
6. International payments:
 - (a) Negotiable instruments;
 - (b) Bankers' commercial credits;
 - (c) Bank guarantees (contract and payment guarantees);
 - (d) Security interests in goods.
7. International commercial arbitration.
8. Training and assistance in the field of international trade law.
9. Yearbook of the Commission.
10. Future work.
11. Date of the sixth session.
12. Adoption of the report of the Commission.

F. Establishment of a Committee of the Whole

8. At its 93rd meeting, on 10 April 1972, the Commission decided to establish a Committee of the Whole and referred to it the following items for consideration:

- Item 6: International payments:
- (a) Negotiable instruments;
 - (b) Bankers' commercial credits;
 - (c) Bank guarantees (contract and payment guarantees);
 - (d) Security interests in goods.³
- Item 7: International commercial arbitration.
- Item 8: Training and assistance in the field of international trade law.
- Item 9: Yearbook of the Commission.

9. At its first meeting, on 19 April 1972, the Committee of the Whole unanimously elected Mr. Shinichiro Michida (Japan) as Chairman and Mr. Emmanuel Sam (Ghana) as Rapporteur.

10. The Commission, after having considered the report of the Committee of the Whole, decided to include the substance thereof in its report on the work of the present session.

³ Information on the work in progress with respect to this item was included in a note by the Secretary-General. Since the item did not call for current action by the Commission, it was not considered by the Committee of the Whole.

G. Decisions of the Commission

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

H. Adoption of the report

12. The Commission adopted the present report at its 125th meeting, on 5 May 1972.

CHAPTER II

INTERNATIONAL SALE OF GOODS

A. Draft Convention on Prescription (Limitation)

Background with respect to the preparation of the draft Convention

13. 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.⁴ At its third session, the Commission, having considered a report of the Working Group (A/CN.9/30), requested it to prepare a preliminary draft Convention setting forth uniform rules and to submit this draft to the Commission at its fourth session.⁵

14. In conformity with the foregoing decision, the Working Group submitted to the Commission at its fourth session a report (A/CN.9/50 and Corr.1), setting forth the text of a preliminary draft Uniform Law on Prescription (Limitation) in the International Sale of Goods (annex I), a commentary on the draft Uniform Law (annex II), and the text of a questionnaire addressed to Governments and international organizations designed to obtain information and views regarding the length of the limitation or prescription period and other related matters (annex III). At that session, the Commission after having considered various issues arising out of the preliminary draft, invited members of the Commission to submit to the Secretary-General any proposals or observations they might wish to make with respect to the preliminary draft and requested the Secretary-General to analyse the replies received to the questionnaire and to submit the analysis to members of the Working Group.⁶ The Commission further requested the Working Group to prepare a final draft of the Uniform Law on Prescription (Limitation) for submission to the Commission at its fifth session; in this work, ac-

count would be taken of the views expressed during the discussion of the subject at the fourth session, of the analysis by the Secretariat of replies to the questionnaire mentioned above, and of any proposals or observations communicated to the Working Group.⁷ Pursuant to this decision, the Working Group held its third session from 30 August to 10 September 1971 and prepared a revised draft Convention on Prescription (Limitation) in the International Sale of Goods.

The Commission's action with respect to the draft Convention

15. At the present session, the Commission had before it the report of the Working Group on its third session (A/CN.9/70), to which the text of the draft Convention was annexed (annex I), and a commentary on the draft Convention which was issued as an addendum (A/CN.9/70/Add.1). The Commission also had before it a compilation of the studies and proposals considered by the Working Group (A/CN.9/70/Add.2), a note by the Secretariat regarding consideration of the report of the Working Group, and a note by the Secretariat concerning alternative methods for the final adoption of the draft Convention.

16. The Commission commended the Working Group for the expeditious manner in which it had fulfilled its mandate and expressed appreciation and gratitude to the members of the Working Group.

17. The Commission discussed, article by article, the draft Convention submitted by the Working Group and in the course of this discussion, various amendments and proposals were suggested by the members. The Commission adopted some articles without change and requested the Working Group to reconsider other articles in the light of the proposals and amendments that were made. For this purpose, the Working Group held several meetings in the course of the session and submitted a revised text of the draft Convention.

18. The Commission considered this revised text and approved most articles as revised. The Commission also set up a number of drafting parties to consider further the language of certain articles and adopted these articles as recommended by the drafting parties. The Commission, however, was not able to reach a consensus on certain provisions and, to indicate this fact, placed these provisions within square brackets for final consideration by an international conference of plenipotentiaries.

19. The Commission considered alternative methods for the final adoption of the draft Convention on Prescription (Limitation) in the International Sale of Goods in the light of the note submitted by the Secretariat on this subject. A statement was made by the representative of the Secretary-General on the financial implications of alternative procedures of adoption. All representatives who took the floor expressed the opinion that, in view of the highly technical and specialized nature of this draft Convention, the Commission should recommend to the General Assembly that an international conference of plenipotentiaries be convened to conclude, on the basis of the draft articles approved by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods.

⁷ *Ibid.*

⁴ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618) 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, II, para. 46.

⁵ *Ibid.*, Twenty-fifth Session, Supplement No. 17 (A/8017) 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, III, para. 97.

⁶ *Ibid.*, Twenty-sixth Session, Supplement No. 17 (A/8417) and Yearbook of the United Nations Commission on International Trade Law, Vol. II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 118.

Decision of the Commission

20. The Commission, at its 125th meeting on 5 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law"

"1. Approves the text of the draft Convention on Prescription (Limitation) in the International Sale of Goods, as set out below in paragraph 21 of the report of the Commission, noting that no consensus was reached with respect to those provisions appearing within square brackets;

"2. Requests the Secretary-General:

"(a) To prepare, together with the Rapporteur of the Commission, a commentary on the provisions of the draft Convention which would include both an explanation of the provisions approved by the Commission and references to reservations by members of the Commission to such provisions;

"(b) To circulate the draft Convention, together with the commentary thereon, to Governments and to interested international organizations for comments and proposals;

"(c) To prepare an analytical compilation of those comments and proposals and to submit this compilation to Governments and to interested international organizations;

"3. Recommends that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft Convention adopted by the Commission, a Convention on Prescription (Limitation) in the International Sale of Goods."

21. The following articles of the draft Convention on Prescription (Limitation) in the International Sale of Goods were approved by the Commission, as stated in paragraph 1 of the decision above.

TEXT OF A DRAFT CONVENTION ON PRESCRIPTION
(LIMITATION) IN THE INTERNATIONAL
SALE OF GOODS

PART I: SUBSTANTIVE PROVISIONS

SPHERE OF APPLICATION

Article 1

1. This Convention shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller against each other relating to a contract of international sale of goods.

2. This Convention shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

3. In this Convention:

(a) "Buyer" and "seller", or "party", mean 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) "Creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "Debtor" means a party against whom the creditor asserts a claim;

(d) "Breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "Legal proceedings" includes judicial, administrative and arbitral proceedings;

(f) "Person" includes corporation, company, association or entity, whether private or public;

(g) "Writing" includes telegram and telex.

Article 2

[1. For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.]

2. Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of this article and of article 3 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.

3. Where a party does not have a place of business, reference shall be made to his habitual residence.

4. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 3

1. This Convention shall apply only when at the time of the conclusion of the contract, the seller and buyer have their places of business in different Contracting States.

2. Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

3. This Convention shall not apply when the parties have validly chosen the law of a non-Contracting State.

Article 4

This Convention shall not apply to sales:

(a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless the fact that the goods are bought for a different use appears from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(b) By auction;

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

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

(e) Of ships, vessels or aircraft;

(f) Of electricity.

Article 5

This Convention shall not apply to claims based upon:

(a) Death of, or personal injury to, any person;

(b) 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 direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) A bill of exchange, cheque or promissory note.

Article 6

1. This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

2. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Convention, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 7

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

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

Subject to the provisions of article 10, the limitation period shall be four years.

Article 9

1. Subject to the provisions of articles 10 and 11, the limitation period shall commence on the date on which the claim becomes due.

2. In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall, for the purpose of paragraph (1) of this article, be deemed to become due on the date on which the fraud was or reasonably could have been discovered.

3. In respect of a claim arising from a breach of the contract, the claim shall, for the purpose of paragraph (1) of this article, be deemed to become due on the date on which such breach occurs. Where one party is required, as a condition for the acquisition or exercise of such a claim, to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

Article 10

1. The limitation period in respect of a claim arising from a defect or lack of conformity which could be discovered when the goods are handed over to the buyer shall be two years from the date on which the goods are actually handed over to him.

2. The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer.

3. If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer discovers or ought to discover the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

Article 11

1. If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstance shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

2. The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 12

1. The limitation period shall cease to run when the creditor performs any act which, under the law of the jurisdiction where such act is performed, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his 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 claim against which the counterclaim is raised. However, both the claim and counterclaim shall relate to a contract or contracts concluded in the course of the same transaction.

Article 13

1. Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings 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, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration 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 this 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 14

In any legal proceedings other than those mentioned in articles 12 and 13, including legal proceedings commenced upon the occurrence of:

- (a) The death or incapacity of the debtor,
- (b) The bankruptcy or insolvency of the debtor, or
- (c) The dissolution or liquidation of a corporation, company, association or entity,

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, unless the law governing the proceedings provides otherwise.

Article 15

1. Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 but such legal proceedings have ended without a final decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

2. If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended, unless they have ended because the creditor has discontinued them or allowed them to lapse.

Article 16

[1. Where a creditor has asserted his claim in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 and has obtained a decision binding on the merits of his claim in one State, and where, under the applicable law, he is not precluded by this decision from asserting his original claim in legal proceedings in another State, the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the decision.]

[2. If recognition or execution of a decision given in one State is refused in another State, the limitation period in respect of the creditor's original claim shall be deemed not to have ceased running by virtue of articles 12, 13, or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the refusal.]

Article 17

[1. Where legal proceedings have been commenced against one debtor within the limitation period prescribed by this Convention, the limitation period shall cease to run against any other party jointly and severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.]

[2. Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed by this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.]

[3. In the circumstances mentioned in this article, the creditor or the buyer must institute legal proceedings against the party jointly or severally liable or against the seller, either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later.]

Article 18

1. Where the creditor performs, in the State where the debtor has his place of business and before the expiration of the limitation period, any act, other than those acts prescribed in articles 12, 13 and 14, which under the law of that State has the effect of recommencing the original limitation period, a new limitation period of four years shall commence on the date prescribed by that law, provided that the limitation period shall not extend beyond the end of four years from the date on which the period would otherwise have expired in accordance with articles 8 to 11.

2. If the debtor has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

Article 19

1. Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

2. Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

Article 20

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor

overcome, the creditor has been 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 relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond four years from the date on which the period would otherwise expire in accordance with articles 8 to 11.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 21

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 during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed. In no event shall the period of limitation be extended beyond the end of four years from the date on which it would otherwise have expired in accordance with the provisions of this Convention.

3. The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim 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.

[LIMIT OF EXTENSION AND MODIFICATION OF THE LIMITATION PERIOD]

Article 22

[Notwithstanding the provisions of articles 12 to 21 of this Convention, no legal proceedings shall in any event be brought after the expiration of ten years from the date on which the limitation period commences to run under articles 9 and 11, or after the expiration of eight years from the date on which the limitation period commences to run under article 10.]

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23

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 24

1. Subject to the provisions of article 23 and of paragraph (2) of this article, no claim 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, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) If both claims relate to a contract or contracts concluded in the course of the same transaction; or

(b) If the claims could have been set-off at any time before the date on which the limitation period expired.

Article 25

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 26

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 27

1. 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 of the limitation period.

2. The limitation period shall be calculated by reference to the calendar of the place where the legal proceedings are instituted.

Article 28

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 12 or asserts a claim as envisaged in article 14, 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 claim could be asserted in that jurisdiction.

INTERNATIONAL EFFECT

Article 29

A Contracting State shall give effect to acts or circumstances referred to in articles 12, 13, 14, 15, 17 and 18 which take place in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstance as soon as possible.

PART II: IMPLEMENTATION

Article 30

[Subject to the provisions of article 31, each Contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of Part I of this Convention the force of law not later than the date of the entry into force of this Convention in respect of that State.]

Article 31

[In the case of a federal or non-unitary State, the following provisions shall apply:

[(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

[(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

[(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.]

Article 32

Each Contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

PART III: DECLARATIONS AND RESERVATIONS

Article 33

1. Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and buyer having a place of business in another of these States shall not be considered international within the meaning of article 2 of this Convention, because they apply the same or closely related legal rules which in the absence of such a declaration would be governed by this Convention.

2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

Article 34

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

Article 35

Any State may declare, at the time of the deposit of its instrument of ratification or accession to this Convention, that it shall not be compelled to apply the provisions of article 23 of this Convention.

Article 36

1. This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of international sales, provided that the seller and buyer have their places of business in States parties to such a Convention.

2. If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

FORMAL AND FINAL CLAUSES NOT CONSIDERED
BY THE COMMISSION

22. The following articles were not considered by the Commission and it was agreed that they should be submitted for consideration to the proposed International Conference of Plenipotentiaries.

Article 37

No reservation other than those made in accordance with articles 33 to 35 shall be permitted.

Article 38

1. Declarations made under articles 33 to 35 of this Convention shall be addressed to the Secretary-General of the United Nations. They shall take effect [three months] after the date of their receipt by the Secretary-General or, if at the end of this period this Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

2. Any State which has made a declaration under articles 33 to 35 of this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect [three months] after the date of the receipt of the notification by the Secretary-General. In the case of a declaration made under paragraph (1)

of article 33 of this Convention, such withdrawal shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State under that paragraph.

PART IV: FINAL CLAUSES

Article 39

[Signature]⁸

This Convention shall be open until [] for signature by [].

Article 40

[Ratification]⁹

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 41

[Accession]¹⁰

This Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 39. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 42

[Entry into force]¹¹

1. This Convention shall enter into force [six months] after the date of the deposit of the [] instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the [] instrument of ratification or accession, this Convention shall enter into force [six months] after the date of the deposit of its instrument of ratification or accession.

Article 43

[Denunciation]¹²

1. Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

2. The denunciation shall take effect [12 months] after receipt of the notification by the Secretary-General of the United Nations.

Article 44

[Declaration on territorial application]

Alternative A¹³

1. Any State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Secretary-General of the United Nations, that this Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect [six months] after the date of receipt of the notification by the Secretary-General of the United Nations, or, if at the end of that period this Convention has not yet come into force, from the date of its entry into force.

⁸ Based on art. 81 of the Vienna Convention on the Law of Treaties (United Nations publication, Sales No.: E.70.V.5, document A/CONF.39/27).

⁹ Art. 82, *ibid.*

¹⁰ Art. 83, *ibid.*

¹¹ Art. 84, *ibid.*

¹² Based on article XII of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, herein cited as the "Hague Sales Convention".

¹³ Based on article XIII of the Hague Sales Convention.

2. Any Contracting State which has made a declaration pursuant to paragraph (1) of this article may, in accordance with article 43 denounce this Convention in respect of all or any of the territories concerned.

Alternative B¹⁴

This Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case, the Party shall endeavour to secure the needed consent of the territory within the shortest period possible and, when the consent is obtained, the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

Article 45

[Notifications]¹⁵

The Secretary-General of the United Nations shall notify the Signatory and Acceding States of:

(a) The declarations and notifications made in accordance with article 38;

(b) The ratifications and accessions deposited in accordance with articles 40 and 41;

(c) The dates on which this Convention will come into force in accordance with article 42;

(d) The denunciations received in accordance with article 43;

(e) The notifications received in accordance with article 44.

Article 46

[Deposit of the original]

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at [place], [date].

B. Uniform rules governing the international sale of goods

23. The Commission, at its second session, established a Working Group on the International Sale of Goods and requested the Working Group 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 this purpose.¹⁶ The Working Group held two meetings in 1970 and a third meeting in January 1972.

24. At its fourth session, the Commission decided that, "until the new text of a uniform law or the revised

¹⁴ Based on article 27 of the Convention on Psychotropic Substances, 1971.

¹⁵ Based on article XV of the Hague Sales Convention.

¹⁶ Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, II, para. 38, subpara. 3 (a).

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;¹⁷

25. At the present session, the Commission had before it the progress report of the Working Group on the International Sale of Goods on its third meeting, held in Geneva from 17 to 28 January 1972 (A/CN.9/62 and Corr.1 and Add.1 and 2).¹⁸

26. Several representatives stressed the difficulty and complexity of the task assigned to the Working Group and praised the Working Group for the progress it had achieved. It was held that although many questions could not be solved in a final form at the last session of the Working Group, the preparation of draft compromise texts for consideration at the next session constituted a great step towards final solutions for these questions.

27. Some representatives stated their views concerning questions relating to the revision of ULIS and requested that their views be taken into consideration by the Working Group in the elaboration of the final text of a draft uniform law. Thus, one representative suggested that the Working Group should strive to improve the definitions in the law by making them simpler and more easily understandable; such definitions might then replace provisional definitions in all conventions dealing with the international sale of goods. The need for simpler and more comprehensible definitions with special reference to the definition of "delivery" of goods was supported by another representative. It was also suggested that the uniform law should only regulate questions which are of practical significance; accordingly, provisions relating to questions of only a theoretical nature (e.g., article 25, paragraph 2 of the recommended text) should be omitted.

28. One representative recalled that several members of the Working Group had expressed reservations with respect to the definition of international sale in the uniform law and suggested that the Working Group should reconsider that definition. Another representative suggested that the definition of delivery should be revised in the light of the definition in the 1939 draft of ULIS.

29. In respect of article 46, one representative suggested that in the preparation of the study of that article requested by the Working Group, the Secretariat should also examine the possibility of including a provision whereby the buyer would be given the right to claim from the seller the costs incurred by the buyer in remedying defects in the goods. Some representatives suggested further that the Working Group should give further thought to the concept of anticipatory breach in article 48 and other articles of ULIS.

30. Several comments were made in connexion with the working methods of the Working Group. One repre-

sentative expressed the view that the Working Group could carry out its work more efficiently if it consisted of fewer members. Another representative suggested that small expert groups composed of two or three representatives should be established in order to elaborate texts on definitions by correspondence.

31. Some representatives pointed out that the Working Group would need considerable time at its next session for completion of the unfinished work of its third session. They therefore suggested that the next regular session of the Working Group should be convened for a period of three weeks. In this connexion, the Commission heard a statement by the representative of the Secretary-General on the financial implications of such sessions of the Working Group.

Decision of the Commission

32. The Commission, at its 124th meeting on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Takes note of the progress report of the Working Group on the International Sale of Goods on the work of its third session;¹⁹

"2. Takes note with approval of the decision of the Working Group that it will hold its fourth session in New York from 22 January to 2 February 1973."

C. General conditions of sale

33. The Commission, at its second session, developed a programme of work designed to ascertain whether certain general conditions of sale prepared under the auspices of the Economic Commission for Europe could be utilized in other regions.²⁰ At its fourth session the Commission decided to continue with the implementation of that decision and requested the Secretary-General to address inquiries on this question directly to Governments, chambers of commerce, trade associations and other trade organizations.²¹

34. At the third session, the Commission had extended its work in this field of law to the examination of the feasibility of developing general conditions embracing a wider scope of commodities and requested the Secretary-General to commence a study of the subject.²² Pursuant to this request, the Secretary-General submitted to the Commission at its fourth session a report including the first phase of the study (A/CN.9/54). After consideration of the report, the Commission requested the Secretary-General to continue his study on the subject.²³

¹⁹ A/CN.9/62.

²⁰ *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1), part two, II, para. 60, subpara. 1.

²¹ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 106, subpara. (a).

²² *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1), part two, III, para. 102, subpara. (b).

²³ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 106, subpara. (b).

¹⁷ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 92, subpara. 1 (c).

¹⁸ The Commission considered the report at its 113th meeting on 26 April 1972.

35. The Commission had before it a report of the Secretary-General (A/CN.9/69) on the implementation of these decisions.²⁴ The representative of Japan distributed to members of the Commission a study he had made concerning the ECE general conditions.

36. All representatives who spoke on the subject commended the report of the Secretary-General and expressed their appreciation for the study prepared by the representative of Japan.

37. Several representatives emphasized the importance of the Commission's work in this field of law and it was agreed that this work should be continued. Some representatives, however, maintained their view, expressed at the fourth session of the Commission, that in free market economies general conditions and trade terms were more appropriately dealt with by trade associations. They suggested, therefore, that the Commission should confine its work in this field, within a narrow scope.

38. One representative expressed the view that the adoption of a new uniform law on the international sale of goods might significantly reduce the importance of general conditions. On the other hand, a number of representatives pointed out that questions dealt with by a uniform law on sale and by general conditions of sale were different: a uniform law must be confined to general rules, while general conditions might provide specific and detailed contractual provisions. Both approaches were useful, but one could not be substituted for the other. It was agreed, however, that, despite these differences between uniform laws and general conditions, their provisions, as far as possible, should be in harmony. In this connexion, one representative suggested that a study should be prepared in order to determine general guidelines regarding questions to be dealt with in general conditions (for example, formation of contract, questions relating to letters of credit) and that, before submission to the Commission for adoption, those guidelines be considered by the Working Group on Sales.

39. In respect of general conditions drawn up under the auspices of ECE, one representative expressed his disappointment in the small number of replies which had been received to the questionnaire of the Secretary-General. Another representative suggested that Governments should be encouraged to reply to the questionnaire.

40. Some representatives noted that they were sceptical about the possibility of promoting the ECE general conditions in regions other than Europe on the ground that those formulations had been drawn up with a view to meeting the requirements of trade among countries situated in the same continent and in relatively close proximity to each other. It was also suggested that these general conditions were not widely used even in Europe. On the other hand, a number of representatives expressed the view that the general conditions were widely used as a basis for drawing up individual contracts and as a basis for agreement on balanced solutions to specific contractual problems. In this way, the ECE general conditions had aided the work of

lawyers and businessmen and had contributed to the harmonization of the law of trade.

41. One representative suggested that the Commission should promote the dissemination of regional general conditions and especially of those drawn up under the auspices of the Economic Commission for Europe. Another representative proposed that the Commission should redraft the ECE general conditions in order to make them more acceptable.

42. In respect of the Secretary-General's study on "general" general conditions, the Commission agreed that the Secretary-General should be requested to continue the work on this subject. One representative expressed the view that such general conditions should reflect basic rules which would be applicable to the sale of all commodities. In the opinion of that representative, such optional general conditions would prove useful. Another representative suggested that the Secretary-General should include in the investigation other further general conditions, for example, those drawn up by the London Corn Trade Association. It was also proposed that the study be extended to the seller's obligations relating to the maintenance and repair of durable goods and machinery with a view of standardizing such obligations.

Decision of the Commission

43. The Commission at its 114th meeting, on 28 April 1972, adopted unanimously the following decision:

"The United Nations Commission on International Law"

"1. *Decides* to defer final action until its sixth session on the promotion of the general conditions drawn up under the auspices of the Economic Commission for Europe;

"2. *Requests* the Secretary-General to submit to the Commission at its sixth session his final study on the feasibility of developing general conditions embracing a wider scope of commodities and, to the extent feasible, to commence the preparation of guidelines on this subject and of a draft set of such general conditions."

CHAPTER III

INTERNATIONAL LEGISLATION ON SHIPPING

44. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo in the context of bills of lading; and set forth a programme of work for the UNCITRAL Working Group on International Legislation on Shipping.²⁵

²⁴ The subject was considered by the Commission at its 113th and 114th meetings on 28 April 1972.

²⁵ Report of the Commission on the work of its fourth session, *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, paras. 10-23). For the Commission's prior action on the subject, see the report of the Commission on the work of its second session, *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1), part two, II, paras. 114-133, and the report of the Commission on the work of its third session, *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970*, part two, III, paras. 157-166).

45. The Working Group met from 31 January to 11 February 1972, and examined the following subjects: the period of carrier responsibility, responsibility for deck cargo and live animals, clauses of bills of lading confining jurisdiction over claims to a selected forum (choice of forum clauses, arbitration clauses) and approaches to basic policy decisions concerning the allocation of risks between the cargo owner and the carrier. In its consideration of these subjects, the Working Group used as its basic document the report of the Secretary-General entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/63/Add.1). The report of the Working Group (A/CN.9/63) contained specific draft legislative proposals on certain subjects and recorded the progress of work on other subjects.

46. In its consideration of this report,²⁶ the Commission expressed its satisfaction with the progress achieved by the Working Group, whose constructive approach to this difficult and important subject was commended by a number of representatives.

47. Most representatives agreed that, consistent with working methods developed in relation to other items, the Commission should not take action on the substantive matters that were in the course of consideration by the Working Group. Several representatives, however, suggested that the Commission should give the Working Group certain guidelines for the continuation of its work. These representatives were of the opinion that the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention)²⁷ was outmoded and, therefore, the Working Group should draft a new convention, rather than merely revise the 1924 Brussels Convention and the Protocol to amend that Convention (Brussels Protocol, 1968). In this connexion, it was stated that the new Convention should be based on the carriers contractual responsibility for the safe delivery of the cargo. It was also noted that the new rules should be patterned after other international conventions concerned with the transport of goods, and that correlation of the rules for different types of carriage was vital in view of the growing importance of combined transport operations and containerization and unitization of cargo.

48. Other representatives indicated that, while the 1924 Brussels Convention should be revised, this Convention had been adopted by some 80 countries and its provisions were based on substantial experience which should not be cast aside. Consequently, proposals for changes should be carefully considered and implemented only with a view to the practical advantages that might be derived from such changes. Some representatives observed that, in revising the rules concerning maritime transport, the Working Group should bear in mind that, despite the advances of technology, conditions of ocean transport were still very different from those of other modes of transport. Some representatives were of the view that, due to advances in technology, ocean trans-

portation was far less hazardous than it had been 50 years ago; accordingly, insurance risks of the shipowner or carrier in ocean transportation had decreased dramatically and this should be reflected in the revision of the Brussels Convention of 1924 so as to result in lower freight rates for the shippers.

49. The Commission noted that the Working Group had indicated in its report (A/CN.9/63 and Corr.1, para. 22) that it had been unable to take final action on some of the subjects that had been taken up and that it would be advisable to hold a special session to complete work on these remaining subjects, with priority given to the basic question of the carrier's responsibility. All the representatives who spoke on the subject indicated their agreement with the proposal that a special two-week session of the Working Group should be held in the autumn of 1972 in order to assist the Working Group to complete the task given to it by the Commission. In this connexion, the Commission heard a statement on financial implications by the representative of the Secretary-General.

50. The Commission also welcomed the suggestion made at the third session of the Working Group (A/CN.9/63 and Corr.1, para. 34) by the observer of the International Institute for the Unification of Private Law (UNIDROIT) that the Commission might wish to avail itself of the offer of the Institute to prepare a study on the legal rules that should apply to the carriage of live animals. One representative noted that the UNCTAD secretariat should be requested to prepare any further study it may wish to submit on the economic and commercial aspects of the subject; this suggestion was welcomed by the observer of UNCTAD.

Decision of the Commission

51. The Commission, at its 122nd meeting on 2 May 1972, unanimously adopted the following decision:

"The United Nations Commission on International Trade Law,

"Taking note with appreciation of the report of its Working Group on International Legislation on Shipping,"²⁸

"Taking note of the resolution adopted by the Working Group on International Shipping Legislation established by the United Nations Conference on Trade and Development²⁹ by which the Commission has been invited to continue with all deliberate speed its examination of the rules and practices concerning bills of lading with a view to their revision and amplification as appropriate,

"1. Decides that the Working Group on International Legislation on Shipping should continue its work under the terms of reference set forth by the Commission in the resolution adopted at its fourth session³⁰ and complete that work expeditiously;

"2. Considers that the Working Group should give priority in its work to the basic question of the

²⁶ The Commission considered the subject in the course of its 110th, 111th and 122nd meetings held on 24 April and 2 May 1972.

²⁷ League of Nations, *Treaty Series*, vol. CXX (1931-1932), No. 2764.

²⁸ A/CN.9/63 and Corr.1.

²⁹ TD/B/C.4/93, TD/B/C.4/ISL/12, annex I, appendix II, p. 9.

³⁰ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 19.

carrier's responsibility and to that end recommends that the Working Group keep in mind the possibility of preparing a new convention as appropriate, instead of merely revising and amplifying the rules in the International Convention for the Unification of Certain Rules relating to Bills of Lading (1924 Brussels Convention), and the Brussels Protocol, 1968;

"3. Requests the Secretary-General:

"(a) To convene a special session of the Working Group at Geneva for two weeks, if feasible in September or October 1972, for the completion of its work in areas left unfinished by it at its third session;

"(b) To convene a regular session of the Working Group in New York from 5 to 23 February 1973 to enable it to examine the remaining areas listed in the resolution adopted by the Commission at its fourth session;³¹

"(c) To provide the Working Group with the material that may be necessary for the performance of its work;

"(d) To accept with appreciation the offer by the International Institute for the Unification of Private Law to prepare a study on the rules which should apply to the carriage of live animals and to invite the Institute to make such a study available to the members of the Working Group."

CHAPTER IV

INTERNATIONAL PAYMENTS

A. Negotiable instruments

52. The Commission, at its fourth session, decided to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions; to this end, it requested the Secretary-General to prepare a draft of such rules accompanied by a commentary for submission to the Commission at its fifth session.³²

53. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/67 and Corr.1) setting forth a draft uniform law on international bills of exchange accompanied by a commentary.³³ The Commission expressed its appreciation for the report of the Secretary-General and acknowledged the valuable contribution made by interested international organizations which had assisted the Secretariat in preparing the draft uniform law on international bills of exchange.³⁴

³¹ *Ibid.*

³² *Ibid.*, para. 35.

³³ The item "Negotiable instruments" was considered by the Committee of the Whole at its 3rd to 5th meetings, on 20, 21 and 24 April 1972, and by the Commission at its 124th meeting, on 4 May 1972.

³⁴ Six meetings with interested international organizations were convened by the Secretariat for consultation purposes. The following international organizations participated in some or all of these meetings: International Monetary Fund (IMF), Organization of American States (OAS), The Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), International

54. Representatives who spoke on the subject noted with appreciation that the working methods followed by the Secretariat in carrying out the work had ensured that the provisions of the draft uniform law took account of current commercial practices in respect of the settlement of international transactions by means of bills of exchange.³⁵

55. The Commission noted that the draft uniform law was concerned with bills of exchange in the narrow sense of the term and did not deal with cheques and promissory notes. The Commission also noted that the Secretariat had made inquiries among banking and trade circles as to the desirability of preparing uniform rules applicable to international promissory notes and that the evidence obtained suggested that this would be feasible. The Commission was unanimously of the opinion that the scope of the draft uniform law should be extended to promissory notes. In respect of cheques, the Commission took note of the different approach to this type of negotiable instrument in the laws patterned on the Geneva Conventions of 1930 and 1931 and in those inspired by the common law tradition; the Commission took the view that the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques could appropriately be considered by the Working Group on International Negotiable Instruments.

56. Some representatives suggested that the Commission should envisage extending the sphere of application of the proposed uniform rules to all commercial negotiable documents employed in international trade transactions. Other representatives, however, opposed this suggestion on the grounds that the decisions and work of the Commission in respect of the harmonization and unification of the law of negotiable instruments had been concerned solely with payment instruments. The Commission, after deliberation, considered that, without prejudice to its future programme of work, the item "negotiable instruments" should for the time being be concerned solely with the drawing up of uniform rules applicable to international bills of exchange, promissory notes and, possibly, cheques.

57. One representative noted that recent developments in payment methods and procedures by electronic means had brought about significant changes in inter-

Bank for Economic Co-operation (IBEC), Bank for International Settlements (BIS), Federation of Banks of the European Communities and International Chamber of Commerce (ICC).

³⁵ In 1969, a questionnaire was addressed to Governments and to banking and trade circles; it was designed to obtain information on current practices followed in making and receiving international payments and on problems encountered in making and receiving international payments by means of negotiable instruments. An annex to that questionnaire elicited views and suggestions on the possible content of uniform rules applicable to a special negotiable instrument to be used in international transactions. An analysis of the 93 replies received to the questionnaire and its annex is contained in document A/CN.9/38 and Add.1 (*Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970*, part three, pp. 243-256) and in document A/CN.9/48.

Supplementary questionnaires, eliciting further information on current international practices and seeking views on the feasibility of tentative uniform rules, were addressed, in 1970 and 1971, to various banking and trade institutions.

national banking practices and expressed the hope that the Commission's work in the field of international payments, either in connexion with the draft uniform law on international bills of exchange or as a separate project, would take account of these developments.

58. Several representatives stated that it was desirable that the Convention on international negotiable instruments should be universal in character.

59. The observer of the International Institute for the Unification of Private Law (UNIDROIT) commented on a note submitted by the Institute (A/CN.9/72) concerning the means of obtaining execution on obligations embodied in an international bill of exchange. The draft uniform law prepared by the Secretariat did not deal with this question, which was therefore left to national law. The observer of the Institute suggested that the Commission consider the feasibility of adopting uniform rules in respect of this issue. Some representatives expressed themselves in favour of this proposal.

60. With respect to the methods of future work, there was consensus that, in accordance with the decision taken by the Commission at its fourth session, a small working group on international negotiable instruments should be established. In this connexion, the Commission heard a statement by the representative of the Secretary-General on the financial implications of the establishment of such a working group. Some representatives were of the opinion that the Secretary-General should be requested to transmit the draft uniform law prepared by the Secretariat to members of the Commission for comments. Other representatives took the view that such comments should be sought at a later stage of the work, after the Working Group had considered the draft uniform law. Several representatives stressed the desirability of further co-operation with interested international organizations and stated that the interorganizational study group set up by the Secretariat should be further utilized in a consultative capacity. Observers of organizations which had been co-operating with the Secretariat in the work on the draft uniform law indicated their readiness to continue such co-operation.

Decision of the Commission

61. The Commission, at its 124th meeting, on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law,

"Having taken note of the Secretary-General's report setting forth a draft uniform law on international bills of exchange accompanied by a commentary,³⁶

"Having regard to the decision taken at its fourth session to establish at its fifth session a small working group to be entrusted with the preparation of a final draft to be submitted to the Commission,

"Being aware of the relevance of commercial practices to the formulation of uniform rules and, therefore, of the desirability of close co-operation

and consultation with interested international organizations, including banking and trade organizations,

"1. Decides:

"(a) To establish a Working Group on international negotiable instruments consisting of representatives of Egypt, France, India, Mexico, Nigeria, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America;

"(b) To entrust the Working Group with the preparation of a final draft uniform law on international bills of exchange and promissory notes;

"(c) To request the Working Group to consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques, and to report its conclusions on these questions to the Commission at a future session.

"2. Requests the Secretary-General:

"(a) To invite the States members of the Working Group to appoint as their representatives on the Working Group persons specially qualified in the law of negotiable instruments and in banking practices;

"(b) To invite members of the Commission not represented on the Working Group and international organizations having a special interest in the matter to attend the sessions of the Working Group as observers and to recommend that they should be represented by persons especially qualified in the law of negotiable instruments and in banking practices;

"(c) To modify the draft uniform law on international bills of exchange with a view to extending its application to international promissory notes and to submit the draft uniform law so modified to the Working Group at its first session;

"(d) To consider the proposal made by the International Institute for the Unification of Private Law that the draft uniform law provide uniform rules in respect of the means by which the execution of obligations embodied in an international bill of exchange can be obtained and to report to the Working Group;

"(e) To carry out further work in connexion with the draft uniform law after consultation with the Commission's Study Group of International Payments, composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

62. The Commission noted with approval that the Working Group of International Negotiable Instruments had decided to hold its first session in Geneva from 8 to 19 January 1973.

B. Bankers' commercial credits

63. This subject is primarily concerned with work carried out by the International Chamber of Commerce (ICC) regarding the standardization of procedures and practices employed in respect of commercial letters of credit. In 1933, ICC drew up the "Uniform customs and practice for documentary credits", which were

³⁶ A/CN.9/67 and Corr.1.

revised in 1951 and 1962. A third revision is at present being finalized by ICC. At its previous sessions, the Commission, in view of the importance of letters of credit in assuring payment for trade transactions, attached particular importance to the work of ICC in this field and considered it desirable that the views of countries not represented in ICC should be taken into account in the work of revision.³⁷ To this end, the Commission decided to invite Governments and interested banking and trade institutions to communicate their observations on the operation of the "Uniform Customs (1962)" to the Secretary-General, for transmission to ICC.

64. The Commission had before it a note by the Secretary-General containing information on work in progress in respect of, *inter alia*, bankers' commercial credits and a note submitted by ICC setting forth a report by its Commission on Banking Technique and Practice on the progress made in respect of the revision of the "Uniform Customs (1962)".³⁸

65. The observer of ICC informed the Commission of the work of revision of "Uniform Customs (1962)" being carried out at present by the working party which was to a large extent based on the comments received from national committees of ICC and also, through the intermediary of the Secretary-General, from interested circles in countries not represented in ICC.

66. The Commission took note of the report of the working party of the ICC Commission on Banking Technique and Practice and expressed the wish that similar progress reports should be submitted by ICC to the Commission at future sessions. The Commission further expressed the hope that ICC would submit the final text of the revised "Uniform Customs" to the Commission before its final adoption by the competent organs of ICC.

C. Bank guarantees

67. The subject of bank guarantees is concerned with certain types of guarantees employed in international trade. The Commission, at its third session, took note of the fact that ICC had initiated work in respect of performance, tender and repayment guarantees (contract guarantees) and decided to invite ICC to extend the scope of its work and to include guarantees of payment.³⁹ The Commission requested the Secretary-General to circulate, to Governments and banking and trade institutions, questionnaires in respect of these guarantees and to transmit the observations received in response thereto to ICC,⁴⁰ so that the views and sug-

gestions of countries not represented in ICC would be taken into account by ICC in its work.

68. At the present session, the Commission had before it a note by the Secretary-General containing information on work in progress in respect of, *inter alia*, bank guarantees, and a note submitted by ICC setting forth a report on the progress made in respect of contract and payment guarantees.⁴¹

69. The observer of ICC informed the Commission of the progress made by a Joint Working Group of its Commission on Banking Technique and Practice and its Commission on International Commercial Practice. The Joint Working Group had prepared a second version of draft uniform rules for contract guarantees which was approved by the two commissions in March 1972.⁴² The expression "contract guarantees" had been employed by reason of the fact that tender, performance and repayment guarantees could be given either by banks or by other establishments, such as insurance companies. Under article 1 of the draft rules, the rules would be applicable by virtue of a specific reference thereto by the parties in their contract.

70. In respect of performance guarantees, no final conclusion had yet been reached as to whether the rules should be limited to payment by the guarantor in case of non-performance or whether they should also envisage performance by the guarantor of his principal's obligations. Another issue which required further consideration was whether the proposed rules should allow for the so-called guarantee on first demand, under which the beneficiary of the guarantee could be paid without having to justify his demand, or whether the rules should recognize only conditional guarantees under which the guarantor would be obliged to pay only when certain conditions had been fulfilled. The present trend of ICC's work was towards conditional guarantees.

71. In the course of comments made by representatives on the draft uniform rules, it was pointed out that it would be desirable for the rules to contain a legal definition of guarantees and to include provisions relating to the confirmation of a guarantee and the effects of such confirmation. It was further suggested that the proposed rules should not choose between conditional and unconditional guarantees, but should reflect existing trends and current practices. In this respect, it was noted that tender guarantees were usually unconditional, that is, on first demand. However, some representatives favoured the present approach of ICC to concentrate only on certain issues that had proved troublesome in practice; guiding principles should be laid down with a view to modifying current practices in areas of controversy. Representatives favouring this approach were of the opinion that the proposed rules need not deal with every type of guarantee.

72. One representative expressed the view that it was desirable to limit the study on payment guarantees

³⁷ Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, I, paras. 23 and 28; *ibid.*, part two, chap. II, paras. 90-95; *ibid.*, part two, III, paras. 119-126; and Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971 (United Nations publication, Sales No.: E.72.V.4), part one, II, paras. 36-43.

³⁸ The item "bankers' commercial credits" was considered by the Committee of the Whole at its 1st, 2nd and 7th meetings, on 19 April and 3 May 1972, and by the Commission at its 124th meeting, on 4 May 1972.

³⁹ Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, II, para. 138.

⁴⁰ *Ibid.*

⁴¹ The item "bank guarantees" was considered by the Committee of the Whole at its 1st, 2nd and 7th meetings, on 19 April and 3 May 1972, and by the Commission at its 124th meeting, on 4 May 1972.

⁴² For the text of these draft rules, see note submitted by ICC setting forth the report on progress made in respect of contract and payment guarantees.

only to those guarantees that were issued by banks in favour of exporters of goods in respect of the payment of the purchase price. It was suggested in this connexion that ICC should be invited to prepare a supplementary questionnaire designed to obtain information about this particular type of guarantee. This suggestion was supported by other representatives and by the observer of ICC.

73. The Commission took note of the report of ICC on contract and payment guarantees and expressed the wish that further progress reports would be submitted by ICC to the Commission at future sessions. The Commission further expressed the hope that ICC would submit the final text of the uniform rules on contract and payment guarantees to a future session of the Commission before its final adoption by ICC.

Co-operation between the Commission and ICC

74. At the third and fourth sessions of the Commission, consideration was given to the question of co-operation between the Commission and ICC in respect of the items "bankers' commercial credits" and "bank guarantees".⁴³ It had been suggested at those sessions that ICC should devise a procedure under which countries not represented in ICC could participate more directly in its work in respect of documentary letters of credit and contract and payment guarantees.⁴⁴

75. At the present session, the observer of ICC stated that his organization was in full sympathy with the concern expressed by representatives at previous sessions. Accordingly, the Secretary-General of ICC had proposed further measures for liaison between the Commission and ICC. Thus it was proposed that a delegation of the Commission, or representatives of business circles in countries not represented in ICC, might participate in the meetings of ICC bodies entrusted with the revision of the "Uniform Customs (1962)" and with the drawing up of uniform rules on contract and payment guarantees. The ICC would also be prepared to consider any other workable suggestion which the Commission might wish to make. The observer of ICC stated that his organization hoped that intersecretariat co-operation would continue.

76. The discussion of the issue of co-operation with ICC reflected two main points of view. Some representatives expressed the view that the Commission, as such, should take a more active part in the work of ICC. These representatives felt that, in view of the world-wide character of trade relations, those countries which were not represented in ICC should be able to participate in the work of ICC in respect of documentary letters of credit and bank guarantees on a footing of equality with countries that were represented. One way to achieve this would be to appoint a delegation of the Commission for that purpose or to establish a special liaison committee.

77. Other representatives took the view that such a procedure presented practical difficulties. The Com-

mission itself had not yet considered the work of ICC in detail and, therefore, had not reached agreed conclusions; consequently, a delegation of the Commission could not speak or intervene on behalf of the Commission as a whole.

Decision of the Commission

78. The Commission, at its 124th meeting, on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law,

"Being convinced that it should continue its present collaborative arrangements with the International Chamber of Commerce in the areas of documentary credits and guarantees,

"Expressing its appreciation to the International Chamber of Commerce for its willingness to consider favourably any workable procedure which would permit a more satisfactory degree of co-operation between members of the Commission not represented on the International Chamber of Commerce and its bodies entrusted with the revision of the 'Uniform Customs and Practice for Documentary Credits (1962)' and with the elaboration of uniform rules in respect of contract and payment guarantees,

"1. Requests the Secretary-General:

"(a) To transmit the wish of the Commission to the International Chamber of Commerce, that it should arrange for representatives of appropriate banking or trade institutions from interested States members of the Commission to attend meetings of bodies of the International Chamber of Commerce as observers, at their own expense, with the particular purpose of ensuring that the views of interested groups or regions not represented in the International Chamber of Commerce be adequately heard in the deliberations of its bodies;

"(b) To ensure the continuing attendance and participation of representatives of the Commission's secretariat at deliberations of the International Chamber of Commerce; and

"(c) (i) To invite the International Chamber of Commerce to prepare a supplementary questionnaire on guarantees of payment issued by a bank in favour of exporters;

(ii) To address the questionnaire to Governments and to banking and trade institutions and to transmit the observations received in response to the questionnaire to the International Chamber of Commerce;

(iii) To prepare an analysis of the observations received in response to the questionnaire and to submit it to the Commission at a future session;

"2. Invites the International Chamber of Commerce to submit to the Commission at future sessions:

"(a) Progress reports in respect of its revision of 'Uniform Customs (1962)' and of its work on contract and payment guarantees;

⁴³ *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71V.1), part two, III, paras. 123, 124 and 136, and *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, paras. 40-43 and 48.

⁴⁴ *Ibid.*

"(b) The final texts of 'Uniform Customs (1962)' and of the uniform rules on contract and payment guarantees before their final adoption by the International Chamber of Commerce."

CHAPTER V

INTERNATIONAL COMMERCIAL ARBITRATION

79. The Commission, at its second session, appointed Mr. Ion Nestor (Romania) as Special Rapporteur on problems concerning the application and interpretation of the existing Conventions on international commercial arbitration and other related problems.⁴⁵

80. The Special Rapporteur submitted a preliminary report to the Commission at its third session (A/CN.9/49 and Add.1). After consideration of the preliminary report, the Commission extended the mandate of the Special Rapporteur and requested him to submit a final report to the Commission prior to its fifth session.⁴⁶ This report (A/CN.9/64) was before the Commission at its present session.⁴⁷ All representatives who spoke on the subject commended the report of the Special Rapporteur and expressed their appreciation for the suggestions set forth in his report. There was general agreement that the report constituted an excellent basis for further work in the field of international commercial arbitration.

81. Several representatives stressed the importance of arbitration as an effective means for the settlement of disputes in international trade. The view was generally held that the Commission should continue its work in this field.

82. Some representatives referred to circumstances which impeded the settlement of international trade disputes by way of arbitration. It was stated that in developing countries arbitration was not much used in trade relations with developed countries mainly because traders in developed countries often insisted upon arbitration clauses which were drawn up from their own point of view, e.g. by providing that the arbitration should take place in a developed country. Another representative noted that the absence of principles as regards the appointment of arbitrators by the appointing authority contributed to the difficulty of constituting *ad hoc* arbitration tribunals and that it would be advisable to examine this subject.

83. Several representatives and observers stated that the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958⁴⁸ and the European Convention on International Commercial Arbitration of 21 April 1961⁴⁹ should be adhered to by the greatest

possible number of States. It was suggested that the Commission and other organizations concerned with arbitration should persuade a greater number of nations to adhere to those conventions. One representative stated that his delegation was particularly interested in the reasons why many States had not adhered to the above conventions.

84. One representative expressed the view that international co-ordination of the work of existing arbitration organizations could contribute to a more widespread use of arbitration in the settlement of international trade disputes. The observer of the International Law Association suggested that an international commercial arbitration council be established under the auspices of the Commission in order to assist with the effective functioning of arbitration when parties have not specifically designated an arbitral tribunal; in such cases, the council would assist with the designation of arbitrators and with establishing the venue of arbitration and the rules applicable to the proceedings. The observers of UNIDROIT and of the Inter-American Commercial Arbitration Commission stated that an international organization could co-ordinate the work of national and regional arbitration organizations by assisting in the exchange of information and experience among them and by promoting harmonization of their rules.

85. It was generally agreed that the Commission, before taking any decision on the proposals contained in the report of the Special Rapporteur, should obtain the views and comments of Governments and arbitration organizations thereon. Several suggestions were made concerning the ways and means of obtaining such views and comments.

86. Some representatives suggested that a questionnaire be sent to Governments and through Governments, to arbitration organizations in order to obtain their views on what they regarded as the most pressing problems and possible solutions thereto. Other representatives were of the opinion that there was no need for a questionnaire but that, instead, a summary of the proposals of the Special Rapporteur should be prepared. It was also suggested that the report be considered by the Fourth International Congress on Arbitration, to be held at Moscow in October 1972. On the other hand, one representative indicated that the Commission should not invite any organization to consider proposals that the Commission itself had not examined.

Decision of the Commission

87. The Commission, at its 124th meeting, on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Requests the Secretary-General: to transmit to States members of the Commission the proposals made by the Special Rapporteur in his report⁵⁰ and to invite them to submit to the Secretariat:

"(a) Their comments on the proposals made by the Special Rapporteur, and

⁴⁵ Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, II, para. 112.

⁴⁶ Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970 (United Nations publication, Sales No.: E.71.V.1), part two, III, para. 156.

⁴⁷ The report was considered by the Committee of the Whole at its 4th and 5th meetings, on 21 April 1972, and by the Commission at its 124th meeting, on 4 May 1972.

⁴⁸ United Nations, Treaty Series, vol. 330 (1959), No. 4739.

⁴⁹ United Nations, Treaty Series, vol. 484 (1963-1964), No. 7041.

⁵⁰ A/CN.9/64.

"(b) Any other suggestions and observations they may have regarding unification and harmonization of the law of international commercial arbitration;

"2. Also requests the Secretary-General: to submit a report to the Commission at its sixth session summarizing the comments, suggestions and observations of States members of the Commission and setting out proposals regarding steps which the Commission may wish to consider with regard to unification in the field of international commercial arbitration."

CHAPTER VI

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

88. The Commission, at its fourth session, requested the Secretary-General to continue consultations with other interested organizations with a view to developing programmes of training and assistance in the field of international trade law. In particular, the Secretary-General was requested to consider means whereby practical experience in this field could be made available to nationals from developing countries through the co-operation of trading and financial institutions in developed countries.⁵¹

89. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/65) setting forth the activities that had been undertaken pursuant to the Commission's decisions and outlining a proposal for future action.⁵²

90. All representatives who spoke on the subject stressed the need of developing countries for an effective programme of training and assistance in the field of international trade law. Several representatives stated that while they were appreciative of the steps taken by the Secretary-General to implement the decisions of the Commission, they hoped that the Secretariat would accelerate and intensify its activities in this field in accordance with the wish expressed by the General Assembly in resolution 2766 (XXVI).

91. Satisfaction was also expressed that some of the recipients of the United Nations/UNITAR fellowships had received training at the Office of Legal Affairs and it was hoped that this training would continue in future years. Some representatives emphasized the importance of the project relating to the development of teaching materials on the subject of international trade law, and hoped that the Secretariat would succeed in its present efforts to secure funds for this project.

92. Several members reiterated their support for the proposal of the secretariat of the Inter-Governmental Maritime Consultative Organization (IMCO) for a programme of assistance to developing countries in the field of laws and regulations applicable to ships

and shipping, under the joint auspices of IMCO, the United Nations Conference on Trade and Development (UNCTAD) and the Commission. The Commission was informed by the observer for IMCO that its Legal Committee had recently decided to recommend to the competent organs of the organization the adoption of such a proposal on the understanding that its implementation would not result in additional financial implications to IMCO.

93. Several representatives expressed regret that developed countries that were members of UNCITRAL had not been able to respond more positively to the request of the Secretary-General to ascertain which commercial and financial establishments within their respective countries would be willing to receive interns from developing countries. It was suggested that the Secretary-General should extend his inquiry to all developed countries Members of the United Nations and urge them to respond favourably.

94. Tribute was paid to those international governmental and non-governmental organizations that had developed special programmes of training and assistance in matters related to international trade law for the benefit of nationals of developing countries, and the hope was expressed that other organizations would follow suit.

95. Some representatives stated that, while they were aware of the financial and administrative difficulties involved in organizing seminars on international trade law in connexion with annual sessions of the Commission, they were nevertheless in favour of such seminars. They suggested that the Secretariat might consider the organization of seminars of a more limited nature than those organized by the International Law Commission and examine whether these seminars could be financed by independent sources.

96. Several representatives welcomed the proposal of the Secretary-General for the organization of an international symposium on the role of universities and research centres in the teaching, development and dissemination of international trade law and requested the Secretariat to explore the feasibility of this proposal and to report its findings to the Commission at its sixth session. In this connexion, the suggestion was made that the participation of Government officials in such a symposium would be desirable.

Decision of the Commission

97. The Commission, at its 124th meeting on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Requests the Secretary-General to accelerate and intensify the activities relating to the implementation of the Commission's programme on training and assistance in the field of international trade law;

"2. Further requests the Secretary-General to explore the feasibility of organizing an international symposium on the role of universities and research centres in the teaching, development and dissemination of international trade law and to report his findings to the Commission at its sixth session."

⁵¹ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 145.

⁵² The item "Training and assistance in the field of international trade law" was considered by the Committee of the Whole at its 6th meeting, on 24 April 1972, and by the Commission at its 124th meeting, on 4 May 1972.

CHAPTER VII

YEARBOOK OF THE COMMISSION

98. 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 decided to include in the first volume of the *Yearbook* the material of the first three sessions of the Commission;⁵³ this volume was published in 1971.⁵⁴

99. At its fourth session, the Commission requested the Secretary-General to publish the second volume of the *Yearbook*, which covered the materials of the fourth session of the Commission and approved the guidelines for the contents of future volumes⁵⁵ as recommended in a report of the Secretary-General (A/CN.9/57 and Corr.1, para. 9). The Commission decided to take final action on the timing of the publication of future volumes of the *Yearbook* at its fifth session.⁵⁶

100. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/66) which contained a suggestion regarding the timing of future volumes of the *Yearbook*, an outline of the contents of the third volume and the financial implications of the publication of that volume.⁵⁷ One language version of the second volume of the *Yearbook*, published in accordance with the decision of the Commission mentioned in paragraph 99 above, was placed before the Commission.⁵⁸

101. All representatives who took the floor welcomed the publication of the second volume of the *Yearbook* and expressed confidence that it would be as valuable as the first volume, which had contributed to the dissemination of the work of the Commission beyond the forum of the United Nations.

102. With respect to the timing of future volumes of the *Yearbook*, all representatives who spoke on the subject supported the recommendation of the Secretary-General that the *Yearbook* be published on an annual basis and appear as soon as practicable following the Commission's session to which the particular volume related. Such annual publication of the *Yearbook* would enable legal and business circles to follow the work of the Commission more closely and provide the means for the timely examination and evaluation of the Commission's work.

⁵³ *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1), part two, III, para. 178.

⁵⁴ *Yearbook of the United Nations Commission on International Trade Law, Volume I: 1968-1970* (United Nations publication, Sales No.: E.71.V.1).

⁵⁵ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4), part one, II, para. 125.

⁵⁶ *Ibid.*

⁵⁷ The item "Yearbook of the Commission" was considered by the Committee of the Whole at its 6th meeting, on 24 April 1972, and by the Commission at its 124th meeting on 4 May 1972.

⁵⁸ *Yearbook of the United Nations Commission on International Trade Law, Volume II: 1971* (United Nations publication, Sales No.: E.72.V.4).

103. Representatives generally agreed that the third volume of the *Yearbook* should contain the material of the fifth session of the Commission as outlined in the Secretary-General's report (A/CN.9/66, annex I). It was noted that the report of the Secretary-General envisaged including in this volume of the *Yearbook* the summary records of the Commission's meeting relating to the draft Convention on Prescription (Limitation) in the International Sale of Goods on the ground that these records would be part of the *travaux préparatoires* of the Convention.⁵⁹ Some representatives expressed doubts as to the need to include these summary records in the *Yearbook* since the draft Convention would be subject to discussion before an international conference of plenipotentiaries or other body, such as the Sixth Committee of the General Assembly. Other representatives stated that these summary records would be of value in interpreting the Convention and indicated that they should be included in the *Yearbook*. In the light of these considerations, it was suggested that the Secretariat should explore the possibility of reproducing these summary records in a less expensive form in connexion with the *Yearbook*.

Decision of the Commission

104. The Commission, at its 124th meeting, on 4 May 1972, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Decides that future volumes of the *Yearbook of the United Nations Commission on International Trade Law* should be published on an annual basis and should be issued in English, French, Spanish and Russian as soon as practicable following the Commission's session to which the particular volume relates;

"2. Requests the Secretary-General to publish, in the third volume of the *Yearbook*, the material on the work of the fifth session of the Commission following in general the outline set forth in annex I to the report of the Secretary-General on the timing and content of the *Yearbook*,⁶⁰ taking due account of the suggestions made during the discussion of this subject."

CHAPTER VIII

FUTURE WORK

105. The Commission considered its future work in the light of (a) a proposal by the Spanish delegation concerning methods of work (A/CN.9/L.22); (b) a letter, dated 10 April 1972, addressed by the Legal Counsel of the United Nations to the Chairman of the Commission with respect to the necessity for financial restraint in planning the work of the Organization and (c) a statement by the Secretary-General of the Inter-

⁵⁹ Among the guidelines for the content of the *Yearbook* that were approved by the Commission at its fourth session was the directive that summary records should not be included in the yearbook "unless they would serve as *travaux préparatoires* of a legal text" (see document A/CN.9/57 and Corr.1, paragraph 9, and the decision of the Commission referred to in foot-note 55, *supra*).

⁶⁰ A/CN.9/66.

national Institute for the Unification of Private Law (UNIDROIT), seeking the views of the Commission in respect of certain draft Conventions drawn up under the auspices of the Institute.⁶¹

A. *Methods of work*

106. The representative of Spain introduced the proposal of his delegation (A/CN.9/L.22). In his view, the Commission, in planning its future work, should give consideration to the following points:

(a) The Commission should establish guidelines with regard to the drafting or revising of texts, which should be entrusted to one expert or to a small group of experts, or to an organization of proved competence;

(b) The work of drafting should always be based on a system of continuity in time and should not be interrupted between sessions of the Commission;

(c) When a draft is prepared, the Commission should ascertain whether it was consonant with the established guidelines and should refer it to the expert or experts who prepared it for revision only if those guidelines had not been respected;

(d) The Commission should intensify its efforts to co-ordinate the activities of other international bodies dealing with the unification of international trade law. To that end, at the start of each session, the Commission should be informed by the Secretariat about the work being carried out by those bodies and should promote co-operation between those bodies and programme future methods of unification, endeavouring in all cases to avoid duplication of effort and loss of time;

(e) The Commission should increase the dissemination of existing international instruments, in order to promote the broadest possible accession to them, paying special attention to the interests of developing countries;

(f) In view of financial considerations, ways and means should be devised to enable the Commission to carry out its work in the most effective way possible.

107. Representatives who commented on the Spanish proposal expressed their appreciation for the suggestions made by the Spanish delegation for reviewing and improving the working methods of the Commission in order to enhance its efficiency. In the course of the discussion of that proposal various views were submitted for consideration by the Commission. The Commission decided to refer the Spanish proposal and the statements of representatives commenting on that proposal to a sessional Working Group consisting of the representatives of Brazil, Ghana, Spain, the Union of Soviet Socialist Republics and the United States of America.

108. The Working Group held a number of meetings during the Commission's session and, after consulting the Secretariat on financial implications, recommended that the Commission should consider the following measures:

(a) As a general rule, sessions of working groups should be extended to three weeks;

(b) Consequently, sessions of the Commission could be reduced to two weeks, keeping in mind, however, the items for each session in order to allow for any necessary extension of the plenary session for a given year;

(c) The Commission should foster a spirit of accommodation in its work;

(d) The activity of working groups should be intensified and they should be encouraged to consider methods of work that would enhance efficiency, which might include, where appropriate and within available resources, the use of experts belonging to the working groups or provided by the Secretariat;

(e) As a general rule, the size of future working groups should be limited to the extent consistent with the representation of viewpoints represented in the Commission.

109. Many representatives commended the conclusions reached by the Working Group. A number of representatives emphasized that the proposals set forth in subparagraphs (a) and (b) or paragraph 108 above were interrelated and not intended to be implemented separately. Several representatives, however, while stating that working methods could be further refined, expressed preference for a more pragmatic approach. In their view, the Commission should plan its future work in accordance with the exigencies of individual topics. Other representatives were of the opinion that the proposals of the Working Group might shift the power of the Commission to the various working groups, which would be undesirable. The view was also expressed that the Commission should not be pessimistic about the results it had achieved during its five years of existence; important progress had been made in the fields of international sale, international shipping legislation, international payments and arbitration and the Commission had, at the present session, finalized a draft uniform law on prescription (limitation).

110. The Commission, after deliberation, agreed to reconsider the question of working methods at its sixth session.

B. *Letter from the Legal Counsel of the United Nations to the Chairman of the Commission*

111. The Chairman informed the Commission of the contents of a letter, dated 10 April 1972, addressed to him by the Legal Counsel of the United Nations. In that letter, the Legal Counsel communicated the view of the Secretary-General that the present financial situation of the United Nations made some measure of budgetary restraint unavoidable. Although the Secretary-General did not suggest that the application of a policy of financial restraint necessarily meant that new programmes and activities could not be undertaken, he invited all United Nations Councils, Commissions and Committees to seek to accommodate new programmes within the staff resources that had become available as a result of the completion of prior tasks or by the assignment of a lower order of priority to certain continuing activities.

112. The Commission took note of the message of the Secretary-General and took account of his observations in planning its programme of future work.

⁶¹ The Commission considered questions relating to its future work at its 109th, 110th, 122nd and 125th meetings, on 20 and 22 April and 2 and 5 May 1972.

C. Legal texts prepared under the auspices of the International Institute for the Unification of Private Law

113. The Secretary-General of UNIDROIT informed the Commission that UNIDROIT had drawn up a draft Uniform Law in respect of the Conditions of Validity of Contracts of the International Sale of Goods, and that this draft Uniform Law would shortly be submitted to the Governing Council of UNIDROIT for approval. Work was also being carried out by a Committee of Governmental Experts on a draft Uniform Law on Agency of an International Character in the Sale and Purchase of Goods. Since these drafts were related to the sale of goods, the Governing Council of UNIDROIT might wish to submit these drafts to the Commission for consideration.

114. The Commission took note of the statement by the Secretary-General of UNIDROIT. It noted that the draft Uniform Law on Agency was still in the course of preparation and that neither draft had yet been approved by the Governing Council of UNIDROIT. The

Commission agreed that, if UNIDROIT should transmit one or both of the draft Uniform Laws with the request that they be communicated to the members of the Commission, the Secretary-General should, in accordance with past practice, transmit such drafts to the members of the Commission.

D. Date of the sixth session

115. The Commission *decided*, at its 125th plenary meeting on 5 May 1972, that its sixth session, to be held at the United Nations Office at Geneva, should meet from 2 to 13 April 1973. The Commission requested the Secretary-General to make arrangements under which the session could be extended, if necessary, until 18 April 1973.

ANNEX

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>
Register of experts and scholars in international trade law: supplement to the register of experts and scholars in international law	A/CN.9/61
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/65
Timing and contents of the UNCITRAL Yearbook: report of the Secretary-General	A/CN.9/66
Provisional agenda and annotations: note by the Secretary-General	A/CN.9/68
General conditions of sale and standard contracts: report by the Secretary-General	A/CN.9/69
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	A/CN.9/71
Proposal by the Spanish delegation concerning the method of work for the fifth session of the United Nations Commission on International Trade Law ..	A/CN.9/L.22
Recommendation of the Working Group on Methods of Work	A/CN.9/V/CRP.23
Draft report of the Committee of the Whole to the Commission	A/CN.9/V.CRP.24
Draft report of the United Nations Commission on International Trade Law on the work of its fifth session (10 April to 5 May 1972)	A/CN.9/V/CRP.24/ Rev.1 and CRP.28 and Add.1 to 5
List of delegations	A/CN.9/INF.4
Summary records of the fifth session of the Commission	A/CN.9/SR.92-125

I. INTERNATIONAL SALE OF GOODS

A. Uniform rules on substantive law

1. "Delivery" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/WG.2/WP.8)*

CONTENTS

	Paragraphs		Paragraphs
I. INTRODUCTION; USES OF "DELIVERY" IN ULIS	1-5	B. "Delivery" and the time and place for payment of the price	37-40
II. "DELIVERY" AS A TOOL FOR RESOLVING SALES PROBLEMS	6-40	III. "DELIVERY" IN OTHER SETTINGS OF THE UNIFORM LAW; ALTERNATIVE DEFINITIONS OF THE TERM	41-64
A. "Delivery" and risk of loss	9-36	A. Conformity of goods as an essential element of "delivery"	44-51
1. Non-conformity of the goods and other breaches of contract	13-20	B. Alternative definitions: "handing over" goods; placing goods "at the buyer's disposal"	52-64
2. Risk when seller reserves control over the goods until payment of the price	21-25		
3. Alternative approaches to resolving problems of risk of loss in ULIS	26-36		
(a) Revision of the definition of "delivery"	27-29		
(b) Statement of rules on risk of loss by reference to commercial events rather than by reference to the concept of "delivery"	30-36		

Annexes

	Page
I. Provisions of ULIS using the term "delivery"	40
II. Rules of ULIS on risk of loss stated without use of concept of "delivery" (<i>déliverance</i>)	40
III. Rules of ULIS on payment of the price stated without reference to "delivery"	41

I. INTRODUCTION; USES OF "DELIVERY" IN ULIS

1. The Uniform Law on the International Sale of Goods (ULIS)¹ uses the concept of "delivery" for the solution of important questions such as these: who bears the risk of loss when the goods are destroyed or damaged? When is the buyer obliged to pay the seller for the goods? The Commission and its Working Group on the International Sale of Goods have given preliminary consideration to the question whether the concept of "delivery", as employed in ULIS, is well suited for the solution of such problems.² Similar questions concerning the use of the concept of "delivery" have arisen in drafting a Uniform Law on Prescription (Limitation) in the International Sale of Goods.³

2. The Commission has requested the Secretary-General to prepare an analysis of the use in ULIS of the concept of "delivery"; this report has been prepared in response to this request.⁴

session, 1969), annex I, paras. 33, 76-84, 100 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A); report of the Secretary-General (A/CN.9/31) analysing the replies and comments by governments and organizations with respect to "delivery", paras. 98-107 and 140-143 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A); the replies analysed in the report are reproduced in document A/CN.9/11 and addenda 1-4; Working Group on the International Sale of Goods, report on first session (January 1970), A/CN.9/35, paras. 112-117 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A); 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) (herein cited UNCITRAL, report on third session (1970)), paras. 56-58 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A).

³ Working Group on Prescription, report on second session (August 1970), A/CN.9/50, annex II, commentary on preliminary draft uniform law, article 7, para. 5, UNCITRAL Yearbook, vol. II: 1971, part two, I, C, 2.

⁴ UNCITRAL, Report on third session (1970), para. 59, UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A. Working Group on Sales, report on second session (December 1970), A/CN.9/52, para. 139 (a) (UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2).

¹ The Uniform Law on the International Sale of Goods (referred to as ULIS or the Uniform Law) is annexed to the Convention Relating to a Uniform Law on the International Sale of Goods which was signed at The Hague on 1 July 1964. (The Convention will be referred to as the "1964 Hague Convention on Sales".)

² For comments on the use of "delivery" in ULIS, see: 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) (herein cited UNCITRAL, report on second

3. The Uniform Law on the International Sale of Goods (ULIS) was drafted in English and in French; both texts are equally authentic.⁵ In the English version, the term "delivery" is used in 33 articles of ULIS; annex I identifies these articles and notes the corresponding term used in the French version. Usually the corresponding term is *délivrance* but in six articles *livraison* and in one article *exécution* is employed—terms which differ from each other and from *délivrance*.⁶

4. Analysis is complicated further by the fact that in ULIS the English word "delivery" usually is not given its normal English meaning. In English, delivery customarily connotes simply the transfer to a second person of possession and control (for this thought, ULIS usually uses the expression "handing over" in English and *remise* in French). "Delivery" (*délivrance*) as used in ULIS is a different and more complex concept. In some situations, goods may be "delivered" to the buyer while the seller retains control over the goods; in other situations, even though possession and control are transferred to the buyer they may not be deemed to be "delivered" to him.⁷ To minimize confusion that results from the difference between the meaning of "delivery" as it is used in ULIS and the normal meaning of that word, in this report the word "delivery", in quotation marks, will refer to that term as it is used in ULIS.⁸

5. It will also be important to bear in mind that the single term "delivery" performs different functions in the Uniform Law: (1) In some settings ULIS uses "delivery" as a tool for answering certain difficult and important questions: Who bears the risk of loss when the goods are damaged or destroyed? When is the buyer required to pay the price? (2) In other settings "delivery" is a neutral, non-dispositive means of leading into a specific rule defining some aspect of the seller's duty of performance. As we shall see, in these settings the definition of the concept of "delivery" is of little significance. These two functions of the term "delivery" will be considered in sections II and III, respectively, of this report.

II. "DELIVERY" AS A TOOL FOR RESOLVING SALES PROBLEMS

6. The principal object of this report will be to consider whether the concept of "delivery" proved to

⁵ 1964 Hague Convention on Sales, final clauses following article XV.

⁶ The French version of article 44 (2) at one point uses *délivrance* and another point *livraison* in place of the English term "delivery". In annex I and in this discussion no distinction is drawn between "delivery" and "deliver" or between "*délivrance*" and "*délivrer*".

⁷ The definition of "delivery" in art. 19 is quoted at para. 12, *infra*. In some (but not all) settings "handing over" the goods to the buyer is one necessary element of "delivery" (*délivrance*), but may not be sufficient to accomplish such "delivery". See section II A 1, *infra*. In other settings (where the contract calls for carriage of the goods from the seller to the buyer) ULIS may provide that "delivery" (*délivrance*) is accomplished even though the seller retains control over the goods. See section II A 2, paras. 21-25, *infra*.

⁸ Comparable difficulty has been noted in languages other than English. See Working Group on Sales, report on first session (January 1970) (A/CN.9/35) (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I A 2 (para. 113 *et seq.*)).

be a successful tool to achieve the operative results desired by the draftsmen. This report will not consider whether the operative results desired by the draftsmen were sound; instead, this report is concerned with a basic question of approach to legislative drafting for international unification. Drafting for international use is subject to exacting requirements of clarity and simplicity. The unifying legislation needs to be enacted in different languages and must be construed in the setting of different legal systems; for these reasons the law needs to be cast in language that is sufficiently concrete and elemental so that the law can be translated effectively and will be read with the same meaning in various linguistic and legal settings.

7. The questions that have been posed by the Commission cannot be answered by considering the concept of "delivery" as an abstract or theoretical question separated from the use of that concept in the operative provisions of the Uniform Law. Thus, the relevant question is not what does the concept of "delivery" really "mean"? Instead, this study will consider the following questions: Has the concept of "delivery", as used in ULIS as a tool for stating rules for a wide variety of legal problems, produced the solutions to those problems desired by the draftsmen? Has this concept contributed to clarity and simplicity in the statement of the rules? If difficulties have developed in various settings, will it be possible to solve them all by a redefinition of the concept of "delivery"? If a redefinition of the concept of "delivery" does not prove to be a practicable solution to the various problems that are encountered, what alternative approaches should be considered? For example, can some of the rules of ULIS be stated more clearly without recourse to the concept of "delivery"? The last question is especially important, since narrowing the field for the use of this concept could simplify the problem of devising a definition that would be appropriate for the settings in which this concept must be used.

8. To explore the answers to the above questions, we turn to the use of "delivery" in ULIS for the solution of two problems that most clearly illustrate the use of the concept of "delivery". These problems are the following: A. Risk of loss; B. Payment of the price.

A. "Delivery" and risk of loss

9. One of the important problems of the law of sales is to determine whether the seller or the buyer bears the loss when the goods are damaged or destroyed. The situations in which the problem arises are varied, and include, *inter alia*, the period after the goods are ready for shipment but before they have been handed over to the carrier; the period during shipment; the period after arrival at the destination before they have been taken over by the buyer; the period during testing by the buyer; the period after rejection of the goods on the ground that they do not conform to the contract. Although most types of loss will be covered by a policy of insurance, the rules allocating the risk of loss to the seller or to the buyer determine which party has the burden of pressing a claim against the insurer, the burden of waiting for a settlement (with its attendant strain on current assets), and the responsibility for salvaging damaged goods. Where insurance coverage is absent or inadequate the

allocation of the risk of loss has even sharper impact. The parties may and often do settle this problem in the contract by an express provision or by the use of a trade term (like f.o.b. or c.i.f.) that carries a settled usage as to the point at which risk passes. But in the absence of a contract stipulation, a statutory rule is needed to settle the problem clearly and in accord with normal commercial expectations.

10. The final chapter of ULIS (chap. VI, articles 96-101) is devoted to rules on passing of the risk. Most of its articles provide specific rules on risk for specific situations; none of these specific provisions employ the concept of "delivery" (*délivrance*).⁹ However, the concept of "delivery" (*délivrance*) is employed in the general rule on risk of loss in article 97 (1), which provides:

"1. The risk shall pass to the buyer when *delivery*¹⁰ of the goods is effected in accordance with the provisions of the contract and the present law."

11. It is necessary to use the foregoing general rule to solve problems of risk of loss in the many situations not governed by the specific rules of chapter VI. Since this general rule merely stated that risk of loss passes to the buyer when "delivery" is effected, the definition of "delivery" becomes crucial. Article 19 provides:

"1. Delivery consists in the handing over of goods which conform with the contract.

"2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer."¹¹

12. The usefulness of "delivery", as so defined, in the solution of problems of risk of loss needs to be tested in the setting of concrete situations.

1. *Non-conformity of the goods and other breaches of contract*

13. One of the important practical problems in sales transactions concerns the effect of breach of contract by the seller on the transfer of the risk of loss

⁹ Article 97 (2) deals with the handing over of non-conforming goods. Article 98 (1) applies when handing over is delayed through breach by the buyer; articles 98 (2) and 100 govern the sale of goods that are not "ascertained" or "appropriated" to the contract. Article 99 deals with risk of loss when the sale concerns goods that, at the time of the contract, are already in the course of transit by sea. Article 98 (3), dealing with one aspect of the problem of the sale of "unascertained" goods, refers to the "acts necessary to enable the buyer to take delivery". But this is one of the instances in which the French version uses the concept of *livraison* rather than *délivrance*. This provision thus probably means to refer to the simple act of taking possession of the goods, rather than the complex legal concept of "delivery" (*délivrance*).

¹⁰ Throughout this report, unless noted otherwise, emphasis has been supplied by the Secretariat.

¹¹ A third subparagraph deals with the special situation in which "the goods handed over to the carrier are not clearly appropriated to the contract". This provision is supplemented by one of the specific rules of chapter VI (article 100) which by its express terms is applicable in any "case to which paragraph 3 of article 19 applies". See para. 35, *infra*. The term "delivery" is not used in article 19 (3); the provision thus seems to be part of one of the specific rules on risk set forth in chapter VI rather than a part of a general definition of "delivery".

to the buyer. The definition of "delivery" in article 19 (1) addresses itself to the problem by providing that "delivery" consists in "the handing over of goods which conform with the contract". The use of this definition as a test for the passing of risk would mean that non-conformity of the goods prevents the risk of loss from passing to the buyer.

14. This rule presents no difficulty when the buyer exercises his right to reject the goods ("avoid the contract") because of the non-conformity of the goods. But in commercial life, buyers often choose to keep goods in spite of some non-conformity or deficiency; if the non-conformity reduces the value of the goods the buyer may exercise the right to claim damages or reduce the price.

15. The problem can be more clearly examined on the basis of the following example: A contract calls for seller to provide buyer with 1,000 bags of wheat; after receipt of the goods, buyer examines them and finds that 10 of the bags are of No. 2 quality. Buyer nevertheless decides to keep the shipment, but notifies the seller that he will reduce the price by the amount of the deficiency. Thereafter the buyer's warehouse burns and the wheat is destroyed. If the definition of "delivery" were the sole test of risk, ULIS would seem to say that, on the facts of the above example, the risk of loss remained indefinitely with the seller, although the buyer chose to retain and use the goods. This would be impractical, and was not intended. The important questions are, after non-conforming goods are tendered to or received by the buyer, *how long* and in *what circumstances* does risk remain with the seller. To deal with these questions ULIS provides a specific provision in chapter VI on risk of loss. Article 97 (2) reads as follows:

"2. In the case of the handing over of goods which are not in conformity with the contract, the risk shall pass to the buyer from the moment when the handing over has, apart from the lack of conformity, been effected in accordance with the provisions of the contract and of the present Law, where the buyer has neither declared the contract avoided nor required goods in replacement."

16. This provision is addressed to the problem posed by the above example. In effect, the provision states that if the buyer does not reject the goods (avoid the contract), the non-conformity of the goods does not affect the transfer to the buyer of the risk of loss. With respect to the problem of structure with which we are concerned, the following observations seem pertinent: (a) the definition of "delivery" in article 19 proved to be inadequate to deal with the problem of risk of loss with respect to non-conforming goods; a specific provision on this question (article 97 (2)) had to be included among the rules on risk of loss in chapter VI; (b) the unsuccessful attempt to deal with the problem by means of the definition of "delivery" led to related provisions that are placed in widely separated parts of the Uniform Law; (c) the need to develop an exception in chapter VI to a general rule in article 19 seems to have contributed to a rule that is needlessly complex and abstract; (d) the specific rule on this problem of risk of loss (article 97 (2)) placed in chapter VI, like the other specific rules on

risk of loss in chapter VI, does not employ the concept of "delivery" (*délivrance*).¹²

17. The definition of delivery in article 19 also proved to be inadequate to cope with the effect of breach of contract on risk of loss in situations where the seller's performance is seriously defective in any one of the following ways: a shipment by an improper type of carrier; shipment under an improper contract of carriage; the failure to take out a policy of insurance required by the agreement or the Law. For all of these problems the provision in article 19 that delivery consists in handing over "goods which conform with the contract" is inadequate.

18. This problem will be explored more fully in section III A at paras. 50 to 51, *infra*. It is sufficient to note here that (as in connexion with the preceding problem on the retention of non-conforming goods) the problem was dealt with more completely in the setting of the specific rules on risk set forth in chapter VI. Thus, article 97 (1) provides that risk passes to the buyer when delivery of the goods is effected "in accordance with the provisions of the contract and the present Law." Indeed, as will be developed more fully in section III A, *infra*, this broad provision of article 97 (1) seems to render redundant the narrower (and inadequate) reference in article 19 (1) to "goods which conform with the contract."

19. Problems of risk of loss arise not only in the context of breach by the seller, but also when breach by the buyer interferes with performance by the seller. The definition of "delivery" in article 19 is also inadequate to deal with the effect of breach by the buyer on risk of loss; this is dealt with by a specific provision in chapter VI on risk of loss—article 98. This article, like the other specific provisions of chapter VI, does not refer to the concept of "delivery".

20. The foregoing examination of the rules on the relationship between breach by both parties and risk of loss suggest the following tentative conclusions with respect to the structural problems presented by the concept of "delivery": (a) the general concept of "delivery" (*délivrance*) need not be employed in dealing with these problems; (b) the attempt in ULIS to relate solutions to such a general concept of "delivery" has made it necessary to develop complex exceptions from the general rules, with the operative provisions divided between the early part of the Law (article 19) and chapter VI on risk; (c) the rules on risk of loss could be simplified and clarified by bringing them together in one place, as in chapter VI, and by dispensing with the use of the concept of "delivery" (*délivrance*) in dealing with problems of risk of loss.

2. Risk when seller reserves control over the goods until payment of the price

21. This problem may usefully be discussed in the context of the following common situation: Pursuant to the contract, the seller dispatches goods to the buyer; on delivery of the goods to the carrier the seller

¹² "Delivery" (*délivrance*) is used only in the general rule of art. 97 (1), quoted above. As has been noted above at note 11, delivery in the narrower sense of transfer of possession (*livraison*) is used in article 98 (3).

receives a negotiable bill of lading which the seller will tender to the buyer in exchange for payment of the price.¹³

22. The carrier normally will deliver the goods only in exchange for surrender of the negotiable bill of lading.¹⁴ Consequently, possession of the bill of lading controls the delivery of the goods. A common arrangement for concurrent exchange of the goods for the price is for the seller to draw a sight draft on the buyer (or on the buyer's bank that has issued a letter of credit) and transmit the sight draft, accompanied by the bill of lading and other documents relating to the shipment (policy of insurance; consular invoice) through banking channels for presentation to the buyer (or his bank); the documents will be surrendered to the buyer (or his bank) when the sight draft is honoured.

23. Under commercial practice, and the rules of some legal systems, retention of control over the goods in the above setting, for the sole purpose of securing payment for the goods, does not overturn arrangements and rules concerning the distinct problem of damage to or loss of the goods.¹⁵

24. The result under ULIS is placed in doubt by relating the complex concept of "delivery" to the rules on risk of loss of the goods. The basic definition of "delivery" in article 19 (1) provides that a necessary part of "delivery" is "handing over" the goods. The term "handing over" (*remise*, in the French text) is not defined in ULIS, but the normal meaning of this expression is the physical surrender of possession and control of the goods. Therefore, if one confined one's attention to the basic definition of "delivery" in article 19 (1), retention of a negotiable bill of lading

¹³ Article 72 (1) recognizes the right of the seller to dispatch goods "on terms that reserve to himself the right of disposal of the goods during transit". The relationship between these rules designed to protect the seller's interest in payment and the rules of ULIS on "delivery" will be considered *infra* at section II B, paras. 37-40.

¹⁴ In issuing a negotiable bill of lading the carrier engages to deliver the goods to the person to whom the bill of lading may be endorsed. The carrier will not know who that person may be until the bill of lading is surrendered; hence reasonable protection for the carrier requires surrender of the document in exchange for the goods.

¹⁵ See, e.g., INCOTERMS 1953 (ICC Brochure 166): *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, vol. 1 (United Nations publication, Sales No.: E.71.V.3.), chap. I-2, page 103 *et seq.* In c. and f. and c.i.f. transactions the seller is required to ship under negotiable bill of lading. Without regard for the time for tender of documents, the buyer shall bear "all risks of the goods from the time they shall have effectively passed the ship's rail at the port of shipment". c. and f.: A-5 and 6; B-3. c.i.f. A-6 and 7; B-3. Accord: Uniform Commercial Code (USA), sec. 2-509(1)(a). Contrast: British Sale of Goods Act, sec. 18, rule 5 (2); sec. 19(1) (2).

Practical considerations support the approach, reflected in INCOTERMS, that the time for the presentation of documents covering goods in the course of shipment should not govern the transfer of the risk of loss. For example, the documents may be surrendered in exchange for the price while the goods are in the course of transit or before or after the goods are unloaded; consequently it is difficult to relate the time the documents were surrendered to the time when damage to the goods occurred. The considerations favouring allocating the risk on the seller while the goods are in his possession (as in his warehouse) do not apply when the goods are in the hands of a carrier. Indeed, since damage is usually discovered only after arrival, the buyer is usually in a better position than the seller to assess transit damage, file and press a claim against the carrier or insurer, and salvage the goods.

could have the consequence of delaying the transfer of risk of loss.

25. On the other hand, paragraph 2 of article 19 provides that where the contract involves carriage of the goods "delivery shall be effected by handing over the goods to the carrier...". However, this paragraph, by its express terms, is applicable only when "no other place for delivery has been agreed upon". The crux of the problem is this: What type of contractual term constitutes an agreement as to another place for "delivery"? Difficulty would be avoided if this provision could be construed as referring only to a contractual term that risk of loss would remain with the seller during carriage.¹⁶ However, article 19 (2) is drafted more broadly, and refers to an agreement as to the place of "delivery"; the only definition of "delivery" is that of article 19 (1) which, as we have seen, provides that an essential part of "delivery" is "the handing over" of the goods. Whether such a result was intended is difficult to ascertain. For present purposes it is sufficient to note that the use of the concept of "delivery" in article 97 (2) creates serious doubt as to the allocation of risk of loss in one of the most common types of commercial arrangements.

3. Alternative approaches to resolving problems of risk of loss in ULIS

26. We have seen that when the definition of "delivery" is applied in the substantive rules that use that term, the impact on important commercial situations seems to be ambiguous or unanticipated. Two alternative approaches to a solution will be considered.

(a) Revision of the definition of "delivery"

27. Can the problem of risk of loss that resulted from the application of the "delivery" concept be met by a revision of the definition of that term? Thus, it has been suggested that the definition of "delivery" in article 19 (1) be revised by deleting the phrase "the handing over of goods" and substituting the phrase "placing the goods at the disposal of the buyer". Later in this report attention will be given to the appropriateness of this suggestion in relationship to the many articles of ULIS that use "delivery" in defining aspects of the seller's duty of performance under the contract.¹⁷ The current issue, however, is a narrow one: Would this revision solve the specific problems of risk of loss produced by the present definition of "delivery"?

28. The relationship between the alternative definitions of "delivery" and the substantive rules using that term is exceedingly complex; to clarify the impact of a change in the definition on our current problem it may be helpful to insert the proposed revised definition of "delivery" into the substantive rule on risk that appears in article 97 (1) of ULIS. Such a coalescence of this substantive rule and the proposed definition of delivery would produce the following:

"where the contract of sale involves carriage of the goods and no other place for [delivery] placing the

goods at the buyer's disposition has been agreed upon, [delivery shall be effected] risk shall pass to the buyer by handing over the goods to the carrier for transmission to the buyer".

29. Examination of the above indicates that the proposed revision of the term "delivery" (whatever its merit in other settings) does not avoid the difficulty with respect to risk of loss that arises under ULIS when the seller ships goods to the buyer and retains a negotiable bill of lading until payment of the price. Indeed, the language "placing the goods at the buyer's disposition" enhances the likelihood that retention of control over the goods until the price is paid would modify the basic rules governing the risk of loss during transit.¹⁸

(b) Statement of rules on risk of loss by reference to commercial events rather than by reference to the concept of "delivery"

30. The foregoing analysis leads to the question whether the rules on risk of loss could be stated with greater clarity by referring directly to concrete commercial events, such as shipment of the goods. Under this approach it would not be necessary to refer to "delivery" of the goods in stating the rules on risk of loss. One consequence would be that the definition of "delivery" could be relieved of refinements designed (unsuccessfully) to cope with the complexities of risk of loss.

31. To test this approach, it may be useful to see whether the basic rules of ULIS on risk of loss may be stated without recourse to the concept of "delivery". Since the purpose of this exercise is to assist in making a basic decision on drafting technique, the redraft will attempt to preserve the results that were probably intended (although not always clearly expressed) in the current version of ULIS; if changes in substantive results are desired, these can more readily be considered after the approach to drafting has been decided.

32. Under this approach, the rules on risk of loss that are now embodied in articles 19 and 97 of ULIS might be recast as follows:¹⁹

¹⁸ For future reference, it may be noted here that the proposed revision of the definition of "delivery" when read into the rules on risk would also produce substantive changes where the contract does not involve (or contemplate) carriage. One example is as follows: The contract provides that the goods shall be available for removal by the buyer on any date during the month of May at the buyer's choice; the goods are destroyed on the seller's premises while they were available for the buyer's removal, but before he was required to remove them. Under the present version of ULIS the risk would remain on the seller: under article 19 (1) the goods had not been "handed over" to the buyer and under article 98 the handing over of the goods was not "delayed owing to the breach of an obligation of the buyer". Under the proposed definition the result would probably be different, and risk throughout May would fall on the buyer since the goods would have been placed "at the disposal of the buyer".

The proper resolution of these questions can best be considered after a decision has been reached on the approach to drafting in substantive review of the group of sections (e.g., chapter VI) dealing specifically with risk of loss. The above example, however, provides further illustration of the complexity of attempting to solve rules on various substantive problems by way of the definition of a single concept.

¹⁹ Language now in ULIS that would be deleted is placed in square brackets; language inserted in the place of the bracketed language is italicized.

¹⁶ An agreement as to risk can be evidenced either by an express contract provision or by the use of a trade term such as *Ex Ship* (named port of destination). See INCOTERMS 1953 (ICC Brochure 166), *loc cit*.

¹⁷ Section III B, paras. 52 to 64, *infra*.

Basic rules on risk under ULIS stated without reference to "delivery"

1. The risk shall pass to the buyer when [delivery of the goods is effected] *the goods are handed over to him in accordance with the provisions of the contract and the present Law.* (Source: a coalescence of ULIS articles 19 (1) and 97 (1).)

2. Where the contract of sale involves carriage of the goods [and no other place for delivery has been agreed upon, delivery shall be effected], *unless the parties have agreed otherwise, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.* (Source: ULIS article 19 (2).)

33. In this redraft the changes in language are small, but there seems to be a significant gain in clarity when the provisions are applied to important commercial situations. This results, in part, from the fact that the rules on risk of loss during shipment are no longer made ambiguous by unanswered questions concerning the effect of retention of control through a negotiable bill of lading.²⁰

34. Under this approach, all of the rules on risk of loss would be placed in a single setting in the Uniform Law: e.g., in chapter VI on risk of loss. In ULIS these rules are now divided between chapter III (article 19) and chapter VI (articles 96-101). For example, article 100 opens as follows: "If, in a case to which paragraph 3 of article 19 applies..." It is thus evident that article 19 (3) and article 100 are two parts of the same rule on risk of loss; under the suggested approach they would be combined into a single provision. To illustrate further the effect of this approach, annex II sets forth a structure of chapter VI on risk of loss, that could result from this unified attention to a single problem.

35. It perhaps bears repeating that we are concerned here with a question of structure and approach and not with the final formulation of rules on risk of loss. Thus the provisions set forth in paragraph 34 and in annex II are designed only to aid in the consideration of whether it is feasible to state the rules on risk of loss without recourse to the concept of "delivery". Once this decision is made any issues of policy and clarity presented by the rules of ULIS on risk of loss can be dealt with in the setting of rules that deal with this single problem. Indeed, this unified approach should make it possible further to simplify certain of the rules of ULIS on risk of loss.²¹

36. It may also be emphasized that the unified approach to the question of risk that has been illustrated herein would not interfere with the use of "delivery" in other parts of ULIS. Nor would this approach affect the definition of the term "delivery" other than to reduce the number of problems that must be borne in

mind in deciding on the most appropriate definition of that term.

B. "Delivery" and the time and place for payment of the price

37. The type of difficulty which resulted from using the concept of "delivery" to deal with problems of risk of loss also arises, in a lesser degree, in connexion with the rules on the time and place for payment of the price.

38. Article 71 of ULIS provides that "delivery of the goods and payment of the price" shall be concurrent. Here (as in connexion with risk of loss) difficulty arises when the contract contemplates carriage of the goods—a circumstance that is normal in international commerce. For this situation article 72 (1) provides that the seller may despatch the goods "on terms that reserve to himself the right of disposal"—but this useful rule is only applicable "where delivery is, by virtue of paragraph 2 of article 19, effected by handing over the goods to the carrier...".

39. To test this provision, let us assume that the parties by express agreement (or the use of an appropriate trade term) agree that risk shall pass to the buyer only at the end of the transport. In such a case may the seller reserve the right of disposal of the goods until the price is paid? In commercial practice this would be one of the clearest cases for the seller's right to retain control over the goods. However, the linkage in ULIS between "delivery" and risk means that in the above case "delivery" was *not* effected "by handing over the goods to the carrier"; under article 72 (1), as quoted above, the seller's right of disposal during transit is conferred only when "delivery is... effected by handing over the goods to the carrier". Such a result was certainly not intended by the draftsmen and is inconsistent with other provisions in the Law.²² These surprising consequences result because of the complexities that arise when a single concept (delivery) is employed to deal with too many distinct situations.

40. Our problem at this stage is the following: What approach will most readily avoid such difficulties? Two alternatives may be considered.

(a) One approach would be to modify the definition of "delivery" in article 19. Although, as we shall see, such a modification may be useful, it is doubtful that revision of the definition of "delivery" can solve problems concerning the time for payment of the price. For example, the suggested change in the first paragraph of article 19—to refer to "placing the goods at the buyer's disposition"—does not reach the present prob-

²⁰ As we have seen, the "delivery" concept, under all proposed definitions, is associated with the question of control over goods; use of "delivery" to determine risk thus injects this issue into the allocation of risk, with doubtful results where the contract calls for carriage of the goods.

²¹ Unified treatment of the problem of risk will not disturb the relationship between the effect of damage to the goods and the seller's contractual duty of performance; this relationship is explicitly established by article 35 (1) of ULIS: "Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes". It will be noted that this clear rule does not use the concept "delivery".

²² See e.g., article 59. It may be possible to escape from the literal reading of article 72 by arguing that "delivery" in articles 71 and 72 is not used in the same sense as in the articles on risk; this argument is made difficult by the fact that the French equivalent of "delivery" in articles 71 and 72 is *délivrance*, the complex concept used for passage of risk, and not *livraison* or *remise*, the terms usually used when only physical control over the goods is intended. As a second line of defence it may be argued that if the specific rules on payment of the price in article 72 are unavailable, one may use the general rule of article 71. This solution is, however, complicated since article 71 uses "delivery" (*délivrance*); it may also be noted that article 71 speaks less clearly than does article 72 concerning the practical steps required to assure payment of the price.

lem, for the current problem arises in the complex setting of the *second* paragraph of article 19 where the contract involves carriage of the goods. In any event, an attempt to solve the various problems as to when the buyer must pay for the goods by way of a definition of "delivery" would produce a definition of great complexity; the complexity is, of course, enhanced if this definition must also solve the problems of risk of loss.

(b) A second approach would be to state when the price must be paid without reference to the concept of "delivery". The basic rule could state that the price is due when the seller "hands over" the goods to the buyer or when the seller "places the goods at the buyer's disposal". An illustration of this approach appears in annex III. (Of course, the substance of the rules and the drafting style call for re-examination after the basic decision as to approach has been made.)

III. "DELIVERY" IN OTHER SETTINGS OF THE UNIFORM LAW; ALTERNATIVE DEFINITIONS OF THE TERM

41. As we have seen, in ULIS the term "delivery" serves various and divergent functions. In two situations that have just been discussed—risk of loss and payment of the price—the term "delivery" is used as a dispositive or "key" concept. In various other articles the term "delivery" is simply a neutral non-dispositive means of leading into a specific rule defining some aspect of the seller's duty of performance (see paras. 56-62, below). In these settings it is doubtful whether the definition of "delivery" is of operative significance. However, this definition now set forth in ULIS has encountered criticism in the proceedings of the Commission, and requires analysis.

42. As we have seen, the basic definition of "delivery", set forth in article 19 (1), is as follows:

"1. Delivery consists in the handing over of goods which conform with the contract."

43. This brief provision poses two problems which have been the subject of comment in proceedings of the Commission. [A] It has been suggested that the concluding phrase "goods which conform with the contract" should be deleted. [B] It has also been suggested that in place of the phrase "the handing over of the goods", the Law should return to the approach of an earlier draft²³ and provide that delivery consists in placing the goods "at the disposal of the buyer".

A. Conformity of goods as an essential element of "delivery"

44. Concern has been expressed that the definition of "delivery" has been complicated by the concluding phrase of article 19 (1), whereby the handing over of goods does not constitute "delivery" if the goods do not "conform with the contract".²⁴ Even though the goods do not conform to the contract the buyer may choose to keep and use the goods—subject, of course, to the right to claim damages from the seller or to re-

duce the price to compensate for the deficiency.²⁵ In such cases ULIS seems to say that goods retained and used by the buyer (and often consumed by him) were never "delivered".

45. It would, of course, be unacceptable for the seller to bear the risk of loss or damage for the goods while the buyer uses and consumes them. As we have seen, ULIS provides in article 97 (2) that where the buyer does not reject non-conforming goods "the risk shall pass to the buyer" retroactively.²⁶ This provision does not, however, amend the definition of "delivery", so the present text of the Law seems to maintain the approach that goods used and consumed by a buyer have never been "delivered" to him.

46. The provision that goods have not been "delivered" when they do not conform to the contract appears to provide another example of the complications resulting from the attempt to use the concept of delivery to solve problems of risk of loss. For example, when the seller "hands over" defective goods to the buyer, it seems appropriate for the risk of loss to remain with the seller until the buyer has had a full opportunity to reject the goods because of their non-conformity. However, it does not seem necessary to attempt to cope with such specific problems in framing the general definition of "delivery"; indeed, the specific rules on risk of loss in chapter VI deal with this problem more clearly and more comprehensively.²⁷

47. The approach, considered in section II of this report, whereby rules on risk of loss would be stated in terms of relevant commercial events (such as shipment), rather than by reference to the concept of "delivery", would probably not only clarify the rules on risk but also permit the simplification of the definition of "delivery" to avoid the anomalous result that goods consumed by a buyer have never been "delivered" to him.

48. Does the provision that conformity of the goods is an element of "delivery" strengthen the buyer's legal protection when the seller supplies defective goods? A negative answer is evident from an examination of other provisions of ULIS on (a) the scope of the seller's obligations and (b) the remedies given the buyer for breach.

(a) The seller's legal obligation to supply conforming goods is stated generally in article 18 and specifically in article 33 (1); the seller's legal duty to supply conforming goods is clearly established by provisions that do not depend on the definition of "delivery". (In examining these provisions it is, of course, necessary to distinguish between (a) the breach of an obligation "to deliver" goods that conform to the contract and (b) the question whether these goods actually handed over and received by the buyer were "de-

²⁵ ULIS arts. 41 (2), 46, 82. Where the non-conformity of the goods does not amount to a "fundamental breach", the buyer may not declare the contract avoided; ULIS art. 43. In these cases the buyer has no choice but to keep the goods.

²⁶ Article 97 (2) of ULIS is quoted and discussed at paras. 15 and 16, above. As has been noted in connexion with the rules of ULIS on risk, a unified approach to the question of risk should make it possible to simplify and clarify this provision.

²⁷ See article 97 (1) quoted in foot-note 30 below, and article 97 (2), quoted above in para. 15, and the specific rule on the effect of buyer's breach on risk of loss in article 98 of ULIS. See also the structure for these rules on risk outlined in annex II to this report.

²³ The provisions of this earlier version are set forth in the study submitted by UNIDROIT; see A/CN.9/WG.2/WP.5.

²⁴ A/CN.9/WG.2/WP.10, reproduced below, part two, I A 3 (see annexed studies by the representatives of the United Kingdom and Norway).

livered" to him. It is this latter question that is raised by the definition of the concept of "delivery".)

(b) The buyer's remedies for lack of conformity of the goods are set forth in articles 41 to 49 of ULIS. (Related provisions on ascertainment and notification of lack of conformity appear in articles 38 to 40.) These provisions are premised on the failure of the seller to deliver conforming goods; they would not be disarranged by the concept that when non-conforming goods have been handed over to the buyer, those goods have been "delivered".

49. The provision of article 19 (1) that delivery consists in handing over "goods which conform with the contract" leads to a further technical distinction which may be discussed on the basis of the following typical example: The sales contract (or applicable usage) requires the seller to take out a policy of insurance covering the goods, and to tender the insurance policy with the other documents relating to the goods. The seller ships goods which conform to the contract but fails to take out or tender the policy of insurance. (The current problem would be illustrated by any serious breach by the seller relating to the shipment or tender of the goods.)²⁸

50. In the example just stated, article 19 leads to the conclusion that the seller has effected "delivery" in spite of the serious breach. An escape from this result cannot be found in the definition of "delivery" in article 19 (1); the reference to "goods which conform" points so clearly to the conformity of the goods that it is difficult to conclude that conformity as to the time or method of shipment or tender is also required for delivery.²⁹ The difficulties which this aspect of the definition of "delivery" produces can be alleviated, with respect to risk of loss, by one of the special provisions on risk of loss in chapter VI.³⁰ This rule on risk of loss, however, does not modify the basic definition of "delivery" in article 19. If "delivery" is to be employed to solve problems other than risk of loss, it will be important to bear in mind the following technical distinction resulting from the definition in article 19. When the seller sends over goods to a carrier for transport to the buyer: (a) any non-conformity with respect to the goods prevents "delivery"; (b) even the most serious breach with respect to the time or manner of shipment, documentation or tender does not prevent "delivery".

51. This anomaly adds further support for the suggestion that the definition of "delivery" in article 19

²⁸ Other illustrations include: delay in shipment; shipment to the wrong place or by an unsuitable carrier or under improper conditions (on deck rather than below deck); failure to arrange for necessary refrigeration; tender of the goods under conditions that deny the buyer his right to inspect the goods before payment.

²⁹ This conclusion is supported in Tunc, *Commentary on the Hague Conventions of 1 July 1964* (Ministry of Justice, The Netherlands), part two, chap. I, sec. 1, pp. 45-46, which recognizes the above distinction.

³⁰ Article 97 (1) provides:

"1. The risk shall pass to the buyer when delivery of the goods is effected in accordance with the provisions of the contract and the present Law."

The emphasized language would seem to include all aspects of the seller's performance, and would not be confined to conformity of the goods with the contract. This provision, it will be noted, is a rule on when risk passes, and does not constitute a further definition of "delivery".

(1) would usefully be simplified by deleting the final clause "which conform with the contract".

B. *Alternative definitions: "handing over" goods; placing goods "at the buyer's disposal"*

52. Criticism has been directed to the internal consistency of the seller's "delivery" obligation under ULIS. The seller is required, under article 18, to "effect delivery" of the goods. It is suggested that the seller should not be placed under such an unqualified obligation since "delivery" (the "handing over" of goods) requires the co-operation of the buyer in accepting possession.³¹

53. A further criticism is the following: To state that "delivery consists in the handing over of goods..." is an unhelpful tautology since the normal meaning of "delivery" is "handing over"; in some languages, it is difficult to find a word for "handing over" that is different from "delivery".³²

54. These reasons have led to the suggestion that ULIS should return to the approach of an earlier draft that stressed the seller's undertaking to place the goods "at the disposal of the buyer".³³

55. In analysing this question, it may be helpful to note that "delivery" may be used in two very different contexts:

(a) "Delivery" may be used in stating the seller's contractual duty to perform the contract. In this context the idea in question is the duty to deliver. This duty will arise and will be violated when no goods of any kind are provided or tendered by the seller.

(b) A very different usage of "delivery" concerns not a contractual duty but the actual relationship between persons and goods. In this sense, "delivery" may be defined as the transfer (or "handing over") of the possession or control over goods. In this sense, delivery can occur quite independently of a contract of sale or the performance of a legal duty—as in the "delivery" of goods by gift. Also, in this sense, goods can be "delivered" by the seller to the buyer when the goods do not conform to the contract.

56. The difference between these two concepts is striking. The duty "to deliver" (meaning (a) above) is an obligation that results from the contract and does not depend on the existence or the location or the quality of any particular goods. "Delivery" (meaning (b) above) may occur when there is no contract or when the handing over of the goods does not fulfil all of the obligations of a contract. Each of these ideas is a coherent and useful concept; difficulty arises only when the two are merged or confused.

³¹ UNCITRAL, Report on second session (1969), annex I, para. 76; Analysis of studies and comments by Governments on The Hague Conventions of 1964 (A/CN.9/31) (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1), para. 99.

³² *Ibid.*

³³ The UNIDROIT draft of June 1934 provided (art. 24): "The seller undertakes to deliver the goods, that is to say, to place them at the disposal of the buyer". Earlier drafts, without using the "disposal" phrase, had also emphasized the seller's duty to perform acts that did not require the buyer's co-operation. For example, the draft of October 1933 provided (art. 28): "The term 'delivery' means the performance of those acts which the seller must perform in order for the goods to be handed over to the buyer..." The background of this aspect of ULIS is presented in the study prepared by UNIDROIT for the Commission, A/CN.9/WG.2/WP.5.

57. In most of the articles of ULIS "delivery" is used in describing the legal obligation "to deliver" (meaning (a) above). Thus, articles 20 to 22 define the time when the seller is obliged to deliver the goods and article 23 states the place at which he is obliged to deliver them; articles 24 to 32 state the sanctions for failure to perform this duty.

58. These two groups of articles thus illustrate the basic structure of the law: The essential ingredients are twofold: (1) To define the legal duty of a party and (2) to specify the sanctions for failure to perform that duty.

59. Of course, the actual physical relationship between a party and the goods may give rise to special obligations and remedies. A clear example is provided by article 92 (1), which provides:

"1. Where the goods have been received by the buyer, he shall take reasonable steps to preserve them if he intends to reject them; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the seller."

Under this provision, the obligation arises when the goods have been "received" (*reçue*) by the buyer; the concept of "delivery" (*délivrance*) is not employed. A similar physical (and clear) concept is employed in paragraph 2 of this same article in which duties to preserve goods arise where goods despatched to the buyer "have been put at his disposal at their place of destination . . .".³⁴ These provisions do not create the ambiguities that, in some situations, are presented by the use of "delivery" (*délivrance*); provisions of this character illustrate a drafting approach that deals clearly with the effect of the physical situation of goods.

60. In a few situations ULIS has used "delivery" (*délivrance*) in connexion with the physical relationship between a party and the goods.

(a) One of these is in connexion with risk of loss (section II *supra*). In deciding whether the risk of damage or loss should fall on the seller or on the buyer it is useful to consider the physical location of the goods: the party in possession of goods can more readily take care of them and is more likely to have effective insurance protection, as under the customary policies covering a building and its contents. The emphasis in ULIS on delivery as the "handing over" of goods seems to have been influenced by the desirability of allocating the risk of loss to the person who is in possession of the goods. However, as was noted in section II, it is possible to state the rules on risk by reference to physical events rather than the "delivery" concept. (Compare the comparable approach of article 92, quoted in para. 59 above, referring to goods that have been "received" and goods put at the buyer's "disposal".)

(b) The physical relationship between the parties and the goods is also important in connexion with the time for payment: A seller runs a credit risk if he surrenders control of the goods before he receives payment; a buyer runs a similar risk if he pays before he receives the goods. The law normally does not

impose these risks on the parties unless they have agreed to accept them. As we have seen in section II, ULIS uses the concept of "delivery" (*délivrance*) in dealing with the time for payment; as in connexion with risk of loss, "delivery" created ambiguities since the concept mingles the idea of the parties' duties of performance with the concrete situation of control over the goods. The route to a solution here, as in risk of loss, may be to avoid the concept of "delivery" and to speak directly in terms of "handing over" the goods—or any equivalent expression that connotes physical control over the goods.

61. These adjustments would seem to dispose of the situations in which actual physical control over the goods plays a decisive role in the Uniform Law; as a consequence, the many remaining articles of ULIS that use the term "delivery" can be read as defining various aspects of the seller's duty to perform his contract. (Meaning (a) in para. 55 above).

62. Our present concern is the provision in article 19 (1) that "delivery consists in the handing over of goods". The following alternative has been suggested: "Delivery consists in placing the goods at the disposal of the buyer in conformity with the contract."³⁵ On the assumption that rules on risk and price payment have been dealt with separately, this suggested language has the advantage of being consistent with the remaining provisions of ULIS which refer to delivery, for they speak of various aspects of the seller's contractual obligation to deliver.

63. One stylistic adjustment might be considered in connexion with this suggestion. The "delivery" of goods, at least in some languages, may more customarily refer to the physical act of transfer of possession and control.³⁶ As we have seen, referring to a seller's contractual duty to deliver may avoid this linguistic embarrassment. Consideration therefore might be given to supplanting the present article 19 with language such as the following:

"The seller's duty to deliver shall include [be performed by] placing the goods at the buyer's disposal in conformity with the contract and the present Law."

64. Regardless of the choice of language, the following questions of rearrangement arise:

(a) If the suggestions made in section II should be accepted, the provisions of articles 19 (2) and 19 (3) would be embodied in the substantive rules on risk in chapter VI. (One possible arrangement appears in annex II. See also subparagraph (c), below.) A brief definition emphasizing the seller's contractual duty to place goods at the buyer's disposition could then be the only provision of article 19.

(b) It may be noted that such a provision would in part duplicate the general language of article 18. (Article 18 seems designed merely to call attention to the structure of chapter III by referring to, in general terms, rules in the first three sections of this chapter;

³⁵ See A/CN.9/WG.2/WP.10 (annexed study by the representative of Mexico at para. 6). See also foot-note 31 *supra*.

³⁶ See A/CN.9/WG.2/WP.10 (annexed studies by representatives of the United Kingdom (comment on art. 19) and Norway (introductory note, para. 2)).

³⁴ It is also significant that these duties arise independently of whether the seller has violated his duty to tender conforming goods, and are especially significant to avoid waste where the goods do not conform to the contract.

the article thus seems without independent effect.) The issue is only stylistic, and perhaps should be deferred until basic questions of approach are decided. At that point consideration might be given to the possible consolidation of articles 18 and 19.

(c) In connexion with this consideration of article 19 (2) (contracts involving carriage of goods) attention could be given to a gap in the structure of chapter III, section 1, subsection 1B (article 23) on place of delivery. The incompleteness of this part is suggested by the opening clause of article 23: "Where the contract of sale does not involve carriage of the goods...". For contracts that do not involve carriage, specific rules on the place of delivery are provided in paragraphs 1 and 2 of article 23. Nothing is stated as to the place of delivery where the contract does involve carriage of the goods; to deal with this important situation the present draft must rely on the portion of the definition of "delivery" that appears in article 19 (2). Indeed, article 19 (2), when analysed, proves to be a rule on the place of delivery in the one situation not covered by article 23; paragraph 2 of article 19 could be added, without change, as a third paragraph of article 23.³⁷

ANNEX I

Provisions of ULIS using the term "delivery"

Article	Subject; term in French text where other than <i>délivrance</i>
1	Scope: international sale (para. 1 (c)).
18	Summary of seller's obligations.
19	Definitions.
20	Date for delivery.
21	Date for delivery.
22	Date for delivery.
23	Place for delivery.
24	Summary of remedies: failure as to date and place.
26	Remedies: failure as to date.
27	Remedies: failure as to date.
28	Remedies: failure as to date.
29	Remedies: failure as to date.
30	Remedies: failure as to place.
31	Remedies: failure as to place.
32	Remedies: failure as to place.
33	Non-conformity of goods.
37	Delivery of missing part; replacement or repair.
42	Power to require performance.
43	Declaration of avoidance.
44	Late delivery; the French text in paragraph 2 renders "delivery" as <i>livraison</i> at one point and as <i>délivrance</i> at another.
45	Partial delivery; the French text in paragraph 2 renders "effect delivery" as <i>exécution</i> .
48	Remedies before time fixed for delivery.
56	Summary of buyer's obligations; in the French text, "delivery" is rendered as <i>livraison</i> .
65	Definition of "taking delivery"; in the French text, rendered as <i>la prise de livraison</i> .

³⁷ This use of article 19 (2) would not be inconsistent with the suggestions made in section II *supra* for a unified treatment of risk. Article 19 (2) would state the place of "delivery", but, under the above suggestions, chapter VI would not state that risk or loss passes to the buyer on "delivery". See annex II at art. 97 (2).

Article	Subject; term in French text where other than <i>délivrance</i>
66	Failure to "take delivery"; in the French text, rendered as <i>prise de livraison</i> .
68	Failure to "accept delivery"; in the French text, rendered as <i>prise de livraison</i> .
71	Payment of the price.
72	Contracts involving carriage.
75	Delivery by instalments; in the French text, rendered as <i>livraison</i> .
90	Expenses of delivery.
91	Delay in taking delivery; in the French text, rendered as <i>livraison</i> .
97	When risk passes to the buyer.
98	Unascertained goods; in the French text, rendered as <i>livraison</i> .

ANNEX II

Rules of ULIS on risk of loss stated without use of concept of "delivery" (*délivrance*)

(N.B.: The following is not proposed as a final redraft but is designed solely to aid in considering which approach to drafting is more conducive to clarity.)

CHAPTER VI

PASSING OF THE RISK

Article 96

(As in ULIS art. 96)

Article 97

[Basic rules on risk resulting from coalescing ULIS articles 19 and 97 (1).]

1. The risk shall pass to the buyer when [delivery of the goods is effected] *the goods are handed over to him* in accordance with the provisions of the contract and the present law.

2. Where the contract of sale involves carriage of the goods [and no other place for delivery has been agreed upon, delivery shall be effected], *unless the parties have agreed otherwise, the risk shall pass to the buyer when the goods are handed over to the carrier for transmission to the buyer.*

3. Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods. If [in a case to which paragraph 3 of article 19 applies] the seller, at the time of sending [the] such notice or other document [referred to in that paragraph], knew or ought to have known that the goods had been lost or had deteriorated after they were handed over to the carrier, the risk shall remain with the seller until the time of sending such notice or document.

(Source: The first sentence is identical with ULIS article 19 (3). The second sentence, with the modifications noted, is the proviso to ULIS article 19 (3) that appears in ULIS article 100. If the present general approach should be approved, the two sentences in this paragraph could probably be coalesced in the interest of brevity and clarity.)

Article 98

(As in ULIS art. 97 (2). If the present basic approach should be accepted, the language of this provision probably could be simplified.)

Article 99

(As in ULIS art. 98.)

Article 100

(As in ULIS art. 99.)

Article 101

(As in ULIS art. 101.)

ANNEX III

Rules of ULIS on payment of the price stated without reference to "delivery"

Article 71

Except as otherwise provided in article 72, [delivery of the goods] placing the goods at the buyer's disposal and payment of the price shall be concurrent conditions. (Second sentence as in ULIS.)¹

Article 72

1. Where the contract involves carriage of the goods [and

¹ In final redrafting, attention might be given to the phrase "concurrent conditions" in the first sentence above; the expression is a legal idiom that is well-known in some legal systems but may not be understood in others.

2. "Ipso facto avoidance" in the Uniform Law on the International Sale of Goods (ULIS): report of the Secretary-General (A/CN.9/WG.2/WP.9)*

CONTENTS

	Paragraphs		Paragraphs
INTRODUCTION	1-4	IV. ANALYSIS OF THE USE OF THE CONCEPT OF "ipso facto AVOIDANCE" IN SPECIFIC ARTICLES OF ULIS	31-58
I. PROVISIONS OF ULIS PROVIDING FOR "ipso facto AVOIDANCE" OF THE CONTRACT AND THE EFFECTS OF SUCH AVOIDANCE	5-8	(a) Article 10 of ULIS: the concept of fundamental breach	32-41
II. COMMENTS BY GOVERNMENTS ON THE CONCEPT OF "ipso facto AVOIDANCE"	9-18	(b) Limitation on remedy of specific performance: article 25 of the Uniform Law	42-46
(a) Desirability of maintenance of "ipso facto avoidance"	10-16	(c) Breach as to date and place for delivery: articles 26 and 30 of ULIS	47-58
(b) Appropriateness of the term "ipso facto"	17-18	CONCLUSION	59
III. THE USE OF THE CONCEPT OF "ipso facto AVOIDANCE" IN NATIONAL LAWS AND IN GENERAL CONDITIONS RELATING TO INTERNATIONAL TRADE	19-30		
(a) The use of the concept in national laws	20-25	Annexes	Page
(b) The use of the concept in general conditions of sale	26-30	I. Comments by Hungary	51
		II. Comments by Italy	51
		III. Comments by Norway	52
		IV. Comments by Spain	52
		V. Comments by Tunisia	53
		VI. Comments by the Union of Soviet Socialist Republics	54

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its third session held in 1970 decided to request "the Secretary-General to prepare a study of the concept of 'ipso facto avoidance' to be considered "at a subsequent session of the Working Group on the International Sale of Goods".¹ The Working Group at its informal meeting held on 15 April 1971 requested the Secretariat to prepare and circulate that study in time for consideration at its third session. The present study is submitted in response to this request.

¹ Report of the United Nations Commission on International Trade Law on the work of its third session, *General Assembly Official Records, Twenty-fifth Session, Supplement No. 17 (A/8017)* (hereinafter referred to as UNCITRAL Report on Third Session (1970)), para. 46, UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

* 9 December 1971.

where delivery is, by virtue of paragraph 2 of article 19, affected by handing over the goods to the carrier] the seller may either postpone despatch of the goods until he receives payment or proceed to despatch them on terms that reserve to himself the right of disposal of the goods during transit. (Second sentence as in ULIS.)²

² In the subsequent review of the substance of the rules on payment of the price, consideration might be given to whether the seller should be able to insist on payment before shipment when he bears the risk of loss during transit. In such a case, buyer's claim for recovery of the price when the goods are lost or damaged is subject to the hazards of seller's continued credit—and the burdens of litigation in a distant place. If such hazards are to be incurred perhaps they should be specifically bargained for. If this view is accepted, article 72 (1) might be drafted along these lines:

"1. Where the contract involves carriage of the goods, the seller may proceed to despatch the goods on terms that reserve to himself the right of disposal of the goods during transit. Unless the risk of loss during transit falls on the seller, he may postpone despatch of the goods until he receives payment."

2. At its third session the Commission also decided to request "States members of the Commission to submit their proposals with respect to the concept of 'ipso facto avoidance' to the Secretariat for consideration in the study" referred to above.² The Secretary-General, in a note verbale dated 17 June 1970, communicated this request to the States concerned. The following States have submitted substantive proposals: Hungary, Italy, Norway, Spain, Tunisia and USSR. These proposals are reproduced in Annexes I-VI to this report.

3. In addition to the proposals referred to in paragraph 2 above, comments and proposals on articles of ULIS relating to *ipso facto* avoidance were reported in the following documents: (a) A/CN.9/11 and Addenda 1, 2 and 3 reproducing studies and comments by Governments on The Hague Conventions of 1964; (b) A/CN.9/17, analysis by the Secretary-General of

² *Ibid.*

the studies and comments contained in the documents referred to under sub-paragraph (a) above; (c) Annex I to the Commission's report on its second session⁸ summarizing comments and proposals by representatives of States Members of the Commission and observers on The Hague Conventions of 1964 at the second session; (d) A/8017, report of the Commission on the work of its third session; (e) A/CN.9/31, report by the Secretary-General analysing the studies and comments by Governments on The Hague Conventions of 1964 (this analysis includes all comments and proposals which were made prior to its preparation); and (f) A/CN.9/35, report of the Working Group on the International Sale of Goods on its first session.

4. In compliance with the request of the Commission referred to in paragraph 1 above, the present report is devoted to the study of the concept of "*ipso facto* avoidance" as used in ULIS. The study first describes the use in ULIS of the concept of "*ipso facto* avoidance", then it gives a short summary of the comments made on the above concept and its use in the Law, and reviews briefly the use of the same or similar concepts in national laws and in general conditions of sale used in international trade. The second part of the study then analyses in detail the concept of fundamental breach as defined in Article 10 of the Law followed by an examination of the use of the concept of *ipso facto* avoidance in specific articles of ULIS. Finally, the report summarizes the conclusions which may be derived from the study and the proposals made as a result thereof.

I. PROVISIONS OF ULIS PROVIDING FOR "*ipso facto* AVOIDANCE" OF THE CONTRACT AND THE EFFECTS OF SUCH AVOIDANCE

5. Under the provisions of the Uniform Law, avoidance of the contract is a remedy for certain breaches of contract. The Law provides, *inter alia*, for this remedy in cases where the seller fails to perform his obligations as regards the date and place of delivery (arts. 25, 26, 28, 30 and 31) and where the buyer fails to pay the price in accordance with the contract (arts. 61 and 62). These articles are reproduced in the second part of this study in the context of the analysis of the use of the concept of "*ipso facto* avoidance" in specific articles of ULIS.⁴

6. The Law, in article 78, defines the term "avoidance" by determining its effects. The article reads:

"1. Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due.

"2. If one party has performed the contract either wholly or in part, he may claim the return

of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently."

7. Accordingly, avoidance of the contract, irrespective of whether it is declared by one of the parties or it occurs *ipso facto* (cf. para. 8 below), has the following legal consequences: (a) Neither party may be compelled to perform his obligations thereunder (i.e., specific performance of the contract will not be required); (b) The defaulting party has to pay the damages resulting from his breach that led to the termination of the contract;⁵ (c) Each party may require the other party to return whatever he has supplied or paid prior to the avoidance of the contract (*restitutio in integrum*); and (d) The buyer has to account for the benefits derived from the goods and the seller has to pay interest on the price.⁶ It may be noted, however, that avoidance of the contract does not always entail *restitutio in integrum* since the contract may also be avoided in cases where it is impossible for either of the parties to return what he has obtained.⁷

8. The Uniform Law differentiates between (a) avoidance based on the declaration by a party⁸ and (b) *ipso facto* avoidance.⁹

(a) Avoidance by declaration is one of the remedies which the injured party may choose when the other party fails to perform certain of its obligations under the contract; thus, the application of this kind of avoidance depends on the will of the injured party.

(b) Under ULIS, *ipso facto* avoidance does not depend on the will of any of the parties but occurs automatically by virtue of the Law.¹⁰ In most instances, *ipso facto* avoidance, as used in ULIS, is a subsidiary remedy for fundamental breach of the contract in cases where the injured party fails to exercise his right to choose from the remedies available to him within a reasonable time or does not inform the other party of his decision promptly if he is requested to do so. Under articles 25 and 28, *ipso facto* avoidance is even more completely divorced from the will of the parties. Thus, under article 25 of the Law¹¹ *ipso facto*

⁵ The damages which may be claimed in cases where the contract is avoided are set out in articles 84 to 87 of ULIS.

⁶ Article 81 of ULIS.

⁷ Under the provisions of art. 79, para. 1, the buyer is deprived of his right to declare the contract avoided where it is impossible for him to return the goods in the conditions in which he received them. However, this rule only applies in exceptional cases as a result of the many exceptions thereto established in art. 79, para. 2. It is noted further that even in cases where under the above rule the buyer loses his right to declare the contract avoided the seller is not deprived of such right; nor does the fact that it is impossible for the buyer to return the goods affect the application of the rules of the law providing for *ipso facto* avoidance of the contract. Similarly, under a literal reading the avoidability of the contract is not affected where it is impossible for the seller to make *restitutio in integrum* (e.g., where as a result of restrictive foreign exchange regulations it is impossible for him to return the price he received).

⁸ Articles 24, 26, 30, 32, 41, 44, 55, 62, 67, 70, 75 and 76.

⁹ Articles 25, 26, 30, 61 and 62.

¹⁰ Note of the Special Commission on the observations presented by various Governments and by the ICC relating to the 1956 Draft of a Uniform Law on the International Sale of Goods, Diplomatic Conference on the Unification of Law governing the International Sale of Goods, Records and Documents of the Conference, volume II, p. 186 at art. 30.

¹¹ See para. 42 below.

⁸ Report of the United Nations Commission on International Trade Law on the work of its second session, *General Assembly Official Records, Twenty-fourth Session, Supplement No. 18 (A/7618)*, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

⁴ The text of articles 25, 26, 28, 30, 61 and 62 of the Law appears in the following paragraphs and foot-notes, respectively, of this study:

Article 25—para. 42

Article 26—para. 49

Article 28—foot-note 48

Article 30—para. 50

Article 61—foot-note 56

Article 62—para. 57

avoidance applies in all cases where "it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates" and under article 61¹² *ipso facto* avoidance applies where "it is in conformity with usage and reasonably possible for the seller to resell the goods". Under these two articles, *ipso facto* avoidance is operative immediately upon the breach of the contract and thereby denies the injured party the opportunity to choose the remedy himself. It may also be noted that *ipso facto* avoidance under articles 25 and 61 is a remedy not only for fundamental but also non-fundamental breach of the contract—a feature that is peculiar to these two articles.

II. COMMENTS BY GOVERNMENTS ON THE CONCEPT OF "*ipso facto* AVOIDANCE"

9. In the course of the examination of ULIS by the Commission, several comments were made with respect to the concept of "*ipso facto* avoidance". These comments relate basically to the following three issues: (a) the desirability of the maintenance of *ipso facto* avoidance, i.e. automatic avoidance not based on a declaration; (b) the appropriateness of the term "*ipso facto*"; (c) the appropriateness of the definition of fundamental breach in article 10 of the Law. Other comments relate to specific articles of ULIS. Of all these comments those relating to the above issues ((a) and (b)) are summarized in paragraphs 10 to 18 below, while those relating to issue (c) are dealt with in parts of the present study dealing with the articles of the Law to which these comments are directed.

(a) Desirability of maintenance of "*ipso facto* avoidance"

10. The basic question raised by the comments is whether the concept of "*ipso facto* avoidance" should be maintained in the Uniform Law, i.e. whether in cases where the Law provides for avoidance as a remedy for certain breaches of contract, the avoidance of the contract should occur *ipso facto* or it should depend on an express declaration by one of the parties to that effect.

11. The reasons which led to the inclusion in specific articles of the Law of the concept of *ipso facto* avoidance as a remedy for certain kinds of breach of contract are indicated in the commentary by Professor André Tunc.¹³ In respect of article 26, the commentary noted that the Law provides for *ipso facto* avoidance because it may legitimately be presumed that when the buyer is confronted with a fundamental breach it is to be concluded that he has no further interest in the contract.¹⁴ With respect to article 25 the Commentary observes that *ipso facto* avoidance

"is in fact the rule to be derived from usages".¹⁵ Similar comments appear in the report of the Special Commission which prepared the draft of ULIS. The Commission held that it was important not to allow the buyer to remain waiting, while he watched price fluctuations before making his election known.¹⁶

12. Several comments proposed the elimination of the concept of *ipso facto* avoidance. One reason was that the legal tests in the articles providing for *ipso facto* avoidance produce considerable uncertainty and, therefore, a declaration as to avoidance should be required.¹⁷ It was also observed that the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness in the relationships of the parties to a transaction.¹⁸ It was noted that while *ipso facto* avoidance would seem fair for commodities where the price fluctuated rapidly, the same might not be true in the case of industrial products where the price tended to be more stable.¹⁹

13. Several comments suggested that *ipso facto* (automatic) avoidance would prejudice the injured party. It was pointed out that the present text, under which silence by the injured party entails automatic avoidance of the contract, may put that party in such a position that the contract becomes avoided in spite of his express intention, e.g. if his letter requiring specific performance goes astray.²⁰ In connexion with article 62, providing for *ipso facto* avoidance when payment is not made on time, the view was expressed that such avoidance of the contract may be inconsistent with the real wishes and specific interests of the seller.²¹

14. It was also suggested that whenever the injured party, whose interests were aggrieved by the other party's misconduct, did not expressly declare his decision to avoid the contract it would be more justifiable to presume the injured party's will to retain the contract.²² The same idea is reflected in a proposal suggesting that articles 26, 30 and 62 of ULIS be amended to provide that in case of a fundamental breach of contract the injured party has the right to declare the contractual obligation dissolved; if, however, such a declaration is not made expressly, the

¹⁵ *Ibid.*, part two, section I, sub-section 1 C at p. 50. It may be noted in this connexion that, at variance with this commentary, the opinion was also voiced in the literature that *ipso facto* avoidance of the contract was a method that seemed to be diametrically opposed to the tendency evident in the ECE standard contracts and general terms of delivery. See B. Godenhjelm, *Some Views on the System of Remedies in the Uniform Law on International Sales*, Scandinavian Studies in Law, edited by Folke Schmidt, 1966, vol. 10, p. 27.

¹⁶ Report of the Special Commission, *op. cit.* (see above, note 10), part one, § 3 I B (1), volume II, p. 34.

¹⁷ A/CN.9/35, para. 94, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2. See also annex IV (Spain), third para.

¹⁸ Annex VI, third para. (USSR).

¹⁹ A/CN.9/31, para. 108, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1.

²⁰ Annex I (Hungary), first paragraph.

²¹ Annex II (Italy), part II, eighth paragraph.

²² Annex VI (USSR), fifth paragraph.

¹² See foot-note 56 below.

¹³ Commentary by Mr. André Tunc, Professor on the Faculty of Law and Economic Science at Paris, on The Hague Conventions of 1st July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale, p. 50 (art. 25).

¹⁴ *Ibid.*, part one, chapter IV, p. 28.

contractual obligation remains in force.²³ A further proposal directed to article 26 suggests deletion of the second sentence of article 26, paragraph 1;²⁴ the acceptance of this proposal would substantially reduce the applicability of *ipso facto* avoidance.

15. Some comments defended *ipso facto* avoidance and expressed the view that this kind of avoidance was, in certain sales, consistent with commercial practice. It was held that to require notice in every case would deprive one party of his rights if he had not complied with a formality that would be completely unnecessary in certain circumstances. Finally, the party who had to give notice would be obliged to retain proof of it; thus relying on a simple clarification of the situation by telephone would be rendered impossible.²⁵

16. The representative of one member of the Commission noted in connexion with article 26 that if the buyer did not exercise his choice to either claim performance or declare the contract avoided, it was to the buyer's advantage to lose the right to claim performance but not the right to claim damages. He, therefore, thought that the present solution of ULIS was satisfactory.²⁶ The representative of another member of the Commission suggested that if the injured party did not waive avoidance and did not require performance or payment of the price. The failure both to deliver the goods at the date fixed and to pay the price at the date fixed should entail immediate *ipso facto* avoidance of the contract.²⁷

(b) *Appropriateness of the term "ipso facto"*

17. It has been suggested that the term *ipso facto* is abstract and confusing. The difficulty of translating this expression was also noted.²⁸ Mention was made of the circumstance that in certain national laws this expression does not mean avoidance without declaration but that avoidance of the contract results from a declaration rather than court action.²⁹

18. Several proposals were made for the substitution of the term "*ipso facto*" by a more suitable one. The use of the following expressions was suggested: "shall be considered as cancelled,"³⁰ "*ipso jure* avoid-

ance", "automatic cancellation" and "automatic avoidance".³¹

I. THE USE OF THE CONCEPT OF "*ipso facto* AVOIDANCE" IN NATIONAL LAWS AND IN GENERAL CONDITIONS RELATING TO INTERNATIONAL TRADE

19. In order to ascertain whether "*ipso facto* avoidance" as used in ULIS is also used in existing laws and regulations governing the international sale of goods, this chapter endeavours to give a short review of provisions of (a) national laws and (b) general conditions relating to contracts of international sale.

(a) *The use of the concept in national laws*

20. As we have seen (para. 8), the concept of "*ipso facto* avoidance" is used in articles 25 and 61 of ULIS as a remedy which terminates the contract automatically with immediate effect without regard to the will of the parties; such approach is not known in any national law reviewed in the preparation of this study. The concept of the said term is used in other articles of ULIS (arts. 26, 30 and 62) as a subsidiary remedy to terminate the contract automatically but only when the injured party did not declare within a certain period that he wanted performance of the obligation. Such approach can be found in several national laws; these national laws, however, do not apply the concept as widely as does ULIS.

21. In this comparison of the rules of various legal systems with the rules of ULIS, it is important to note that the concept of *ipso facto* avoidance and somewhat similar concepts used in various national legal systems may relate to a number of specific legal issues. These include the following: (a) whether a party who is in breach of contract may continue with the performance of the contract (in other words, whether the innocent party may refuse to accept—i.e., reject—performance tendered by the party in breach); (b) whether an innocent party has lost the right to continue with performance of the contract following breach by the other party; (c) whether the innocent party may require performance (i.e., have a legal remedy for specific performance) from the party in breach; (d) whether an innocent party who has the right to refuse to accept performance by a party in breach make a "declaration" informing the other party of his action. It will be noted that these specific issues involve sharply distinct policies and consequences. For this reason, and because of the varying connotations under national law of the general legal concepts that are applicable in this area, it is not always clear whether these concepts provide answers to all, or only to some, of the specific issues stated above. However, in spite of the caution that is necessary in comparing the meaning and effect of the varying general rules of national law with the rules of ULIS, the following examination of national rules may be useful.

22. A national law which contains provisions on automatic avoidance of the contract that are similar to those of ULIS is the Swiss Code of Obligations.

²³ Annex IV (Spain), last paragraph. The Czechoslovak International Trade Code (Act No. 101 of 4 December 1963), in section 235, provides for a similar solution. The Code in the preparation of which due account was taken of the 1956 draft of the Uniform Law does not use the concept of *ipso facto* avoidance in any of its provisions although that concept was already used in the 1956 draft.

²⁴ Annex I (Hungary), third paragraph.

²⁵ A/CN.9/35, para. 96, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

²⁶ Annex III (Norway), para. 1. It is noted, however, that Norway has later submitted an amended text of chapter III of ULIS to the Working Group on the International Sale of Goods for consideration (A/CN.9/WG.2/WP.10/Add.1, annex XVIII) in which *ipso facto* avoidance had been removed.

²⁷ Annex V (Tunisia), para. 2.

²⁸ A/CN.9/35, para. 95, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

²⁹ Annex II (Italy), part I. It is noted in this connexion that some of the General Conditions prepared under the auspices of the Economic Commission of Europe give the same meaning to the said expression, e.g. General Conditions No. 410 (item 14.2) and No. 420 (item 14.2).

³⁰ A/CN.9/35, para. 95, UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

³¹ Op. cit. (see above note 15), vol. 10, p. 27.

Article 190 of the Code provides that in cases where the contract relating to commercial matters fixes a term for delivery and the seller is in default it is presumed that the buyer renounces the goods; if the buyer requires delivery he has to inform the seller of this request immediately after the expiry of the term fixed for delivery. The Italian Civil Code provides in article 1457 that in cases where performance by one of the parties within the term fixed is to be considered as essential for the interests of other party, within three days from the expiry of this term, the latter party has to give notice to the other informing him that he requires performance of the obligation; if he does not do so the contract is considered as avoided. A somewhat analogous provision is contained in section 525 of the Japanese Commercial Code providing that in cases where the object for which the contract was made cannot be attained unless it is performed at a fixed time or within a fixed period, and one of the parties allows the time to elapse without performance on his part, the other party shall be deemed to have rescinded the contract unless he immediately demands performance.

23. On the other hand, several national laws do not recognize automatic termination of the contract even in cases where the term of delivery is essential, e.g. in case of a so-called fixed-term contract where the contract provides expressly or impliedly that delivery has to take place at or before a certain date and not later. Thus, § 361 of the German Civil Code (BGB) provides that in case of such a contract "it is to be assumed, when in doubt, that the other party has the right to declare the contract avoided...". The same remedy is provided for, *inter alia*, in article 300 of the Hungarian Civil Code and in sections 235 and 287 of the Czechoslovak International Trade Code.

24. The British Sale of Goods Act of 1893 and related laws distinguish between a stipulation in a contract that is a "condition, the breach of which may give rise to a right to treat the contract as repudiated" and a stipulation that is a "warranty, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated". Under the Sale of Goods Act and related laws, when goods are tendered or delivered to the buyer, it seems that the buyer may exercise his right to refuse the goods only if he informs the seller of his action.³²

25. The laws of another group of countries only recognize automatic avoidance of the contract if the parties have agreed to such avoidance in their contract. Thus, e.g., section 290 of the Czechoslovak International Trade Code³³ stipulates that "if the contract provides for the extinction of an obligation arising from it, or for its repudiation by the buyer should the seller fail to perform his obligation within the time fixed in the contract, the obligation or the contract shall be extinguished as of the beginning of the seller's delay unless the buyer notifies the seller immediately after his

delay has begun that he insists upon the performance of the contract". A similar provision is contained in article 173 of the Law No. 2 of 1961 of Kuwait.

(b) *The use of the concept in general conditions of sale*

26. To test the conformity of *ipso facto* avoidance with commercial practice, the present study examines the use of this concept in general conditions of sale and standard contract forms. Paragraphs 27 to 29 below, give a short review of provisions of general conditions providing for termination of the contract. Paragraph 27 deals with the ECE general conditions and standard contract forms; paragraphs 28 and 29 examine formulations prepared by trade associations and similar organizations.

27. The general conditions and contract forms prepared under the auspices of the Economic Commission for Europe provide as follows:

Contract forms for the sale of cereals (Nos. 1-8): if either party refuses to fulfil his obligations within the time allowed by the contract, or fails to do so even within two further days after having received notice from the other party to fulfil the contract within those additional days, the injured party has no other remedy but to claim the difference between the contractual price and the actual price or value of the goods;

General conditions for timber (Nos. 410 and 420): in case of delay in delivery the buyer, *inter alia*, may terminate the contract "*ipso jure*"; in these forms, however, the term "*ipso jure*" has the meaning as terminating the contract by giving notice in writing to the seller "indicating the date when he [the buyer] will consider the contract as discharged";

General conditions for the supply of plant and machinery (Nos. 188 and 574): in case of delay in delivery the buyer may claim reduction of the price and if the goods remain undelivered even within an extended time-limit, he may terminate the contract by notice in writing to the seller;

General conditions for durable consumer goods and other engineering stock articles (No. 730): the buyer has similar rights as under the general conditions for the supply of plant and machinery;

General conditions for solid fuels (August 1958): the seller has the right to rescind the contract if the buyer does not remove the goods within an additional period agreed upon by the parties or allowed unilaterally by the seller; a similar right is granted to the buyer when the seller does not deliver the goods;

General conditions for citrus fruit (No. 312): the buyer is empowered to rescind the contract if the seller fails to deliver the goods within the contractual time-limit, or within an additional period of time established by the parties.

28. Of the general conditions of sale and standard contract forms prepared by trade associations, which were available to the Secretary-General in the preparation of the present study, only a few could be found which provided, as a remedy, for some kind of automatic termination of the contract. One of these is the London Jute Association's contract No. 3 of 1960 of the sale of fibres of origin other than Pakistan and India. This contract form may imply automatic termination of the contract by the stipulation in paragraph 12/B that "in the event of default in shipment or tender of documents" the seller shall pay, *inter alia*, a certain amount as liquidated damages. The only other

³² See sections 11(b), 35 and 36 of the 1893 Sale of Goods Act and similar provisions in the Indian Sales of Goods Act of 1930; in the Law of Australia (W. F. Clemens-A. Bonnici, *Rogers and Voornard's Mercantile Law in Australia*, 1967, p. 113) and the Ghanaian Sale of Goods Act of 1961.

³³ Act No. 101 of 4 December 1963.

forms found which provide for automatic termination of the contract are the standard contract forms Nos. 2, 3 and 4 of the Cereals Trade Association of the Hamburg Exchange. These forms stipulate that in case of delay, if neither of the parties informs the other of his insistence on specific performance, the obligations of the parties as regards delivery and acceptance cease to be valid after the expiration of a month from the last day of the agreed delivery period. (It is noted, however, that contract forms Nos. 7 and 7/a of the same association do not contain such provisions.) It should also be noted that these provisions seem to assume that performance is never tendered by the party in breach.

29. Many of the general conditions and standard contract forms which are available in the preparation of this report recognize automatic termination of the contract, but only in case of *force majeure* or other impossibility of performance. In other circumstances, termination of the contract is always subject to some kind of declaration or notice to this effect by the non-defaulting party. Such declaration or notice is required, *inter alia*, in the following formulations:

Cattle Food Trade Association, London: contract forms Nos. 1, 4, 6, 8, 9, 10, 15, 19, 22, 100, 101, 102, 103, 104.

The Incorporated Oil Seed Association, London: contract forms 67A, 71A and 76A (Nigerian goods); 22 and 23 (Manchurian soya beans); 28 and 29 (North American and Canadian linseed); 50, 65, 67, 68, 69, 70, 71, 73 (specific seeds);

Vereiniging voor den Coprahandel, Amsterdam: contract form No. 1, approved by the Philippine Copra Exporters Association;

Associazione Granaria, Milano: Italian contract for rice and broken rice No. 15;

Fédération Internationale du Commerce des Semences (FIS): Rules and usages for the international trade in agricultural seeds of 1968;

Federation of Oils, Seeds and Fats Associations, Ltd., London: all contract forms;

International Wool Textile Organization: International trade agreement applicable to contracts in woolen-spun yarns of 1959; International contract for woolcloth of 1960;

The International Association of Rolling Stock Builders and the European Builders of Internal Combustion Engine Locomotives: General conditions for the supply for export of railway rolling stock and combustion engine locomotives of 1958.

30. From the above short spot review of national laws and general conditions it may be concluded that while some national laws provide for certain aspects of automatic avoidance of the contract, general conditions of sale and standard contract forms which are used in international trade do not, as a rule, recognize that kind of termination of the contract. The very few exceptions which can be found relate to the sale of certain agricultural goods. It appears, therefore, that *ipso facto* avoidance of the contract is an approach that is inconsistent with the tendency evident not only in the ECE standard contracts and general terms of delivery (cf. foot-note 15 above) but, with a few exceptions, also in other general conditions of sale and standard contracts used in international trade. From these facts and from the circumstance that all formulations examined in the preparation of the present study were drawn up by organizations active in the promotion and facilitation of international trade, it could

be concluded that, although the concept of *ipso facto* avoidance is known in some form by a number of national laws, this device has not been accepted in the practice of international trade and, with a few exceptions, does not correspond to international usages.

IV. ANALYSIS OF THE USE OF THE CONCEPT OF "*ipso facto* AVOIDANCE" IN SPECIFIC ARTICLES OF ULIS

31. It may also be helpful to examine the use of *ipso facto* avoidance in specific articles of ULIS to analyse whether it protects adequately the interests of both parties in case of breach of the contract. Many of the objections made in the course of the Commission's proceedings stressed that the use of the concept in ULIS is vague and causes confusion and uncertainty as to the parties' rights and obligations; consequently, the following examination will also be concerned with this aspect of the question.

(a) Article 10 of ULIS: the concept of *fundamental breach*

32. As has been noted in paragraph 8 above, except for cases governed by articles 25 and 61, *ipso facto* avoidance is a remedy for "fundamental breach" of the contract with respect to time and place for delivery and payment of the price. Such *ipso facto* avoidance occurs automatically if the injured party fails to exercise his right to choose from the remedies available to him within a reasonable time or does not inform the other party of his decision promptly if he is requested to do so. In cases where the breach of the contract is a non-fundamental one, silence of the parties does not entail avoidance of the contract. The occurrence of *ipso facto* avoidance, therefore, depends on the fact whether the breach of contract in question is a fundamental or a non-fundamental one. Thus, automatic avoidance can operate effectively only if the definition in the Law of the concept of "fundamental breach" is clear and unambiguous. Without a clear definition the parties to a contract would not know what, under the Law, their rights and obligations are. Thus, the injured party could be in doubt as to whether: (a) he may choose between requiring performance or declaring the contract avoided because the breach of the contract was a fundamental one, or (b) he does not have such a choice because the breach of the contract was not a fundamental one and thus, notwithstanding his preference, the contract would remain in force. Similarly, if the injured party does not inform the defaulting party of the remedy he has chosen, the defaulting party could be in doubt as to whether (a) the contract has been *ipso facto* avoided on the ground that his breach of contract was a fundamental one or (b) the contract is still in force and he has to perform it because the breach of contract was not a fundamental one.

33. The definition of "fundamental breach" appears in article 10 of ULIS which provides as follows:

"For the purposes of the present Law, a breach of contract shall be regarded as fundamental whenever 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."

34. This definition gave rise to many objections. Thus, it was held that the articles left to the subjective judgement of the parties the determination of whether a fundamental breach occurred.³⁴ It was also noted that the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness rather than to unambiguity in the relationships of the parties to a transaction.³⁵ The opinion was also held that the definition contained in article 10 of the Law was too complex for effective application.³⁶ Several other comments relating to this article were against the use in the definition of the expression "reasonable person" and suggested the deletion of this term or the replacement thereof by a less vague term.³⁷ One representative suggested the substitution of the word "fundamental" by the word "major".³⁸

35. The above definition contains both subjective and objective elements: the breach is fundamental if

(a) A reasonable person in the same situation as the other [injured] party

(b) Would not have entered into the contract if he had foreseen the breach and its effects, provided that

(c) The foregoing was known or ought to have been known by the party in breach at the time of the conclusion of the contract. Let us examine each of these elements in turn.

36. It will be noted that the definition refers to the possible reaction of "a reasonable person in the same situation as the other party", and that the word "situation" covers both the character of the person and the factual situation in which he is placed;³⁹ these elements of the definition seem to be intended to render the character of the breach more objective. The injured party is always an existing person who, therefore, may act in a subjective manner, while a "reasonable man" is a fictive person who is considered to act always in a reasonable, i.e. in an objective manner. It must be remembered, however, that when a breach occurs in the course of a sales transaction the above test must be applied by the parties to guide their conduct. A party may be expected to think in a subjective manner influenced by his own point of view; he will not be fully aware of the exact situation of the other party at the conclusion of the contract. Thus, it is doubtful whether both parties would come to the same conclusion as to whether a reasonable person would have entered into the contract if he had foreseen the breach and its effects. While the test might help the judge to reach a fair decision, it hardly seems sufficiently precise to enable the parties to decide whether they should (and may) continue with performance of the contract.

37. As was noted in paragraph 34 above, many comments suggested that "reasonable person" be replaced by a more precise term. Expressions such as "a merchant engaged in international commerce", "most persons engaged in international trade", etc. were suggested.⁴⁰ In response, it was noted that the Uniform Law does not apply only to transactions concluded by merchants or by persons engaged in international trade. It would seem therefore that unless the scope of the law is restricted to commercial transactions, the present expression "a reasonable person in the same situation as the other party", is more appropriate than those suggested for its replacement.

38. The third and last criterion contained in the present definition of fundamental breach is that "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 concluded the contract. With respect to this criterion Tunc notes in his commentary⁴¹ that there are cases where because of the nature of the goods or because of other circumstances, the seller should know that punctual delivery is essential for the buyer; reference was made to a restaurateur who orders turkeys to be delivered on the morning of 24 December. In other situations, says the commentary, the seller may be entitled to think that the date provided in the contract has no fundamental importance for the buyer; consequently, if a buyer, for exceptional reasons, wishes to insist on observance of the precise date he should make this known to the seller at the time of the conclusion of the contract.

39. Under ULIS, delay in delivery is not the only kind of breach of contract that may amount to a fundamental breach of contract. Under the Law, breach of the contract may amount to a fundamental breach in any one, *inter alia*, of the following cases: (a) if delivery is to be effected by handing over the goods to a carrier and the goods had been handed over at a place other than that fixed (art. 32); (b) if the seller fails to effect delivery completely and in conformity with the contract (art. 45, para. 2); (c) if the seller fails to hand over documents at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over (art. 51); (d) if the seller fails on request, within a reasonable time, to free the goods from all rights and claims of third persons (art. 52, para. 3); and (e) if the buyer fails to pay the price at the date fixed (art. 62). While in some of these cases the party in breach could be expected to know at the conclusion of the contract what the reaction of a reasonable person would be if he had foreseen the breach of its effects, in other cases (e.g. where the buyer pays the price with some delay) it might prove difficult to know exactly what that reaction would be and, consequently, whether the breach of contract is to be considered as "fundamental".

40. Several comments of Governments (para. 32 above) came to the conclusion that the definition of fundamental breach in article 62 of ULIS is not suf-

³⁴ A/7618, annex I, para. 83.

³⁵ Annex VI (USSR), third para.

³⁶ A/CN.9/52, para. 87, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

³⁷ *Ibid.*, paras. 85 and 86; A/CN.9/WG.2/WP.6, paras. 65-69.

³⁸ A/CN.9/WG.2/WP.6, para. 70.

³⁹ *Op. cit.* (see above, note 13), p. 26, foot-note 2.

⁴⁰ For these and other proposals see A/CN.9/52, para. 86, UNCITRAL Yearbook, vol. II: part two, I, A, 2.

⁴¹ *Op. cit.* (see above, note 13), p. 26.

ficiently exact. It was noted that under ULIS the failure to pay the price at the date fixed was not a fundamental breach in all cases. Therefore, the judge must decide whether, in various factual situations, a fundamental breach had taken place. This, it was concluded, would inevitably lead to differences in interpretation as to what constituted a fundamental breach so that a fact constituting fundamental breach in one country (with a possible consequence of an *ipso facto* avoidance of the contract) in another country would have the opposite result.⁴² To avoid this uncertainty, it was suggested that the Law should provide that (unless the contract stipulates otherwise) non-payment would always constitute a fundamental breach.⁴³ Others suggested that this approach was too harsh; reference was made to the ECE general conditions under which non-payment on the due date was not considered to be a fundamental breach since an extension of one month was always granted.⁴⁴

41. From the considerations in paragraphs 33-39 above it may be concluded that because of the vagueness of the tests in the definition of the concept of fundamental breach as contained in article 10 of ULIS the definition as a whole lacks the precision necessary to enable one party to know whether the other party will continue with performance. Of course, this difficulty would not cause doubt on *ipso facto* avoidance if the definition of "fundamental breach" can be clarified so that the parties can know when such breach occurs. However, a wide variety of proposals submitted to improve the present definition have been found by other members of the Commission to be inadequate. It is doubtful that the definition can be rendered sufficiently clear so that a party will know whether the other party will refuse to perform the contract, in the absence of a declaration to that effect.

(b) *Limitation on remedy of specific performance: article 25 of the Uniform Law*

42. Article 25 of ULIS reads as follows:

"The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected".

43. The Special Commission that prepared the draft submitted at The Hague made the following comment:⁴⁵

"The draft at once rejects the *ipso facto* avoidance which allows the seller to recover his freedom automatically, perhaps contrary to the intent of the innocent buyer, subject to paying damages—and judicial avoidance which is in conformity with the traditions of certain countries but is contrary to business practice; . . . so the draft has adopted as the general rule avoidance by simple declaration on

the part of the buyer, but it allows avoidance *ipso facto* in certain exceptional cases where it cannot be prejudicial to him."

44. Article 25 applies wherever "it is in conformity with usage and reasonably possible for the buyer to purchase goods to which the contract relates." Under modern commercial practice such transactions are scarcely "exceptional cases"; *ipso facto* avoidance thus may have a much wider scope than was intended.

45. It is important to bear in mind that two different questions are at stake: (1) May the buyer force the seller to deliver goods which the buyer can readily acquire on the market? (2) If the buyer remains silent until the seller tenders the goods, may the buyer rightfully refuse to accept? Article 25 seems to have been designed to deal with the first of these questions, and answers it in the negative. When this result, as in article 25, also leads to *ipso facto* avoidance, a positive answer, perhaps inadvertently, is also given to the second question. As a consequence, a buyer need not inform the seller when he refuses to accept the goods. Without this information the seller may not receive important information concerning the need to re-despatch or resell goods which the buyer has refused to accept.

46. In analysing the rules of ULIS providing for *ipso facto* avoidance, it is also important to bear in mind that most contracts of international sale require the carriage of goods from the seller to the buyer. Often the goods must be transported for a substantial distance and the carriage will involve substantial time and expense. If the goods are shipped to the buyer when the parties have differing, but undeclared, views as to whether the contract has been avoided, unnecessary transportation costs may result; in some situations there may be misunderstanding as to whether the goods are accepted, with resulting deterioration of the goods and needless wharfage, demurrage or storage expenses.⁴⁶ These problems become acute when avoidance may occur *ipso facto*—i.e., without a declaration giving the other party this important information.

(c) *Breach as to date and place for delivery: articles 26 and 30 of ULIS*

47. Article 26, paragraphs 1 and 2, of ULIS⁴⁷ reads as follows:

"1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He

⁴⁶ Article 92 (2) in some circumstances requires the buyer to take possession [of the goods] on behalf of the seller. But this requirement is applicable only where this may be done "without payment of the price". And, even where article 92 (2) is applicable, there is no requirement that the buyer notify the seller.

The notice requirements of article 39 of ULIS are inapplicable for two reasons: (1) These requirements are confined to seller's breach with respect to "conformity of the goods"; (2) Notice of lack of conformity does not necessarily provide information concerning the action that will be taken as a result of the breach (i.e., a claim for damages versus refusal to accept).

⁴⁷ Article 26 of ULIS consists of four paragraphs. Paragraphs 3 and 4 are not reproduced here because their provisions do not affect directly the concept of *ipso facto* avoidance.

⁴² A/7618, Annex I, paras. 63 and 64, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

⁴³ A/CN.9/C.1/SR.7, p. 70.

⁴⁴ *Ibid.*, p. 71.

⁴⁵ Op. cit. (see above, note 10), vol. II, chapter I B, § 3, pp. 34-35.

shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

"2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided."

48. Article 30, paragraphs 1 and 2, of ULIS⁴⁸ reads as follows:

"1. Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided."

"2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided."

Article 26 provides for remedies as regards the date of delivery, while article 30 provides for remedies as regards the place of delivery. Paragraphs 1 and 2 of these two articles are parallel provisions. Under both articles the buyer has the right either to require performance by the seller or to declare the contract avoided; if he does not inform the seller of his decision within a reasonable time, the contract shall be *ipso facto* avoided. In respect of these articles, the Special Commission noted that it was important "not to allow the buyer to remain waiting, whilst he watches price fluctuations before making his election known".⁴⁹

49. One of the notes from Governments submitted on this topic⁵⁰ pointed out that the remedial system laid down in the Law confused two issues: (1) the right to require performance of the contract and (2) fundamental breach of contract. It was observed that the right to require performance derived from the contract. This note recommended that ULIS be amended so that in case of a fundamental breach the contractual obligation should remain in force unless the injured party declares the contract avoided. This recommendation, in effect, would remove *ipso facto* avoidance from the Law.

50. It may be advisable to consider whether acceptance of this recommendation would make it possible for the buyer to delay a decision while he "watches price fluctuations"—the reason given by the Special Commission (para. 47, above), for *ipso facto* avoidance.

51. In this connexion it should be noted that under ULIS, as it now stands, the seller can prevent the buyer from waiting by requesting him, under articles 26(2) or 30(2) to make known his decision promptly. If this remedy for delay in reaching a decision were deemed insufficient, a more direct approach to the problem could be found through a provision

addressed specifically to this problem. Such a provision could (1) deny buyer the remedy of specific performance if the buyer invokes this remedy following a delay during a period of fluctuating prices⁵¹ and (2) if damages are eventually requested, denying the benefit of added damages resulting from a change in the price while the buyer delayed his decision.⁵² Such a direct approach to the problem (if a problem exists) seems clearer and less likely to produce unintended consequences than the use of the doctrine of *ipso facto* avoidance.

52. Under articles 26 and 30 *ipso facto* avoidance occurs if: (a) the breach of contract was "fundamental" and (b) the buyer failed within "a reasonable time" to inform the seller of his decision regarding the remedy he had chosen. Both these conditions are subjective ones. As has been noted, one of the basic problems with respect to "*ipso facto*" avoidance is whether each party to the sales transaction is given sufficient guidance (in the absence of a declaration) as to the performance he may expect from the other party. The doubts that may arise in the application of the concept of "fundamental breach" in article 10 of ULIS have already been discussed (paras. 32 to 41, above). A further dimension of this problem arises from the fact that the operation of *ipso facto* avoidance also depends on whether a "reasonable time" has elapsed.

53. The Law does not define the expression "reasonable time" after the lapse of which the contract becomes *ipso facto* avoided, and indeed this concept may not be susceptible of precise definition. As a consequence, one of the parties may hold that the reasonable time within which the buyer was expected to make known his decision has already elapsed and thus the contract is to be considered as *ipso facto* avoided, while the other party may be of an opposite opinion. The various possibilities that may arise are outlined in the following paragraph.

54. Several possibilities may arise in the following common situation: The seller has delayed delivery of the goods for three weeks later than the date envisaged in the contract. (To simplify the analysis, it is assumed that the breach of the contract amounts to a "fundamental breach".) On these facts,⁵³ the following situations may arise:

(1) The seller may consider the contract *ipso facto* avoided because he did not get any request from the buyer to perform the contract and, in his opinion, three weeks are more than a "reasonable time" within which a request for performance should have been made. These possibilities arise:

(a) The buyer may be of the same opinion as the seller. On this set of facts there is no misunderstanding as to whether performance will occur.

⁵¹ There is danger for abuse only when there has been a substantial rise in price during a delay by the buyer prior to invoking the remedy of specific performance.

⁵² Delay by the buyer postponing the date as of which damages are measured prejudices the other party if the price has fallen during that period.

⁵³ Similar problems may arise in cases where the seller delivers (or despatches) the goods at another place than that fixed in the contract.

⁴⁸ Article 30 of ULIS consists of three paragraphs. Paragraph 3 is not reproduced here because its provisions do not affect directly the concept of *ipso facto* avoidance.

⁴⁹ Op. cit. (see above, note 10), vol. II, p. 34.

⁵⁰ Annex IV (Spain).

(b) However, the buyer may think that under the circumstances a "reasonable time" would be more than three weeks: let us assume that after four weeks the buyer requests the seller to perform the contract. On receiving this request the seller (i) may comply with the request; or (ii) may find it inconvenient or impractical to comply with the request because of redistribution of the goods on the basis of his assumption that the contract was *ipso facto* avoided.⁵⁴

(2) The seller may consider that the contract is still in force since he has received no complaint from the buyer concerning the delay nor a declaration of avoidance. If he is aware of the Law's rules on *ipso facto* avoidance (a knowledge that may not always be assumed in connexion with the day-to-day conduct of business transactions) he may believe that a "reasonable time" for the buyer's declaration has not expired. In such a case, the seller may "deliver" the goods: in the usual international transaction this would be accomplished by despatching the goods to the buyer by carrier. In such a case:

(a) If the buyer wishes to have the goods or if (on the basis of an analysis of the Law's rules on *ipso facto* avoidance) he concludes that under the rules of the Law he cannot declare the contract avoided because a "reasonable time" has not expired, he will accept the goods;

(b) If the buyer does not wish to accept the goods (a view that may be influenced by a drop in price during the initial three weeks or during the period required for shipment) or if he believes that a "reasonable time" has expired, he may refuse to accept the goods, even at the point of receipt after an extended international shipment. Under such circumstances substantial time may expire (and attendant expense and waste accrue) before the seller learns that the goods have not been accepted at the point of destination.⁵⁵

55. From the above analysis it can be concluded that because of the vagueness of the expression "reasonable time" used in articles 26 and 30 of the Law, the parties in common commercial situations cannot be sure of their rights and obligations under these articles. It will be recalled that, in the above situation, doubt is enhanced by the possibility of differing interpretations concerning whether a breach is "fundamental". It seems unlikely that drafting changes in the definitions of "reasonable time" and "fundamental breach" can render these terms sufficiently precise for each party to be able to assess his legal rights in the setting of *ipso facto* avoidance.

56. The structure of the remedial provisions of ULIS is such that similar provisions reappear in various

parts of the structure. Consequently, provisions similar to those already discussed reappear in articles 61 and 62, which provide for *ipso facto* avoidance, under some circumstances, when the buyer delays making a payment of the price. The analysis presented with respect to articles 25 and 26 is applicable to the parallel provisions in articles 61⁵⁶ and 62, and need not be repeated here.

57. These articles do present one special problem that has not yet been discussed. Under these articles remarkable (and probably unintended) consequences occur since, under a literal reading of these articles, avoidance can occur *ipso facto* (without the choice or any declaration by the seller) even after goods have been delivered to the buyer. This result may be illustrated in the setting of article 62, which provides:

"1. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

"2. Where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided."

58. It will be observed that, under article 62, the failure of the buyer to pay the price may lead to *ipso facto* avoidance of the contract even when the seller does not choose this remedy by a declaration. Comments and replies have called attention to possible surprising consequences of such *ipso facto* avoidance, with respect to delivered goods, which may redound to the benefit of the party in breach (the buyer) and to the detriment of the innocent party (the seller). Thus, it has been suggested that the buyer, because of his own breach, would destroy the seller's right to recover the price and would gain the right to return the goods to the seller,⁵⁷ and possibly to recover from the seller any payments the buyer has made.⁵⁸ Although these results are consistent with a literal reading of ULIS, it is difficult to suppose that they were deliberately chosen by the draftsmen; it is more likely that the above difficulties provide further examples of the hazards inherent in drafting a law in terms as general and abstract as "*ipso facto* avoidance".

⁵⁶ Article 61 of the Law reads as follows:

"1. If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation.

"2. The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be *ipso facto* avoided as from the time when such resale should be effected."

⁵⁷ Annex II (Italy), p. 5. Similarly Sweden, A/CN.9/11/Add.5, p. 4 and A/CN.9/31, pp. 44-45.

⁵⁸ A/7618, annex I, p. 82, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

⁵⁴ This alternative will seldom arise since businessmen will normally communicate with each other concerning steps in performance and difficulties that arise. However, *ipso facto* avoidance under ULIS assumes that such communication may not occur; hence this alternative is listed as a theoretical, if not probable, outcome.

⁵⁵ The circumstances in which a declaration may be dispensed with after shipment are not free of doubt in view of complications concerning (a) the relationship between articles 25 and 26 (3), and (b) the rules on whether "delivery" may occur when the shipment of the goods does not comply with the contract.

CONCLUSION

59. The one basic question that calls for a decision by the Working Group is whether avoidance of the contract should occur *ipso facto*, i.e., in the absence of a declaration by the injured party. Such a decision would then provide a basis for the review and revision of the various articles of ULIS that employ this approach. It is believed that a decision to delete *ipso facto* avoidance from the Law can be effectively implemented, but presenting a proposed redraft on this basis seems premature until the Working Group has (a) taken a decision on the desirability of retaining *ipso facto* avoidance and (b) acted on pending proposals for the consolidation and rationalization of the remedial structure of ULIS.

ANNEX I

Comments by Hungary

In our opinion the present regulation of *ipso facto* avoidance as provided for in article 26 of the ULIS may put even the buyer abiding by the contract in such a position that the contract becomes avoided in spite of his intention (e.g., his letter goes astray).

In order to avoid or reduce this risk, we suggest to modify the first sentence of paragraph 1 of article 26 of the ULIS to read as follows:

"1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may, within a reasonable time, either require performance by the seller or declare the contract avoided."

Furthermore we suggest to delete the second sentence of paragraph 1 of article 26 of the ULIS. Under such a regulation, according to the first sentence of paragraph 1 of article 26 of ULIS, the buyer has the right to choose between requiring the performance of the contract or declaring it avoided. Should the buyer not exercise his right within a reasonable time, or his letter is not received by the seller, then the seller shall act in accordance with paragraph 2 of article 26 of the Uniform Law.

ANNEX II

Comments by Italy

I

The *ipso facto* avoidance referred to in various articles of ULIS (for example, articles 25, 26, 30, 61 and 62) is contrasted with avoidance declared by one of the parties. In other words, the Uniform Law, setting aside recourse to judicial avoidance as a penalty for non-performance, makes provision for two forms of extra-judicial avoidance: one which requires the intervention of the interested party, who must inform the other party of his decision to avoid the contract, and the other which operates automatically when a determined factual situation provided for in the law comes to pass.

The question asked by the United Nations Commission on International Trade Law concerns precisely the concept of "*ipso facto* avoidance" in the context of the Uniform Law. In particular, the Commission wishes to know whether it would be appropriate to amend the English text by replacing the term "*ipso facto* avoidance" by the term "automatic cancellation" or "automatic avoidance".

In Italian law the term *risoluzione di diritto* (there is no such expression as *risoluzione di pieno diritto*) has a much

broader meaning than the equivalent term in the Uniform Law. It is used to describe the avoidance which operates without the need for judicial intervention, in cases where avoidance occurs automatically (for example, fundamental breach of one of the terms of the contract; article 1457 of the Civil Code) or in cases where intervention by the interested party is necessary (for example, when there is an express avoidance clause and the interested party declares that he wishes to make use of it; art. 1456, 2nd para. Civil Code).

In other words, while in Italian law the term *risoluzione di diritto* means extra-judicial avoidance, in the Uniform Law the term is used to define a subdivision of this concept, namely, avoidance which operates automatically, without the need for a communication from the interested party to the other party.

Hence the use of the term *risoluzione de plein droit* presents no difficulty of interpretation for the Italian legislator. On the one hand, we are in fact dealing with a *risoluzione di diritto* according to our own terminology; on the other hand, the narrower interpretation given to that term in the Uniform Law is quite clear from the distinction drawn between the declaration of the avoidance and the *ipso facto* avoidance. Consequently, there seems to be no need to change the wording, at least from the standpoint of the application of this provision to works of Italian jurists.

Of course, this does not exclude the possibility of using other terminology in amendments made necessary by the adoption of different wording in the English text. In my opinion, that should not change the meaning of the provisions quoted from the Uniform Law, where the term "*ipso facto* avoidance" is replaced by "automatic avoidance" or by any other phrase which makes it clear that such avoidance operates without the need for intervention by the interested party.

However, in the French text the word "*résolution*" should be maintained in any case because of its specific meaning in the Italian translation.

The foregoing concerns of course only the problem of the meaning of the term "*résolution de plein droit*", clarification of which was sought by the Commission; it does not deal with the subsequent problems of considering whether and within what limits it may be desirable to provide for automatic avoidance in the international sale of goods.

II

Article 62 of the Uniform Law on the International Sale of Goods annexed to The Hague Convention of 1964 states:

"Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided."

Here, we must stress that the first part of the above provision appears to be substantially in line with the principles of the Italian Civil Code on the avoidance of the contract through non-performance according to which (article 1453) the other party "has the option of requiring performance or avoiding the contract".

In fact, while the Italian Civil Code states that the avoidance follows the warning to perform the contract (art. 1454), the ULIS provision gives the seller the power to declare *sic et simpliciter* the contract avoided; however, a similar mechanism is also used in our law when there is an express avoidance clause (art. 1456 of the Civil Code) and hence its application should not cause any special difficulties in our system.

Similarly, it seems unnecessary to share the perplexity over the excessive generality of the concept of "fundamental breach of the contract". Indeed, no less general is the complementary

concept of "non-performance"—of minor importance considering the interests of the other party—adopted in article 1455 of the Italian Civil Code. Furthermore, scholars are becoming increasingly convinced that in the preparation of international conventions we must make greater use of elastic clauses, likely to be accepted by a greater number of countries because they can more easily be adapted to the normative and conceptual categories which exist already in individual legal systems.

The second part of this provision causes greater perplexity, not so much because of the vagueness of the term "reasonable time"—here we can use the same arguments as those applied to the use of the words "fundamental breach"—as because of the unfair situation to which the term might give rise in practice.

Supposing, for example, that the seller, having delivered the goods to the buyer and not having been paid within the period stipulated in the contract, allows a subsequent period of time to elapse out of sheer tolerance; in this case, the application of the principle of "*ipso facto* avoidance" would mean that the seller cannot require the buyer to perform the obligation of paying the price but only to hand back the goods (apart from the payment of damages which, under article 84 of the Convention, are limited to "the difference between the price fixed by the contract and the current price on the date on which the contract is avoided" and hence may amount to nothing).

We must also point out that "*ipso facto* avoidance" does not always have the natural sequel of allowing the seller to take back the goods. Often in international transactions raw materials are sold for subsequent processing and transformation. The seller can no longer re-possess them when they have already been used by the buyer in the production cycle. This case is covered in article 1519 of the Italian Civil Code which stipulates that "the seller, upon failure to pay, may repossess the goods sold so long as they are still held by the buyer and provided they are in the state in which they were at the time of delivery".

To sum up, therefore, the second part of the first paragraph of article 62, establishing "*ipso facto* avoidance" of the contract whenever the seller does not inform the buyer within a reasonable time of his choice between performance and avoidance, involves a "value judgement" of the omissive behaviour of the seller himself; but such a value judgement (or absolute legal presumption) which should be based on correspondence with *id quod plerumque accidit* would actually seem too rigid because in some cases it may prove to be against the real wishes and specific interests of the seller.

In the light of the foregoing, we would draw attention to the undesirable consequences to which the present formulation of that part of article 62 dealing with "*ipso facto* avoidance" might give rise and we suggest as a useful alternative the solution of this problem which may be found in article 1519 of the Italian Civil Code.

ANNEX III

Comments by Norway

In the opinion of the Norwegian Government the matter is one which cannot be discussed thoroughly without going deeply into the law of sales. However, the following suggestions are made:

1. According to article 26 of the ULIS, a number of remedies are available to the buyer when the seller does not deliver in time. Since it is desirable that the buyer exercises a choice between his remedies as soon as possible, particularly with regard to unaccepted goods, he is required to do so—even if not specially requested by the seller (as stated in para. 2)—within "a reasonable time", as stated in paragraph 1. The notification must come from the buyer, who is the aggrieved party, as the choice between remedies cannot well be left to the seller, who is the defaulting party.

If the buyer does not exercise his choice within a reasonable time, the legislator must do it for him, as one should not leave the seller in the awkward position of not knowing whether he should deliver or not. Otherwise the seller would have the risk, if he delivers, of being met with "avoidance" by the buyer, and, if he does not deliver, of encountering a claim for delivery long after the original time for delivery. It is generally to the advantage of the buyer that if he does not exercise his choice, he loses, not the right to claim damages, but the right to claim performance. This is the solution which is expressed in article 26 (1).

Although details can of course be discussed, the present solution seems satisfactory in the main. It should be stressed that the remedy "*ipso facto* avoidance" does not mean that the "contract is killed", since the buyer retains his right to claim damages (cf. art. 78, para. 1).

2. The same considerations apply largely to article 62 which concerns the position when the seller is the aggrieved party. However, the rules should not be exactly parallel to those in article 26, since there is a considerable practical difference between delivery of goods and payment of money. Movement of goods is expensive and often takes a long time, payment of money involves small costs and can be done quickly. These differences are not observed in the present text of article 62. It is therefore desirable to exclude the application of article 62 (1) ("*ipso facto* avoidance") when the goods have been delivered to the buyer. There are also further changes which are desirable, but which cannot be discussed without a thorough analysis of the whole section. However, in the opinion of the Norwegian Government, the proposals made at the first session of the Working Group on the International Sale of Goods and which are reproduced in paragraphs 98 to 101 of the report of the Working Group, could very well serve as a basis for further discussions on the subject.

3. The terminological question of substituting some other expression for "*ipso facto* avoidance" should be considered by those who are experts on English legal style.

ANNEX IV

Comments by Spain

In general, it can be said that the basic system laid down in the text of the Uniform Law to cover cases involving a fundamental breach of the contract by one of the parties in carrying out his obligation is that the other party may choose between requiring performance of the contract and declaring the contract avoided. However, if he does not inform the first party of his decision within a reasonable time, the contract is *ipso facto* avoided. This follows from articles 26, 30 and 62.

This system was the subject of some criticism in the Working Group on the International Sale of Goods. Some representatives stated, for instance, that the notion of "*ipso facto* avoidance" left considerable uncertainties, was abstract, confusing and difficult to translate into other languages. Other representatives, however, defended the retention of "*ipso facto* avoidance" in the text of the Law (A/CN.9/35, paras. 92-96).

When the question is seen in this light, two fundamental comments may be made on the aspect of the Uniform Law to which we have referred. First, the system laid down is confused, and second, it gives rise to uncertainty between the parties.

The system is confused for various reasons:

(1) The consequences of the fundamental breach appear to depend upon the declaration of the other contracting party requiring either performance or avoidance of the contract. But in reality, the basic principle is that the fundamental breach leads to *ipso facto* avoidance unless within a reasonable time the other contracting party states that he requires performance of the contract. This follows from the text of articles 26(1), 30(1) and 62(1). That being so, it would

have been simpler to state as a general principle that the contract is automatically avoided if the other party does not duly declare that he requires performance.

(2) In fact, the system laid down confuses the real consequences of the fundamental breach. Such a breach gives the injured party a new right, namely the right to avoid the contract. But it does not give rise to the right to require performance, because such a right may be exercised by both parties from the time the contract is concluded and as long as it is not avoided.

That being so, the Uniform Law creates confusion by placing on the same footing, as rights deriving from the fundamental breach, the right to require performance and the right to avoid the contract, because the fundamental breach gives rise only to the latter, since the right to require performance already exists. The logical system would therefore be that unless the injured party exercised the right to avoid the contract, which is the right created by the fundamental breach, the contractual obligation would remain in force, without the need for any declaration, and that consequently performance by the parties would be exigible.

But the Law lays down without justification a contradictory system. If the injured party wishes to keep the contractual obligation in force and to require performance of the contract, he must make an express declaration to that effect, since if he does not do so, the contract is automatically avoided. In other words, the right to require performance of the contract is presented as a right that may be exercised as a consequence of the fundamental breach, even though it arises not from the breach but from the conclusion of the contract. The right that is really linked to the fundamental breach is the right to avoid the contract.

(3) The system is complicated even further by the hypotheses that it may not be possible to require performance of the contract (article 25) or that there may be a reduction in the time allowed to make the declaration requiring performance (articles 26(2) and 30(2)).

Furthermore, the system causes uncertainty between the contracting parties. In fact, if the contract can be avoided without the need for a declaration, it is perfectly possible for it to be avoided as a result of facts of which neither party is aware. It should be remembered that the declaration of avoidance of the contract not only contains a declaration of intent, but also serves to place on record the facts that provide the basis for that declaration.

In view of the foregoing, it would seem advisable to amend the system laid down in articles 26, 30 and 62 of the Uniform Law.

The amendments should be based on the following concepts:

- I. The contract is binding on the parties until it is avoided.
- II. The failure of one contracting party to fulfil any of his obligations, if it constitutes a fundamental breach of the contract, gives the other party the right to declare the contractual obligation dissolved. If such a declaration is not made expressly, the contractual obligation remains in force.

ANNEX V

Comments by Tunisia

Articles 26 and 62 of the Convention relating to a Uniform Law on the International Sale of Goods, which deal especially with this notion of "*ipso facto* avoidance", provide as follows:

1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. The buyer must inform the seller of his decision within a reasonable time; it is in the event of his remaining silent that the contract is *ipso facto* avoided.

2. Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller

may either require the buyer to pay the price or declare the contract avoided. The seller must inform the buyer of his decision also within a reasonable time; otherwise the contract is *ipso facto* avoided.

These provisions call for the following comments:

(1) There are two procedures whereby the contract may be avoided. The first requires an express declaration by one of the parties (the buyer in article 26, the seller in article 62). The second requires that one of the parties should remain silent for more than "a reasonable time". This duality of procedure is unfortunate. It could give rise to many disputes, owing to the fact that there is a certain period during which the fate of the contract remains uncertain. This period coincides with what is called in the Convention the "reasonable time". If the seller does not deliver the goods at the date agreed upon in the contract, and if the buyer remains silent, the seller will find himself in an awkward situation, since the contract remains in force but might be avoided at any time by the buyer. It is true that the seller can request the buyer to make known his decision promptly; he can also deliver the goods before the buyer has stated his intentions (in which case the contract cannot be avoided), but this will not solve every problem, since it will still have to be determined what is meant by a "reasonable time", by "promptly", and so forth.

It would therefore seem more efficient to do away with this duality of procedure. The contract would be *ipso facto* avoided if, at the date fixed, the seller has not delivered the goods or the buyer has not paid the price. However, the buyer (article 26) or the seller (article 62) could waive *ipso facto* avoidance and grant an additional period of time for delivery of the goods or payment of the price.

This procedure is more advantageous:

(a) Firstly, because the fate of the contract is known as soon as the time allowed for delivery of the goods or payment of the price has expired. There will no longer be this period of uncertainty called a "reasonable time";

(b) Secondly, because "*ipso facto* avoidance" could be waived only through an express declaration by one of the parties. Under the existing text, it is the silence of one of the parties that may affect the fate of the contract; yet it is obviously conducive to greater security for parties to contracts that the fate of the agreements which bind them should be established as speedily as possible and in express form;

(c) Thirdly, it would be better that *ipso facto* avoidance should be the rule whenever one of the parties does not perform his obligation or is late in performing them.

(2) A particularly notable feature of articles 26 and 62 is their vagueness. Apart from the terms "a reasonable time" and "promptly" referred to above, which may give rise to contention, note should also be taken of another equally vague expression, namely, "a fundamental breach of the contract". Failure to deliver the goods and failure to pay the price can result in avoidance only where they amount to "a fundamental breach of the contract". Since the principal obligation of a seller is to deliver the goods within a fixed time and the principal obligation of the buyer is to pay the price at the agreed date, it is hardly conceivable that a party can fail to perform his obligations, or not perform them properly, without thereby rendering himself liable for a "fundamental breach of the contract". The use of this expression therefore seems pointless. In addition, it will give rise to many disputes.

To conclude, it is felt that the articles in question should be worded as follows:

"Article 26: Failure to deliver the goods at the date fixed entails *ipso facto* avoidance of the contract. The buyer may, however, waive avoidance and require performance by the seller.

"Article 62: Failure to pay the price at the date fixed entails *ipso facto* avoidance of the contract. The seller may, however, waive avoidance and require the buyer to pay the price."

ANNEX VI

Comments by the Union of Soviet Socialist Republics

We share the doubts already expressed by a number of other representatives regarding the wide use of the above concept that follows from the present wording of ULIS, particularly in articles 26(1), 30(1) and 62(1).

Perhaps, from the academic point of view the idea of treating the contract as avoided whenever one of the parties commits a certain "fundamental" breach and the other does not require performance "within a reasonable time", might seem to have the effect of ensuring a desired certainty of the mutual rights and obligations of the parties. Although it is evident that even in such a case situations are plausible which find no solution in ULIS or, anyway, give a rise to great complications, as was specifically illustrated by an example where the buyer following the delivery of the goods does not pay the price (see A/CN.9/35, annex II, para. 71).

However, apart from that or another specific shortcoming, it is thought that in practice the acceptance of this abstract concept in the form of a general rule might lead, in many cases, to confusion and vagueness rather than to unambiguity in the relationships of the parties to a transaction. Under the present text of ULIS "*ipso facto* avoidance" is provided to operate not upon the occurrence of certain factual circumstances (failure to delivery or pay at the date fixed, etc.), but is made dependent whether or not the respective breach is "fundamental", which would not be always easy for the parties to determine in a specific situation.

In addition, the rules of the above articles of ULIS, bound to ensure both the protection of the lawful interests of the unfaulty creditor and the certainty of the legal situation resulting from a breach by the debtor of his obligations, give preference in final analysis to the second task, or end; which solution, however, in the present context, objectively tends to operate to a considerable degree in the interests of a faulty debtor.

Eventually, a more effective solution of the problem, taking the balanced cognizance of both tasks, i.e. protection of the creditor's rights, on one side, and certainty in the relationships of the parties, on the other side, could be arrived at when proceeding from the basic prerequisite of stability of contractual relationships. Avoidance of the contract constitutes an act involving consequences too serious to have it inferred from the fact of the creditor's "silence", i.e. failure to make

a declaration, on his own initiative, of his intention to keep the contract alive. It is thought more justifiable to presume the creditor's will to retain the contract, whenever the creditor, whose interests are aggrieved by the debtor's misconduct, does not expressly declare his decision to avoid the contract. It would not be out of place to note that in a number of other articles ULIS proceeds from this very principle of the stability of the contractual obligations.

It goes without saying that certain provisions should be drafted to eliminate eventual abuses by the creditor of his right to avoid the contract, particularly with regard to the choice of the time for avoidance. Such a problem, however, could be solved in a satisfactory manner if the debtor who, following his fundamental breach of the contract, has not been notified by the creditor of the avoidance, is accorded the right to ask the creditor whether the latter still requires performance: in this case failure to answer within a reasonable time seems to justify treating the contract as avoided. The said right, of which the realization depends on the debtor himself and does not require much time under existing means of communication, would enable the debtor, at any moment as he thinks necessary, to ascertain the situation with respect to the fate of the contract and his contractual obligations. Besides, the burden of taking measures to ensure such clarity, would be put quite logically on the party in breach.

In addition, it could be stipulated that the debtor is not entitled to perform without asking first for the creditor's approval. Should the debtor effect performance without such an approval, the creditor is entitled to avoidance of the contract, provided that he declares promptly for it. Otherwise, as stipulated in paragraph 3 of article 26 and paragraph 3 of article 30 and as suggested rather than stipulated in article 62 of ULIS (para. 98 in A/CN.9/35), the creditor would lose the right to avoid the contract.

In the course of the previous discussions, some representatives who supported the concept of "*ipso facto* avoidance" referred to the fact that in "some sales" the concept would correspond to commercial practice (see, for example, A/CN.9/35, para. 96). However, it would hardly be appropriate thereunder to formulate this concept in ULIS in the form of a general rule, covering all sales contracts regulated by the Uniform Law. As to the "some sales" referred to above, it would be enough, in our opinion, to stipulate in articles 26(1), 30(1) and 62(1) of ULIS the right of the parties to specify in their transactions those breaches where the contract could be considered avoided *ipso facto*.

3. Analysis of comments and proposals relating to articles 18-55 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.10)*

CONTENTS

	Paragraphs
I. INTRODUCTION	1-4
General comment	5
II. ANALYSIS OF THE COMMENTS AND PROPOSALS	6-80
A. Article 18	6-8
B. Article 19	9-18
(a) Comments on paragraph 1	10-15
(b) Comments on paragraphs 2 and 3	16-18
C. Articles 20 to 23	19-23
D. Articles 24 to 32	24-31
E. Articles 33 to 37	32-46
F. Articles 38 to 40	47-58
G. Articles 41 to 49	59-64
H. Articles 50 and 51	65-69
I. Articles 52 and 53	70-76
J. Articles 54 and 55	77-80

* 3 December 1971.

I. INTRODUCTION

1. The United Nations Commission on International Trade Law at its fourth session, after consideration of the report of the Working Group on the International Sale of Goods on the work of its second session,¹ decided as follows:

"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;³¹

"(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 documents which are necessary for the continuation of its work."

³¹ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38. Yearbook of the United Nations Commission on International Trade Law, vol. I:1968-1970, part two, II, A.*

2. Pursuant to the above decision, the Working Group on the International Sale of Goods met during the fourth session of the Commission and decided, *inter alia*, as follows:

"2. At its third session, the Working Group will consider the following articles of ULIS:

"(a) Articles 18-55, on the basis of the reports to be submitted by representatives of members of the Commission on these articles;

"(b) Articles 1-17, in the light of the comments and suggestions of members of the Commission made at the fourth session of the Commission.

"3. The Working Group entrusts the representatives of its members set out below with the examination of the following chapters (subchapters) of ULIS:

"(a) Delivery (arts. 18 and 19)	Hungary, in co-operation with United Kingdom and Mexico
"(b) Date of delivery (arts. 20-22)	United States, in co-operation with France and Ghana
"(c) Place of delivery (art. 23)	
"(d) Remedies for the seller's failure to perform his obligations as regards the date and place of delivery (arts. 24 and 25)	Japan, in co-operation with India and Brazil
"(e) Remedies as regards the date of delivery (arts. 26-29) and remedies as regards the place of delivery (arts. 30-32)	
"(f) Lack of conformity (arts. 33-37)	USSR, in co-operation with United Kingdom and Tunisia
"(g) Ascertainment and notification of lack of conformity (arts. 38-40)	Austria, in co-operation with United States and Kenya
"(h) Remedies for lack of conformity (arts. 41-49)	France, in co-operation with Austria and Hungary
"(i) Handing over of documents (arts. 50 and 51)	India, in co-operation with Iran and France
"(j) Transfer of property (arts. 52 and 53)	United Kingdom, in co-operation with USSR and Mexico
"(k) Other obligations of the seller (arts. 54 and 55)	India, in co-operation with Iran and France

"The reports on the results of the examination should be submitted to the Secretariat by 15 July 1971.

"4. The Secretariat is requested to circulate the above reports to the representatives of the members of the Working Group for comments, by 15 August 1971.

"5. Representatives of the members of the Working Group who wish to comment on any of the reports are requested to submit their comments to the Secretariat by 30 September 1971.

"6. The Secretariat is requested

¹ A/CN.9/52.

"...

"(b) to prepare an analysis of the reports and the comments referred to in paragraphs 3 and 5 above, and submit it to the third session of the Working Group."

3. The following reports and comments relating to articles 18 to 55 have been submitted to the Secretary-General:

On articles 18 and 19

1. Comments and proposals of the representative of Hungary (annex I)
2. Comments and proposals of the representative of the United Kingdom (annex II)

On articles 20 to 23

3. Comments and proposals of the representative of the United States (annex III)

On articles 24 to 32

4. Comments and proposals of the representative of Japan (annex IV)

On articles 33 to 37

5. Comments and proposals of the representative of the USSR (annex V)
6. Comments and proposals of the representative of the United Kingdom (annex VI)

On articles 38 to 40

7. Comments and proposals of the representative of Austria (annex VII)
8. Comments of the representative of the United States on the proposals of the representative of Austria (annex VIII)
9. Response by the representative of Austria to the comments of the representative of the United States (annex IX)
10. Comments and proposals of the representative of Kenya (annex X)

On articles 41 to 49

11. Comments and proposals of the representative of France (annex XI)

On articles 50 and 51

12. Comments and proposals of the representative of India (annex XII)

On articles 52 and 53

13. Comments and proposals of the representative of the United Kingdom (annex XIII)
14. Comments and proposals of the representative of Mexico (annex XIV)
15. Comments and proposals of the representative of the USSR (annex XV)

On articles 54 and 55

16. Comments and proposals of the representative of India (annex XVI)

Comprehensive study of articles 18-49, 65 and 97

17. Comments and proposals of the representative of Mexico (annex XVII)

Comprehensive study of articles 18-55 and introductory note

18. Amendments proposed by Norway for the revision of ULIS chapter III: obligations of the seller (annex XVIII)

4. The proposals and comments made in the above reports that deal with a single issue or article are considered together in this analysis. This report also includes comments on articles 18 to 55 that appear in previous documents of the Commission. The text of the proposals and comments (annexes I-XVIII) appears in document A/CN.9/WG.2/WP.10/Add.1.

General comment

5. The representative of Austria expressed the view that the use in the text of ULIS of the word "promptly" results in a certain degree of inflexibility while the expression "reasonable time" causes ambiguity. It was suggested that this problem affects a large number of the articles of ULIS, and that the Working Group therefore should deal with this issue before taking up chapter III and the following chapters.²

II. ANALYSIS OF THE COMMENTS AND PROPOSALS

A. Article 18

6. Article 18 of ULIS reads:

"The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law."

7. This article states the principal obligations of the seller.³ The representative of the United Kingdom expressed agreement with this provision but noted that the provision was not sufficiently comprehensive because it did not take account of the obligations of the seller provided for in articles 54 (carriage and insurance of the goods) and 91 (preservation of the goods).⁴ The representative of Norway suggested some drafting changes in the text of the article. He further suggested that the requirement that the goods shall be in conformity with the contract which is now contained in article 19, paragraph 1, as an element of the concept of delivery, should be expressed in article 18 as a separate obligation of the seller.⁵ The text proposed by the Norwegian representative is as follows:

"The seller shall effect delivery of the goods in conformity with the contract, hand over any documents relating to the goods and transfer the property thereto, as prescribed by reference to trade terms or by other clauses of the contract or, in the absence of such provisions, by usage and the present Law."⁶

8. Some comments relating to the concept of delivery in article 19 of the Law may also bear on article 18. These comments are set out in paragraphs 10-14 below.

B. Article 19

9. Article 19 of ULIS reads:

"1. Delivery consists in the handing over of goods which conform with the contract.

² Annex IX, para. 3.

³ Commentary by Mr. André Tunc, p. 44.

⁴ Annex II, p. 1.

⁵ Annex XVIII, introductory note, para. 2.

⁶ *Ibid.*, text of art. 18.

"2. Where the contract of sale involves carriage of the goods and no other place for delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer.

"3. Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods."

(a) *Comments on paragraph 1*

10. The representative of the United Kingdom noted that in several articles of ULIS (e.g. in articles 65 and 75) the word "delivery" is used in a different concept than that defined in article 19. He considered that the definition in article 19 was really a definition of "making delivery" as contrasted with the definition of "taking delivery" in article 65.⁷

11. The question was raised whether "delivery" was a unilateral or a bilateral obligation. According to the opinion previously expressed by the representative of Spain, delivery "presupposes a bilateral act which consists of the seller's supplying the goods and the buyer's accepting them". Therefore, according to that opinion, delivery could not be regarded as an exclusive obligation of the seller.⁸ The representative of Mexico expressed the view that the provisions of ULIS failed to answer the above question by separating the obligation of the seller to effect delivery from the obligation of the buyer to take delivery.⁹ On the other hand, the representative of Hungary considered that it was clear from the Law that delivery was meant to be a unilateral act of the seller.¹⁰

12. The representative of Mexico expressed the view that there was a need for a definition in the Law of the notion "delivery". He suggested that the present definition in article 19, paragraph 1, be replaced by a definition providing that delivery is effected when the buyer has the "juridical possibility to dispose of the goods."¹¹ On the basis of this consideration he suggested the following text:

"The delivery consists in placing the goods at the disposal of the buyer in the terms of the contract."¹²

⁷ Annex II, comments on art. 19.

⁸ A/CN.9/11/Add.1, p. 29, see also A/CN.9/31, para. 99.

⁹ Annex XVII, para. 1.

¹⁰ Annex I, introductory para. (a).

¹¹ Annex XVII, para. 4.

¹² *Ibid.*, para. 6. It is noted in this connexion that the concept of the representative of Mexico that delivery should be considered as effected when the buyer has the juridical possibility to dispose of the goods was the underlying concept of the definition of "delivery" in the 1939 draft of the Law. This concept was expressed by Professor Ernst Rabel as follows: "Considering the many . . . types of commercial sales, the draft must define delivery in an abstract formula as the act by which the seller accomplishes all the acts (or the last of the acts) that he is required to do in order that the goods should come into the hands of the buyer or some person on his behalf." (UNIDROIT: Unification of Law, 1949, p. 63.) The same concept was reflected in art. 19, para. 1, of the 1939 draft adopted at the XIIth Session of the Council of UNIDROIT which reads as follows:

13. The above proposal was supported by the representatives of Hungary¹³ and the United Kingdom.¹⁴ In the same document the representative of the United Kingdom also suggested that all definitions relating to "delivery" be included in the "opening general chapter of the Law".

14. In contrast with the above view of Mexico, Hungary and the United Kingdom (para. 12 above), the representative of Norway suggested that the definition of "delivery" should retain the expression "handing over" and proposed that article 19, paragraph 1, read as follows:

"Delivery of the goods is effected by [consists in] the handing over of goods to the buyer or a person acting on his behalf."¹⁵

15. Several comments were made as regards the provision in article 19, paragraph 1, that "delivery" did not occur unless the goods conformed with the contract. In the view of the representative of the United States this limitation conflicted with articles 41 to 49.¹⁶ The representative of the United Kingdom held that this provision might cause anomalies—e.g. the goods would not be considered as "delivered" where they do not conform to the contract but the buyer decides to keep them and to reduce the price in accordance with article 41, para. 1(c), of the Law, or where under article 39 of the Law the buyer loses the right to rely upon the lack of conformity. The representative of the United Kingdom suggested that non-conformity should not be dealt with in terms of non-delivery.¹⁷ Similar suggestions were made by the representatives of Hungary¹⁸ and Norway who proposed that the presentation of the provisions on the seller's obligations should be based on the distinction between the seller's obligations as regards the handing over of the goods and the seller's obligations to deliver goods which conform with the contract.¹⁹

"Delivery is accomplished when the seller has done all the acts which he is bound to do in order that the goods be consigned to the buyer or a person authorized to receive them on his behalf. What acts are necessary for this purpose, depends on the nature of the contract."

Again the same concept was voiced at the 1951 Hague Diplomatic Conference. The Conference informed UNIDROIT of its opinion that it was advisable to examine the content of the obligation of the seller to deliver and of the suggestion made by some delegates in respect of this question according to which "the seller would fulfil his obligation to deliver, if he has accomplished every act incumbent on him in order that the goods may be handed over to the buyer." (Final Act of the Conference, UNIDROIT, Unification of Law, vol. III (1954), pp. 285, 287.)

¹³ Annex I, text on art. 19.

¹⁴ Annex II, comments on art. 19, para. 2.

¹⁵ Annex XVIII, text of art. 19, para. 1.

¹⁶ Annex III, in section entitled "Suggestions for consideration by the Working Group".

¹⁷ Annex II, comments on art. 19, paras. 6-7. It is noted that the Tunc commentary (p. 46) expresses the following view on this question: ". . . it may be difficult to know . . . if the delivery was of goods conforming to the contract. But these are simple questions of fact which could not be avoided in any other system, and which could in another system be enmeshed in difficult questions of law".

¹⁸ Annex I, para. 1(b).

¹⁹ Annex XVIII, introductory note, para. 2.

(b) *Comments on paragraphs 2 and 3*

16. The representative of the United Kingdom expressed the view that the opening words in paragraph 2 "where the contract of sale involves carriage of the goods" were not sufficiently precise because in practice delivery took place also in case of "ex works" contract, under which the seller was to hand over the goods to the carrier (who was to take them on behalf of the buyer), while under the above provision such handing over would not be considered as delivery since the contract did not involve carriage of the goods.²⁰ On the other hand, the representative of Norway retained paragraphs 2 and 3 of the Law, without change, in his revised text of article 19.²¹

17. The representatives of Hungary and Mexico suggested that paragraphs 2 and 3 of article 19 should be brought into line with the wording of paragraph 1 suggested in paragraph 4 above. The representative of Hungary suggested that the words "handing over" and "handed over" in paragraphs 2 and 3 be replaced by "placing at the disposal" and "placed at the disposal". The representative of Mexico followed this suggestion in respect of only paragraph 2; in respect of paragraph 3 he proposed that the above words should be replaced by the word "delivery". In addition to these changes, the representative of Hungary suggested that it should be stated in paragraph 2 that placing the goods at the disposal of the "first carrier or forwarding agent" should effect delivery. After the changes proposed by the representatives of Hungary and Mexico, respectively, article 19 would read as follows:

"2. Where the contract involves carriage of the goods and no other place of delivery has been agreed upon, delivery shall be effected by placing the goods at the disposal [Hungary: of the first carrier or forwarding agent] [Mexico: of the carrier] for transmission to the buyer.

"3. Where the goods [Hungary: placed at the disposal of the carrier or forwarding agent] [Mexico: delivered at the carrier] are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall in addition to [Hungary: placing the goods at the disposal of the carrier or forwarding agent] [Mexico: delivering the goods] send to the buyer notice of the consignment and, if necessary, some document specifying the goods."²²

18. The representative of the United Kingdom expressed the view that at the present stage the Working Group should only take a provisional decision as to the revision of the definition of "delivery" and should re-examine the definition in the context of subsequent articles of the Law.²³

C. *Articles 20 to 23*

19. Articles 20 to 23 of ULIS read:

"Article 20

"Where the parties have agreed upon a date for delivery or where such date is fixed by usage, the

seller shall, without the need for any other formality, be bound to deliver the goods at that date, provided that the date thus fixed is determined or determinable by the calendar or is fixed in relation to a definite event, the date of which can be ascertained by the parties.

"Article 21

"Where by agreement of the parties or by usage delivery shall be effected within a certain period (such as a particular month or season), the seller may fix the precise date of delivery, unless the circumstances indicate that the fixing of the date was reserved to the buyer.

"Article 22

"Where the date of delivery has not been determined in accordance with the provisions of articles 20 or 21, the seller shall be bound to deliver the goods within a reasonable time after the conclusion of the contract, regard being had to the nature of the goods and to the circumstances.

"Article 23

"1. Where the contract of sale does not involve carriage of the goods, the seller shall deliver the goods at the place where he carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.

"2. If the sale relates to specific goods and the parties knew that the goods were at a certain place at the time of the conclusion of the contract, the seller shall deliver the goods at that place. The same rule shall apply if the goods sold are unascertained goods to be taken from a specified stock or if they are to be manufactured or produced at a place known to the parties at the time of the conclusion of the contract."

20. The representative of the United States recalled the comments made at The Hague Conference in 1964 that these articles included "unnecessary detail" and they "could usefully be consolidated and simplified", and suggested the consolidation of articles 20, 21 and 22 into one article. He suggested further that in articles 20 to 32 instead of "delivery" the words "handing over" should be used and that article 19(2) and (3) "which do not deal with the definition of *délivrance* but with the handing over of the goods should go in article 23". The report of the representative of the United States noted that the representative of France dissented from this proposal.²⁴

21. The text suggested by the representative of the United States reads as follows:

"Article 20 [including 21 and 22]

"The seller shall* hand the goods over, without any formality:

"(a) if a date is fixed or determinable by agreement or usage, on that date; or

* The words 'be bound to' are omitted in conformity with article 23(1)."

²⁰ Annex II, comments on art. 19, paras. 8-9.

²¹ Annex XVIII, text of art. 19.

²² Hungary: annex I; Mexico: annex XVII, paras. 9 and 10.

²³ Annex II, last para.

²⁴ Annex III, in section entitled "Suggestions for consideration by the Working Group".

"(b) if a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

"(c) in any other case, within a reasonable time* after the conclusion of the contract.

"Article 23

"1. Where the contract of sale involves the carriage of goods and no other place has been agreed upon, the seller shall hand the goods over to the carrier for transmission to the buyer and shall, where they are not clearly marked with an address or otherwise appropriated to the contract, send the buyer notice of the consignment and, if necessary, some document specifying the goods. [Taken from present art. 19(2), (3).]

"2. Where the sale relates to specific goods and the parties knew that the goods were at a particular place at the time of the conclusion of the contract, the seller shall hand over the goods at that place. The same rule shall apply to unascertained goods to be taken from a specified stock or to be manufactured or produced at a place known to the parties at that time.

"3. In all other cases, the seller shall hand over the goods at the appropriate** place where he carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence."²⁵

*The words 'regard being had to the nature of the goods and to the circumstances' have been omitted in conformity with, e.g., articles 26(1) and 30(1).

**Inserted to take care of the place where the seller has several places of business."

22. It will be noted that the above draft states that the seller's obligation is to "hand over the goods". In connexion with articles 18 and 19, above, suggestions were made for alternative wording to express the seller's obligation; the Working Group may wish to bear in mind any decision it has taken on this point in considering the above draft.

23. The representative of Norway suggested the reorganization of articles 20 to 23 and some minor drafting changes in article 23. Under his proposal the Law would deal first with the place of delivery and with the date of delivery. Accordingly, article 23 of the present Law should precede articles 20 to 22.²⁶

D. Articles 24 to 32

24. Articles 24 to 32 of ULIS read:

"Article 24

"1. Where the seller fails to perform his obligations as regards the date or the place of delivery, the buyer may, as provided in articles 25 to 32:

"(a) require performance of the contract by the seller;

²⁵ Ibid.

²⁶ Annex XVIII, articles 20 to 23.

"(b) declare the contract avoided.

"2. The buyer may also claim damages as provided in article 82 or in articles 84 to 87.

"3. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

"Article 25

"The buyer shall not be entitled to require performance of the contract by the seller, if it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. In this case the contract shall be *ipso facto* avoided as from the time when such purchase should be effected.

"(a) REMEDIES AS REGARDS THE DATE OF DELIVERY

"Article 26

"1. Where the failure to deliver the goods at the date fixed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

"2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided.

"3. If the seller has effected delivery before the buyer has made known his decision under paragraph 1 of this article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.

"4. Where the buyer has chosen performance of the contract and does not obtain it within a reasonable time, he may declare the contract avoided.

"Article 27

"1. Where failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.

"2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period shall amount to a fundamental breach of the contract.

"Article 28

"Failure to deliver the goods at the date fixed shall amount to a fundamental breach of the contract whenever a price for such goods is quoted on a market where the buyer can obtain them.

"Article 29

"Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with article 82.

“(b) REMEDIES AS REGARDS THE PLACE OF DELIVERY

“Article 30

“1. Where failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract, and failure to deliver the goods at the date fixed would also amount to a fundamental breach, the buyer may either require performance of the contract by the seller or declare the contract avoided. The buyer shall inform the seller of his decision within a reasonable time; otherwise the contract shall be *ipso facto* avoided.

“2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the contract shall be *ipso facto* avoided.

“3. If the seller has transported the goods to the place fixed before the buyer has made known his decision under paragraph 1 of this article and the buyer does not exercise promptly his right to declare the contract avoided, the contract cannot be avoided.

“Article 31

“1. In cases not provided for in article 30, the seller shall retain the right to effect delivery at the place fixed and the buyer shall retain the right to require performance of the contract by the seller.

“2. The buyer may however grant the seller an additional period of time of reasonable length. Failure to deliver within this period at the place fixed shall amount to a fundamental breach of the contract.

“Article 32

“1. If delivery is to be effected by handing over the goods to a carrier and the goods have been handed over at a place other than that fixed, the buyer may declare the contract avoided, whenever the failure to deliver the goods at the place fixed amounts to a fundamental breach of the contract. He shall lose this right if he has not promptly declared the contract avoided.

“2. The buyer shall have the same right, in the circumstances and on the conditions provided in paragraph 1 of this article, if the goods have been despatched to some place other than that fixed.

“3. If despatch from a place or to a place other than that fixed does not amount to a fundamental breach of the contract, the buyer may only claim damages in accordance with article 82.”

25. The representative of the United States noted that all reports submitted by members of the Working Group were concerned with specific articles or questions; consequently, none of these reports touched upon more general questions as to the remedial system of the Law.²⁷

26. In this connexion, the Working Group may wish to examine article VII of the Convention and article 16 of the Uniform Law providing that a court shall not be bound to enter or enforce a judgement providing for specific performance except in cases in

which it would do so under its law in respect of similar contracts of sale not governed by the Uniform Law. In chapter III, ULIS provides for specific performance in a number of articles (e.g. art. 24, para. 1(a), art. 26, paras. 1 and 4, art. 27, art. 30, para. 1, art. 31, etc.). However, as a result of article VII of the Convention and article 16 of ULIS, the specific provisions of ULIS are not applicable in cases where in respect of similar contracts the *lex fori* does not provide for specific performance. The Working Group may wish to consider whether this situation would cause uncertainty as to the enforceability of the buyer's request for performance.

27. The representatives of Japan and of Norway suggested that it was unnecessary to make any distinction between the failure to deliver the goods at the date fixed and the failure to deliver the goods at the place fixed.²⁸ To remove this distinction they suggested that articles 30 to 32 dealing with remedies as regards the place of delivery should be deleted and that articles 24 to 29 should be amended as set out in paragraphs 29 and 31 below.

28. These representatives suggested further that substantive changes be made in the remedial system of the Law. Both representatives proposed that “*ipso facto* avoidance” should be deleted.²⁹ The representative of Japan noted that this concept might cause disagreements and disputes between the parties due to the uncertainty under the present language of the Law as to the exact time when such avoidance occurred.³⁰ This representative expressed the opinion that it was basically the buyer's right to cancel the contract if the seller committed a breach but suggested that in case where the buyer requires performance without indicating the date within which such performance has to take place, he should be required to warn the seller of his intention to cancel the contract if the seller does not perform the contract within a reasonable time.³¹

29. The text of articles 24 to 29 as suggested by the representative of Japan reads:

“Article 24

“1. Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may, as provided in articles 25-[28]:

“(a) require performance of the contract by the seller;

“(b) declare the contract avoided;

“(c) purchase the goods, after the declaration of avoidance of the contract, to replace those to which the contract relates.

“2. [No change.]

“3. [No change.]

“Article 25

“The buyer shall not be entitled to require performance of the contract by the seller, if it is in

²⁸ Japan: annex IV, para. II.6; Norway: annex XVIII, introductory note, para. 3.

²⁹ Japan: *ibid.*, para. II.1; Norway: *ibid.*, para. 5(e).

³⁰ *Ibid.*

³¹ *Ibid.*, para. 4.

²⁷ Annex III, in section entitled “Scope and related questions”.

conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.

"Article 26

"1. Where the failure to deliver the goods at the date or place agreed amounts to a fundamental breach of the contract, the buyer may either require performance by the seller or declare the contract avoided. He may grant the seller an additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided or require performance.

"2. Where the buyer requires performance without specifying length of time, the seller may effect delivery within a reasonable time. To avoid the contract, the buyer shall give a warning to the avoidance of contract. If the seller still fails to deliver, the buyer may declare the contract avoided.

"3. If the buyer does not inform the seller of his decision in the case of paragraph 1 of this article and the seller requests the buyer to make known his decision, the seller may effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

"4. Where the buyer does not specify the period of time for performance under paragraph 2 of this article and the seller requests the buyer to make known his date, the seller shall be entitled to effect delivery unless the buyer does not reply promptly from the moment when the request has arrived and the contract cannot be avoided.

"Article 27

"1. Where failure to deliver the goods at the date or place agreed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to require performance of the contract by the seller.

"2. The buyer may grant the seller additional period of time. If the seller fails to deliver within this period, the buyer may declare the contract avoided.

"3. Where the buyer does not specify the period of time for performance under paragraph 2 of this article, the delivery and the avoidance of contract shall be governed by the provisions of paragraphs 2 and 3 of article 26.

"Article 28

"[Deleted]

"Article 29

"[No change]"³²

30. The representative of Norway pointed out that the rules on remedies were not presented in a systematic manner; rules relating to the same remedy were contained in different articles. He, therefore, suggested that each of the various remedies should be dealt with in a separate article. The representative of Norway also noted that the parallel remedial provisions in

article 24 *et seq.* and in article 41 *et seq.* needed to be harmonized both as regards form and substance.³³ For similar reasons, the representative of the United States suggested the exploration of the question whether it was desirable to maintain the sharp distinction between the remedies as to (a) date and place, and (b) conformity of the goods.³⁴

31. The text of articles 24 to 29 as proposed by the representative of Norway reads:

"Article 24 [cf. ULIS art. 24 and art. 26, para. (3)]

"1. Where the seller fails to perform his obligations as regards delivery, the buyer may, as provided in articles 25 to 28:

"(a) require performance of the contract by the seller;

"(b) declare the contract avoided.

"2. The buyer may also claim damages as provided in article 82 or in articles 84-87, [No change.]

"3. If the seller has effected delivery of the goods, the buyer shall lose his rights to remedies [as regards delivery] if he has not given the seller notice thereof promptly after he has received the goods. The buyer shall lose his right to declare the contract avoided, if he does not exercise it promptly after he has received the goods.

"4. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace. [No change.]

"Delete subtitle (a)

"Article 25 (performance of the contract) [cf. ULIS arts 25, 26, 27]

"1. The buyer may require performance of the contract by the seller, *except in cases where:*

"(a) the seller is in no position to perform the contract; or

"(b) it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates.

"2. If the buyer requires the seller to perform the contract, he may grant the seller an additional period of time of reasonable length for such performance.

"3. The buyer shall lose his right to require performance of the contract if he does not exercise it within a reasonable time after the expiry of the time for delivery.

"4. Subject to the provisions of articles 26 and 27 the seller shall retain, after the date fixed for the delivery of the goods, the right to effect delivery.

"Article 26 [cf. ULIS art. 26, paras. 1 and 2]

"1. If the buyer does not obtain performance of the contract in accordance with the provisions of article 25, he may insist on his right to performance or declare the contract avoided in accordance with the provisions of article 27.

³³ Annex XVIII, introductory note, para. 4.

³⁴ Annex III, in section entitled "Scope and related questions".

³² *Ibid.*, suggested text.

"2. If the seller requests the buyer to make known whether he requires performance or will declare the contract avoided, and the buyer does not make known his decision promptly, the contract shall be considered to be avoided.

"Article 27 (avoidance of the contract)

[ULIS arts. 26, 27, 28]

"1. Where the seller's failure to perform his obligations as regards delivery amounts to a fundamental breach of the contract, the buyer may declare the contract avoided.

"2. The buyer may also declare the contract avoided on account of failure to deliver the goods at the date fixed whenever a price for such goods is quoted on a market where the buyer can obtain them.

"3. Where, in accordance with article 25, the buyer has required the seller to effect performance, the buyer may [always] declare the contract avoided after the expiry of the additional period of time fixed by the buyer or, failing this, of a reasonable time after he has made such request. Notwithstanding, the provisions of paragraphs 1 and 2 of this article, the buyer is not entitled to declare the contract avoided until after such period has expired.

"Article 28 [as ULIS art. 29]

"Where the seller tenders delivery of the goods before the date fixed, the buyer may accept or reject delivery; if he accepts, he may reserve the right to claim damages in accordance with article 82." [No change.]

E. Articles 33 to 37

32. Article 33 of ULIS reads:

"1. The seller shall not have fulfilled his obligation to deliver the goods where he has handed over:

- "(a) part only of the goods sold or a larger or a smaller quantity of the goods than he contracted to sell;
- "(b) goods which are not those to which the contract relates or goods of a different kind;
- "(c) goods which lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith;
- "(d) goods which do not possess the qualities necessary for their ordinary or commercial use;
- "(e) goods which do not possess the qualities for some particular purpose expressly or impliedly contemplated by the contract;
- "(f) in general, goods which do not possess the qualities and characteristics expressly or impliedly contemplated by the contract.

"2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material."

33. The representative of the USSR held that, except for subparagraph (d), all subparagraphs of this article dealt basically with the same question: whether or not the goods conform to the express or implied requirements of the contract. Consequently, there was no need for detailed enumeration of specific cases of non-conformity; in this connexion it was noted that under one of the subparagraphs the goods would be considered as conforming with the contract while under another subparagraph they would not, e.g. goods which conformed to the seller's sample (subpara. (c)) might not possess the qualities required for some particular purpose contemplated by the contract (subpara. (c)). As a consequence, the representative of the USSR suggested the deletion of article 33, paragraph 1, since its substance is covered by article 19, paragraph 1, or, at least, the deletion of subparas. (b) and (c) the provisions of which are self-evident.³⁵

34. The representative of the United Kingdom suggested that the differentiation in subparagraph 1(d) between "ordinary use" and "commercial use" was unclear. In his opinion a reference to "the qualities necessary for ordinary use" would suffice.³⁶ He also thought that there was a considerable overlapping between sub-paras. 1(e) and (f) which could be eliminated by reference in para. (e) to "some unusual purpose which the buyer had made known to the seller".³⁷

35. The representative of Norway suggested the following language to replace the introductory part of the article:

"The seller shall not have fulfilled his obligation as regards the conformity of the goods where he has handed over:"³⁸

36. Article 34 of ULIS reads:

"In the cases to which article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods."

37. The representatives of the USSR and of the United Kingdom held that this article was not clear.³⁹ In the view of the representative of the United Kingdom, the provision did not indicate whether it was the remedies agreed upon in the contract by the parties or those provided for in the *lex fori* or the proper law of the contract which were to be understood under "other remedies" referred to in the article. He therefore suggested the deletion of the article.⁴⁰ The representative of the USSR was of the opinion that this article would be interpreted as "forbidding the parties to the contract themselves to agree to some other remedies" in addition to those provided for in ULIS. In order to avoid this interpretation he suggested that at the end of the article

³⁵ Annex V, para. 1.

³⁶ Annex VI, para. 5.

³⁷ *Ibid.*, para. 6.

³⁸ Annex XVIII, text, of para. 33.

³⁹ According to the Tunc Commentary, this provision "is in particular intended to preclude the possibility of a party who has acquired goods relying on a general theory of nullity based on mistake as to the substance of the goods. Article 8, in limiting the field of the Uniform Law, would otherwise have allowed a person acquiring goods to avail himself of this doctrine, if article 34 did not prevent it." Tunc Commentary, p. 56.

⁴⁰ Annex VI, para. 8.

the following words should be added: "except those provided for by agreement between the parties or by any usage".⁴¹

38. Article 35 of ULIS reads:

"1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes. However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.

"2. The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in paragraph 1 of this article if it was due to an act of the seller or of a person for whose conduct he is responsible."

39. Drafting proposals were submitted with respect to this article. The representative of Norway suggested that the second sentence in paragraph 1 should be deleted and that in paragraph 2 the word "responsible" be substituted for the word "liable".⁴² The representative of the USSR suggested that after the words "was due to an act" in paragraph 2 there should be added the words "or failure to act".⁴³ The representative of the United Kingdom noted that article 35 was too complex; this article should be simplified if simplification of the definition of delivery is agreed on.⁴⁴

40. The representatives of the USSR⁴⁵ and of the United Kingdom⁴⁶ noted that the present text of the Law did not contain any provision as to guarantees of quality. Consequently, in the view of the representative of the USSR, if a defect in the goods was discovered within the guaranteed period but after the risk had passed to the buyer, the seller would be liable only under the conditions laid down in article 35, i.e. if the defect "was due to an act of the seller or of a person for whose conduct he is responsible". He consequently suggested that paragraph 2 of article 35 be amended to read as follows:

"The seller shall be liable for the consequences of any lack of conformity occurring after the time fixed in the preceding paragraph if it was due to an act or failure to act of the seller or of a person for whose conduct he is responsible, or if it is covered by a guarantee granted by the seller, provided that it was not due to an act of failure to act of the buyer or of a person for whose conduct he is responsible."⁴⁷

41. Article 36 of ULIS reads as follows:

"The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in subparagraphs (d), (e) or (f) of paragraph 1 of article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity."

42. No comment was made with respect to this article. It is noted, however, that if the Working Group deletes or modifies any of subparas. (d), (e) or (f) of paragraph 1 of article 33 it may need to re-examine the references to these subparagraphs in article 36.

43. Article 37 of ULIS reads as follows:

"If the seller has handed over goods before the date fixed for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense."

44. The representative of the USSR held that the seller should only be allowed to avail himself of the right provided for in article 37 if there is no objection on the part of the buyer. He suggested further that the word "unreasonable" was rather vague and should be replaced by the word "material". Accordingly, he suggested that the last half sentence of the article, commencing with the word "provided", should read as follows:

"... provided that the exercise of this right does not cause the buyer either material inconvenience or material expense and takes place before the seller has received any different instructions from the buyer.

In any event, the exercise of the above right by the seller shall not affect the buyer's right to claim damages in accordance with article 82."⁴⁸

45. The representative of the United Kingdom suggested that article 37 should be redrafted to read:

"If the seller has handed over goods before the date fixed for delivery but the goods which have been handed over are inadequate (either in quality or quantity) to fulfil the contract, he may at any time up to that date deliver further goods or substitute other goods or remedy defects in the goods already handed over unless he thereby causes unreasonable inconvenience or unreasonable expense to the buyer."⁴⁹

46. The representative of Mexico suggested that the expressions "handed over" and "handing over", where they were used not to express physical handing over but delivery, should be replaced by the word "delivery".

F. Articles 38 to 40

47. Articles 38 to 40 of ULIS read as follows:

"Article 38

"1. The buyer shall examine the goods, or cause them to be examined, promptly.

"2. In case of carriage of the goods the buyer shall examine them at the place of destination.

"3. If the goods are redespached by the buyer without trans-shipment and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redespach, examination of the goods may be deferred until they arrive at the new destination.

⁴¹ Annex V, para. 2.

⁴² Annex XVIII, text of art. 35.

⁴³ Annex V, para. 4.

⁴⁴ Annex VI, para. 11.

⁴⁵ Annex V, para. 4.

⁴⁶ Annex VI, para. 11.

⁴⁷ Annex V, para. 4.

⁴⁸ Annex V, para. 3.

⁴⁹ Annex VI, para. 13.

"4. The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.

"Article 39

"1. 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. If a defect which could not have been revealed by the examination of the goods provided for in article 38 is found later, the buyer may nonetheless rely on that defect, provided that he gives the seller notice thereof promptly after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.

"2. In giving notice to the seller of any lack of conformity, the buyer shall specify its nature and invite the seller to examine the goods or to cause them to be examined by his agent.

"3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

"Article 40

"The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose."

48. Some of the comments made on these articles relate to more than one article. It seems therefore appropriate first to set out the comments which are of a more general character. This will be followed by comments on specific articles, and then by revised drafts of articles 38 to 40 suggested by members of the Working Group.

49. The representative of the United States held that articles 38 and 39 were too strict and inflexible. Thus the requirements as to inspection were inflexible. In addition, where the buyer failed to notify the seller promptly of the lack of conformity he would not only lose any right to reject the goods but he would also lose the right to claim a price adjustment if he kept the goods. The representative of the United States suggested that article 38 should be deleted or, in any event, should be redrafted to take into consideration the question of latent defects.⁵⁰ The language of the articles as suggested by the representative of the United States is reproduced in paragraph 57 below.

50. The representative of Austria objected to the above suggestion that time-limits within which the buyer had to notify the seller of the defects of the goods should vary according to the action of the buyer

(e.g., rejection versus acceptance and claim for damages).⁵¹ He also expressed disagreement with the text proposed by the representative of United States.⁵²

51. In respect of article 38, the representative of Japan, at the second session of the Commission, expressed the opinion that the use of the term "promptly" might give rise to uncertainties in cases where the buyer is a middleman and he cannot examine the goods "at the place of destination". Attention was also directed to cases where such a buyer having received goods by ship must forward the goods to the consumer by rail or road; it was noted that in such cases the buyer cannot meet the requirement of redespaching the goods "without trans-shipment".⁵³ The representative of Austria suggested that this uncertainty be remedied by specifying that in case of carriage of the goods, the buyer's obligation to examine the goods should only commence from the time when the goods arrived at their place of destination.⁵⁴

52. The Government of Norway also commented on the restriction in article 38, paragraph 3, in cases of trans-shipment, and noted that this provision was not appropriate where the goods were shipped in containers. Instead, when there was trans-shipment examination before redespach should not be required where this would cause to the buyer unreasonable or disproportionate inconvenience.⁵⁵ The representative of Austria, while supporting the idea that the present text of ULIS was not apt to cover shipments in containers, did not agree with the above proposal of the Norwegian Government. He suggested that trans-shipment of goods in containers should not be considered a trans-shipment.⁵⁶ The text, as suggested by the representative of Austria, is reproduced in paragraph 55 below.

53. In connexion with the possible inclusion in the text of a separate provision on containers, the representative of the United States noted that the word "container" was not sufficiently clear since it could be read to also include other receptacles, e.g. bottles, cans, etc.⁵⁷

54. With respect to article 40, the representative of Austria proposed that the expression "ought to have known" should be substituted for "of which he could not have been aware", in the French text the expression "*et qu'il n'a pas fait connaître*" should be substituted for "*et qu'il n'a pas révélés*",⁵⁸ since the proposed language would conform more closely to the language of other articles of ULIS.

55. The representative of Austria proposed the following amendments to articles 38 to 40 of ULIS:⁵⁹

Article 38

Paragraph 2

Revised text: "In case of carriage of the goods the buyer shall examine them promptly after their arrival at the place of destination."

⁵¹ Annex IX, para. 2.

⁵² *Ibid.*, para. 4.

⁵³ A/7618, annex I, para. 89 and A/CN.9/31, para. 114.

⁵⁴ Annex VII, para. 2.

⁵⁵ A/CN.9/11, pp. 24-25 and A/CN.9/31, para. 115.

⁵⁶ Annex VII, para. 2(2).

⁵⁷ Annex VIII, para. 1.

⁵⁸ Annex VII, paras. 1-2.

⁵⁹ *Ibid.*, paras. 2-3.

⁵⁰ Annex VIII, paras. 2 to 4.

Paragraph 3

Add to the present text: "The redespach of the goods by another means of transport without the goods being removed from a container shall be considered to be redespach without trans-shipment."

Article 40

Revised text: "The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew or ought to have known and of which he did not inform the buyer."

56. The representative of Kenya, while expressing his agreement with the amended version of article 38(3), as proposed by the representative of Austria, noted that the omission of the word "promptly" in the revised text of article 38(2) would make no material difference.⁶⁰

57. The representative of the United States suggested the following language:⁶¹

"Article 38

"1. The buyer shall lose the right to avoid the contract for lack of conformity of the goods if he does not give the seller notice specifying its nature [and inviting him to examine them or cause them to be examined] promptly after he discovers or ought to have discovered it.

"[2. In determining whether the buyer ought to have discovered the lack of conformity, he shall not be held to examine them before their place of destination in the case of their carriage, or before the place of their new destination when they are redespached by the buyer without trans-shipment and the seller knew or ought to have known of the possibility of their redespach.]

"3. [Para. 4 of article 38 of ULIS, unchanged.]

"Article 39

"1. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within a reasonable time after he discovers or ought to have discovered it.

"2. The buyer shall lose the right to rely on a lack of conformity of the goods for any purpose if he does not notify the seller of it within two years after the goods were handed over unless the lack of conformity constituted a breach of a guarantee covering a longer period.

"Article 39, bis

"Where any notice referred to in articles 38 and 39 has been sent by [letter, telegram or other] appropriate means, a delay or a failure to arrive at its destination shall not deprive the buyer of the right to rely thereon.

⁶⁰ Annex X, paras. 1-2.

⁶¹ Annex VIII. The proposal indicated a preference for deletion of the language in brackets.

"Article 40

"[Unchanged.]"

58. The representative of Kenya objected to certain amendments proposed by the representative of the United States and noted that he was content with the Austrian proposals.⁶²

G. Articles 41 to 49

59. Article 41 of ULIS reads as follows:

"1. Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may, as provided in Articles 42 to 46:

"(a) require performance of the contract by the seller;

"(b) declare the contract avoided;

"(c) reduce the price.

"2. The buyer may also claim damages as provided in article 82 or in articles 84 to 87.

60. The representative of Norway suggested that the present text of the introductory part of article 41, paragraph 1, should be replaced by the following language:

"Where the buyer has given due notice to the seller that the goods delivered do not conform with the contract, the buyer may, as provided for in articles 42-47:"⁶³

61. Articles 42 to 49 of ULIS read as follows:

"Article 42

"1. The buyer may require the seller to perform the contract:

"(a) if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects;

"(b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;

"(c) if the sale relates to unascertained goods, by delivering other goods which are in conformity with the contract or by delivering the missing part or quantity, except where the purchase of goods in replacement is in conformity with usage and reasonably possible.

"2. If the buyer does not obtain performance of the contract by the seller within a reasonable time, he shall retain the rights provided in articles 43 to 46.

"Article 43

"The buyer may declare the contract avoided if the failure of the goods to conform to the contract and also the failure to deliver on the date fixed amount to fundamental breaches of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or,

⁶² Annex X, para. 3.

⁶³ Annex XVIII, text of art. 41.

in the case to which paragraph 2 of article 42 applies, after the expiration of the period referred to in that paragraph.

"Article 44

"1. In cases not provided for in article 43, the seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

"2. The buyer may however fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with Article 46 or, provided that he does so promptly, declare the contract avoided.

"Article 45

"1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles 43 and 44 shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

"2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract.

"Article 46

"Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.

"Article 47

"Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate.

"Article 48

"The buyer may exercise the rights provided in articles 43 to 46, even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract.

"Article 49

"1. 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 has been prevented from exercising his right because of fraud on the part of the seller.

"2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages."

62. The representative of Norway suggested that these articles be revised as follows:

"Article 42 (performance of the contract) [cf. ULIS, art. 42, art. 44, para. 2]

"1. The buyer may require the seller to perform the contract:

- "(a) if the sale relates to goods to be produced or manufactured, by remedying defects in the goods;
- "(b) if the sale relates to specific goods, by delivering the goods to which the contract refers or the missing part thereof;
- "(c) if the sale relates to unascertained goods, by delivering the missing part or quantity; or
- "(d) if the lack of conformity amounts to a fundamental breach and the buyer rejects the goods delivered, by delivering other goods which are in conformity with the contract."

"2. In the cases referred to in paragraph 1 the buyer may grant the seller an additional period of time of reasonable length for the performance of the contract."

"3. The buyer shall not be entitled to avail himself of the remedies referred to in paragraphs 1 and 2:

- "(a) if the seller is in no position to perform the contract; or
- "(b) if it is in conformity with usage and reasonably possible for the buyer to have the defects remedied or to purchase goods in replacement."

"4. The buyer shall lose his right to require performance of the contract if he does not exercise it within a reasonable time after giving the seller notice of the lack of conformity."

"Article 43 [cf. ULIS art. 44]

"1. The seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense."

"2. The seller shall lose his right to perform the contract if he does not inform the buyer of his intention to do so promptly after having received the buyer's notice of lack of conformity."

"Article 44

[cf. ULIS art. 42, para. 2 and art. 44, para. 2]

"If the buyer does not obtain performance of the contract by the seller in accordance with the provisions of articles 42 or 43, he may insist on his right to performance or, subject to the provisions of articles 45-47, choose between reducing the price or declaring the contract avoided in accordance with the provisions of article 46.

"Article 45 [as ULIS art. 46]

"Where the buyer has neither obtained performance of the contract nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract. [No change.]

"Article 46 (avoidance of the contract)

[cf. ULIS art. 43]

"1. The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract amounts to a fundamental breach of the contract.

"2. The contract may, however, not be declared avoided until

"(a) in cases where the buyer has required performance of the contract in accordance with Article 42, the expiry of the additional period of time fixed by the buyer or, failing this, of a reasonable time after he has made such request, or

"(b) the seller has had a reasonable time for the exercise of his right to perform the contract according to Article 43.

"3. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity or, in cases to which paragraph 2 of this Article applies, after the expiration of the relevant period referred to in that paragraph.

"Article 47 [as ULIS art. 45 in principle unchanged]

"Article 48-49 [as ULIS arts. 47-48]

"[ULIS art. 49 deleted.]"⁶⁴

63. The representative of Norway offered the following explanations, *inter alia*, of the provisions of the draft:

(a) Contrary to article 42, paragraph 1(c) of ULIS, article 42, paragraph 1(d) of the draft implies that the buyer is not entitled to reject the goods delivered and require the seller to deliver other goods which conform with the contract, unless the lack of conformity amounts to a fundamental breach.

⁶⁴ Annex XVIII, text of arts. 42 to 49.

(b) Article 42 (4) includes a new provision requiring the buyer to exercise his right to require performance within a reasonable time.

(c) Article 43 (2) includes a new provision requiring the seller to inform the buyer of his intention to remedy the lack of conformity promptly.

(d) The concept of "*ipso facto* avoidance" has been deleted.

(e) Article 46(2) supplements and at the same time limits application of the general rule that fundamental breach is a condition for the avoidance of the contract; it also departs to a certain degree from the rule contained in article 43 of ULIS.⁶⁵

64. The representative of France suggested that under Article 44(2) the buyer should only have the right to declare the contract avoided if the lack of conformity amounted to a fundamental breach.⁶⁶

H. Articles 50 and 51

65. Articles 50 and 51 read as follows:

"Article 50

"Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.

"Article 51

"If the seller fails to hand over documents as provided in article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under articles 24 to 32 or under articles 41 to 49, as the case may be."

66. The representative of the United States noted that articles 50 and 51 are treated separately from articles 54 and 55, and commented that as a consequence general problems relating to the seller's obligations other than delivery would be lost sight of.⁶⁷

67. The representative of India observed that articles 50 and 51 did not lay down what documents relating to the goods should be handed over by the seller to the buyer and suggested that if the contract or usage did not provide for the handing over of documents these articles would not seem to have any application.⁶⁸ He also referred to writings on the Law suggesting that the Law was too simple to be helpful because it did not provide for the obligations of the seller and the buyer in case of the documentary sale, although this was the typical international sale of goods.⁶⁹

⁶⁵ *Ibid.*, introductory note, paras. 5(b), (c) and (e).

⁶⁶ Annex XI, para. 5(2). This document also commented on proposals made by Norway at a previous occasion (A/CN.9/31, para. 117). Since, however, those proposals are not reflected in the new draft submitted by the representative of Norway (annex XVIII) this analysis considers them as superseded.

⁶⁷ Annex III, in section entitled "Scope and related questions".

⁶⁸ Annex XII, para. 2.

⁶⁹ *Ibid.*, para. 4.

68. The representative of India noted further that the provisions of article 51 equating "documents relating to the goods" to the goods themselves, would only be acceptable to the common law system if this provision would only apply to "documents of title to the goods."⁷⁰

69. The representative of India suggested further that since the questions relating to handing over of documents under all the different types of contracts (such as f.o.b., c.i.f., Ex Ship, etc.) could not be completely regulated in the Law, the Working Group should consider whether there was any practical advantage in retaining the provisions of articles 50 and 51.⁷¹ The Arab Republic of Egypt, in its comments submitted to the Commission in 1969, also touched upon this question and suggested that since specific rules on documentary sales were not included in the Law the above two articles of the Law should be deleted.⁷²

I. Articles 52 and 53

70. Articles 52 and 53 of ULIS read as follows:

"Article 52

"Where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller of such right or claim, unless the seller already knows thereof, and requests that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims or third persons be delivered to him by the seller.

"2. If the seller complies with a request made under paragraph 1 of this article and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with article 82.

"3. If the seller fails to comply with a request made under paragraph 1 of this article and a fundamental breach of the contract results thereby, the buyer may declare the contract avoided and claim damages in accordance with articles 84 to 87. If the buyer does not declare the contract avoided or if there is no fundamental breach of the contract, the buyer shall have the right to claim damages in accordance with article 82.

"4. The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this article within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the goods."

"Article 53

"The rights conferred on the buyer by article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person.

71. The representative of the United Kingdom observed that the title of section III (articles 52 and

53), i.e. "Transfer of property" misleadingly suggested that this section dealt with the time, place, etc. of the transfer of property, whereas this was not the case. It was suggested that a better title would be "Guarantee of title".⁷³

72. The representative of Tunisia suggested that this chapter dealt only with the question of transfer of property in case of litigation; it might be desirable also to include in the Law provisions for the transfer of property in general.⁷⁴ According to the comments by the representative of Mexico the Law provided only for the transfer of the right to use and dispose of the thing in accordance with its nature (*jus utendi*) but it was not concerned with other elements of the transfer of property or "transfer of title"—viz., the transfer of the rights to obtain and enjoy the products and fruits of the thing (*jus fruendi*) and to consume, sell or transfer the thing without limitation (*jus abutendi*).⁷⁵ This representative also noted that there were various types of third person claims and administrative limitations and restrictions which prevented the buyer from using or disposing of the purchased goods; he suggested that article 52, paragraph 1, should indicate that, in principle, the buyer would acquire the goods free of liens and limitations and that in addition to the rights or claims from third persons reference should also be made to restrictions imposed by public authority.⁷⁶

73. The Government of Austria observed that in article 52, paragraph 1, there was no distinction between cases where a right of a third person existed and cases where a third person only claimed a right. It was held in this connexion that the seller could not be held responsible for unfounded claims; especially this responsibility should not be without any time-limit.⁷⁷

74. In respect of article 52 the opinion was also expressed that any breach of the guarantee of title ought to be treated as a fundamental breach; unless the buyer had accepted the goods with knowledge of the adverse claim such a breach should entitle the buyer to declare the contract avoided and to claim damages.⁷⁸

75. In order to avoid vagueness and ambiguity, several drafting changes were suggested;⁷⁹ it was also observed that the English and French versions of these articles were not consistent with each other.⁸⁰

76. The representatives of Mexico and of the USSR suggested that articles 52 and 53 should be amended in accordance with the considerations referred to in paragraphs 72 to 75 above. The amended text would read as follows:

"Article 52

"1. The goods shall not be subject to a right or claim of a third person, nor to restrictions imposed by public authority which prevent their use or acquisition, unless the buyer knows or should have known at the time of the contract that the goods would be

⁷⁰ *Ibid.*, para. 9.

⁷¹ *Ibid.*, para. 10.

⁷² A/CN.9/11/Add.3 and A/CN.9/31, para. 120.

⁷³ Annex XIII, para. 1. See also annex XV, para. 1.

⁷⁴ A/7618, annex I, para. 90 and A/CN.9/31, para. 122.

⁷⁵ Annex XIV, paras. 4 and 5.

⁷⁶ *Ibid.*, para. 12.

⁷⁷ A/CN.9/11, para. II(6) and A/CN.9/31, para. 121.

⁷⁸ Annex XIII, paras. 3 and 4.

⁷⁹ Annex XIV, subparas. 12(c) and (d); annex XV, para. 2.

⁸⁰ *Ibid.*, subpara. 12(e).

acquired under such conditions. In this case the buyer should make known to the seller the right, claim or restriction, unless the seller already knows thereof, and request that, within a reasonable time, the goods should be freed therefrom or that other goods free from all rights and claims of third persons or restrictions imposed by public authority be delivered to him by the seller.⁸¹

"2. [No change.]⁸²

"3. [No change.]⁸²

"4. Include the expression 'or the restriction imposed by public authority' after the words 'the right or claim of the third person'.⁸³

Article 53

Add at the end of the article:

(a) The words "or restrictions imposed by public authority"⁸⁴ and

(b) The expression "except those provided for by agreement between the parties or by any usage".⁸⁵

J. Articles 54 and 55

77. Articles 54 and 55 of ULIS read as follows:

"Article 54

"1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed.

"2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

"Article 55

"1. If the seller fails to perform any obligation other than those referred to in articles 20 to 53, the buyer may:

"(a) where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with articles 84 to 87, or

"(b) in any other case, claim damages in accordance with article 82.

"2. The buyer may also require performance by the seller of his obligation, unless the contract is avoided."

78. The Government of Austria held that articles 54 and 55 were at odds with each other. Whereas article 55 attached penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singled out two of those obligations which were not otherwise dealt with.⁸⁶ A similar comment was made by the representative of Czechoslovakia. He suggested that it would be useful more completely to specify the obligation of the creditor to co-operate in the fulfilment of the transaction.⁸⁷

79. The representative of India pointed out that the provisions of articles 54 and 55 were not as appropriate and clear as the corresponding rules in common law countries. In his opinion, the requirement under common law to make a "reasonable" contract with the carrier, having regard to the nature of the goods and circumstances of the case, was to be preferred to the requirement under ULIS to make such contracts as are "necessary" for the carriage of the goods. Moreover, it was not clear whether under article 54 (1) the seller was required to conclude a contract with the carrier "on behalf of the buyer" as provided for in common law systems.⁸⁸ He also noted that the remedies provided in article 55 entitling the buyer to require performance of the obligation and damages seemed to be stronger than those provided for in common law countries for breach of similar obligations by the seller, where the buyer could normally sue the seller only for damages.⁸⁹

80. On the basis of the considerations referred to in paragraph 79 above, the representative of India suggested that the Working Group should consider whether the provisions in articles 54 and 55 could be improved.⁹⁰

⁸¹ *Ibid.*, para. 13.

⁸² *Ibid.*, para. 14.

⁸³ *Ibid.*, para. 15.

⁸⁴ *Ibid.*, para. 16.

⁸⁵ Annex XV, para. 2.

⁸⁶ A/CN.9/11, p. 8 and A/CN.9/31, para. 123.

⁸⁷ A/7618, annex I, para. 41 and A/CN.9/31, para. 124.

⁸⁸ Annex XVI, para. 5.

⁸⁹ *Ibid.*, para. 9.

⁹⁰ *Ibid.*, para. 10.

4. Analysis of comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS): note by the Secretary-General (A/CN.9/WG.2/WP.11)*

CONTENTS

	Paragraphs		Paragraphs
INTRODUCTION	1-3	C. Comments on article 2 (Definitions relating to the sphere of application of the Law)	27-30
I. GENERAL COMMENTS	4-5	D. Comments on article 3 (Exclusion of the application of the Law by contract)	31
II. COMMENTS ON THE SPHERE OF APPLICATION OF THE LAW (ARTICLES 1 TO 6 OF ULIS)	6-36	E. Comments on article 5 (Exclusion of consumer and other goods from the sphere of the Law)	32-34
A. Comments in general on the sphere of application	6-7	F. Comments on article 6 (Mixed contracts)	35-36
B. Comments on article 1 (Sphere of application)	8-26		

* 20 December 1971.

	Paragraphs
III. COMMENTS ON ARTICLES 7 TO 17	37-60
A. Comments on article 8 (Questions not regulated in the Law)	37
B. Comments on article 9 (Usages)	38-39
C. Comments on article 13 (Definition of the expression "a party knew or ought to have known")	40
D. Comments on article 15 (Form of the contract)	41-50
E. Comments on article 17 (Interpretation)	51-60

Annexes
I. Text of revised articles 1-17 of the Uniform Law*
II. Comments of the Spanish delegation on the report of the Working Group on the International Sale of Goods*
III. Comment by the delegation of Ghana on the possible revision of article 15 of ULIS*
IV. Proposal by the Polish delegation concerning article 17 of ULIS*
V. Delegation of Ghana: memorandum to the Working Group on the International Sale of Goods*

* Not reproduced in the present volume.

INTRODUCTION

1. The Working Group on the International Sale of Goods at its meeting held during the fourth session of the United Nations Commission on International Trade Law decided that at its third session it would consider the following articles of ULIS:

"(a) Articles 18-55, on the basis of the reports to be submitted by representatives of the Commission on these articles;

"(b) Articles 1-17, in the light of the comments and suggestions of members of the Commission made at the fourth session of the Commission."

2. An analysis of the comments and proposals contained in the reports submitted by representatives of members of the Commission on articles 18-55 of ULIS appears in document A/CN.9/WG.2/WP.10. The text of these reports is contained in document A/CN.9/WG.2/WP.10/Add.1.

3. This report summarizes the comments and proposals on articles 1 to 17, made at the fourth session of the Commission and in the course of the consideration by the Sixth Committee of the Commission's report on its fourth session. The proposals and comments that deal with a single issue or article are considered together in this report. In the foot-notes reference is made to the summary records in which the proposals and comments are contained. (The symbols of the summary records of the fourth session of the Commission begin with A/CN.9.) The text of articles 1 to 17 as recommended by the Working Group at its second session is annexed to this report as annex I.* Also annexed are the comments which Governments submitted in writing to the fourth session of the Commission except those which are reproduced *in extenso* in this report.

I. GENERAL COMMENTS

4. Most representatives who spoke on the subject expressed their appreciation for the work done by the Working Group in respect of articles 1 to 17 of ULIS.

5. A few comments also contained suggestions with respect to working methods. Thus, Poland suggested that the Commission should give further consideration to its methods of work with a view to increasing its

efficiency;¹ Hungary expressed the view that the Commission's work could be improved by its paying more attention to current trade usages and, in drafting legislation, by giving due weight to generally accepted usages in addition to, or instead of, purely legal considerations.²

II. COMMENTS ON THE SPHERE OF APPLICATION OF THE LAW (ARTICLES 1 TO 6 OF ULIS)

A. Comments in general on the sphere of application

6. Japan held that in view of the close relationship between the substance of the uniform rules on international sale of goods and the uniform rules on time-limits and limitations, it was desirable that the two sets of rules should have the same sphere of application.³ A similar proposal was made by Iraq.⁴ Chile also spoke on the question and suggested that the two drafts should be harmonized.⁵ It should be noted in this connexion that the Working Group on Time-limits and Limitations came to the conclusion that the sphere of application of the draft convention on prescription (limitation) prepared by the Working Group need not be the same as that of the Uniform Law on the International Sale of Goods. The text of the draft convention on prescription (limitation) appears in document A/CN.9/70.

7. Pakistan called for unification of the rules relating to conflict of laws in order to help to eliminate uncertainty in the application of laws to international commercial transactions.⁶ Nigeria, on the other hand, suggested that the Working Group should give special attention to the question of definitions so as to eliminate ambiguity in the provisions on the application of the Law.⁷

B. Comments on article 1 (Sphere of application)

8. Many countries expressed their agreement with the text of article 1 as suggested by the Working Group at its second session (see annex I). Thus,

¹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1249th meeting, para. 6.*

² *Ibid.*, 1251st meeting, para. 11.

³ *Ibid.*, 1249th meeting, para. 11.

⁴ *Ibid.*, 1252nd meeting, para. 6.

⁵ *Ibid.*, 1253rd meeting, para. 88.

⁶ *Ibid.*, 1251st meeting, para. 21.

⁷ A/CN.9/SR.72, p. 2.

* For this text, not reproduced in the present volume, see UNCITRAL Yearbook, volume II: 1971, part two, A, 2, annex II.

Poland considered that the new text was simpler and provided a better indication of the limits of the sphere of application of the Law than the 1964 text.⁸ Japan,⁹ Argentina,¹⁰ Mexico,¹¹ Bulgaria,¹² Hungary¹³ and Norway¹⁴ also held that the new text was an improvement on the earlier one. The USSR noted that it endorsed, in general, the text proposed by the Working Group and held that it was a sound basis for further work.¹⁵ A similar comment was made by the United Kingdom.¹⁶ The United States also held that the recommended text was a distinct improvement on the former version although the new text did not provide for all situations in a proper way; e.g., under the new text the retail purchase of a microscope by a foreigner would be governed by the Uniform Law. Yet, it was thought that even if the new text had certain imperfections, its clarity was preferable to the difficulties which had arisen from the application of the original text.¹⁷

9. Several countries agreed, in general, with the text recommended by the Working Group but suggested certain changes in the language of the article.

10. Australia, while expressing its willingness, in general, to accept the recommended text, suggested that the clarity of the provision could be improved.¹⁸

11. Romania held that subparagraph 1 (a) was a truism and should therefore not be set out as a condition of application but should be deleted. Instead Romania suggested to insert the word "contracting" in the introductory part of paragraph 1, before the word "States". With respect to subparagraph 1 (b) it noted that this subparagraph had no *raison d'être* except with regard to the rules of private international law of non-contracting States. The subparagraph should therefore be amended to make this clear.¹⁹ Spain proposed that in subparagraph 1 (b) the expression "rules of private international law" should be replaced by "rules of conflicts" since the former also include material rules, rules of immediate application, etc.²⁰

12. Jamaica and Haiti disagreed with the text recommended by the Working Group, without specifying the text that they would prefer. In the view of Jamaica the retention of only one basic test could lend itself to abuse.²¹ Haiti held that the deletion of the tests contained in subparagraphs 1 (a), (b) and (c) of article 1 of ULIS resulted in oversimplification of the text.²²

⁸ *Ibid.*, p. 3 and A/CN.9/SR.74, p. 15.

⁹ A/CN.9/SR.72, p. 11.

¹⁰ A/CN.9/SR.74, p. 8.

¹¹ *Ibid.*, p. 12.

¹² *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1252nd meeting, para. 28.

¹³ A/CN.9/SR.74, p. 8.

¹⁴ *Ibid.*, p. 15.

¹⁵ *Ibid.*, p. 13.

¹⁶ *Ibid.*, p. 11.

¹⁷ A/CN.9/SR.72, p. 9. See also A/CN.9/SR.74, p. 13.

¹⁸ *Ibid.*, p. 5 and A/CN.9/SR.74, p. 7.

¹⁹ A/CN.9/SR.71, p. 13. See also A/CN.9/SR.72, p. 12 and A/CN.9/SR.74, p. 14.

²⁰ Annex II (A/CN.9/IV/CRP.8), text on articles 1 and 2, section B.

²¹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 28.

²² *Ibid.*, para. 80.

13. Spain²³ and Belgium voiced their concern at the abandonment of the principle of universality. However, Belgium indicated that she could accept as a working basis the text proposed by the Working Group.²⁴

14. Comments were made on the basic test recommended by the Working Group, according to which the Law would apply if the places of business of the parties to a contract of sale of goods were in different States. Several representatives suggested that this test should be supplemented by one or more objective tests.

15. Guyana,²⁵ Ghana,²⁶ India,²⁷ and Pakistan²⁸ suggested that the above basic test should be supplemented by a test relating to the international carriage of the goods; to this end, the new text should be supplemented by subparagraph 1 (a) of article 1 of the original text of ULIS. In the view of India this proposal was warranted by the fact that for businessmen and business lawyers it was a very common concept to regard an international sale as characterized not merely by the circumstance that the parties to a contract had their places of business in different countries but also by the circumstance that the goods were carried from the territory of one State to the territory of another.²⁹ The reasons advanced by Ghana for the support of this proposal are contained in annex V to this report.

16. In opposition to the proposal set out in paragraph 15 above, the United Kingdom expressed the view that the text proposed by the Working Group was a sound basis for further work,³⁰ rather than to recommence work on a new basis as international carriage.³¹ At the same time, however, the United Kingdom expressed the opinion that the text in its present form was oversimplified. If, e.g., a foreigner went to New York and sold goods to a local buyer, and the offer, acceptance and delivery took place in New York, the operation would be considered, according to the new criterion, as an international sale; that was not the case under the original text.³²

17. The observer for UNIDROIT suggested the insertion of another objective test than that set out in paragraph 15 above. According to his suggestion the law would apply to contracts of sale of goods entered into by parties whose places of business were in different contracting States, unless all the acts constituting the offer and the acceptance had been effected in the same State.³³

²³ A/CN.9/SR.72, p. 4, *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1252nd meeting, para. 43, and annex II, text on articles 1 and 2, para. A(2).

²⁴ A/CN.9/SR.74, p. 10.

²⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1248th meeting, para. 16.

²⁶ Annex V, para. (a)(ii); A/CN.9/SR.72, p. 10 and *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 72.

²⁷ A/CN.9/SR.71, p. 7.

²⁸ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee*, 1251st meeting, para. 22.

²⁹ A/CN.9/SR.71, p. 7.

³⁰ A/CN.9/SR.74, p. 11.

³¹ A/CN.9/SR.72, p. 12.

³² A/CN.9/SR.72, p. 8.

³³ A/CN.9/SR.73, pp. 2-3.

18. Several countries held that the original text of article 1 was better than the revised one and suggested that the texts contained in subparagraphs 1 (a), (b) and (c) of article 1 of ULIS should be re-inserted in the new text either in their original or in a revised form.

19. In France's opinion the former text was more satisfactory.³⁴ Austria held that the new text might cause even greater difficulties than the original.³⁵ Also, in the opinion of Belgium the new text was too summary and might give rise to disputes in cases where it was not clear whether the sale was national or international.³⁶ The Arab Republic of Egypt also emphasized its preference for the 1964 text.³⁷

20. Austria, Belgium, France and the Arab Republic of Egypt submitted a revised draft of article 1 of the Law.³⁸ Austria stated that the proposal was intended to combine the advantages of the old and new texts by reinstating the three objective criteria of the old text and by adding a fourth case, where the goods have been transported to the place of delivery prior to the conclusion of the contract.³⁹ Belgium also noted that there was a need for the insertion of a provision on sales of goods held in stock in the country of the buyer.⁴⁰ It should be noted that Austria expressed its agreement with subparagraphs 1 (a) and (b) of the text recommended by the Working Group, if this text could avoid the maintenance of reservations such as those set out in articles III, IV, and V of the 1964 Hague Convention.⁴¹

21. The text proposed by Austria, Belgium, France and the Arab Republic of Egypt reads as follows:

"Article 1

"1. The present Law shall apply to *international* 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. A contract shall be considered to be an international contract of sale:

"(a) where it 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; or

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

³⁴ A/CN.9/SR.72, p. 11.

³⁵ *Ibid.*, p. 10.

³⁶ *Ibid.*, p. 9.

³⁷ A/CN.9/SR.73, p. 4.

³⁸ A/CN.9/IV/CRP.8. The text of this proposal is reproduced in paragraph 21 of the present report.

³⁹ A/CN.9/SR.74, p. 2.

⁴⁰ *Ibid.*, p. 9.

⁴¹ *Ibid.*, p. 8.

"(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 of the contract have been effected.

"3. A contract shall also be considered to be an international contract of sale of goods if the seller has caused the goods to be carried into the territory of a State other than that in which he has a place of business, unless:

"(a) the buyer had no reason to know that the seller had his place of business in a different State and that the goods had been carried from the territory of a different State to the place of delivery; or

"(b) the goods to which the contract refers are, by their nature and number, normally purchased by an individual for personal, family or domestic use;

"[4. The present Law shall also apply where it has been chosen as the law of the contract by the parties.] *

*Not yet discussed.

"Delete article 2, subparagraph (a) and article 5, subparagraph 1 (a) of the new draft."

22. India expressed its agreement with the above proposal but held that a negative form setting out the transactions which did not fall within the scope of the Law would be preferable.⁴² Ghana supported this position of India.⁴³ Brazil, while agreeing with the above text, proposed minor drafting changes.⁴⁴ Hungary expressed misgivings regarding the system embodied in the proposal and pointed to imperfections in the text.⁴⁵

23. A drafting suggestion was made by Belgium in respect of subparagraph 1(b) of the text recommended by the Working Group, which was also embodied, although only in brackets, in the proposal set out in paragraph 21 above. This suggestion was based on the view that in Belgium, e.g., the *Cour de cassation* could not give an interpretation of a foreign law and other countries may also experience the same difficulties; Belgium stressed therefore the need to specify whether the Uniform Law involved was to be applied as the law of the contracting State in question or as the law of the State in which it was invoked.⁴⁶

24. With respect to paragraph 2 of article 1 of the text recommended by the Working Group, which is basically the reproduction of article 4 of ULIS, the United States noted that this paragraph might create difficulties because it allowed two inhabitants of the same State to choose to apply the Law to their contract.⁴⁷ Haiti also opposed the paragraph in its present form because parties to a local contract of sale might evade the application of their national law by choosing the uniform law as applicable to the contract.⁴⁸

⁴² A/CN.9/SR.75, p. 7.

⁴³ *Ibid.*, p. 9.

⁴⁴ *Ibid.*, p. 8.

⁴⁵ *Ibid.*, pp. 7-8.

⁴⁶ A/CN.9/SR.74, p. 16.

⁴⁷ *Ibid.*, p. 13.

⁴⁸ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1251st meeting, para. 80.*

25. Some comments on paragraph 2 of article 1 related to the language of the paragraph. Romania noted that it was not clear whether the words "the parties" included non-contracting or referred only to contracting States.⁴⁹ Spain held that the text lacked precision as to whether the choice of law might be "express or implied".⁵⁰

26. Spain also objected to the omission from the text of any reference to mandatory provisions of national laws, such as that which appeared in the closing phrase of article 4 of ULIS.⁵¹ Norway noted that the provision in article 1, paragraph 2, of the recommended text did not mean that the parties could free themselves from the peremptory norms of national law and pointed out that the Working Group, at its second session, thought that the question of mandatory norms was a universal problem and decided that it would examine it in depth at a later stage.⁵²

C. Comments on article 2 (Definitions relating to the sphere of application of the Law)

27. The majority of the States which commented on paragraph (a) of article 2, were opposed to the provision contained therein. Thus, Argentina held that it introduced in the Law a subjective element which could lead to difficulties with respect to proof.⁵³ Romania proposed the replacement of the subjective text by an objective one.⁵⁴ This proposal was supported by Belgium in case the paragraph would be maintained.⁵⁵ The elimination of the subjective elements from the article was also proposed by India,⁵⁶ Austria,⁵⁷ Hungary,⁵⁸ Belgium⁵⁹ and the representative of UNIDROIT⁶⁰ suggested that article 2, paragraph (a) should be deleted. On the other hand, Norway opposed the deletion of this paragraph⁶¹ and stated that in its opinion the criterion contained in this provision would not reduce the scope of law since it would nearly always be possible to verify the place of business of the other party.⁶² The United Kingdom held that the criterion laid down in paragraph (a) was sound, and noted that in the United Kingdom a large number of international transactions were effected through the medium of brokers who seldom specified the name or nationality of their principals.⁶³ Mexico also favoured retaining paragraph (a), but suggested that it should be drafted in the affirmative.⁶⁴

28. In order clearly to separate the subjective and the objective texts identified in article 2, paragraph (a), of the recommended draft, Guyana suggested that the text of the paragraph should be revised as follows:

"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

"(i) neither knew that the place of business of the other party was in a different State,

"(ii) nor had reason to know that the place of business of the other party was in a different State."⁶⁵

29. Comments were also made in respect of paragraph (b) of article 2. The United States held that the meaning of the phrase "place of business" needed further clarification.⁶⁶ India suggested that the text of this paragraph should indicate which of the States, in which the party has places of business, had a closer relationship to the contract and its performance.⁶⁷ Hungary submitted for consideration the idea that paragraph (b) should provide that if one of the places of business of a party was in a contracting State, his principal place of business should be deemed to be in a contracting State.⁶⁸ The USSR held that this proposal merited consideration;⁶⁹ the United Kingdom objected to the idea.⁷⁰

30. Spain suggested that paragraph (c) of article 2 should be deleted because it would allow the reservations now contained in article V of the 1964 Convention.⁷¹ Spain suggested further that articles 1 and 2 of the Law should be rearranged in the form of a single article. The proposed text appears in document A/CN.9/R.8 and Corr.1 which is reproduced in annex II.

D. Comments on article 3 (Exclusion of the application of the Law by contract)

31. Spain proposed the deletion of this article on the ground that it would permit the stronger party to impose on the other party rules that reduce his own liability and increase his rights.⁷²

E. Comments on article 5 (Exclusion of consumer and other goods from the sphere of the Law)

32. Several States suggested that paragraph 1(a) of article 5 should be deleted. Austria proposed the deletion on the basis that the reinsertion in the text of subparagraphs 1(a), (b) and (c) of article 1 of ULIS, as suggested by a number of countries (see paras. 18-22 above), would make the exemption of consumer goods unnecessary.⁷³ UNIDROIT held that by acceptance of its proposal in respect of article 1

⁴⁹ A/CN.9/SR.71, p. 13.

⁵⁰ Annex II, text on articles 1 and 2, paragraph C(a).

⁵¹ *Ibid.*, para. C(b) and A/CN.9/SR.72, p. 4.

⁵² A/CN.9/SR.72, p. 7. See also A/CN.9/52, para. 48.

⁵³ A/CN.9/SR.74, p. 8.

⁵⁴ *Ibid.*, p. 14.

⁵⁵ *Ibid.*, p. 16.

⁵⁶ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1253rd meeting, para. 94.*

⁵⁷ A/CN.9/SR.72, p. 13.

⁵⁸ A/CN.9/SR.74, p. 8.

⁵⁹ *Ibid.*, p. 10.

⁶⁰ A/CN.9/SR.73, p. 3.

⁶¹ A/CN.9/SR.74, p. 15.

⁶² A/CN.9/SR.72, p. 7.

⁶³ A/CN.9/SR.74, p. 11.

⁶⁴ *Ibid.*, p. 12.

⁶⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1248th meeting, para. 17.*

⁶⁶ *Ibid.*, 1251st meeting, para. 32.

⁶⁷ A/CN.9/SR.74, p. 6.

⁶⁸ A/CN.9/SR.74, p. 9.

⁶⁹ *Ibid.*, p. 13.

⁷⁰ *Ibid.*, p. 14.

⁷¹ Annex II, text on articles 1 and 2, paragraph A(c).

⁷² Annex II, text on article 3.

⁷³ A/CN.9/SR.72, p. 13.

(para. 17 above), sales of consumer goods would be excluded automatically.⁷⁴ Spain's reason for the deletion of paragraph 1(a) was that this paragraph placed a restriction on the scope of the law which was not rational and which, in addition, was based on tests that were difficult to apply.⁷⁵

33. The Arab Republic of Egypt agreed, in principle, with subparagraph 1(a) but suggested that the language of the paragraph should be revised in order to eliminate practical difficulties caused by the ambiguity of such terms as "individual" and "personal".⁷⁶

34. Comments were also made as regards subparagraph 2(b). Poland wondered whether it was necessary to exclude from the Law ships and aircrafts in which there was substantial trade.⁷⁷ Spain held that any reference in this paragraph to registration should be deleted and replaced by technical data based on the economic importance of the goods sold (minimum tonnage or power). It suggested the following language:

"(b) of any ship or inland navigation vessel of [specified] tonnage or any aircraft of [specified] powers."⁷⁸

F. Comments on article 6 (Mixed contracts)

35. Spain suggested that the provision in article 6 should be transferred into article 1; in addition, the provision should be formulated in a positive way by stating that there shall be deemed to be a contract of sale whenever the substantive obligations of the parties consist in the delivery of and payment for goods.⁷⁹

36. In view of the manifold comments and proposals relating to the sphere of application of the Law, Spain suggested that the Working Group should defer consideration of this question until a final draft on substantive rules has been completed.⁸⁰ In connexion with this proposal the Working Group might also wish to consider whether the problems connected with the sphere of application of the Law could not be more easily resolved on the basis of a study. Such study would compare the original text of ULIS with the different proposals relating to the sphere of application of the Law in order to demonstrate which factual situations are covered by the existing text and which by the different suggested texts and solutions.

III. COMMENTS ON ARTICLES 7 TO 17

A. Comments on article 8 (Questions not regulated in the Law)

37. Spain expressed the view that although the retention of this article would not create any problem, it served no purpose since the scope of the Law was in itself determined by the content of its provisions.

At the same time, however, Spain also noted that it would be desirable to formulate a uniform law that would govern all aspects of contracts of sale and would accordingly include the questions of formation and validity of the contract as well as provisions on limitation (prescription).⁸¹

B. Comments on article 9 (Usages)

38. The USSR held it necessary that this article should be reviewed because members of the Working Group had divergent views thereon.⁸²

39. Spain deemed it necessary to make a distinction in the text of this article between normative usages, i.e., usages which had achieved, in a particular type of contract, a degree of observance such that any agreement of the same class was considered to be subject to that usage, and contractual or interpretative usages, i.e., usages which derived their binding force from the interest of the parties.⁸³ On the basis of this distinction, Spain suggested the following language for article 9:

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

"2. The parties shall also, unless otherwise expressly agreed, be bound by any usages of international trade, whether or not known to the parties, which are generally observed in contracts of the type involved. In the event of conflict with the present Law, such 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 generally accepted and regularly given to them in the trade concerned unless otherwise expressly agreed by the parties."⁸⁴

C. Comments on article 13 (Definition of the expression "a party knew or ought to have known")

40. Guyana observed that deletion of article 13 on the ground that the term "reasonable person" was undefinable and therefore difficult to apply in an international sales transaction, was inconsistent with the inclusion of a similar test in article 2(a). Accordingly, either the test in article 2(a) should be abandoned or article 13 should be retained.⁸⁵

D. Comments on article 15 (Form of the contract)

41. Several States suggested the deletion of this article. India made this proposal on the basis that an identical text was contained in article 3 of the Uniform Law on Formation. Moreover, article 8 of ULIS pro-

⁷⁴ A/CN.9/SR.73, p. 3.

⁷⁵ Annex II, text on article 5, section A.

⁷⁶ A/CN.9/SR.73, p. 4.

⁷⁷ A/CN.9/SR.72, p. 3.

⁷⁸ Annex II, text on article 5, section B.

⁷⁹ *Ibid.*, text on article 6.

⁸⁰ Annex II, text on articles 1 and 2, paragraph A(1).

⁸¹ *Ibid.*, text on article 8.

⁸² A/CN.9/SR.71, p. 10.

⁸³ See annex II, text on article 9 for detailed analysis of the different types of usages.

⁸⁴ *Ibid.*, pp.13-14.

⁸⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1248th meeting, para. 18.*

vided that the Law was not concerned with the formation of the contract, nor with its validity. The question of form, therefore, could be handled when the Commission came to consider the Uniform Law on Formation.⁸⁶ Iran,⁸⁷ Spain,⁸⁸ Tanzania,⁸⁹ Poland,⁹⁰ France⁹¹ and Austria⁹² were also of the opinion that the question of form belonged in the Uniform Law on Formation. In Byelorussia's opinion formation of the contract should not be dealt with in the Uniform Law; in any event, countries should be permitted to require that contracts must be in writing.⁹³ This position was also supported by Bulgaria.⁹⁴ On the other hand, Singapore,⁹⁵ the United States,⁹⁶ Mexico⁹⁷ and the United Kingdom⁹⁸ were of the opinion that article 15 should be maintained.

42. The United States⁹⁹ and the United Kingdom suggested that article 15 should be retained in its present form. The United Kingdom pointed out that this was desirable because under the conditions of modern trade, formation, variation and cancellation of the contract were often effected orally by telephone.¹⁰⁰

43. There were many proposals that the contract should be in writing if this was required by the law of the country of either party.

44. The USSR suggested that the present text of article 15 should be supplemented with a provision set forth in paragraph 115 of the report of the Working Group on its second session.¹⁰¹ This provision reads: "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".¹⁰² The United States opposed this proposal.¹⁰³ Ghana supported the inclusion of the above provision¹⁰⁴ but supplemented by a further provision: that it was the duty of the party whose place of business was in the territory of a country the law of which required written form, to inform the other party of this requirement.¹⁰⁵ If written form should be required an obligation to inform the other party of the requirement was supported by the United Kingdom. However, the United Kingdom maintained its view that sellers and buyers should be allowed to conclude contracts orally if they wished; in addition the Law should not oblige countries to amend the rules of their national legislation concerning the form of contracts.¹⁰⁶

45. Argentina suggested that the words "and shall not be subject to any other requirements as to form" should be deleted from the first sentence of article 15; this change and interpreting article 15, in the light of articles 8 and 5, would achieve the objective stated in paragraph 43 above. At the same time the suggested deletion from article 15 would eliminate the contradiction now existing between this article and article 8.¹⁰⁷ Ghana agreed with the deletion of the above words and suggested that the second sentence of the article should also be deleted and that, as already reported, the article should be supplemented by a text on the lines of that quoted in paragraph 44 above.¹⁰⁸

46. Ethiopia¹⁰⁹ and India¹¹⁰ suggested that the present text of the article should be preceded by the words "unless otherwise agreed by the parties or provided by a mandatory rule of the national law of any of the parties" as proposed by Brazil at the fourth session of the Commission.¹¹¹

47. The observer for UNIDROIT noted that written form was required in many countries with respect to contracts entered into by Government agencies. He suggested therefore that the text of article 15 be supplemented by the words "without prejudice to contracts entered into by Government agencies".¹¹² The USSR pointed out that such a solution would not be satisfactory since in the USSR international trade was not carried out by the Government but by foreign trade organizations which were independent legal bodies.¹¹³ France proposed that a distinction be made between contracts concluded between private persons and contracts between public bodies.¹¹⁴

48. Norway suggested that a clause should be included in the Convention to the effect that any State could make a declaration that it required the written form for contracts of sale to which one of its State enterprises or agencies was a party. The clause would read as follows:

"Any State may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Secretary-General of the United Nations that, notwithstanding article 15 of the Uniform Law, the form of writing is required according to its law for the enforcement in its territory of contracts of sale to which the State or governmental agency is a party."¹¹⁵

49. Brazil disagreed with the above solution on the ground that businessmen would not know which States had made such a reservation.¹¹⁶

50. Ghana pointed out that the solution to be adopted depended on the approach of the national

⁸⁶ A/CN.9/SR.71, p. 8.

⁸⁷ A/CN.9/SR.77, p. 5.

⁸⁸ A/CN.9/SR.75, p. 13 and annex II, text on article 15.

⁸⁹ *Ibid.*, p. 15.

⁹⁰ A/CN.9/SR.77, p. 3.

⁹¹ *Ibid.*, p. 6.

⁹² A/CN.9/SR.75, p. 16.

⁹³ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1249th meeting, para. 19.*

⁹⁴ *Ibid.*, 1252nd meeting, para. 28.

⁹⁵ A/CN.9/SR.77, p. 7.

⁹⁶ A/CN.9/SR.75, p. 14.

⁹⁷ A/CN.9/SR.76, p. 13.

⁹⁸ A/CN.9/SR.75, p. 10.

⁹⁹ *Ibid.*, p. 14 and A/CN.9/SR.77, p. 6.

¹⁰⁰ A/CN.9/SR.75, p. 10.

¹⁰¹ A/CN.9/SR.75, p. 12.

¹⁰² A/CN.9/52.

¹⁰³ A/CN.9/SR.75, p. 14.

¹⁰⁴ A/CN.9/SR.76, p. 6.

¹⁰⁵ A/CN.9/SR.75, p. 13.

¹⁰⁶ A/CN.9/SR.77, p. 7.

¹⁰⁷ A/CN.9/SR.76, p. 5.

¹⁰⁸ *Ibid.*, p. 6.

¹⁰⁹ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1253rd meeting, para. 39.*

¹¹⁰ *Ibid.*, para. 94.

¹¹¹ A/CN.9/SR.77, p. 3; A/8417, para. 73.

¹¹² A/CN.9/SR.75, p. 15.

¹¹³ A/CN.9/SR.76, p. 4.

¹¹⁴ A/CN.9/SR.77, p. 6.

¹¹⁵ A/CN.9/IV/CRP.11.

¹¹⁶ A/CN.9/SR.77, p. 3.

laws of the countries which required the contract to be in writing: In the absence of a writing, was the contract void or merely unenforceable? The position of Ghana in respect of both cases appears in annex III to this report.

E. Comments on article 17 (Interpretation)

51. Argentina¹¹⁷ and India supported the text of article 17 as recommended by the Working Group; India held that the alternative texts proposed during the second session of the Working Group in some cases were uncertain as the original text of ULIS and in other cases would encourage the judge to apply national law instead of ULIS.¹¹⁸

52. Several proposals were submitted with a view to improve the text recommended by the Working Group. Hungary¹¹⁹ and the United States¹²⁰ suggested that the words now in brackets should be deleted. Egypt also proposed the deletion of these words with the further suggestion that the last part of the proposal should be reworded to read: "... and to the need to promote the uniformity of rules governing the international sale of goods".¹²¹ Spain proposed that the text recommended by the Working Group should be supplemented by reference to the principle of good faith.¹²² Iran suggested rewording of the text to read: "In interpreting and applying the provisions of this Law, regard shall be had to its general purpose of promoting uniformity in international trade".¹²³

53. Tanzania held that neither the original nor the Working Group's texts were appropriate; instead, a provision was needed that would govern interpretation not merely by explanation of the purpose of the Law. It held further that the interpretation clause of the Law should make it clear that no recourse to national law should be admitted in interpretation.¹²⁴

54. Many comments were concerned with the problem of gaps in the Law. The United Kingdom,¹²⁵ Australia¹²⁶ and Hungary were of the opinion that there was no need to adopt any provision on the question of gaps; in Hungary's view, gaps would be covered either by the terms of the contract or by trade practices and usages.¹²⁷

55. Other States, however, held that the recommended text of article 17 should be supplemented by a provision dealing with gaps. Brazil was of the opinion that, while there was no need for a provision on interpretation, it was essential to have a provision on gaps.¹²⁸ Brazil supported the inclusion in the text of the provision on gaps contained in paragraph 131 of the

Working Group's report on its second session.¹²⁹ It was suggested, however, that the words "governed by the present Law" should be deleted and the following expression should be added in brackets to the end of the proposed provision: "[such as its international character and promotion of the uniformity of the Law]".¹³⁰ Argentina also expressed its willingness to accept the text suggested in paragraph 131 of the report.¹³¹

56. Ghana expressed the view that, in order to settle the question of gaps, recourse should be had to the rules of private international law. Alternatively the Working Group should draw up a descending scale of norms which would indicate what rules should be looked at to find the residual law.¹³² The USSR noted that, if no other solution could be found, the question of gaps could be settled by including a passage in the Commission's report recording the consensus that private international law should apply to questions not settled by ULIS.¹³³ The Arab Republic of Egypt objected to any reference to private international law unless the Law contained some uniform rule concerning conflict of laws.¹³⁴ Bulgaria suggested that any reference to domestic law should be avoided.¹³⁵ Pakistan held that it would be useful to include in article 17 a residual rule of conflict of laws on the lines of article 110, paragraph 1, of the CMEA General Conditions of Delivery of 1968.¹³⁶

57. Spain proposed the following text:

"Questions concerning matters governed by the present Law which are not expressly settled therein and which cannot be settled by means of the analogous application of its own rules shall be subject to the system indicated by the *lex fori* for the case of gaps in the Law."¹³⁷

58. Poland proposed the following text:

"(2) If in the case of a contract governed by this Law it is not possible to solve a certain question by means of interpretation and application of this Law, the following laws would apply:

"(a) in case of a question concerning ... the law of ... (here a unified rule on conflict of laws should be inserted, to be agreed by the Commission).

¹²⁹ A/CN.9/52. The text reads: "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".

¹³⁰ A/CN.9/SR.77, p. 14.

¹³¹ A/CN.9/SR.78, p. 2.

¹³² *Ibid.*, p. 12 and *Official Records of the General Assembly, Twenty-sixth session, Sixth Committee, 1251st meeting*, para. 72.

¹³³ A/CN.9/SR.78, p. 7.

¹³⁴ *Ibid.*, p. 12.

¹³⁵ *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1252nd meeting*, para. 28.

¹³⁶ *Ibid.*, 1251st meeting, para. 23. The text of article 110, paragraph 1, of the CMEA General Conditions reads:

"1. Relations of the parties concerning delivery of goods, in so far as they are not regulated or not fully regulated by contracts or by the present General Conditions of Delivery, shall be governed by the substantive law of the seller's country."

¹³⁷ A/CN.9/SR.78, p. 11. See also *Official Records of the General Assembly, Twenty-sixth Session, Sixth Committee, 1252nd meeting*, para. 43.

¹¹⁷ A/CN.9/SR.78, p. 2.

¹¹⁸ A/CN.9/SR.71, p. 9.

¹¹⁹ A/CN.9/SR.77, p. 15.

¹²⁰ *Ibid.*, p. 13.

¹²¹ *Ibid.*, p. 11.

¹²² *Ibid.*, p. 12.

¹²³ A/CN.9/SR.78, p. 13.

¹²⁴ *Ibid.*, p. 5.

¹²⁵ A/CN.9/SR.77, p. 11.

¹²⁶ *Ibid.*, p. 15.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*, p. 14.

"(b) in case of a question concerning . . . the law of . . . (*idem.*)

"(c) *idem.*"¹³⁸

59. Austria suggested that article 17 should be deleted from the text of the Uniform Law; the text adopted by the Working Group would be better placed in a preamble, a protocol of signature or any other instrument not forming an integral part of the text.¹³⁹

¹³⁸ Annex IV.

¹³⁹ A/CN.9/SR.77, p. 14.

60. France recommended that in order to promote uniformity in interpretation, the Commission should set up a standing working group with the task to publish commentaries every five years, setting out and criticizing judgements involving interpretation of the Uniform Law.¹⁴⁰ Belgium¹⁴¹ and Poland¹⁴² supported the proposal.

¹⁴⁰ A/CN.9/SR.78, p. 4.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, p. 6.

5. Progress report of the Working Group on the International Sale of Goods on the work of its third session, held in Geneva from 17 to 28 January 1972 (A/CN.9/62*, Add.1 and Add.2***)**

CONTENTS

	Paragraphs
Introduction	1-10
Action with respect to the Uniform Law	11-14
Future work	15-17

Annexes

	Page
I. Decisions of the Working Group	79
II. Reasons for decisions of the Working Group	82
III. Revised text of articles 1-55 of the Uniform Law	90

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 14 members of the Commission: Austria,* Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, 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 resolution adopted by the Commission at its second session,¹ 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 (ULIS)] might render them capable of wider acceptance by countries of dif-

ferent 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 26 January 1970, and its second session at the United Nations Office at Geneva from 7 December to 18 December 1970. Reports of the Working Group on its first and second sessions² were submitted, respectively, to the third and fourth sessions of the Commission.

3. The Commission, at its fourth session, decided, "1. . . . :

"(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;

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

² A/CN.9/35 and A/CN.9/52; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2, and UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

* Appointed by the Commission at its fourth session following the relinquishment by Norway of its membership in the Working Group in order to accommodate the inclusion of a new member of the Commission.

¹ 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) (hereafter referred to as UNCITRAL, report on second session (1969)), para. 38; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

* 24 February 1972.

** 21 March 1972.

*** 3 March 1972.

"(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 documents which are necessary for the continuation of its work."

4. Pursuant to the above decision, the Working Group met during the fourth session of the Commission and adopted certain organizational measures relating to its third session.

5. The Working Group held its third session at the United Nations Office at Geneva from 17 January to 28 January 1972. All members of the Working Group were represented except Tunisia.

6. The session was also attended by observers from Australia, Belgium, Norway and Spain, and from the following intergovernmental and international non-governmental organizations: Commission of the European Communities, The Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT), and International Chamber of Commerce (ICC).

7. The following documents were placed before the Working Group:

(a) Provisional agenda (A/CN.9/WG.2/WP.12)

(b) Note by the secretariat of UNIDROIT on the concept of "delivery", (*délivrance*) in the drafting of ULIS (A/CN.9/WG.2/WP.5)

(c) Report of the Secretary-General: "Delivery" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.8).

(d) Report of the Secretary-General: "Ipso facto avoidance" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.9)

(e) Note by the Secretary-General: Analysis of comments and proposals relating to articles 18-55 of the Uniform Law on the International Sale of Goods (ULIS) (A/CN.9/WG.2/WP.10 and Add.1 and Add.2)

(f) Note by the Secretary-General: Analysis of comments and proposals relating to articles 1-17 of the Uniform Law on the International Sale of Goods (ULIS) (A/CN.9/WG.2/WP.11 and Corr.1)

(g) Note by Austria, Belgium, Egypt and France on the definition of an international sale of goods (A/CN.8/WG.2/WP.13).

8. The Working Group adopted the following agenda:

1. Election of officers
2. Adoption of the agenda
3. Consideration of articles 18-55 of ULIS
4. Consideration of articles 1-17 of ULIS
5. Future work
6. Adoption of the report.

9. At its first and seventh meetings, held on 17 and 20 January 1972, the Working Group, by acclamation, elected the following officers:

Chairman: Mr. Jorge Barrera Graf (Mexico)

Rapporteur: Mr. Dileep Anant Kamat (India)

10. In the course of its deliberations, the Working Group set up drafting parties to which various articles were assigned.

ACTION WITH RESPECT TO THE UNIFORM LAW

11. In accordance with the programme of work decided upon at a meeting of the Working Group held during the Commission's fourth session, the Working Group considered articles 1 to 6 and 18 to 55 of the Uniform Law on the International Sale of Goods.

12. The Working Group's conclusions with respect to these articles are shown in annex I.

13. The reasons for these conclusions as well as the general trends of opinions relating to particular articles of ULIS appear from annex II to this report, prepared by the Rapporteur subsequent to the session of the Working Group.⁴ Some members of the Working Group had reservations or doubts concerning certain of the conclusions; these views are also noted in annex II.⁵

14. The text of articles 1-55 as adopted or as deferred for further consideration appears in annex III.⁶

FUTURE WORK

15. The Working Group decided that at its next session it would continue consideration of those articles on the agenda of the present session on which no final decision was taken and would also consider articles 56-70.

16. The Working Group requested the Secretariat to submit to the next session of the Working Group a working paper that would consolidate the work done at the present session and suggest alternative solutions

³ Report of the United Nations Commission on International Trade Law, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417) para. 92; UNCITRAL Yearbook, vol. II, part one, II, A.

⁴ Because of the relationship between the articles under consideration, decisions with respect to many of the articles were reached in the course of the last two days of the session. For this reason, it was not practicable during the session to prepare and adopt a report giving the reasons for these decisions.

⁵ Annex II appears in document A/CN.9/62/Add.1.

⁶ Annex III appears in document A/CN.9/62/Add.2.

for the problems raised during that session. The Secretariat might consult with such members of the Working Group and in such manner as it would find appropriate. The members of the Working Group expressed their willingness to co-operate with the Secretariat in this task.

17. The Working Group decided that it would hold a meeting during the fifth session of the Commission in order to consider the time and place of its next session and to give further consideration to the preparatory work to be done for that session.

ANNEX I

Decisions of the Working Group

SPHERE OF APPLICATION OF THE LAW: ARTICLES 1-6

1. The Working Group approved the following text to replace articles 1-6 of ULIS subject to the viewpoints and reservations reflected in annex II:

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 fact that the parties have their places of business in different States shall be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract.

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

Article 2

The present Law shall not apply to sales:

1. (a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless it appears from the contract [or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract] that they are 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 3

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 4

For the purpose of the present Law:

(a) 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;

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

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration;

(d) 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;

(e) 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 5

The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions.

GENERAL OBLIGATIONS OF THE SELLER; OBLIGATIONS AS REGARDS THE DATE AND PLACE OF DELIVERY: ARTICLES 18-32

ARTICLE 18

2. The Working Group decided that in order to make it clear that all obligations of the seller should be performed as required by the contract and the law, the French text of this article should read as follows:

Le vendeur s'oblige, dans les conditions prévues au contrat et à la présente loi, à effectuer la délivrance, à remettre les documents s'il y a lieu, et à transférer la propriété.

It was held that the English text was clear enough and did not need to be redrafted.

3. In view of the comments made on the substance of the article, the Working Group deferred final action on this article until its next session.

ARTICLES 19-23

4. The Working Group decided to take as a basis for its consideration of these articles the text of articles 19 to 21 set forth in document A/CN.9/WG.2/III/CRP.16 and, as article 22, the text of article 21 contained in document A/CN.9/WG.2/III/CRP.3. The texts of these articles read as follows:

Article 19

Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.

Article 20

1. Delivery shall be effected:

(a) Where the contract of sale involves the carriage of goods and no other place for delivery has been agreed upon, by handing the goods over to the carrier for transmission to the buyer;

(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unascertained goods to be drawn from a specific stock to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

(c) In all other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.

Article 21

1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed.¹ Where the goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

2. [Article 54(2) unchanged.]

Article 22

The seller shall [hand the goods over, or place them at the buyer's disposal]:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

5. Various comments were made in respect of these articles.

6. The Working Group deferred final action on articles 19 to 23 until its next session.

ARTICLES 24-32

7. The Working Group took as a basis for its consideration of these articles the text set forth in the report of Drafting Party II (A/CN.9/WG.2/III/CRP.9), reading as follows:

Article 24

1. Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may exercise the rights provided in articles 25 to 27.

2. The buyer may also claim damages as provided in article 82 or in articles 84 to 87.

3. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 25

1. Where the failure to deliver the goods at the date or place fixed amounts to a fundamental breach of the contract, the buyer may either retain the right to performance of the contract by the seller or by notice to the seller declare the contract [avoided].

[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods within a reasonable time, unless the request indicates otherwise.]

[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods before the expiration of any time indicated in the request, or if no time is indicated, before the expiration of a reasonable time.]

¹ Note that article 54, paragraph 1 of ULIS, which served as basis for this sentence, has been later revised by the Working Group to read as set out in paragraph 34 below.

3. If, before he has made known to the seller his decision under paragraph 1 of this article, the buyer is informed that the seller has effected delivery and he does not exercise promptly his right to declare the contract [avoided] the contract cannot be [avoided].

4. If after the date fixed for delivery the buyer requests the seller to perform the contract, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, before the expiration of a reasonable time, unless the seller refuses to deliver within that time.

Article 26

1. Where the failure to deliver the goods at the date or place fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to performance of the contract by the seller.

2. The buyer may however grant the seller an additional period of time of reasonable length. If the seller fails to perform his obligations within this period, the buyer may by notice to the seller declare the contract [avoided].

Article 27

Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

ARTICLES 28 TO 32

[Deleted]

8. The Working Group requested the representative of Hungary to submit a study on the two alternatives of paragraph 2 of article 25 recommended by Drafting Party II (A/CN.9/WG.2/III/CRP.9) and, if necessary, on questions covered by articles 24-32, taking into consideration the proposals contained in document A/CN.9/WG.2/III/CRP.9 and the comments made thereon. The study would be circulated by the Secretariat among members of the Working Group before the next session of the Working Group.

9. In view of the above decision the Working Group decided to defer final action on these articles until its next session.

OBLIGATIONS OF THE SELLER AS REGARDS CONFORMITY OF THE GOODS: ARTICLES 33-49

ARTICLE 33

10. The Working Group took note of the proposals contained in documents A/CN.9/WG.2/III/CRP.4/Rev.1 and A/CN.9/WG.2/III/CRP.14 relating to paragraph 1 of this article and decided to defer final action on this paragraph until its next session.

11. With respect to paragraph 2 of this article, the Working Group decided that in the French version of that paragraph the word *manifestement* should be inserted immediately before the words *sans importance*. The representatives of the United States and of the United Kingdom were requested to produce an equivalent English version to replace the words "not material" in the English text of this paragraph and they suggested the words "clearly insignificant".

ARTICLE 34

12. The Working Group decided to delete this article.

ARTICLE 35

13. The Working Group adopted the first sentence of paragraph 1 of this article and decided to defer consideration of the second sentence of this paragraph pending future action in connexion with the articles on passing of risk.

14. With respect to paragraph 2 of this article, the Working Group tentatively adopted a proposal that would make the paragraph read as follows:

The seller shall be liable for the consequences of any lack of conformity even though they occur after the time fixed in paragraph 1 of this article.

15. In view of the comments made in respect of this text, the Working Group decided to defer final action on paragraph 2 until the next session.

16. The Working Group further requested the representative of the USSR to submit for future consideration a text on the seller's liability for the breach of a guarantee in respect of the goods.

ARTICLE 36

17. The Working Group decided to defer consideration of this article until a final decision was taken in respect of article 33.

ARTICLE 37

18. The Working Group decided to delete the word "fixed" and to add at the end of this article the following sentence: "The buyer shall, however, retain the right to claim damages as provided in article 82", and it adopted the article as amended. The article as adopted reads:

If the seller has handed over goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 82.

ARTICLE 38

19. The Working Group reiterated its approval of paragraphs 1, 2 and 3 of the text contained in paragraph 109 of document A/CN.9/35.

20. In view of the comments made in respect of paragraph 4 of this text, the Working Group decided to defer final action on this paragraph to its next session.

ARTICLE 39

21. The Working Group decided to substitute the expression "within a reasonable time" for the word "promptly" where it appears in paragraph 1 and to delete the language commencing with "and invite the seller . . ." to the end of the sentence in paragraph 2.

22. The Working Group decided to adopt this article as amended. The article as adopted reads as follows:

1. 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 within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in article 38 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.

2. In giving notice to the seller of any lack of conformity, the buyer shall specify its nature.

3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

ARTICLE 40

23. The Working Group decided to adopt this article without change.

ARTICLE 41

24. The Working Group adopted the text proposed by Drafting Party VI. The article as adopted reads:

Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may:

- (a) exercise the rights provided in articles 42 to 46;
- (b) claim damages as provided in article 82 or articles 84 to 87.

ARTICLE 42

25. The Working Group adopted the text proposed by Drafting Party V. The article as adopted reads:

The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law.

ARTICLES 43-44

26. The Working Group deferred consideration of these articles until its next session and decided to use as a basis for future consideration of these articles the alternative proposals in document A/CN.9/WG.2/III/CRP.17/Add.1, as amended. The proposals read:

ALTERNATIVE A

Article 43

[Where the buyer requires the seller to perform the contract or] where the contract has not been declared avoided under article 44, the seller may deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defect in the goods handed over.

Article 44

1. The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract amounts to a fundamental breach of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity.

2. The buyer may also declare the contract avoided when he has fixed an additional period of time of reasonable length for the further delivery or for the remedying of the defect and the seller has failed to comply therewith, provided the buyer exercises this right promptly after the expiration of the period referred to in this paragraph.

ALTERNATIVE B

Article 43 (ULIS article 44)

1. The seller shall retain, even after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.

2. The buyer may however grant the seller an additional period of time of reasonable length for the performance of the contract. If at the expiration of the additional period

the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring performance of the contract in accordance with article 42 or reducing the price in accordance with article 46 or declaring the contract avoided in accordance with article 44.

Article 44 (ULIS article 43)

1. The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract, amounts to a fundamental breach of the contract.

2. However, unless the seller has refused to perform, the contract cannot be avoided;

(a) In any case where the seller under paragraph 1 of article 43 retains the right to deliver goods or remedy defects, before the seller has had a reasonable time to exercise that right, or

(b) In any case where the buyer has requested performance of the contract, before the expiry of any period specified in the request, or, if no period has been specified, before the expiry of a reasonable time.

3. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he has discovered or ought to have discovered the lack of conformity, or in cases to which paragraph 2 of this article applies, after the expiration of the relevant period of time referred to in that paragraph.

ALTERNATIVE C

Article 43 (merger of articles 43 and 44 of ULIS)

1. Where the non-conformity of goods delivered by the seller amounts to a fundamental breach of contract, the buyer, by notice to the seller, may declare the contract [avoided]. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he discovered or ought to have discovered the lack of conformity.

2. The seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over. This right may not be exercised if the delay in taking such action constitutes a fundamental breach of contract or if such action causes the buyer either unreasonable inconvenience or unreasonable expense.

3. Although the non-conformity of the goods does not constitute a fundamental breach the buyer may fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with article 46 or, provided that he does so promptly, declare the contract avoided.

ARTICLE 45

27. The Working Group decided to adopt this article without change.

ARTICLE 46

28. The Working Group requested the Secretariat to submit to the next session of the Working Group a study on this article.

ARTICLE 47

29. The Working Group decided to adopt this article without change.

ARTICLE 48

30. The Working Group decided to give further attention to this article. It was concluded that the problem of "anticipatory breach" posed by this article should be studied in connexion with the related provisions on this problem that appear in later sections of ULIS.

ARTICLE 49

31. The Working Group took note of the decision of the Commission at its third session to the effect that "the subject-matter of article 49 of ULIS would come within the scope of a convention on prescription and should be omitted from the Uniform Law on Sales". (A/8017, para. 34)

HANDING OVER OF DOCUMENTS: ARTICLES 50-51

32. The Working Group decided to defer final action on these articles and requested the representative of Japan, in consultation with the representatives of Austria, India and the United Kingdom, to submit to the next session of the Working Group a study on these articles. The Secretariat was requested to circulate this study among members of the Working Group.

TRANSFER OF PROPERTY: ARTICLES 52-53

33. The Working Group decided to defer final action on these articles until its next session. It invited the representative of Mexico to submit a proposal for a separate paragraph to deal with the question of restrictions by public authority.

OTHER OBLIGATIONS OF THE SELLER: ARTICLES 54-55

ARTICLE 54

34. The Working Group decided to substitute the expression "on the terms normally used for the transport of goods of the contract description" for "on the usual terms" in paragraph 1 of this article, and adopted the article as amended. The article as adopted reads as follows:

1. If the seller is bound to despatch the goods to the buyer, he shall make, in the usual way and on the terms normally used for the transport of goods of the contract description, such contracts as are necessary for the carriage of the goods to the place fixed.

2. If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.

35. The Working Group decided to defer final action on the proposal contained in document A/CN.9/WG.2/III/CRP.16 suggesting that this article should be transferred to article 21.

ARTICLE 55

36. The Working Group decided to defer final action on this article, and requested the representative of Japan to extend his study on articles 50 and 51 of ULIS to cover this article.

ANNEX II

Reasons for decisions of the Working Group

SPHERE OF APPLICATION OF THE UNIFORM LAW: ARTICLES 1-6

1. The provisions of ULIS defining its sphere of application was one of the principal subjects of consideration at the second session of the Working Group, held in December 1970. At that session the Working Group, *inter alia*, recommended modifications of the rules of articles 1 and 2 as well as other provisions of ULIS relating to its sphere of application. The

reasons for these recommendations appear at paragraphs 43-69 of the report on the second session.¹

2. The above-mentioned report of the Working Group was considered by the Commission at its fourth session;² the Commission's report with respect to these matters was discussed in the Sixth Committee of the General Assembly.³ Comments and proposals made at the Commission's fourth session and in the Sixth Committee during the twenty-sixth session of the General Assembly relating to articles 1-6 of ULIS were summarized in a note by the Secretary-General (A/CN.9/WG.2/WP.11, paragraphs 6 to 36). The Working Group also had before it a note by Austria, Belgium, Egypt and France on the definition of an international sale of goods (A/CN.9/WG.2/WP.13).

3. In considering the above comments and proposals, the Working Group focused its attention on two objections to the text recommended by the Working Group at its second session: (a) that the basic test of applicability of the Law that the parties have their places of business in different States, should be supplemented by one or more tests and, (b) that the subjective criterion in article 2 (a) based on knowledge of the parties should be replaced by an objective criterion. In connexion with these two objections the Working Group also paid attention to article 5 (1) (a) of the previously recommended text removing consumer sales from the scope of the Law.

4. The Working Group set up a drafting party (IV) consisting of the Chairman, the representatives of Austria, Japan and the USSR and the observer for Norway. The Drafting Party was requested to review the text recommended by the Working Group at its second session in the light of the debate and the comments and proposals mentioned above, and, if necessary, to submit an amended text.

5. The report of the Drafting Party appears in document A/CN.9/WG.2/III/CRP.15.

6. The Working Group approved, with minor amendments, the text recommended by the Drafting Party subject to the viewpoints and reservations of some delegations reflected below. The text as adopted is reproduced in paragraph 1 of annex I to the report of the Working Group.

7. The Working Group considered that the reintroduction of the qualifications contained in article 1(1) (a) (b) and (c) of ULIS or the introduction of any similar qualifications, as suggested in document A/CN.9/WG.2/WP.13, was not desirable because of the difficulties and uncertainties set forth in paragraphs 14-22 of the report of the Working Group on its second session.

8. The Working Group also considered that the suggested qualifications were not necessary because the recommended text excluded from the scope of the Law both (a) consumer sales and (b) transactions where the parties were not aware of the fact that their places of business were in different States. It was also considered that these rules, combined with the basic rule requiring that the parties have their places of business in different States, render the scope of application of the Law similar in result to that of original ULIS or that suggested in document A/CN.9/WG.2/WP.13, but expresses the scope of application in a clearer and simpler form.

9. Article 2 (a) of the text adopted at the second session had excluded transactions where the parties were not aware that they had their places of business in different States.

The Working Group agreed that this provision was difficult to apply in view of the subjective element contained in the expression "neither knew nor had reason to know".

10. The Working Group therefore substituted the above subjective test by an objective criterion which is contained in article 1, paragraph 2, in the recommended text (annex I, paragraph 1).

11. Article 5(1) (a) of the text recommended by the Working Group at its second session provided that goods ordinarily bought for consumer purposes were not excluded from the scope of the Law if "the seller knew that the goods were bought for a different use". The Working Group decided that the subjective test in the above phrase should be replaced by the objective test "it appears from the contract that they are bought for a different use". Some members of the Working Group suggested that the test should employ the language used in article 1-2 of the newly recommended text so that the text would read "it appears from the contract or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract...".

12. The Working Group was also of the opinion that articles 1-6, as amended, could be arranged in a more logical order. To this end, the previous article 2 (a), in its revised form, was transferred to article 1 of the present text (paragraph 2). As a result, article 1 includes all of the basic rules on the applicability of the Law; article 2 (previously article 5) deals with the exclusion of certain transactions and types of goods from the sphere of application of the Law. The rules relating to mixed contracts, previously set forth in article 6, now appear as article 3. Article 4 sets out the provisions previously contained in article 2 (b) to (f). Finally, the present article 5 is the previous article 3.

13. In deciding on the above rearrangement of the articles, the Working Group did not take decisions on comments with respect to the substance of subparagraph 2 (b) of present article 2,⁴ paragraph 1 of present article 3,⁵ article 4 (a) and (b)⁶ of the present text and present article 5.⁷

14. All members agreed that the present text relating to sphere of application of the Law was an improvement on the previously recommended text. However, some members were of the opinion that the present text did not meet all of their objections, especially the objection that under the recommended text certain sales which are essentially of domestic character might fall within the scope of the Law. These members, therefore, suggested that the basic test of applicability, contained in article 1(1) of the present text, should be supplemented by an additional requirement relating to the carriage of the goods or by the four qualifications contained in document A/CN.9/WG.2/WP.13.

GENERAL OBLIGATIONS OF THE SELLER; OBLIGATIONS AS REGARDS THE DATE AND PLACE OF DELIVERY: ARTICLES 18-32

15. The Working Group discussed these articles in the light of the report of the Secretary-General on "Delivery" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.8) and the comments and proposals made in respect of these articles, as summarized in document A/CN.9/WG.2/WP.10, paragraphs 10-23.

16. It was agreed that article 18, which was an introductory article to chapter III of the Law on the obligation of the seller, should be held in abeyance until the revision of that chapter was completed.

17. With respect to the definition of "delivery" in article 19, the Working Group gave preliminary consideration to the

⁴ A/CN.9/WG.2/WP.11, para. 34.

⁵ *Ibid.*, para. 35.

⁶ *Ibid.*, paras. 29-30.

⁷ *Ibid.*, para. 31.

¹ A/CN.9/52; UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

² Report of the United Nations Commission on International Trade Law on the work of its fourth session (29 March-20 April 1971), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417) (hereinafter referred to as UNCITRAL report on fourth session (1971)), paras. 57-69; UNCITRAL Yearbook, vol. II, part one, II, A.

³ Report of the Sixth Committee (A/8506); see above, first part, I, B.

question whether the Working Group should attempt to draft a definition of this term which would provide satisfactory solutions for specific problems such as risk of loss. In this connexion, the Working Group considered the above-mentioned report of the Secretary-General (A/CN.9/WG.2/WP.8). The report analysed the attempt in ULIS to employ a single concept of "delivery" for the solutions of specific problems, such as risk of loss, and pointed to difficulties in concrete commercial situations that resulted from this approach. The Working Group concluded that the approach employed in ULIS was unsatisfactory and that in approaching the problem of the definition of "delivery" it would be assumed that problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery".

18. A second question was whether the term "delivery" should be defined in the uniform Law. Some representatives were of the opinion that the Law should not provide for a definition. On the other hand, the view was expressed that the lack of any definition would leave a gap in the Law, particularly with reference to rules on time and place of delivery, and it was concluded that a revised definition of "delivery" should be included in the uniform Law.

19. The Working Group also considered the consequences of the definition of "delivery" in ULIS that the goods are not delivered unless they "conform with the contract". It was observed that, as a result, goods that were accepted and consumed by the buyer might not be considered to be "delivered" to him. The Working Group agreed that the conformity of the goods was not an essential element of "delivery", and, therefore, no such requirement was to be included in the definition.

20. Different proposals were made as to the definition of "delivery". Some representatives suggested that the present definition in ULIS, which reads "handing over the goods", should be maintained. Other representatives proposed that "delivery" should be defined as "placing the goods at the disposal of the buyer", and still others proposed the wording "handing over to the buyer or to a carrier or forwarding agent". It was also suggested that the present text should be substituted by a comparatively simple definition in general terms, based on the element of transfer of possession.

21. The Working Group also considered a proposal which defined "making delivery" by analogy to the definition of "taking delivery" contained in article 65 (A/CN.9/WG.2/III/CRP.2). The Working Group adopted this proposal, with minor changes, as a working hypothesis. The text as adopted, reads:

Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.

22. With respect to articles 20-23, the Working Group set up a drafting party (I) consisting of the representatives of Austria, France, the United States and the Union of Soviet Socialist Republics and the observer for ICC. The report of the Drafting Party is contained in document A/CN.9/WG.2/III/CRP.3. The report, setting forth proposed revised texts for articles 20 and 21, is as follows:

Article 20

(Article 19 (2) and (3), and article 23 (2) of ULIS—article 23 of the United States proposal)

1. Where the contract of sale involves the carriage of goods and no other place has been agreed upon, the seller shall hand the goods over to the carrier for transmission to the buyer and shall, where they are not clearly marked with an address or otherwise appropriated to the contract, send the buyer notice of the consignment and, if necessary, some document specifying the goods.

2. Where the sale relates to specific goods and the parties knew that the goods were at a particular place at the time of the conclusion of the contract, the seller shall [place the

goods at the buyer's disposal] at that place. The same rule shall apply to unascertained goods to be taken from a specified stock or to be manufactured or produced at a place known to the parties at that time.

3. In all other cases, the seller shall [place the goods at the buyer's disposal] at the place where the seller carried on business at the time of the conclusion of the contract, or, in the absence of a place of business, at his habitual residence.

Article 21

(Articles 20, 21 and 22 of ULIS—article 20 of the United States proposal)

The seller shall [hand the goods over, or place them at the buyer's disposal]:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.

23. In addition to comments and proposals relating to the substance of the recommended text, many representatives suggested that since the Drafting Party had prepared its proposal before the Working Group made its decision on the definition of "delivery" (paragraph 21 above) the text recommended by the Drafting Party should be brought into line with that definition.

24. Pursuant to this proposal the Working Group set up a new drafting party (VIII) consisting of the representatives of Austria, Hungary and the United States, to prepare a revised draft of articles 19-23, taking into account the comments and proposals made during the debate. The proposal of the Drafting Party appears in document A/CN.3/WG.2/III/CRP.16. The text of this proposal reads as follows:

Article 19

Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.

Article 20

1. Delivery shall be effected:

(a) Where the contract of sale involves the carriage of goods and no place for delivery has been agreed upon, by handing the goods over to the carrier for transmission to the buyer;

(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unascertained goods to be drawn from a specific stock to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

(c) In all other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.

Article 21

1. If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.

2. [Article 54 (2) unchanged.]

25. One representative held that the merit of the original text of article 19 was that it defined delivery when the carriage of goods was involved; in the view of this representative this merit was lost in the new text. Another representative suggested that articles 19 and 20 should be combined. Some representatives were of the opinion that article 54 (2), that had been included in the recommended text as article 21, paragraph 2, should be deleted.

26. The Working Group agreed to add to the proposal of Drafting Party VIII (CRP.16), set forth in paragraph 24 above, article 21 of the text in document CRP.3 as article 22 and to defer final action with respect to the amended text until its next session. The text, as adopted for further consideration, is set out in annex I to the report of the Working Group (paragraph 4).

27. One representative expressed the view that the structure of ULIS was preferable to that in document CRP.16 and submitted the following draft for consideration by the Working Group at its next session:

"Section 1. Delivery of the Goods

"Article 19

"[1. Delivery consists in the seller's accomplishing the final act necessary in order to enable the buyer to take control of the goods.]

"2. Where the contract of sale contemplates carriage of the goods and no other method of delivery has expressly or impliedly been agreed upon, delivery shall be deemed to be effected by handing over the goods to the carrier for transmission to the buyer.

"3. Where the goods handed over to the carrier are not appropriated to performance of the contract, the seller shall, in addition to handing over the goods, send to the buyer notice of the consignment and, if necessary, some document specifying the goods."

"Articles 20, 21, 22, 23

"[ULIS unchanged.]"

Articles 24-32

28. In considering articles 24-32 of ULIS the Working Group had before it the analysis of comments and proposals made in respect of these articles (A/CN.9/WG.2/WP.10, paragraphs 25-31) and the report of the Secretary-General on "ipso facto avoidance" in the Uniform Law on the International Sale of Goods (A/CN.9/WG.2/WP.9).

29. Most representatives and observers who spoke on the issue agreed that the concept of "ipso facto avoidance" that was used, *inter alia*, in articles 25, 26 and 31 of ULIS, should be eliminated from the remedial system of the Law because it created uncertainty as regards the rights and obligations of the parties in case of breach of the contract. The opinion was also expressed that the only advantage that might be derived from application of the concept of "ipso facto avoidance" was that this concept could be employed to prevent the buyer from profiting from price fluctuations; on the other hand it was suggested that the problem of possible speculation based on price fluctuation could be dealt with directly without the use of the general concept of *ipso facto* avoidance. Most representatives concluded that any advantage related to the question of speculation was far outweighed by the confusion and uncertainty into which the whole relationship of the parties would be thrown by the retention of the concept of *ipso facto* avoidance. One observer noted that the system of "ipso facto avoidance" was one of the major obstacles that prevented many countries from acceding to ULIS.

30. One representative, who felt that the concept of "ipso facto avoidance" should be maintained, stated that a similar concept was contained in his national law and that the application of this concept caused no difficulties in practice. The

same representative also expressed the view that the uncertainty caused by the concept of "ipso facto avoidance" was not worse than that resulting from a system that would require a prolonged exchange of notices in order to avoid the contract. An observer also urged caution with regard to elimination of the concept.

31. The Working Group agreed that in the remedial system of the law avoidance of the contract should be made dependent on notice by the injured party to the party in breach. If the injured party did not declare the contract avoided the contract continued to be in force.

32. The Working Group considered the proposal as set forth in the analysis of comments and proposals (A/CN.9/WG.2/WP.10, paragraph 27) that the provisions of the Law on remedies for breach of contract with regard to the date of delivery and the place of delivery should be amalgamated. Several representatives expressed their agreement with this proposal. One representative, however, objected to this proposal. An observer suggested that the present system of articles 24 to 32 should be retained.

33. In addition to the above general comments and proposals regarding the remedial system of the Law, several specific comments and proposals were made in respect of articles 24 to 32.

34. In respect of article 24 one representative suggested that since this article served no useful purpose it should be deleted.

35. As regards article 25 some representatives were of the opinion that this article should also be deleted. One representative, however, expressed the view that such deletion would only be required if the concept of "ipso facto avoidance" had been definitively deleted from the Law. Another representative objected to the deletion of this article but suggested that the article should be redrafted.

36. In respect of article 28 one representative expressed the view that this article was too rigid. Several representatives suggested the deletion of the article. One representative expressed concern at the proposal to delete article 28 although the text of this article was not appropriate. In the view of this representative article 28 should state that the failure to deliver the goods at the date fixed does not amount to a fundamental breach of the contract.

37. The Working Group set up a drafting party (II) consisting of the representatives of Hungary, Japan and the United Kingdom and the observers for Belgium and Norway. The report of the Drafting Party is contained in document A/CN.9/WG.2/III/CRP.9. The text of this report is reproduced in annex I to the report of the Working Group at paragraph 7.

38. The Chairman of the Drafting Party reported to the Working Group that doubts had been expressed whether the term "avoided" was the appropriate term in English or whether the term "terminated" or "cancelled" should be used instead. The Drafting Party put the word "avoided" between square brackets to indicate that this question needed further consideration.

39. In articles 25, paragraph 1, and 26, paragraph 1, of the proposed text the Drafting Party substituted the expression "the buyer may . . . retain the right to performance" for the expression "the buyer may . . . require performance", which was used in article 26 of ULIS. The Drafting Group introduced this change because it held that the word "require" (a) had overtones of specific performance which would depend on the rules of individual legal systems, and (b) could be understood in such a way that the buyer had to state expressly his wish that the contract should be performed.

40. The Drafting Party could not agree on the language of article 25, paragraph 2. Therefore, it included in its report both variants which were proposed for this paragraph and

suggested that with respect to this paragraph the Working Group should take its final decision on the basis of a study to be prepared on the implications of both variants.

41. One representative noted that the text recommended by the Drafting Party, especially articles 25, paragraphs 2, 3 and 4, 26, paragraph 1, and 27, gave the impression that any delivery made at a place other than that fixed was not a delivery at all. The text did not provide for cases in which the seller made delivery but at a wrong place.

42. An observer suggested that the following provision should be included in article 24 as paragraph 2 *bis*:

"When the seller has effected delivery of the goods, the buyer shall lose his rights to remedies [as regards delivery] if he does not give the seller notice of the failure within a reasonable time after he has received the goods and has become or ought to have become aware of the failure."

43. The Chairman of the Drafting Party noted that the Drafting Party had considered the above proposal and decided not to include it in the recommended text. Some representatives who were not members of the Drafting Party also thought that the proposal was not acceptable.

44. In respect of article 25 of the recommended text, one representative suggested that the new system embodied in this article was not practicable; it should be replaced by a system under which the seller's failure to deliver the goods at the right place and at the right time would preclude him from taking any action before the buyer informed him of his (the buyer's) decision. Another representative noted that the new system in article 25, providing that avoidance of the contract could only be effected by express declaration, would not eliminate disputes between the parties because the system had maintained the concept of "fundamental breach" and this concept might give rise to conflicting interpretations.

45. Some representatives noted that the expressions "promptly" and "reasonable time" which were used in several paragraphs of article 25 were not clear and, therefore, some indication was needed as to their exact meaning.

46. One observer suggested that article 25, paragraph 3, of the recommended text should be redrafted as follows:

"3. The buyer shall lose his right to declare the contract avoided, if he does not exercise it promptly after he has received the goods or has been informed of delivery at a certain date and place, unless the seller has effected delivery after he has got notice of the buyer's declaration of avoidance under paragraph 1 of this article."

47. The Working Group decided to defer final action on these articles until its next session and, in accordance with the proposal of the Drafting Party, requested the representative of Hungary to prepare a study on the questions set out in paragraph 8 of annex I.

OBLIGATIONS OF THE SELLER AS REGARDS CONFORMITY OF THE GOODS: ARTICLES 33-49

Article 33

48. Some representatives were of the opinion that the opening phrase of paragraph 1 of this article "the seller shall not have fulfilled his obligation to deliver the goods . . ." was not acceptable because it linked the seller's obligation of delivery to the conformity of the goods, and the Working Group had previously decided that conformity of the goods was not an essential element of delivery.

49. The opinion was also expressed that subparagraphs 1 (a) to 1 (f) were too complex and that it was not desirable to attempt to enumerate, in an exhaustive list, all possible cases of non-conformity. In the view of some representatives, a preferable approach would be to set forth a short statement of a general principle coupled with a few specific examples.

50. In response to the above criticisms and suggestions, the observer for Norway submitted the proposal contained in document A/CN.9/WG.2/III/CRP.4/Rev.1, which reads as follows:

"1. The seller shall not have fulfilled his obligation as regards conformity where the goods are not of the quantity or quality [or do not have other characteristics] expressly or impliedly contemplated by the contract, in particular, where the goods:

"(a) Are only part of the goods sold or are of a larger or smaller quantity than contemplated in the contract;

"(b) Lack the qualities of a sample or model which the seller has handed over or sent to the buyer, unless the seller has submitted it without any express or implied undertaking that the goods would conform therewith; or

"(c) Do not possess the qualities necessary for their use.

"2. The seller shall not be responsible for the consequences of a lack of conformity as regards qualities necessary for their use [or other qualities contemplated by the contract], if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity (cp. ULIS art. 36).

"3. (As ULIS art. 33, paragraph 2 revised.)"

51. Several representatives did not find the above proposal entirely satisfactory. In the view of these representatives, it was important to have a precise and exhaustive list of what constituted non-conformity so that the buyer could determine whether or not the seller was in breach of his obligation.

52. The Working Group set up a drafting party (IX) consisting of the United Kingdom and the United States to prepare a text that would simplify paragraph 1 of article 33.

53. The Drafting Party submitted the text contained in document A/CN.9/WG.2/III/CRP.14. That text reads as follows:

"1. The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract.

"1 *bis*. Unless the terms or circumstances of the contract indicate otherwise, the seller shall deliver goods:

"(a) Which are fit for the purposes for which goods of the same contract description would ordinarily be used;

"(b) Which are fit for any particular purpose expressly or impliedly made known to the seller;

"(c) Which possess the qualities of a sample or model which the seller has handed over or sent to the buyer;

"(d) Which are contained or packaged in the manner usual for such goods."

54. The Working Group took note of the above text and deferred final action on paragraph 1 of article 33 until its next session.

55. With respect to paragraph 2 of this article, the Working Group decided that the words "not material" in the English version should be replaced by the words "clearly insignificant" and, accordingly, in the French text the word "*manifestement*" should be inserted immediately before the words "*sans importance*". The reason for these changes was to make it clear that this paragraph was intended to reflect the maxim "*de minimis non curat lex*".

Article 34

56. The Working Group decided that article 34 of ULIS should be deleted.

57. It was noted that the article was intended to protect the uniformity of the rules of article 33 regarding conformity of the goods by preventing recourse to other remedies available under some national rules, like a plea of nullity, based on mistake as to the quality of the goods.

58. The Working Group concluded that the article in its present formulation goes much beyond the intention of the draftsmen of ULIS and could possibly be interpreted to preclude not only remedies under the national law but those remedies that the parties might have agreed upon in the contract.

59. It was suggested that in order to avoid the above interpretation the words "except those provided for by agreement between the parties or by any usage" should be added at the end of the article. This proposal was not accepted on the ground that it would give rise to a serious problem of concordance with the rest of the Uniform Law.

60. Other draft texts were also considered, including a proposal contained in document A/CN.9/WG.2/III/CRP.5. The Working Group held that the language of those proposals was also too broad.

61. It was concluded that since the problem referred to in paragraph 2 above would arise only in exceptional cases, article 34 should be deleted altogether for lack of appropriate language that would clearly reflect the intention of the draftsmen of this article.

Article 35

62. The Working Group decided to adopt without change the first sentence in paragraph 1 of this article.

63. With respect to the second sentence of paragraph 1, the Working Group deferred its consideration to a future session, pending action in connexion with later articles on passing of risk.

64. Paragraph 2 of this article was tentatively redrafted to read as set out in annex I to the report of the Working Group at paragraph 14.

65. One representative suggested that paragraph 2 should also provide for the seller's liability for breach of a guarantee. Some representatives, however, were of the opinion that the subject of contracts of guarantee involved much larger issues than those dealt with in paragraph 2 of this article and should therefore be dealt with in a separate article.

66. In view of the above comments, the Working Group decided to defer final action on paragraph 2 until its next session. The Working Group also requested the representative of the USSR to submit for future consideration a text on the seller's liability for breach of a guarantee in respect of the goods.

Article 36

67. The Working Group took note of the comment in document A/CN.9/WG.2/WP.10, paragraph 42, stating that the deletion or modification of any of the subparagraphs (d), (e) or (f) of paragraph 1 of article 33 might also require re-examination of the references to these subparagraphs in article 36. The Working Group, therefore, deferred consideration of this article until a final decision was taken in respect of article 33.

Article 37

68. The text of the article as adopted by the Working Group appears in annex I, paragraph 18.

69. The last sentence of the article, as adopted by the Working Group, was added to the original text of ULIS to indicate that although the buyer cannot refuse advance delivery where such delivery does not cause him "unreasonable inconvenience or unreasonable expense", the buyer may nevertheless claim compensation for any inconvenience or expense.

Article 38

70. The Working Group reiterated its approval of paragraphs 1, 2 and 3 of the text recommended by the Working Group at its first session.⁸

71. The Working Group concluded that the language of original paragraphs 2 and 3 of article 38 of ULIS required the buyer to inspect the goods under circumstances that would often make such examination impracticable or inconvenient. One example is where the buyer upon delivery redispaches the goods to a customer by rail or road. The problem becomes more serious where the goods are delivered in such containers as would make it impracticable to open them before reaching their final destination. The Working Group therefore considered that the flexible language in paragraphs 2 and 3 in the recommended text would meet those objections.

72. With respect to paragraph 4 of this article one representative suggested that in the absence of agreement by the parties, the methods of examination shall be governed "by the law and usages of the seller". Another representative suggested that the opening phrase of this paragraph should read "The opportunity and methods of examination shall be governed . . .".

73. In view of these comments, the Working Group decided to defer final action on paragraph 4 until its next session.

Article 39

74. The Working Group considered that the use of the word "promptly" in paragraph 1 of this article was inappropriate, since it might result in depriving the buyer of all remedies if he did not notify the seller within the shortest possible time of the lack of conformity.

75. A distinction was drawn between two cases: (1) where the buyer was seeking to avoid the contract and to reject the non-conforming goods, and (2) where he decided to keep the same goods and to claim damages or reduction in the price. It was concluded that while the short notification period established by the word "promptly" was suitable in the first case, it was not appropriate in the second.

76. Where the buyer was rejecting the goods, a prompt communication to the seller was important so that he could have an opportunity to make a tender of conforming goods within the required period. In such cases, a prompt communication might also be important to give the seller an opportunity to care for or redispose of the rejected goods and thus reduce the chance for loss or damage to the goods or the incurring of unnecessary expense. On the other hand, where the buyer decided to keep the defective goods, subject to a claim for damages, the above reasons for prompt notification were not applicable.

77. The Working Group therefore decided that the phrase "within a reasonable time" should be substituted for the word "promptly" which appears twice in that paragraph.

78. The Working Group considered that the above change was flexible enough to accommodate the two cases mentioned in paragraph 2 above; for what is a "reasonable time" was, of course, a question that depended on the circumstances of each case.

79. In deleting the concluding phrase in paragraph 2 of this article, "and invite the seller to examine the goods or to cause them to be examined by his agent", the Working Group concluded that it was inconsistent with normal commercial practice.

80. The text of the article as adopted appears in annex I, paragraph 22.

⁸ Report of the Working Group on the International Sale of Goods, first session, 5-16 January 1970 (A/CN.9/35), paras. 109-111; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A.

Article 40

81. No comments having been made with respect to this article, the Working Group decided to adopt this article without change.

Article 41

82. Several representatives expressed the opinion that the drafting of article 41 of ULIS could be improved. Other representatives suggested that inasmuch as the controlling provisions were contained in articles 42 to 46, article 41 was not necessary.

83. With a view to simplifying article 41, the Working Group set up a drafting party (V) consisting of the representatives of Austria, India and the United States and the observer for Norway.

84. The Working Group adopted the text proposed by the Drafting Party as contained in document A/CN.9/WG.2/III/CRP.11/Rev.2 which appears in annex I, paragraph 24.

85. One representative suggested that the expression "fully or partially" be inserted after the word "conform" in the opening phrase of this article.

Article 42

86. One observer suggested that article 42 should be amended so as to provide that when the buyer rejects the goods delivered on grounds of non-conformity, he should not be entitled to demand other goods in replacement unless the non-conformity amounted to a fundamental breach. The same observer also suggested that the buyer should lose his right to demand performance if he did not exercise this right within a reasonable time after giving the seller notice of the lack of conformity.

87. Several representatives did not agree with the above suggestions. In the view of these representatives the buyer should be entitled to require performance in all cases where he has not declared the contract avoided nor availed himself of the other remedies open to him, irrespective of whether the breach was or was not fundamental.

88. For the same reason mentioned in paragraph 87 above, several representatives were of the opinion that article 42 of ULIS unnecessarily limited the right of the buyer to require performance. It was also suggested that this article was unnecessarily complex.

89. In view of the above suggestions and comments, the Working Group referred this article to the Drafting Party that was set up in connexion with article 41 (paragraph 83).

90. The Working Group adopted the text proposed by the Drafting Party as contained in document A/CN.9/WG.2/III/CRP.11/Rev.2, which appears in annex I, paragraph 25.

91. One representative suggested that the expression "total or partial" be inserted before the word "performance" in the above text.

92. For the reasons mentioned in paragraph 86 above, one observer stated that the adopted text could be improved and proposed that article 42 should read as follows:

"1. [Same as paragraph 1 of article 42 of ULIS].

"2. However, the buyer may not reject the goods delivered and insist on getting delivered other goods which are in conformity with the contract, unless the lack of conformity amounts to a fundamental breach of the contract. The buyer shall lose his right to such performance if he does not exercise it within a reasonable time after he has discovered or ought to have discovered the lack of conformity.

"3. [Same as in paragraph 2 of article 42 of ULIS]."

Articles 43-44

93. Several representatives were of the opinion that the drafting of articles 43 and 44 of ULIS could be improved.

94. It was suggested that the phrase "and also the failure to deliver on the date fixed" should be deleted since article 43 dealt only with avoidance of the contract for lack of conformity. The remedies as regards delay in delivery were dealt with in articles 26 to 29.

95. Other representatives were of the opinion that the language in question be replaced by the phrase "on the date fixed for delivery" so as to make it clear that the goods should conform to the contract on that date.

96. One representative supported the language of article 43 on the ground that there was a direct link between non-conformity and delivery date. In the view of this representative, the buyer should not be able to avoid the contract unless the delay in making good the defect or deficiency constitutes a fundamental breach of the contract.

97. One observer proposed that article 43 should be re-drafted in such a way as to allow the seller a reasonable time to remedy the defect before the buyer could declare the contract avoided provided that the buyer did not suffer unreasonable inconvenience or expense.

98. Several representatives did not agree with this proposal in cases where the non-conformity amounted to a fundamental breach of the contract.

99. It was also mentioned that the reference to paragraph 2 of article 42 at the end of article 43 made the article too complex and difficult to understand.

100. With respect to article 44, some representatives were of the opinion that paragraph 1 of this article was superfluous and should be deleted; if the contract was not avoided, it went without saying that the seller would try to remedy the defect in question.

101. Other representatives were opposed to the deletion of paragraph 1 on the ground that the paragraph dealt with cases where the non-conformity of the goods did not amount to fundamental breach and therefore served a useful purpose.

102. One representative stated that paragraph 1 should not be deleted but that its language was too broad. Thus, the seller's right to cure the defect should be limited to cases where the seller was in some way surprised; otherwise, the provision would protect a seller who knowingly supplied defective goods.

103. The Working Group set up a drafting party (VI) consisting of the representatives of Austria, India, the USSR and the United States, as well as the observer for Norway, to make recommendations with respect to articles 43 and 44 in the light of the above comments and proposals.

104. The Drafting Party could not reach agreement on the drafting of those two articles and submitted for the consideration of the Working Group three alternative proposals that are contained in document A/CN.9/WG.2/III/CRP.17/Add.1. The text of these alternative proposals appears in annex I, paragraph 26.

105. On the recommendation of the Drafting Party, the Working Group deferred further consideration of articles 43 and 44 until its next session and decided to use the above alternative proposals as a basis for future consideration.

106. One observer suggested that the following words should be added at the end of paragraph 1 in article 43 under alternative B:

"However, this right cannot be exercised when the delay in taking such action amounts to a fundamental breach of contract."

Article 45

107. The Working Group decided to adopt this article without change.

108. One representative was of the opinion that paragraph 1 of this article should be deleted and that the expression "or if only part of the goods delivered conforms to the

contract" be added at the end of subparagraph 1 (a) of article 33.

Article 46

109. Several representatives expressed the opinion that article 46 in its present form was difficult to understand. One representative pointed out that the words "the buyer may reduce the price" does not make it clear whether the buyer could claim a return of a portion of the price he had already paid or could only do so under an action for damages. In response to this criticism, one representative suggested that the above phrase should read "the buyer may claim a reduction in the price" so as to enable the buyer to make such a claim in cases where he had paid the full price. The same representative also suggested that the right to claim a reduction in price should be limited to cases of deficiency in quantity and should not extend to cases of defect in quality because of the difficulty of determining objectively the measure of the reduction in price the buyer might make.

110. One representative suggested that in view of the complexity of the language of this article, the article should be deleted. If the buyer made a bad contract, he would in all probability like to avoid the contract. However, this representative was prepared to accept a clear provision that would enable the buyer to set off against an action by the seller for damages a price reduction for lack of conformity.

111. Another representative was of the opinion that the difficulty with article 46 arose partly because of its position in the Uniform Law and partly because of the complexity of its language. The article might become clear if it was merged with paragraph 2 of article 44.

112. One representative doubted whether the measure of reduction in price was adequately expressed by the words "in the same proportion as the value of the goods at the time of the conclusion of the contract". He was not convinced that it was fair to take account of the value of the goods at the time of the conclusion of the contract, especially in the case of commodities the price of which was of a highly speculative nature.

113. One representative expressed the view that the remedy of reduction in price should be one of the options open to the buyer and should not be limited to cases where the buyer had neither obtained performance nor declared the contract avoided. In this connexion, this representative suggested that the Uniform Law should specifically provide for the right of the buyer, as a separate remedy, to cure the defect in the goods at the seller's expense if the buyer so chooses without the need to previously require the seller to cure the defect.

114. The Working Group referred article 46 to the Drafting Party (VI) that was set up in connexion with articles 43 and 44.

115. On the recommendation of the Drafting Party (A/CN.9/WG.2/IH/CRP.17), the Working Group deferred further consideration of article 46 and requested the Secretariat to submit to the Working Group at its next session a study on this article.

Article 47

116. No comments having been made in respect of this article, the Working Group decided to adopt this article without change.

Article 48

117. One representative expressed the view that the concept of anticipatory breach that is contained in article 48 was basically taken from the Common Law and was unknown to the legislation of many countries. In the opinion of this representative article 48 did not provide clear guidelines that could assist in the application of the article by judges in countries unfamiliar with the concept of anticipatory breach.

118. Another representative stated that in view of the reference to articles 43 to 46 in article 48, the phrase "even

before the time fixed for delivery" in the article would preclude the right of the seller to remedy the defect at or before the actual date of delivery.

119. Another representative stated that the rule set forth in article 48 did not appear to be entirely in conformity with the common law rule relating to anticipatory breach and should therefore be redrafted.

120. At the suggestion of several representatives, the Working Group decided to give further consideration to this article at a future session in connexion with later provisions in ULIS which deal with the question of anticipatory breach (articles 75 to 77).

Article 49

121. The Working Group took note of the decision of the Commission at its third session that "the subject-matter of article 49 of ULIS would come within the scope of a convention on prescription and should be omitted from the Uniform Law on Sale" (A/8017, paragraph 34).

HANDING OVER OF DOCUMENTS: ARTICLES 50-51

122. Some representatives were of the opinion that articles 50 and 51 had little practical advantage since they did not state which documents relating to the goods should be handed over by the seller. Thus, article 50 would be unhelpful if the contract or usage did not specify the time and place for the handing over of the documents; if the contract or usage did govern these questions, the custom or usage would be given effect under other articles of the Uniform Law. For these reasons, article 50 and 51 should be deleted.

123. One representative who shared the view that these articles should be deleted, stated that it would be difficult for the Working Group to regulate in specific provisions of the Uniform Law all issues relating to handing over of documents under the different contracts such as f.o.b., c.i.f., Ex Ship etc. In the view of this representative, article 55 was sufficiently broad to include the seller's obligation relating to such documents. As an alternative, this representative suggested that articles 50 and 51 should deal only with documents of title.

124. Another representative, while agreeing that article 50 should be deleted, held that article 51 should be retained because it equated documentary sales with non-documentary sales and subjected both types of sale to the same law. Such a provision was useful to prevent disputes as to what law was applicable to documentary sales.

125. Other representatives objected to the deletion of articles 50 and 51 on the ground that the handing over of documents was an important question in international sales. One of these representatives suggested that article 50 may be redrafted to read "The seller shall hand over all such documents relating to the goods as are necessary to enable the buyer to take over the goods". Another suggestion was to consolidate articles 50 and 51 with articles 54 and 55 or, as an alternative, to define delivery in such a way as to include the idea of handing over documents relating to the goods.

126. Another representative who favoured the retention of articles 50 and 51 suggested that the word "any" in the first line of article 50 should be deleted and the words "under the contract or usage" be inserted after the word "goods" in the second line of the same article.

127. At the suggestion of some representatives who stated that final action on articles 50 and 51 could not be taken without a careful study of the issues involved, the Working Group decided to defer final action on these articles. The Working Group also requested the representative of Japan, in consultation with the representatives of Austria, India and the United Kingdom, to submit to the next session of the Working Group a study on the questions dealt with in articles 50 and 51. The Secretariat was requested to circulate this study among the members of the Working Group.

TRANSFER OF PROPERTY: ARTICLES 52-53

128. One representative introduced the proposal relating to articles 52 and 53 that is contained in document A/CN.9/WG.2/WP.10, paragraph 76. In addition to introducing some drafting changes, the proposal aimed at protecting the buyer from "restrictions imposed by public authority" as well as from rights and claims of third parties.

129. Several representatives were opposed to the above proposal. It was stated that articles 52 and 53, contrary to the title given to them in ULIS, deal with the guarantee of title by the seller rather than the transfer of property. Restrictions imposed by public authority seldom constituted incumbrances to title; they mostly restricted the movement of the goods.

130. Some representatives also stated that the question of public restrictions was too complex to be dealt with under articles 52 and 53. It was pointed out there were various kinds of restrictions imposed by public authority, some of which affected the obligations of the seller alone, while others affected the obligations of both buyer and seller. Furthermore, some restrictions arise before the conclusion of the contract, others after the conclusion of the contract, and therefore the seller could not be held responsible for all their consequences without reference to the passing of risk. In the view of those representatives the question of restrictions by public authorities should be dealt with, if necessary, under separate provisions.

131. Consideration was given to the proviso "unless the buyer knows or should have known at the time of the contract that the goods would be acquired" subject to the right or claim of a third party, which was introduced in the above proposal. In the view of some representatives this proviso was unacceptable. In the absence of an express agreement by the buyer to take the goods subject to a right or claim of a third party, actual or constructive knowledge should not deprive the buyer of his guarantee of title.

132. Several representatives were of the opinion that the régime established by articles 52 and 53 of ULIS leaned heavily in favour of the seller. In the view of these representatives, the seller's failure to transfer a good title to the goods, free from third party's rights or claims, results, in most cases, in a fundamental breach of the contract. The buyer should be entitled to rescind the contract without the necessity of first requesting the seller to perfect the title or to deliver other goods free from incumbrances or claims as article 52 of ULIS required.

133. Some representatives who shared the above view suggested that a defect in title was not different from a non-conformity in the quantity or quality of the goods which constituted a fundamental breach. Consequently, the remedies of the buyer should be the same in both cases, it was proposed that the seller's obligation to transfer a good title should be dealt with under the articles dealing with the obligations of the seller as regards the conformity of the goods to the terms of the contract (article 33).

134. Other representatives, while agreeing that a defect in title should not be treated as less serious than a non-conformity, did not agree with the proposal that the seller's obligation to transfer good title should be dealt with under or close to the articles on conformity of the goods. The two obligations were distinctly different.

135. Some representatives had reservation about the use of the word "claim" in articles 52 and 53. The use of such word might lead to abuse by the buyer in that he might hold the seller responsible for any third party's claim, however frivolous or vexacious. Other representatives did not share this reservation on the ground that the word "claim" could only be interpreted to mean a valid or well-founded claim. One representative stated that if any qualification was used in the text to describe the claim such as the word "valid" might raise the problem of which law should determine the validity of that claim.

136. One representative suggested that the words "except those provided for by the agreement between the parties or by usage" be added at the end of article 53.

137. Another representative proposed that article 52 should be drafted as follows:

"1. The seller shall not have fulfilled his obligation as regards property where the goods are subject to a right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

"2. The buyer shall have the same rights on a failure by the seller to fulfil his obligation as regards property as he has on a failure by the seller to fulfil his obligation as regards conformity."

138. In view of the above comments and proposals the Working Group decided to defer final action on articles 52 and 53 until its next session and requested the representative of Mexico to submit a proposal for a separate article or paragraph to deal with the question of restrictions by public authority.

OTHER OBLIGATIONS OF THE SELLER: ARTICLES 54-55

Article 54

139. In order to conform the language of paragraph 1 of this article to that used in INCOTERMS 1953, the Working Group decided to substitute the expression "on the terms normally used for the transport of goods of the contract description" for the phrase "on the usual terms" and adopted the language of article 54 as amended. The adopted text as amended appears in annex I to the report of the Working Group at paragraph 34.

140. Some representatives were of the opinion that paragraph 2 of article 54 should be deleted. If the seller was not bound by the contract to effect insurance of the goods, he should not be under a legal obligation to provide the buyer with information relating to premiums and insurance policies.

Article 55

141. One representative stated that the remedies provided in article 55 entitling the buyer to require performance of the obligation and to claim damages were more stringent than those provided for in common law countries for breach of similar obligations by the seller; the buyer could normally claim damages only.

142. One observer had doubt as to the desirability of article 55, the wording of which he considered to be too strong.

143. One representative pointed out that the reference to the obligations of the seller under article 53, made in paragraph 1 of article 55, was perhaps a mistake or oversight, as there were no obligations under article 53.

144. In the light of the above comments, the Working Group decided to defer final action on article 55, and requested the representative of Japan to extend his study on articles 50 and 51 of ULIS to cover this article.

ANNEX III

Revised text of articles 1-55 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.

* Square brackets indicate that the Working Group took no final decision on the provisions enclosed.

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

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

Article 2

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 or household use, unless it appears from the contract [or from any dealings between, or from information disclosed by the parties at any time before or at the conclusion of the contract] that they are 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 3

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 4

For the purpose of the present Law:

(a) [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;]

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

(c) Neither the nationality of the parties nor the civil or commercial character of the parties or the contract shall be taken into consideration;

(d) 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;

(e) 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 5

The parties may exclude the application of the present Law or derogate from or vary the effect of any of its provisions.

Article 6

(Transferred to article 3, paragraph 2)

Article 7

(Transferred to article 4 (c))

Article 8

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. (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 expression, 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

[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.]

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)

Article 13

(Deleted)

Article 14

Communications provided for by the present Law shall be made by the means usual in the circumstances. (Unchanged)

Article 15

[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].]

Article 18

[The seller shall effect delivery of the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and the present Law.]

Article 19

[Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.]

Article 20

1. [Delivery shall be effected:

(a) Where the contract of sale involves the carriage of goods and no other place for delivery has been agreed upon, by handing the goods over to the carrier for transmission to the buyer;

(b) Where, in cases not within the preceding paragraph, the contract relates to specific goods or to unascertained goods to be drawn from a specific stock to be manufactured or produced and the parties knew that the goods were at or were to be manufactured or produced at a particular place at the time of the conclusion of the contract, by placing the goods at the buyer's disposal at that place;

(c) In all other cases by placing the goods at the buyer's disposal at the place where the seller carried on business at the time of the conclusion of the contract or, in the absence of a place of business, at his habitual residence.]

Article 21

1. [If the seller is bound to deliver the goods to a carrier, he shall make, in the usual way and on the usual terms, such contracts as are necessary for the carriage of the goods to the place fixed. Where the goods are not clearly marked with an address or otherwise appropriated to the contract, the seller shall send the buyer notice of the consignment and, if necessary, some document specifying the goods.]

2. [If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.] (Previous article 54, paragraph 2 of ULIS.)

Article 22

[The seller shall [hand the goods over, or place them at the buyer's disposal]:

(a) If a date is fixed or determinable by agreement or usage, on that date; or

(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, within that period on a date chosen by the seller unless the circumstances indicate that the buyer is to choose the date; or

(c) In any other case, within a reasonable time after the conclusion of the contract.]

Article 23

[Merged with article 20]

Article 24

1. [Where the seller fails to perform his obligations as regards the date or place of delivery, the buyer may exercise the rights provided in articles 25 to 27.]

2. [The buyer may also claim damages as provided in article 82 or in article 84 to 87.]

3. [In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.]

Article 25

1. [Where the failure to deliver the goods at the date or place fixed amounts to a fundamental breach of the contract, the buyer may either retain the right to performance of the contract by the seller or by notice to the seller declare the contract [avoided].]

[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods within a reasonable time, unless the request indicates otherwise.]

[2. If the seller requests the buyer to make known his decision under paragraph 1 of this article and the buyer does not comply promptly, the seller may effect delivery of the goods before the expiration of any time indicated in the request, or if no time is indicated, before the expiration of a reasonable time.]

3. [If, before he has made known to the seller his decision under paragraph 1 of this article, the buyer is informed, that the seller has effected delivery and he does not exercise promptly his right to declare the contract [avoided] the contract cannot be [avoided].]

4. [If after the date fixed for delivery the buyer requests the seller to perform the contract, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, before the expiration of a reasonable time, unless the seller refuses to deliver within that time.]

Article 26

1. [Where the failure to deliver the goods at the date or place fixed does not amount to a fundamental breach of the contract, the seller shall retain the right to effect delivery and the buyer shall retain the right to performance of the contract by the seller.]

2. [The buyer may however grant the seller an additional period of time of reasonable length. If the seller fails to perform his obligations within this period, the buyer may by notice to the seller declare the contract [avoided].]

Article 27

[Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.]

Articles 28 to 32

[Merged with articles 24 to 27]

Article 33

1. [The seller shall deliver goods which are of the quantity and quality and description required by the contract and contained or packaged in the manner required by the contract.]

1 *bis*. [Unless the terms or circumstances of the contract indicate otherwise, the seller shall deliver goods

(a) Which are fit for the purposes for which goods of the same contract description would ordinarily be used;

(b) Which are fit for any particular purpose expressly or impliedly made known to the buyer;

(c) Which possess the qualities of a sample or model which the seller has handed over or sent to the buyer;

(d) Which are contained or packaged in the manner usual for such goods.]

2. No difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is clearly insignificant.

Article 34

(Deleted)

Article 35

1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when risk passes. [However, if risk does not pass because of a declaration of avoidance of the contract or of a demand for other goods in replacement, the conformity of the goods with the contract shall be determined by their condition at the time when risk would have passed had they been in conformity with the contract.]

2. [The seller shall be liable for the consequences of any lack of conformity even though they occur after the time fixed in paragraph 1 of this article.]

Article 36

[The seller shall not be liable for the consequences of any lack of conformity of the kind referred to in subparagraphs (d), (e) or (f) of paragraph 1 of article 33, if at the time of the conclusion of the contract the buyer knew, or could not have been unaware of, such lack of conformity.]

Article 37

If the seller has handed over goods before the date for delivery he may, up to that date, deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defects in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense. The buyer shall, however, retain the right to claim damages as provided in article 82.

Article 38

1. The buyer shall examine the goods, or cause them to be examined, promptly.

2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

3. If the goods are redispached by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispach, examination of the goods may be deferred until they arrive at the new destination.

4. [The methods of examination shall be governed by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.]

Article 39

1. 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 within a reasonable time after he has discovered the lack of conformity or ought to have discovered it. If a defect which could not have been revealed by the examination of the goods provided for in article 38 is found later, the buyer may none the less rely on that defect, provided that he gives the seller notice thereof within a reasonable time after its discovery. In any event, the buyer shall lose the right to rely on a lack of conformity of the goods if he has not given notice thereof to the seller within a period of two years from the date on which the goods were handed over, unless the lack of conformity constituted a breach of a guarantee covering a longer period.

2. In giving notice to the seller of any lack of conformity, the buyer shall specify its nature.

3. Where any notice referred to in paragraph 1 of this article has been sent by letter, telegram or other appropriate

means, the fact that such notice is delayed or fails to arrive at its destination shall not deprive the buyer of the right to rely thereon.

Article 40

The seller shall not be entitled to rely on the provisions of articles 38 and 39 if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose. (Unchanged)

Article 41

Where the buyer has given due notice to the seller of the failure of the goods to conform with the contract, the buyer may:

(a) Exercise the rights provided in articles 42 to 46;

(b) Claim damages as provided in article 82 or articles 84 to 87.

Article 42

The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law.

Articles 43 and 44

ALTERNATIVE A

Article 43

[[Where the buyer requires the seller to perform the contract or] where the contract has not been declared avoided under article 44, the seller may deliver any missing part or quantity of the goods or deliver other goods which are in conformity with the contract or remedy any defect in the goods handed over.]

Article 44

1. [The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract amounts to a fundamental breach of the contract. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after giving the seller notice of the lack of conformity.]

2. [The buyer may also declare the contract avoided when he has fixed an additional period of time of reasonable length for the further delivery or for the remedying of the defect and the seller has failed to comply therewith, provided the buyer exercises this right promptly after the expiration of the period referred to in this paragraph.]

ALTERNATIVE B

Article 43 (ULIS article 44)

1. [The seller shall retain, even after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over, provided that the exercise of this right does not cause the buyer either unreasonable inconvenience or unreasonable expense.]

2. [The buyer may however grant the seller an additional period of time of reasonable length for the performance of the contract. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring performance of the contract in accordance with article 42 or reducing the price in accordance with article 46 or declaring the contract avoided in accordance with article 44.]

Article 44 (ULIS article 43)

1. [The buyer may declare the contract avoided if the delivery of goods which do not conform to the contract, amounts to a fundamental breach of the contract.]

2. [However, unless the seller has refused to perform, the contract cannot be avoided:

(a) In any case where the seller under paragraph 1 of article 43 retains the right to deliver goods or remedy defects, before the seller has had a reasonable time to exercise that right, or

(b) In any case where the buyer has requested performance of the contract, before the expiry of any period specified in the request, or, if no period has been specified, before the expiry of a reasonable time.]

3. [The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he has discovered or ought to have discovered the lack of conformity, or in cases to which paragraph 2 of this article applies, after the expiration of the relevant period of time referred to in that paragraph.]

ALTERNATIVE C

Article 43 (Merger of articles 43 and 44 of ULIS)

1. [Where the non-conformity of goods delivered by the seller amounts to a fundamental breach of contract, the buyer, by notice to the seller may declare the contract [avoided]. The buyer shall lose his right to declare the contract avoided if he does not exercise it promptly after he discovered or ought to have discovered the lack of conformity.]

2. [The seller shall retain, after the date fixed for the delivery of the goods, the right to deliver any missing part or quantity of the goods or to deliver other goods which are in conformity with the contract or to remedy any defect in the goods handed over. This right may not be exercised if the delay in taking such action constitutes a fundamental breach of contract or if such action causes the buyer either unreasonable inconvenience or unreasonable expense.]

3. [Although the non-conformity of the goods does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for the further delivery or for the remedying of the defect. If at the expiration of the additional period the seller has not delivered the goods or remedied the defect, the buyer may choose between requiring the performance of the contract or reducing the price in accordance with article 46 or, provided that he does so promptly, declare the contract avoided.]

Article 45

1. Where the seller has handed over part only of the goods or an insufficient quantity or where part only of the goods handed over is in conformity with the contract, the provisions of articles 43 and 44 shall apply in respect of the part or quantity which is missing or which does not conform with the contract.

2. The buyer may declare the contract avoided in its entirety only if the failure to effect delivery completely and in conformity with the contract amounts to a fundamental breach of the contract. (Unchanged)

Article 46

[Where the buyer has neither obtained performance of the contract by the seller nor declared the contract avoided, the buyer may reduce the price in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of their lack of conformity with the contract.]

Article 47

Where the seller has proffered to the buyer a quantity of unascertained goods greater than that provided for in the contract, the buyer may reject or accept the excess quantity. If the buyer rejects the excess quantity, the seller shall be liable only for damages in accordance with article 82. If the buyer accepts the whole or part of the excess quantity, he shall pay for it at the contract rate. (Unchanged)

Article 48

[The buyer may exercise the rights provided in articles 43 to 46, even before the time fixed for delivery, if it is clear that goods which would be handed over would not be in conformity with the contract.]

Article 49

(Deleted)

Article 50

[Where the seller is bound to hand over to the buyer any documents relating to the goods, he shall do so at the time and place fixed by the contract or by usage.]

Article 51

[If the seller fails to hand over documents as provided in article 50 at the time and place fixed or if he hands over documents which are not in conformity with those which he was bound to hand over, the buyer shall have the same rights as those provided under articles 24 to 32 or under articles 41 to 49, as the case may be.]

Article 52

1. [Where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller of such right or claim, unless the seller already knows thereof, and request that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him by the seller.]

2. [If the seller complies with a request made under paragraph 1 of this article and the buyer nevertheless suffers a loss, the buyer may claim damages in accordance with article 82.]

3. [If the seller fails to comply with a request made under paragraph 1 of this article and a fundamental breach of the contract results thereby, the buyer may declare the contract avoided and claim damages in accordance with articles 84 to 87. If the buyer does not declare the contract avoided or if there is no fundamental breach of the contract, the buyer shall have the right to claim damages in accordance with article 82.]

4. [The buyer shall lose his right to declare the contract avoided if he fails to act in accordance with paragraph 1 of this article within a reasonable time from the moment when he became aware or ought to have become aware of the right or claim of the third person in respect of the goods.]

Article 53

[The rights conferred on the buyer by article 52 exclude all other remedies based on the fact that the seller has failed to perform his obligation to transfer the property in the goods or that the goods are subject to a right or claim of a third person.]

Article 54

1. [If seller is bound to dispatch the goods to the buyer, he shall make, in the usual way and on the terms normally used for the transport of goods of the contract description, such contracts as are necessary for the carriage of the goods to the place fixed.]

2. [If the seller is not bound by the contract to effect insurance in respect of the carriage of the goods, he shall provide the buyer, at his request, with all information necessary to enable him to effect such insurance.]

Article 55

1. [If the seller fails to perform any obligation other than those referred to in articles 20 to 53, the buyer may:

(a) Where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided that he does so promptly, and claim damages in accordance with articles 84 to 87, or

(b) In any other case, claim damages in accordance with article 82.]

2. [The buyer may also require performance by the seller of his obligation unless the contract is avoided.]

6. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Articles 18 and 19 of ULIS: Comments and proposals of the representative of Hungary	A/CN.9/WG.2/WP.10/ Add.1—Annex I
Articles 18 and 19 of ULIS: Comments and proposals of the representative of the United Kingdom	A/CN.9/WG.2/WP.10/ Add.1—Annex II
Articles 20 to 23 of ULIS: Comments and proposals of the representative of the United States	A/CN.9/WG.2/WP.10/ Add.1—Annex III
Articles 24 to 32 of ULIS: Comments and proposals of the representative of Japan	A/CN.9/WG.2/WP.10/ Add.1—Annex IV
Articles 33 to 37 of ULIS: Comments and proposals of the representative of the USSR	A/CN.9/WG.2/WP.10/ Add.1—Annex V
Articles 33 to 37 of ULIS: Comments and proposals of the representative of the United Kingdom	A/CN.9/WG.2/WP.10/ Add.1—Annex VI
Articles 38 to 40 of ULIS: Comments and proposals of the representative of Austria	A/CN.9/WG.2/WP.10/ Add.1—Annex VII
Articles 38 to 40 of ULIS: Comments of the representative of the United States on the proposals of Austria	A/CN.9/WG.2/WP.10/ Add.1—Annex VIII
Articles 38 to 40 of ULIS: Response by the representative of Austria to the comments of the representative of the United States	A/CN.9/WG.2/WP.10/ Add.1—Annex IX
Articles 38 to 40 of ULIS: Comments and proposals of the representative of Kenya	A/CN.9/WG.2/WP.10/ Add.1—Annex X
Articles 41 to 49 of ULIS: Comments and proposals of the representative of France	A/CN.9/WG.2/WP.10/ Add.1—Annex XI
Articles 50 and 51 of ULIS: Comments and proposals of the representative of India	A/CN.9/WG.2/WP.10/ Add.1—Annex XII
Articles 52 and 53 of ULIS: Comments and proposals of the representative of the United Kingdom	A/CN.9/WG.2/WP.10/ Add.1—Annex XIII
Articles 52 and 53 of ULIS: Comments and proposals of the representative of Mexico	A/CN.9/WG.2/WP.10/ Add.1—Annex XIV
Articles 52 and 53 of ULIS: Comments and proposals of the representative of the USSR	A/CN.9/WG.2/WP.10/ Add.1—Annex XV
Articles 54 and 55 of ULIS: Comments and proposals of the representative of India	A/CN.9/WG.2/WP.10/ Add.1—Annex XVI
Comprehensive study of Articles 18 to 49, 65 and 97 of ULIS: Comments and proposals of the representative of Mexico	A/CN.9/WG.2/WP.10/ Add.1—Annex XVII

<i>Title or description</i>	<i>Document reference</i>
Comprehensive study of Articles 18 to 55: Introductory note and amendments proposed by Norway for the revision of ULIS Chapter III (obligations of the Seller)	A/CN.9/WG.2/WP.10/Add.1—Annex XVIII
Article 18-55: Comments and proposals of the representative of Austria	A/CN.9/WG.2/WP.10/Add.2
Note by Austria, Belgium, Egypt and France on the definition of an international sale of goods	A/CN.9/WG.2/WP.13

B. Time-limits and limitations (prescription) in the international sale of goods

1. Analysis of replies to the questionnaire, and comments made at the fourth session of the Commission by Governments, on the length of the prescriptive period and related matters: report of the Secretary-General (A/CN.9/70/Add.2, section 14)*

CONTENTS

	<i>Paragraphs</i>		<i>Paragraphs</i>
INTRODUCTION	1-5	A. Sphere of application of the uniform law: articles 1-5	43-51
I. LENGTH OF THE LIMITATION PERIOD	6-8	(a) Exclusion of the rights of the guarantor: article 1 (1)	43-44
II. COMMENCEMENT OF THE LIMITATION PERIOD	9-23	(b) Ambiguity in article 1 (1) (2) ..	45-46
A. The basic rule: article 7 (1)	9-14	(c) Repetition of provisions relating to notice: article 1 (3)	47
B. Special rules for rights or claims based on lack of conformity of the goods	15-19	(d) The terms "creditor" and "debtor": article 1 (4) (d), (e)	48
(a) Special rules under domestic law	15-16	(e) Applicability with respect to proceedings to establish invalidity of the contract	49
(b) Acceptability of the provisions of the preliminary draft: article 7 (3) (4)	17-19	(f) Exclusion of rights based on bodily injury: article 2 (a)	50-51
C. Express undertaking for a period of time: article 9	20-21	B. Interruption of the limitation period: articles 10-13	52-56
D. Other comments concerning the commencement of the limitation period ..	21A-23	(a) Proposal to simplify and improve the provisions of articles 10-12 ..	52-53
III. MODIFICATION OF THE LIMITATION PERIOD	24-32	(b) Acknowledgement by partial performance: article 13 (3)	54
A. Rules under national laws	24-25	(c) Acknowledgement after the expiration of the period: article 13 (5)	55-56
B. Preferred rule of modification: acceptability of article 18	26-32	C. Extension where institution of legal proceedings prevented; misstatement or concealment by debtor: articles 15 and 16	57-60
(a) Extension	26-29	D. Who can invoke limitation: article 19	61-62
(b) Shortening; exception for arbitration	30-32	E. Set-off: article 20 (2)	63
IV. EXTENSION DURING NEGOTIATION: ARTICLE 14	33-34	F. Preservation of existing rights: article 25	64
V. EFFECT OF DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS: ARTICLE 17	35-39	G. Relation of the uniform law to other regional international agreements on prescription; e.g. CMEA General Condition	65
VI. RIGHTS BASED UPON A JUDGEMENT OR AWARD	40-41	H. Relation of the uniform law to ULIS	66
VII. OTHER COMMENTS	42-66		

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its second session, estab-

lished a Working Group on Time-limits and Limitations (Prescription), and requested it to study the subject of time-limits and limitations (prescription) in

* 24 February 1972. Revised version of document A/CN.9/WG.1/WP.24.

the field of the international sale of goods.¹ 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, for submission to the fourth session.² The Commission also decided that a questionnaire should be addressed to Governments and interest international organizations to obtain information and views regarding the length of the limitation period and other relevant issues.³ The Working Group held its second session in 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). The report of the Working Group (A/CN.9/50) includes the preliminary draft of the uniform law (annex I), a commentary on the preliminary draft (herein cited commentary) (annex II), and the text of the questionnaire (annex III), which was addressed to Governments and to interested international organizations in September 1970.

2. At the fourth session of the Commission, held in April 1971, the Commission considered the method and approach it should follow in examining the preliminary draft. The Commission concluded that the Working Group should consider the replies to the questionnaire prior to any decision concerning the length of the limitation period. It was also observed that several important questions dealt with in 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 questions pending a decision on the length of the period of limitation.⁴ To that end the Commission requested the Secretary-General to analyse the replies received to the questionnaire and to transmit this analysis to the members of the Working Group in advance of its third session, held on 30 August to 10 September 1971.⁵

3. At the time of the preparation of the original version of this report, which was considered by the Working Group at its third session, the following 29

States had replied to the questionnaire:⁶ Argentina, Australia, Austria, Bulgaria, Denmark, Finland, India, Italy, Jamaica, Japan, Kenya, Khmer Republic, Kuwait, Libya, Luxembourg, Madagascar, Malawi, Mexico, New Zealand, Norway, Portugal, South Africa, Sweden, Syria, Trinidad and Tobago, USSR, United Kingdom, United States and Venezuela. Subsequent to the preparation of the original version of this report, the following four States replied to the questionnaire: Czechoslovakia, Guatemala, Poland and Spain. This report consequently has been revised after the third session of the Working Group to reflect, as far as possible, the views expressed in these additional replies. It will be noted that the respondents included States from each region.⁷

4. The questions contained in part I of the questionnaire were primarily designed to obtain relevant information on the existing national rules. The questions in part II solicited opinion with respect to which uniform rules would be most appropriate. The analysis of the replies requested by the Commission is set out herein after.

5. At the fourth session of the Commission, the Commission also 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 in formulating a final draft of a uniform law.⁸ Because of the close relationship between the replies to the questionnaire and the views expressed at the fourth session of the Commission on the subject, this report will also refer to such views whenever deemed pertinent to the purpose of the analysis of the replies.

I. LENGTH OF THE LIMITATION PERIOD

6. The questionnaire at part II, 1, directed the attention of Governments to article 6 of the preliminary draft, which is designed to state the general prescriptive period; the preliminary draft states two alternatives—three years and five years. The questionnaire inquired as to the choice between these alternatives, or whether some other period was preferred. Twenty-four States replied to this inquiry. Table A, below, analyses the replies. In the third column, following the name of each State, is the length of the period (in years) under

¹ Report of the United Nations Commission on International Trade Law on the work of its second session, *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618) (hereinafter referred to as UNCITRAL, report on the second session (1969)), para. 46, United Nations Commission on International Trade Law, *Yearbook*, vol. I: 1968-1970, United Nations, New York 1971 (hereinafter referred to as UNCITRAL Yearbook, vol. I) part two, II, A.

² 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 the third session (1970)), para. 97; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

³ UNCITRAL, report on the third session (1970), para. 89; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

⁴ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417) (hereinafter referred to as UNCITRAL, report on the fourth session (1971)), para. 110; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

⁵ UNCITRAL, report on fourth session (1971), para. 119; *ibid.*

⁶ In addition to the 29 States, the Secretariat received a communication from the Council for Mutual Economic Assistance which referred to sections 92-103 (chap. XVI, Limitation of action) of the CMEA General Conditions of Delivery of Goods between Organizations of Member Countries. These rules are contained in United Nations Commission on International Trade Law, *Register of Texts of Conventions and other Instruments concerning International Trade Law*, vol. I, pp. 99-101, United Nations, New York, 1971. In this regard, see the suggestion by USSR in para. 65 of this report concerning the relationship between the uniform law on prescription and regional international agreements which establish different rules of prescription to regulate contracts of international sale of goods concluded between persons in those contracting States.

⁷ Replies were received from States from the following regions: African, 5; Asian, 5; Eastern European, 4; Latin American, 7; Western European and others, 12.

⁸ UNCITRAL, report on fourth session (1971), para. 111; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

the domestic law of that State, as supplied in response to the question in part I, 1.⁹

Table A

Preferred length of the period (years)	Number of States	States
5	9	(Finland (10), Italy (10), Jamaica (6), Japan (5), Kenya (6), Kuwait (15), Trinidad and Tobago (4), United Kingdom (6 (England)), 20 (Scotland)), Venezuela (10))
4 or 5 ...	1	(Argentina (4))
4	3	(Poland (2), South Africa (3), United States (4))
3	10	(Austria (3), Czechoslovakia (3), India (3), Khmer Republic, Madagascar (5), Mexico (10), Norway (3), Spain (15), Sweden (10), ^{9a} USSR (3))
2	1	(Bulgaria (3)) ¹⁰

7. At the fourth session of the Commission,¹¹ many representatives, whose Governments have not replied to the questionnaire, also expressed their preference as to the length of the period: a five-year period was preferred by five States;¹² a four-year period by one;¹³ a three-year period by four;¹⁴ and a shorter period by one.¹⁵ Thus, these also may be taken into account in addition to the result in the preceding paragraph.

8. The questionnaire, at part II paragraph (a), sought information concerning the frequency with which claims arising out of international sales of goods (or similar transactions) were brought to a tribunal after the expiration of (i) three, (ii) four or (iii) five years.

⁹ Several States indicated that the length of the period under domestic law varied depending upon the nature of claims or parties involved to the transactions. In such cases, however, the length of the period of general applicability most nearly comparable to the field covered by the preliminary draft was chosen. With regard to claims based on lack of conformity of goods, some States indicated the existence of special rules and those are treated separately in this report. See paras. 15 and 16, *infra*.

^{9a} The reply to the questionnaire reported that business circles preferred five years; the preference of the Government was for three years. The reply indicated that the preference of three years assumed that liberal rules on extension and modification of the period would be included in the Uniform Law.

¹⁰ Bulgaria's preference is affected by the fact that the CMEA General Conditions provides a two-year period. Cf. the USSR proposal, para. 65 *infra*, concerning the relation of the Uniform Law to other regional international agreements on prescription.

¹¹ In this report, reference to the discussion at the fourth session of the Commission is based on the summary records of the meetings of the Commission. The Commission considered the subject of prescription at its 80th-83rd meetings on 13 and 14 April 1971. The summary records bear document numbers A/CN.9/SR.80-83 (herein cited SR.80-83).

¹² Australia (SR.81), Ghana (SR.83), Nigeria (SR.81), Tanzania (SR.81), United Arab Republic (SR.82).

¹³ Chile (SR.82).

¹⁴ Belgium (SR.81), Hungary (SR.82), Iran (SR.83), Romania (SR.83).

¹⁵ Singapore (SR.82).

Many replies indicated that such data were not readily available. Six States, however, made general comments. Three States (whose length of the limitation period under their domestic rule is three years) stated that claims after three years were very rare¹⁶ and indicated that their experience with the three-year period was satisfactory.¹⁷ One State observed that proceedings were most frequently delayed until the last year before the expiry of the six-year period established under its domestic rule.¹⁸ Two States (whose length of the limitation period under the domestic rules is 10 years) stated that claims were seldom brought to a tribunal more than five years after the delivery of goods,¹⁹ one of these States reported that in most cases litigation was instituted within two or three years.²⁰

II. COMMENCEMENT OF THE LIMITATION PERIOD

A. The basic rule: article 7 (1)

9. Article 7 (1) of the preliminary draft provides the basic rule on commencement of the period with respect to claims arising from breach of contract: the limitation period shall commence "on the date on which such breach of contract occurred". The questionnaire, at part I paragraph 2 (a), asked whether the commencement of the period was governed, under national law, by a general rule or principle (e.g., the time when action could be brought, the time when the performance had become due, the time of breach, or some other general rule) and inquired concerning the character of any such general rule or principle.

10. The following shows the result of the replies on the time when the limitation period commences to run under the national laws:

(a) From the time when the cause of action accrued (Jamaica, Kenya, Malawi, New Zealand, Trinidad and Tobago, United Kingdom, United States);

(b) From the day when the right to sue accrued (USSR);²¹

(c) From the time when the action could be brought (Czechoslovakia, Mexico, Spain);

(d) From the date of the objective possibility of a judicial complaint (Austria);²²

(e) From the date of exigibility of the obligation (Luxembourg, Madagascar, Bulgaria);

(f) From the time when the performance became due (Denmark, Libya, Norway, Poland, South Africa);

¹⁶ Austria, USSR.

¹⁷ Norway.

¹⁸ United Kingdom.

¹⁹ Finland, Sweden.

²⁰ Sweden.

²¹ The right to sue accrued from the day the person learned or should have learned of the infringement of his right.

²² The reply explains this rule to mean: (a) if a fulfilment date has been agreed upon, the period of limitation begins from that date; (b) in the absence of such an agreement and if the fulfilment date is to be set by the creditor, the limitation period begins from the date set by the creditor; (c) the period of prescription for the payment of the purchase price starts in any case only with the delivery of the goods; and (d) the knowledge of the creditor that it is possible to assert a claim or to proceed with a judicial complaint is irrelevant.

(g) From the time when the debt becomes payable (Guatemala, Kuwait);

(h) From the time when the right can be exercised (Italy, Japan, Portugal);

(i) From the date when action could legally be brought or the right exercised (Venezuela);

(j) From the date when the breach of contract takes place or the cause of action arises (India);

(k) From the date when the contract was entered into (regardless of when the right becomes due) (Finland, Sweden);

(l) From the date of presentation of the relevant bill of sale, which, in case of doubt, shall be deemed to have been presented on the date appearing on it (Argentina).

11. It should be noted that rules that seem to be similar or identical may lead to entirely different results when applied to concrete cases. This is mainly because of differences in the underlying rules of substance which control the accrual of the cause of action, the time the obligation becomes due, or the like. For example, one reply²³ indicated that the right to sue accrued from the day the person learned or should have learned of the infringement of his right. This may not be so under the rules of substance of other States which stated a similar rule that the limitation period commenced from the time when the cause of action accrued.²⁴ Another reply,²⁵ which stated that the period commenced to run from the time when the right could be exercised, indicated that, if a notice was required, the period started to run after a stated time of receiving notice. One reply,²⁶ which stated that the period commenced from the date of *exigibility* of the obligation, and another reply,²⁷ which stated that the period commenced from the time when the performance had become *due*, indicated the existence of a special rule under their domestic rules stating that, where maturity of claims depended on a previous notice (or demand) from the creditor, the period started to run from the time when the right *could* first be exercised. No other replies referred to the existence of such a special rule.²⁸ Still another reply,²⁹ while explaining its rule that the period commenced to run from the date of the *objective possibility* of a judicial complaint,

²³ USSR.

²⁴ Cf., for example, the text accompanying foot-note 43 and foot-note 125. Also see the view of Sweden expressed in the text at foot-note 30.

²⁵ Portugal.

²⁶ Bulgaria.

²⁷ Norway.

²⁸ The reply of the United States, commenting on article 8 of the preliminary draft, stated that the test employed in article 8 may bring uncertain results since it could be argued that a person can hardly exercise a right before he knows of its having accrued and that, therefore, the date of his discovery of the accrual of the right is decisive. The reply also stated that the possibility of relying on *force majeure* or incompetence may also introduce uncertainty. (It may be observed that the latter point is regulated by arts. 15 and 16. But see the view of the United States on these articles at paras. 57 and 58, *infra*.) At the fourth session of the Commission the representatives of the following States expressed general approval of article 8: Mexico (SR.83), Poland (SR.81), Romania (SR.83), United Arab Republic (SR.82), USSR (SR.81).

²⁹ Austria.

stated that knowledge by the creditor that it was possible to assert a claim or to proceed with a judicial complaint was irrelevant.

12. Thus, without knowing the contents of the domestic rules of substance of each of those States, it seems difficult to categorize the replies and to draw conclusions as to which is the prevailing approach.

13. Related to the divergencies in the substantive law is the comment that the concept of "breach of contract" in article 7 (1) of the preliminary draft must be defined to avoid divergent interpretations.³⁰

14. At the fourth session of the Commission, the representatives of six States³¹ expressed approval of the approach of article 7 (1). However, one representative opposed this approach on the ground that the moment at which the breach of contract had occurred was difficult to determine, and proposed that the limitation period should commence from the moment when the creditor could demand the performance of the other party's obligation.³² One reply,^{32a} submitted after the fourth session of the Commission, proposed that the limitation period should commence from the time when action could have been brought. According to this reply, this proposed general test would also render the provisions of article 7 (5) and (6) superfluous, thus contributing to simplification of the Uniform Law.

B. Special rules for rights or claims based on lack of conformity of the goods

(a) Special rules under domestic law

15. The questionnaire, at part I, 2 (b), with respect to rights or claims by buyers based on non-conformity of the goods, asked if the commencement of the period governing such claims was governed by the same rule as other claims arising from sales transactions or by a special rule. The questionnaire also asked if the prescriptive period for such claims started to run from the shipment of the goods; placing the goods at the disposition of the buyer; receipt of the goods; discovery of the defect; the occurrence of the damage, or some other point.

16. Three replies³³ indicated that such claims would be prescribed one year from the receipt of the goods. One of them³⁴ noted an exception to the rule if the seller had given a warranty for a longer period of time or had acted fraudulently. One reply³⁵ stated that a one-year prescriptive period was applicable from the time of delivery for claims based on "guarantee" [by virtue of law] against defects in the goods. Another reply³⁶ indicated that claims based on non-conformity,

³⁰ Sweden.

³¹ Ghana (SR.83), India (SR.82), Poland (SR.81), Romania (SR.83), United Arab Republic (SR.82), USSR (SR.81).

³² Austria (SR.83). Also see Austria's written proposal (A/CN.9(IV)/CRP.2) circulated at the fourth session of the Commission. This document is reproduced as a working paper for the Working Group under the document number A/CN.9/WG.1/WP.18.

^{32a} Spain.

³³ Denmark, Khmer Republic, Kuwait. The Khmer Republic did not indicate the existence of a general rule.

³⁴ Denmark.

³⁵ Italy.

³⁶ Austria.

other than those claims based on "guarantee" [by virtue of law] against deficiencies of the merchandise,³⁷ lapsed three years from the time when the buyer had become aware of the damage and of its author; in any case such claims lapsed after 30 years. One reply^{37a} indicated that the period for claims arising from hidden defects in the goods was six months from the date of the delivery of the goods. Two replies³⁸ seemed to indicate the existence of a six-month period from the time of delivery of the goods; on the other hand, a three-year period applied if the seller hid the defects. Three replies referred to rules in which the time-limit within which notice of defects was required was closely combined with the rule of prescription. According to one of these replies,³⁹ the right of action lapsed either (i) on expiration of the period for giving notice (six months) if the buyer had not given notice; or (ii) six months from the date on which the notice was given. Another reply^{39a} indicated such periods to be one month and one year respectively. According to the other reply,⁴⁰ a six-month prescriptive period started to run from the date of notice; if no notice of the defects was given, or if it was impossible to determine the date of giving notice, a six-month prescriptive period started to run from the date of the expiry of the period for notice (six months). Six replies⁴¹ indicated that the general prescriptive period applied to such claims and that the period was calculated from the time of delivery irrespective of the discovery of the non-conformity. One reply⁴² indicated that the general prescriptive period commenced to run from the time when the title to the goods passed to the buyer.⁴³

³⁷ With respect to claims based on "guarantee" [by virtue of law] against deficiencies of the merchandise, the reply referred to the existence of a short notice rule and stated that because of an over-all short time-limit (six months), the prescription rule would have no practical significance in respect to these claims. Cf. para. 19 (b), *infra*.

^{37a} Spain.

³⁸ Bulgaria, Czechoslovakia.

³⁹ Portugal.

^{39a} Poland.

⁴⁰ USSR.

⁴¹ India, Jamaica, New Zealand, Norway, United Kingdom, United States. The reply of Norway noted this rule reflected accepted doctrine in Norway. The reply, however, also noted the existence of a Supreme Court decision of 1928 which presumed that the period commenced to run after the notice of non-conformity had been given. The reply of New Zealand noted the existence of a two-year special prescriptive period from the time of accrual of cause of action with regard to claims based on personal injuries arising from the sale of goods. However, in such cases, where the court considered that the delay in bringing the action was occasioned by mistake of fact or law or by any other reasonable cause, or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay, the court might if it thought it just, grant leave to bring such an action at any time within six years after the date on which the cause of action accrued. The court might also impose any conditions it thought just upon bringing such an action. Cf. article 2 (a) of the Preliminary Draft and paras. 50 and 51, *infra*.

⁴² Malawi.

⁴³ Several replies referred to their domestic rules concerning the time-limit within which notice of the defects must be given. However, since these notice rules are outside the scope of the uniform law (see art. 1 (3) of the Preliminary Draft), these are not included in the analysis. One reply (Sweden) noted that its time-limit for notice (one year) had been described also as a rule of prescription by a legal doctrine. Also see para. 19 (b), *infra* and foot-note 112 and its accompanying text, *infra*.

(b) *Acceptability of the provisions of the preliminary draft: article 7 (3) (4)*

17. The questionnaire, at part II.2, noted that article 7, paragraphs 3 and 4 of the preliminary draft stated rules with respect to rights or claims relying on lack of conformity of the goods, and asked whether these proposed rules were satisfactory. Twenty-one States answered this question. (a) Ten replies indicated unconditional approval.⁴⁴ (b) Two replies indicated approval, subject to certain qualifications. One of these suggested an exception for damage claims arising from defects due to the seller's fault—and emphasized the possibility that damage resulting from gross negligence or even deliberate intent might occur at a late date.⁴⁵ The other reply suggested an exception where the seller intentionally hid defects or non-conformity.⁴⁶ (c) Two replies,⁴⁷ while expressing approval of article 7 (3) and (4), mentioned that the passing of the risk of loss might be used as a test for commencement of the period rather than the test employed in article 7 (3) and (4). One of these⁴⁸ suggested that in some situations the date when the goods were placed "at the disposition of the buyer" might be difficult to ascertain (e.g. as in a sale of equipment to be installed at the buyer's factory); since a contract of international sale normally contained a clause concerning the time for passage of the risk of loss, this time could be more easily determined. The reply also made reference to article 35 of ULIS wherein it is provided that the condition of the goods at the time when the risk passes is decisive for the question whether or not the goods are in conformity with the contract. It was noted that under the suggested formula the limitation period may start to commence earlier than under article 7 (3) and (4); it was suggested, however, that the difference between the two approaches usually would not exceed two months while the limitation period under the proposed uniform rules would be at least three years.⁴⁹ (d) One reply⁵⁰ stated that article 7 (4) was superfluous because, in its view, it was already covered by article 7 (3) or, in any event, could be covered by slight change in the wording of article 7 (3). (e) Still another reply⁵¹ indicated that the rules of article 7 (3) and (4) should bring out the point that the period of limitation would not run until a reasonable time was allowed for inspection.

⁴⁴ Argentina, Czechoslovakia, Jamaica, Khmer, Madagascar, Norway, Spain, Trinidad and Tobago, United Kingdom, Venezuela. Portugal referred only to article 7 (4) and stated that the rule met its domestic rule. Spain suggested several drafting changes. These included the following: (i) The final phrase of article 7 (3) ("irrespective of the date on which such defects or other lack of conformity are discovered or damage therefrom ensues") should be deleted because it was superfluous; (ii) The word "duly" and the last phrase ("or are handed over to the buyer, whichever is the earlier") in article 7 (4) should also be deleted because the words "placed at the disposition" would convey these ideas.

⁴⁵ Austria.

⁴⁶ Kuwait.

⁴⁷ Finland and Sweden.

⁴⁸ Sweden.

⁴⁹ Cf. the domestic rule of Malawi described in para. 16, foot-note 42.

⁵⁰ USSR. Compare the comment at the fourth session of the Commission (SR.81).

⁵¹ India.

tion of the goods by the buyer or his agents, if no time was prescribed in the contract.⁵²

18. The remaining four replies objected to article 7 (3) and (4) of the preliminary draft. (a) One reply,⁵³ preferred a rule in which the limitation period would commence to run from the date on which defects or lack of conformity were discovered or could reasonably have been discovered. (b) Another reply⁵⁴ also preferred a rule similar to the above ("from the time when the buyer becomes aware of defects of goods received."). A supporting reason for this proposal was that the text of article 7 (3) ("placed at the disposition of the buyer") was ambiguous. It also referred to articles 38 and 41 of ULIS, in which it is provided that prompt examination after receipt of the goods is necessary in order to preserve remedies for non-conformity. The reply suggested that the provisions of the draft should be examined to ascertain whether they conformed to the provisions of ULIS. (c) One reply⁵⁵ recommended adoption of a rule similar to article 94 (2) of CMEA General Conditions which (in brief) relates the beginning of the period to the time of the seller's answer to the buyer's claim.⁵⁶ (d) One reply⁵⁷ was of the view that the allowance of three to five years after delivery of the goods for claims based on lack of conformity of the goods was excessive.

19. In addition to the above, at the fourth session of the Commission, (a) the representatives of three States⁵⁸ expressed general approval for the rules contained in article 7 (3) and (4); (b) one of them⁵⁹ however, commenting on articles 7 and 9 of the preliminary draft, stated that it would be necessary to regulate within the framework of the same legislative texts, the problem of the so-called "déchéance", which the Commission had already decided should be settled solely by ULIS. Another State⁶⁰ also suggested that it would be necessary to take into account the comparatively short time-limits specified for notifications and complaints in national legislations and also in

article 39 of ULIS; it would be illogical to lay down a long limitation period if the rights of the plaintiff had already lapsed because of the expiry of the time-limit specified for notification. Still another State⁶¹ thought that for claims based on non-conformity of the goods, even three years after the delivery seemed unduly long.⁶² (c) Another State⁶³ suggested that the word "last" should be inserted before "carrier" in article 7 (4). In its view, since placing the goods at the disposition of the buyer was the relevant act, it was important to refer to the "last" carrier.

C. Express undertaking for a period of time: article 9

20. One reply⁶⁴ commented on the rule of article 9 as follows: (a) Although the principle upon which article 9 is based was not objectionable, it would often be difficult to ascertain the day when "the buyer first informed the seller of [his] right"; even if the buyer's communication was in writing, it might sometimes be regarded as a mere communication of facts and not as invoking a right based on the seller's undertaking. Therefore, the time when the seller's undertaking expired should be treated as the starting point.⁶⁵ (b) The seller, after delivering the goods, might adjust certain components of the goods and in this connexion might expressly extend the period applicable to those parts; therefore the provision of article 9 that the undertaking must be contained in the contract of sale should be deleted. Another State⁶⁶ was also of the view that the limitation period should commence from the expiration of the period of the express undertaking. One reply⁶⁷ noted its domestic rule that claims based on guarantee of good working order were subject to the prescriptive period of six months from the time of discovery of the operational defects.

21. At the fourth session of the Commission, the representatives of seven States⁶⁸ indicated that the rule contained in article 9 was acceptable to them. One of them,⁶⁹ however, suggested the following stylistic changes: The term "guarantee" was preferable to the term "undertaking" because the latter was vague, at least in normal commercial usage; and the words "the buyer first informed the seller of such right" should be replaced by the words "the buyer first informed the seller of a claim to such a right". This representative also suggested that the concluding provision of article 9 was obscure, but noted that he generally agreed with its intention.

⁶¹ Austria. The representative stated that in Austria such claims lapsed after six months (SR.83).

⁶² See foot-note 112 and its accompanying text on the relationship between the rules on time-limits for notice (e.g. art. 39 (1) of ULIS) and the uniform law on prescription.

⁶³ Hungary (SR.82).

⁶⁴ Sweden.

⁶⁵ The rule proposed by the Working Group on Prescription at its first session contained such a rule. References to the prior draft and the reasons for the change to the present article 9 of the preliminary draft appear in the commentary to art. 9 in A/CN.9/50.

⁶⁶ India.

⁶⁷ Italy.

⁶⁸ Argentina (SR.82), Ghana (SR.83), Mexico (SR.83), Poland (SR.81), Romania (SR.83), United Arab Republic (SR.82), USSR (SR.81).

⁶⁹ Ghana (SR.83).

⁵² The representative of India, at the fourth session of the Commission, noted that, in the case of machinery, for example, latent defects might not be discovered until long after the delivery date; reference was made to buyers in developing countries: in order to safeguard the interests of developing countries, article 7 (3) should be amended to provide that the limitation period should commence at least one year after the date of the discovery of the defects (SR.82).

⁵³ Kenya.

⁵⁴ Japan.

⁵⁵ Bulgaria.

⁵⁶ Under article 94 (2) of CMEA General Conditions, the special limitation period of one year begins to run from the day following the day of receipt by the buyer of the seller's answer on the substance of the claim, and, if an answer is not given by the seller within the times mentioned in subparagraph 1 or 5 of article 76, from the day following the day of expiry of the aforesaid period for giving an answer on the substance of the claim. Unless the seller's contains a settlement of the substance of the claim, the period of limitation shall run from the day following the day of expiry of the period for giving an answer on the substance of the claim.

⁵⁷ Mexico. At the fourth session of the Commission, however, the representative of Mexico expressed general approval to article 7 (3) and (4) (SR.83).

⁵⁸ Poland (SR.81), Romania (SR.83), United Arab Republic (SR.82).

⁵⁹ Poland (SR.81).

⁶⁰ Norway (SR.83).

D. Other comments concerning the commencement of the limitation period

21A. One reply^{69a} commented on the final clause of article 7 (5) ("otherwise... when performance is due"). It was suggested that this clause was superfluous. Moreover, it was suggested that there was no justification for speaking of the prescriptive period as commencing to run from "the date when performance is due" except when performance has not taken place by that date. The reply also referred to the wording of article 7 (1) in which the date of breach of contract test is adopted; it was noted that the language of article 7 (1) is inconsistent with that of article 7 (5).^{69b}

22. Two replies suggested that the structure of articles 7 to 9 concerning the commencement of the limitation period was too complex. One reply⁷⁰ stated that these provisions should be consolidated into a simpler text such as "the time at which the right can first be exercised". The other suggested that consideration should be given to the relatively simple provisions of article 2-725 of the Uniform Commercial Code (USA).⁷¹

23. At the fourth session of the Commission, one State⁷² was also of the view that articles 7 to 9 were complex and expressed its preference for the rules contained in the Austrian proposal submitted at the fourth session.⁷³

III. MODIFICATION OF THE LIMITATION PERIOD

A. Rules under national laws

24. Article 18 of the preliminary draft deals with the power of the parties to modify the limitation period. To help evaluate the rules contained in article 18, the questionnaire, at part I, 3, asked whether the prescriptive period could be varied by agreement of the parties under national laws.

25. Table B, below, summarizes the replies.⁷⁴ The number given in parentheses after the name of a State indicates the length of the basic limitation period (in years) under its domestic law.

Table B

(1) Can the parties extend the period?

- (a) Yes 6 (Australia (6),⁷⁵ Czechoslovakia (3), Kenya (6), Luxembourg (30),⁷⁶ New Zealand (6),⁷⁷ United Kingdom (England (6), Scotland (20))⁷⁸)

^{69a} USSR.

^{69b} Also see the text accompanying foot-note 32a, *supra*.

⁷⁰ Italy.

⁷¹ United States.

⁷² Belgium (SR.81).

⁷³ A/CN.9(IV)/CRP.2. This document is reproduced as a working paper for the third session of the Working Group on Prescription as A/CN.9/WG.1/WP.18.

⁷⁴ Domestic rules that were reported to be unclear or unsettled are not included in the table.

⁷⁵ Except in New South Wales.

⁷⁶ Possible only after the commencement of the period.

⁷⁷ The reply indicated that the rule would be probably the same as the English law described in foot-note 78, *infra*.

⁷⁸ The reply included the following: technically, the parties were not free to vary the limitation period in English law, but the parties might agree expressly to waive the limitation period and the contract not to rely upon the Limitation Act was probably enforceable by action. The reply indicated that the rule under the Scottish law was unclear on this point but that a recent recommendation for revision allowed no modification.

- (b) No⁷⁹ ... 18 (Austria (6), Denmark (5),⁸⁰ Finland (10), Guatemala (2), India (3), Italy (10), Japan (5), Kuwait (15), Libya (15), Madagascar (5), Malawi (6), Mexico (10), Norway (3), Poland (2), Portugal (20), Spain (15), USSR (3),⁸¹ United States (4))

(2) Can the parties shorten the period?⁸²

- (a) Yes ... 10 (Austria (3), Czechoslovakia (3), Finland (10), Japan (5), Luxembourg (30), Madagascar (5),⁸³ New Zealand (6), United States (4),⁸⁴ United Kingdom (England (6), Scotland (20)),⁸⁵ Norway (3)⁸⁶)

- (b) No ... 10 (Guatemala (2), India (3), Kuwait (15), Libya (15), Malawi (6), Mexico (10), Poland (2), Portugal (20), Spain (15), USSR (3))

B. Preferred rule of modification: Acceptability of article 18

(a) Extension

26. The questionnaire, at part II, 3, directed attention to article 18 (2) of the preliminary draft, which permits the parties to extend the limitation period to the maximum of three years from the date of expiration of the limitation period. Article 18 (2) placed in brackets the phrase "after the commencement of the limitation period..." as to the time when parties could agree on extension. Inclusion of the bracketed language would, *inter alia*, deny effect to extensions in the original sales contract. The questionnaire asked whether the bracketed language should be included.

27. Five replies⁸⁷ preferred inclusion of the language in brackets. The reasons supporting this preference included the following: (a) there was danger of abuse of such provisions in form contracts; (b) to allow modification at the time of contract contradicted the function of the statutory limitation period, and (c) no

⁷⁹ This group included Austria, Italy and Madagascar, which allowed renunciation or waiver of the effect of prescription but only after the expiry of the period.

⁸⁰ The reply, however, stated that an agreement to extend the period subsequent to the underlying contract, although invalid as such, would normally entail an acknowledgement of the obligation.

⁸¹ The reply indicated, however, that the expired period might be reinstated by the tribunal if there was a valid reason for the delay in bringing action.

⁸² The replies of Australia, Denmark, Italy and Kenya explained their rules concerning extension but did not make reference to shortening. These States are not, therefore, included in the following analysis.

⁸³ The reply stated that the period could probably be shortened.

⁸⁴ The Uniform Commercial Code, section 2-725 (1) provides that by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

⁸⁵ The reply indicated as follows: technically, the parties were not free to vary the limitation period in English law, but the parties might agree that no claim should arise unless a notice thereof was given within some period which was shorter than the limitation period. The reply referred to the existence of such practice where contracts contained arbitration clauses. The reply, however, indicated that the courts might extend the period provided for in such a contract clause if "undue hardship would result".

⁸⁶ It is reported that extension was not allowed but shortening was not prohibited.

⁸⁷ Austria, Italy, South Africa, United Kingdom, Venezuela.

economic grounds normally existed for such an extension at the time of entering a contract. Three replies⁸⁸ preferred deletion of the language in brackets. One reply⁸⁹ indicated that either alternative was acceptable if the period was three years, but it preferred to have the language in brackets if the period was five years. Another reply⁹⁰ stated that either alternative was acceptable.

28. The questionnaire, at part II, 3, asked whether a rule different from that set forth in article 18 was preferred, and, if so, what rule should be provided. Of the 21 replies, five⁹¹ gave general approval to article 18 (2). Three replies⁹² indicated a preference between the two alternatives and did not state that they preferred a different rule. One reply^{92a} stated that possible extension should be two years rather than three. Seven replies⁹³ stated that no extension should be allowed. One of these⁹⁴ stated the following: article 18 (2) deviated substantially from the sound basic principle laid down in article 18 (1): moreover, the three-year extension was excessive because the total of the period would then exceed even five years which was the longest period that had been proposed. If some extension should be permitted to give opportunity for amicable settlement, only a one-year extension beyond the basic three-year period should be permitted. Two replies⁹⁵ stated that more freedom was desirable. One reply⁹⁶ stated that, if the three-year period is to be chosen, the rule on modification should be more flexible. One reply⁹⁷ advocated provision for successive extensions of three years at one time to a total maximum period of 10 years. This reply also stated that if the length of the basic limitation period was to be three years, greater freedom should be allowed for modification. One reply⁹⁸ noted that an agreement extending the period should be allowed where it was made after the conclusion of the contract.

29. In addition to the above, at the fourth session of the Commission the representatives of three States⁹⁹ gave general approval to article 18. The representatives of two States¹⁰⁰ stated that article 18 (2) should retain the language in brackets.¹⁰¹ The representatives of three States¹⁰² opposed extension. One of them¹⁰³ stated that allowing such agreements would inject a subjective

element; the rule of limitation should be objective. One representative¹⁰⁴ noted that the provisions of article 18 were difficult to reconcile with those of article 20 (1), which stated that "no right which has become barred by reason of limitation shall be recognized or enforced in any legal proceedings". Still another representative¹⁰⁵ stated that the text was not absolutely clear as to when an extension of the period was permissible. One representative suggested alternatives based on the principle that the shorter the period the more exceptions and extensions would have to be admitted, while the contrary would be true if the period were longer.¹⁰⁶

(b) Shortening; exception for arbitration

30. Only three replies¹⁰⁷ made reference to the shortening of the limitation period. Two replies¹⁰⁸ indicated that shortening of the limitation period should be permitted. One of these¹⁰⁹ approved the power to shorten to a period of not less than two years.¹¹⁰ The other called attention to the rule of article 18 (4), according to which a contract clause "whereby the acquisition or enforcement or continuance of a right is dependent upon" a party giving notice to the other party within a certain period of time is valid. This reply noted that under the rules contained in the preliminary draft the parties could, in effect, shorten the period by the use of such a contract clause.

31. In addition, one reply¹¹¹ referred to the provision in article 18 (4) with respect to contract clauses shortening the period for submitting a claim to arbitration. This reply noted that such a clause would have no effect under its domestic law.

32. At the fourth session of the Commission, the view was expressed that article 18 (4) was not clear; in this connexion it was also suggested that if it was not possible to prescribe a very short limitation or prescription period, provision should at least be made for a very short time-limit in which to make a claim for lack of conformity, as was laid down in ULIS.¹¹²

⁸⁸ Czechoslovakia, Mexico, Sweden.

⁸⁹ Norway.

⁹⁰ Trinidad and Tobago.

⁹¹ Austria, Jamaica, Khmer Republic, Mexico, Norway.

⁹² South Africa, United Kingdom, Venezuela.

^{92a} Poland.

⁹³ Argentina, Bulgaria, India, Italy, Madagascar, United States, USSR. The representative of Argentina, however, expressed his warm support for the provisions of article 18.

⁹⁴ USSR.

⁹⁵ Kuwait, Trinidad and Tobago.

⁹⁶ Finland. Finland preferred five years for the basic limitation period.

⁹⁷ Sweden.

⁹⁸ Japan.

⁹⁹ Chile (SR.82), Ghana (SR.83), Singapore (SR.82).

¹⁰⁰ Poland (SR.81), Spain (SR.82).

¹⁰¹ The representative of Spain also stated that possible extension should be two years rather than three (SR.82). The reply of Poland indicated the same view. See the text accompanying footnote 92a, *supra*.

¹⁰² Nigeria (SR.81), Tanzania (SR.81), United Arab Republic (SR.82).

¹⁰³ Nigeria (SR.81).

¹⁰⁴ India (SR.82).

¹⁰⁵ Spain (SR.82).

¹⁰⁶ Hungary (SR.82).

¹⁰⁷ Italy, Sweden, United States.

¹⁰⁸ Sweden, United States.

¹⁰⁹ United States.

¹¹⁰ The Uniform Commercial Code, section 2-725 (1), allows shortening of the period to not less than one year. A minimum of two years should be applicable to the international sale of goods since "normally, more time is needed for the verification and assertion of claims than in national transactions".

¹¹¹ Malawi.

¹¹² Austria (SR.83). This discussion may have reflected a possible conflict between: (a) the provision in article 1 (2) that the Law governs the period within which the rights of the parties may be enforced in legal proceedings "or otherwise exercised" and, (b) the provision of article 1 (3) excluding from the Law's scope rules with respect to the time for giving notice to the other party. Cf. article 18 (4). In view of the specific provision of article 1 (3), the phrase "or otherwise exercised" in article 1 (2) can hardly refer to the giving of notice to the other party with respect to defect or the assertion of a claim. Moreover, article 1 (3), in excluding from the scope of the Law rules on the time for giving notice to the other party, does not differentiate between rules requiring notice to the other party within a period that is described in general terms (e.g. "promptly") and rules re-

IV. EXTENSION DURING NEGOTIATION: ARTICLE 14

33. Ten replies referred to the rules contained in article 14. One reply^{112a} commented favourably on article 14 but it indicated that the words in brackets should be deleted. Another reply¹¹³ implied that its preference for three years as the basic limitation period was affected by the premise that the rules of article 14 and 18 (2) were in the Uniform Law. Still another reply,¹¹⁴ in connexion with the suggestion that more freedom should be provided to modify the period,¹¹⁵ indicated that in article 14 an extension of three years (not one year as in the Preliminary Draft) should be allowed if the basic limitation period of three years is to be adopted. The other seven replies¹¹⁶ preferred the deletion of article 14 from the Uniform Law. These replies included the comment that while such a rule might seem to meet a real need, in practice article 14 could give rise to disputes about the time at which negotiations were broken off; it was further suggested that other tests contained in the proposed rule also were difficult to apply. Further, one reply¹¹⁷ stated that experience suggested that sometimes it was only after legal proceedings were instituted that real negotiations to settle their dispute got going; there was no need, therefore, to provide for the extension of the limitation period on account of negotiations.

34. In addition to the above, further views were expressed at the fourth session of the Commission. The representatives of four States¹¹⁸ commented favourably on article 14. One of them,¹¹⁹ however, thought that the words in brackets should be deleted and a third¹²⁰ thought that simpler and more precise language should be found. Another representative¹²¹ stated that the words "on the merits of" should be deleted and it was of the opinion that article 14 should be deleted if the basic period was to be five years. The representatives of three States¹²² opposed the in-

quiring notice to the other party that is described in specific terms (e.g. "within six months after the delivery" or the like). Thus, a rule of national law like ULIS article 39 (1) that requires that notice to the other party be given "promptly" but in no event later than "a period of two years from the date on which the goods were handed over" would not be affected by the Uniform Law on Prescription. However, what conduct is covered by the phrase "or otherwise exercised" in article 1 (2) may not be free from doubt. Presumably, the impact of the Uniform Law on Prescription on national rules would be determined by reference to the actual operative effect of the rules in question under the national law rather than by the way the rule is described. Thus, if a rule of national law specifying a period within which "rights shall be exercised" is applied to require notice to the other party, that application would be outside the scope of the Uniform Law on Prescription and would not be disturbed by the Uniform Law. Also see para. 19, *supra*.

^{112a} Poland.

¹¹³ Norway.

¹¹⁴ Sweden.

¹¹⁵ See the text accompanying foot-note 97.

¹¹⁶ India, Italy, Spain, USSR, United Kingdom, United States. Madagascar stated that article 14 was contrary to its national law.

¹¹⁷ India.

¹¹⁸ Austria (SR.83), Mexico (SR.83), Romania (SR.83), United Arab Republic (SR.82).

¹¹⁹ Austria (SR.83).

¹²⁰ Mexico (SR.83).

¹²¹ Hungary (SR.82).

¹²² Argentina (SR.82), Ghana (SR.83), Singapore (SR.82). ing the period in these cases.

clusion of article 14. In their view, article 14 introduces an element of uncertainty; parties acting in bad faith might prolong the negotiations in order to extend the limitation period; without article 14, the parties would have an incentive for serious negotiations in order to arrive at a settlement; it would be the reverse if article 14 was retained.

V. EFFECT OF DISCONTINUANCE OR DISMISSAL OF PROCEEDINGS: ARTICLE 17

35. Part I, 4 of the questionnaire made the following inquiry concerning existing national rules:

"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 prove abortive and thereby fails to reach a decision on the merits?"

36. Thirty States replied to this question. Table C, below, summarizes the result of the replies:

Table C

(1) Dismissal has no effect on running of the period and no extension is provided:

(a) In all cases ... 13 (Australia, Austria, Guatemala, Jamaica, Japan, Kenya, Malawi,¹²³ Mexico,¹²⁴ New Zealand,¹²⁵ South Africa, Spain, Trinidad and Tobago, USSR¹²⁶)

(b) In all cases except where arbitration is abortive 1 (United Kingdom¹²⁷)

¹²³ The reply noted that no provision was made for extending the period in these cases.

¹²⁴ In case of credit instruments such as bills of exchange, promissory notes and cheques, a special provision existed that the limitation period was interrupted by presentation of claims even if the judge was incompetent. Such a rule seems to lie outside the scope of the uniform law. See art. 2 (f) of the preliminary draft.

¹²⁵ The reply noted that the general rule was applicable only where a cause of action had once accrued and the statute had begun to run. And, according to the reply, a cause of action arises at the moment when a state of facts occurs which gives a potential plaintiff a right to succeed in an action against a potential defendant; therefore there must be a plaintiff who can succeed and a defendant against whom he can succeed. Thus, the reply stated that, if, for example, the tribunal was not competent to hear the case because the prospective defendant was protected by diplomatic immunity, the principle prevented a cause of action from even having arisen. No other State referred to the question of diplomatic immunity.

¹²⁶ However, note that it was provided that, if a tribunal found that the reason for the delay in bringing an action after the expiry of the prescriptive period was valid, the infringed right would be subject to protection, i.e. the expired prescriptive period might be reinstated by the tribunal (including arbitral tribunal or mediation board). A similar rule authorizing the tribunal to reinstate the expired period was observed in

(c) In all cases except where the action is dismissed because the court is not competent	3	(India, ¹²⁸ Luxembourg, Venezuela ¹²⁹)
(d) Only where dismissed because of procedural defects or irregularities	1	(Kuwait ¹³⁰)
TOTAL	18	
(2) Period is		
(a) Interrupted by bringing action (regardless whether later discontinued or dismissed) ¹³¹	8	(Argentina, Finland, Italy, ¹³² Libya, Madagascar, Poland, ^{132a} Portugal, ¹³³ Sweden)
(b) Extended in all cases:	4	(Czechoslovakia, ^{133a} Denmark, ¹³⁴ Norway, ¹³⁵ United States ¹³⁶)
TOTAL	12	

New Zealand concerning claims for damages arising from personal injuries. See foot-note 41, *supra*.

¹²⁷ Where arbitration proceedings prove to be abortive, the court could extend the limitation period so as to allow the claimant to start a new arbitration or to institute legal proceedings.

¹²⁸ The time which a plaintiff had spent prosecuting with due diligence and in good faith, but in ignorance of the lack of competency of the court or any similar problem, should be excluded in calculating the running of the period.

¹²⁹ The prescriptive period is interrupted "by virtue of an action brought before the courts, even if heard by a judge who is not competent".

¹³⁰ In all other cases including dismissals because of incompetency of the court, a new period commenced to run from the date of last procedure of the previous action.

¹³¹ Sometimes what was meant by "interruption" was not clear. Usually it may be assumed from the replies that "interruption" started the running of a new period.

¹³² According to the reply, the general rule was that the limitation period was interrupted by bringing an action and the new period started to run after the final judgement was rendered, including cases where the action was dismissed because the court was not competent. In other cases of dismissal, the new period commenced to run from the time when the action was instituted.

^{132a} However, the reply noted that the plaintiff's inaction for over three years after the proceedings had been instituted destroyed the effect of interruption.

¹³³ Portugal has a rule similar to Italy. See foot-note 132 *supra*. In addition, if an action was dismissed for a procedural reason not attributable to the creditor, an extension of two months from the day of dismissal was also provided.

^{133a} The period was extended for 30 days after the plaintiff was notified of the decision to dismiss the proceedings because of lack of competence.

¹³⁴ No express provisions existed. But it had been held by legal theory and practice that the basic period was extended to allow the plaintiff to bring another action without undue delay.

¹³⁵ The period was extended for three months after the plaintiff was notified of the decision to dismiss the proceeding. However, if the dismissal was caused by an intentional fault of the plaintiff, no such extension would be granted.

¹³⁶ The reply noted that the rule generally embodied in state statutes on the subject was that a creditor, when he had

37. It will be noted that categories 1 (c) and 1 (d) above are comparable to that of the preliminary draft. States falling in categories 1 (a) and 1 (b) are more strict than the preliminary draft in dealing with a plaintiff whose action has been dismissed, while the States in categories 2 (a) and 2 (b) are, in general, somewhat more liberal.

38. One reply¹³⁷ proposed that additional time should be given when an action was dismissed or discontinued on any ground other than on the merits. The reply was of the view that a litigant who voluntarily discontinued an action that was defective (for a reason not relating to the merits), should be given at least as favourable treatment as a litigant who awaited the initiative of his adversary in moving for dismissal.¹³⁸

39. At the fourth session of the Commission, the representatives of two States,¹³⁹ referring to article 17 (2), supported extension of the limitation period only in the case of *bona fide* action before a court without jurisdiction; if a claimant knowingly initiated proceedings in the wrong court, no extension of the limitation period should be available. One representative¹⁴⁰ stated that article 17 was absolutely necessary.

VI. RIGHTS BASED UPON A JUDGEMENT OR AWARD

40. Under article 2 (d) of the preliminary draft, the uniform law does not apply to rights based upon "a judgement or award made in legal proceedings" even though the judgement or award results from a claim arising from an international sale. At the second session of the Working Group, the view was expressed that if the enforcement of judgements should be included within the uniform law at a later stage of drafting, the limitation period for such enforcement should be longer than that applicable to the underlying claim: consideration should be given to a period of 10 years.¹⁴¹ To obtain background information to meet this contingency, the questionnaire (part I, 5) inquired concerning the length of the period within which rights established by a final judgement or award could be enforced under the national law.

asserted a right in a proceeding that did not lead to a disposition on the merits, had a specified time—normally six months to a year—within which to assert his claim in another proceeding. Under the applicable state law, the availability of this privilege might depend on the reasons for which the proceedings were dismissed. Most state statutes provided it irrespective of the reasons for dismissal. Others did so only if the dismissal was neither voluntary nor for failure to prosecute. In relation to contracts of sale, section 2-725(3) of the Uniform Commercial Code provides that the additional time is given only if the termination of the first action did not result from voluntary discontinuance or from dismissal for failure or neglect to prosecute. It provides: Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

¹³⁷ United States.

¹³⁸ Cf. with the domestic rule of the United States at foot-note 136.

¹³⁹ India (SR.82), Singapore (SR.82).

¹⁴⁰ Argentina (SR.82).

¹⁴¹ See paragraph 4 of commentary to article 2 in A/CN.9/50.

41. Twenty-eight States responded to this inquiry. All the States except two indicated the length of such period to be 10 years or more. Table D summarizes the replies:

Table D

Years		
3	1	(USSR) ¹⁴²
5	1	(Guatemala)
10	9	(Argentina, Czechoslovakia, Finland, Italy, Japan, Mexico, Norway, Poland, Sweden)
12	8	(Australia, ¹⁴³ India, ¹⁴⁴ Jamaica, Kenya, ¹⁴⁵ Malawi, ¹⁴⁶ New Zealand, ¹⁴⁷ Trinidad and Tobago, United Kingdom) ¹⁴⁸
15	2	(Kuwait, Libya)
20	3	(Denmark, Portugal, Venezuela) ¹⁴⁹
30	4	(Austria, ¹⁵⁰ Khmer Republic, Luxembourg, South Africa)

VII. OTHER COMMENTS

42. The questionnaire (part II, 4) asked Governments if there was any provision in the preliminary draft which was not well adapted to the circumstances and needs applicable to international sale of goods, or which would interfere with adoption of a convention implementing the draft. Several States submitted comments pursuant to this inquiry. These comments will be discussed in the order of the provisions in the preliminary draft.

¹⁴² If no citizen is involved in the underlying transaction, the period was one year. Foreign judgements or arbitral awards must be submitted for execution within three years.

¹⁴³ The reply stated that the period differed from State to State and ranged from 12 to 20 years.

¹⁴⁴ But an award could be enforced only by filing a suit for its enforcement in a court within a period of three years from the date of the award.

¹⁴⁵ The reply noted that the interest claim on a judgement debt was subject to the six year limitation period from the date on which the interest became due.

¹⁴⁶ In addition to a rule similar to Kenya concerning interest claims (see foot-note 145, *supra*), the reply noted that, since the warrant of execution was valid only for 12 months, in practice application must be made every 12 months to keep a judgement or award alive.

¹⁴⁷ The reply noted that the interest claim on a judgement debt was subject to the six-year limitation period from the date on which the interest became due; actions founded on a foreign judgement or any arbitration awards were also subject to the six-year limitation period.

¹⁴⁸ The reply stated that the length of the period in Scotland was 20 years. The reply also noted that, if an arbitration agreement was not under seal and the award was not registered, it would be necessary to enforce the award as a contract between the parties; hence the period was six years. Foreign judgements were treated in the same manner as contractual rights and the limitation period was six years.

¹⁴⁹ In addition to these States, Australia and the United Kingdom may be included here. See foot-note 143 and foot-note 148.

¹⁵⁰ If the creditor was a corporation, the period was 40 years.

A. Sphere of application of the uniform law: articles 1-5

(a) Exclusion of the rights of the guarantor: article 1 (1)

43. One reply¹⁵¹ stated that the proposed treatment of the legal relationship arising from a guarantee was one-sided because article 1 (1) included within its scope only the rights of the buyer and seller arising from a guarantee and excluded the rights of the guarantor against the parties to the contract of sale. In the opinion given in that reply both should be included.

44. One reply¹⁵² stated that under its domestic law the length of the prescriptive period applicable to the rights based on a personal guarantee was the same as that provided for the rights which were guaranteed by such a guarantee; consequently, the rights against a guarantor could not be enforced when the principal obligation had been prescribed. The preliminary draft has no such specific rule on the relationship between the prescriptive periods applicable to claims against the debtor and guarantor. It could be contended that the rules of the preliminary draft did not prevent the continued application of specialized rules on the relationship between the principal debt and a claim against the guarantor. It might be noted that whether the prescriptive period applicable to both claims started on the same date (and therefore expired on the same date) would depend (*inter alia*) on whether the reference in article 7 (1) to "any right arising out of a breach of the contract of sale" meant that the period applicable to the claim against the guarantor would necessarily start on the date of the breach by the seller or whether the period might start on the date of the breach by the guarantor which might in some cases relate to a date subsequent to that of the breach by the seller.

(b) Ambiguity in article 1 (1) (2)

45. Two replies¹⁵³ stated that the phrase "or otherwise exercised" in article 1 (2) is unclear. According to one of them, although the draft provided that any State might, upon ratification, declare that it would delete the words or otherwise exercised", this provision did not in itself clarify the question.¹⁵⁴

46. The same reply also called attention to various terms in article 1 (1) relative to the application of the uniform law. These include the following terms: (a) contract of sale (or a guarantee), (b) "breach", (c) "termination", or (d) "invalidity" of the contract (or guarantee). It was suggested that these terms were not differentiated clearly enough in the text of the draft and that their theoretical formulation was tentative and vague.

(c) Repetition of provisions relating to notice: article 1 (3)

47. One reply¹⁵⁵ was of the view that the idea expressed in article 1 (3) is largely repeated in article 7 (2) and article 18 (4).¹⁵⁶

¹⁵¹ United States.

¹⁵² Norway.

¹⁵³ Poland, USSR.

¹⁵⁴ USSR. Cf. foot-note 112.

¹⁵⁵ USSR.

¹⁵⁶ Cf. the text accompanying foot-notes 39 and 40, *supra*.

(d) *The terms "creditor" and "debtor": article 1 (4) (d), (e)*

48. A reply¹⁵⁷ suggested replacing the words "creditor" and "debtor" by the words "claimant" and "respondent". At the fourth session of the Commission, the same view¹⁵⁸ was expressed. In this connexion it was noted that the terms "creditor" and "debtor" would imply that rights had already been adjudicated.

(e) *Applicability with respect to proceedings to establish invalidity of the contract*

49. At the fourth session of the Commission, one representative¹⁵⁹ suggested that legal proceedings to establish the invalidity of the contract were within the scope of the preliminary draft whereas ULIS dealt only with the obligations of the seller and buyer arising from the contract of sale. He doubted that this approach of the preliminary draft was wise and suggested that the uniform law on prescription should be confined to actions arising from the failure by either the seller or the buyer to perform his obligations; it would be unwise to venture into the involved and so far comparatively unexplored field of formation of the contract and defects that might affect the contract itself. The observer of UNIDROIT also thought that the preliminary draft covered the question of the invalidity of the contract. He was of the view that the question of the invalidity of the contract raised specific problems of a completely different character from those connected with non-performance or defective performance of a contract.¹⁶⁰ One reply^{160a} was in accord with the above views and proposed the deletion of article 8.

(f) *Exclusion of rights based on bodily injury: article 2 (a)*

50. One reply¹⁶¹ stated that it had no objection to the exclusion from the scope of the application of the uniform law of rights based on liability for the death of, or personal injury to the parties,¹⁶² but suggested that, if such claims were excluded, claims for damage to property other than the goods sold should also be excluded. A similar view was also proposed by a member of the Working Group on Prescription at its second session.¹⁶³

51. The same reply gave the view that all personal injury and wrongful death claims should be excluded; therefore, the reference to "buyer" in subparagraph (a) of article 2 should be deleted.

B. *Interruption of the limitation period: articles 10-13*

(a) *Proposal to simplify and improve the provisions of articles 10-12*

52. One reply¹⁶⁴ gave the view that the present texts of articles 10 to 12 were unnecessarily prolix; a more straightforward approach should be adopted, probably by way of consolidating the rules in these articles into a simpler rule. This reply also made several comments on details of the rules contained in these articles. Because of the detailed and interrelated character of these comments, they are presented as a working paper (A/CN.9/WG.1/WP.20).

53. At the fourth session of the Commission, one representative¹⁶⁵ stated that the phrase "provided that such counterclaim does not arise out of a different contract", was too general and that the concept of counterclaim as contemplated in article 10 (2) could encourage the lodging of complaints which bore no relation to the original claim.¹⁶⁶ Another representative¹⁶⁷ was of the view that article 12 was difficult to understand and should be revised. One reply,^{167a} submitted after the fourth session of the Commission, shared the same view.

(b) *Acknowledgement by partial performance: article 13(3)*

54. At the fourth session of the Commission, one representative¹⁶⁸ stated the following: according to paragraph 4 of the commentary to article 13 (A/CN.9/50, annex II), "the partial repair by a seller of a defective machine" could be regarded as acknowledgement by the debtor which would cause the limitation period to start afresh. Such an important rule should be expressly stated in the uniform law, particularly since article 13 was linked with article 9, which dealt with the case of express undertakings—and also with article 42 of ULIS.

(c) *Acknowledgement after the expiration of the period: article 13 (5)*

55. One reply¹⁶⁹ expressed the view that acknowledgement after expiration of the limitation period should not be given effect and consequently objected to the rule of article 13 (5). Another reply¹⁷⁰ also proposed the deletion of article 13 (5); under this view, whether an acknowledgement after the expiration of the limitation period or payment of instalments or interests after the period constitutes a new obligation ought to be left to applicable national law.

¹⁵⁷ South Africa.

¹⁵⁸ Singapore (SR.82).

¹⁵⁹ France (SR.83).

¹⁶⁰ See SR.83.

^{160a} Spain.

¹⁶¹ United States.

¹⁶² Cf. foot-note 41, *supra*, explaining the unique rule of prescription in New Zealand concerning claims for damages arising from personal injuries.

¹⁶³ See appendix A to annex II of A/CN.9/50.

¹⁶⁴ United States.

¹⁶⁵ USSR (SR.81).

¹⁶⁶ But cf. foot-note 2 to the commentary to article 10 (in A/CN.9/50) where it is stated that the question of the extent to which counterclaim can be filed is to be determined by the procedural rules of the forum.

¹⁶⁷ Belgium (SR.81).

^{167a} Spain.

¹⁶⁸ Hungary (SR.82).

¹⁶⁹ Libya.

¹⁷⁰ Sweden.

56. At the fourth session of the Commission, a representative¹⁷¹ also opposed the rule of article 13 (5). Another representative¹⁷² stated that he could accept the doctrine of article 13 although he felt that such acknowledgement should take place before the expiry of the limitation period.

C. Extension where institution of legal proceedings prevented; misstatement or concealment by debtor: articles 15 and 16

57. Two replies¹⁷³ gave the view that the rules set forth in article 15 are very difficult to apply and might lead to divergent interpretations and applications; uncertainty should be avoided by specifying the circumstances justifying an extension. One¹⁷⁴ of these replies also indicated that its domestic rules contained a provision suspending the running of the limitation period while the creditor was insane, a minor, or otherwise incompetent, although these were peculiarly "personal" to the creditor. In its view, a broader formula was desirable since the limitation period probably should not run whenever the creditor could not be reproached for not asserting his rights.¹⁷⁵

58. Two replies¹⁷⁶ foresaw uncertainties in the application of the rule of article 16 on the time from which the period recommenced, and recommended reformulation of the article. One¹⁷⁷ of these replies suggested that article 16 gave undue protection to a creditor who did not find out the identity of the debtor within the basic limitation period.

59. According to one reply,¹⁷⁸ article 16 was largely covered by the more general and adequate formulation of article 15. According to another reply,^{178a} articles 15 and 16 should be merged into a single provision and only suspension of the period should be provided rather than extension.

60. At the fourth session of the Commission, two representatives¹⁷⁹ stated that articles 15 and 16 were acceptable. One representative¹⁸⁰ was of the view that the scope of article 15 was not clear. Another representative¹⁸¹ stated that the grounds for extension should be kept at a minimum or even eliminated so as to avoid difficulties of application arising from divergent court practice in the various countries and expressed its preference for laying down a comparatively long limitation period.

D. Who can invoke limitation: article 19

61. One reply¹⁸² objected to article 19 since it contradicted a rule of public policy whereby judges should

be able to invoke the limitation period. Another reply¹⁸³ reserved its position with regard to the provisions of article 19.

62. At the fourth session of the Commission, three representatives referred to article 19. One¹⁸⁴ opposed article 19, another¹⁸⁵ favoured it, and the third¹⁸⁶ suggested that the Working Group might reconsider the question.

E. Set-off: article 20 (2)

63. One reply^{186a} doubted the propriety of article 20 (2) (a). Another reply¹⁸⁷ indicated that set-off should be permitted even if the claim in question did not arise from the same contract but arose from the same transaction, occurrence, or event; the factual interrelationship of the claims rather than their formal legal basis should be decisive. At the fourth session of the Commission, one representative¹⁸⁸ supported the approach of article 20 (2) concerning set-off. Another¹⁸⁹ thought that the requirement of article 20 (2) (a) was not necessary.

F. Preservation of existing rights: article 25

64. In lieu of the rule contained in article 25 (1), one reply¹⁹⁰ suggested that all rights or claims arising from contracts of sale entered into before the operative date of the uniform law should be governed by the law applicable at that time, and not by the uniform law.

G. Relation of the uniform law to other regional international agreements on prescription; e.g. CMEA General Condition

65. One reply¹⁹¹ was of the view that it would be necessary to have the Convention implementing the uniform law stipulate that the Convention would not be applied to contracts of international sale of goods concluded between persons whose States had established or would establish other rules concerning the prescriptive period by concluding international agreements.¹⁹²

H. Relation of the uniform law to ULIS

66. One reply¹⁹³ expressed the view that it was desirable that the length of the limitation period, and the rules on modification, commencement, extension or shortening of the period be examined in relation to the substantive rules of ULIS; this examination was important because of the connexion between the rules concerning extinctive prescription and the substantive rights arising out of the contract of sale of goods.¹⁹⁴

¹⁷¹ USSR (SR.81).

¹⁷² India (SR.82).

¹⁷³ Italy, United States.

¹⁷⁴ United States.

¹⁷⁵ The reply of New Zealand indicated that periods of disability such as infancy or lunacy were generally excluded from the limitation period under its domestic law.

¹⁷⁶ Italy, United States.

¹⁷⁷ United States.

¹⁷⁸ USSR.

^{178a} Spain.

¹⁷⁹ Argentina (SR.82), Mexico (SR.83).

¹⁸⁰ India (SR.82).

¹⁸¹ France (SR.83).

¹⁸² Madagascar.

¹⁸³ India.

¹⁸⁴ United Republic of Tanzania (SR.81).

¹⁸⁵ Argentina (SR.82).

¹⁸⁶ Nigeria (SR.81).

^{186a} Poland.

¹⁸⁷ United States.

¹⁸⁸ Argentina (SR.82).

¹⁸⁹ Austria (SR.83).

¹⁹⁰ Trinidad and Tobago.

¹⁹¹ USSR.

¹⁹² See, e.g. foot-note 6, *supra*.

¹⁹³ Japan.

¹⁹⁴ See, e.g. para. 18 (b), *supra*.

2. Report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods on its third session, held in New York from 30 August to 10 September 1971 (A/CN.9/70)*

CONTENTS

	Paragraphs
Introduction	1-7
Action with respect to convention and uniform law	8-10
 <i>Annexes</i>	
I. Text of a draft Convention on Prescription (Limitation) in the field of international sale of goods (September 1971)	Page 110
II. List of participants	115
III. List of documents and working papers before the Working Group	115

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), 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.¹

2. 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, for submission to the fourth session.² 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.³

3. The Working Group held its second session in 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). The report of the Working Group (A/CN.9/50) included the preliminary draft of the uniform law (annex I), a commentary on the preliminary draft (herein cited commentary) (annex II), and the text of the questionnaire (annex III) which was addressed to Governments and to interested international organizations in September 1970.

4. The Commission at its fourth session, held in April 1971, requested the Working Group to hold a third session to prepare a final draft of the Uniform Law on Prescription (Limitation) for submission to the

Commission at its fifth session.⁴ The Commission concluded that the Working Group should consider the replies to the questionnaire prior to any decision concerning the length of the limitation period and related matters. To that end the Commission requested the Secretary-General to analyse the replies received to the questionnaire and to transmit this analysis to the members of the Working Group in advance of its third session.⁵ The Commission also decided that views expressed by representatives with respect to the preliminary draft, as reflected in the summary records, and any proposals or observations on the preliminary draft which might be submitted by members of the Commission, should be taken into account by the Working Group in formulating a final draft of a uniform law.⁶ Consequently, the analysis prepared by the Secretary-General, in response to the above request by the Commission, has taken account both of the replies to the questionnaire and the comments made at the fourth session of the Commission.⁷

5. The Working Group held its third session at the United Nations Headquarters in New York from 30 August to 10 September 1971. The members of the Working Group are: Argentina, Belgium, Japan, Norway, Poland, the United Arab Republic and the United Kingdom of Great Britain and Northern Ireland. All of the members were represented at the session of the Working Group. The meeting was also attended by observers from Guyana, the Council of Europe, the European Economic Community, and The Hague Conference on Private International Law. The list of participants is contained in annex II.

6. The Working Group had before it studies and proposals submitted by Austria, Argentina, Belgium, Czechoslovakia, Norway, Poland, the United Arab Republic, the United Kingdom of Great Britain and Northern Ireland, and the United States of America

¹ Report of the United Nations Commission on International Trade Law on the work of its second session, *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)* (hereinafter referred to as UNCITRAL, Report on the Second Session (1969)), para. 46; UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

² 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 the Third Session (1970)), para. 97; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

³ *Ibid.*, para. 89.

⁴ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)* (hereinafter referred to as UNCITRAL, Report on the Fourth Session (1971)), para. 118; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

⁵ *Ibid.*

⁶ *Ibid.*, paras. 111, 118.

⁷ A/CN.9/WG.1/WP.24.

(A/CN.9/WG.1/WP.11 to 21, 23 and 26), and by The Hague Conference on Private International Law (A/CN.9/WG.1/WP.22). The Working Group had also before it the analysis mentioned above and a working paper by the Secretariat (A/CN.9/WG.1/WP.25). The documents placed before the Working Group are listed in annex III. The studies and proposals considered by the Working Group, designated annex V, will be set forth in addendum 2 to this report.

7. The Working Group elected the following officers:

Chairman: Mr. Stein Rognlien (Norway)

Rapporteur: Mr. Paul R. Jenard (Belgium)

ACTION WITH RESPECT TO CONVENTION AND UNIFORM LAW

8. In response to the Commission's request, the Working Group completed the final draft of a convention on prescription (limitation) in the field of international sale of goods; the text appears as annex I. Part I of the convention sets forth the text of a uniform law; succeeding parts of the convention contain provisions on implementation, declarations and reservations, and the necessary final clauses. The provision of part IV, final clauses, were not considered by the Working Group. The final draft of the convention indicates by brackets certain provisions considered by the Working Group as requiring final decision by the Commission at its fifth session.

9. The Working Group requested the Secretariat to revise the commentary to the preliminary draft, which was annexed to the report of the second session of the Working Group (A/CN.9/50),* to take account of the provisions of the convention and the final revision of the uniform law. The commentary to the final draft of the convention, designated annex IV, will be issued separately in addendum 1 to this report. In addition to explanation of the provisions of the convention and the Working Group's reasons for adopting those provisions, the commentary will note points on which members of the Working Group expressed reservations concerning provisions adopted by the Working Group. In the opinion of the Working Group, final action on such questions may be taken during the fifth session of the Commission.

10. The Working Group did not consider alternative approaches for final adoption of the Convention, and requests the Secretariat to analyse such alternative approaches for consideration and decision by the Commission at the fifth session.

ANNEX I

Text of a draft Convention on Prescription (Limitation) in the field of international sale of goods (September 1971)

(Prepared by the UNCITRAL Working Group on Prescription at its third session held in New York, 30 August-10 September 1971)

The States Parties to this Convention,

Desiring to establish a uniform law on prescription (limitation) in the field of the international sale of goods,

* UNCITRAL Yearbook, vol. II: 1971, part two, I, C, 2.

Have resolved to conclude a convention to this effect and have agreed as follows:

PART I: UNIFORM LAW

SPHERE OF APPLICATION OF THE LAW

Article 1

(1) This Uniform Law shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller to a contract of international sale of goods [or to a guarantee incidental to such a contract].

(2) This Law shall not affect a rule of the applicable law providing a particular time-limit within which one Party is required, as a condition for the acquisition or exercise of this claim, to give notice to the other Party or perform any act other than the institution of legal proceedings.

(3) 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 exercise a claim, whether or not such a claim is for a sum of money;

(e) "Debtor" means a party against whom the creditor seeks to exercise such a claim;

(f) "Legal proceedings" includes judicial, administrative and arbitral proceedings;

(g) "Person" includes any corporation, company, or other legal entity, whether private or public;

(h) "Writing" includes telegram and telex.

Article 2

(1) Unless otherwise provided herein, this Law shall apply without regard to the rules of private international law.

(2) [Notwithstanding the provision in paragraph 1 of this article, this Law shall not apply when the parties have expressly chosen the Law of a non-contracting State as the applicable law.]

Article 3

(1) For the purpose of this Law a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph 1 of this article 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.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

Article 4

(1) This Law shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this 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 5

This 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 at the time of the conclusion of the contract knows that the goods are bought for a different use;
- (b) By auction;
- (c) On execution or otherwise by authority of law;
- (d) Of stocks, shares, investment securities, negotiable instruments or money;
- (e) Of ships, vessels or aircraft;
- (f) Of electricity.

Article 6

This Law shall not apply to claims based upon:

- (a) Liability for the death of, or injury to the person of, the buyer [or other person];
- (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 direct 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 7

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 8

The limitation period shall be four years.

COMMENCEMENT OF THE LIMITATION PERIOD

Article 9

(1) Subject to the provisions of paragraphs 3 to 6 of this article and to the provisions of article 11, the limitation period in respect 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 exercise of a claim 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 claim 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 time at 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 claims 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 of contract 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 claim arising out of such breach shall commence on the date on which such breach occurred. If the contract is not treated as terminated, 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 claim arising out of the contract 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. If the contract is not treated as terminated, 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 10

Subject to the provisions of article 11, where a claim arises in relation to a contract of sale [or from a guarantee incidental thereto], and not from a breach of the contract of sale, the limitation period shall commence on the date on which the claim could first be exercised.

Article 11

If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer first informs the seller that he intends to assert a claim based on the undertaking, but not later than on the date of the expiration of the period of the undertaking.

INTERRUPTION OF THE LIMITATION PERIOD: LEGAL PROCEEDINGS: ACKNOWLEDGEMENT

Article 12

(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:

(a) as instituting judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim; or

(b) as invoking his claim for the purpose of obtaining satisfaction or recognition thereof in the course of judicial proceedings which he has commenced against the debtor in relation to another 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 claim against which the counterclaim is raised, provided that such counterclaim does not arise out of a different contract.

Article 13

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings by requesting that the claim 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 14

The institution of judicial or arbitral proceedings against one debtor shall have effect in relation to any other person jointly and severally liable with him [or liable under a guarantee], provided that the creditor, before the expiration of the limitation period, informs such person in writing that the proceedings have been instituted.

Article 15

Where any legal proceedings are commenced upon the occurrence of:

- (a) The death or incapacity of the debtor;
- (b) The bankruptcy or insolvency of the debtor;
- (c) The dissolution of a corporation, company or other legal entity;
- (d) The seizure or transfer of the whole or part of the assets of the debtor,

the limitation period shall cease to run only if the creditor performs an act recognized under the law applicable to those proceedings for the purpose of obtaining satisfaction or recognition of his claim. Such act may be performed before the expiration of any further period as may be provided for under that law.

Article 16

Where the creditor performs any act, recognized under the Law of the jurisdiction where such act is performed as manifesting his desire to interrupt the limitation period, a new limitation period of four years shall commence on the date on which notice of this act is served on the debtor by a public authority.

Article 17

(1) Where the debtor acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run by reason of and from the date of such acknowledgement.

(2) 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.

(3) Payment of interest shall be treated as payment in respect of the principal debt.

[(4) The provisions of this article shall apply whether or not the limitation period prescribed by articles 8 to 11 has expired.]

EXTENSION OF THE LIMITATION PERIOD

Article 18

(1) Where the creditor has commenced legal proceedings in accordance with articles 12, 13 or 15:

(a) The limitation period shall be deemed to have continued to run if the creditor subsequently discontinues the proceedings or withdraws his claim;

(b) Where the court or arbitral tribunal has declared itself or been declared incompetent, or where the legal proceedings have ended without a judgement, award or decision on the merits of the claim, the limitation period shall be deemed to have continued to run and shall be extended for one year respectively from the date on which such declaration was made or from the date on which the proceedings ended.

(2) Where an arbitration has been commenced in accordance with article 13, but such arbitration has been stayed or set aside by judicial decision, the limitation period shall be deemed to have continued to run and shall be extended for one year from the date of such decision.

Article 19

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 claim, 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. The limitation period shall in no event be extended beyond 10 years from the date on which the period would otherwise expire in accordance with articles 8 to 11.

Article 20

[Where judicial or arbitral proceedings are instituted against the buyer within the limitation period prescribed by this Law either by a subpurchaser or by a person jointly and severally liable with the buyer, the buyer shall be entitled to an additional period of one year from the date of the institution of such proceedings for the purpose of obtaining recognition or satisfaction of his claim against the seller.]

Article 21

Where the creditor has obtained a final judgement or award on his claim in judicial or arbitral proceedings, but such judgement or award is not recognized in another jurisdiction, he shall be entitled, within a period of four years from the date of such final judgement or award, to institute legal proceedings in that jurisdiction for the purpose of obtaining satisfaction or recognition of his claim.

MODIFICATION OF THE LIMITATION PERIOD

Article 22

(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 9 to 11, extend the limitation period by a declaration in writing to the creditor, provided that such declaration shall in no event have effect beyond the end of 10 years from the date on which the period would otherwise expire or have expired in accordance with articles 8 to 11.

(3) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim 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 23

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 24

(1) Subject to the provisions of paragraph 2 of this article and of article 23, no claim 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 claim as a defence for the purpose of set-off against a claim asserted by the other party:

(a) If both claims relate to the same contract; or

(b) If the claims could have been set-off at any time before the date on which the limitation period expired.

Article 25

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 26

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 27

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 28

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 12 or asserts a claim as envisaged in article 15, 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 claim could be asserted in that jurisdiction.

PART II: IMPLEMENTATION

Article 29

(1) Each Contracting State shall, in accordance with its constitutional procedure, give to the provisions of Part I of this Convention the force of law, not later than the date of the entry into force of this Convention in respect of that State.

(2) Each Contracting State shall communicate to the Secretary-General of the United Nations the text whereby it has given effect to this Convention.

Article 30

Each Contracting State shall apply the provisions of the Uniform Law to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

PART III: DECLARATIONS AND RESERVATIONS

Article 31

(1) Two or more Contracting States may at any time declare that any contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of article 3 of this Convention, because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(2) Any Contracting State may at any time declare with reference to such State and one or more non-Contracting States that a contract of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of Article 3 of this Convention because they apply the same or closely related legal rules to sales which in the absence of such a declaration would be governed by this Convention.

(3) If a State which is the object of a declaration made under paragraph 2 of this article subsequently ratifies or accedes to this Convention, the declaration shall not remain in effect unless the ratifying or acceding State declares that it will accept it.

Article 32

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of the Uniform Law to actions for annulment of the contract.

Article 33

Any State which has ratified the Convention relating to a Uniform Law on the International Sale of Goods done at The Hague on 1 July 1964, or which has acceded to that Convention, may at any time declare:

(a) That, by way of derogation from Article 3, paragraph 1, of this Convention, it will apply the provisions of Article 1, paragraph 1, of the Uniform Law annexed to the Convention of 1 July 1964;

(b) That, in the event of conflict between the provisions of the Uniform Law annexed to the Convention of 1 July 1964 and the provisions of this Convention, it will apply the provisions of the Uniform Law annexed to the Convention of 1 July 1964.

Article 34

(1) Any State which has previously ratified or acceded to one or more Conventions on the conflict of laws affecting limitation in respect of the international sale of goods 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 in cases governed by one of those previous Conventions only if that Convention itself leads to the application of the Uniform Law.

(2) Any State which makes a declaration under paragraph 1 of this Article shall specify the Conventions referred to in that declaration.

Article 35

(1) Any State may declare, at the time of the deposit of its instrument of ratification or accession to the present Convention, that it shall not be compelled to apply the provisions of Articles 12, 14, 15, 16, or 18 (1) (b) of this Convention where the relevant acts or circumstances took place outside the jurisdiction of that State.

(2) Any State which has not made a declaration under paragraph 1 of this article may at any time declare that it will not be compelled to apply the provisions of the articles referred to in that paragraph where the relevant acts or circumstances took place within the jurisdiction of a State which has made a declaration under that paragraph.

(3) Any State which makes a declaration under paragraph 1 or 2 of this Article shall specify the particular article or articles of this Convention in respect of which the declaration is made.

Article 36

This Convention shall not prevail over Conventions, already entered into or which may be entered into, and which contain provisions concerning limitation in respect of the international sale of goods in special fields.

Article 37

No reservation other than those made in accordance with articles 31 to 35 shall be permitted.

Article 38

(1) Declarations made under articles 31 to 35 of this Convention shall be addressed to the Secretary-General of the United Nations. They shall take effect [three months]

after the date of their receipt by the Secretary-General or, if at the end of this period the present Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

(2) Any State which has made a declaration under articles 31 to 35 of this Convention may withdraw it at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect [three months] after the date of the receipt of the notification by the Secretary-General. In the case of a declaration made under article 31, paragraph 1, of this Convention, such withdrawal shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State under that paragraph.

* * * * *

PART IV: FINAL CLAUSES

[The provisions of this part were not considered by the Working Group.]

Article 39

[Signature]¹

The present Convention shall be open until [] for signature by [].

Article 40

[Ratification]²

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 41

[Accession]³

The present Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 31. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 42

[Entry into force]⁴

(1) The present Convention shall enter into force [six months] after the date of the deposit of the [] instrument of ratification or accession.

(2) For each State ratifying or acceding to the present Convention after the deposit of the [] instrument of ratification or accession, the Convention shall enter into force [six months] after the date of the deposit of its instrument of ratification or accession.

Article 43

[Denunciation]⁵

(1) Any Contracting State may denounce the present Convention by notifying the Secretary-General of the United Nations to that effect.

(2) The denunciation shall take effect [twelve months] after receipt of the notification by the Secretary-General of the United Nations.

¹ Based on article 81 of the Vienna Convention on the Law of Treaties.

² Based on article 82 of the Vienna Convention on the Law of Treaties.

³ Based on article 83 of the Vienna Convention on the Law of Treaties.

⁴ Based on article 84 of the Vienna Convention on the Law of Treaties.

⁵ Based on article XII of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, herein cited as the "Hague Sales Convention".

Article 44

[Declaration on territorial application]

Alternative A⁶

(1) Any State may, at the time of the deposit of its instrument of ratification or accession or at any time thereafter, declare, by means of a notification addressed to the Secretary-General of the United Nations, that the present Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect [six months] after the date of receipt of the notification by the Secretary-General of the United Nations, or, if at the end of that period the Convention has not yet come into force, from the date of its entry into force.

(2) Any Contracting State which has made a declaration pursuant to paragraph 1 of this article may, in accordance with article 43 denounce the Convention in respect of all or any of the territories concerned.

Alternative B⁷

The present Convention shall apply to all non-metropolitan territories for the international relations of which any Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case the Party shall endeavour to secure the needed consent of the territory within the shortest period possible, and when the consent is obtained the Party shall notify the Secretary-General. The Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

Article 45

[Notifications]⁸

The Secretary-General of the United Nations shall notify the Signature and Acceding States of:

(a) The declarations and notifications made in accordance with article 38;

(b) The ratifications and accessions deposited in accordance with articles 40 and 41;

(c) The dates on which the present Convention will come into force in accordance with article 42;

(d) The denunciations received in accordance with article 43;

(e) The notifications received in accordance with article 44.

Article 46

[Deposit of the original]

The original of the present Convention shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention in the Chinese, English, French, Russian and Spanish texts, all of which are equally authentic.

DONE at [place], [date].

⁶ Based on article XIII of The Hague Sales Convention.

⁷ Based on article 27 of the Convention on Psychotropic Substances, 1971.

⁸ Based on article XV of The Hague Sales Convention.

ANNEX II

List of participants

[Annex not reproduced in the present volume]

ANNEX III

List of documents and working papers before the Working Group

[Annex not reproduced in the present volume]

3. Commentary on the Draft Convention on Prescription (Limitation) in the International Sale of Goods, May 1972 (A/CN.9/73)*

CONTENTS

	<i>Page</i>		<i>Page</i>
INTRODUCTION: OBJECTIVE OF THE CONVENTION	116	Article 5. Exclusion of certain claims	121
PART I: SUBSTANTIVE PROVISIONS	117	Article 6. Mixed contracts	122
SPHERE OF APPLICATION	117	I. Sale of goods and supply of labour or other services by the seller, paragraph (1)	122
Article 1. Introductory provisions; definitions ..	117	II. Supply of materials by the buyer, paragraph (2)	123
I. Basic scope of the Convention, paragraph (1)	117	Article 7. Interpretation to promote uniformity ..	123
(a) The parties	117	The duration and commencement of the limitation period	123
(b) Transactions subject to the Convention; types of claims or rights	118	Article 8. Length of the period	123
II. The Convention not applicable to "time-limits" (<i>déchéance</i>), paragraph (2)	118	Article 9. Basic rule on commencement of the period	123
III. Definitions, paragraph (3)	118	I. Structure of the Convention: basic rule ..	124
Article 2. Definition of a contract of international sale	119	II. Fraud during the formation process of the contract	124
I. The basic criterion, paragraph (1)	119	III. Breach of contract	124
II. Place of business, paragraph (2)	119	IV. Other claims not arising out of breach	124
III. Habitual residence, paragraph (3)	119	Article 10. Claims based on non-conformity of the goods; express undertaking	125
IV. Civil or commercial character of the transaction, paragraph (4)	119	I. Claims by buyers relying on non-conformity of the goods	125
Article 3. Application of the Convention; exclusion of the rules of private international law ..	120	II. Express undertaking for a period of time ..	125
I. Application of the Convention, paragraph (1)	120	Article 11. Termination before performance is due; instalment contracts	126
II. Exclusion of the rules of private international law, paragraph (2)	120	I. Basic rule, paragraph (1)	126
III. Effect of agreement by the parties, paragraph (3)	120	II. Instalment contracts, paragraph (2)	126
Article 4. Exclusion of certain sales and types of goods	121	Cessation and extension of the limitation period	127
I. Exclusion of consumer sales, subparagraph (a)	121	Article 12. Judicial proceedings	127
II. Exclusion of sales by auction, subparagraph (b)	121	Article 13. Arbitration	128
III. Exclusion of sales on execution or otherwise by authority of law, subparagraph (c) ..	121	Article 14. Legal proceedings arising from death, bankruptcy or the like	128
IV. Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)	121	Article 15. Proceedings not resulting in a decision on the merits of the claim	129
V. Exclusion of sales of ships, vessels or aircraft, subparagraph (e)	121	Article 16. Proceedings in a different jurisdiction; extension where foreign judgement is not recognized	130
VI. Exclusion of sales of electricity, subparagraph (f)	121	I. Institution of a fresh legal proceeding in another State, paragraph (1)	130
		II. Extension where recognition or enforcement of foreign judgement is refused, paragraph (2)	130

* 6 November 1972. This commentary deals with the provisions of the Draft Convention on Prescription (Limitation) in the International Sale of Goods as approved by the Commission at its fifth session. It supersedes the previous commentary on the provisions of the Draft Convention as recommended by the Working Group on Time-Limits and Limitations (A/CN.9/70/Add.1). The present commentary has been prepared by the Secretariat, in consultation with the Rapporteur of the Commission, in conformity with the request made by the United Nations Commission on International Trade Law in the report on the work of its fifth session. *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 20. See above, first part, II, A.

	Page		Page
Article 17. Joint debtors; recourse actions	130	Article 26. Interest	136
I. Effect of the institution of legal proceedings against a joint debtor, paragraph (1)	131	Calculation of the period	136
II. Recourse actions, paragraph (2)	131	Article 27. Basic rule	136
III. Time-limit for commencing legal proceedings against joint debtors or against the seller, paragraph (3)	131	Article 28. Effect of holiday	136
Article 18. Recommencement of the period by service of notice	132	International effect	137
Article 19. Acknowledgement by debtor	132	Article 29. Acts or circumstances to be given international effect	137
Article 20. Extension where institution of legal proceedings prevented	133	PART II: IMPLEMENTATION	138
Modification of the limitation period by the parties	133	Article 30. Implementing legislation	138
Article 21. Modification by the parties	133	Article 31. Implementing process in a federal State	138
I. Extension of the limitation period	133	Article 32. Non-applicability as to prior contracts	139
II. Notices to other party; arbitration	134	PART III. DECLARATIONS AND RESERVATIONS	139
[Limit of extension and modification of the limitation period]	134	Article 33. Declarations limiting the application of the Convention	139
Article 22. Over-all limitation for bringing legal proceedings	134	Article 34. Reservation with respect to actions for annulment of the contract	139
Effects of the expiration of the limitation period	134	Article 35. Reservation with respect to who can invoke limitation	139
Article 23. Who can invoke limitation	134	Article 36. Relationship with conventions containing limitation provisions in respect of international sale of goods	140
Article 24. Effect of expiration of the period; set-off	135	Formal and final clauses not considered by the Commission (articles 37 to 46)	140
I. Effect of expiration of the period	135		
II. Claim used as a defence or for the purpose of set-off	135		
Article 25. Restitution of performance after prescription	136		

Introduction: objective of the Convention

1. This Convention is concerned essentially with the period of time within which parties may bring legal proceedings to exercise their rights or claims relating to a contract of international sale of goods.

2. Divergencies in national rules governing the prescription of rights or limitation of claims create serious difficulties. Limitation periods under national laws vary widely. Some periods are short (e.g. six months, one year) 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 (which in some cases are as long as 30 years) are longer than are appropriate for transactions involving the international sale of goods, and fail to provide the essential protection that should be afforded by limitation rules.¹ 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.

¹ See analysis of replies to the questionnaire and comments made at the fourth session of the Commission by Governments on the length of the prescriptive period and related matters: report of the Secretary-General (A/CN.9/70/Add.2, section 14) at paras. 6 and 16 (see above, I, B, 1).

3. National rules not only differ, but in many instances are difficult to apply to international sales transactions.² One difficulty arises from the fact 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 further enhanced for international transactions, since merchants and lawyers will often be unfamiliar with the implication of the general concepts and with the techniques of interpretation used in a foreign legal system.

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 prescription (or limitation) present a special difficulty of characterization or qualification: some

² For some illustrations of difficulties, see R. Kuratowski, *Limitation of Actions Founded on Contract and Prescription of Contractual Obligations in Private International Law*, Estratto Pagliavatti del Terzo Congresso di Diritto Comparato, vol. III—Paris IV, pp. 447-460; E. Harris, *Time Limits for Claims and Actions, in Unification of the Law Governing International Sale of Goods* (J. Honnold, ed. 1966), pp. 201-223. Also see H. Trammer, *Time Limits for Claims and Actions in International Trade*, *ibid.*, pp. 225-233.

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.³

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. In view of the widely varying concepts and approaches prevailing under national laws with respect to the prescription of rights and the limitation of claims,

³ See para. 4 of commentary on art. 3.

it has been considered advisable to provide uniform rules in a convention that are as concrete and complete as possible. A brief and general uniform law (such as a law merely specifying the length of the period of limitation) would do little in actual practice to achieve unification, since the divergent rules of national law would then be brought into play in "interpreting" such a brief and general provision. Since this Convention is confined to one type of transaction—the purchase and sale of goods—it is possible to state uniform rules for this type of transaction with a degree of concreteness and specificity that is not feasible in statutes that deal with many different types of transactions and claims. The loss of uniformity through the use of divergent rules and concepts of national law cannot be wholly avoided, but this Convention seeks to minimize this danger by facing the problems that are inherent in this field as specifically as feasible within the scope of a convention of manageable length. See also article 7, on rules for interpreting and applying this Convention.

Part I: substantive provisions

SPHERE OF APPLICATION

Article 1

[Introductory provisions; definitions]*

(1) This Convention shall apply to the limitation of legal proceedings and to the prescription of the rights of the buyer and seller against each other relating to a contract of international sale of goods.

(2) This Convention shall not affect a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of this claim, to give notice to the other party or perform any act other than the institution of legal proceedings.

(3) In this Convention:

(a) "Buyer" and "seller", or "party", mean 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) "Creditor" means a party who asserts a claim, whether or not such a claim is for a sum of money;

(c) "Debtor" means a party against whom the creditor asserts a claim;

(d) "Breach of contract" means the failure of a party to perform the contract or any performance not in conformity with the contract;

(e) "Legal proceedings" includes judicial, administrative and arbitral proceedings;

(f) "Person" includes corporation, company, association or entity, whether private or public;

(g) "Writing" includes telegram and telex.

COMMENTARY

I. Basic scope of the Convention, paragraph (1)

1. Under article 1 (1), this Convention 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 Convention do not vary because of differing terminology of national law. This approach is vital in view of the international character of the Convention and its objective to promote uniformity in interpretation and application.

2. Specific aspects of the Convention's sphere of application will be discussed in relation to: (a) the parties governed by the Convention, and (b) the types of transactions and claims or rights that are subject to the limitation period.

(a) The parties

3. Paragraph (1) of article 1 shows that this Convention is directed to the rights or claims arising from the relationship of the "buyer and seller". The terms, as defined in article 1 (3) (a), include the "successors to and assigns of their rights or duties under the contract of sale". The Convention 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" could be an insurer who becomes subrogated to rights under a sales contract. Succession could also result from the merger of companies or from corporate reorganization.

* Captions were not drafted at the session of the Commission; they are added for ease of reference and should not be considered as parts of the text of the draft.

4. It will be noted that, under paragraph (3) (a), to become a "buyer" or "seller" a person must "buy or sell, or agree to buy or sell, goods". Thus a party who has only the right (or "option") to conclude a sales contract is not a "buyer" or "seller" unless and until the contract is concluded. Thus rights under the option agreement (as contrasted with rights under a contract that may result from the exercise of the option) are not governed by the Convention.

(b) *Transactions subject to the Convention; types of claims or rights*

5. Under article 1 (1), this Convention applies to "a contract of international sale of goods". Whether a sale is "international" is governed by article 2. Certain exclusions from the scope of the Convention are provided in articles 4 through 6.

6. Paragraph 1 of article 1 provides that this Convention shall apply to rights or claims "relating to a contract" of international sale of goods; the Convention is not intended to 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 against each other" 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 sells goods to a distributor who resells the goods to the second buyer, a claim by the second buyer against the manufacturer would not be governed by the Convention (see also para. 3, above). Nor does this Convention apply to rights or claims of the buyer or seller against a person who is neither a "buyer" nor "seller" and who guarantees the performance by the buyer or seller of an obligation under the contract of sale.¹

7. The language "relating to a contract" contained in article 1 (1) is broad enough to include not only claims arising from breach of a sales contract but also claims relating to the termination or invalidity of such a contract.² For example, the buyer may have made an advance payment to the seller under a contract 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, in practice, between the two types of claims, both are governed by this Convention.

II. *The Convention not applicable to "time-limits" (délchéance), paragraph (2)*

8. Paragraph (2) of article 1 is designed, *inter alia*, to make clear that this Convention has no effect on certain rules of local law involving "time-limits" (*délchéance*); typical examples are requirements that one party give notice to the other 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 trans-

saction—action such as making prompt tests to preserve evidence as to the quality of goods or taking control over and salvaging rejected goods.

9. 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), annexed 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" (arts. 26, 30, 62 (1)) or "promptly" (arts. 32, 43, 62 (2), 66 (2), 67, 75). These brief, flexible periods for special types of parties' action "other than the institution of legal proceedings" are quite different from a general period of limitation. Consequently, paragraph (2) of article 1 states that this Convention shall not affect "a rule of the applicable law providing a particular time-limit within which one party is required, as a condition for the acquisition or exercise of his claim, to give notice to the other party".³

10. Paragraph (2) of article 1 also preserves rules of applicable law providing "a particular time-limit" within which one party is required, as a condition for the acquisition or exercise of his claim, to "perform any act other than the institution of legal proceedings". 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 Convention.

III. *Definitions, paragraph (3)*

11. "Person" is defined in article 1 (3) (f) to include "corporation, company, association or other entity, whether public or private". This definition is intended to show that this Convention is applicable without regard to the form of organization that engages in contracts of sale. "Public" entities often engage in commercial activities and it is important to make it clear that such activities are subject to this Convention in the same way as "private" entities. An entity need not be corporate. An "association" such as a partnership which can sue or be sued in its own name under national law, is an "entity" and a "person" for the purpose of this Convention. The terms used in article 1 (3) (f) are, of course, illustrative only and not exclusive of others.

12. Most of the other definitions of words contained in paragraph (3) 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 (3) (e) can best be considered in connexion with article 14, and the definition of "breach of contract" in paragraph (3) (d) can best be considered in connexion with articles 9 (3) and 11 (2).

13. Certain other words used in this Convention (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 Convention. 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 the Convention and its objective to promote uniformity in interpretation and application.⁴

¹ For similar reasons, claims based upon a documentary letter of credit will not come within the scope of this Convention. The documentary letter of credit is an undertaking by banks independent of the underlying sales contract and is not the legal relationship of "the buyer and seller against each other".

² Opportunity for a reservation with respect to applicability of the Convention to actions for annulment of the contract is provided in article 34.

³ As to the effect of a contract clause establishing a time-limit, see art. 21 (3) and accompanying commentary, para. 5. Also see art. 9 (3).

⁴ See art. 7 and accompanying commentary. Also see para. 2 of commentary on art. 30.

Article 2

[Definition of a contract of international sale]

[(1) For the purposes of this Convention, a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the seller and buyer have their places of business in different States.]

(2) Where a party to the contract of sale has places of business in more than one State, his place of business for the purposes of paragraph (1) of this article and of article 3 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.

(3) Where a party does not have a place of business, reference shall be made to his habitual residence.

(4) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract shall be taken into consideration.

COMMENTARY

1. This article deals with the degree of internationality which brings a sale of goods within the scope of this Convention.

I. The basic criterion, paragraph (1)

2. This paragraph lays down the basic criterion for the definition of a contract of international sale of goods. The paragraph provides that for a contract of sale to be considered international, the contract must satisfy the following three requirements: (a) at the time of the conclusion of the contract, the parties must have their *places of business*, and not simply centres of only formal significance, such as places of incorporation, (b) in *different States* (whether these are contracting or non-contracting States). In short, the parties' places of business should not be in the same State.

3. Various additional qualifications for the definition of a contract of international sale of goods were considered: these related to international carriage of goods, offer and acceptance, and place of delivery. They were rejected, however, because of the serious practical difficulties of clarity in relation to these terms. The simplicity and clarity of this single basic criterion (i.e., that the parties have their place of business in different States) contributes to certainty in solving the question whether a sale of goods is "international".

4. Under paragraph (1) of this article, the contract of sale of goods is considered international, even though at the time of the conclusion of the contract, one of the parties neither knew nor had reason to know that the other's place of business was in a different State. One example is where one of the parties was acting as agent for a foreign undisclosed principal. Two reasons led to the decision not to require knowledge that the other party's place of business was in a different State. The first is that inclusion of subjective elements in article 2 (1) would raise difficult problems of proof. The second is that knowledge by the parties that, at the time of the conclusion of the contract, they have their places of business in different States was not considered necessary for the application of rules of prescription. When parties enter into a contract of sale, they contemplate performance and not the prescription of their claims. While they may need to know, at the time of contracting, which law defines their mutual obligations concerning performance, at this time there is little practical interest in knowing which prescription rules would apply to their legal actions in case of breach or other non-performance.

5. Paragraph (1) of this article, however, was placed within square brackets so as to indicate that the scope of the Convention should be given further consideration. (Cf. art. 3 (1) and accompanying commentary, para. 2. Also cf. art. 36.)

II. Place of business, paragraph (2)

6. This paragraph deals with the situation where one of the parties to the contract has more than one place of business. For the purpose of characterizing a sale of goods as "international" no problem arises where all the places of business of one party (X) are situated in States other than the one where the other party (Y) has his place of business; whichever place is designated as the relevant place of business of X, the places of business of X and Y will be in *different States*. The problem arises only when one of X's places of business is situated in the *same State* as the place of business of Y. In such a case it becomes crucial to determine which of these different places of business is the relevant place of business within the meaning of paragraph (1) of this article.

7. Paragraph (2) lays down the criteria for determining the relevant place of business. This paragraph, as a general rule, points to the party's "principal place of business". Thus, where a party has his *principal* place of business in State A, and has branches in States B, C and D, that party's place of business for the purpose of this Convention is the place of business in State A.

8. Paragraph (2) of this article recognizes that in some cases a mere branch may have a closer relationship with the transaction than a principal place of business where such a branch 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 this Convention. Therefore, paragraph (2) qualifies the general rule relating to the *principal* place of business, by the phrase "unless another place of business has a closer relationship to the contract and its performance". The phrase "the contract and its performance" refers to the transaction as a whole, including factors relating to the offer and the acceptance as well as the performance of the contract. In determining this closer relationship, this paragraph states that regard shall be given to "the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". Factors that may not be known to one of the parties at the time of entering into the contract would include supervision over the making of the contract by another office or the foreign origin or final destination of the goods; when these factors are not known to or contemplated by the parties they are not to be taken into consideration.

III. Habitual residence, paragraph (3)

9. This paragraph deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognized places of business. Occasionally, however, a person who does not have a "place of business" may enter into a contract of sale of goods that is intended for commercial purposes, and not simply for "personal, family or household use" within the meaning of article 4 of this Convention. The present provision provides a means of dealing with this situation.

IV. Civil or commercial character of the transaction, paragraph (4)

10. This paragraph deals with the classifications that some legal systems make in connexion with the applicability of different bodies of law. In order to avoid misinterpretations that might otherwise arise, the paragraph excludes reference to these classifications, whether they relate to the nationality of the parties, or to the "commercial or civil character of the parties or of the contract".

Article 3

[Application of the Convention; exclusion of the rules of private international law]

(1) This Convention shall apply only when, at the time of the conclusion of the contract, the seller and buyer have their places of business in different Contracting States.

(2) Unless otherwise provided herein, this Convention shall apply irrespective of the law which would otherwise be applicable by virtue of the rules of private international law.

(3) This Convention shall not apply when the parties have validly chosen the law of a non-Contracting State.

COMMENTARY

1. Paragraphs (1) and (2) of this article deal with these questions: When must a Contracting State apply the rules of this Convention? What contacts between an international sales transaction and a Contracting State (choice of law rules) are required for the application of the Convention? Paragraph (3) deals with the freedom of the parties to exclude the application of the Convention.

I. Application of the Convention, paragraph (1)

2. Paragraph (1) of this article provides that this Convention must be applied "only when, at the time of the conclusion of the contract, the seller and buyer have their place of business in different Contracting States". Thus, a Contracting State is not bound, by adhering to this Convention, to apply the rules of the Convention when one party has his place of business in a non-Contracting State. This restriction on the application of the Convention was considered necessary in view of the difficulty inherent in alternative tests for the application of the Convention. Consideration was given to the rule that the forum of a Contracting State should always apply the Convention to the international sale of goods; this was finally rejected because this would give excessive application to the Convention and might encourage forum shopping. General reference to the rules of private international law was found unsatisfactory because of the wide disparity among such rules. (Cf. art. 3 (2).)

II. Exclusion of the rules of private international law, paragraph (2)

3. Paragraph (2) of this article provides that, subject to any contrary provisions in this Convention, the Convention must be applied without regard to "the law which would otherwise be applicable by virtue of the rules of private international law". This language is designed to emphasize the fact that the applicability of this Convention depends on the basic test established in article 3 (1) above rather than the general rules of private international law.

4. If the applicability of this Convention were linked to the rules of private international law, special difficulties would have been presented because of unusually divergent approaches to the characterization of prescription problems that are followed in different legal systems. For example, while most Civil Law systems characterize limitations problems as substantive questions and apply the proper law of the contract (*lex causae contractus*) (and in some cases, the "proper law of prescription"), most Common Law jurisdictions characterize

limitations problems as questions of procedure and, on this ground, apply the rules of the *forum (lex fori)*. In yet other Common Law jurisdictions, a combination of the two characterizations is possible.¹ The Convention's establishment of its own rule for applicability in article 3 (1), therefore, makes certainty as well as simplicity of the Convention.²

5. The opening phrase of the paragraph, "unless otherwise provided herein", is occasioned by specific provisions of the Convention which refer to the rules of private international law. One such instance is paragraph (1) of article 13 which provides, *inter alia*, that in the absence of a provision in the arbitration agreement, the manner for commencing arbitration shall be determined "by the law applicable to that agreement" i.e., the law which, under conflict of law rules, governs the arbitration agreement. Another example is paragraph (3) of article 21 which provides, *inter alia*, that the validity of a certain clause defined therein shall not be affected by the provisions in the other paragraphs "provided that such clause is valid under the applicable law".

III. Effect of agreement by the parties, paragraph (3)

6. Paragraph (3) of this article deals with the extent to which the parties are free to exclude the application of the Convention. The State has an interest in preventing stale claims from crowding its courts and tribunals, and in reducing the presentation of false evidence. While the autonomy of the will of the parties is a cardinal principle in a régime of substantive rules on the international sale of goods, prescription rules may be considered to be of such a mandatory character as to justify restricting the freedom of choice of the parties. See, e.g., article 21. Thus, as the compromise accepted by all the members of the Commission, article 3 (3) sets forth the only situation in which the parties can, as a result of the exercise of their freedom of choice, exclude the application of the Convention; that situation is when the parties have "validly chosen the law of a non-Contracting State". For example, where parties to an international sale of goods have their place of business in different Contracting States, if the contract validly provides that the applicable law to the contract is the law of a State that has not adopted the Convention, the forum of a Contracting State would not apply the Convention. Whether the choice including its manner is "valid" is the question to be determined by the forum.

¹ The rules of English conflict of laws on this question may be illustrated by the following examples. Proceedings are instituted in an English court. The English limitation period (which is classified as procedural) is six years:

- (i) The applicable law is that of France, where the limitation period is 30 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 that the right itself under the claim has already been prescribed 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 a 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.

² But see art. 36 and accompanying commentary.

Article 4

[Exclusion of certain sales and types of goods]

This Convention shall not apply to sales:

(a) Of goods of a kind and in a quantity ordinarily bought by an individual for personal, family or household use, unless the fact that the goods are bought for a different use appears from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

(b) By auction;

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

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

(e) Of ships, vessels or aircraft;

(f) Of electricity.

COMMENTARY

I. Exclusion of consumer sales, subparagraph (a)

1. Subparagraph (a) of this article excludes consumer sales from the scope of this Convention. A consumer sale effected by a tourist in another country could conceivably be subject to the limitation rules of this Convention, but for the exclusion of such sales contained in subparagraph (a) of this article. In such transactions, however, the seller often 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 transactions are usually considered as domestic transactions and do not comprise a significant part of international trade. It is for this reason, among others, that this Convention excludes such sales from its scope of application.

2. Another reason for the exclusion of consumer sales from this Convention is that in a number of countries such sales are subject to various types of national laws that are designed to protect the consumer. To avoid any risk of impairing these rules, it is considered advisable that questions of limitations of actions or prescriptions of rights relating to such contracts should be excluded from this Convention.

3. The basic test used to categorize such sales is an objective one, namely, whether the goods are "of a kind and in a quantity ordinarily bought by an individual for personal, family, or household use". However, a sale of goods which is ordinarily bought for consumer purposes will not be excluded from the scope of the Convention when "the goods are bought for a different use". The test employed in determining whether the goods are bought for a different purpose is again an objective one: this fact must appear "from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;" the actual knowledge of the seller that the goods are bought for a different use is not important.

II. Exclusion of sales by auction, subparagraph (b)

4. Subparagraph (b) of this article excludes from the scope of this Convention sales by auction. Because sales by auction are often subject to special rules under the local law, it was concluded that they should remain in every aspect subject to the special rules of the local law. In addition, it was not considered proper that the length of the limitation period is affected by the location of the place of business of the successful bidder since at the opening of the auction the seller could not know which buyer would make the purchase.

III. Exclusion of sales on execution or otherwise by authority of law, subparagraph (c)

5. Subparagraph (c) of this article excludes sales on judicial or administrative execution or otherwise by authority of law, because such sales are usually governed by special rules in the State under whose authority the sale is made. Furthermore, such sales do not constitute a significant part of international trade and may safely be regarded as purely domestic operations.

IV. Exclusion of sales of stocks, shares, investment securities, negotiable instruments or money, subparagraph (d)

6. This subparagraph excludes sales of stocks, shares, investment securities, negotiable instruments and money. Such transactions present problems that are different from the usual international sale of goods and, in addition, in many countries, are subject to special mandatory rules. It was considered appropriate that prescription of claims relating to such sales should be outside the scope of this Convention.

V. Exclusion of sales of ships, vessels or aircraft, subparagraph (e)

7. This subparagraph excludes from the scope of the Convention sales of ships, vessels and aircraft which are also subject to special rules under national legal systems. This subparagraph does not require registration for ships, vessels or aircraft in order to exclude their sales from the scope of the Convention. The reason is to avoid problems that might arise in connexion with the definition of what amounts to "registration" under the Convention; various methods of registration are used by various legal systems. Furthermore, there could be uncertainty in deciding what law would govern registration, since the place of possible registration might not be known at the time of the sale.

VI. Exclusion of sales of electricity, subparagraph (f)

8. This subparagraph excludes sales of electricity from the scope of the Convention on the ground that international sales of electricity present problems that are different from those of the usual international sales.

Article 5

[Exclusion of certain claims]

This Convention shall not apply to claims based upon:

(a) Death of, or personal injury to, any person;

(b) 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 direct enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought;

(f) A bill of exchange, cheque or promissory note.

COMMENTARY

1. Paragraph (a) excludes from the Convention claims based on the death or personal injury to any person. If such a claim is based on tort (or *delict*) and is not a claim "relating to a contract of international sale of goods", the claims would, of course, be excluded from this Convention by virtue of the provisions of article 1 (1).¹ But under some circumstances claims for liability for the death or personal injury of the buyer or other person might be based on the failure of the goods to comply with the contract; a claim by the buyer against the seller for pecuniary loss might be based on personal injuries to persons other than himself. While such claims based on bodily injuries, under some legal systems, may be regarded as contractual, in others the characterization is in doubt and in still others all such claims may be regarded as delictual. To avoid doubt and diversity if such claims are governed by this Convention, it was thought advisable to exclude all such claims; it would be also inappropriate to subject such claims to the same limitation period as would be applicable to the usual type of commercial claims.

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 1963.²

3. Paragraph (c) excludes claims based on "a lien, mortgage or other security interest in property". This exclusion is consistent with the basic provisions of article 1 (1) that this Convention applies to claims or rights "relating to a contract of international sale of goods". Moreover, liens, mortgages and other security interests involve rights *in rem* which traditionally have been governed by the *lex situs* and are enmeshed with a wide variety of rights affecting other creditors; attempts to expand the scope of the Convention to include such claims may impede the adoption of the Convention. It will be noted that article 5 (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 limitation period applicable to a right or claim based on a sales contract 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 24 (1) (para. 2 of commentary on art. 24), this Convention 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 Convention with respect to the enforcement of stale claims.

4. Under paragraph (d), claims 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 Convention. 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.

5. Paragraph (e) excludes claims based on "a document on which enforcement or execution can be obtained in accordance with the law of the place where such enforcement or execution is sought". Such documents subject to direct 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. In addition, these documents present some of the problems of unification of enforcement of actions mentioned with respect to paragraph (d) (para. 4, above). (Paragraph (e) is also somewhat analogous to the exclusion under paragraph (f) of claims based on documents having a legal identity distinct from the sales contract; compare the discussion in para. 6, below.)

6. Paragraph (f) excludes claims 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 Convention. Such instruments are in many cases governed by international conventions or national laws that state special periods of limitation. In addition, such instruments are often circulated among third persons who have no connexion with or knowledge of the underlying sales transaction; moreover the obligation under the instrument may be distinct (or "abstracted") from sales transaction from which the instrument originated. In view of the facts, claims under the instruments described in paragraph (f) are excluded from this Convention. Contrast assignees of the rights under the sales contract (art. 1 (3) (a)).

¹ See para. 6 of commentary on art. 1, *supra*.

² See art. VI (basic periods of 10 or 20 years, subject to certain adjustments); art. I (1) (k) (definition of "nuclear damage").

Article 6

[Mixed contracts]

(1) This Convention shall not apply to contracts in which the preponderant part of the obligations of the seller consists in the supply of labour or other services.

(2) Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of this Convention, unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

COMMENTARY

1. This article deals with two different situations relating to mixed contracts.

1. *Sale of goods and supply of labour or other services by the seller, paragraph (1)*

2. This paragraph deals with contracts under which the seller undertakes to sell goods as well as to supply labour or other services. An example of such a contract is where the seller agrees to sell plant and machinery and undertakes to set up the plant as a going concern or to supervise its installation or setting up. In such cases, paragraph (1) provides that where the "preponderant part" of the obligation of the seller consists in the supply of labour or other services, the contract is not subject to the provisions of this Convention.

3. It is important to note that this paragraph does not attempt to determine whether obligations created by one instrument or transaction comprise essentially one or two

contracts. Thus, the question whether the seller's obligations relating to the sale of goods and to the supply of labour or other services, can be treated as constituting two separate contracts (under what is sometimes known as the doctrine of "severability" of the contract), is to be decided by national courts in accordance with the applicable law.

II. Supply of materials by the buyer, paragraph (2)

4. The opening phrase of paragraph (2) of this article provides that the sale of goods to be manufactured by the seller to the buyer's order is as much subject to the provisions of this Convention as the sale of ready-made goods.

5. The concluding phrase in this paragraph "unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production" is intended to exclude from the scope of this Convention contracts for the sale of goods to be manufactured or produced when the buyer undertakes to supply the seller (the manufacturer) of the goods with a substantial part of the raw materials from which the goods are to be manufactured or produced. Since such a contract is more akin to a contract of service or labour than to a contract of sale of goods, it is excluded from the scope of this Convention.

Article 7

[Interpretation to promote uniformity]

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

COMMENTARY

1. National rules on prescription (limitation) are subject to sharp divergencies in approach and concept. Thus, it is

especially important to avoid construction of the provisions of this Convention in terms of the varying concepts of national law. To this end, article 7 emphasizes the importance, in interpreting and applying the provisions of the Convention, of regard for the international character of the Convention and the need to promote uniformity. Illustrations of the application of this article may be found elsewhere in the commentary, e.g. in art. 1 at paras. 11-13; art. 13, foot-note 1.

THE DURATION AND COMMENCEMENT OF THE LIMITATION PERIOD

Article 8

[Length of the period]

Subject to the provisions of article 10, the limitation period shall be four years.

COMMENTARY

1. Establishing the length of the limitation period has required the reconciliation of various conflicting considerations. On the one hand, the limitation period must be adequate for investigation, negotiation for a settlement and making the arrangements necessary for bringing legal proceedings. In assessing the time required, consideration has been given to the special problems resulting from the distance that often separates the parties to an international sale and the complications resulting from differences in language and legal systems. On the other hand, the limitation period should not be so long as to fail to provide protection against the dangers of uncertainty and injustice that result from the passage of time without the restitution of disputed claims. These include the loss of evidence and the possible threat to business stability or solvency resulting from extended delays.

2. In the course of preparing the draft, it was generally considered that a limitation period within the range of three to five years would be appropriate. To help resolve the

question of the length of the limitation period, and other relevant issues, a questionnaire was addressed to Governments and interested international organizations. The replies, reporting national rules and suggestions from each region, were analysed in a report of the Secretary-General.¹ Aided by these replies, it was concluded that an appropriate limitation period is four years. In reaching this decision, account was taken of article 10 which provides a special shorter period of two years for claims arising from a defect or lack of conformity of the goods and other provisions in this Convention affecting the running of the limitation period. These include article 18 (a new period commences to run afresh when the creditor performs an act which has the effect of recommencing the original limitation period under a given jurisdiction), article 19 (a new period commences to run afresh when the debt is acknowledged by the debtor), articles 15, 16, 17 and 20 (rules extending the limitation period) and article 21 (modification of the period by the parties).

¹ This report (A/CN.9/WG.1/WP.24) appears in addendum 2 to the report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods on the work of its third session (A/CN.9/70).

Article 9

[Basic rule on commencement of the period]

(1) Subject to the provisions of articles 10 and 11, the limitation period shall commence on the date on which the claim becomes due.

(2) In respect of a claim based on fraud committed before or at the time of the conclusion of the contract, the claim shall, for the purpose of paragraph (1) of

this article, be deemed to become due on the date on which the fraud was or reasonably could have been discovered.

(3) In respect of a claim arising from a breach of the contract, the claim shall, for the purpose of paragraph (1) of this article, be deemed to become due on the date on which such breach occurs. Where one party is required, as a condition for the acquisition or exercise of such a claim, to give notice to the other party, the commencement of the limitation period shall not be postponed by reason of such requirement of notice.

COMMENTARY

I. Structure of the Convention: basic rule

1. Articles 9 to 11 govern the starting point in time of the limitation period with regard to all types of claims covered by this Convention. Article 9 provides the general rule as to the commencement of the period: the limitation period commences to run "on the date on which the claim becomes due". Article 10 provides special rules, including a shorter period of two years, for claims arising from a defect or other lack of conformity of the goods. Article 10 (3) also deals with the situation where the seller gives an express undertaking relating to the goods. Article 11 covers the situations where the contract has been terminated before performance is due.

2. As described above, article 9 (1) states the basic rule that the limitation period commences to run on the date when "the claim becomes due". Paragraphs (2) and (3) of this article provide specific rules as to when the claim should be regarded to have become "due" for the purpose of the application of the basic rule provided in article 9 (1); these situations are (a) where claims arise because of fraud committed in the process of the conclusion of the contract (para. (2)) and (b) where claims arise from breach of contract (para. (3)). The application of this basic rule to typical situations is explained below.¹

II. Fraud during the formation process of the contract

3. Where fraud was committed while contract was being negotiated or at the time of the conclusion of the contract, various claims may arise under the applicable law. The defrauded party may be entitled to damages resulting from the fraud; he may even be entitled to avoid the contract.² If the contract is avoided, the defrauded party may want to claim for the restitution of advance payments, if any. For all these claims, article 9 (2) provides the following test: the limitation period commences to run "on the date on which the fraud was or reasonably could have been discovered".³

III. Breach of contract

4. With respect of a claim arising from breach of contract, article 9 (3) provides that the claim shall be deemed to have become due "on the date on which such breach occurs".

¹ Some representatives objected to article 9 because in their view the rules contained therein are inconsistent with each other.

² But see art. 34 and accompanying commentary.

³ It may be noted that article 9 (2) concerns only with the fraud committed "before or at the time of the conclusion of the contract"; the effect of fraud committed after the conclusion of the contract is governed by article 20 (see accompanying commentary, para. 1).

The "breach of contract" is defined in article 1 (3) to mean "the failure of a party to perform the contract or any performance not in conformity with the contract". The application of this rule may be illustrated by the following examples:

Example 9 A: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. The seller failed to supply or tender any goods in response to the contract on 1 June or on any subsequent date. The limitation period for any legal proceedings by the buyer (and the prescription of the buyer's rights) in respect of a breach of the contract of sale commences to run on the date on which the breach of contract occurred, i.e. in this example, 1 June, the date for performance required under the contract.

Example 9 B: The sales contract required the seller to place goods at the buyer's disposition on 1 June 1972. The seller failed to supply or tender any goods in response to the contract on 1 June. But a few weeks thereafter the buyer agreed for the extension of the time for delivery until 1 December 1972. On 1 December, the seller again failed to perform. If the above extension of the time for delivery was valid, the limitation period commences to run on the date of "breach" of the contract on 1 December 1972.

Example 9 C: The sales contract provided that the buyer may pay the price at the time of delivery of the goods and obtain a 2 per cent discount. The contract also provided that the buyer must, at the latest, pay in 60 days. The buyer did not pay on delivery of the goods. The limitation period does not commence to run until the end of the 60 day period because there was no "breach" of contract by the buyer until the time for his performance expired.

Example 9 D: The sales contract provided that the goods shall be shipped at a date in 1972 to be named by the buyer. The buyer might have requested shipment in January 1972 but he requested shipment on 30 December 1972. The seller does not perform. The limitation period with respect to this failure to perform did not commence until after 30 December, since, under the terms of the contract, there was no "breach" of contract until after the date specified by the buyer.

5. The second sentence of article 9 (3) is designed to clarify the point in time for the commencement of the limitation period where the applicable law requires one party to give a notice to the other party. The breach of contract has occurred prior to such a notification; consequently, to delay the commencement of the limitation period until the time of notification would be inconsistent with the approach adopted in the first sentence of article 9 (3). Moreover, the time of notification may depend on the diligence with which the buyer inspects the goods and gives the notification. Consequently, this paragraph makes it clear that the commencement of the period would not be determined by the time of giving notice.⁴

IV. Other claims not arising out of breach

6. Some claims may arise without breach or fraud. One example is provided by claims for the 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, the basic rule provided in article 9 (1) will govern. Whether such claim exists and when the claim becomes due must, of course, be decided under the applicable rules of national law.

⁴ This rule, of course, has no effect on rules of municipal law requiring notice. Also see art. 1 (2) and accompanying commentary, paras. 8 and 9; art. 21 (3) and accompanying commentary, para. 5.

Article 10

[Claims based on non-conformity of the goods; express undertaking]

(1) The limitation period in respect of a claim arising from a defect or lack of conformity which could be discovered when the goods are handed over to the buyer shall be two years from the date on which the goods are actually handed over to him.

(2) The limitation period in respect of a claim arising from a defect or lack of conformity which could not be discovered when the goods are handed over to the buyer shall be two years from the date on which the defect or lack of conformity is or could reasonably be discovered, provided that the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer.

(3) If the seller gives an express undertaking relating to the goods, which is stated to have effect for a certain period of time, whether expressed in terms of a specific period of time or otherwise, the limitation period, in respect of any claim arising from the undertaking, shall commence on the date on which the buyer discovers or ought to discover the fact on which the claim is based, but not later than on the date of the expiration of the period of the undertaking.

COMMENTARY

1. *Claims by buyers relying on non-conformity of the goods*

1. As noted earlier (para. 1 of commentary on art. 9) paragraphs (1) and (2) of article 10 provide special rules with reference to articles 8 and 9 with regard to buyer's "claim arising from a defect or lack of conformity" of the delivered goods. The phrase "a claim arising from a defect or lack of conformity" of the goods is sufficiently broad to include any respect in which the goods fail to comply with the requirements of the contract. These special rules are regarded as necessary because the basic test provided in article 9 may often be difficult to apply to concrete cases particularly where defects in goods could not be discovered until sometime after the handing over of the goods and because of divergent rules under applicable laws concerning the time when such claims become "due". Paragraph (1) of article 10 deals with claims arising from non-conformity "which could be discovered when the goods are handed over to the buyer" and paragraph (2) deals with claims arising from non-conformity "which could not be discovered when the goods are handed over to the buyer".

2. The rule adopted by article 10 is that, until defects could reasonably be discovered, the limitation period should not start to run for these claims; otherwise, harsh results for buyers may result in some circumstances when defects are of such a nature as to prevent the discovery of the defects until long after the handing over of the goods to the buyer.¹ On the other hand, the Convention takes account of the needs of the seller of the goods by reducing the length of the limitation period to two years (cf. art. 8). This shortening of the period was thought important because, particularly in case of defects in goods, the seller would need to resolve the dispute while trustworthy evidence on the true condition of the goods are still available; the period of two years would

be appropriate for this purpose.² An over-all cut-off point against prolonging disputes due to late discovery of defects is also provided in article 10 (2) for claims based on defects which could not be discovered when the goods are handed over to the buyer. Regardless of the discovery of defects, "the limitation period shall not extend beyond eight years from the date on which the goods are actually handed over to the buyer".

3. The phrase "the goods are actually handed over to the buyer" points to the circumstances which constitute placing the goods under the buyer's "actual" control regardless of whether this occurs on the due place or date contemplated by the contract or otherwise.³ Unless the goods have reached the stage where "actual" inspection of the goods by the buyers becomes possible, the goods cannot be regarded to have been "actually handed over to the buyer".

Example 10 A: 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 loaded the goods on board a ship in Santiago on 1 June 1972. The goods reached Bombay on 1 August 1972, 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. Under these facts, the goods are "actually handed over" to the buyer on 15 August.

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 time when the goods were "actually" handed over to the buyer.⁴

II. *Express undertaking for a period of time*

4. Paragraph (3) of article 10 provides an exception to the rules of paragraphs (1) and (2) of the article for cases

² It may be noted that the period for claims arising from defects commences to run from the date on which the defects could reasonably be discovered even if damages do not immediately ensue from such defects. However, the over-all fairness of the Convention needs to be considered in the light of the following factors: (a) exclusion from the Convention (art. 5 (a)) of claims based on "death of, or personal injury to, any person"; (b) confining the scope of this Convention to claims that arise in relation to a contract—thereby excluding claims based on tort or *delict* (see discussion in para. 6 of commentary on art. 1); (c) exclusion of consumer sales from the Convention (art. 4 (a)); (d) the special provisions (art. 10 (3)) for claims based on an express undertaking by the seller which is stated to have effect for a period of time.

³ The term "delivery" was intentionally avoided because of the ambiguities in the legal concept. E.g. ULIS article 19 (1) provides: "delivery consists in the handing over of goods which conform with the contract".

⁴ Of course, where the buyer takes effective physical control over the goods in the seller's city and thereafter ships the goods, then the goods would be regarded to have been actually handed over to the buyer. It may also be noted that goods may be handed over to the agents or assignors of the buyer. Cf. art. 1 (3) (a). For purpose of illustration, suppose the buyer in example 10 A, above, resells the goods to C during the transit of the goods and transfers the bills of lading to C. The goods are handed over to the "buyer" when C actually takes possession of the goods.

¹ Discoverability of the defects must be tested in the light of the methods contemplated by the agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examination is to be effected.

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 certain period of time. The approach for the commencement of the period for claims arising from the undertaking is the same as the preceding paragraphs of the article: the limitation period commences "on the date on which the buyer discovers or ought to discover the fact on which the claims is based". But the overall cut-off date provided in paragraph (2) of the article ("eight years from the date on which the goods are actually handed over to the buyer") cannot be used where the undertaking is expressed in terms of a certain period of time.

Thus, article 10 (3) provides that the limitation period shall in any event commence "not later than on the date of the expiration of the period of the undertaking".⁵

5. Article 10 (3) does not specify when the seller's "express undertaking" must be given. Under the working of this provision, the seller, after delivering the goods, might adjust certain components of the goods and in this connexion might give an express warranty which would be governed by this article.

⁵ One representative expressed a serious doubt as to whether paragraphs (2) and (3) of article 10 were fairly balanced.

Article 11

[Termination before performance is due; instalment contracts]

(1) If, in circumstances provided for by the law applicable to the contract, one party is entitled to declare the contract terminated before the time for performance is due, and exercises this right, the limitation period in respect of a claim based on any such circumstances shall commence on the date on which the declaration is made to the other party. If the contract is not declared to be terminated before performance becomes due, the limitation period shall commence on the date on which performance is due.

(2) The limitation period in respect of a claim arising out of a breach by one party of a contract for the delivery of or payment for goods by instalments shall, in relation to each separate instalment, commence on the date on which the particular breach occurs. If, under the law applicable to the contract, one party is entitled to declare the contract terminated by reason of such breach, and exercises this right, the limitation period in respect of all relevant instalments shall commence on the date on which the declaration is made to the other party.

entitled to declare the contract terminated "exercises this right," the limitation period runs from "the date on which the declaration is made to the other party". On the stated facts in the above example, this date is 15 July.

4. It will be noted that under paragraph (1), the above result depends on a decision by the party to elect to declare the contract terminated. If, in the above instances, such an election (i.e., by the notification of termination made on 15 July) had not taken place, "the limitation period shall commence on the date on which performance is due"—1 December in the above example.¹

5. In the interest of definiteness and uniformity the period will commence on the earlier date (15 July) only when a party positively "declares" the contract terminated. Thus, termination resulting from a rule of applicable law that in certain circumstances the contract shall be automatically terminated is not termination resulting from "declaration" by a party within the meaning of paragraph (1). It will also be noted that article 11 does not govern the situation, under some legal systems, whereby circumstances such as repudiation, bankruptcy and the like before performance is due entitles one party to declare the performance immediately due. However, the result may be similar, since an action based upon failure to perform at such accelerated date would be governed by article 9.

COMMENTARY

1. Both paragraphs (1) and (2) of article 11 deal with problems that arise when a party is entitled to terminate the contract in certain circumstances occurring before performance is due. Paragraph (1) establishes the basic general rule; paragraph (2) deals with the special problems that arise when a contract calls for the delivery of goods, or the payment for goods in instalments.

I. Basic rule, paragraph (1)

2. The basic rule of paragraph (1) may be illustrated by the following:

Example 11 A: A contract of sale made on 1 June 1972 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 declares to the seller that in view of the seller's repudiation the contract is terminated.

3. Under some legal systems, the notification on 1 July of refusal to perform in the future is regarded to be an anticipatory breach upon which an election to terminate and a legal action may be based. In some legal systems, circumstances such as bankruptcy or other events manifesting an inability to perform may also become grounds upon which one party may terminate the contract before the performance is due. In such circumstances, where one party who is

II. Instalment contracts, paragraph (2)

6. For claims arising out of a breach of instalment contracts for the delivery of or payment for goods, article 11 (2) follows the same approach as article 9 (3). The limitation period "shall, in relation to each separate instalment, commence on the date on which the particular breach occurs". This rule will minimize difficulties which might be encountered by theoretical problems whether a particular instalment contract should be regarded as a set of several contracts or not. The application of article 11 (2) may be illustrated by the following example:

Example 11 B: A contract of sale made on 1 June 1972 required 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. Each of the four instalments were delivered late. The buyer complained to the seller of these late deliveries but did not elect to terminate the contract although he was entitled to do so under the applicable law to the contract if he wished. Under these facts, separate periods of limitation would apply to the July, August, September and October deliveries.

¹ This Convention does not, of course, specify the time when a notification of termination must be given except that paragraph (1) of article 11 restricts the application of the rule to those instances where declaration to terminate the contract was made "before performance becomes due".

7. However, when one party does terminate the contract, article 11 (2) provides that "the limitation period in respect of all relevant instalments" commences when such declaration was made. This rule may be illustrated as follows:

Example 11 C: The contract is the same as in 11 B above.

The first instalment, delivered on 1 July, proved on examination to be so seriously defective that the buyer rightfully took steps: he rejected the defective instalment and he notified the seller on 5 July that the contract was terminated as to future instalments.

8. For the purpose of paragraph (2), the relevant conduct by the buyer was the buyer's election to "declare the contract terminated" as to future instalments. Once termination is effected, a single period for claims arising from all relevant instalments (i.e., July, August, September and October instalments) commences on the date of the declaration that the contract is terminated—5 July in the above example. The term "all relevant instalments" embraces all instalments, whether previous or subsequent, covered by or affected by the termination of the contract.

CESSATION AND EXTENSION OF THE LIMITATION PERIOD

Article 12

[Judicial proceedings]

(1) The limitation period shall cease to run when the creditor performs any act which, under the law of the jurisdiction where such act is performed, is recognized as commencing judicial proceedings against the debtor or as asserting his claim in such proceedings already instituted against the debtor, for the purpose of obtaining satisfaction or recognition of his 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 claim against which the counterclaim is raised. However, both the claim and counterclaim shall relate to a contract or contracts concluded in the course of the same transaction.

COMMENTARY

1. As was noted earlier (introduction, para. 1), this Convention is essentially concerned with the time within which the parties to an international sale of goods may bring legal proceedings to exercise claims or rights. Article 8 states the length of the limitation period. Articles 23 to 26 state the effects of the expiration of the period; these include the rule (art. 24 (1)) that no claim for which the limitation period has expired "shall be recognized or enforced in any legal proceedings". To round out this structure, the present article 12 provides that the "limitation period shall cease to run" when the creditor commences judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim (provision for "legal" proceedings other than "judicial" proceedings—e.g., arbitration and various type of administrative proceedings—is made in articles 13 and 14). The net effect of these rules is substantially the same as providing that a proceeding for enforcement may only be brought before the limitation period has expired. However, the approach of this Convention, in stating that the limitation period shall "cease to run" when the proceeding is instituted, provides a basis for dealing with problems that arise when the proceeding fails to result in a decision on the merits or is otherwise abortive (see art. 15).

2. The central problem of article 12 is to define the stage which judicial proceedings must reach before the expiration of the limitation period. In different jurisdictions proceedings may be commenced 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 commencing a judicial proceeding 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.

3. 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) refers to the performance by the creditor of any act recognized "under the law of the jurisdiction where such act is performed" as commencing judicial proceedings against the debtor for the purpose of obtaining satisfaction or recognition of his claim.¹ 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 also an institution of a proceeding "for the purpose of obtaining satisfaction or recognition of his claim".

4. Paragraph (1) also applies where the creditor adds a claim to a proceeding he has already instituted against the debtor.² The step in that proceeding that stops the running of the limitation period depends on when, under the law of the jurisdiction where the proceeding is brought, the creditor has performed an act "asserting his claim" in the pending proceeding.

5. Paragraph (2) of this article deals with the point in time when a counterclaim³ is deemed to be instituted. Its provisions may be examined in terms of the following example:

Example 12 A: The seller commenced suit against the buyer on 1 March 1970. In this proceeding, the buyer interposed a counterclaim on 1 December 1970. The limitation period governing the buyer's counterclaim would, in normal course, have expired on 1 June 1970.

6. In the above example, the crucial question is whether the buyer's counterclaim shall be deemed to be instituted (a) on 1 March, the time when the seller's suit was commenced or (b) on 1 December 1970, when the buyer's counterclaim was in fact interposed in the pending action.

7. Under paragraph (2) of article 12, alternative (a) was chosen. This result is adopted to promote efficiency and economy in litigation by encouraging consolidation of actions rather than the hasty bringing of separate actions.

¹ One representative was of the view that the approach of article 12 (1) may make it difficult to ascertain the exact time when the limitation period ceased to run. Cf. art. 29.

² The permissibility of amendment of claims in a pending proceeding and its effect are the questions left to the law of the forum.

³ The meaning of "counterclaim" in paragraph (2) may be drawn from the reference in paragraph (1) to "judicial proceedings" employed for the purpose of obtaining satisfaction or recognition of a claim. Such a judicial proceeding by counterclaim can lead to affirmative recovery by the defendant against the plaintiff; the use of a claim "as a defence or for the purpose of set-off", after the limitation period for that claim has expired, is governed by article 24 (2). The question whether a counterclaim is acceptable procedure is, of course, left to the rules of the forum.

8. The above rule applies when the seller's claim and the buyer's counterclaim relate to the same contract or to contracts concluded in the course of the same transaction.⁴ The

⁴ For example, where the plaintiff brings a suit on the basis of a distributorship agreement, while the defendant counterclaims on an agreement to sell related to the distributorship agreement, these claims might be regarded as arising "in the course of the same transaction".

same benefit is not given to the buyer when his claim against the seller arises from a different transaction than that which provided the basis for seller's claim against the buyer; in this event, the buyer must actually institute his counterclaim before the expiration of the limitation period. The act which is regarded as instituting this counterclaim is determined under the approach employed in article 12 (1), discussed at paragraphs 3 and 4, above.

Article 13

[Arbitration]

(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings 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, arbitral proceedings shall be deemed to commence on the date on which a request that the claim in dispute be referred to arbitration 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 13 applies to arbitration based on an agreement to submit to arbitration.¹ Article 12 relies on national law to define the point in the commencement of judicial proceedings when the limitation period shall cease to run. The same

¹ Article 13 applies only where the parties "have agreed to submit to arbitration". Obligatory "arbitration" not based on an agreement would be characterized as "judicial proceedings" for the purpose of the Convention. See arts. 1 (3) (3), and 12. On construction of this Convention to promote uniformity, as contrasted with the application of local terminology, see art. 7 and accompanying commentary.

approach cannot be used in relation to arbitral proceedings under article 13 since in many jurisdictions the manner for commencing such proceedings is left to the agreement of the parties. Thus, article 13 (1) provides that any question as to what acts constitute the commencement of arbitral proceedings is to be answered under "the arbitration agreement or by the law applicable to that agreement".

2. If the agreement or the applicable law does not prescribe the manner of commencement of arbitral proceedings, under paragraph (2) the decisive point is the date on which "a request that the claim in dispute be referred to arbitration 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 at the request, but the sender need not establish that the request came into the hands of the other party in view of the practical difficulties involved in proving receipt of the request by a designated person following delivery of the request at the specific place.

3. Paragraph (3) of this article 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 limitation period or to determine the act that stops the running of the period under this Convention. On the other hand, paragraph (3) does not take any position concerning the validity of such agreements under national law. (Cf. art. 21 (3) and accompanying commentary, paras. 5 and 6.)

Article 14

[Legal proceedings arising from death, bankruptcy or the like]

In any legal proceedings other than those mentioned in articles 12 and 13, including legal proceedings commenced upon the occurrence of:

- (a) The death or incapacity of the debtor,
- (b) The bankruptcy or insolvency of the debtor, or
- (c) The dissolution or liquidation of a corporation, company, association or entity,

the limitation period shall cease to run when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim, unless the law governing the proceedings provides otherwise.

COMMENTARY

1. Article 14 governs all the other legal proceedings than those mentioned in articles 12 and 13. Such proceedings will include, *inter alia*, proceedings for the distribution of assets on death, bankruptcy or the dissolution or liquidation of a corporation as illustrated in (a) through (c) of article 14. It will be noted that these illustrations set forth in paragraphs (a) through (c) do not limit the scope of the article, which applies to "any legal proceedings other than those mentioned in articles 12 and 13". Thus, it would appear that receivership proceedings or the re-organization of a corporation could come within this article. These proceedings are often different from ordinary judicial or arbitral proceedings in that the proceedings may not be instituted by an individual creditor; instead, creditors may have an opportunity to file claims in

existing proceedings. Consequently, article 14 provides that the limitation period ceases to run "when the creditor asserts his claim in such proceedings for the purpose of obtaining satisfaction or recognition of the claim". However, this rule is subjected to a proviso: "unless the law governing the proceedings provides otherwise". This modification is considered necessary because creditors may often rely on the national rules governing those proceedings such as rules specifying the period during which claims may be filed. Unless such local

rules are honoured, the creditors could be misled as to their rights.

2. As has been noted (para. 3 of commentary on art. 1), this Convention applies only to the prescription of rights or claims as between the parties to an international sale. In the types of proceedings illustrated in this article involving the distribution of assets (as in bankruptcy), prescription may affect the rights of third parties. The nature of such effect, if any, is not regulated by this Convention and is left to applicable national law.

Article 15

[Proceedings not resulting in a decision on the merits of the claim]

(1) Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 but such legal proceedings have ended without a final decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

(2) If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended, unless they have ended because the creditor has discontinued them or allowed them to lapse.

COMMENTARY

1. Article 15 is addressed to problems that arise when legal proceedings in which a creditor asserts his claim ends without an adjudication on the merits of his claim. Under articles 12 (1), 13 (1) and 14, when a creditor asserts his claim in legal proceedings for the purpose of satisfying his claim, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings before the expiration of the limitation period, in the absence of further provision, 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. Legal proceedings may end without a final decision binding on the merits of the claim from various reasons. A proceeding may be dismissed because it is brought in a tribunal without jurisdiction over the case or because of procedural defects preventing adjudication on the merits; a higher authority within the same jurisdiction may declare that the lower court lacked competency to handle the case; arbitration may be stayed or set aside by judicial authority within the same jurisdiction; moreover, a proceeding may not result in a decision binding on the merits of the claim because the creditor discontinues the proceeding or withdraws his claim. Article 15 covers these and other instances wherever "such legal proceedings have ended without a final decision binding on the merits of the claim". The rule is that "the limitation period shall be deemed to have continued to run"; cessation of the period, as provided under articles 12, 13 or 14, will be rendered inapplicable.

2. This article, however, takes account of the possibility that, a substantial period of time after the creditor commences a legal proceeding, the proceeding may be brought to an end without a final decision on the merits because of the lack of jurisdiction or procedural defect. If this occurs after

the expiration of the limitation period, the creditor might have no opportunity thereafter to institute a new legal proceeding; if this is established shortly before the expiration of the period the creditor may have insufficient time to institute a new legal proceeding.¹ To meet these problems, article 15 (2) provides: "If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended."

3. The extension of the limitation period, however, should not be left within the control of one of the parties and a creditor who voluntarily discontinues legal proceedings should not be given special treatment. Thus, article 15 (2) also provides that the extension will not be granted when proceedings have "ended because the creditor has discontinued them or allowed them to lapse".²

4. The application of this exception to the rule may be clarified by an example:

Example 15 A: 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.

In such case, A has until 1 June 1974 to institute a second legal proceeding. (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.)

5. The denial of the extension is intended to affect not only explicit discontinuance or withdrawal of the legal proceeding but also such a failure to pursue the proceeding that the plaintiff has "allowed" the proceedings "to lapse". Under this language, an extension may not be available when, because of failure to continue the proceedings, the proceedings are automatically terminated by virtue of the procedural rules of the forum. In general, the extension is not available when the proceedings came to an end because of the choice of the creditor not to pursue them.

¹ The question whether a second proceeding on the same claim is permissible procedure is, of course, left to the procedural law of the forum.

² The few members of the Commission were of the view that the extension under article 15 (2) should not be granted unless the creditor acted in good faith and had instituted the proceedings with due diligence. But others thought that the danger of the abuse of the extension granted under article 15 (2) would be mostly speculative because of high costs usually involved in such proceedings; further the danger of the abuse would be counterbalanced by the certainty of the rule which was attained by avoiding difficult problems of proof concerning "good faith".

Article 16

[*Proceedings in a different jurisdiction; extension where foreign judgement is not recognized*]

[(1) Where a creditor has asserted his claim in legal proceedings within the limitation period in accordance with articles 12, 13 or 14 and has obtained a decision binding on the merits of his claim in one State, and where, under the applicable law, he is not precluded by this decision from asserting his original claim in legal proceedings in another State, the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the decision.]

(2) If recognition or execution of a decision given in one State is refused in another State, the limitation period in respect of the creditor's original claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14, and the creditor shall, in any event, be entitled to an additional period of one year from the date of the refusal.]

COMMENTARY

1. This article is concerned with the situations where the creditor has obtained a decision on the merits of his claim in one State and seeks to assert his original claim afresh in legal proceedings (paragraph (1)) or to enforce the decision (paragraph (2)) in another State. Difficult problems arise because of the limited recognition and enforcement which decision in one State is given in other States.

I. *Institution of a fresh legal proceeding in another State, paragraph (1)*

2. When the refusal of recognition or execution of the decision in one State is expected in another State, the creditor will have to bring a legal proceeding in that State based on the original claim. The creditor may also find it easier to sue again on the original claim in lieu of involving himself in a complicated process of proving the validity of the first decision. The creditor who was rendered an unfavourable decision on the merits of his claim may also consider having his claim tried again in another State if he is not precluded from asserting his original claim afresh in legal proceedings in that State. Legal rules variously termed such as *res judicata*, "merger" of the claim in the judgement, or the like, may prevent the assertion of the original claim after the decision on the merits of the claim even if rendered in another State. While such legal rules may be clear within a single jurisdiction, their operation may be unclear on the international level.

3. Paragraph (1) of article 16 provides that where the creditor is not precluded from asserting his original claim afresh in legal proceedings in another State, "the limitation period in respect of this claim shall be deemed not to have ceased running by virtue of articles 12, 13 or 14," and the creditor shall be entitled to an additional period of one year from the date of the original decision in the first State for the purpose of instituting a fresh legal proceeding in the second State.

4. As already explained, under articles 12 (1), 13 (1) and 14 of this Convention, when a creditor asserts his claim in legal proceedings, the limitation period "shall cease to run"; when a creditor asserts his claim in legal proceedings in one State before the expiration of the limitation period, in the absence of further provision, the limitation period would never expire even in other States. See article 29 and its accompanying commentary. Therefore, the phrase "shall be deemed not to have ceased running" was employed in article 16 (1) to provide a basis to bring the limitation period to an end. This provision also prescribes an additional period (i.e. one year from the date of the decision in the first State) within which the creditor must bring a new legal proceeding in the second State. The net effect of article 16 (1) is that the creditor is entitled to institute a new legal proceeding only within one year after the decision in the first State.

5. It will be noted that under article 16 (1) the State which rendered the original decision need not be a Contracting State.

II. *Extension where recognition or enforcement of foreign judgement is refused, paragraph (2)*

6. Where the creditor has obtained a final decision on the merits of his claim in one State, but recognition or enforcement of such judgement or award is refused in another State, paragraph (2) of article 16 grants the creditor a period of "one year from the date of the refusal" to institute legal proceedings in the second State to contest the merits of his claim.¹ The rule of article 16 (2) applies to all cases where the recognition or enforcement of the final decision "is refused" in another State. The grounds for such refusal to recognize the final decision rendered in another jurisdiction may vary. One important ground is the lack of agreement between the States concerned calling for the recognition of judgements or awards.

7. It will be noted that, as under article 16 (1), the State which rendered the original decision need not be a Contracting State for the application of the rule of article 16 (2).

8. Article 16 is placed in square brackets to indicate that the Commission could not reach consensus in approving the provisions.²

¹ One representative objected to the allowance of one year "from the date of the refusal" because of the fear that this might unduly prolong the total period since "the date of the refusal" might be after a substantially long period after the original decision contradictory to the purpose of the prescription. In his view, at least a certain maximum cut-off point would be necessary if this rule is to be retained. But see article 22 and its accompanying commentary. Also see footnote 2, *infra*. Another representative noted that an additional period of four years from the date of the original decision would be preferable but accepted the present formula in a spirit of compromise.

² Several representatives preferred deletion of article 16 (1); a few representatives also suggested deletion of article 16 (2). One representative thought that the following provision should be added at the beginning of article 16 (cf. art. 5 (d)):

"Where a decision on the merits has been made in legal proceedings, the limitation of any claim based on such a decision shall be governed by the law applicable to such limitation."

Article 17

[*Joint debtors; recourse actions*]

[(1) Where legal proceedings have been commenced against one debtor within the limitation period pre-

scribed by this Convention, the limitation period shall cease to run against any other party jointly and

severally liable with the debtor, provided that the creditor informs such party in writing within that period that the proceedings have been commenced.

(2) Where legal proceedings have been commenced by a subpurchaser against the buyer, the limitation period prescribed by this Convention shall cease to run in relation to the buyer's claim over against the seller, if the buyer informs the seller in writing within that period that the proceedings have been commenced.

(3) In the circumstances mentioned in this article, the creditor or the buyer must institute legal proceedings against the party jointly or severally liable or against the seller, either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later.]

COMMENTARY

I. Effect of the institution of legal proceedings against a joint debtor, paragraph (1)

1. The purpose of paragraph (1) of this article is to provide answers to questions that may arise in the following situation. Two persons (A and B) are jointly and severally responsible for performance of a sales transaction. The other party (P) commences a legal proceeding against A within the limitation period. What is the effect of the legal proceeding commenced by P against A on the limitation period applicable to P's claim against B?

2. Under some legal systems the institution of a legal proceeding against A also satisfies the limitation period applicable to P's claim against B. Under other legal systems institution of legal proceedings against A has no effect on the running of the limitation period with regard to B. Consequently, the stating of a uniform rule on this issue is desirable. The rule that the institution of legal proceedings against A has no effect on the running of the period against B involves certain practical difficulties. Such a rule makes it advisable for the creditor (P) to institute legal proceedings against both A and B within the limitation period—at least in cases where there is doubt concerning the financial ability of A to satisfy a judgement. Where A and B are in different jurisdictions it would not be feasible to institute a single proceeding against them both, and instituting separate proceedings in different jurisdictions, merely to prevent the running of the limitation period against the second debtor (B), involves expense that would be needless when A is able to satisfy the judgement.

3. Under article 17 (1), when legal proceedings are commenced against A the limitation period "shall cease to run" not only with respect to A but also with respect to B. It will be noted that the rule of article 17 (1) is operative only when the creditor informs B in writing within the limitation period that the proceedings against A have been instituted. This written notice may give B the opportunity, if he chooses, to intervene in or participate in the proceedings against A.¹

"Article 28 A. In the absence of any other provision to the contrary, any notice, request or writing to be served on any person pursuant to any provision in part I of this Convention shall be deemed to be served for the purposes of part I of this Convention when left at a place of business of that person or if he has none at his habitual residence or, if he has neither, at his last known place of business or residence."

II. Recourse actions, paragraph (2)

4. Paragraph (2) of this article deals with situations like the following: A sells goods to B who resells the goods to a

subpurchaser C. C commences legal 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.

5. If C commences legal proceedings against B toward the end of the limitation period applicable to B's claim against A, B may not have enough time to prepare for the institution of legal proceedings against A; unless B is properly protected in such situations, B may be compelled to institute formal legal proceedings for the redress of the recourse claim against A, even though the necessity for such redress is speculative. Thus, article 17 (2) provides that when the subpurchaser C commences legal proceedings against B, the limitation period "shall cease to run" with respect to B's claim against A.²

6. It will be noted, however, that the limitation period applicable to B's claim against A "ceases to run" only if B "informs [A] in writing within that period that the proceedings have been commenced".³ Hence, if C commenced a legal proceeding against B⁴ after the expiration of the limitation period applicable to B's claim against A under this Convention, B will no longer be protected under article 17 (2).⁵ This result is supported because the original seller should not be exposed indefinitely to claims arising from resale by the buyer after the expiration of the limitation period. Moreover, where such risk presented a problem, they could be covered by insurance.

III. Time-limit for commencing legal proceedings against joint debtors or against the seller, paragraph (3)

7. The effect of paragraphs (1) and (2) of this article ("cease to run") is subject to the additional important restriction provided under paragraph (3): In order for the creditor or the buyer to be entitled to the protection under article 17 (1) or (2), he must institute legal proceedings against the joint debtor or against the seller, "either within the limitation period otherwise provided by this Convention or within one year from the date on which the legal proceedings referred to in paragraphs (1) and (2) commenced, whichever is the later". Thus, to take the example from paragraph 1, above, if P commences legal proceedings against A, in the last year of the limitation period, P must institute legal proceedings against B within one year from the date of the commencement of his action against A; on the other hand, if P's action against A was instituted before the last year of the limitation period, the protection provided under article 17 (1) and (2) will be of no importance since P's action against B is, in any event, subject to the same "limitation period otherwise provided by this Convention".⁶

8. The rules of article 17, particularly the rule contained in paragraphs (2) and (3) of the article, are products of compromises between sharply conflicting views. Questions remained as to the necessity for such provisions. For these reasons, the Commission decided to place this article in brackets.

¹ A few representatives considered that the introduction of subpurchaser's claims into the article was contradictory to the purpose of the Convention particularly with regard to the scope of the Convention.

² See foot-note 1, *supra*.

³ In many cases the sale by B to C will be a domestic sale for which no limitation period is prescribed by this Convention.

⁴ Recourse claims may often arise substantially later than the time of the original sale between A and B. In view of the length of the limitation period provided under this Convention for claims arising from a defect or lack of conformity of the goods, the protection afforded by article 17 (2) for recourse actions may be of limited utility.

⁵ One representative suggested that the additional period of one year must be granted to the buyer even where subpurchasers instituted legal proceedings against the buyer within two years of the expiration of the limitation period under this Convention. The reason for this suggestion was that subpurchasers are likely to institute legal proceedings a substantial period after the original sales particularly where national laws provide longer limitation period for domestic sales transaction.

⁶ One representative considered that a general provision concerning notices for the purpose of part I of this Convention was desirable. He proposed the following provision to be added after article 28.

Article 18

[Recommencement of the period by service of notice]

(1) Where the creditor performs, in the State where the debtor has his place of business and before the expiration of the limitation period, any act, other than those acts prescribed in articles 12, 13 and 14, which under the law of that State has the effect of recommencing the original limitation period, a new limitation period of four years shall commence on the date prescribed by that law, provided that the limitation period shall not extend beyond the end of four years from the date on which the period would otherwise have expired in accordance with articles 8 to 11.

(2) If the debtor has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Under some legal systems certain acts by the debtor such as a demand for performance may satisfy the applicable rule on limitations and may have the effect of recommencing the limitation period which is provided under the local law, even though these acts are not linked to the institution of legal proceedings. Under some legal systems a letter or even a verbal demand may suffice. In other legal systems, the only way for a creditor to comply with the limitation period is by bringing legal proceedings. Article 18 is a compromise between these two approaches. To some extent, this article provides a concession for the continuation of the procedure to which parties in some legal systems have accustomed. On the other hand, this article takes the view that the creditor should not be allowed to take advantage of a local procedure for satisfying the rule of limitation with which the debtor may not be familiar. Thus, article 18 is made applicable only

when the creditor performs such act "in the State where the debtor has his place of business" before the expiration of the limitation period provided under this Convention.¹ It may be noted that article 18 is applicable only if the act performed by the creditor would (in the absence of this Convention) have "the effect of recommencing" the local limitation period. Thus, if the local rule only provides for an additional shorter period after such act rather than "recommencing the original limitation period," such local rule would not be honoured under article 18.²

2. The effect given to such act under article 16 is that "a new limitation period of four years" commences to run afresh from the date on which the local limitation period would otherwise have been recommenced in the absence of this Convention. The proviso to article 18 (1) places an overall limit beyond which no extension of the limitation period would be given effect. It will be noted that this consequence is different from the institution of legal proceedings (arts. 12, 13 and 14); on the institution of legal proceedings the period will "cease to run" subject to the adjustments provided in articles 15 to 17.

3. Paragraph (2) of article 18 refers to the provisions of article 2 (2), (3) of this Convention for instances where the debtor has places of business in more than one State or no place of business.

¹ A few representatives opposed article 18 because the article brings in an element not consistent with uniformity. According to one representative, at least article 18 should spell out what these acts were which were contemplated by this provision.

² If "the effect of recommencing the original limitation period" is given under the local law but is subject to certain conditions which have been fulfilled, it has been assumed that such conditions under the local law would not interfere with the application of article 18.

Article 19

[Acknowledgement by debtor]

(1) Where the debtor, before the expiration of the limitation period, acknowledges in writing his obligation to the creditor, a new limitation period of four years shall commence to run from the date of such acknowledgement.

(2) Payment of interest or partial performance of an obligation by the debtor shall have the same effect as an acknowledgement under paragraph (1) of this article if it can reasonably be inferred from such payment or performance that the debtor acknowledges that obligation.

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 of certainty in legal relationships. An extension of the limitation period when a debtor acknowledges his obligation to the creditor before the expiration of the original limitation period is consistent with the above purposes. Consequently, under paragraph (1) of this article, when such acknowledgement occurs, a limitation period of four years will begin to run afresh by reason of such acknowledgement.

2. This new limitation period may have significant impact on the debtor's rights; consequently, paragraph (1) requires

that the acknowledgement must be in writing. A writing by a debtor confirming an earlier oral acknowledgement would become an "acknowledgement" within the meaning of this article when the written confirmation was made. The requirement of a "writing" is defined in article 1 (3) (g). Of course, the "acknowledgement" of the original debt may be somewhat similar to a transaction creating a new debt (sometimes called a "novation") which, under applicable law, may be independent of the original obligation—so that the original transaction need not be proved to justify recovery under the new obligation. Applicable law may not require this "novation" to be effected in writing; the rule of article 19 that an "acknowledgement" must be in writing is not intended to interfere with the rules of the applicable law on "novation".

3. Paragraph (2) deals with payment of interest and "partial performance of an obligation" when these acts imply an acknowledgement of the debt. In both cases, the new limitation period will commence to run afresh only with respect to the obligation acknowledged by such action. The partial payment of a debt is the most typical instance of partial performance, but the language of paragraph (2) is sufficiently broad to include other types of partial performance such as the partial repair by a seller of a defective machine. Of course, whether there is an acknowledgement under the circumstance 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.

Article 20

[Extension where institution of legal proceedings prevented]

Where, as a result of a circumstance which is beyond the control of the creditor and which he could neither avoid nor overcome, the creditor has been 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 relevant circumstance ceased to exist. The limitation period shall in no event be extended beyond four years from the date on which the period would otherwise expire in accordance with articles 8 to 11.

COMMENTARY

1. This article provides for limited extension of the limitation period when circumstances not imputable to a creditor prevent him 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.¹ To avoid excessive liberality, no extension is permitted when any one of the following restrictions is applicable: (1) the preventing circumstances must be "beyond control of the creditor"; (2) the

creditor could neither have avoided nor overcome the occurrence of such circumstance. There are many types of preventing circumstances that are "*beyond the control of the creditor*" and which therefore might provide a basis for an extension. These might include: a state of war or the interruption of communication; the death or incapacity of the debtor where an administrator of the debtor's assets has not yet been appointed (Cf. art. 14); the debtor's misstatement or concealment of his identity or address which prevents the creditor from instituting legal proceedings; fraud committed by the debtor after the conclusion of the contract such as concealment of defects in the goods.²

2. There is no reason to extend the limitation period when the circumstance preventing institution of legal proceedings ceased to exist a substantial period 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 legal proceedings to obtain satisfaction or recognition of the claim. For these reasons, the limitation period is extended one year from the date on which the preventing circumstance is removed. Thus, if, at the time such preventing circumstance ceased to exist, the limitation period has expired or has less than one year to run, the creditor will be entitled to a period of one year from the date on which the preventing circumstance ceased to exist.

3. The last sentence of article 20 places an over-all limit beyond which no extension would be given under any circumstance.

² As to the effect of fraud committed before or at the time of the conclusion of the contract on the commencement of the limitation period, see art. 9 (2).

¹ Under articles 12, 13 and 14, it is provided that the limitation period shall "cease to run" when a creditor asserts his claim in legal proceedings. 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 12, 13 and 14.

MODIFICATION OF THE LIMITATION PERIOD BY THE PARTIES

Article 21

[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 during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed. In no event shall the period of limitation be extended beyond the end of four years from the date on which it would otherwise have expired in accordance with the provisions of this Convention.

(3) The provisions of this article shall not affect the validity of a clause in the contract of sale whereby the acquisition or exercise of a claim 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 21 declares a general rule that this Convention does not allow parties to modify the limitation period. Exceptions to this rule provided in paragraphs (2) and (3) are explained below.

1. *Extension of the limitation period*

2. Paragraph (2) permits the parties to extend the limitation period to the maximum of four years from the date when the limitation period would otherwise have expired according to the other provisions of this Convention. The extension can be accomplished by a unilateral declaration by the debtor; an effective declaration may, of course, be a part of an agreement by the parties. 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 fraudulent testimony. Therefore, only a declaration in writing can extend the period.

3. Under paragraph (2), declaration is effective only when it is made "during the running of the limitation period". This restriction in the Convention 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 claim becomes due or the breach occurs at which time the limitation period commences to run under articles 9 to 11. It was considered that without this restriction a party with stronger bargaining power might impose extensions at the time of contracting; in addition, a clause extending the limitation period might be a part of a form contract to which the other party might not give sufficient attention.

4. 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 or are awaiting the outcome of similar proceedings in other fora.¹

II. Notices to other party; arbitration

5. One of the purposes of paragraph (3) of article 21 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 exercise of a claim is dependent upon one party giving notice to the other party. A typical example would be modification of the length of period provided in the national law applicable to the contract of sales within which the buyer must give notice to the seller in order to preserve his rights when goods are defective. Article 21 (3) makes it clear that this Convention does not interfere with applicable rules which allow such contractual stipulations for notices.²

¹ One representative, supported by a few others, proposed the following for article 21 (2):

"(2) The debtor may, at any time during the running of the limitation period, by a declaration in writing to the creditor, extend the limitation period for a new period of time. Such a declaration shall in no event have effect beyond the end of four years, from the date of the declaration or from the date on which the period would otherwise expire, whichever is the later. The debtor may renew the effect of the declaration for a further period, provided however that the prescription period shall in no event by reason of declarations under this article be extended beyond eight years from the date on which the period would otherwise expire in accordance with this Convention.

² It may be noted that this Convention has no effect on

6. Paragraph (3) of article 21 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 exercise of a claim 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 (3) (e), "includes judicial, administrative and arbitral proceedings"; "*judicial* proceedings" is narrower in scope. As a result, the provisions of article 21 will not affect the validity of a clause in the contract of sale "whereby the acquisition or exercise of a claim" 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 provision, paragraph (3) concludes with the proviso that such clause must be valid under the applicable law. For example, the applicable law may give the court the power, because of hardship to a party, to extend the period which was provided for in the contract; this Convention does not interfere with the continued exercise of this power.

rules of local law involving "time-limit" (*déchéance*) within which one party is required to give notice to the other party concerning defects in goods (e.g., ULIS, art. 39 (1)). See article 1 (2) and accompanying commentary paras. 8 and 9. One representative was of the view that the rule of article 21 (3) should be incorporated in article 1 (2).

[LIMIT OF EXTENSION AND MODIFICATION OF THE LIMITATION PERIOD]

Article 22

[Over-all limitation for bringing legal proceedings]

[Notwithstanding the provisions of articles 12 to 21 of this Convention, no legal proceedings shall in any event be brought after the expiration of 10 years from the date on which the limitation period commences to run under articles 9 and 11, or after the expiration of eight years from the date on which the limitation period commences to run under article 10.]

COMMENTARY

1. As already noted, this Convention contains provisions which permit the limitation period to be extended or modified in various situations (arts. 15 to 21). Some of those provisions specify overriding limits for such extensions of the period (e.g., arts. 18 and 20); these overriding limits are applicable only to the operation of specific provisions. Thus, it is possible that the period may be extended, in some cases, for such a

substantially prolonged period that the institution of the legal proceedings toward the end of that extended period would be no longer compatible with the purpose of prescription. This article, therefore, sets forth an over-all cut-off point beyond which no legal proceedings may be instituted under any circumstance. Such cut-off point is "the expiration of 10 years from the date on which the limitation period commences to run under articles 9 and 11," or "the expiration of eight years from the date on which the limitation period commences to run under article 10".

2. This provision was proposed, at a late stage of the drafting, to take account of the inclusion of other provisions extending the limitation period. Most representatives who spoke on the provision were in favour of the inclusion in principle of the present article. However, this provision is placed in square brackets because most representatives did not have time to evaluate the effect of the provision in the context of the Convention as a whole.

EFFECTS OF THE EXPIRATION OF THE LIMITATION PERIOD

Article 23

[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 23 is addressed is the following: if a party to legal proceedings does not

assert that the action is barred by expiration of the limitation period, may the tribunal raise this issue of its own motion (*suo officio*)? This Convention 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. One consideration supporting this result is that many of the facts relevant to the running of the period will be known only to the parties and ordinarily will not be apparent from the evidence presenting the substance of the claim; for instance, this may be true with respect to possible extensions of the limitation period (e.g., arts. 19 and 21). Under the traditions of some legal systems, if a judge must search for such facts, he may have to involve himself in the case as to depart from the judges' usual role of neutrality. Moreover, 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.) There may be also instances where a creditor does not

wish to invoke prescription because of a special business relationship with the debtor while disagreeing on the substance of the pending dispute. Hence, this article provides that prescription of rights or limitation on legal proceedings due to the expiration of the limitation period may only be invoked if a party requests.

2. However, it has been noted by several representatives in the Commission that prescription is a matter of public policy and that the matter should not be subjected to the parties' disposal. According to them the tribunal should take the expiration of the limitation period into account unless parties agreed to the modification of the period under article 21 of this Convention. Tribunals can obtain facts from parties without burdening themselves by collection of evidence; the question of who should have the burden of collecting evidence should not affect the issue of who should invoke prescription. This Convention in article 35 takes account of this view by permitting States to make reservation at the time of ratification or accession to this Convention "that it shall not be compelled to apply the provisions of article 23 of this Convention".

Article 24

[Effect of expiration of the period; set-off]

(1) Subject to the provisions of paragraph (2) of this article and of article 23, no claim 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, one party may rely on his claim as a defence or for the purpose of set-off against a claim asserted by the other party, provided that in the latter case this may only be done:

(a) If both claims relate to a contract or contracts concluded in the course of the same transaction; or

(b) If the claims could have been set-off at any time before the date on which the limitation period expired.

COMMENTARY

I. Effect of expiration of the period

1. Paragraph (1) of article 24 emphasizes this Convention's basic purpose to provide a limitation period within which the claims of the parties must be submitted to a tribunal. See article 1 (1). Once the limitation period expires, the claim 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 claims "in any legal proceedings". This Convention 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 limitation period. 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 the 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 Convention. 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 Convention with respect to the enforcement of rights or claims barred by limitation. See also article 5 (c). As to the effect of voluntary performance of an obligation

after the expiration of the limitation period, see article 25 and accompanying commentary.

II. Claim used as a defence or for the purpose of set-off
3. The rules of paragraph (2) can be illustrated by the following examples.

Example 24 A. 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 24 (2), since both claims relate to the same transaction;¹ *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 24 (2), *B* may rely on this claim "for the purpose of set-off". 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*.²

Example 24 B. 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 24 (2), the claims "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.

¹ As to another example where claims arise from "a contract or contracts concluded in the course of the same transaction," see foot-note 4 in the commentary on art. 12.

² On legal proceedings calling for affirmative recovery by the defendant against the plaintiff, see art. 12 (2). See also para. 5 of the commentary on that article and its accompanying footnote.

Article 25

[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

As has already been noted (para. 1 of commentary on art. 24), expiration of the limitation period precludes the exercise or recognition of the claims of the parties in legal

proceedings (see art. 24 (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 25 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.

Article 26

[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

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 26 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 27

[Basic rule]

(1) 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 of the limitation period.

(2) The limitation period shall be calculated by reference to the calendar of the place where the legal proceedings are instituted.

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 27 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 27 (1) 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 "the last day of the last calendar month of the limitation period", i.e., 28 February of the later year.

2. Since different calendar systems are used in different States, paragraph (2) of article 27 provides that "the calendar of the place where the legal proceedings are instituted" must be used in calculating the period.

Article 28

[Effect of holiday]

Where the last day of the limitation period falls on an official holiday or other *dies non juridicus* precluding the appropriate legal action in the jurisdiction where the creditor institutes judicial proceedings as envisaged in article 12 or asserts a claim as envisaged in article 14,

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 claim 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 12 or 14. 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* precluding the appropriate legal action in the jurisdiction" where the creditor asserts his claim. In such cases, the limitation period is ex-

tended "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 claim 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.

INTERNATIONAL EFFECT

Article 29

[Acts or circumstances to be given international effect]

A Contracting State shall give effect to acts or circumstances referred to in articles 12, 13, 14, 15, 17 and 18 which take place in another Contracting State, provided that the creditor has taken all reasonable steps to ensure that the debtor is informed of the relevant act or circumstances as soon as possible.

COMMENTARY

1. This article is concerned with a group of problems illustrated by the following situation. Buyer has a claim against Seller arising from an international sale of goods. The claim arose in 1970. In 1973 Buyer instituted a legal proceeding against Seller in State X. In 1975, while the proceeding in State X is still pending, Buyer instituted a legal proceeding in State Y based on the same claim. (State Y has adopted the Convention.) Since Buyer's claim arose more than four years prior to the institution of the proceeding in State Y, that proceeding would be barred unless the limitation period "ceased to run" when the legal proceeding was commenced in State X.

2. Article 29 refers to the effect which Contracting States shall give to "acts or circumstances referred to in articles 12, 13, 14, 15, 17 and 18". Most of these articles deal with the point which various types of legal proceedings must reach in order to stop the running of the limitation period (arts. 12, 13 and 14; cf. arts. 17 and 18). Article 15, to which article 29 also refers, deals with the effect on the running of the period when the proceeding ends without a final decision on the merits of the claim to afford the creditor an opportunity to institute a further legal proceeding: in such cases the creditor is assured of a period of one year from the date on which the proceedings ended, unless the proceedings have ended because the creditor has discontinued the proceedings or allowed them to lapse. Thus, there is a close relationship between the provisions of the Convention that the limitation period "ceases to run" on the institution of legal proceedings (i.e., arts. 12 (1), 13 (1), and 14), and the rules of article 15 concerning the effect of proceedings not resulting in a decision on the merits of the claim.¹ To return to the above example, if the proceedings in State X ended on 1 February 1975 without a final decision on the merits of the claim for a reason other than the discontinuance or withdrawal of the proceeding, the limitation period "shall be deemed to have continued to run" but the period is extended to 1 February 1976. The above rules, however, do not take up the question of the effect of proceedings in one State (X) on the running of the period in a second State (Y)—the problem to which the present article is addressed.

3. Under article 29, if State X is a Contracting State these events in State X would be given "international" effect in State Y and an action brought in State Y until 1 February 1976 would not be barred by limitation.²

4. By the terms of article 29, a Contracting State (State Y) "shall give" the prescribed effect when the first action (in State X) is in a Contracting State. This language was not intended to forbid a Contracting State from giving comparable effect to acts occurring in non-Contracting States; but any such effect is not compelled by the Convention.

5. The analysis of the references in article 29 to articles 12, 13 and 14 and article 15 showed that article 29 is primarily addressed to problems of limitation that arise when an initial proceeding (e.g., in State X) ends *without* a final decision on the merits of the claim. When that proceeding (in State X) *does* lead to a decision on the merits of the claim, the international effect of that decision (in State Y) is specified in article 16. For example, when the decision on the merits in State X is not recognized in State Y, article 16 assures the creditor of a limited additional period to bring an action on the original claim in State Y.³

6. Article 29 also prescribes the international effect of the recommencement of the limitation period which, under article 18, may occur in some jurisdictions as a result of acts such as the service of a demand notice. Attention is also drawn to the rules of article 17 concerning recourse actions and the effect of the institution of legal proceedings against a joint debtor. If these provisions (now set in square brackets) should be adopted, under article 29 the effect given to the circumstances mentioned in article 17 should be also honoured by other Contracting States.

7. An important requirement for international effect under article 29 is that the creditor take "all reasonable steps to ensure that the debtor is informed of the relevant act or cir-

² If the buyer, after instituting the judicial proceeding in 1973 in State X, in 1974 discontinues the proceeding or withdraws his claim, under article 16 the result is somewhat different: in such cases, the limitation period "shall be deemed to have continued to run" and no extension is granted. As a result, the bringing of the action in State X becomes irrelevant with respect to the running of the period, and the action instituted in State Y would be barred by the four-year period established by this Convention. This footnote does not discuss the situation that would result if the creditor discontinues the proceeding in State X subsequent to the bringing of the proceeding in State Y.

³ When the decision in State X is recognized and is enforceable in State Y, any further proceeding in State Y would normally be based on the judgement rendered in State X. The period for bringing "claims based upon . . . a judgement or award made in legal proceedings" is not governed by this Convention. See art. 5 (d) and accompanying commentary.

¹ This relationship is discussed more fully in the commentary on art. 15.

cumstances as soon as possible".⁴ While in most cases commencement of a proceeding will require notification to the defendant-debtor, under some procedural system, this may not be assured. Hence, this requirement was considered necessary.⁵

⁴ See foot-note 1 of the commentary on art. 17.

⁵ Two representatives opposed to the rule of article 29 for the reason that it is not realistic to ask a State to recognize the effect of institution of legal proceedings in a far-distant State whose procedural rules for the institution of the legal proceedings may often be difficult to ascertain (Cf. art. 12 and accompanying commentary, paras. 2 and 3); moreover, under articles 15 and 29 the period would be extended even if a suit was brought in an incompetent court in another Contracting State. In their view, should article 29 be retained,

8. The limitation on the effect of acts in one State (State X) in a second State (State Y) applies only with respect to those articles listed in article 29; thus, article 29 is primarily concerned only with the international effect of the institution of legal proceedings. It may also be noted that the effectiveness of certain other acts does not depend on where they take place: e.g., acknowledgement of the debt (art. 19) and a declaration or agreement modifying the period (art. 21) have the effect prescribed in those articles without regard to the place where the acknowledgement, declaration or agreement occurs.

Contracting States must be permitted to make a reservation limiting the effect in such States of legal proceedings in other States.

Part II: implementation

Article 30

[Implementing legislation]

[Subject to the provisions of article 31, each Contracting State shall take such steps as may be necessary under its constitution or law to give the provisions of part I of this Convention the force of law not later than the date of the entry into force of this Convention in respect of that State.]

COMMENTARY

1. This article deals with the obligation of a Contracting State to take implementing steps that would give the provisions of part I of this Convention the force of law within the territorial jurisdiction of that State. The special problems that may be presented in a federal or non-unitary State are dealt with in article 31.

2. This article does not spell out the manner in which a Contracting State should give the provisions of part I "the force of law". This is left entirely for each Contracting State to take such steps "as may be necessary" under its constitu-

tional rules. Thus, the ratification of or accession to this Convention by a State may be sufficient "under its constitution or law" to give the provisions of part I "the force of law" and no additional steps would be required; in other States, implementing domestic legislation may be required to give such effect to the provisions of part I. Where such implementing process is required after ratification or accession, the Contracting State is bound to take such necessary steps "not later than the date of the entry into force of this Convention in respect of that State"; that date is specified in article 42 of this Convention. It will be noted that under article 30, the Contracting State shall give to "the provisions of" part I the force of law; as a consequence, a Contracting State may not introduce changes that modify the intended meaning of those provisions: part I is not a "model law".

3. This provision is kept in square brackets because the Commission was of the view that the final drafting of this provision may require further attention by the international conference of plenipotentiaries.

Article 31

[Implementing process in a federal State]

[In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations,

supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.]

COMMENTARY

1. Where a Contracting State to this Convention is a federal or non-unitary State, the federal authority may not have power to effect certain provisions of this Convention in its constituent States or provinces because those provisions may relate to the matters which are within the legislative jurisdiction of each of such constituent States or provinces. Consequently, rule supplementing article 30 may be needed for a Contracting State which is a federal State. Article 31 provides the process required for such a federal State in order to fulfil the obligation to implement the provisions of this Convention. This provision is kept in square brackets for the same reason as indicated for article 30.

Article 32*[Non-applicability as to prior contracts]*

Each Contracting State shall apply the provisions of this Convention to contracts concluded on or after the date of the entry into force of this Convention in respect of that State.

COMMENTARY

1. This article sets forth a definite time as the starting point for the taking of effect of the provisions of this Convention with respect to contracts: a Contracting State is bound

to apply the provisions of the Convention only to contracts that are concluded on or after the date of the entry into force of this Convention in respect of that State. This starting point was preferred to other dates (e.g., the date the breach is committed or the date the claim arises) because it is more definite and because it avoids difficult problems of retroactivity.

2. The date of the entry into force of this Convention in respect of each Contracting State is dealt with in article 42 of the Convention.

Part III: declarations and reservations**Article 33***[Declarations limiting the application of the Convention]*

(1) Two or more Contracting States may at any time declare that contracts of sale between a seller having a place of business in one of these States and a buyer having a place of business in another of these States shall not be considered international within the meaning of article 2 of this Convention, because they apply the same or closely related legal rules which in the absence of such a declaration would be governed by this Convention.

(2) If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Some States, in the absence of this Convention, apply the same or closely related rules to sales. These States should

be permitted, if they choose, to continue to apply their present rules to transaction involving such States, and at the same time adhere to the Convention. The present article makes this possible.

2. Paragraph (1) of this article enables any two or more Contracting States to make a joint declaration, *at any time*, to the effect that contracts of sale entered into by a seller having a place of business in one of these States and a buyer having a place of business in another of these States, "shall not be considered international within the meaning of article 2 of this Convention". Since under paragraph (1) of article 1 of this Convention, the provisions of the Convention are applicable to contracts of international sale of goods as defined in article 2, the effect of the declaration under paragraph (1) of this article is to exclude such contracts from the scope of application of the Convention.

3. Paragraph (1) uses the term "place of business"; paragraph (2) provides a rule which is in line with the rules of article 2 of this Convention.

Article 34*[Reservation with respect to actions for annulment of the contract]*

A Contracting State may declare, at the time of the deposit of its instrument of ratification or accession, that it will not apply the provisions of this Convention to actions for annulment of the contract.

COMMENTARY

In some legal systems where actions for annulment, as for incapacity, duress or fraud (*dol*), is required to establish nullity of the contract, the period of limitation for bringing

such actions may be treated differently from the period governing the general limitation for the exercise of claims arising from the contract. For example, in such actions the point for the commencement and the length of the period may be different from those rules provided under this Convention (e.g., art. 9 (2)). This article permits a State to declare that it will not apply the provisions of this Convention to actions for annulment of the contract. Thus, the State which has made a reservation under this article may continue to apply its local rules (including the rules of private international law) to the actions for annulment of contract.

Article 35*[Reservation with respect to who can invoke limitation]*

Any State may declare, at the time of the deposit of its instrument of ratification or accession to this Convention, that it shall not be compelled to apply the provisions of article 23 of this Convention.

COMMENTARY

This article permits a Contracting State to make reservation with regard to the application of the rule of article 23 which provides that prescription of rights or limitation of legal proceedings due to the expiration of the limitation may only be invoked by a party. The reason for the necessity to allow this reservation has already been explained in para. 2 of commentary on art. 23.

Article 36

[Relationship with conventions containing limitation provisions in respect of international sale of goods]

(1) This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning limitation of legal proceedings or prescription of rights in respect of international sales, provided that the seller and buyer have their places of business in States parties to such a convention.

(2) If a party has places of business in more than one State, or if he has no place of business, the provisions of paragraphs (2) and (3) of article 2 shall apply.

COMMENTARY

1. Paragraph (1) of this article provides that present and future conventions which contain provisions concerning limitation in respect of the international sale of goods shall, in case of conflict, prevail over this Convention.

2. Such situations could occur in those conventions that deal with international sales of a particular commodity, or

a special group of commodities. In addition, it has been suggested that article 49 of the 1964 ULIS conflicts with some of the provisions of part I of this Convention. Article 36 permits such a conflicting provision to be applied in relations between the parties whose places of business are in States which ratified such a convention. The same could be true with respect to a conflicting provision in a convention concluded at the regional level such as the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance, 1968.¹

3. The rule stated above is applicable only when the seller and buyer have their places of business in States parties to such a conflicting convention. Paragraph (2) of article 36 provides the rule for applying this provision where a party has places of business in more than one State or where he has no place of business.

¹ The question has also been raised as to whether the 1955 Hague Convention on the Law Applicable to International Sale of Goods includes prescription within its scope.

FORMAL AND FINAL CLAUSES NOT CONSIDERED BY THE COMMISSION

The following articles were not considered by the Commission and it was agreed that they should be submitted for consideration to the proposed International Conference of Plenipotentiaries.

Article 37

No reservation other than those made in accordance with articles 33 to 35 shall be permitted.

Article 38

1. Declarations made under articles 33 to 35 of this Convention shall be addressed to the Secretary-General of the United Nations. They shall take effect [three months] after the date of their receipt by the Secretary-General or, if at the end of this period this Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

2. Any State which has made a declaration under articles 33 to 35 of this Convention may withdraw it

at any time by a notification addressed to the Secretary-General of the United Nations. Such withdrawal shall take effect [three months] after the date of the receipt of the notification by the Secretary-General. In the case of a declaration made under paragraph (1) of article 33 of this Convention, such withdrawal shall also render inoperative, as from the date when the withdrawal takes effect, any reciprocal declaration made by another State under that paragraph.

Part IV: final clauses**Article 39**

[Signature]¹

This Convention shall be open until [] for signature by [].

Article 40

[Ratification]²

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 41

[Accession]³

This Convention shall remain open for accession by any State belonging to any of the categories mentioned in article 39. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 42

[Entry into force]⁴

1. This Convention shall enter into force [six months] after the date of the deposit of the [] instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the [] instrument of ratification or accession, this Convention shall enter into force [six months] after the date of the deposit of its instrument of ratification or accession.

Article 43

[Denunciation]⁵

1. Any Contracting State may denounce this Convention by notifying the Secretary-General of the United Nations to that effect.

2. The denunciation shall take effect [12 months] after receipt of the notification by the Secretary-General of the United Nations.

¹ Based on the Vienna Convention on the Law of Treaties (United Nations publication, Sales No.: E.70.V.5), document A/CONF.39/27, art. 81.

² *Ibid.*, art. 82.

³ *Ibid.*, art. 83.

⁴ *Ibid.*, art. 84.

⁵ Based on article XII of the 1964 Hague Convention relating to a Uniform Law on the International Sale of Goods, herein cited as "The Hague Sales Convention".

Article 44

[Declaration on territorial application]

ALTERNATIVE A⁶

1. Any State may, at the time of the deposit of its instrument of ratification or accession or at any time

thereafter, declare, by means of a notification addressed to the Secretary-General of the United Nations, that this Convention shall be applicable to all or any of the territories for whose international relations it is responsible. Such a declaration shall take effect [six months]

⁶ Based on article XIII of The Hague Sales Convention.

after the date of receipt of the notification by the Secretary-General of the United Nations, or, if at the end of that period this Convention has not yet come into force, from the date of its entry into force.

2. Any Contracting State which has made a declaration pursuant to paragraph (1) of this article may, in accordance with article 43, denounce this Convention in respect of all or any of the territories concerned.

ALTERNATIVE B⁷

This Convention shall apply to all non-metropolitan territories for the international relations of which any

⁷ Based on article 27 of the Convention on Psychotropic Substances, 1971.

Party is responsible except where the previous consent of such a territory is required by the Constitution of the Party or of the territory concerned, or required by custom. In such a case, the Party shall endeavour to secure the needed consent of the territory within the shortest period possible and, when the consent is obtained, the Party shall notify the Secretary-General. This Convention shall apply to the territory or territories named in such a notification from the date of its receipt by the Secretary-General. In those cases where the previous consent of the non-metropolitan territory is not required, the Party concerned shall, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which this Convention applies.

Article 45

[Notification]⁸

The Secretary-General of the United Nations shall notify the Signatory and Acceding States of:

- (a) The declarations and notifications made in accordance with article 38;
- (b) The ratifications and accessions deposited in accordance with articles 40 and 41;
- (c) The dates on which this Convention will come into force in accordance with article 42;
- (d) The denunciations received in accordance with article 43;
- (e) The notifications received in accordance with article 44.

⁸ Based on article XV of The Hague Sales Convention.

Article 46

[Deposit of the original]

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention.

DONE at [place], [date].

4. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
Report on acknowledgement by debtor and novation, prepared by Mr. Mohsen Chafik (United Arab Republic)	A/CN.9/WG.1/WP.11*
Proposals and commentaries concerning the scope of application of the uniform law on prescription, prepared by Mr. Jerzy Jakubowski (Poland)	A/CN.9/WG.1/WP.12*
Suggestions for articles 3 and 4 of the draft uniform law by Mr. A. G. Guest (United Kingdom)	A/CN.9/WG.1/WP.13*
Report on the international effect of interruption by legal proceedings instituted in a foreign State, prepared by Mr. A. G. Guest (United Kingdom)	A/CN.9/WG.1/WP.14*

*These documents have been re-issued together in document A/CN.9/70/Add.2.

<i>Title or description</i>	<i>Document reference</i>
Article 10 and international effect of interruption by legal proceedings instituted in a foreign State, note of the Belgian delegation, prepared by Mr. P. Stienon	A/CN.9/WG.1/WP.15*
Report on recourse actions and the expression "otherwise exercised" in article 1 (2) of the preliminary draft, prepared by Mr. Gervasio R. Colombres (Argentina)	A/CN.9/WG.1/WP.16*
Amendments proposed by Belgium to the text of a preliminary draft of a uniform law on prescription (limitation) in international sale of goods (August 1970)	A/CN.9/WG.1/WP.17*
Amendments proposed by Austria to the text of a preliminary draft of a uniform law on prescription (limitation) in international sale of goods (August 1970)	A/CN.9/WG.1/WP.18*
Article 17: Extension of period where foreign judgment not recognized, memorandum by Mr. A. G. Guest (United Kingdom)	A/CN.9/WG.1/WP.19*
Comments on articles 10 to 12 of the preliminary draft, submitted by the United States	A/CN.9/WG.1/WP.20*
Amendments proposed by Norway to the text of a preliminary draft of a uniform law on prescription (limitation) in international sale of goods (August 1970)	A/CN.9/WG.1/WP.21*
Report on products liability: Death and injuries caused to persons and damages caused to goods, prepared by Mr. M. H. van Hoogstraten (Secretary-General of The Hague Conference on Private International Law)	A/CN.9/WG.1/WP.22*
Report on the words "or upon the occurrence of another event" in article 1 (3) of the preliminary draft: memorandum of Mr. Ludvik Kopác (Czechoslovakia)	A/CN.9/WG.1/WP.23*
Working Paper by the Secretariat	A/CN.9/WG.1/WP.25*
Proposals and observations of the United States of America on the preliminary draft uniform law on prescription	A/CN.9/WG.1/WP.26*
Amendments proposed by Norway to the text of the draft Convention on Prescription (Limitation) in the Field of International Sale of Goods	A/CN.9/R.9
Draft Convention on Prescription (Limitation) in the field of International Sale of Goods: consideration of the report of the Working Group on Prescription; note by the Secretariat	A/CN.9/R.11
Alternative methods for the final adoption of the draft Convention on Prescription (Limitation) in the Field of International Sale of Goods: note by the Secretariat	A/CN.9/R.12
Amendments by Austria	A/CN.9/V/CRP.1
Amendments by Spain	A/CN.9/V/CRP.2 and Corr.1
Amendments by Austria	A/CN.9/V/CRP.3
Amendments by Belgium and France	A/CN.9/V/CRP.4
Suggestions by the representative of The Hague Conference on Private International Law	A/CN.9/V/CRP.5
Amendment by Guyana	A/CN.9/V/CRP.6
Amendment by Nigeria	A/CN.9/V/CRP.7
New article by Guyana	A/CN.9/V/CRP.8
Amendments by Ghana	A/CN.9/V/CRP.9
Amendments by Spain	A/CN.9/V/CRP.10
Amendment by Austria	A/CN.9/V/CRP.11

<i>Title or description</i>	<i>Document reference</i>
Amendment by Hungary	A/CN.9/V/CRP.12
Amendment by Guyana	A/CN.9/V/CRP.13
Amendments by the United States of America	A/CN.9/V/CRP.14
Observations and proposals by the Union of Soviet Socialist Republics	A/CN.9/V/CRP.15 and Rev.1*
Amendments by Australia	A/CN.9/V/CRP.16
Amendments by Spain	A/CN.9/V/CRP.17
Amendments by Belgium, Egypt and France	A/CN.9/V/CRP.18
Proposal by the Union of Soviet Socialist Republics ..	A/CN.9/V/CRP.19
Report of Drafting Party I	A/CN.9/V/CRP.20 and Rev.1**
New draft proposed by the Working Group on Prescription	A/CN.9/V/CRP.21; Add.1 and Corr.1, Add.2; 21/Rev.1; and 21/Rev.1/Add.1 to 10***
Amendments by Norway	A/CN.9/V/CRP.22
Draft decision proposed by the Working Group on Prescription	A/CN.9/V/CRP.26
Proposal by Singapore for the addition of a new article governing the maximum over-all limitation period in the draft Convention on Prescription	A/CN.9/V/CRP.27

* In English only.

** In French and Russian only.

*** In English, French and Russian only.

II. INTERNATIONAL PAYMENTS

Negotiable instruments

1. Draft uniform law on international bills of exchange and commentary: report of the Secretary-General (A/CN.9/67)*

CONTENTS

	Page	Articles	Page
INTRODUCTION	145	D. The endorser	41-42 168
Abbreviations	147	E. The guarantor	43-45 169
PART ONE. SPHERE OF APPLICATION: FORM	1-3 147	PART FIVE. PRESENTMENT, DISHONOUR AND RECOURSE	46-68 170
PART TWO. INTERPRETATION	4-11 150	Section 1. Presentment for acceptance	46-51 170
Section 1. General	4-6 150	Section 2. Presentment for payment	52-56 174
Section 2. Interpretation of formal requirements	7-10 152	Section 3. Recourse	57-68 176
Section 3. Completion of an incomplete instrument	11 154	PART SIX. DISCHARGE	69-78 181
PART THREE. TRANSFER AND NEGOTIATION	12-22 154	Section 1. General	69 181
PART FOUR. RIGHTS AND LIABILITIES	23-45 161	Section 2. Payment	70-75 181
Section 1. The rights of a holder and a protected holder	23-26 161	Section 3. Renunciation	76 184
Section 2. Liability of the parties	27-45 163	Section 4. Reacquisition by a prior party	77 184
A. General	27-33 163	Section 5. Discharge of a prior party	78 184
B. The drawer	34 166	PART SEVEN. LIMITATION (PRESCRIPTION)	79 185
C. The drawee and the acceptor	35-40 166	PART EIGHT. LOST BILLS	80 185
		Annex. Draft uniform law on international bills of exchange	185

Introduction

1. The United Nations Commission on International Trade Law decided at its fourth session "to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions". To this end, the Commission requested the Secretary-General "to prepare a draft of such rules accompanied by a commentary".¹ The present report, setting forth a draft uniform law on international bills of exchange with commentary, has been prepared in response to that decision.

2. The decision taken by the Commission at its fourth session was based upon the analysis of a substantial body of information resulting from question-

naires directed to Governments and to banking and trade institutions. These inquiries were designed to ascertain current methods and practices for making and receiving international payments and also the nature and scope of problems encountered in settling international transactions by means of negotiable instruments.² These inquiries evidenced that, in spite of a trend towards increasing use of the cable or telegraphic transfer, negotiable instruments play a vital role in international payment transactions, and that the problems encountered in this area made it advisable to continue the work on this subject. The analyses of the voluminous material submitted in response to the questionnaires and comparative studies effected by the Secretariat have shown that significant problems have resulted from divergencies among the rules of the different legal systems. These divergencies relate, *inter alia*, to: rules related to the form and content of negotiable instruments; the effect of stipulations

¹ Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, (UNCITRAL, report on the fourth session (1971)), para. 35; Yearbook of the United Nations Commission on International Trade Law (hereafter referred to as UNCITRAL Yearbook) vol. II: 1971, part one, II, A. For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7.

² The text of the questionnaire prepared pursuant to a decision taken by the Commission at its second session is reproduced in document A/CN.9/38. An analysis of the replies to that questionnaire is contained in document A/CN.9/38 and Add. 1.

* 31 March 1972.

on an instrument such as drawing without recourse and interest clauses; the conditions under which a person can acquire an instrument free from claims and defences of other parties; the effect of forged signatures and of material alteration; rights under a lost instrument; the formalities required in connexion with protest for non-acceptance or non-payment of an instrument; the consequences of failure to give notice of dishonour; the facts leading to discharge of liability and the effects of such discharge. Other problems were shown to owe their existence to difficulties in understanding the rules and requirements of foreign legal systems that may be applicable where an instrument circulates internationally.

3. The Commission requested the Secretary-General to carry out the present work "after consultation with interested international organizations, including banking and trade institutions."³ Pursuant to this request, throughout the preparatory stages leading up to the formulation of the present draft uniform law, consultations were held with specialists provided by international organizations having a special interest in the matter. At a series of meetings held with these specialists,⁴ advice was secured with respect to the basic scope and structure of the proposed uniform rules and the choice between the existing divergent rules which would be most consistent with current commercial practices and needs; at later stages, the specialists reviewed preliminary drafts of the uniform rules from the point of view of substance and form. Through the co-operation of these specialists, supplementary questionnaires directed to issues that had arisen in the course of the preparation of the uniform rules were addressed to various banking and trade institutions;⁵ valuable supplementary information on present-day commercial practices was received in reply to these questionnaires.

4. In conformity with the terms of reference set forth in the decision taken by the Commission at its fourth session, the use of an international bill of exchange subject to the uniform law is optional: the drawer of a bill of exchange may elect to draw the bill either under national law or under the uniform law. In order to draw a bill of exchange subject to the uniform law, it is required under article 1 (2) (a) that the bill bear the designation "international bill of exchange subject to the Convention of . . .".

5. The issues dealt with in the present draft are, in general, those encompassed by one or another of the principal systems of negotiable law. The present

draft, like the existing formulations, does not attempt to provide rules for many of the issues that may arise in connexion with a negotiable instrument such as capacity to contract, the authority of agents, bankruptcy, succession and torts. Such issues are dealt with under the general law and it would not be practicable to establish uniform rules for these areas as a part of a uniform law dealing with negotiable instruments. Consequently, under this draft, as under the existing systems of negotiable instruments law, such areas are governed by the applicable national law.

6. At an early stage in the preparation of the present draft, consideration was given to the feasibility of restricting the uniform rules to a much narrower scope than that of any of the existing formulations of negotiable instruments law. Under this approach, the uniform rules would deal only with certain questions where divergencies among the existing legal systems have proved to be most troublesome in the international use of negotiable instruments.

7. This approach was given careful consideration and was the subject of consultation with banking and trade institutions. The conclusion was that such a narrow approach to the draft created more problems than it avoided. Analysis showed that there is an area of negotiable instruments law involving a network of interrelationships on the instrument; this area needs to be dealt with as a unit. Selecting only some of these issues for inclusion in the uniform rules and remitting related issues to the rules of national law would lead to various difficulties. In some situations there will be doubt as to which national law is applicable, and the parties in one country can not readily understand or comply with the rules of foreign legal systems. In other cases, even where the rules of the existing systems of negotiable instrument law seem, at first glance, to be compatible with each other, closer examination of the judicial interpretation given these rules shows that they do not mesh precisely with each other or with any limited set of uniform rules applicable to an international instrument.

8. The degree of the relationship among the uniform rules embodied in the present draft varies from article to article. It is possible that some of the articles of the present draft, on further examination, could be omitted without serious impairment of the unity of the draft. But it is believed that any such pruning should be undertaken with caution, and that substantial restriction of the scope of these uniform rules would impair the Commission's objective to promote uniformity and certainty in connexion with instruments employed for international payments.

9. The rules embodied in the present draft reflect a policy to minimize departures from the content of the existing principal legal systems of negotiable instruments law. Where the existing legal systems concur in a rule, that rule generally has been followed in the present draft. In the instances where the systems differ, a choice or a compromise between divergent rules was based on available evidence of current commercial practice and need. Thus, a questionnaire addressed to Governments and to banking and trade institutions called attention to such divergencies, and solicited views as to the most appropriate solution. An analysis of the responses, which was submitted to the

³ UNCITRAL, report on the fourth session (1971) para. 35.

⁴ Six meetings were held at the following times: 20 June to 4 July 1969; 19 to 23 January 1970; 16 to 22 July 1970; 18 to 22 January 1971; 20 to 29 September 1971; 13 to 19 January 1972. The following organizations participated in these meetings: International Monetary Fund, Organization of American States, Hague Conference on Private International Law, International Institute for the Unification of Private Law, International Bank for Economic Co-operation, Bank for International Settlements, International Chamber of Commerce, and Fédération bancaire des communautés européennes. The Secretariat acknowledges gratefully the co-operation and assistance received from the above organizations and experts.

⁵ These supplementary questionnaires were sent in July 1970 and September 1971. The analysis of the replies thereto has not been reproduced in documents of the Commission, but will be available at the session for consultation by members of the Commission.

Commission at its fourth session (A/CN.9/48), has been of great assistance in making a responsible choice between divergent rules.

10. The present draft uniform law is concerned with bills of exchange in the narrow sense of the term; cheques and promissory notes are not within the scope of the present draft. Inquiries have been made amongst banking and trade circles as to the desirability of extending the uniform rules on international bills of exchange also to international promissory notes.

11. The virtually unanimous view of those consulted was that it would be advisable for the uniform law also to encompass promissory notes, since in certain parts of the world, promissory notes are widely used in international commerce and there are indications that promissory notes may well assume, in the future, greater importance than is at present the case. The Commission may therefore wish to consider the desirability of requesting the Secretariat to modify the present draft with a view to extending its application to promissory notes.

Abbreviations

The abbreviations used in the commentary to the draft uniform law on international bills of exchange are as follows:

BEA: Bills of Exchange Act, 1882 (United Kingdom)

ULB: Geneva Uniform Law on Bills of Exchange and Promissory Notes (1930)

UCC: Uniform Commercial Code (United States)

Part One. Sphere of application: form

Article 1

(1) This Law shall apply to international bills of exchange.

(2) An international bill of exchange is a written instrument which

(a) Contains, in the text thereof, the words "Pay against this international bill of exchange, drawn subject to the Convention of _____" or words of similar import); and

(b) Contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite sum of money to a specified person (the payee) or to his order; and

(c) Is payable on demand or at a definite time; and

(d) Is signed by the drawer; and

(e) Shows that it is drawn in a country other than the country of the drawee or of the payee or of the place where payment is to be made.

Relevant legislation

BEA—section 3

UCC—section 3-503

ULB—articles 1 and 2

Cross references

Definite sum of money: article 7

Payable on demand: article 9 (1) and (2)

Payable at a definite time: article 9 (3)

COMMENTARY

Paragraph (1)

1. The definition of an international bill of exchange is set forth in paragraph (2) which makes clear that the use of an international bill of exchange subject to this Law is optional. As regards the applicability of this Law, see also articles 2 and 3.

Paragraph (2)

2. This paragraph defines an international bill of exchange, i.e., it lays down the formal requisites with which an instrument must comply in order to be an international bill of exchange subject to this Law. Non-compliance of an instrument with these requisites will make the uniform law inapplicable. The inapplicability of this Law is the sole consequence of non-compliance with paragraph (2); such non-compliance does not interfere with the validity or negotiability of the instrument under applicable national law (e.g., the law of the place of drawing or of the place of issuance).

"A written instrument"

3. The term "written" is not defined in the uniform law. This term, in the context in which it is here used, would include any mode of representing or reproducing words in visible form, and is sufficiently flexible to permit the Law to apply to long-distance electronic transmission or reproduction of a writing.

4. Subject to the requirements laid down in paragraph (2), the validity of an instrument as an international bill of exchange is not dependent on the use of any specific wording or any specific language.

Subparagraph (a): the designation

5. This Law becomes applicable only by the voluntary use of an international bill of exchange which clearly states that the bill is governed by this Law. Subparagraph (a) is designed to ensure that this choice is clearly manifested. The choice to bring the instrument within this Law would initially be made by the drawer in employing an instrument bearing the designation "international bill of exchange drawn subject to the convention of _____." Others who become a party to the instrument bearing this designation, in view of the voluntary nature of their act, similarly manifest their consent to the applicability of this Law.

Subparagraphs (b) to (d): other formal requisites

6. These requisites are in substance those which in the principal legal systems are considered to be the minimum requirements for an instrument to qualify as a bill of exchange. Consequently, bills currently in use under the principal legal systems may be made into international bills of exchange subject to this Law by the use of the designation specified in subparagraph (a) and by the evidence on the bill of the international elements under subparagraph (e).

7. To come within this Law, a bill must be an "unconditional order" (i.e., it must not be payable upon a contingency) to pay "a definite sum of money" (as defined in article 7) "on demand" or "at a definite time" (as defined in article 9). As to a conditional endorsement, see article 17. As to a conditional acceptance, see article 40.

"... To a specified person (the payee) or to his order; ..."

8. The expression "to the order of" (pay to the order of) or "to his order" (pay X or to his order) is frequently found on bills. Under the BEA or the ULB, in contrast to the UCC,

such an expression is irrelevant to the negotiability of the instrument, and the omission thereof does not therefore prevent negotiation. This Law follows in this respect the BEA and the ULB. Hence, a bill under this Law may be drawn either "pay to X", "pay to the order of X", or "pay to X or to his order". The wording of article 1 (2) (b) does not permit an international bill of exchange to be drawn payable to bearer. However, the drawer (by drawing the bill payable to himself) or any holder may transform the bill into a bearer bill by endorsing it in blank.

Subparagraph (e): internationality

9. An international bill of exchange under this Law is intended to serve as a means of settling international payments. Hence, the uniform law will be applicable only when certain international elements appear on the face of the bill. Subparagraph (e) requires that an international bill of exchange shown a place of drawing that is situated in a country other than the country of the drawee or of the payee or of the place where payment is to be made. The requirement that the place of drawing be mentioned on a bill is only found in the ULB (articles 1 and 2), and not in the BEA (s. 3 (4) (c)) and UCC (s. 3-112 (1) (a)). However, inquiries amongst banking and trade circles revealed that, whatever the legal system may be under which a bill is drawn, the place of drawing and the place of payment are generally specified on instruments used for international payments. Thus, the requirement under subparagraph (e) of article 6 corresponds to present commercial practice.

10. Paragraph (2) (e) does not require that detailed street addresses of places in two different countries appear on the bill. For the purpose of internationality, it suffices for the bill to mention two countries. Thus, a bill drawn by J. Brown, New York, on F. Dupont, France, or made payable to F. Dupont, France, would meet the requirement of subparagraph (e). However, it would be in the interest of the drawer to specify the address of the drawee and the place of payment, since under articles 51 and 56 of the uniform law, a bill is dishonoured by non-acceptance or by non-payment, *inter alia*, if presentment for acceptance or for payment cannot be made because the drawee or the acceptor cannot be found. In such a case, the holder of the bill may exercise a right of recourse against the drawer.

11. Consideration has been given to the feasibility of other tests of the "internationality" of an instrument, such as a test based on the requirement that an international bill of exchange be used solely to settle international transactions, e.g., the international sale of goods or a test geared to potential conflict of law situations. After consultation with interested international organizations these tests were abandoned because they were considered impracticable and lacked the advantage of the present test, namely the indisputable appearance of internationality on the face of the instrument. Analysis of the sphere of application of the uniform law shows that the test prescribed in article 1 (2) (e) embraces the majority of cases in which there is an international movement of credit and also the principal situation in which conflicts of law arise.

Article 2

The incorrectness of statements made on a bill for the purpose of paragraph (2) (e) of article 1 shall not affect the application of this Law.

COMMENTARY

1. The security of transactions in international bills of exchange depends on a clear and indisputable identification of the applicable legal régime. To this end, article 1 in paragraph (2) (e) requires that the bill be designated as an international bill of exchange drawn subject to this convention. In addition, under paragraph (2) (e) an instrument subject

to this Law must show "that it is drawn in a country other than that of the drawee, or of the payee, or of the place where payment is to be made". The requirement of "internationality" consequently must appear from the statements made on the instrument. These rules are strengthened by the rule of the present article whereby the applicability of this Law cannot be placed in doubt by controverting the statements made on the face of the bill in conformity with paragraph (2) (e).

2. Article 2 has the same effect as a provision that, for the purpose of application of the law, the appearance of the international elements, required under article 1 (2) (e), constitutes an irrebuttable presumption. Therefore, an incorrect statement as to the place of drawing, etc., so as to bring the instrument under the uniform law, does not thereby make the instrument invalid as an international bill of exchange, and cannot be a defence to be raised against a holder, even if such holder had knowledge of the fact that the statement is incorrect. To provide otherwise would provide grounds for casting doubt on the applicability of Law, and would impair the circulation of an international bill of exchange.

3. This article does not preclude a party from bringing, outside the bill, an action for damages against another party on the ground that he made fraudulently incorrect statements as to the place of drawing, payment, the address of the drawee or that of the payee. In the course of discussions of this article with interested international organizations and banking and trade institutions, the suggestion was made that the convention of which the uniform law will form an annex could contain an article permitting contracting States to provide, in their national legislation, for sanctions against a party who fraudulently abuses article 1 (2) (e).

Article 3

This Law shall apply without regard to whether the countries indicated on an international bill of exchange pursuant to paragraph (2) of article 1 are Contracting States.

Cross reference

Definition of "international bill of exchange": article 1 (2).

COMMENTARY

1. The sole requirement for the Law's applicability is that the instrument is an international bill of exchange, i.e. an instrument which complies with the formal requirements laid down in article 1 (2). Under this test, the form of a contracting State would apply the uniform law, and not its domestic law or the bills of exchange law of a foreign State which, through the application of conflict rules, might otherwise be applicable.

2. The provision of article 2 may be illustrated by the following example. An instrument containing, in the text thereof, the words "International Bill of Exchange drawn subject to the Convention of..." (see article 1 (2) (a)) on its face shows that it is drawn in State X on drawee in State Y. Neither X nor Y is a contracting State. The instrument is accepted by the drawee, and the payee endorses the bill to E. The acceptor dishonours the bill by non-payment and E requests the drawer to pay the bill. The drawer asserts a defence (for instance, failure by the holder to observe applicable formalities as to protest, and the holder brings his claim before the court of a contracting State. By virtue of article 2, the uniform law is applicable, and the rights and liabilities of all parties to the bill are governed by the uniform law, irrespective of the place where each separate contract on the bill was made, where the bill was dishonoured, or where protest was made or should have been made. This rule on the applicability of the uniform law thus supplants the various rules on conflict of laws that might otherwise be applicable.

3. In substance, article 2 gives effect to the intention of the parties that their legal relationships on the bill would be governed by the uniform law, in accordance with the statement on the bill. Thus, parties signing an international bill as drawer, endorser, guarantor or acceptor thereby manifest their intention to be governed by the uniform law. The same may be said of a person who takes the bill as transferee, holder or protected holder. The application of the uniform law to legal relationships between parties to an international bill of exchange on the sole ground that the instrument is an international bill of exchange responds therefore to the reasonable expectations of the parties.

4. The intent of the parties that this uniform law shall be applicable distinguishes the present draft from other uniform legislation which is applicable without regard to the rules of private international law. An example of the latter approach is provided by the Uniform Law on the International Sale of Goods (ULIS) annexed to The Hague Convention of 1964. Article 1 of ULIS makes the law applicable to sales contracts between parties whose places of business are in "different States": this provision does not require that either of these "different 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."

This provision was the subject of criticism at sessions of the United Nations Commission on International Trade Law (UNCITRAL) and of UNCITRAL's Working Group on the International Sale of Goods, and a different approach to the applicability of such uniform rules was recommended.¹ One of the grounds for criticism was the possibility that a sales transaction could be covered by ULIS when the parties had not chosen ULIS and had no grounds for expecting that ULIS would be applicable to their transaction. This difficulty, of course, is obviated by article 1 (2) (a) of the present draft which specifies, as one of the conditions of the law's applicability, that the bill bear a prescribed designation which evidences the intent of the parties to choose the uniform law.²

¹ UNCITRAL, report on second session (1969), annex I, para. 40; UNCITRAL, report on third session (1970), para. 30, UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A, and part two, III, A; UNCITRAL, report on fourth session (1971), paras. 67-69, UNCITRAL Yearbook, vol. II: 1971, part two, II, A; Working Group on the International Sale of Goods, report, on the second session (A/CN.9/52), paras. 32-35, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

² The draft convention on prescription (limitation) in the field of international sale of goods (September 1971), adopted by the Working Group on Prescription at its third session (August-September 1971), states in article 2 that the law shall be applicable "without regard to the rules of private international law". A/CN.9/70, annex I, *supra*, part two, I, B, 2. This rule of applicability, like that of ULIS, does not rest on a choice of the parties. The special problems inherent in problems of prescription that led to this wider approach to applicability are explained in the commentary to the draft convention on prescription. (A/CN.9/70/Add.1, commentary to article 2 at paras. 2-9)

A more precise parallel to the present draft uniform law on international bills of exchange is provided by the draft convention on the international combined transport of goods (TCM Convention), as adopted by the fourth session of the Joint IMCO/ECE meeting, 15-19 November 1971. (CTC IV/18/Rev.1; TRANS/374/Rev.1.) Under article 1 (1) a Combined Transport Document shall bear the heading (e.g.) "Negotiable Combined Transport Document governed by the TCM Convention". Under article 1 (3), the provisions of the Convention shall apply to every Combined Transport Document "whatever may be the place of issue, the place at which the goods are taken in charge, the place designated for delivery" or other specified aspects of the transaction, and without regard to whether they occur in a Contracting State. Thus, under the

5. Of course, the obligation to apply the uniform law in the circumstances defined in articles 1 to 3 is incumbent on Contracting States only. Consequently, whether the forum of a non-contracting State would apply the uniform law to an instrument that complies with the requirements set forth in article 1 (2) would depend on the conflict of law rules of that form. Presumably, the forum of a non-contracting State would consider such an instrument to be an international bill of exchange subject to the uniform law if its conflict rules referred to the law of the country where the instrument was drawn and if that country is a Contracting State. But, in other factual settings a non-contracting State may apply the rules of the national law rather than this uniform law. In such cases, an instrument, drawn as an international bill of exchange under the uniform law, might not qualify as a bill of exchange under the applicable law. The present draft seeks to meet that potential problem by laying down, in article 1 (2), requisites that are in substance similar to those which in the principal legal systems are considered to be the minimum requirements for an instrument to qualify as a bill of exchange (see commentary to article 2 above). Hence, the presence on an instrument of the requisites under article 1 (2) will, in most cases, also qualify the instrument as a bill of exchange under whatever national law may be applicable. Therefore, article 1 (2) helps to ensure that an instrument drawn pursuant to its provisions will qualify as a negotiable instrument even if the forum of a non-contracting State applies its own law, or by reason of its conflict rules, applies the law of another non-contracting State. However, there may be cases where a bill that satisfies the requisites of article 1 (2) will not meet one of the requirements imposed by a national law.

6. Consideration has been given to adding a provision that the uniform law would be applicable only if the instrument was drawn [or issued] in a Contracting State. The principal effect of such a rule would be to discourage banking and trade circles from drawing or issuing international bills of exchange in non-contracting States and thereby reduce the complications that might result from the application of conflict rules by the forums of non-contracting States. Such a rule limiting the applicability of the uniform law has not been incorporated in the present draft. Under this draft a person is given the opportunity to draw, accept and endorse an international bill of exchange without regard to whether it is drawn in a Contracting State or a non-contracting State, and a court in a Contracting State would give effect to their intent that the uniform rules should apply which was expressed on the face of the instrument and by the voluntary use of the bill. Of course, the court of a non-contracting State may not give effect to this intent. This possibility, however, can be taken into account by the parties in deciding whether to employ the international bill of exchange in the light of their expectation as to whether litigation would be brought in a Contracting or in a non-contracting State. Furthermore, the rule mentioned above would necessarily make the uniform law inapplicable to an instrument drawn as an international bill of exchange in a non-contracting State, even where the drawee is in a Contracting State, or the bill is payable in a Contracting State, and litigation arises in a Contracting State. Such a rule would unduly restrict the scope of application of the uniform law.

7. The above problem, and others related to the application of uniform rules to rights and liabilities on an international bill of exchange, are inherent in the process of adoption of uniform rules for as long as a uniform law is not universally adopted and applied.

Draft TCM Convention, as under the present draft uniform law on international bills of exchange, the applicability of the uniform rules is based on the issuance and the receipt by subsequent parties of a document bearing a designation that opts for the rules of the convention.

Part Two. Interpretation

Section I: General

Article 4

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 above general principle with regard to the interpretation and application of the Law corresponds to provisions recommended by the Working Group on the International Sale of Goods and by the Working Group on Prescription¹

2. One of the important objectives of the article is to promote uniformity in the interpretation and application of this Law. To this end, the text of the uniform law directs attention to its "international character"; the regard for the international character of the Law would avoid interpreting its provisions by recourse to local (and varying) national concepts, rather than to the Law's provisions read as an independent piece of international legislation. This article may also be helpful to encourage tribunals in one State to promote uniformity by interpreting the Law with due regard to the interpretation given to the Law in other States.

Article 5

In this Law:

(1) "Bearer" means a person in possession of a bill endorsed in blank;

(2) "Bill" means an international bill of exchange governed by this Law;

(3) (a) "Endorsement" means a signature, or a signature accompanied by a statement designating the person to whom the bill is payable, which is placed on the bill by the payee, by an endorsee from the payee, or by any person who is designated under an uninterrupted series of such endorsements. An endorsement which consists solely of the signature of the endorser means that the bill is payable to any person in possession of the bill.

(b) "Endorsement in blank" means an endorsement which consists solely of the signature of the endorser or which includes a statement to the effect that the bill is payable to any person in possession of the bill.

(c) "Special endorsement" means an endorsement which specifies the person to whom the bill is payable.

(4) "Holder" means the payee or the endorsee of a bill who is in possession thereof;

(5) "Issue" means the first transfer of a bill to a person who takes it as a holder;

(6) "Party" means a party to a bill;

(7) "Protected holder" means the holder of a bill which, on the face of it, appears to be complete and

¹ Working Group on Sales: A/CN.9/52, para. 127, UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2; Working Group on Prescription: A/CN.9/50, annex I (article 5) and annex II (commentary to article 5), UNCITRAL Yearbook, vol. II: 1971, part two, I, C, 2; A/CN.9/70, annex I (article 7) and A/CN.9/70/Add.1 (commentary to article 7). (See above, part two, I, B, 2.) See also UNCITRAL, report on third session (1970), paras. 52-54; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A; UNCITRAL, report on fourth session (1971), paras. 82-84; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

regular and not overdue, provided that such holder was, when taking the bill, without knowledge of any claims or defenses affecting the bill or of the fact that it was dishonoured.

COMMENTARY

Paragraph (2): "bill"

Article 1 (1) of this Law provides that the uniform law shall apply to an international bill of exchange. Article 1 (2) specifies the circumstances under which an instrument is an international bill of exchange. This Law uses the Expression "bill" to replace the longer expression "international bill of exchange".

Paragraph (3): "endorsement"

Relevant legislation

BEA—sections 2, 31

UCC—sections 3-202 (2) and 204

ULB—article 13

Subparagraph (a)

1. The existing legal systems refer to the concept of "endorsement" without defining this term. In the interest of clarity and uniformity, this Law includes a definition of this basic concept. Under this definition, an endorsement must comply with two basic requirements. First, it must be signed by the proper person, i.e., the payee or an endorsee from the payee, or any person who is designated under an uninterrupted series of such endorsements. Second, it must be done in a proper formal way: i.e., by a signature with or without a statement designating the person to whom the bill is payable.

Example A. The payee signs "pay A". This is a proper endorsement. It indicates the person to whom the bill is payable (A), and it is signed by a proper person (the payee).

Example B. The bill is stolen from the payee by T. The thief forges the payee's signature and orders the bill to be paid to B. This forgery is not an endorsement, since it is not signed by the proper person as specified in the definition.

"An uninterrupted series of such endorsements"

2. The first endorser is always the payee. The endorsee from the payee is the person who is indicated by the payee as the one to whom the bill is payable. This endorsee, in his turn, will be the second endorser. The person who is indicated by him is the next endorsee, etc. By such indication, an uninterrupted series of endorsements will be created, in a way that from the face of the bill the last possessor can trace his right to the bill to the payee.

Example C. The payee endorses the bill by writing "pay A" and signing his name. A endorses the bill by writing "pay B" and signing his name. B acquires the bill through an uninterrupted series of endorsements.

Example D. The payee endorses the bill "pay A" and signs his name. A delivers the bill to B without endorsing it. B writes "pay C" and signs his name. The series of endorsements was interrupted following the endorsement by the payee.

Example E. The payee endorses the bill "pay A" and signs his name. A endorses the bill by merely signing his name and delivers the bill to B. B delivers it to C. C acquired the bill through an uninterrupted series of endorsements.

Subparagraph (b): "endorsement in blank"

Relevant legislation

BEA—section 34 (1)

UCC—section 3-201 (2)

ULB—article 13

An endorsement in blank means an endorsement, as defined in article 5 (3) (a) "which consists solely of the signature

of the endorser or which includes a statement to the effect that the bill is payable to any person in possession of the bill". It differs from a special endorsement (article 5 (3) (c)) since the person to whom the bill is to be payable is not a specific person but is any person in possession of the bill.

Example F. The payee signs his name and provides:

- (1) Pay "any person"; or
- (2) Pay "bearer";

In those two cases the bill was endorsed "in blank". A bill is also endorsed in blank if the endorsee merely signs his name.

Paragraph (4): "holder"

Relevant legislation

BEA—section 2

UCC—section 1-201 (20)

1. The rights to and upon a bill are vested in the holder (article 26). He has the right to receive payment at maturity, and payment to him discharges the party paying (article 70). Being a "holder" is a necessary element for qualifying as a protected holder. Under part five of this Law, the holder has the duty to present the bill for acceptance and for payment, and, in the event of dishonour, to protest the bill and to give notice of dishonour.

2. Pursuant to article 5 (3) (a), in order to be a holder, one must

- (a) Be a payee or an endorsee; and
- (b) Be in possession of the bill.

If one of those requirements is missing, the person is not a holder.

Example G. The payee endorsed the bill "to A" (a "special" endorsement) and delivered the bill to A. A is the holder.

Example H. The payee endorsed the bill to "A", and delivered the bill to B. Neither A nor B is a holder.

Example I. The payee endorsed the bill in blank and delivered it to A. A is the holder.

Example J. The payee endorsed the bill in blank. The bill was stolen by T. T is the holder. Since the payee is not "in possession" of the bill, he is not the holder.

3. Under the definition of "holder", a drawer or guarantor are not holders since they are neither a "payee" nor "endorsee". It is provided, however, that they have rights on the bill (see articles 36 and 44 (3)).

Example K.

4. An acceptor dishonoured the bill. The holder exercised his rights of recourse, and was paid by the drawer. The bill was delivered to the drawer without an endorsement. The drawer (being neither "payee" nor "endorsee") is not the holder of the bill. However, he has rights on the bill against the acceptor in accordance with article 36.

5. A payee or endorsee may reacquire a bill. Even though the bill is not endorsed to them, in connexion with the reacquisition, the "payee" or "endorsee", comply with the definition of "holder".

6. If a holder parts with possession of the bill, he ceases to be the holder. His rights are determined by the rules on "lost bills".

7. For the purposes of the definition of holder, it is irrelevant whether the possession of the bill is lawful or not. As seen from example D, even a thief may be a holder. Of course, if the possession is unlawful, there may be a defence on or a claim to the bill pursuant to article 24.

8. To be a "holder", the possessor need be the owner of the bill. When a bill is endorsed "for collection", the endorsee in possession is the holder of the bill, although he may be only an agent of the endorser rather than the owner of the bill.

Paragraph (5): "issue"

Relevant legislation

BEA—section 2

Cross references

Presentment for payment of an undated bill: article 53 (c)

Interest on an undated bill from the issue thereof: article 8 (3)

The word "issue" is used several times in the draft. It means the first transfer of a bill to a person who takes it as a holder. The usual case is where the drawer delivers the bill to the payee. If the drawer makes the bill payable to himself and the drawer-payee endorses and transfers the bill to an endorsee, the bill is then "issued" to such endorsee. It should be noted that delivery of the bill by the drawer to the drawee for acceptance is not an "issue" of the bill, since the drawee does not take it as a holder.

Paragraph (6): "party"

The draft uses the term "party" to refer to a party "to the bill", i.e., a person who signed the bill. The drawer, endorser, acceptor and guarantor are parties to the bill. On the other hand, the drawee is not a party to the bill.

Paragraph (7): "protected holder"

Relevant legislation

BEA—section 29

UCC—sections 3-302 and 304

ULB—articles 16 and 17

1. The main advantages of a negotiable instrument result from the strong legal position of a protected holder, who takes the bill free from claims or defences (article 25).

2. To be a protected holder, a person must be a "holder" of a bill which appears on the face of it to be complete and regular and not overdue; he must take the bill without knowledge of any claim or defence or discharge affecting the bill and of the fact that it was dishonoured.

"On the face of it appears to be complete and regular"

3. A person cannot qualify as a protected holder if the bill, on the face of it, does not appear to be complete and regular. For example, a bill would not appear to be "complete" if there is a blank space for the date of issue and the date of issue is missing; the bill would not appear to be "regular" if the name of the first endorser does not correspond to the name of the payee. The expression "on the face of it" shows that the holder need not look beyond the instrument, and refers to both the face and the back of the bill.

"On the face of it appears to be ... not overdue"

4. A holder who takes a fixed-term bill after the expiration of the term cannot qualify as a protected holder. Such a bill should have been paid, and its circulation cast doubt on its value.

5. A dated demand bill should be paid within one year of its date (article 53 (f)). If the holder takes the bill after such time, he cannot qualify as a protected holder. If a demand bill is undated, it should be presented for payment within one year of its issue (article 53 (f)). However, this date may not be known to the holder. Consequently, he takes the bill without such knowledge, he may qualify as a protected holder since, from its face, the bill does not "appear to be overdue".

"Without knowledge"

6. A holder cannot qualify as a protected holder if, when taking the bill, he knows about the existence of claims or defences affecting the bill or about the fact that the bill was dishonoured. Such holder takes the bill at his own risk, and it is not the policy of the uniform law to protect him. For the definition of the expression "without knowledge" (and especially the effect of negligent failure to know) see article 6 and commentary.

"When taking the bill"

7. A holder may be a protected holder if knowledge of claims, defences or dishonour was acquired by him after he has taken the bill.

8. A person may be a protected holder even if he has not given value or consideration for the bill. This rule is consistent with some legal systems and departs from the approach of others (see BEA, section 29 (1) (b), and UCC, sections 3-202 (1) (a) and 3-303). The present approach was selected because of the problems of unifying the various views on "value" (or "consideration") among divergent legal systems.

Article 6

For the purpose of this Law, a person is considered to have "knowledge" of a fact if he has actual knowledge thereof [or if the absence of knowledge thereof is due to [gross] negligence on his part] [or if he has been informed thereof or if the fact appears from the face of the bill].

Relevant legislation

BEA—section 29 (1) (b), 59 (1) and 90

UCC—section 1-201 (19) and (15), 3-303 and 304

ULB—articles 16, 17 and 40

Cross references

Knowledge in case of forged endorsement: article 22

Knowledge in case of forged signature: article 28

Knowledge in case of material alteration: article 29

Knowledge in case of defects of an endorsed bill: article 42

COMMENTARY

In several provisions of the uniform law, the rights or liabilities of a party are dependent on whether he transferred or took the bill "without knowledge" (see cross references). Article 6 provides that for the purpose of the uniform law, knowledge means actual knowledge of a fact. The main question in this respect is whether the concept of "knowledge" should be extended beyond actual knowledge to cover the two following cases: (a) cases in which a person in the past had knowledge about a fact but had forgotten this fact so that he did not have actual knowledge of the fact at the time he took or transferred the bill; and (b) cases in which the absence of actual knowledge may be attributed to negligence (or gross negligence). On this issue the rules of the main legal systems are in conflict, and it is difficult at this stage to frame a single rule. In view of this fact, the above draft of article 6 sets forth alternative texts for consideration by the working group.

*Section 2. Interpretation of formal requirements**Article 7*

The sum payable by a bill is a definite sum although the bill states that it is to be paid

(a) With interest; or

(b) By stated instalments; or

(c) According to an indicated rate of exchange or according to a rate of exchange to be determined as directed by the bill.

Relevant legislation

BEA—section 9

UCC—section 3-106

ULB—articles 5 and 33

Cross references

Amount of the bill: article 8 (1) (2)

Interest (no date specified from which interest is to run): article 8 (3)

Interest (no rate specified): article 8 (4)

Interest to be paid after maturity: articles 67 and 68

Rate of exchange (no rate specified): article 74

COMMENTARY

1. This article provides that if a bill states that it is to be paid with interest, by stated instalments, or according to a certain rate of exchange the sum payable by such a bill shall be a definite sum for the purpose of article 1 (2) (b). The article thus settles a sharp controversy between the principal legal systems. Anglo-American law permits the stipulation of interest on any bill (BEA, s. 9 (1) (a) and UCC, s. 3-106 (1) (a)), whereas the Geneva Uniform Law allows such a stipulation only in the case of bills payable at sight or at a fixed period after sight and denies it any effect to a stipulation for interest in the case of bills payable at other maturities (ULB, article 5). A majority of those who replied to the questionnaire favour a rule permitting the stipulation of interest (see A/CN.9/48, para. 26, UNCITRAL Yearbook, vol. II: 1971, part two, II, 2) and article 7 responds to this view.

2. Article 8 (3) and (4) set forth rules in respect of the calculation of interest on bills which do not specify the rate from which interest is to run or which do not specify the rate.

3. The same considerations have prevailed with respect to paragraph (b). A bill may be made payable by instalments, but by virtue of article 1 (2) (b) and (c), such a bill must specify the amount of each instalment and the date on which it is payable.

4. Paragraph (c) sanctions the common practice of bills drawn in a currency which is not that of the place of payment. If no rate of exchange is indicated or the bill contains no directions to that effect, article 74 will apply.

Article 8

(1) If there is a discrepancy between the amount of the bill expressed in words and the amount expressed in figures, the sum payable shall be the amount expressed in words.

[(2) If the amount of the bill is specified in a currency having the same designation but a different value in the country where it was drawn and the country where payment is to be made, the designation shall be considered to be in the currency of the country where payment is to be made [provided that the place where payment is to be made is indicated on the bill].

(3) Where a bill states that it is to be paid with interest, without specifying the date from which interest is to run, interest shall run from the date of the bill [and if the bill is undated, from the issue thereof].

(4) Where a bill states that it is to be paid with interest, without specifying the rate, simple interest at the rate of [five] per cent per annum shall be payable.

Relevant legislation

BEA—sections 9 and 72 (4)

UCC—sections 3-106, 118 (c)

ULB—article 6

Cross references

Interest: article 7

Issue: article 5 (5)

COMMENTARY

Paragraph (1)

1. This paragraph deals with bills where there is a discrepancy between the two, and follows in substance the relevant provisions of the BEA, UCC and ULB. The sum payable by a bill may of course be expressed in words only or in figures only.

Paragraph (2)

2. This provision envisages the case where, for instance, a bill for X francs is drawn in Paris, France, and made payable in Geneva, Switzerland. In the absence of any express indication to the contrary, the bill is then payable in Swiss francs.

3. During the discussions on this paragraph with interested international organizations, the view was expressed that this rule should only obtain if a place of payment is indicated on the bill. A proviso to that effect is put between brackets.

Paragraph (3)

4. As to "issue", see article 5 and commentary.

Paragraph (4)

5. If no rule of interest is specified simple (rather than compound) interest is payable unless the bill contains a stipulation for the payment of compound interest. As in the case of a rate of interest fixed on the bill, the legal rate of interest is payable only until maturity. After maturity, the rate of interest specified in article 67 (b) or article 68 (b) will be applicable.

Article 9

(1) A bill is payable on demand

(a) If it states that it is payable on demand or at sight or on presentment or if it contains words of similar import;

(b) If no time for payment is expressed.

(2) A bill which is accepted or endorsed or guaranteed after maturity is a bill payable on demand as regards the acceptor, the endorser or the guarantor.

(3) A bill is payable at a definite time if it states that it is payable

(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the bill; or

(b) At a fixed period after sight; or

[(c) By instalments at successive dates, even when it is stipulated in the bill that upon default in payment of any instalment the unpaid balance shall become due immediately.].

(4) The time of payment of a bill payable at a fixed period after date is determined by reference to the date stated on the bill regardless of whether bill is ante-dated or post-dated.

Relevant legislation

BEA—sections 10 and 11

UCC—sections 3-108 and 109

ULB—articles 2, 33 and 34.

COMMENTARY

Bills payable on demand

1. Paragraph (1) (a) permits a wide latitude in the use of expressions which make a bill payable on demand. The requirement of one standard expression would not appear to

be justifiable in view of well-established practices in different parts of the world.

2. As to the period of time within which a demand bill must be presented for payment, see article 53 (e).

3. Paragraph (1) (b) restates similar rules found in the principal legal systems.

4. Paragraph (2) provides that the acceptance, endorsement or guarantee of an overdue bill will make the bill payable on demand as regards the acceptor, the endorser and the guarantor. Similar rules are found in the BEA (section 10) and the UCC (section 3-108).

Bills payable at a definite time

5. The word "sight" in paragraph (3) (b) refers to presentment for acceptance. "After sight" bills must be presented for acceptance (article 46 (1) (b)) in order to determine the date of maturity.

6. Article 7 (b) provides that a sum payable is a "definite sum" if the bill states that it is to be paid by stated instalments (i.e. say \$100 on the first of January 1973, \$100 on the first of January 1974 etc.). Article 9 (3) (c) provides a parallel rule as to the date of the bill, i.e. that a bill is payable at a definite time if it states that it is payable by instalments at successive dates. It is also provided that a bill is payable at a definite time if it states that upon default in payment of an instalment, the unpaid balance shall become due immediately. This last provision is put between brackets to indicate doubt as to whether such a rule is advisable. The holder of such a bill may not know, from its face, if there is a default and therefore he may not know what is the amount due. (It may also be noted that if such a rule is to be retained it might be included either in article 9 which deals with the definition of a "definitive time", or article 7 which deals with the definition of a "definitive sum").

7. Paragraph (3) (a) provides that bill is payable at a definite time if it states that it is payable at a fixed period after the date of the bill. Paragraph (4) provides further that: by the expression "date of the bill" is meant the date stated on the bill regardless of whether the bill is ante-dated or post-dated.

Example A. On the first of January 1972, the drawer draws a bill payable three months after date. The drawer writes on the bill the first of January 1971 [or the first of January 1973] as the date of the bill. Though such date is factually incorrect this does not prevent the bill from expressing a definite time of payment. Such time is the first of April 1971 [or the first of April 1973] and not the first of April 1972.

8. If the instrument states that it is payable at a fixed period after date, and no such date is indicated, the instrument is incomplete. The possessor of the instrument has the right to insert the date of the bill in accordance with the provisions of article 11.

Article 10

(1) A bill may

(a) Be drawn upon two or more drawees,

(b) Be signed by two or more drawers,

(c) Be payable to two or more payees.

(2) If a bill is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the bill may exercise the rights of a holder. In any other case the bill is payable to all of them and the rights of a holder can only be exercised by all of them.

Relevant legislation

BEA—section 6 (2), 37 (3)

UCC—sections 3-110 (d), 3-116

Cross references

- Signature: article 27
 Negotiation of a bill: article 13
 Discharge: part six of the Law.

COMMENTARY

Paragraph (1)

1. Article 1 (2) provides that a bill is a written instrument which, *inter alia*, contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite sum of money to a specific person (the payee). The purpose of this paragraph is to make it clear that a written instrument is also a bill if the direction to pay is made by more than one person, or if the persons directed to pay or to receive payment are several.

Paragraph (1) (a)

2. Although inquiries amongst banking and trade institutions revealed that a plurality of drawees is only infrequently formed on bills, the majority view amongst those consulted favoured a rule that would permit such practice expressly.

Paragraphs (2) and (3)

3. This paragraph deals with the case where a bill is drawn payable to two or more payees. It provides a rule of interpretation whereby if the bill does not state expressly that such payees are in the alternative, it is payable to all of them and only all of them can exercise the rights of a holder.

Example A. A bill is drawn payable to A and B. A endorses the bill to C. What are C's rights? If A has authority to endorse the bill in the name of B, C is a holder, and has all the rights which a holder has under this Law. On the other hand, if A has no authority to endorse the bill on behalf of B, his signature is not an "endorsement" (as defined in article 5 (c)) since it is not signed by the proper persons, i.e., A and B together.

4. Where the bill provides that it is payable to A or B, every one of them in possession of the bill is its holder (see definition of holder in article 5 (4)); and every one of them in possession of the bill may exercise the rights of a holder as provided by this Law.

Section 3. Completion of an incomplete instrument*Article 11*

(1) The possessor of an instrument which

(a) Contains, in the text thereof, the words "Pay against this International Bill of Exchange, drawn subject to the Convention of..." (or words of similar import), and

(b) Is signed by the drawer,

but which lacks elements pertaining to one or more of the other requirements set out in article 1 (2), shall be presumed to have received authority from the drawer to insert such elements, and the instrument so completed is effective as a bill.

(2) When such an instrument is completed otherwise than in accordance with the authority given, the lack of authority cannot be set up as a defence against a holder who took the bill without knowledge of the lack of authority.

Relevant legislation

- BEA—section 20
 UCC—section 3-115
 ULB—article 10

Cross references

"Pay against this International Bill of Exchange": article 1 (2)

"Knowledge": article 6

COMMENTARY

1. Article 11 deals with the completion of an instrument which lacks one or more of the requirements set forth in article 1 (2) of this Law: the sum of the bill, the name of the payee, the country of the drawer, drawee or payee, etc. However, the presumed authority under article 11 does not include the authority to insert: (a) the signature of the drawer (required by article 1 (2) (d)); or (b) the words "Pay against this International Bill of Exchange, drawn subject to the Convention of..." (required by article 1 (2) (d)). Therefore, only an instrument on which the designation already appears, and which is signed by the drawer, can be completed as a bill by inserting other elements required by article 1 (2) (e). Such completion would respond to the reasonable expectation of the parties.

2. If an instrument lacks elements pertaining to one or more of the requirements set out in article 1 (2), it is not a bill under this Law, and cannot be enforced as a bill until completed. When the missing elements have been inserted, the instrument becomes a bill, and the Law is applicable. Article 11 distinguishes between two cases: first, the completion was in accordance with the authority given: the bill is then effective as completed in the hands of any holder. The fact that it was previously not completed is not relevant. Second, the instrument was completed in contravention of the authority given: the instrument is a bill, but the lack of authority may be raised as a defence against a holder who knew about it.

Example. An instrument, containing in the text thereof the words "Pay against this International Bill of Exchange drawn subject to the Convention of..." and signed by the drawer is issued to the payee without the sum being stated. It is understood between the drawer and the payee that the sum to be inserted should be determined in the future. Without authority, the payee inserts an incorrect sum, and endorses the bill to A. What are A's rights?

If A took the bill without knowledge of the lack of authority, he has right on the bill, as completed, against the parties who signed it. If A knew about the unauthorized completion, the drawer may raise a defence based upon the fact that the instrument was completed without authority.

Part Three. Transfer and negotiation*Article 12*

The transfer of a bill vests in the transferee the rights to and upon the bill of the transferor.

Relevant legislation

- BEA—sections 29 (3), 31 and (4)
 UCC—section 3-201

Cross references

- Definition of "protected holder": article 5
 Claims and defences: article 24 (1)

COMMENTARY

1. The uniform law makes a distinction between the transfer of a bill (article 12) and its negotiation (article 13). When a bill is transferred, the consequences thereof are similar to an assignment: the transferee has the same rights as the transferor. When a bill is negotiated, the transferee is a holder, and may qualify as a protected holder. His rights are not based only on those of this transferor but derive directly from his being a holder and if he qualifies as such, from his being a protected holder.

Example A. A bill payable to P is accepted by the drawee. The payee (P) transferred the bill to A without endorsement. What are A's rights? A is not a holder (see article 5) and therefore does not have the rights of a holder (see article 23). Article 12 provides that A has the same rights to and upon the bill as the payee. On these facts the payee has rights on the bill against the acceptor and the drawer; the same rights are vested in A.

Example B. P by fraud induces the drawer to draw a bill payable to P (the payee). P transfers the bill without an endorsement to A. A is without knowledge of the fraud. A brings an action against the drawer. The drawer has a defence based on fraud against P; under article 12, the drawer may also raise the defence of fraud against A.

2. In addition to the cases where a bill is transferred without being endorsed, article 12 applies also to cases where a bill is negotiated. In this case the transferee may rely either on his rights as a transferee, or on his independent rights as a holder or if he so qualifies, as a protected holder.

3. It will be noted that the "transferor" under article 12 may be a "protected holder" who has special rights under article 25. Such a protected holder may "transfer" the bill to one who would not qualify as a "protected holder" under article 25. This article deals with the circumstances in which the transferee receives the same protection as the transferor.

Example C. The payee by fraud induces the drawer to draw a bill payable to the payee. The payee endorses the bill to A, who is a protected holder pursuant to article 5. A transfers or endorses the bill to B, who knows about the fraud but did not participate in it. Upon dishonour of the bill, B brings an action against the drawer.

According to article 12, the drawer is liable to B. The drawer has no defence against A, as A is a protected holder (article 25). In the above facts, the rights of A were transferred to B. Therefore the drawer has no defence against B.

4. The reason for the so-called "shelter rule" is not to protect a holder who knows about the defect, but rather to enable a protected holder to transfer or negotiate the bill freely. Unless the transferee from a protected holder may enforce the protected holder's rights, in many cases the protected holder could not receive the full benefit from the right conferred on him by the uniform law.

"Rights to and upon the bill"

5. This expression indicates that the rights transferred are of two kinds:

(a) the rights upon the bill against parties who signed it. The extent of those rights is discussed in articles 34 to 45; and

(b) the proprietary rights to a bill (i.e., the proprietary right to demand the return of the bill or its value). The exercise of these proprietary rights is generally not dealt with by the uniform law, and is left to national law.

Article 13

(1) A bill is negotiated when it is transferred

(a) by endorsement and delivery of the bill by the endorsed to the endorsee, or

(b) by mere delivery of the bill but only if the last endorsement is in blank.

(2) Negotiation shall be effective to render the transferee a holder even though the bill was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would subject the transferee to claims to the bill or to defences as to liability thereon.

Relevant legislation

BEA—sections 22 (2), 31, 55 (2)

UCC—sections 3-202 (1), 3-207

ULB—articles 7 and 11

Cross references

Definition of "endorsement": article 5

Definition of "endorsement in blank": article 5

Definition of "holder": article 5

Claims and defences: article 24

COMMENTARY

Paragraph (1)

1. This paragraph follows in substance the relevant provisions of the existing legal systems. A bill is negotiated when the holder endorses it (either specially or in blank) and delivers it to the endorsee (see article 5). When a bill is negotiated, the transferee is a holder, and thereby acquires the rights, and is subject to all the liabilities, of a holder (see articles 5 and 24).

Example A. The payee endorses a bill specially to A, and delivers it to A. By these acts the bill was negotiated to A, and A thereby becomes the holder of the bill.

Example B. The payee endorsed a bill specially to A, but does not deliver the bill to A. Without further endorsement the payee delivers the bill to B. The bill was not negotiated either to A or to B. Neither A nor B is a holder.

Example C. The payee endorses a bill in blank and delivers it to A. The bill was thereby negotiated to A, who became its holder. If A delivers the bill to B, even without further endorsement, the bill is thereby negotiated to B, and B will be the new holder.

Paragraph (2)

2. The purpose of this paragraph is to provide that a bill is negotiated (and therefore the transferee is a holder), even though the transferor is a person without legal capacity, or the endorsement or delivery was obtained by fraud or other illegal means. The main importance of this provision lies in the fact that such transferee, being a holder, may qualify himself in proper circumstances as a protected holder. Even if such holder is not a protected holder, he may negotiate the bill to a person who may take it, in proper circumstances, as a protected holder.

3. This paragraph does not deal with the question of liability on a bill of the party negotiating it, nor does it impose the rights of a person to the bill. The party negotiating the bill may assert any defence or any claim available to him under articles 24 and 25 of this law.

4. Paragraph (2) does not impose any liability on a party who signed the bill under the circumstances mentioned in the paragraph. The question whether such party may raise the defence of *ius tertii* is governed by article 24 (3).

Example A. A induces the payee by way of fraud to negotiate to him a bill owned by the payee. Pursuant to article 13, the bill has been "negotiated" to A; consequently, A is a holder of the bill. The consequences are shown by the following examples.

Example B. The same facts as in example A. A brings an action against the payee P. Nothing in this article makes the payee P liable to A in spite of the fraud practised by A on P. Pursuant to article 24, the payee has a valid defence to A's action.

Example C. The same facts as in example A. The payee P brings an action against A to recover the bill or to prohibit A from negotiating the bill. The payee P will succeed if remedies of this type are permitted under the law of the place where the negotiation took place.

Example D. The same facts as in example A. A brings an action against the drawer. This question is not solved by article 13. The answer to this question is to be found in article 24.

Example E. By fraud A induces the payee (P) to negotiate to him a bill owned by P. A negotiates the bill to B, who takes it as a protected holder. P brings an action against B for conversion of the bill. P's action fails. According to article 13, A is a holder, and the bill was negotiated to B in circumstances that make B a protected holder. According to article 25, P's claim fails against a protected holder.

Example F. The same facts as in example E. B brings an action against the drawer and the payee (P). According to article 13, A was a holder and therefore B, being without knowledge of the fraud, may be a protected holder. According to article 25 the defences of the drawer and the payee are not available against the protected holder.

Article 14

Where a bill is transferred without an endorsement necessary to make the transferee a holder, the transferee is entitled to require the transferor to endorse the bill to him.

Relevant legislation

BEA—section 31 (4)

UCC—section 3-201 (3)

Cross references

Definition of "negotiation": article 13

Definition of "holder": article 5

Definition of "special endorsement": article 5

Definition of "endorsement in blank": article 5

COMMENTARY

1. Order bills are often transferred by a holder without an endorsement. Article 12 of this law provides that the transferee has the same rights as the transferor. But the transferee is not a holder. He may wish to have the transfer completed by endorsement so that he will be able to qualify as a holder and under the proper circumstances as a protected holder. Article 14 grants him that right. If the transferor refuses to endorse the bill, the court would require him to do so.

2. No provision is made as to the kind of endorsement (e.g., special, blank, unqualified) the transferor is obliged to give, since that depends on the circumstances of the transfer.

Article 15

The holder of a bill endorsed in blank may convert the blank endorsement into a special endorsement by indicating therein that the bill is payable to himself or to some other person.

Relevant legislation

BEA—section 34 (4)

UCC—section 3-204 (3)

ULB—article 14

Cross references

Definition of "holder": article 5

Definition of "endorsement in blank": article 5

Definition of "special endorsement": article 5

COMMENTARY

The provisions of this article are in substance those of the existing legal systems. The importance of this provision is twofold. First, the alteration of a blank endorsement into a special endorsement, since authorized therein, is not a material alteration; consequently, the provisions of article 29 do not apply. Second, the holder by merely converting the blank endorsement into a special endorsement does not incur liability on the bill, since he has not signed the bill (see article 27 (a)).

Article 16

When the drawer has included in the bill, or the endorser in his endorsement, words prohibiting transfer, such as "not transferable", "not negotiable", "not to order", or words of similar import, the bill cannot be negotiated except for purposes of collection.

Relevant legislation

BEA—sections 8 (1), and 35

UCC—sections 3-205, 3-206

ULB—articles 11 and 15

Cross references

Definition of "endorsement": article 5

Definition of "negotiation": article 13

Endorsement for collection: article 20

COMMENTARY

1. By virtue of this article, the drawer or an endorser may insert in the bill or in the endorsement words prohibiting its transfer. The legal effect of such wording is to prevent the further negotiation of the bill, except for collection under article 20. It should be noted that article 16 does not prevent the transfer of such a bill by ways that do not amount to negotiation.

2. Under article 1 (2) of this law, a bill may be payable "to a specific person"; it need not be payable "to order" of the payee. Therefore, the mere omission of that expression does not prevent the negotiation of the bill. To prevent such negotiation the bill must prohibit transfer, as by providing that it is not to order.

3. The Secretariat enquired among banking and trade institutions about the practice followed in connexion with endorsements prohibiting transfer of a bill. The information received suggests that such endorsements are rarely used and that their legal effect is unclear.

4. The Secretariat concluded that there was not sufficient evidence to justify limiting the power of the holder to insert in the bill a provision prohibiting its transfer.

Article 17

An endorsement purporting to negotiate a bill subject to a condition shall be effective to negotiate the bill irrespective of whether the condition is fulfilled.

Relevant legislation

BEA—section 33

UCC—section 3-202

ULB—article 12

Cross references

Definition of "endorsement": article 5

Definition of "negotiation": article 13

COMMENTARY

1. Article 17 provides that a bill is negotiated and the transferee is a holder even if an endorsement is made conditional (e.g., "pay on the arrival of the goods") and even if the condition is not fulfilled. The condition does not avoid the negotiation of the bill.

2. This article is based on provisions that are similar in substance in the main legal systems. It is in conformity with majority view expressed in the replies to the Questionnaire on negotiable instruments (A/CN.9/48, para. 71).

3. This article, by its terms, is limited to endorsements; it does not impair the rule of article 1 (2) that a bill must contain "an unconditional order" to pay.

Article 18

An endorsement purporting to transfer only a part of the sum payable shall be ineffective as an endorsement.

Relevant legislation

BEA—section 32 (2)

UCC—section 3-202

ULB—article 12

Cross references

Definition of "endorsement": article 5

"Sum payable": articles 1 (2), 7, 8

COMMENTARY

1. Article 18 provides that "a partial endorsement" is not effective as an endorsement. The transferee of a bill endorsed as to part of the sum cannot, therefore, qualify as a holder. Nothing in this article can prevent the assignment of a part of a bill: this problem is not dealt with by the uniform law.

2. This article is based on provisions that are similar in substance in the main legal systems. It is also in conformity with the majority view expressed in the replies to the questionnaire on negotiable instruments (A/CN.9/48, para. 71).

Article 19

Where there are two or more endorsements, it shall be presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the bill.

Relevant legislation

BEA—section 32 (5)

UCC—section 3-414 (2)

Cross references

Definition of "endorsement": article 5

COMMENTARY

This provision is based on substantially similar provisions found in the BEA and UCC. It establishes a presumption of rank for the purpose of the right of recourse by an endorser, who paid the bill, against prior endorsers (see article 41: "subsequent to himself"). This provision is also relevant for determining to what extent the discharge of one endorser discharges subsequent endorsers (see article 78 (1): "any party who has a right of recourse against him").

Article 20

(1) Where an endorsement for collection contains the words "for collection", "for deposit", "value in collection", "by procurator", or words of similar import, authorizing the endorsee to collect the bill, the endorsee

(a) may only endorse the bill on the same terms; and

(b) may exercise all the rights arising out of the bill and shall be subject to all claims and defences which may be set up against the endorser.

(2) The endorser for collection shall not be liable upon the bill to any subsequent holder.

Relevant legislation

BEA—section 35

UCC—section 3-205 and 206

ULB—article 18

Cross references

Definition of "endorsement": article 5

Claims and defences: article 24

*COMMENTARY**Paragraph (1)*

1. An endorsement for collection grants to the endorsee the power to receive payment of the bill and makes him an agent of the endorser. The endorsee for collection has the same rights on the bill as his endorser: defences that prior parties may have against the endorser for collection are available against the endorsee for collection.

Example A. By fraud the payee induces the drawer to draw a bill payable to the payee. The payee endorses the bill "for collection" to A. A sues the drawer. By virtue of paragraph (1) (b) of this article, the drawer, since he could raise the defence of fraud against the payee, may raise it also against the payee's endorsee for collection.

2. To collect the bill it may be necessary for the endorsee for collection to endorse the bill further. Article 20 (1) (a) provides that such endorsement may be effected without specific authorization on the bill from the endorser for collection.

Paragraph (2)

3. The reason for the rule that an endorser for collection is not liable on the bill to any subsequent holder is that the purpose of the endorsement is to collect the bill for the endorser and not from him.

Example B. The payee endorsed the bill "for collection" to A. Fraudulently, and without the permission of the payee, the bill was sold (and endorsed in blank) by A to B. The acceptor refused payment, and B brought an action against the payee. By virtue of paragraph (2) the payee is not liable to B. In that respect, an endorsement for collection resembles an endorsement "without recourse" (see article 31).

Article 21

Where a bill is transferred or negotiated to a prior party, he may, subject to the provisions of this law, re-issue or further transfer or negotiate the bill.

Relevant legislation

BEA—section 37

UCC—section 3-208

Cross references

Transfer of a bill: article 12

Negotiation of a bill: article 13

Definition of "issue": article 5

As to the rights and liabilities of a prior party who acquired the bill: see article 77 and 78.

COMMENTARY

1. A bill may return to a prior party. This may happen in several ways: the bill may be endorsed to a prior party or may be delivered to him as a receipt for payment without any endorsement (see article 70 (2)). Article 21 provides that such prior party may re-issue or further negotiate the bill.

Example A. The payee endorsed the bill specially ("to the order of A"), to A. A endorsed the bill specially to B. The bill is dishonoured by the drawee, and paid by A who thereupon recovered the bill. According to article 22, A may negotiate the bill to D.

2. "Subject to the provisions of this Law"

Only a "holder" can negotiate a bill (see article 13). Therefore a prior party who re-acquires the bill can negotiate it only if he is a holder.

Example B. The payee endorsed the bill specially to A. A endorsed the bill specially to B. B endorsed the bill specially to the drawer. The drawer may negotiate the bill. Though the drawer was not a holder when he drew the bill (article 5), he became a holder when the bill was negotiated to him.

Example C. The payee endorsed the bill specially to A. A endorsed the bill specially to B. The bill is dishonoured by the drawee. The drawer pays it, and receives the bill without any endorsement. Under these circumstances the drawer is not a holder and he therefore may not negotiate the bill. However, he may re-issue it to A.

Article 22

(1) A person who acquires a bill through what appears on the face of the bill to be an uninterrupted series of endorsements shall be a holder even if one of the endorsements was forged or was signed by an agent without authority, provided that such person was without knowledge of the forgery or of the absence of authority.

(2) Where an endorsement was forged or was signed by an agent without authority, the drawer or the person whose endorsement was forged or was signed by an agent without authority shall have against the forger or such agent and against the person who took the bill from the forger or from such agent the right to recover compensation for any damage that he may have suffered because of the operation of paragraph (1) of this article.

(3) Subject to the provisions of article 28 (a) and (b), a forged endorsement or an endorsement by an agent without authority shall not impose any liability on the person whose signature was forged or on behalf of whom the agent purported to act when endorsing the bill.

Relevant legislation

BEA—section 24

UCC—section 3-404

ULB—articles 16 and 40

Cross references

Definition of "endorsement": article 5

Definition of "holder": article 5

Definition of "knowledge": article 6

COMMENTARY

1. The Geneva and the "common law tradition" systems differ considerably in respect of the effect of a forged¹ endorsement² on the rights and obligations of the parties to an order³ bill.⁴ Article 22 differs from the rules obtaining under these systems. A brief survey of the existing legal systems will be made, and the provisions of article 22 will then be examined.

1. THE EXISTING LEGAL SYSTEMS

A. The Geneva Uniform Law

2. Pursuant to the ULB (articles 16 and 40), a forged endorsement is considered to be a valid endorsement in so far as the rights of a non-negligent *bona fide* possessor or payor are concerned, provided that he established his title to the bill through an uninterrupted series of endorsements even though one or more were forged. The following consequences flow from the above rule:

(a) The *bona fide* possessor of a bill containing a forged endorsement has rights on the bill against parties who signed it, whether those parties signed the bill before or after the forged endorsement.

(b) A *bona fide* payment after maturity to the above-mentioned possessor discharges the payor. When the drawee pays the bill, he is entitled to debit the drawer's account with him.

B. The "common law tradition" systems

3. Both the BEA and the UCC deny effect to a forged endorsement. According to the BEA, a forged endorsement "is wholly inoperative, and no right to retain the bill or to give discharge therefor or to enforce payment therefor against any party thereto can be acquired through or under that signature" (BEA, s. 24). According to the UCC, a forged endorsement "is wholly inoperative as that of the person whose name is signed" (UCC, s. 3-404). It follows that:

(a) The *bona fide* possessor of a bill containing a forged endorsement has no rights on the bill against parties who signed the bill before⁵ the forged endorsement.

(b) The right to act upon the bill rests in the true owner, namely, the person from whom the bill was taken illegally. The true owner may recover the bill or its value from the unlawful possessor⁶ and also has rights upon the bill against parties who signed it before the forgery.⁷

¹ This difference applies also to the case of an endorsement by an agent acting outside his authority (BEA, s. 24; UCC, s. 3-404).

² All systems provide that the person whose signature is forged is not liable on the bill; see article 28 of the Uniform Law.

³ In respect of a bearer bill which was stolen from its owner, all systems provide that a *good faith* taker or payor has full rights, as if the bill was not taken illegally.

⁴ In the United Kingdom and several other Commonwealth countries, special rules apply as to a forged endorsement on cheques (arts. 60, 80 of the BEA and the Cheques Act 1957).

⁵ Both the BEA and the UCC, like the ULB, give the possessor rights against persons who signed the bill after the forgery. (See BEA, s. 55 (b), and UCC, s. 3-417.)

⁶ *Underwood (A.L.) Ltd. v. Bank of Liverpool* (1924) K.B. 775; UCC, art. 3-419. It should be noted that according to the UCC (art. 31-419 (3)), a bank acting as agent for collection, which is acting in good faith and in accordance with reasonable commercial standards is not liable in conversion to the true owner beyond the amount of any proceeds remaining in his hands.

⁷ See BEA, s. 70; UCC, s. 3-804.

(c) A *bona fide* payment after maturity to the person possessing the bill through a forged endorsement does not discharge the party making the payment. When the drawee pays the bill to the above-mentioned possessor, he is not entitled to debit the drawer's account. If the drawer's account was debited, it is the drawee's duty to reverse any resultant charge he made.⁸

(d) The drawee who paid the bill in good faith is entitled to recover the payment from the person paid.⁹

C. Who bears the risk of a forged endorsement?

4. The basic difference, in terms of bearing the risk of a forged endorsement, between the ULB and the BEA and UCC approach is the following: according to the ULB the risk of the forged endorsement rests upon the owner of the bill from whom the bill was stolen, while according to the BEA and the UCC, the risk rests upon the person who took the bill from the forger. The different results under the two main systems are shown by the following two examples:

Example A. The drawer drew and delivered a bill to the payee (P). T stole the bill from P. The thief (T) forged P's signature, and "endorsed" the bill to A, who took it without knowledge about the theft and forgery. A endorsed it to B, who took it without knowledge of the theft and forgery. B receives payment from the drawee, who pays without knowledge. The drawee debits the drawer's account.

Under the ULB, the payment by the drawee operates as a discharge of his debt to the drawer, and he is entitled to debit the drawer's account (i.e., the risk is not upon the drawee). As the bill is paid to the person entitled to payment, the drawer discharges his obligation to the payee (i.e. the risk is not upon the drawer). The risk of forgery rests, therefore, according to the ULB, on the payee, the last owner before the forgery, who lost possession of the bill.

Under the BEA and the UCC, payment by the drawee does not discharge his debt to the drawer. When the forgery is discovered he must credit the account of the drawer. (As a result, the risk does not remain upon the drawer; on the other hand, the drawer does not gain from the forgery since he is still liable upon the bill to the payee.) The drawee is entitled to recoup his loss, by shifting it to B, who in turn will shift it on A (i.e. the risk is not upon the drawee or the person paid by him). A cannot shift the risk back. He will bear it. Consequently, under the BEA and UCC the risk falls on the person who took the bill from the forger.

Example B. The drawer sent a bill by post to the payee (P). Before the bill reaches the payee, T stole the bill from the post. T forged P's signature, and "endorsed" the bill to A, who took it without knowledge about the theft or forgery. A endorsed it to B, who took it without knowledge. B receives payment from the drawee; the drawee's payment is without knowledge. The drawee debits the drawer's account.

Under the ULB, the drawee is discharged (i.e., the risk is not upon the drawee). The drawee is thus entitled to debit the drawer's account. The drawer has not paid the payee, as the bill has not reached the payee. It follows that the risk of the forgery is on the drawer, the owner of the bill from whom it was stolen, and whose account was debited.

Under the BEA and UCC the drawee is not discharged. He is not entitled to debit the drawer's account with him, and he must reverse it (i.e., the risk is not upon the

drawer; the drawer has not gained, as he is still liable to the payee under the obligation for which the bill was drawn). The drawee is entitled to recoup his loss by shifting it to B, who in turn will shift it to A (i.e., the risk is not upon the drawee or the person paid). A suffers the loss, as he presumably gave goods or services to the forger without receiving payment. Thus the loss ultimately falls on the person A who took the bill from the forger.

D. The advantages and disadvantages of the two approaches to forgery

5. The main advantages of the ULB, as compared to the BEA and UCC, are the following:

(a) The ULB promotes circulation and consequently easy financing of transactions by bills, since any possessor without knowledge is assured that a previous forged endorsement has no effect on his right to and upon the bill. Under the BEA and UCC, on the other hand, a possessor without knowledge may be hesitant in taking the bill, since he may have no right to, or upon, the bill if there is a previous forged endorsement.

(b) The ULB rule gives greater finality to payment. If a bill is given in payment of a debt, the payment will be final once the bill is paid by the drawer and it is no longer necessary to inquire whether the transferor or the transferee had rights to or upon the bill. In that respect payment by way of a bill resembles payment by way of money. Under the ULB, once the drawee paid the bill without fraud or gross negligence, the payment is final. The relations between the drawer and the drawee, the payee and the drawer (if the bill was stolen from the payee), and the endorsees among themselves, are settled promptly and with finality. On the other hand, under the BEA and UCC, the transactions must be reopened.

(c) The ULB rule provides economy of remedies. Pursuant to the ULB, when the drawee pays and debits the drawer's account, the risk of the forgery is automatically imposed on the party who should, under the ULB, bear the risk (i.e., the last owner before the forgery). There is no need for any action or litigation in order to impose the risk on such party. On the other hand, according to the BEA and UCC, a series of actions or remedies may be necessary to transfer the loss to the one ultimately responsible (i.e., the one who took from the forger). One may envisage several actions (and therefore possible disputes) before the risk rests on the taker from the forger. The first is the recrediting of the drawer's account; the second is the recouping by the drawee of the money paid; the third is the claim by the person paid against previous endorsees; the fourth is the action between the true owner and the drawer; the fifth is the action between the true owner and the drawee or subsequent endorser. Not all of those actions will actually take place and some of them are in the alternative, but there is an inherent risk of multiplicity of actions and remedies.

6. The main advantages of the approach of the BEA and UCC, compared to the ULB, are the following:

(a) It encourages the use of a bill by the drawer as a means of payment or credit, since the drawer is assured that he will not bear the risk of any forgery of an endorsement. Especially, it encourages the use of the mail as a means to transfer bills from the drawer to the drawee. Under the ULB, on the other hand, the potential drawer of a bill may be hesitant to issue the bill and to send it by post, since he may bear the risk if the bill is stolen from the post before it reaches the payee.

(b) The BEA-UCC approach puts the risk of forgery on the one who dealt with the forger. That party ought to bear the risk, as he can most easily prevent it. The endorsee should know his endorser. He should not take the bill from a stranger. The ULB, on the other hand, imposes the risk of forgery on the owner of the bill, who under normal and efficient procedures for handling bills (including the use of mail) cannot prevent theft and forgery of the bill.

⁸ Under the BEA, such payment is not made "in due course", as it is not made to the holder.

⁹ In the United Kingdom it is based on theory of "money had and received by mistake": See *London and River Plate Bank v. Bank of Liverpool* (1896) Q.B. 7.

II. ARTICLE 22 OF THE DRAFT

A. *The scope of the new rule*

7. Under article 22 of the draft the most important provisions are these: (a) in the hands of a holder without knowledge about the forgery, a forged endorsement should be considered to be a valid endorsement; (b) the last owner before the forgery has a right for damages from the forger and the person who took the bill from the forger. Of course, the person whose signature was forged is not liable on the bill.

8. As a result of those provisions:

(a) The possessor of a bill without knowledge about the forged endorsement has rights on the bill against parties who signed it, without regard whether those parties signed the bill before or after the forged endorsement.

(b) The last owner before the forgery loses his right to and upon the bill but has a right to receive compensation for that loss from the forger and from the person who took the bill from the forger.

B. *Who bears the risk of a forged endorsement?*

9. From the foregoing analysis it follows that the risk of forgery rests upon the party who took the bill from the forger. This may be shown by the following examples:

Example C. The drawer issued a bill to the payee (P), who received it. T stole the bill from P. T forged P's signature, and "endorsed" the bill to A, who took it without knowledge of the forgery. A endorsed it to B who took it without knowledge of the forgery. B received payment from the drawee. The drawee debited the drawer's account. Who bears the risk?

Pursuant to article 22 the payment by the drawee effects a discharge of his debt to the drawer (consequently, the risk is not on the drawee). Since the bill was paid to the person entitled to payment, the drawer discharges his obligation to the payee (consequently, the risk is not upon the drawer). The payee who lost his rights to and upon the bill is entitled to compensation from A for such loss. A cannot shift the risk to anyone else. Therefore, the risk of the forgery rests on A, who took the bill from the forger.

Example D. The drawer sent a bill by post to the payee (P). Before the bill reaches P it was stolen from the post. The thief forged P's signature, and "endorsed" the bill to A, who took it without knowledge of the forgery. A endorsed it to B who takes it without knowledge of the forgery; B received payment from the drawee. The drawee debited the drawer's account. Who bears the risk?

According to article 22, the payment by the drawee entitles him to debit the drawer's account. The drawer—who still is liable on his underlying obligation to the payee—has lost ownership of the bill, and he has a right for compensation against A. A cannot shift the risk to anyone else. Therefore, the risk of the forgery rests on A, the person who took the bill from the forger. In both examples there are two persons who acquired the bill subsequent to the forgery. If the forger receives payment from the drawee, the drawee is the person who acquired from the forger, and the risk rests on him.

Example E. The drawer issued the bill to the payee, who received it. The bill was stolen from the payee. The thief forged the payee's signature and presented the bill for payment to the drawee. The drawee pays without knowledge of the forgery to the forger and debits the drawer's account. Who bears the risk?

Pursuant to article 22, the payment by the drawee effects a discharge of his debt to the drawer and he is entitled to debit the drawer's account. The drawer is discharged from any liability on the bill. The payee lost his rights to and upon the bill. He is entitled to compensation for such loss from the drawee. The risk rests on the drawee.

C. *Rationale*

10. As pointed out above, each solution to the "forged endorsement" problem, whether under the BEA, the UCC or the ULB, has its advantages and disadvantages. Theoretically, the best solution would be one which embodies all the advantages of these systems, without being subject to their disadvantages. This cannot be done since any "positive" aspect of an optimum solution is of necessity accompanied by a "negative" aspect. As has been noted, the elements of an optimum solution include: (a) finality of payment; (b) economy of remedies; (c) allocation of the risk of forgery to the person best able to guard against the risk; (d) encouragement of the use of bills as payment, credit or security instruments. Article 22 offers a compromise solution; it attempts to embody the principal advantages of the existing legal systems, whilst avoiding or minimizing their main disadvantages.

Finality of payment

11. Under article 22 that advantage is substantially achieved; payment by the drawee is final. The legal relations between the drawee and the drawer, the payee and the drawer, the endorsee between themselves, the drawee and the person receiving payment are settled in a final way. The only "non-final" element is the rule that enables the person from whom the bill was stolen to recover from the person who acquired the bill from the forger.

12. *Economy of remedies:* payment by a drawee without knowledge of the forgery effects a discharge of his obligation to the drawer; the drawee may debit the drawer's account. There is no occasion for further action between them. It follows that there is no need for further action between the drawee and the person receiving payment, or between him and previous endorsers. The person whose signature is forged (payee or endorsee) loses his right to act upon the bill, and therefore there is no need for further action by him against the drawer, drawee or any subsequent endorsee. All these potential actions are replaced by a single right of action of the last owner of the bill before the forgery against the forger and the person who acquired the bill from the forger.

13. *The risk of forgery should be borne by the person who is best able to prevent the forgery:* it is the person who acquired the bill from the forger who can best prevent the circulation of the bill containing the forged endorsement. The endorsee should know his endorser. He should not take the bill from a stranger. Article 22 encourages this by giving the last owner before the forgery a right of action against the person who took from the forger.

14. *Encouragement to drawers to issue bills:* article 22 is a compromise between the ULB rule on the one hand, and the BEA and UCC rule on the other. The position of the drawer under article 22 is not as good as under the BEA and UCC, since under article 22 the drawee without knowledge of the forgery may always debit the drawer's account, and the drawer is subject to liability on the bill to any possessor without knowledge. On the other hand, the drawer's position is somewhat better under article 22 than under ULB rule: if the bill was stolen on its way to the payee, the drawer has a right of action against the person who acquired it. Furthermore, the drawer can protect himself against possible risk by drawing the bill "not to order" (under article 16), in which case a forgery of the payee's endorsement will not subject him to liability even to a possessor without knowledge. Such drawing does not prevent the negotiation of the bill for purposes of collection.

15. *Encouragement to endorsees to acquire the bill for payment:* article 22 is a compromise between the ULB rule and the BEA and UCC rule. An endorsee without knowledge of the forgery is assured that payment by the drawee is final, and he is not subject to a possible action by the drawer. Furthermore, article 22 grants to the endorsee rights on the bill not only against parties who signed it after the forgery but also against parties who signed the bill before the forgery.

Finally, if the endorsement to the endorsee is authentic, any previous forged endorsement does not impair his rights. It follows that if the endorsee can assure himself that his endorser is not the forger, such endorsee will not hesitate to take the bill under article 22. It is submitted that in most cases an endorsee is able to have such assurance and therefore article 22 may encourage him to take the bill.

16. *Encouragement to the drawee to pay the bill*: a drawee who has not signed an acceptance is not under an obligation to the possessor of a bill who presents the bill for payment. But such a drawee may be obliged contractually to the drawer to honour the bill. Under the "common law tradition" systems, such drawee is sometimes put in a dilemma: If he will pay the bill, his payment will not discharge him if an endorsement was forged. If he will refuse payment and it will turn out that the endorsement is authentic, he may be liable to the drawer. Article 22 protects such drawee, and eliminates the above-mentioned dilemma. Article 22 assures the drawee that if he pays a person known to him to be honest—in most cases this will be a collecting bank known to the drawee—his payment will discharge him.

D. Further remarks

17. Paragraph 22 (1) sets forth a qualification that the person who acquired the bill took it without knowledge of the forgery. It follows that in the hands of a person who knew about the forgery, "a forged endorsement is no endorsement". Such person is not considered as a holder, and has no right upon the bill against parties who signed it before the forgery.

18. The rule provided in article 22 applies to a forged endorsement and to an authentic endorsement by a person purporting to act as an agent but without authority to do so.

19. The purpose of article 22 is to determine the rights and liabilities of the parties to a bill in case of a forged endorsement. The article does not deal with the liability of the person whose endorsement is forged. Such person's liability is dealt with under article 28.

Part Four. Rights and liabilities

Section 1. The rights of a holder and a protected holder

Article 23

A person who signs a bill is liable to the holder thereof in accordance with the provisions of this Law.

Relevant legislation

BEA—section 38
UCC—section 3-301

Cross references

Definition of "holder": article 5 (4)
As to the right of the holder to negotiate the bill: article 13
As to the right of the holder to receive payment of the bill: articles 67 and 48
As to the right of the holder to discharge parties to the bill, see part six

COMMENTARY

A person who signs a bill undertakes to pay it at maturity. This obligation is subject to necessary presentment and protest by the holder. The rights on a bill are concentrated in the hands of the holder. In the absence of any claim or defence, the holder (even if he is not a "protected holder") has full rights on the bill. Article 23 emphasizes this fact. Although the rights of a holder are subject to substantial qualifications in other articles (e.g., article 24), the general principle stated herein is a useful starting-point for solving problems under this Law.

Article 24

(1) The rights on a bill of a holder who is not a protected holder are subject to

(a) Any valid claim to the bill on the part of any person; and

(b) Any defence of any party which would be available under a contract.

(2) A party may not avoid liability to a remote holder on the ground that he has a defence against his immediate party if such defence is based on legal relations not connected with the bill.

(3) A party may not avoid liability to a holder on the ground that a third person has a valid claim to the bill, unless such person himself has claimed the bill from the holder and informed such party thereof.

Relevant legislation

BEA—section 36 (2) and (5)
UCC—section 3-306
ULB—articles 7, 16 and 17

Cross references

Definition of "holder": article 5 (4)
Definition of "protected holder": article 5 (7)
Rights of a protected holder: article 25

COMMENTARY

1. Article 23 states the general rule that any party who signs a bill is liable to the holder. However, in certain cases a party has a defence to his liability on the bill even though his signature appears on it. For example, his signature may have been obtained by unlawful means or he may have been dispossessed of the bill.

2. In such circumstances, if the holder is a "protected holder" (articles 5 (7) and 25), or if he is a transferee from a protected holder (article 25 (2)), he takes the bill free from all claims or defences of any party.

3. On the other hand, if the holder is not a protected holder, article 24 applies: he is subject to any claim or defence of any party. His legal status is similar to that usually applicable to an assignee in a simple assignment of debt.

Example A. The payee by fraud induced the drawer to draw a bill payable to the payee. The payee endorsed the bill to A. A knew about the fraud. A brings an action against the drawer. Under article 24, the drawer has a valid defence against A. Since A did not take the bill without knowledge he is not a protected holder. We may assume that under the applicable law, fraud is a valid defence to a claim based on a contract. It follows that the drawee has a valid defence against the payee.

"Claims" and "defences"

4. The holder who is not a protected holder is subject to any valid "claim to" the bill by any person and to any "defence" of any party. A "claim" to a bill refers to the assertion of a right to possession of the bill; a "defence" refers to a party's right to establish that he is free from liability on the bill. The claim is based on a right to the bill by any person, whether that right is based on full ownership or on some other proprietary right (e.g., security right, bailment). The defence is based on a contractual defence against liability on the bill (e.g., fraud, duress, breach of promise).

Example B. The payee (P) endorsed a bill in blank and negotiated it to A. B obtained the bill from A by fraud and negotiated it to C, who knew about the fraud. A brings an action against C to recover possession of the bill. Under article 24, A has a valid claim to the bill against C. C is a

holder of the bill, since the bill was negotiated to him. The fact that the bill was obtained by fraud does not prevent "negotiation" (article 13 (2)). But since C is not a protected holder, C's possession is subject to A's claim.

Example C. The payee by fraud obtained the acceptance of the drawee (E). The payee endorsed the bill to A who knew of the fraud. A brings an action against E, based on his acceptance. Under article 24, since A is not a protected holder, he is subject to E's defence based on fraud.

In most cases, the person who has a defence as to his liability on the bill will also have a valid claim to the bill.

Example D. By way of fraud A obtained the endorsement of the payee (P) on a bill. A negotiated the bill to B who knew of the fraud. B brings an action on the bill against the payee, P. Under article 24, P has a valid defence against B, and he has a valid claim against B for possession of the bill.

5. Under paragraph 2, a party may not avoid liability to a remote holder on the ground that he has a defence against his immediate party if such defence is based on legal relations not connected with the bill, e.g., the right of set-off arising out of another transaction. Article 24 provides that while such a defence may be a good defence between the two parties between whom it arises (i.e., the immediate parties), such a defence is not available as against a remote party. Article 24 does not attempt to define what are the defences which are based on relations not connected with the bill, and how far are they available between immediate parties. This question is left to national law. Article 24 provides only that such a defence, even though available between immediate parties, is not available between remote parties.

6. Article 24 (3) deals with the defence of *ius tertii* a defence based on the claim of a third person rather than on the non-liability of the defendant.

Example E. The drawer (D) drew and issued a bill to the payee (P). By fraud A induced P to negotiate the bill to him. A brings an action against D. Does D have a defence based on the fraud A practised on P? Pursuant to article 24 (3), D has no such defence.

The main reasons for this rule are as follows: (a) The rule protects the drawer (or any other party), since his obligation on the bill will be discharged by his payment to the holder even if the drawer knows of the claim of another person (see article 70); (b) It is not proper to allow the drawer (or any other party) to advance a defence which is based on a claim which the person entitled to it may not wish to raise. However, if such person asserts his claim and informs the party thought to be liable about his claim, the defence of *ius tertii* is available.

Article 25

(1) The rights on a bill of a protected holder are free from

(a) Any claim to the bill on the part of any person; and

(b) Any defence of any party, except defences based on circumstances which render the obligation on the bill of such party null and void; and

(c) Any defence based on discharge or on the absence of liability on the ground that the bill was dishonoured by non-acceptance or by non-payment or was not duly protested.

(2) The transfer of a bill by a protected holder shall not rest in the transferee the rights of a protected holder if the transferee has participated in a transaction which gives rise to a claim to, or a defence upon, the bill.

Relevant legislation

BEA—sections 38 and 59

UCC—sections 3-305 and 3-602

ULB—articles 4 and 17

Cross reference

Definition of "protected holder": article 5 (7)

"Claims" and "defences": article 24

Rights of a person who takes from a protected holder: article 12

Rights of a holder not being a protected holder: article 24

Discharge of a party's liability: see part six

Absence of liability in case of dishonour: articles 50, 55 and 60.

COMMENTARY

Paragraph (1)

1. As has been noted under article 5, the main advantages of a negotiable instrument result from the strong legal position of a protected holder. He receives the bill free from any defences of previous parties, and free from claims to it by any person.

Example A. The payee by fraud induced the drawer to draw a bill payable to the payee. The payee negotiated the bill to A, a protected holder. A brings an action against the drawer. Pursuant to paragraph (b), the drawer may not raise the defence of fraud against A.

Example B. The payee endorsed the bill in blank and sent it to A. The bill was stolen from the mail. The thief sold the bill to B, who is a protected holder. The payee brings an action against B for recovery of the bill or its amount. Pursuant to paragraph (1) (a), the claim of the payee to the bill is not available against the protected holder.

2. The general rule embodied in article 25, that the protected holder takes a bill free from all defences of any party is subject to an important exception. The protected holder does not cut defences based on circumstances which render the obligation of a party null and void ("real defences").

Example C. The payee made the drawer issue, under physical menace, a bill payable to the payee. The payee negotiated the bill to A, a protected holder. A exercises a right of recourse against the drawer. According to article 25, the drawer will have a valid defence against A if under applicable national law the circumstances under which the signature was made render it null and void.

Example D. B asks A to sign a document as a witness. In fact and without knowledge A signs a bill as drawer payable to B. B negotiates the bill to C, a protected holder. C brings an action against A. According to article 25, A has a valid defence against C if, under applicable national law, the circumstances under which the signature was made render it null and void.

3. Under paragraph (1) (c) the discharge of a party is not effective against a subsequent protected holder. The defence of "discharge" is not a "real defence". The policy of this provision is to protect the protected holder who takes a bill without knowledge of the discharge. The payer has an effective means to protect himself from liability to a subsequent holder by exercising his right to demand surrender of the bill when he pays (see article 70 (2)); the subsequent holder has no equivalent means for self-protection.

Example E. A bill was drawn and accepted payable on 1 January 1972. The acceptor paid the bill to the then holder, but did not ask for the bill. On the same day the holder endorsed the bill to A, who took it as a protected holder. According to article 25, the acceptor is liable to A.

4. According to article 5 (7), a "holder" may be a "protected holder" only when he takes a bill which on the face of it appears not to be overdue. Since most cases of "discharge"

occur at or after maturity, the possibility of having a protected holder after a previous discharge is very limited. Still, this may occur, as will be illustrated by the following examples:

Example F. A bill was dishonoured by non-acceptance. The holder made no protest and endorsed the bill to A who took it before maturity and without knowledge that it was dishonoured. Has A rights on the bill against the drawer?

Under article 60, if the holder fails to protest the bill, the drawer is not liable. Nevertheless, pursuant to article 25, A, since he is a protected holder, has rights on the bill against the drawer.

Example G. A party to a demand bill was discharged by the holder (e.g., he paid the bill to the holder). After the discharge, but within the one-year period for presentment for payment, provided for by article 53 (e) the bill was endorsed to A. A may be a protected holder and may have rights, under article 25, against a party who is discharged.

5. Discharge of a party is effective against a protected holder who knows of the discharge. In many cases, such knowledge in itself prevents the holder from being a protected holder (e.g., he knows that the bill was paid and therefore he does not take it in "without knowledge"). But there are circumstances in which such knowledge in itself does not prevent a party from being a protected holder (e.g., the signature of a party was cancelled, and such cancellation is visible on the face of the bill). In such cases, article 25 provides that the party discharged is not liable to the protected holder. Nothing should prevent such a protected holder from exercising his right as a protected holder against other parties, even if such parties were previously discharged, provided the protected holder has no knowledge of such discharge.

Example H. A, the endorsee of a demand bill, waives his right against the payee-endorser; the waiver was effected by cancelling the payee's endorsement. The bill was paid by the acceptor. After the payment, A endorsed the bill to B who took it as a protected holder. What are B's rights against the payee and the acceptor? It follows from article 25 that B has no right against the payee, but has a right to be paid by the acceptor.

6. The liability of the drawer, endorser and guarantor is "secondary", in that their liability does not crystallize before the holder makes the necessary presentment and protest. A holder who fails to make the necessary presentment and protest has no right against secondary parties. If such holder negotiates the bill to a protected holder, such protected holder is not subject to the defence of non-presentment and non-protest. This result follows from the provision of paragraph (1) (c) which provides that against a protected holder a party may not raise the defence of non-liability because the bill "was dishonoured by non-acceptance or by non-payment or was not duly protested".

Example I. A demand bill was presented by the holder for payment. The drawee dishonoured the bill. The holder failed to protest in due time (i.e. on the day on which the bill is dishonoured or on one of the two business days which follow (article 59)) and endorsed the bill to a holder, who took it as a protected holder. The drawer may not raise the defence of non-protest against the protected holder.

Paragraph (2)

7. Article 12 provides that the transfer of a bill vests the rights of the transferor in the transferee. It was pointed out earlier it follows from this rule that the transfer of a bill by a protected holder vests in the transferee the rights of the protected holder, even though the transferee may not qualify as a protected holder (the "shelter rule"). This rule is not intended, and should not be used, to permit any person who "participated in a transaction which gives rise to a claim to, or defence upon, the bill" to wash the bill clean by passing it into the hands of a holder. Consequently, under

paragraph (2), such a person is denied the protection of the "shelter rule".

Example J. The payee, in collaboration with B, by fraud induced the drawer to draw a bill payable to the payee. The payee endorsed the bill to A, who is a protected holder. A endorsed the bill to B. B brings an action against the drawer.

Pursuant to article 25, the drawer has a good defence. Though generally B acquires the same rights as A, and A, as a protected holder, has a valid right against the drawer, paragraph (1), this rule does not apply when the transferee was himself a party to the fraud. The same rule applies if the bill is negotiated by A back to the payee. On the other hand, this rule does not apply if the bill is negotiated to a person who merely knew about the defence. The rule of paragraph (2) applies only to a person who participates in a transaction which gives rise to a claim to, or defence upon, a bill. A person does not "participate" in a transaction by mere knowledge of the transaction.

Article 26

(1) Every holder is presumed to be a protected holder

(2) Where it is established that a defence exists, the holder has the burden of establishing that he is a protected holder.

Relevant legislation

BEA—section 30

UCC—section 3-307 (3)

Cross references

Definition of "holder": article 5 (4)

Definition of "protected holder": article 5 (7)

Rights of a holder: article 24

Rights of a protected holder: article 25

COMMENTARY

This provision follows substantially the BEA and UCC. Until it is established that a defence exists, the presumption is that any holder is a protected holder. When it is established that a defence exists the plaintiff-holder may, if he so elects, seek to cut off the defence by establishing that he is a protected holder (or that he acquired the rights of a prior protected holder). On this issue he has the full burden of proof.

Section 2. Liability of the parties

A. GENERAL

Article 27

(1) A person is not liable on a bill unless he signs it.

(2) A person who signs in a name which is not his own shall be liable as if he had signed in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.

Relevant legislation

BEA—section 23

UCC—section 3-401

ULB—articles 7 and 8

COMMENTARY

1. Article 27 (1) embodies one of the basic principles of the law of negotiable instrument namely that "a person is not liable on a bill unless he signs it". To this rule there are several exceptions dealt with by other articles of this law (articles 28 and 30).

2. This law does not define the expression "signature", but paragraph (3) provides that it may be in handwriting, by facsimile, perforations, symbols or any other mechanical means.

3. A person may have more than one name, e.g., a "private" name and a "business" or "trade" name. Paragraph (2) provides that the signature of any one of those names is sufficient to establish the signer's liability on the bill. It is the fact of signing, not of the name signed, that is the decisive factor. It also follows from paragraph (2) that a person who forges the signature of another person is liable on the bill as if he had signed his own name.

Article 28

A forged signature on a bill does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person shall be liable:

(a) If he has ratified the signature;

(b) To a holder without knowledge of the forgery if, through his conduct he has given such holder or an intervening endorser reason to believe that the signature was his own or was made by an agent with authority.

Relevant legislation

BEA—section 24

UCC—section 3-404 and 406

Cross references

Signature on a bill: article 27

Knowledge: article 6

Signature by an agent: article 30

COMMENTARY

1. In conformity with the generally prevailing rule, article 28 provides that a forged signature on a bill does not impose liability on the person whose signature was forged. Two exceptions to this rule are set forth in article 28; a third appears in article 30.

2. One exception appears in paragraph (a). A person may incur liability under a forged signature if he ratifies the signature.

3. A second exception is stated in paragraph (b). A person whose forged signature appears on the bill may behave in such a way as to represent (expressly or by implication, intentionally or through his negligence) to the holder that the signature is genuine. In such case, the person so behaving is liable on the forged signature.

Example A. The payee intends to endorse the bill to A. Before A takes the bill he asks the drawer if the signature on the bill is his. The drawer answers in the affirmative. It turns out that the drawer's signature was forged. Article 28 (b) provides that the drawer is liable on the bill since through his answer to A he gave A reason to believe that the signature was his own.

4. The reason for paragraph (b) is that as between two innocent persons—the person whose signature was forged and the person who took the bill—the risk of forgery should be imposed on the person who through his conduct has given reason to believe that the signature was authentic. Conse-

quently, if the person who took the bill knew about the forgery, he should not be able to impose liability on the person whose signature is forged. It is provided, therefore, that only "a holder without knowledge of the forgery" may rely on the provisions of paragraph (b).

Article 29

(1) Where a bill has been materially altered:

(a) Parties who have signed the bill subsequent to the material alteration shall be liable on the bill according to the terms of the altered text; and

(b) Parties who have signed the bill before the material alteration shall be liable on the bill according to the terms of the original text, provided that:

(i) A party who has himself made, authorized, or assented to the material alteration shall be liable according to the terms of the altered text; and

(ii) A party who through his conduct facilitated the material alteration shall be liable to a holder without knowledge of the alteration according to the terms of the altered text.

(2) For the purpose of this law, any alteration is material which modifies the written undertaking on the bill of any party in any respect.

Relevant legislation

BEA—sections 55 (2) (b) and 64

UCC—section 3-406 and 407

ULB—article 69

Cross references

Definition of "holder": article 5 (4)

"Knowledge": article 6

COMMENTARY

Paragraph (1)

1. This article follows substantially the ULB and, with an important modification, the BEA and UCC.

2. Subparagraph (1) (b) differs from the BEA and UCC in that an alteration, even if fraudulent, does not discharge parties who signed the bill before the alteration; such parties are liable to any holder according to the original wording of the bill.

3. Subparagraph (b) (i) is an exception to paragraph (b) and, in substance, follows the BEA. The drawer or an endorser who alters the bill is not liable according to the terms of the original text, but according to the terms of his alteration.

4. Subparagraph (b) (ii), in substance, follows the UCC. The person whose conduct facilitated the material alteration shall be liable according to the terms of the altered text.

Example A. A bill which stated the sum payable as \$1,000 was accepted. The payee then raised the sum to \$21,000 and endorsed the bill to A. A endorsed the bill to B.

By virtue of article 29, the acceptor is liable to B for \$1,000.

If he dishonours the bill (and any necessary presentment and protest is performed) the drawer is liable to B for \$1,000. Pursuant to paragraph (1) (a), the payee and A are liable to B for \$21,000.

Example B. The same facts as in example A. The bill was drawn in such a way as to facilitate the material alteration (e.g., open space was left and this enabled the payee to change the figure and wording of the sum without it being apparent. By virtue of paragraph (1) (b) (ii) the drawer is liable to pay \$21,000, since the way he drew the bill facilitated the material alteration.

Paragraph (2)

5. Paragraph (2) defines what constitutes a material alteration. The test is: Was there any change in the "written undertaking on the bill"?

6. In the following cases there is no such change:

(a) A bill was made payable to "P". Thereafter, the bill is payable "to P or to order". This addition has not modified the written undertaking on the bill of any party (see article 1 (2)).

(b) The sum payable was initially stated as \$5. Thereafter, the sum payable was changed to 500 cents.

7. In the following cases there is a material alteration:

(a) The date of payment is changed;

(b) The sum payable is changed (whether increased or decreased).

Article 30

(1) A bill may be signed by an agent.

(2) The signature on a bill by an agent, with authority to sign, and showing on the bill that he is signing in a representative capacity, imposes liability on the bill on the person represented and not on the agent.

(3) Where an agent signs without authority or where he signs with authority but does not show on the bill that he is signing in a representative capacity, he shall be liable on the bill. The person whom the agent purports to represent shall not be liable on the bill.

(4) An agent who is liable on the bill pursuant to paragraph (3) and who pays the bill shall have the same rights as the person for whom he purported to act would have had if that person had paid it.

Relevant legislation

BEA—sections 25 and 26

UCC—section 3-403

ULB—article 8

Cross reference

"Signature": article 27

COMMENTARY

1. Paragraph (1) is common to the three legal systems.

2. Paragraph (2) achieves the same results as the BEA and the UCC, namely, that an agent signing a bill within his authority, and indicating that he is signing the bill as an agent, is not liable on the bill. The person liable is his principal.

3. Paragraph (3) follows substantially the UCC and ULB: it provides that an agent signing a bill without authority is personally liable on the bill; his principal is not liable. This provision deviates from the BEA in so far as the agent's liability under article 30 is on the bill itself, and not on a warranty of authority.

4. Paragraph (3) follows substantially the BEA and UCC: it provides that an agent who signs a bill while acting within his authority, but without indicating on the bill that he is signing in a representative capacity is personally liable on the bill. His principal is not liable.

5. Paragraph (4) follows substantially the ULB.

Example. The agent is A, and his principal is P. The bill bears the following signatures affixed by A (whether the signature of the acceptor, drawer, endorser or guarantor):

(1) "P"

(2) "A"

(3) "P by A, agent".

In each of these three cases, if the signature was made without authority, P is not liable on the bill and A is liable. On the other hand, if the signatures were made with the authority from P, then in the above three cases:

Case (1): P is liable on the bill; A is not liable

Case (2): A is liable on the bill; P is not liable

Case (3): P is liable on the bill; A is not liable.

Article 31

(1) Any party may exclude or limit his liability on the bill by an express stipulation on the bill.

(2) Such exclusion or limitation of liability shall be effective only with respect to the party making the stipulation.

Relevant legislation

BEA—section 16

UCC—sections 3-413 (2); 3-414 (1)

ULB—articles 9 and 15

COMMENTARY

1. Under the ULB, the drawer may not release himself from guaranteeing payment; a clause to that effect in a bill is deemed not to be written. The drawer may, however, exclude his liability for acceptance of the bill. An endorser may release himself from guaranteeing both acceptance and payment. In contrast, the BEA and the UCC permit the drawing or endorsing of a bill without the drawer or endorser incurring any liability thereon.

2. Inquiries amongst banking and trade institutions reveal that bills are drawn "without recourse" only sporadically; the exceptions occur under letters of credit which permit drawing in this manner. Endorsements "without recourse" also occur seldom. It was, however, pointed out that such endorsements are sometimes found on bills issued in connexion with short term credits or "without recourse financing" and are employed by banks when they pass on bills for collection. On the basis of this information, there would appear to be no justification for preventing the drawer or endorser from limiting or excluding his liability.

3. Article 31 does not specify the language that must be used to exclude or limit liability. The common expression is "without recourse". Article 22 provides that an endorsement "for collection" does not impose liability on the endorser to a subsequent holder. Such an endorsement is therefore an endorsement which "excludes" liability on the bill. Pursuant to article 46 (1) (a), a party may stipulate on the bill that it shall be presented for acceptance. Such party thereby made his liability conditional on the presentment for acceptance of the bill; if the bill is not duly presented for acceptance, the party making the stipulation is not liable. Under article 47, a party may stipulate on the bill that it shall not be presented for acceptance or that it shall not be presented before a specified date or before the occurrence of a specified event. Where a bill is presented for acceptance notwithstanding such a stipulation and acceptance is refused, the bill is not thereby dishonoured by non-acceptance as regards the party so stipulating. It follows that such a stipulation is in the nature of exclusion of liability for dishonour by non-acceptance.

4. The exclusion or limitation of liability pursuant to article 31 "shall be effective only with respect to the party making the stipulation". The stipulation does not operate in favour of a prior or subsequent party.

Example A. The drawer drew a bill "without recourse". The payee endorsed the bill without any qualification. The bill is dishonoured by the drawee. The holder has a right of recourse against the payee but not against the drawer.

Example B. The payee endorsed a bill "without recourse". The bill is dishonoured by the drawee. The holder has a right of recourse against the drawer but not against the payee.

5. Article 31 deals with exclusion or limitation of liability on the bill. Such a stipulation does not by itself affect the liability of an endorser under article 42.

Article 32

Where a person other than the drawee places his signature on a bill he shall be liable thereon as an endorser unless he clearly indicates on the bill that he signed in some other capacity.

Relevant legislation

BEA—section 56
UCC—section 3-402

Cross references

Liability of a guarantor: articles 43 to 45.

COMMENTARY

1. This article is based on the BEA and UCC. It differs from the BEA in so far as it extends the liability under article 32 to any holder and not merely to a holder in due course.

2. Liability under article 32 must be distinguished from the liability of a guarantor under articles 43 to 45. A person will be liable as a guarantor (and not as an endorser) if he specifies expressly on the bill that he is signing as a guarantor.

3. Questions concerning the capacity in which a person signs a bill must be answered from the bill itself and not from any evidence outside the bill.

Article 33

All drawers, acceptors, endorsers and guarantors of a bill are jointly and severally liable thereon.

Relevant legislation

ULB—article 47

Cross references

Liability of the drawer: article 34
Liability of the acceptor: article 36
Liability of the endorser: article 41
Liability of the guarantor: article 44

COMMENTARY

1. All the parties liable on the bill are liable jointly and severally. It follows that the holder has an option: he may proceed against all parties collectively or he may proceed against the parties separately. If he decides to proceed separately, he is not required to observe the order in which they became liable on the bill.

2. Since the liability of the parties is several (as well as joint) bringing an action against one party does not prevent bringing an action against the other parties.

3. Nothing in this article effects the provisions of this law with respect to the necessity of presentment for acceptance and for payment, or of protest. The holder has no right of recourse against the drawer and the endorsers if the necessary presentment and protest were not effected. The reference in article 33 to the liability of the parties assumes that the necessary presentment and protest were effected.

B. THE DRAWER

Article 34

The drawer engages that upon dishonour of the bill by non-acceptance or non-payment and upon any necessary protest he will pay the amount of the bill, and any interest and expenses which may be claimed under article 67 or 68, to the holder or to any party subsequent to himself who is in possession of the bill and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

Relevant legislation

BEA—section 55 (2) (a)
UCC—section 3-414
ULB—article 9

Cross references

Dishonour by non-acceptance: article 51
Dishonour by non-payment: article 56
Necessary protest: article 57
Definition of "holder": article 5 (4)

COMMENTARY

1. The provisions of this article are substantially similar to those of the main legal systems. The drawer's liability is "secondary" to that of the acceptor. Only if the bill is dishonoured (by non-acceptance or non-payment) by the drawee or acceptor will the drawer be liable. The drawer's liability (unlike that of the acceptor) is "conditional": it is subject to any necessary presentment and protest. If the bill is not dishonoured, or if the bill is dishonoured but a necessary protest is not effected, the liability of the drawer has not crystallized. A distinction should be made between such non-liability situations and cases of discharge. The drawer is discharged of liability by payment or other occurrences provided in part six. Discharge assumes the actual existence of liability.

2. The engagement of the drawer is to pay the bill, upon dishonour and any necessary protest, to the holder. If the bill is paid by an endorser to the holder, and the bill is delivered to such endorser by the holder, the liability of the drawer is to pay the bill to such endorser. In the same way, if such endorser was discharged because of cancellation of his signature, and the bill was delivered to him by the holder, the drawee is liable to such endorser. Article 34 therefore provides that the drawer engages to pay the bill "to the holder or any party subsequent to himself who is in possession of the bill and is discharged of his liability thereon in accordance with articles 69 (2), 70, 71 or 76.

3. It may be noted that the liability of the drawer is not subject to any notice of dishonour. This is in conformity with the policy of this law that notice of dishonour is not necessary in order to render a party liable on the bill. Thus, article 66 provides that the only consequence of failure to give due notice of dishonour is to render the holder liable to the drawer for any damages that the drawer may suffer from such failure.

4. Article 34 deals with the liability of the drawer. The rights of the drawer against the acceptor are dealt with in article 36.

C. THE DRAWEE AND THE ACCEPTOR

Article 35

(1) The drawee is not liable on a bill until he accepts it.

(2) The drawing of a bill or its endorsement does not of itself operate as a transfer or assignment to the holder of funds in the hands of the drawee.

Relevant legislation

BEA—sections 23 and 53
UCC—sections 3-401 and 409
ULB—annex to the ULB, article 16

Cross references

Liability of an acceptor: article 36
Definition of endorsement: article 5 (2)

COMMENTARY

Paragraph (1)

1. The rule expressed in this paragraph is common to all systems. Article 27 provides that no person is liable on a bill unless he signs it. In conformity with this general rule under article 35 (1) the drawee is not liable on a bill until he accepts it.

Paragraph (2)

2. This paragraph provides that the drawing of a bill does not of itself operate as a transfer or an assignment to the holder of any funds in the hands of the drawee. (An assignment may, of course, be evidenced by facts outside the bill.) The rule of paragraph (2) follows substantially the BEA and UCC. There is no similar provision in the ULB. However, article 16 of the annex to the ULB provides that "the question whether the drawer is obliged to provide cover (provision) at maturity and whether the holder has special rights to this cover, remains outside the scope of the uniform law". Most countries following the Geneva system do not recognize "provision".

Article 36

The acceptor engages that he will pay to the holder:

- (a) At maturity, the amount of the bill;
- (b) After maturity, the amount of the bill and any interest and expenses which may be claimed under article 67 (b) or 68.

Relevant legislation

BEA—sections 17 (1) and 54 (1)
UCC—section 3-410
ULB—article 28

COMMENTARY

1. The rule expressed in this article follows substantially the provisions of the main legal systems. The acceptor is the primary party liable on the bill. His obligation is unconditional, i.e., he is liable on the bill even if the bill was not presented for payment, and no protest was made.

2. The liability of the acceptor is to pay the bill at maturity to the holder. If the bill was paid to the holder by the drawer or by an endorser, or if the holder discharges the drawer or the endorser of their liability, the acceptor is liable to pay the amount of the bill to the drawer or endorser who was so discharged and who is in possession of the bill.

Article 37

An acceptance must be written on the bill and may be effected either by the drawee's signature alone or by his signature accompanied by the word "accepted" or by words of similar import.

Relevant legislation

BEA—sections 2 and 17 (2) (a)
UCC—section 3-410 (1)
ULB—articles 25 and 29

COMMENTARY

This article follows in substance the relevant provisions of the principal legal systems. It provides that the acceptance must be in writing and on the bill. It must be signed by the drawee. A person who is not a drawee cannot accept a bill.

Article 38

(1) A bill may be accepted:

(a) Before the instrument has been signed by the drawer, or while otherwise incomplete;

(b) Before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

(2) Where a bill drawn payable at a fixed period after sight is accepted and the acceptor has not indicated the date of his acceptance, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

(3) Where a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder shall be entitled to have the acceptance dated as of the date of presentment to the drawee for acceptance.

Relevant legislation

BEA—section 18
UCC—section 3-410 (2) and (3)
ULB—article 25

Cross references

Presentment for acceptance: article 48
Dishonour by non-acceptance: article 51
Dishonour by non-payment: article 56
Incomplete instrument: article 11
"Issue": article 5

COMMENTARY

Paragraph (1)

1. This paragraph follows substantially the BEA and UCC. Inquiries amongst banking and trade institutions have shown that it is not uncommon for a bill to be accepted before its issuance or even before it is signed by the drawer or is incomplete in other respects. Similarly, acceptance at or after maturity occurs at times, and bills not infrequently are accepted after dishonour by non-acceptance or non-payment. On the basis of this information it was concluded that a rule on the lines of paragraph (1) would be justified.

Paragraph (2)

2. A bill drawn payable at a fixed period after sight (i.e., at a fixed period after presentment for acceptance) must be presented for acceptance in order to determine the date of payment (article 46 (1) (b)). It may happen that when such a bill is presented and accepted the acceptor for one reason or another omits to indicate the date of his acceptance. In such case, the date of payment cannot be ascertained from the face of the bill, and the bill is incomplete.

Paragraph (2) provides that in such case, the drawer or the holder may insert the date of acceptance. This solution seems to be preferable to the solution of the ULB, under which

the holder must in such case "authenticate the omission by a protest drawn up within the proper time" (article 25, ULB). This law, by giving the drawer or holder the right to insert the missing date, uses the approach that is applicable to any other completion of an incomplete instrument (article 11).

Paragraph (3)

3. It occurs in practice that the drawee is prepared to accept an "after sight" bill which he had previously dishonoured by a non-acceptance. In such case the date of acceptance is important in order to determine the date of payment. Paragraph (3) provides that the holder is entitled to have the bill accepted not as from the date of the acceptance, but as from the date of the first presentment for acceptance. If the acceptor refuses to write the correct date, this would be a "qualified acceptance" dealt with in article 39 and the holder may [refuse to take the "qualified" acceptance, and may] treat the bill as dishonoured by non-acceptance.

Article 39

(1) An acceptance may be either general or qualified.

(2) By a general acceptance the drawee engages to pay the bill according to its terms.

(3) By a qualified acceptance the drawee engages to pay the bill according to terms expressly stated in his acceptance. An acceptance is qualified if, *inter alia*, it is

(a) Conditional, in that the acceptance states that payment by the acceptor will be dependent upon the fulfilment of a condition therein stated;

(b) Partial, in that the acceptance relates to only part of the amount of the bill;

(c) Qualified as to place, in that the acceptance indicates a place of payment other than the place of payment indicated on the bill or, in the absence of such indication, other than the address indicated on the bill as that of the drawee;

(d) Qualified as to time;

(e) An acceptance by one or more of the drawees but not by all.

Relevant legislation

BEA—section 19

UCC—section 3-412

ULB—article 26

Cross references

"Acceptance": article 37

Dishonour by non-acceptance: article 51

The rights of the holder in case of a qualified acceptance: article 40

COMMENTARY

This article follows in substance the relevant provision of the BEA. Its purpose is to define the expressions "general acceptance" and "qualified acceptance". Those expressions are of importance in connexion with article 40.

Article 40

(1) The holder may refuse a qualified acceptance other than a partial [or local] acceptance. Upon such refusal the bill is dishonoured by non-acceptance.

(2) Where a holder takes a qualified acceptance other than an acceptance which is partial or is qualified as to place, the drawer and any endorser and guarantor who do not affirmatively assent shall be discharged of liability on the bill.

(3) Where the drawee gives a partial acceptance, the bill is dishonoured by non-acceptance as to the part of the amount not accepted.

Relevant legislation

BEA—section 44

UCC—section 3-412

ULB—article 26

Cross references

"Qualified acceptance": article 46

"Dishonour by non-acceptance": article 62

"Partial acceptance": article 46

COMMENTARY

1. Pursuant to article 40 and in conformity with the main legal systems, when the drawee offers a qualified acceptance, the holder has an option. He may reject the offer, insist on a general acceptance, and treat the refusal to give it as a dishonour. After any necessary protest the holder may exercise a right of recourse against the drawer, endorsers and their guarantors. If the holder opts to take the qualified acceptance, the acceptor is liable according to the terms of his acceptance. As far as the drawer, the endorsers and their guarantors are concerned, if they do not affirmatively assent, they are discharged. Article 40 deviates from the BEA in providing that only the affirmative consent by the drawer, endorsers and their guarantors will prevent their discharge. The BEA (section 44) provides that notice of the qualified acceptance should be given to the drawer and any endorser; if they do not express their dissent within a reasonable time, they shall be deemed to have assented.

2. An exception to this rule is recognized by this law in case of "partial acceptance", i.e., an acceptance of only a part of the amount of the bill (article 39 (3) (b)). Article 40 provides that, in such case, the holder must take the partial acceptance. The bill is not dishonoured as to the part accepted. As to the part not accepted, the bill is considered to be dishonoured by non-acceptance.

3. In the reply to the questionnaire (A/CN.9/48, para. 79), nearly half of the replies favoured a rule imposing on the holder the duty to take partial acceptance; slightly more than half opposed such a rule. The stronger reasons seemed to support the view that it is to be to the advantage of all parties that partial acceptance should be taken. Therefore, this draft provides that the holder may not refuse partial acceptance.

D. THE ENDORSER

Article 41

The endorser engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay the amount of the bill, and any interest and expenses which may be claimed under articles 67 or 68, to the holder or to any party subsequent to himself who is in possession of the bill and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

Relevant legislation

- BEA—section 55 (2) (a)
 UCC—section 3-414 (1)
 ULB—article 1

Cross references

- "Dishonour by non-acceptance": article 51
 "Dishonour by non-payment": article 56
 Necessary protest: article 57
 Definitions of "holder": article 5 (4)

COMMENTARY

1. The provisions of this article are substantially similar to those of the BEA, UCC and ULB. The endorser's liability, like that of the drawer's, is "secondary" and "conditional" (see commentary to article 34). For further commentary on this article see commentary to article 34.

2. In addition to his liability on the bill, an endorser may incur liability for any damages suffered by a holder subsequent to himself in accordance with the provisions of article 42.

Article 42

(1) Any person who negotiates a bill shall be liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to the negotiation

(a) A signature on the bill was forged or unauthorized; or

(b) The bill was materially altered; or

(c) A party has a valid claim or defence; or

(d) The bill is dishonoured by non-acceptance or non-payment.

(2) Liability on account of any defect mentioned in paragraph (1) shall be incurred only to a holder who took the bill without knowledge of such defect.

Relevant legislation

- BEA—sections 55 (2) (b) and 52 (a) and (c)
 UCC—sections 3-417 (2)

Cross references

- Definition of "endorsement": article 5 (3)
 Definition of "holder": article 5 (4)
 Forged signature: article 28
 Material alteration: article 29
 "Claim or defence": article 24
 Dishonour by non-acceptance: article 51
 Dishonour by non-payment: article 56
 "Knowledge of a fact": article 6

COMMENTARY

1. In addition to his liability on the bill pursuant to article 41, an endorser may incur liability to any holder subsequent to himself for any damages that such holder may suffer because of defects in previous signatures, material alteration or other defects in the endorser's title to the bill. Such liability may arise even before maturity of the bill, and the amount of the damages is not necessarily the amount of the bill. Under the UCC (section 3-417 (2)) and the BEA (section 58, dealing only with a bill payable to bearer) such liability is based on the concept of "warranties". This concept is not known in countries following the Geneva uniform law,

and in the interest of clarity is not employed in this Law. Article 42 is drafted in terms of liability for damages—a concept known to all legal systems.

Example A. The signature of the payee was forged. The forger "endorsed" the bill to A. A endorsed the bill to B. After such endorsement and before maturity the forgery was discovered. The payee, of course, is not liable on the bill since his signature was forged (article 28). Pursuant to article 42, B has a right to receive compensation from A for any damages that he may suffer because of his inability to receive payment of the bill from the payee.

Example B. A bill which stated the sum payable as \$1,000 was accepted. The payee then raised the sum to \$21,000 and endorsed the bill to A. A endorsed the bill to B.

By virtue of article 42, B has a right against A to compensation for the damage he may suffer because of his inability to receive payment of the full amount from the drawer, who is liable, pursuant to article 29 (see example A above), only for the amount of \$1,000.

2. Liability pursuant to article 42 runs in favour of any holder subsequent to the endorser. It is not limited to the immediate holder who took the bill from the endorsee thought to be liable. The holder has a right pursuant to article 42 only if he did not know about the defect when he took the bill.

E. THE GUARANTOR

Article 43

(1) Payment of a bill may be guaranteed, as to the whole or part of its amount, by any person who need not be a party to the bill.

(2) A guarantee must be written on the bill or on a slip affixed thereto. It is expressed by the words: "guaranteed", "aval", "good as aval", or by words of similar import, accompanied by the signature of the guarantor.

(3) A guarantor may specify the party whose payment he guarantees.

(4) In the absence of such specification, the person guaranteed shall be the drawer.

Relevant legislation

- ULB—Articles 30 and 31

Cross reference

- "Party": article 5 (5)

COMMENTARY

1. The provision of this article, and of articles 44 and 45, follow in substance the provisions of the ULB in respect of the giver of an aval. The liability of a guarantor, pursuant to articles 43 to 45 is "on the bill", and is "negotiable" in nature, i.e. it runs in favour of any subsequent holder, and defences will not be available against preferred rights of a protected holder. Nothing in this article prevents a person from guaranteeing the payment of a bill by an ordinary non-negotiable guarantee, governed by national law.

2. Payment may be guaranteed by a third person or by a person who is already a party. In that case, his liability as a guarantor should add to his main liability as a party, e.g., the endorsee may guarantee payment by the acceptor.

3. A person does not incur the liability of guarantee under the Law merely by signing his name on the bill. Such person is liable, pursuant to article 32, "as an endorser". In order to incur liability as a guarantor, the person signing the bill must use words expressing a guarantee (e.g.: "guaranteed", "good as aval").

4. A guarantor may specify the party whose liability he guarantees (i.e. "guarantee payment by the acceptor"). It may occur, however, that the guarantor has not specified the person guaranteed. In such case, the guarantee is not invalid. Paragraph (4) provides that in such case "the person guaranteed shall be the drawer".

5. Paragraph (4) lays down a rule of law rather than a rule of evidence; proof as to the guarantor's intent would be irrelevant.

Article 44

(1) A guarantor shall be liable on the bill to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise.

(2) The guarantor shall be liable on the bill even when the party for whom he has become guarantor is not liable thereon, unless that party's lack of liability is apparent from the face of the bill.

Relevant legislation

ULB—article 30

COMMENTARY

1. The liability of a guarantor is similar to that of the person for whom he has become guarantor. It follows, therefore, that if the person guaranteed is the drawer or the endorser, the guarantor is not liable on the bill if the bill was not duly presented and due protest was not effected. If the person guaranteed is discharged of his liability on the bill, the guarantor is discharged. Similarly, if the person guaranteed has a defence to his liability on the bill—whether this defence relates to the bill or whether it relates to another transaction—this defence is available to the guarantor since he is liable "to the same extent as the person for whom he has become guarantor".

2. The guarantor under articles 43 to 45 differs from the "non-negotiable" guarantor in that his liability is not truly secondary in nature. Paragraph 2 provides that a guarantor shall be liable on the bill "even when the person for whom he has become a guarantor is not liable on the bill" except where such absence of liability is apparent from the face of the bill.

Example A. A guaranteed payment by the drawer. The drawer is a person who has no capacity to incur liability on the bill. Pursuant to article 44 (2), A is liable on the bill.

Example B. A guaranteed payment by the drawer. The drawer's signature was forged. Though such "drawer" is not liable on the bill (see article 28), A is liable on the bill.

Example C. A guaranteed payment by the payee. The payee transferred the bill without the necessary endorsement. The payee is not liable on the bill, and his absence of liability "is apparent from the face of the bill". A is not liable on the bill.

3. The policy behind paragraph (2) is to protect the reasonable expectations of a holder. If from the face of the bill it appears that the person guaranteed is liable on the bill, the guarantor should be liable in the same manner. On the other hand, if from the face of the bill it is shown that the person guaranteed is not liable on the bill, the basic reason for the rule—to protect the holder's reasonable expectations—does not support liability for the guarantor.

Article 45

The guarantor, when he pays the bill, shall have rights on the bill against the party guaranteed and against those who are liable thereon to that party.

Relevant legislation

ULB—article 30

Cross references

Payment of the bill: article 70

Party: article 5

COMMENTARY

By payment of the bill, the guarantor acquires rights on the bill against the person whose payment was guaranteed, and against those persons who are liable on the bill to that person.

Part Five. Presentment, dishonour and recourse

Section 1. Presentment for acceptance

Article 46

(1) The holder must present a bill for acceptance

(a) When the drawer or an endorser or a guarantor has stipulated on the bill that it shall be so presented;

(b) When the bill is drawn payable at a fixed period after sight; or

[(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee].

(2) The holder may present for acceptance any other bill.

Relevant legislation

BEA—section 39

UCC—section 3-501 (1) (a)

ULB—articles 21 and 22

Cross references

Definition of "holder": article 5 (4)

Acceptance: article 37

Stipulation on a bill: article 31

Definite time: article 9 (3)

COMMENTARY

1. The general rule embodied in this article is that presentment for acceptance is optional, except in the cases stated in subparagraphs (a), (b) and (c) of paragraph (1). In those cases presentment for acceptance is necessary in order to render prior parties liable on the bill. The provisions of paragraph 1 (a) and (b) are common to the Geneva and Anglo-American systems.

Paragraph (1) (a)

2. An express stipulation on a bill that it must be presented for acceptance is effective only in respect of the party who made the stipulation (article 31 (2)). A stipulation requiring presentment may also oblige the holder to present the bill within a specific period of time or at or after a specified date or the occurrence of a specific event (article 47 (1)).

Example. The drawer D drew a fixed-term bill on drawee B payable to payee P. P endorsed the bill to C and stipulated on the bill that it is to be presented for acceptance before a certain date.

(a) C does not present the bill for acceptance: P is not liable on the bill (see article 50 (1)).

(b) C presents it after the date specified by P (but before maturity) and acceptance is refused: P is not liable on the bill (there is no due presentment pursuant to article 48 (g) and C requires an immediate right of recourse against D pursuant to article 51 (2)).

Paragraph 1 (b)

3. Where a bill is drawn payable at a fixed period after sight, presentment for acceptance is necessary in order to determine the date of maturity. If the acceptor of such a bill omits to state on the bill the date of acceptance, the holder may insert that date (article 38 (2)).

Paragraph 1 (c)

4. The BEA (s.39) and the UCC (s.3-501 (1) (a)) require presentment for acceptance of a bill which is drawn payable elsewhere than at the residence or place of business of the drawee. Such a bill is often referred to as a "domiciled" bill. The ULB (article 22) provides that where a bill is drawn payable at the address of a third party or in a locality other than that of the domicile of the drawee, the drawer may not prohibit presentment for acceptance. Under the Geneva system, the holder retains therefore his option to present or not present a bill so drawn.

Under the Anglo-American system, the rationale of the obligation of the holder to present a domiciled bill for acceptance is founded upon the need to advise the drawee that a bill has been drawn upon him payable at a place other than that of his residence or place of business (usually a bank), so as to enable him to provide his agent (the bank) with the necessary funds. Under that system, failure by the holder to present a domiciled bill for acceptance results in discharge of the liability of prior parties.

Under the Geneva uniform law, the failure by the holder to present a domiciled bill does not make him lose his rights on the bill against prior parties, unless of course the drawer or an endorser has expressly stipulated that it shall be presented for acceptance.

5. Enquiries amongst banking and trade institutions have not led to a clearcut view as to whether it is desirable to include in article 46 a provision on the lines of subparagraph (c); that subparagraph is therefore placed between brackets.

It would appear that, in actual practice, a rule on the lines of subparagraph (c) would not impose an undue burden upon the holder. Enquiries on current practice have shown that presentment for acceptance, even in the case of fixed-term bills, is normally made since acceptance by the drawee establishes his liability on the bill, and, in the case of non-acceptance renders prior parties immediately liable. Moreover, in many countries the Central Bank will purchase only bills that have been accepted, or the purchase of non-accepted bills is restricted to bills which do not exceed a certain amount or in respect of which the period between the time of drawing and the maturity date does not exceed a certain minimum period.

On the other hand, the inclusion of subparagraph (c) in the uniform law would relieve prior parties of their liability on the bill to the holder if the holder failed to present a domiciled bill for acceptance; and it could be argued that such non-liability of the drawer or of an endorser who has received goods from the holder for the issue or endorsement of the bill imposes undue hardship upon the holder.

6. Consideration was given to a compromise approach whereby the non-presentment of a domiciled bill would have a different legal effect than the non-presentment of bills which fall within the provisions of subparagraphs (a) or (b). Under that approach, if the failure of the holder to present a domiciled bill for acceptance is the cause of non-payment by the drawee, the drawer and the endorsers would still be liable on their signature but should be able to seek compensation from the holder for the damages they have suffered because they were obliged to pay the bill in place of the drawee. In certain circumstances, this would lead to a result similar to that obtaining under Anglo-American law. However, there may be cases in which the dishonour by non-

payment is not caused by the failure of the holder to present the bill for acceptance. In such cases, the compromise approach provided that the drawer or endorsers should pay the amount of the bill at maturity without a right to receive compensation from the holder.

7. Summing up, three alternative solutions are therefore possible:

- (i) The holder has an option to present or not present a domiciled bill for acceptance; in that case subparagraph (c) should be deleted;
- (ii) The holder must present a domiciled bill for acceptance and failure to present results in non-liability of prior parties; in that case, subparagraph (c) should be retained;
- (iii) The holder must present a domiciled bill for acceptance and failure to present renders him liable to a prior party for any damages that may result from such failure if the bill is dishonoured by non-payment; in that case subparagraph (c) should be retained and article 50 should be modified accordingly.

Paragraph 2

8. Presentment for acceptance is optional in respect of bills that do not fall within paragraph (1). Bills drawn payable on demand entitle the holder to immediate payment upon presentment. Consequently, if the drawee refuses to pay a demand bill, but accepts it, the holder may refuse to take the acceptance and treat the bill as dishonoured by non-payment. However, the acceptance establishes the liability of the acceptor on the bill.

Article 47

(1) The drawer or an endorser or a guarantor may stipulate on the bill that it shall not be presented for acceptance or that it shall not be presented before a specified date or before the occurrence of a specified event.

(2) Where a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1), and acceptance is refused, the bill is not thereby dishonoured in respect of the party making the stipulation.

(3) Where the drawee accepts a bill notwithstanding a stipulation that it shall not be presented for acceptance, the acceptance shall be effective.

Relevant legislation

ULB—article 22

Cross references

Exclusion or limitation of liability on the bill: article 31.
Dishonour by non-acceptance: article 51.

COMMENTARY

Paragraph (1)

1. The legal effect of a prohibition from presenting a bill for acceptance is that the holder cannot exercise an immediate right of recourse for dishonour by non-acceptance against the parties in respect of whom the stipulation is operative. Similarly, where a party stipulates that the bill shall not be presented before a certain date, the right of recourse for dishonour by non-acceptance against such party will only accrue to the holder if the dishonour occurred on or after that date.

2. Paragraph (1) permits a stipulation to the effect that the bill must not be presented before the occurrence of a specified event. Enquiries amongst banking and trade institutions have shown that such stipulations occur not infrequently.

In some countries, particularly Latin American, it appears to be normal practice to delay presentment until the merchandise has arrived or (in some African countries) until after customs clearance. In some countries, drawees often refuse to accept documentary bills on the ground that the carrying vessel has not yet reached its destination point, and a bill may therefore often direct a holder not to present it for acceptance until the vessel has arrived.

Such stipulation, if made on a bill drawn payable at a fixed period after sight, does not affect the validity of the instrument as an international bill of exchange on the ground that the instrument would no longer be payable at a definite time or would be "conditional". If the specified event did not occur, for instance the vessel suffered shipwreck before reaching its destination, presentment for acceptance as directed by the stipulation is obviously impossible and would be dispensed with under article 49 (2). In that case, the holder would acquire an immediate right of recourse against the party who made the stipulation (by virtue of article 51 (1) (b)). The bill is not made "conditional" by such a stipulation because the order to pay is not conditional.

3. In contrast to paragraph 1, article 22 of the ULB provides that the stipulation prohibiting presentment for acceptance, whether totally or limited in time, can only be made by the drawer. The present paragraph extends a similar possibility to endorsers and guarantors; this extension is consistent with article 31 which provides that any party to a bill may exclude or limit his liability on the bill.

Paragraph (2)

4. "... The bill is not thereby dishonoured by non-acceptance" means that the holder cannot exercise, under article 51 (2), an immediate right of recourse in the event of non-acceptance against a prior party who made the stipulation.

Paragraph (3)

5. An acceptance is an engagement on the part of the drawee that he will pay the bill to the holder (article 36). The acceptance of a bill does not adversely affect a party who made the stipulation under paragraph (1).

Article 48

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

- (a) The holder must present the bill to the drawee.
- (b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.
- (c) Where the drawee is dead, presentment may be made to the person or authority who, under the applicable law is entitled to administer his estate.
- (d) Where the drawee is in the course of insolvency proceedings, presentment may be made to a person who under the applicable law is authorized to act in his place.
- (e) Where a bill is drawn payable on, or at a fixed period after, a stated date, any presentment for acceptance must be made before the date of maturity.
- (f) A bill drawn payable at a fixed period after sight must be presented for acceptance within one year of its date.

(g) A bill in which the drawer or an endorser or a guarantor has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

(h) A bill in which the drawer or an endorser or a guarantor has stipulated that it shall be presented for acceptance, but without stating a date or time-limit for presentment, [or a bill which is drawn payable elsewhere than at the place of business or residence of the drawee and which is not a bill payable after sight,] must be presented before the date of maturity.

Relevant legislation

- BEA—sections 40 and 41
- UCC—sections 3-503 and 504
- ULB—articles 21, 23, 24

Cross references

- Definition of "holder": article 5 (4)
- Bill drawn upon two or more drawees: article 10

COMMENTARY

1. This article sets forth the rules regarding proper presentment for acceptance.

Paragraph (a)

2. As elsewhere in this Law, the word "holder" or "drawee" includes an authorized agent.

3. In contrast to presentment for payment, which is local, i.e. where the funds are, presentment for acceptance is personal. It must be made to the drawee himself because he must write the acceptance. For this reason, it is not necessary to set forth rules as to the place of presentment for acceptance.

Paragraph (b)

4. This paragraph envisages the special case of bills drawn upon two or more drawees, and follows in this respect section 3-504 (3) (a) of the UCC which eliminates the requirement, found in section 41 (1) (b) of the BEA, that presentment be made to each of two or more drawees. Under paragraph (b), presentment is to be made to all drawees only when it is so indicated on the bill.

Paragraphs (c) and (d)

5. If the drawee is dead or is in the course of insolvency proceedings, the holder may, pursuant to article 49 (a), dispense with presentment for acceptance. In these cases, presentment is therefore optional and paragraphs (2) and (3) indicate to whom presentment may be made. A similar provision obtains under the BEA (sections 41 (1) (c) and (d) and 2 (a)).

Paragraphs (e) to (h)

6. The provisions of these paragraphs lay down rules as to the time of presentment for acceptance.

Paragraph (e)

7. "Before the date of maturity". This is in accordance with the ULB (article 21). The BEA and UCC permit presentment for acceptance also on the date on which the bill is payable.

Paragraph (f)

8. As regards the period of time within which a bill payable at a fixed period after sight must be presented for acceptance, paragraph (f) follows the ULB by laying down a period of one year as from the date stated on the bill or, if no such date is stated, from the date of the bill. The BEA and UCC provide that an after sight bill must be either presented for acceptance or negotiated within a reasonable time. Since the concept of "reasonable time" with reference to negotiable

instruments is unknown outside the common law countries and might lead to difficulties of application on universal level, it has not been retained in this draft.

Paragraph (g)

9. Paragraph (g) also covers bills payable after sight in respect of which a party has extended or abridged the time of presentment prescribed by paragraph (f). Pursuant to article 31 (2), such a stipulation is personal to the party stipulating it. The provision of paragraph (g) leads to the following result in the case of bills payable after sight: If an endorser stipulated that the bill must be presented within six months after date, and the holder presented the bill (say) seven months after date, the holder loses his right of recourse against that endorser, whether the bill was accepted or not, by reason of the fact that there was no due presentment for acceptance in respect of that endorser. If the drawee refuses to accept, the parties to the bill other than that endorser are liable on the bill and the holder may exercise an immediate right of recourse against such parties by virtue of article 51 (2).

Paragraph (h)

10. Paragraph (h) covers the two remaining types of bill in respect of which presentment for acceptance is necessary pursuant to article 46 (b) and (c).

Presentment for acceptance by mail

10. Consideration has been given to a provision worded as follows:

"Where authorized by agreement or by the usage of banking or trade, a presentment by acceptance by mail is sufficient, in which event the time of presentment is determined by the time of receipt of the mail".

A similar provision covered presentment for payment by mail.

These provisions were inspired by similar provisions found in the BEA (s. 41 (1) (e)) and the UCC (s. 3-504 (2) (a)).

11. Subsequent enquiries as to business and banking practices with regard to presentation by mail revealed little or no usage in this respect, in either common law and civil countries, mainly because of the many difficulties to which presentment by mail may give rise in practice. Amongst the difficulties put forward by banking and trade circles are the following:

- (i) The difficulty of fixing appropriate and practicable time-limits since postal services cannot always and everywhere be relied upon; e.g. there can be mistakes in delivery of the mail, postal strikes or other circumstances that are beyond the control of the parties;
- (ii) The difficulty of obtaining satisfactory evidence of the fact that a registered letter has been delivered to the drawee or acceptor;
- (iii) The difficulty for the holder to prove that the registered letter did indeed contain the bill sent for presentment;
- (iv) The existence of generous time-limits (necessary for international bills) within which the holder must receive notification of payment, or of dishonour, might induce debtors to pay only shortly before the expiry of such time-limits;
- (v) In the event of dishonour the holder will have lost possession of the bill and in some countries the law establishes a presumption of payment in favour of the drawee or the acceptor in possession of the bill.

12. In view of the absence of support for a rule which would entitle the holder to treat a bill presented by mail as dishonoured simply because of the passage of a given period of time, the present draft of the uniform law does not set forth a rule on presentment by mail. Nor does the present draft contain a rule that prevents presentment by mail. Presentment may be made not only by the holder, but also by an agent. Technically, the postal service would serve as

an agent of the holder in making presentment. The issue is therefore whether special rules of substantive law or of evidence should be provided in the uniform law regarding the special case of presentment by mail. The evidence and opinion summarized above has led to the conclusion that no special provision should be made for presentment by mail.

Article 49

Presentment for acceptance shall be dispensed with

(1) Where the drawee is dead or is in the course of insolvency proceedings, or is a person not having capacity to accept the bill; or

(2) Where, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance;

(3) Where a party has waived presentment expressly or by implication, in respect of such party.

Relevant legislation

BEA—section 41 (2)

UCC—section 3-511

ULB—article 54

Cross reference

Time-limits for presentment for acceptance: article 48 (e) to (h)

COMMENTARY

1. The common law system and the Geneva Uniform Law both recognize the existence of circumstances which excuse the holder from an obligation to present a bill for acceptance or for payment, or from drawing up a protest. However, there are sharp differences as to the approach adopted, on the one hand, by the BEA and UCC and, on the other hand, by the ULB:

(a) Under the English and American statutes, circumstances beyond the control of the holder excuse delay in presentment or protesting; once the cause of delay has ceased to operate presentment or protest must be made with "reasonable diligence". Presentment or protest is dispensed with when, after the exercise of reasonable diligence, it cannot be effected. Under the ULB, the existence of an unsurmountable obstacle ("*vis major*") extends the time-limits for presentment or for protest. The holder must, on pain of losing his right of recourse against the drawer, endorsers and their guarantors, present the bill or draw up protest "without delay" if the "*vis major*" ceases to operate within a period of 30 days after maturity, or, in respect of demand bills and after sight bills, within 30 days as from the date on which the holder has given notice of "*vis major*" to his endorser. The holder is dispensed from making presentment or protest if the "*vis major*" continues to operate beyond that period, and he is then permitted to exercise an immediate right of recourse.

(b) The grounds upon which presentment or protest is excused or dispensed with under the two systems also differ. The ULB mentions only "*vis major*", including the "legal prohibition (*prescription légale*) by any State", but excludes expressly "facts which are purely personal to the holder". Under the BEA and UCC, such "personal facts" can be a legitimate cause for delay or for dispensation.

(c) The BEA and UCC set forth grounds, excusing delay in presentment or protest or dispensing with these formalities, that are not expressly mentioned in the ULB, and vice versa.

2. Article 49 does not make provision for the excuse of delay. This Law adopts a system of fixed time-limits for presentment for acceptance (cf. article 48), as in the ULB, rather than the concept of reasonable time recognized under Anglo-American law. If by reasonable diligence presentment for acceptance cannot be made within the prescribed time-

limits for such presentment, presentment is completely dispensed with; the bill is then dishonoured by non-acceptance (article 51 (1) (b)) and the holder acquires an immediate right of recourse against prior parties (article 51 (2)).

3. If the drawee is dead, presentment to "the person or authority who under the applicable law is entitled to administer his estate or to his heirs" is optional (article 48 (c)).

4. If the drawee is in the course of insolvency proceedings, presentment to "a person who under the applicable law is authorized to act in his place" is optional (article 48 (d)). The question what constitutes insolvency is left to national law.

Article 50

(1) If a bill which must be presented for acceptance in accordance with article 46 (1) (a) is not duly presented, the party who stipulated on the bill that it shall be presented shall not be liable on the bill.

(2) If a bill which must be presented for acceptance in accordance with article 46 (1) (b) or (c) is not duly presented, the drawer, the endorser and the guarantors shall not be liable on the bill.

Relevant legislation

BEA—sections 39 (3) and (4), 40

UCC—sections 3-501, 502

ULB—article 53

Cross references

Bills that must be presented for acceptance: article 46

Due presentment for acceptance: article 48

Presentment dispensed with: article 49

COMMENTARY

Paragraph (1)

1. Pursuant to article 31 (2), a stipulation that the bill must be presented for acceptance is effective only in respect of the party making the stipulation. Therefore, if the bill is not presented, that party is not liable. The holder cannot exercise against him a right of recourse if the bill is subsequently dishonoured by non-payment.

Paragraph (2)

2. This paragraph concerns bills drawn payable at a fixed period after sight and those that are payable elsewhere than at the residence or place of business of the drawee. Non-presentment of such bills results in the holder failing to acquire a right of recourse against all prior parties in the event of dishonour by non-payment.

3. The consequences of failure to present is that specified parties "shall not be liable on the bill". The draft draws a distinction between circumstances that bar the creation of liability and circumstances that lead to discharge. The undertaking of the drawer or an endorser is that "upon dishonour of the bill by non-acceptance . . . he will pay the amount of the bill" (see articles 34 (the drawer) and 41 (endorser)). If the bill is not presented for acceptance, although it must be so presented under article 46 (1), it is not dishonoured by non-acceptance, and the liability of the drawer and endorser does not materialize. On the other hand, a party is "discharged" of his liability, if he paid the bill, or on any other ground set forth in article 69 of this Law. The notion of discharge, as used in that and other articles in part six, implies that the liability of a party has materialized.

4. The same considerations obtain in respect of the use of the expression "shall not be liable" in article 55 in the context of failure to present for payment.

Article 51

(1) A bill is dishonoured by non-acceptance

(a) When acceptance is refused upon due presentment or when the holder cannot obtain the acceptance to which he is entitled under this Law; or

(b) When presentment for acceptance is dispensed with pursuant to article 49, and the bill is not accepted.

(2) Where a bill is dishonoured by non-acceptance the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorser and the guarantors.

Relevant legislation

BEA—sections 42 and 43

UCC—section 3-507

ULB—article 53

Cross references

Due presentment: article 48

Presentment dispensed with: article 49

An acceptance to which the holder is entitled: article 40

COMMENTARY

Paragraph (1) (a): "acceptance to which he is entitled"

1. Pursuant to article 40, the holder is entitled to a general acceptance; he may refuse to take a qualified acceptance and the bill is then dishonoured.

As to what constitutes a general or a qualified acceptance, see article 39 (2) and (3).

2. The fact that a bill has been dishonoured by non-acceptance does not prevent the drawee from accepting it subsequently (see article 38 (1) (b)).

3. The term "dishonour" is not used in the Geneva uniform law, but appears to be widely understood in civil law countries. The term, as used in this Law, comprises actual dishonour (a refusal to accept or to pay) and constructive dishonour (where presentment is dispensed with).

4. The immediate right of recourse can only be exercised after the bill has been duly protested for dishonour by non-acceptance (article 57).

Section 2. Presentment for payment

Article 52

(1) Presentment of a bill for payment shall be necessary in order to render the drawer, an endorser or a guarantor liable on the bill.

(2) Presentment for payment shall not be necessary to render the acceptor liable.

Relevant legislation

BEA—section 45 and 52

UCC—section 3-501

ULB—article 38.

Cross references

Liability of the drawer: article 34

Liability of an endorser: article 41

Liability of a guarantor: article 44

COMMENTARY

Paragraph (1)

1. Presentment for payment is a condition precedent to liability of the drawer, endorsers and their guarantors. Failure to present deprives the holder from his right of recourse against prior parties (article 55).

2. As to what constitutes due presentment for payment, see article 53.

Paragraph (2)

3. The acceptor is liable by virtue of his acceptance; presentment for payment to him, or to his guarantor, is not a condition precedent to his liability on the bill.

Article 53

A bill is duly presented for payment if it is presented in accordance with the following rules:

(a) The holder of a bill must present the bill for payment to the drawee or to the acceptor.

(b) Where a bill is drawn upon or accepted by two or more drawees, it shall be sufficient to present the bill to any one of them; if a place of payment is specified, presentment shall be made at that place.

(c) Where the drawee or acceptor is dead, and no place of payment is specified, presentment must be made to the person or authority who under the applicable law is entitled to administer his estate.

(d) A bill which is not payable on demand must be presented for payment on the day on which it is payable or on one of the two business days which follow.

(e) A bill which is payable on demand must be presented for payment within one year of its stated date and if the bill is undated within one year of the issue thereof.

(f) A bill must be presented for payment:

- (i) At the place of payment specified on the bill; or
- (ii) Where no place of payment is specified, at the address of the drawee or the acceptor indicated on the bill; or
- (iii) Where no place of payment is specified and the address of the drawee or the acceptor is not indicated at the principal place of business or residence of the drawee or the acceptor.

Relevant legislation

BEA—sections 45 and 52

UCC—sections 3-501, 503 and 504.

ULB—articles 34 and 38.

Cross references

Definition of "holder": article 5 (4)

Bill drawn upon two or more drawees: article 10

Bills payable at a definite time: article 9 (3)

Bill payable on demand: article 9 (1)

COMMENTARY

1. This article sets forth the rules regarding proper presentment for payment.

Paragraph (a)

2. As elsewhere in this Law, the word "holder," "drawee" or "acceptor" includes an authorized agent. Since presentment for payment is "local", paragraph (f) sets forth rules regarding the proper place of presentment for payment.

Paragraph (b)

3. This paragraph envisages the special case of a bill drawn upon or accepted by two or more drawees, and follows in this respect sections 3-504 (3) (a) of the UCC which eliminates the requirement, found in section 45 (b) of the BEA, that presentment be made to each of two or more drawees, unless they are partners, and no place of payment is specified. If a place of payment is specified on the bill, the holder must present the bill to the drawee or acceptor at that place, but if two or more drawees have their residence or place of business in that place, he may present the bill to any one of them.

Paragraph (c)

4. If the drawee or acceptor is dead, the holder must present the bill for payment to the person or authority who under the applicable law is entitled to administer the drawee's or acceptor's estate. In contrast with presentment for acceptance (article 48 (c)), the death of the drawee or of the acceptor does not dispense with presentment for payment, although, under article 54 (1), this circumstance may excuse delay in making presentment.

Paragraphs (d) and (e)

5. The provisions of these paragraphs lay down rules as to the time at which or within which presentment of payment must be made. Presentment after the due date (in the case of bills payable at a definite time) or after the expiry of the period of one year (in the case of bills payable on demand) deprives the holder of his right of recourse if the bill is dishonoured, and prior parties will not be liable to him on the bill.

Paragraph (f)

6. This paragraph sets forth the rules regarding the proper place of presentment for payment.

Article 54

(1) Delay in making presentment for payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, presentment must be made promptly [within days].

(2) Presentment for payment shall be dispensed with

(a) Where the drawer or an endorser or a guarantor has waived presentment expressly or by implication; such waiver shall bind only the party who made it;

(b) Where a bill is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(c) Where a bill is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(d) Where the drawee or acceptor of a bill after the issue thereof, is in the course of insolvency proceedings in the country where presentment is to be made;

(e) Where a bill has been protested for dishonour by non-acceptance;

(f) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to pay the bill and the drawer has no reason to believe that the bill would be paid if presented.

Relevant legislation

BEA—section 46
UCC—section 3-511
ULB—article 54

Cross reference

Due presentment for payment: article 53

COMMENTARY

Paragraph (1)

1. As to delay in presenting a bill for payment, see paragraph 1 of the commentary to article 49.

Paragraph (2) (a)

2. Waiver binds only the party who made it; this rule is in accordance with article 31 (2).

Paragraph (2) (c)

3. Pursuant to article 53 (2), a bill payable on demand must be presented for payment within one year of its stated date or, if the bill is undated, within one year of its issue.

Paragraph (2), (d) and (e)

4. The provisions of these subparagraphs are based on similar provisions of the BEA.

Article 55

If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors shall not be liable on the bill.

Relevant legislation

BEA—section 45
UCC—section 3-501
ULB—article 53

Cross references

Due presentment for payment: article 53
Delay in presentment excused: article 54 (1)
Presentment dispensed with: article 54 (2)

COMMENTARY

Presentment of a bill for payment is one of the conditions precedent to the liability of parties prior to the holder. Therefore, non-presentment or failure to present a bill in accordance with the requirements of due presentment (article 53) deprives the holder of his right of recourse against prior parties. The drawer may of course accept the bill after maturity, and such an acceptance will make him liable to the holder and any party subsequent to the holder (article 38 (1) (b)).

Article 56

(1) A bill is dishonoured by non-payment

(a) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Law; or

(b) When presentment for payment is dispensed with pursuant to article 54 (2), and the bill is overdue and unpaid.

(2) Where a bill is dishonoured by non-payment the holder may, subject to the provisions of article 57, exercise a right of recourse against the drawer, the endorsers and the guarantors.

Relevant legislation

BEA—section 47
UCC—section 3-507 (1)
ULB—article 43.

Cross references

Due presentment: article 53
Presentment dispensed with: article 54 (2)
Payment to which the holder is entitled: articles 71 and 72.

COMMENTARY

Paragraph (1) (a): "payment to which he is entitled"

1. Pursuant to article 71 and 72, the holder may refuse partial payment or refuse to take payment in a place other than the place where the bill was duly presented for payment in accordance with article 53 (f).

Therefore, the refusal by the holder to accept such payment constitutes a dishonour of the bill by non-payment and the holder acquires a right of recourse against prior parties.

2. The right of recourse can only be exercised after the bill has been duly protested for dishonour by non-payment (article 57).

Section 3. Recourse

Article 57

Where a bill has been dishonoured by non-acceptance or by non-payment, the holder may exercise his right of recourse only after the bill has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

Relevant legislation

BEA—section 44 (2) and 51 (2)
UCC—section 3-501 (3)
ULB—article 44

Cross references

Definition of holder: article 5
Dishonour by non-acceptance: article 51
Dishonour by non-payment: article 56
Protest for dishonour: articles 58 to 61.

COMMENTARY

1. There are three conditions that may be precedent to the liability of the drawer, endorsers and their guarantors. These are: (a) presentment for acceptance, where this is required under article 46 (1), (b) presentment for payment and (c) protest for dishonour. Once these conditions are fulfilled, the holder is entitled to exercise his right of recourse against those parties. Failure to protest a bill for dishonour deprives the holder of his right of recourse; prior parties are not liable on the bill (article 60). However, the acceptor remains liable on the bill, irrespective of whether the bill was presented for payment or was protested for non-payment.

2. Pursuant to article 51 (2), dishonour by non-acceptance in respect of bills payable at a definite time entitles the holder to exercise an immediate right of recourse, i.e., before the maturity of the bill.

Article 58

(1) A protest may be effected by means of a declaration written on the bill and signed and dated by the drawee or the acceptor, or, in the case of a bill domiciled with a named person for payment, by that named person, the declaration shall be to the effect that acceptance or payment is refused.

(2) A protest shall be effected by means of an authenticated protest as specified in paragraph (3) and (4) of this article in the following cases:

(a) Where the declaration specified in paragraph (1) of this article is refused or cannot be obtained; or

(b) Where the bill stipulates an authenticated protest; or

(c) Where the holder does not effect a protest by means of the declaration specified in paragraph (1) of this article.

(3) An authenticated protest is a statement of dishonour drawn up, signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of the place where acceptance or payment of the bill was refused. The statement shall specify

(a) The person at whose request the bill is protested;

(b) The place and date of protest; and

(c) The cause or reason for protecting the bill, the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(4) An authenticated protest may

(a) Be made on the bill itself; or

(b) Be made as a separate document, in which case it must clearly identify the bill that has been dishonoured.

Relevant legislation

BEA—section 51 (7)

UCC—section 3-509

ULB—article 44, article 8 of the Geneva Convention of 1930 for the Settlement of Certain Conflicts of Laws in connexion with Bills of Exchange and Promissory Notes

Cross references

Protest as a condition precedent to the liability of parties: articles 57 and 60

Time for protest: article 59

Delay in protesting excused: article 61 (1)

Protest dispensed with: article 61 (2)

COMMENTARY

General

1. Under article 44 of the ULB, non-acceptance or non-payment must be evidenced by an authenticated act (protest for non-acceptance or non-payment). Questions as to the form of protest are left to the law of the place in which the protest must be drawn up. The Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, in annex II (reservations), permits a Contracting State to "prescribe that protest to be drawn up in its territory may be replaced by a declaration dated and written on the bill itself, and signed by the drawee, except where the drawer stipulates in the body of the bill of exchange itself for an authenticated protest".

2. Under Anglo-American law, protest is required only in the case of foreign bills of exchange (BEA, section 51 (1) (2); UCC, section 3-501 (3)); dishonour of an inland bill may be evidenced by noting. Under section 51 (7) of the BEA, a protest must contain a copy of the bill, and must be signed by the notary making it. Under section 3-509 of the UCC, a protest is a certificate of dishonour "made under the hand and seal of a United States consul or vice-consul or a notary public or other person authorized to certify dishonour by the law of the place where dishonour occurs".

3. Replies to the 1969 Questionnaire on Negotiable Instruments revealed the existence of serious problems due to legal divergencies and to the rules on procedure in various countries with regard to legal action taken against parties to a bill (see A/CN.9/38, paragraphs 55 to 62). These replies further revealed a general desire for simplified rules on protest (see A/CN.9/48, paragraphs 112 to 114). Accordingly, further questions were addressed to banking and trade institutions in order to ascertain the practicability of various alternative solutions to the problems.

4. One solution considered was to reverse the procedure provided by article 46 of the ULB, i.e. protest should not be required unless there were an express stipulation to that effect on the bill, such as "with protest", "avec frais", etc. This procedure was proposed by several respondents to the 1969 Questionnaire on Negotiable Instruments (see A/CN.9/48, paragraph 114 (a)), and has been adopted in article 85 of the Draft Uniform Law for Latin America on Commercial Documents¹ ("A protest shall be necessary only when the drawer or a holder of a bill inserts the expression "supra protest" on the face with visible character"). This solution was abandoned in view of the virtually unanimous opinion of banking and trade institutions that, owing to the legal consequences of dishonour to parties prior to the holder and the duties of due presentment incumbent on the holder, some specified kind of evidence of dishonour should be required in all circumstances.

5. After consultation with interested international organizations and banking and trading institutions, the approach finally adopted is to provide for a simplified form of protest, consisting in a signed declaration on the bill by the drawee or the acceptor indicating a refusal to accept or to pay. Bills of exchange used for settling international transactions are commonly made payable at a bank. With respect to such domiciled bills a declaration of dishonour would, under paragraph (1), normally be given by the paying bank (which often acts also in a collecting capacity).

A more formal protest, i.e. an authenticated protest drawn up by a person authorized to certify dishonour under the law of the place where the dishonour occurred, is required only in the following cases:

(a) When the declaration of the drawee or the acceptor is refused, or cannot be obtained; or

(b) When the bill itself specifies an authenticated protest; or

(c) When the holder of the bill calls for an authenticated protest.

6. The uniform law thus envisages three possibilities:

(a) Waiver of the protest (article 61 (2) (a)). Such waiver binds only the party who made it (articles 31 (2) and 61 (2) (a)) and protest is required in respect of other prior parties;

(b) A simplified form of protest by a declaration effected in accordance with article 58 (1);

(c) An authenticated protest in the cases required under article 58 (2).

¹ Proyectos de Ley Uniforme de Títulos-Valores para América Latina (OAEA)/Ser. GIV., C-d-1589, Argentina, 11 June 1968.

7. Paragraphs (3) and (4) lay down the form which an authenticated protest must take.

Article 59

(1) Protest for dishonour by non-acceptance or by non-payment must be made on the day on which the bill is dishonoured or on one of the two business days which follow.

[(2) An authenticated protest must be effected at the place where the bill has been dishonoured.]

Relevant legislation

BEA—sections 51 and 93

UCC—section 3-509 (4)

ULB—article 44

Cross references

Form of protest: article 58

Failure to protest: article 60

Protest dispensed with: article 61 (2)

COMMENTARY

1. Obvious consideration was given to establishing time-limits for protest on the lines of the ULB; under this approach protest for dishonour by non-acceptance must be made within the time-limits fixed for presentment for acceptance, and protest for dishonour by non-payment within the time-limits fixed for presentment for payment (in the case of bills payable on demand) or on one of the two business days following the day on which the bill is payable (in the case of bills not payable on demand).

2. In the course of discussions with interested international organizations, the view was expressed that the time-limits laid down by the ULB were too long, in particular because the ULB (article 45) requires that notice of dishonour be given "within the four business days which follow the day for protest". It was pointed out that, where bills of exchange are used for the settlement of international commercial transactions, it was of the utmost importance that prior parties, against whom the holder may wish to have recourse, be advised of the dishonour without delay. Article 59 (1) lays down, therefore, the brief time-limit of three days, running from, and including, the day on which the bill was dishonoured.

Paragraph (2)

3. In the case of dishonour by non-acceptance, the place where the bill is dishonoured is the place where acceptance was refused by the drawee. If the drawee could not be found, presentment for acceptance is dispensed with (article 49 (b)). Dispensation from presentment for acceptance is a ground on which protest is dispensed with (article 61 (e)).

4. In the case of dishonour by non-payment, the place where the bill is dishonoured is the place where presentment for payment must be made (article 53 (f)).

Article 60

If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors shall not be liable on the bill.

Relevant legislation

BEA—section 51 (2)

UCC—section 3-501 and 502

ULB—article 53

Cross reference

Protest dispensed with: article 61

COMMENTARY

1. The provision of this article is in accordance with the relevant provisions of the main legal systems. Protest, together with due presentment for acceptance (where necessary) and for payment, is a condition precedent to the liability of prior parties.

2. The use of the words "shall not be liable on the bill" is explained in paragraph 3 of the commentary to article 50.

Article 61

(1) Delay in protesting a bill for dishonour by non-acceptance or by non-payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, protest must be made promptly [within . . . days].

(2) Protest for dishonour by non-acceptance or by non-payment shall be dispensed with:

(a) Where the drawer, an endorser or a guarantor has waived protest expressly or by implication; such waiver shall bind only the party who made it;

(b) Where the cause of delay in making protest continues to operate beyond 30 days after maturity or, in the case of a bill payable on demand, where the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(c) As regards the drawer of a bill, where (i) the drawer and the drawee are the same person; or (ii) the drawer is the person to whom the bill is presented for payment; or (iii) the drawer has countermanded payment; or (iv) the drawee or the acceptor is under no obligation to accept or pay the bill;

(d) As regards the endorser, where the endorser is the person to whom the bill is presented for payment;

(e) Where presentment for acceptance or for payment is dispensed with in accordance with articles 49 or 54 (2).

Relevant legislation

BEA—section 51 (8) and (9)

UCC—section 3-511 (2), (4) and (5)

ULB—article 54

Cross references

Waiver: see also article 31

Presentment for acceptance: articles 46 to 49

Presentment for payment: articles 52 to 54

Time-limit for presentment of a bill payable on demand: article 53 (e)

COMMENTARY

Paragraph (1)

1. As to delay in protesting, see paragraph 1 of the commentary to article 49.

Paragraph (2) (a)

2. . . . "Waiver shall bind only the party who made it": this rule is in accordance with article 31 (2).

3. In contrast to section 3-511 (5) of the UCC, a waiver of protest does not include or imply a waiver of presentment.

Paragraph (2) (b)

3. Pursuant to article 53 (e), a bill payable on demand must be presented for payment within one year of its stated date or, if the bill is undated, within one year of its issue.

Paragraphs (2) (c), (d) and (e)

4. The provisions of these subparagraphs are based on similar provision in the BEA.

Article 62

(1) Where a bill has been dishonoured by non-acceptance or by non-payment, due notice of dishonour must be given to the drawer, the endorser and their guarantors.

(2) Notice may be given by the holder or any party who has himself received notice, or by any other party who can be compelled to pay the bill.

(3) Notice operates for the benefit of all parties who have a right of recourse on the bill against the party notified.

Relevant legislation

BEA—section 49
UCC—section 3-508
ULB—article 45

Cross references

Dishonour by non-acceptance: article 51
Dishonour by non-payment: article 56
Form of notice of dishonour: article 63
Time-limit for giving notice of dishonour: article 64
Delay in giving notice of dishonour: article 65 (1)
Notice of dishonour dispensed with: article 65 (2)
Effects of failure to give notice of dishonour: article 66

*COMMENTARY**General*

1. Under the BEA and UCC, the giving of notice of dishonour is necessary to charge secondary parties. In contrast, under the ULB, failure by the holder to give notice merely makes him liable to such parties for damages which shall not exceed the amount of the bill. This draft follows the approach of the Geneva Uniform Law (see article 66). Notice of dishonour is therefore not a condition precedent to the liability of parties to the bill.

Paragraph (1)

2. As to what constitutes due notice of dishonour, see article 63.

3. Under the ULB, 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 payee. On the other hand, the BEA and the UCC require the holder or a prior endorser liable on the bill to notify any other party against whom he wishes to proceed. Paragraph (1) follows the procedure laid down in Anglo-American law.

4. "... To the drawer, the endorser and their guarantors": the acceptor and his guarantor are not entitled to notice.

Paragraph (2)

5. This paragraph follows the similar provision of section 3-508 (1) of the UCC.

Paragraph (3)

6. It follows from this paragraph that notice of dishonour given by the payee to the drawer operates as a notice from

endorsers subsequent to the payee. If an endorser subsequent to the payee exercises a right of recourse against the drawer, the drawer cannot then claim damages under article 66 on the ground that that endorser failed to give notice.

Article 63

Notice of dishonour may be given in writing or orally and in any terms which identify the bill and state that it has been dishonoured. The return of the dishonoured bill shall be sufficient notice.

Relevant legislation

BEA—section 49 (5) and (7)
UCC—section 3-508 (3)
ULB—article 45

COMMENTARY

1. This article follows the substance of the relevant provisions of the BEA, UCC and ULB.

2. A written notice need not be signed; it suffices that the party notified is informed of the identity of the bill and of the fact of dishonour. All three systems provide that the return of a dishonoured bill constitutes due notice of dishonour.

Article 64

Notice of dishonour must be given within the two business days which follow:

(a) The day of protest or, where protest is dispensed with, the day of dishonour; or

(b) The receipt of notice from another party.

Relevant legislation

BEA—section 49 (12)
UCC—section 3-508
ULB—article 45

Cross references

Form of notice of dishonour: article 63
Time-limit for protest: article 59
Delay in protesting: article 61 (1)
Protest dispensed with: article 61 (2)
Failure to give due notice: article 66

COMMENTARY

1. It is commercially desirable that parties liable on the bill as a consequence of dishonour be advised without delay that they have become liable. Inquiries amongst banking and trade circles have led to the conclusion that a period of three days (i.e., the day of protest or, where protest is dispensed with, the day of dishonour, and the two business days that follow) is an adequate and practicable period in which to give notice; it will, in most cases, enable the holder's agent in a foreign country where the bill was payable to inform his principal of the dishonour and will enable the holder to give notice to prior parties against whom he wishes to have recourse. Unavoidable delay in giving notice is excused under article 65 (1).

2. A party receiving notice has the same period of time for giving notice to prior parties that the holder had upon dishonour.

Article 65

(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond

the control of the holder. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(2) Notice of dishonour shall be dispensed with:

(a) Where the drawer or an endorser or a guarantor has waived notice of dishonour expressly or by implication; such waiver shall bind only the party who made it;

(b) Where the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given;

(c) As regards the drawer of the bill, where the drawer and the drawee are the same person, or the drawer is the person to whom the bill is presented for acceptance or payment, or where the drawer has countermanded payment, or where the drawee or the acceptor is under no obligation to accept or pay the bill;

(d) As regards the endorser, where the endorser is the person to whom the bill is presented for payment.

Relevant legislation

BEA—section 50

UCC—section 3-511

ULB—article 46

Cross references

To whom notice must be given: article 62

Form of notice of dishonour: article 63

Time-limit for giving notice: article 64

Failure to give due notice: article 66

COMMENTARY

Paragraph (1)

1. As to delay in giving notice of dishonour, see paragraph 1 of the commentary to article 49.

Paragraph (2) (a)

2. Waiver binds only the party who made it; this rule is in accordance with article 31 (2).

Paragraph (2) (b)

3. "... The last date on which notice should have been given," i.e., the second business day following the day of protest or, where protest is dispensed with, the second business day following the day of dishonour or, where the notice is given by a party who himself has received notice, the second business day following the receipt by him of notice from another party.

Paragraphs 2 (c) and (d)

4. These subparagraphs cover the various situations where a party is not entitled to notice; they follow in substance the provisions of the BEA.

Article 66

Failure to give due notice of dishonour shall render the holder liable to the drawer, the endorsers and their guarantors for any damages that they may suffer from such failure [provided that the total amount of the damages shall not exceed the amount of the bill].

Relevant legislation

BEA—section 48

UCC—section 3-501 (2)

ULB—article 45

Cross references

When to give notice of dishonour: article 62 (1)

To whom notice must be given: article 62 (2)

Form of notice: article 63

Time-limit for giving notice: article 64

Delay in giving notice: article 65 (1)

Notice dispensed with: article 65 (2)

COMMENTARY

1. The consequences of failure to give notice differ sharply between the Anglo-American Law and the Geneva Uniform Law. Under the BEA and the UCC, the giving of notice of dishonour is necessary to charge secondary parties and is thus a condition precedent to their liability on the bill to the holder or to any other party who has acquired a right of recourse against them. Under the ULB, failure to give notice does not discharge the drawer's or prior endorsers' liability on the bill, but merely makes the party who failed to give notice liable for the damages resulting from such failure. Under the ULB, therefore, a holder or any other party who acquires a right of recourse, but failed to give notice, may exercise such right of recourse upon due protest.

2. Article 66 follows the ULB approach. Under this article, failure to give due notice of dishonour renders the holder liable to the party paying the bill for any damages that he may suffer. The term "holder" includes, of course, a party who paid the bill and proceeds against another party antecedent to him.

3. The words "provided that the total amount of the damages shall not exceed the amount of the bill" are placed between brackets. A provision to that effect is found in article 45 of the ULB. However, in the course of discussions with interested international organizations, the opinion was voiced that failure to give notice and a delayed exercise of the right of recourse might, in certain circumstances, give rise to damages that exceed the amount of the bill. This aspect of the provision of article 66 is therefore referred to the Working Group for consideration.

Article 67

The holder may recover from any party liable,

(a) At maturity: the amount of the bill;

(b) After maturity: the amount of the bill, interest due at (...) per cent per annum above the official rate of discount effective at the place of payment [at the place where the holder has his residence or place of business] calculated on the basis of the number of days and of a year of (365) days, and any expenses of protest and of the notices given;

(c) Before maturity: the amount of the bill, subject to a discount from the date of making payment to the date of maturity, to be calculated at the official rate of discount effective on the date when the recourse is exercised at the place where the holder has his residence or place of business.

Relevant legislation

BEA—section 57

UCC—no equivalent provision, but see section 3-122

ULB—article 48

Cross reference

Holder: article 5 (4)

COMMENTARY

1. When a bill is dishonoured, the holder is entitled, upon due protest, to recover from any prior party and the acceptor the amount of the bill and also any interest that may be due because payment was made after maturity and any expenses in making protest and giving notices.

2. If payment is made before maturity (i.e., an immediate right of recourse was exercised upon dishonour by non-acceptance), the party paying is entitled to a discount from the date of payment to the date of maturity.

3. If the bill itself provides for interest, it is part of the sum payable (article 7) until maturity. After maturity, interest is payable as damages.

Article 68

A party who takes up and pays a bill may recover from the parties liable to him:

(a) The entire sum which he was obliged to pay in accordance with article 67;

(b) Interest due on that sum calculated at the highest permissible legal rate at the pace of payment from the day on which he made payment;

(c) Any expenses which he has incurred.

Relevant legislation

BEA—section 57

UCC—no equivalent provision, but see section 3-122

ULB—article 49

COMMENTARY

Where the drawer has taken up and paid a bill, the acceptor is liable to the drawer for the sum the drawer was compelled to pay pursuant to article 67 and for any interest and expenses. An endorser or a guarantor has similar rights on the bill against prior parties and the acceptor.

Part Six. Discharge

Section 1. General

Article 69

(1) Liability of a party on a bill is discharged by:

(a) Payment in accordance with articles 70 to 75;

(b) Renunciation in accordance with article 76;

(c) Reacquisition of the bill by a prior party in accordance with article 77;

(d) Discharge of a prior party in accordance with article 78 (1);

(e) Absence of his assent to a qualified acceptance in accordance with article 40 (2).

(2) A party is also discharged of his liability on the bill by any act or agreement which would discharge him of his contractual liability for the payment of money.

Relevant legislation

UCC—section 3-601

COMMENTARY

1. Article 69 is declaratory. Being the first article of part six on "discharge", it summarizes the various ways by which liability on a bill is discharged.

"Discharge"

2. A party who is "discharged" of his liability has no further liability on the bill (but see article 25). If an action on the bill is brought against such party, he may raise his discharge as a defence. If the party discharged is the acceptor, he may debit any current account that he has with the drawer. If the drawer or an endorser is discharged of liability on the bill, he is also discharged of liability on the underlying obligation to his immediate party.

Example A. The drawee is indebted to the drawer. The drawer is indebted to the payee. A bill is drawn on the drawee. On presentment by the payee, the drawee accepts the bill. At maturity the bill is paid by the acceptor to the payee. The acceptor is discharged. He may debit the drawer's account with him.

Example B. Same facts as in A, but the acceptor dishonours the bill and the drawer pays the payee. The drawer is discharged of his liability on the bill. We may assume that under applicable national law, his original debt to the payee is also discharged.

3. Articles 70 to 78 provides four ways by which liability on a bill is discharged. These enumerated grounds for discharge are not exhaustive. It is provided by article 69 (2) that any act or agreement which would discharge a party to a contract of his contractual liability for the payment of money shall also discharge him of his liability on the bill.

Example C. The holder, orally (and without delivering the bill), waives his rights on the bill against an endorser. Is the endorser discharged?

According to article 76, such waiver does not constitute a discharge. It may be, however, that under a given legal system such waiver is a valid discharge of an obligation to pay money. If this is the case, such waiver will also discharge the endorser of his liability on the bill. In several countries there are rules (of substance and of procedure) by which the debtor may deposit the amount of the debt with a competent authority (e.g. the courts); such a deposit is considered equivalent to payment to the creditor and therefore operates as a discharge. In countries where such a possibility exists, the deposit of the amount of the bill by a party liable should discharge him of liability, since it is considered to be an "act" under paragraph (2) which would discharge a party of his contractual liability for the payment of money.

4. The draft does not provide conflict rules for the application of the rule set forth in paragraph (2); this question is accordingly left to national law.

Section 2. Payment

Article 70

(1) A party is discharged of his liability on the bill when he pays the holder or a party subsequent to himself the amount due pursuant to articles 67 or 68.

(2) A person receiving payment of a bill in accordance with paragraph (1) shall deliver the receipted bill and any such authenticated protest to the person paying the bill.

Relevant legislation

BEA—section 59

UCC—section 3-603

ULB—articles 39 and 40

Cross references

"Discharge": see comments to article 69
Definition of holder: article 5 (4)

COMMENTARY

1. Payment discharges the payor if it is made at or after maturity since this is his undertaking by signing the bill (see articles 34, 36 and 41). Payment before maturity is governed by article 67 (c). If the bill is dishonoured by non-acceptance, the parties liable should be able to discharge their liability even before maturity, since the holder has an immediate right of recourse (article 51 (2)).

2. The payor is fully discharged if he pays the amount of the bill and any additional sum required pursuant to article 67. An offer to pay a lesser amount is governed by article 71.

"A party subsequent to himself"

3. The person receiving payment is usually the holder. If the bill is dishonoured by the drawee or acceptor, the holder has a right of recourse against the drawer and the endorsers (articles 51 (2) and 56 (2)). When the drawer or an endorser pays the bill to the holder, the bill is usually delivered to the payor. In the absence of an endorsement by the holder—and such endorsement is not necessary—the payor, though in possession of the bill may not be considered to be a holder (see article 5 (4)). The drawer who paid the bill to the holder has a right thereon against the acceptor. If the bill was paid to the holder by an endorser, he has a right against the acceptor, drawer and previous endorsers. Article 70 provides that payment by the acceptor, drawer or endorsers to "a subsequent party" (i.e., the party who paid the holder), discharges him of his liability on the bill.

Example A. A, an endorsee from the payee, presented the bill for payment to the acceptor but the bill was dishonoured. A exercised his right of recourse against the payee, who paid A. The payee then exercised his right of recourse against the drawer. Payment by the payee discharges him (the payee) since he paid the "holder" (A). Payment by the drawer to the payee discharges the drawer, since he paid "a subsequent party".

4. It should be noted that payment discharges a party, even if the payor knows that there is a claim to the bill. This results from the provision of article 24.

Example B. The drawer (D) drew and issued a bill to the payee (P). By fraud A induced P to negotiate the bill to him. At maturity, the bill was presented for payment to the acceptor by A. The acceptor paid knowing of the fraud. Is the acceptor discharged? Pursuant to article 70 the acceptor is discharged. This follows from the rule provided by article 24 (3), under which on these facts D has no defence on the bill against A (*ius tertii* is no defence).

Article 71

(1) The holder may take partial payment from the drawee or the acceptor. In that case

(a) the acceptor is discharged of his liability on the bill to the extent of the amount paid; and

(b) the bill shall be considered as dishonoured by non-payment as to the amount unpaid.

(2) The drawee or the acceptor making partial payment may require that mention of such payment be made on the bill and that a receipt therefore be given to him.

(3) When a bill has been paid in part, a party who pays the unpaid amount shall be discharged of his liability on the bill, and the person receiving the pay-

ment shall deliver the receipted bill and any authenticated protest to the party making the payment.

Relevant legislation

BEA—section 47

UCC—section 3-507

ULB—article 39

Cross references

Definition of holder: article 5 (4)

Definition of "authenticated protest": article 58 (2)

COMMENTARY

1. Under this draft the holder is not obliged to accept partial payment. He has an option. On the one hand, the holder may accept partial payment. In this case any party liable is discharged *pro tanto*, and the bill is dishonoured to the extent of the amount unpaid. On the other hand, the holder may refuse partial payment. In this case the bill is considered to be dishonoured by non-payment as to the whole amount.

2. In replies to the questionnaire on negotiable instruments (A/CN.9/48, para. 84), several respondents favoured a rule imposing on the holder the duty to take partial payment. An almost equal number opposed such a rule on the ground that the holder should not be obliged to take less than he is entitled to. It was also considered that it is not proper to impose on the holder the burden of dividing his right to payment between several persons.

Article 72

(1) The holder may refuse to take payment in a place other than the place where the bill was duly presented for payment in accordance with article 53 (f).

[(2) If payment is not then made in the place where the bill was duly presented for payment in accordance with article 53 (f), the bill shall be considered as dishonoured by non-payment.]

Relevant legislation

BEA—section 45 (4)

UCC—section 3-504

Cross references

Definition of holder: article 5 (4)

COMMENTARY

1. Pursuant to article 62 (f), a bill must be presented for payment at the place of payment specified in the bill. When no place of payment is specified, the bill must be presented for payment at the address of the drawer or acceptor indicated on the bill. When no place of payment is specified and the address of the drawee or acceptor is not indicated, the bill must be presented for payment at the principal place of business or residence of the drawee or the acceptor. It is commercially reasonable for payment to be made at the place where the bill is presented for payment. It is therefore provided that an offer to pay the bill in some other place may be rejected by the holder, who may then treat the bill as dishonoured by non-payment.

2. Paragraph (2) explains in more detail the legal meaning of the "may" provision in paragraph (1). It is put between brackets because it may be considered superfluous.

Article 73

(1) Where a bill has been materially altered as to its amount, any person who pays the bill pursuant to such alteration without knowledge of the alteration shall have the right to recover the amount by which the bill was raised from the party who so altered the bill or from any subsequent party except a party who was without knowledge of the alteration at the time he transferred the bill.

(2) In any other case of alteration which is material, as defined in article 29 (2), any person who pays the bill pursuant to such alteration without knowledge of the alteration shall have the right to receive the amount paid by him from the person who altered the bill, or from any subsequent party except a party who was without knowledge of the alteration at the time he transferred the bill.

(3) Where the signature of the drawer has been forged, any person who pays the bill without knowledge of the forgery shall have the right to recover the amount paid by him from the person who forged the signature of the drawer, or from any party subsequent to the drawer a party who was without knowledge of the forgery at the time he transferred the bill.

Relevant legislation

BEA—section 54

UCC—section 3-417 (1), 3-418

Cross references

Rights of holder and protected holder in case of alteration: article 29

"Forged signature": article 28

"Knowledge": article 6

COMMENTARY

Paragraph (1)

1. Article 73 (1) deals with the alteration of a bill by modification of its amount. If the amount is lowered, no question of recovery by the payor can arise. The question of recovery may, however, arise in the case where the amount of the bill is raised.

Example A. A bill which stated the sum payable as \$1,000 was accepted. The payee then raised the sum to \$10,000 and endorsed the bill to A. A endorsed the bill to B. At maturity the bill was paid as altered by the acceptor. What are the acceptor's rights?

The acceptor paid \$9,000 more than he was obliged to pay to the holder (article 36). If he paid with knowledge of the alteration, he paid at his own risk. If he paid without knowledge, he may, under article 73 (1), recover this amount from any person who took the altered bill, except from a party who was without knowledge of the alteration. In example A, the acceptor may recover \$9,000 from the payee, and from A or B if they knew about the alteration. This would appear to be a just solution, since the risk of the alteration is shifted to the party who made the alteration or to a party who knew about it.

Paragraph 2

2. This paragraph deals with other cases of material alteration, e.g. alteration of the date.

Example B. A bill was drawn and accepted as payable on 1 January 1973. The payee then altered the date to 1 January 1972, and endorsed the bill to A. A endorsed the bill to B. On 1 January 1972, the bill was paid by the acceptor.

Article 73 (2) provides that if the acceptor paid without knowledge of the alteration, he may recover the amount of the bill from the payee, or from A or B, if A or B knew about the alteration.

Paragraph 3

3. This paragraph deals with the case of a forged drawing. Under article 28, the drawer whose signature was forged is not liable on the bill. Payment by the acceptor or drawee, without knowledge of the forgery, is payment by mistake. It is the policy of this law that the drawee or acceptor should be able to receive the amount paid from the forger (who is liable on the bill (article 28)), and from any party who had knowledge of the forgery at the time he transferred the bill. If all parties (except the forger) are innocent, the risk of the forgery as a theoretical matter, will lie on the forger. If, as will usually be the case, the forger cannot be found or has no funds to pay the bill, the risk falls on the drawee or acceptor (the rule in *Price v. Neal*). The reason for this result is that the drawee or acceptor is in a better position than the holder to identify the forger's signature.

4. No provision is made in article 73 concerning forged endorsements since that case is covered by article 22 of the draft.

5. No provision is made for other cases in which payment is made by a party to the bill though: (a) he is not obliged to pay (he has a "real defence"), or (b) some other party has a claim to the bill.

The question raised under (a) is left to national law. As to (b) there is no occasion for recovery since under article 24 such claims do not provide a valid defence.

Article 74

[This article will contain rules in respect of a bill drawn payable in a currency other than that of the payment. At the time of finalizing the draft uniform law consultations had not yet been completed regarding certain implications of such rules and their possible conflict with existing international agreements and mandatory national rules such as exchange control regulations. It is expected that a draft uniform rule on this issue will be finalized in time for the first meeting of the Working Group.]

Article 75

[(1) Where a party tenders payment of the amount due in accordance with articles 67 or 68 to the holder at or after maturity and the holder refuses to accept such payment:

(a) The party tendering payment shall not be liable for any interest or costs as from the day payment was offered; and

(b) Any party who has a right of recourse against a party tendering payment shall not be liable for such interests or costs.

(2) The provisions of paragraph (1) (b) shall also apply if the person tendering payment to the holder is the drawee.]

Relevant legislation

UCC—section 3-604

Cross references

The amount to be paid at or after maturity: article 67 and 68

COMMENTARY

1. This article deals with the offer of payment ("tender"). It provides that a party liable on a bill may, at or after maturity, offer payment to the holder. If the holder refuses to accept such payment, the party making the offer will not be liable to pay interest or costs as from the date of the offer. As to the parties who have a right of recourse against the party offering payment, article 75 provides that they are discharged from any liability for interests or costs as from the date of the offer.

2. Paragraph (2) is necessary since paragraph (1) refers to tender by "a party". The drawee is not a "party", since he has not signed the bill. It is submitted that the rules about tender should apply also, as far as the right of recourse is concerned, to the tender made by the drawee.

3. The article is put between brackets, since it may already be covered by the provision of article 69 (2).

Section 3. Renunciation*Article 76*

(1) A party is discharged of his liability on the bill if the holder, at or after maturity, writes on the bill an unconditional renunciation of his rights thereon against such party.

(2) Such renunciation shall not affect the right to the bill of the party who so renounced his rights thereon.

Relevant legislation

BEA—sections 62 and 63

UCC—section 3-605

Cross reference

Definition of "holder": article 5 (4)

COMMENTARY

1. A party liable on a bill is discharged of his liability thereon when the holder renounces his rights against him, provided the renunciation is unconditional and is made on the bill at or after maturity. Waiver made before maturity or not on the bill, is dealt with under article 69 (2).

Example A. The holder renounces his right on the bill against the payee by cancellation of the payee's endorsement. The holder has no right against the payee. Any subsequent holder, even if he qualifies as a protected holder, has no rights against the payee (article 24).

2. It should be noted that a renunciation or waiver made under this article, while affecting the parties' liabilities on the bill does not affect the title to the instrument.

Example B. The renunciation by the holder in example A does not affect his title to the bill, though it seems, on the face of the bill, that he has not taken through an uninterrupted series of endorsements.

Section 4: Reacquisition by a prior party*Article 77*

A party liable who rightfully becomes the holder of the bill shall be discharged of liability thereon to any party who had a right of recourse against him.

Relevant legislation

BEA—section 61

Cross reference

Definition of "holder": article 5 (4)

COMMENTARY

1. Article 77 deals with the case where a bill is transferred to a party who has been liable on the bill and who now takes the bill as a holder. As a holder, such party has rights on the bill against all previous parties. Those parties, if obliged to pay to the holder, will have a right of recourse against parties previous to them, including the holder in his "capacity" as a previous party. In order to prevent multiplicity of actions, article 77 provides that a previous party who becomes a holder is discharged of liability on the bill to any party subsequent to him. Article 78 provides that such subsequent parties are discharged of liability against the holder.

Example A. The payee endorsed a bill to A. A endorsed the bill to the drawer. Pursuant to article 77, the drawer is discharged of his liability on the bill to the payee and to A, and the payee and A are discharged of their liability to A (in his "capacity" as a holder).

2. A party to a bill may reacquire the bill by unlawful means. There is no reason to discharge him in that case. It is provided, therefore, that discharge occurs only if the previous party becomes a holder rightfully.

Section 5. Discharge of a prior party*Article 78*

(1) Where a party is discharged of liability on the bill, any party who had a right of recourse against him shall also be discharged.

(2) An agreement, not amounting to partial or total discharge, between the holder and a party liable on the bill shall not affect the right and liabilities of other parties.

Relevant legislation

BEA—section 37

UCC—section 3-208

COMMENTARY

Paragraph (1)

1. The discharge of a party to a bill affects not only his rights on the bill, but also the rights of parties subsequent to the party discharged. When those parties signed the bill they were entitled to assume that if they paid the bill, they would have a right of recourse against prior parties. The discharge of a previous party impairs this right of recourse. It is reasonable, therefore, to discharge parties subsequent to the party discharged.

Example A. The payee endorsed a bill to A. A waived his rights against the drawer by cancelling his signature. Pursuant to article 78, the payee is discharged of liability on the bill.

Paragraph (2)

2. The holder of a bill may agree not to sue a party, or may suspend his right to enforce payment or may make other agreements with a party that affects that party's liability but do not constitute a total or partial discharge. Article 78 (2) provides that such agreements do not affect the rights and liabilities of other parties to the bill. These other parties remain liable to the holder as if the contract was not made

and may exercise their right of recourse without taking the contract into account.

Example B. The holder agreed with the acceptor to postpone payment. The agreement may not be raised as a defence by the drawer if he is sued prior to the extended date set in the above agreement. If the drawer paid the bill, he has a right thereon against the acceptor; the contract between the holder and the acceptor may not be raised by the acceptor as a defence against the drawer's action. If, because of the postponement, presentment for payment or protest was not duly effected, the drawer is discharged.

This rule results from the independent nature of each party's liability on the bill; such independent liability is derived from the signature on the bill (and the provisions of the uniform law) and cannot be effected by an agreement to which the party is not privy.

Part Seven. Limitation (prescription)

Article 79

[It is expected that the law will include an article on the limitation of legal proceedings and the prescription of rights arising under an international bill of exchange. The preparation of such an article presents difficult problems of reconciling the divergent approaches of different legal systems,¹ and requires further study. It is expected that proposals with respect to this problem can be submitted in time for the first session of the Working Group.]

Part Eight. Lost bills

Article 80

[This article will deal with the question of lost bills, which is approached differently in the principal legal systems. Consultations with banking and trade organizations have shown that a workable solution is feasible. It is expected that draft proposals dealing with this issue can be submitted in time for the first session of the Working Group.]

ANNEX

Draft uniform law on international bills of exchange Part One. Sphere of application: form

Article 1

- (1) This Law shall apply to international bills of exchange.
- (2) An international bill of exchange is a written instrument which
 - (a) Contains, in the text thereof, the words "Pay against this international bill of exchange, drawn subject to the Convention of _____" (or words of similar import); and
 - (b) Contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite sum of money to a specified person (the payee) or to his order; and
 - (c) Is payable on demand or at a definite time; and
 - (d) Is signed by the drawer; and
 - (e) Shows that it is drawn in a country other than the country of the drawee or of the payee or of the place where payment is to be made.

¹ See report of the Working Group on Time-limits and Limitations in the International Sale of Goods. A/CN.9/70/Add.1; commentary to opening clauses at para. 4.

Article 2

The incorrectness of statements made on a bill for the purpose of paragraph (2) (e) of article 1 shall not affect the application of this Law.

Article 3

This Law shall apply without regard to whether the countries indicated on an international bill of exchange pursuant to paragraph (2) of article 1 are Contracting States.

Part Two. Interpretation

SECTION 1. GENERAL

Article 4

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.

Article 5

In this Law:

- (1) "Bearer" means a person in possession of a bill endorsed in blank;
- (2) "Bill" means an international bill of exchange governed by this Law;
- (3) (a) "Endorsement" means a signature, or a signature accompanied by a statement designating the person to whom the bill is payable, which is placed on the bill by the payee, by an endorsee from the payee, or by any person who is designated under an uninterrupted series of such endorsements. An endorsement which consists solely of the signature of the endorser means that the bill is payable to any person in possession of the bill.
- (b) "Endorsement in blank" means an endorsement which consists solely of the signature of the endorser or which includes a statement to the effect that the bill is payable to any person in possession of the bill.
- (c) "Special endorsement" means an endorsement which specifies the person to whom the bill is payable.
- (4) "Holder" means the payee or the endorsee of a bill who is in possession thereof;
- (5) "Issue" means the first transfer of a bill to a person who takes it as a holder;
- (6) "Party" means a party to a bill;
- (7) "Protected holder" means the holder of a bill which, on the face of it, appears to be complete and regular and not overdue, provided that such holder was, when taking the bill, without knowledge of any claims or defences affecting the bill or of the fact that it was dishonoured.

Article 6

For the purpose of this Law, a person is considered to have "knowledge" of a fact if he has actual knowledge thereof [or if the absence of knowledge thereof is due to [gross] negligence on his part] [or if he has been informed thereof or if the fact appears from the face of the bill].

SECTION 2. INTERPRETATION OF FORMAL REQUIREMENTS

Article 7

The sum payable by a bill is a definite sum although the bill states that it is to be paid

- (a) With interest; or
- (b) By stated instalments; or

(c) According to an indicated rate of exchange or according to a rate of exchange to be determined as directed by the bill.

Article 8

(1) If there is a discrepancy between the amount of the bill expressed in words and the amount expressed in figures, the sum payable shall be the amount expressed in words.

[(2) If the amount of the bill is specified in a currency having the same designation but a different value in the country where it was drawn and the country where payment is to be made, the designation shall be considered to be in the currency of the country where payment is to be made [provided that the place where payment is to be made is indicated on the bill]].

(3) Where a bill states that it is to be paid with interest, without specifying the date from which interest is to run, interest shall run from date of the bill [and if the bill is undated, from the issue thereof].

(4) Where a bill states that it is to be paid with interest, without specifying the rate, simple interest at the rate of [five] per cent per annum shall be payable.

Article 9

(1) A bill is payable on demand

(a) If it states that it is payable on demand or at sight or at sight or on presentment or if it contains words of similar import;

(b) If no time for payment is expressed.

(2) A bill which is accepted or endorsed or guaranteed after maturity is a bill payable on demand as regards the acceptor, the endorser or the guarantor.

(3) A bill is payable at a definite time if it states that it is payable

(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the bill; or

(b) At a fixed period after sight; or

[(c) By instalments at successive dates, even when it is stipulated in the bill that upon default in payment of any instalment the unpaid balance shall become due immediately.]

(4) The time of payment of a bill payable at a fixed period after date is determined by reference to the date stated on the bill regardless of whether bill is ante-dated or post-dated.

Article 10

(1) A bill may:

(a) Be drawn upon two or more drawees,

(b) Be signed by two or more drawers,

(c) Be payable to two or more payees.

(2) If a bill is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the bill may exercise the rights of a holder. In any other case the bill is payable to all of them and the rights of a holder can only be exercised by all of them.

SECTION 3. COMPLETION OF AN INCOMPLETE INSTRUMENT

Article 11

(1) The possessor of an instrument which

(a) Contains, in the text thereof, the words "Pay against this international bill of exchange, drawn subject to the Convention of ————" (or words of similar import), and

(b) Is signed by the drawer,

but which lacks elements pertaining to one or more of the other requirements set out in article 1 (2), shall be presumed to have received authority from the drawer to insert such elements, and the instrument so completed is effective as a bill;

(2) When such an instrument is completed otherwise than in accordance with the authority given, the lack of authority cannot be set up as a defence against a holder who took the bill without knowledge of the lack of authority.

*Part Three. Transfer and negotiation**Article 12*

The transfer of a bill vests in the transferee the rights to and upon the bill of the transferor.

Article 13

(1) A bill is negotiated when it is transferred

(a) By endorsement and delivery of the bill by the endorser to the endorsee, or

(b) By mere delivery of the bill but only if the last endorsement is in blank.

(2) Negotiation shall be effective to render the transferee a holder even though the bill was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would subject the transferee to claims to the bill or to defences as to liability thereon.

Article 14

Where a bill is transferred without an endorsement necessary to make the transferee a holder, the transferee is entitled to require the transferor to endorse the bill to him.

Article 15

The holder of a bill endorsed in blank may convert the blank endorsement into a special endorsement by indicating therein that the bill is payable to himself or to some other person.

Article 16

When the drawer has included in the bill, or the endorser in his endorsement, words prohibiting transfer, such as "not transferable", "not negotiable", "not to order", or words of similar import, the bill cannot be negotiated except for purposes of collection.

Article 17

An endorsement purporting to negotiate a bill subject to a condition shall be effective to negotiate the bill irrespective of whether the condition is fulfilled.

Article 18

An endorsement purporting to transfer only a part of the sum payable shall be ineffective as an endorsement.

Article 19

Where there are two or more endorsements, it shall be presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the bill.

Article 20

(1) Where an endorsement for collection contains the words "for collection", "for deposit", "value in collection", "by procuration", or words of similar import, authorizing the endorsee to collect the bill, the endorsee:

(a) May only endorse the bill on the same terms; and

(b) May exercise all the rights arising out of the bill and shall be subject to all claims and defences which may be set up against the endorser.

(2) The endorser for collection shall not be liable upon the bill to any subsequent holder.

Article 21

Where a bill is transferred or negotiated to a prior party, he may, subject to the provisions of this Law, re-issue or further transfer or negotiate the bill.

Article 22

(1) A person who acquires a bill through what appears on the face of the bill to be an uninterrupted series of endorsements shall be a holder even if one of the endorsements was forged or was signed by an agent without authority, provided that such person was without knowledge of the forgery or of the absence of authority.

(2) Where an endorsement was forged or was signed by an agent without authority, the drawer or the person whose endorsement was forged or was signed by an agent without authority shall have against the forger or such agent and against the person who took the bill from the forger or from such agent the right to recover compensation for any damage that he may have suffered because of the operation of paragraph (1) of this article.

(3) Subject to the provisions of article 28 (a) and (b), a forged endorsement or an endorsement by an agent without authority shall not impose any liability on the person whose signature was forged or on behalf of whom the agent purported to act when endorsing the bill.

Part Four. Rights and liabilities**SECTION 1. THE RIGHTS OF A HOLDER AND A PROTECTED HOLDER***Article 23*

A person who signs a bill is liable to the holder thereof in accordance with the provisions of this Law.

Article 24

(1) The rights on a bill of a holder who is not a protected holder are subject to:

(a) Any valid claim to the bill on the part of any person; and

(b) Any defence of any party which would be available under a contract.

(2) A party may not avoid liability to a remote holder on the ground that he has a defence against his immediate party if such defence is based on legal relations not connected with the bill.

(3) A party may not avoid liability to a holder on the ground that a third person has a valid claim to the bill, unless such person himself has claimed the bill from the holder and informed such party thereof.

Article 25

(1) The rights on a bill of a protected holder are free from

(a) Any claim to the bill on the part of any person; and

(b) Any defence of any party, except defences based on circumstances which render the obligation on the bill of such party null and void; and

(c) Any defence based on discharge or on the absence of liability on the ground that the bill was dishonoured by non-acceptance or by non-payment or was not duly protested.

(2) The transfer of a bill by a protected holder shall not rest in the transferee the rights of a protected holder if the transferee has participated in a transaction which gives rise to a claim to, or a defence upon, the bill.

Article 26

(1) Every holder is presumed to be a protected holder.

(2) Where it is established that a defence exists, the holder has the burden of establishing that he is a protected holder.

SECTION 2. LIABILITY OF THE PARTIES**A. GENERAL***Article 27*

(1) A person is not liable on a bill unless he signs it.

(2) A person who signs in a name which is not his own shall be liable as if he had signed in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.

Article 28

A forged signature on a bill does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person shall be liable:

(a) If he has ratified the signature;

(b) To a holder without knowledge of the forgery if, through his conduct he has given such holder or an intervening endorser reason to believe that the signature was his own or was made by an agent with authority.

Article 29

(1) Where a bill has been materially altered:

(a) Parties who have signed the bill subsequent to the material alteration shall be liable on the bill according to the terms of the altered text; and

(b) Parties who have signed the bill before the material alteration shall be liable on the bill according to the terms of the original text, provided that:

(i) A party who has himself made, authorized, or assented to the material alteration shall be liable according to the terms of the altered text; and

(ii) A party who through his conduct facilitated the material alteration shall be liable to a holder without knowledge of the alteration according to the terms of the altered text.

(2) For the purpose of this Law, any alteration is material which modifies the written undertaking on the bill of any party in any respect.

Article 30

(1) A bill may be signed by an agent.

(2) The signature on a bill by an agent, with authority to sign and showing on the bill that he is signing in a representative capacity, imposes liability on the bill on the person represented and not on the agent.

(3) Where an agent signs without authority or where he signs with authority but does not show on the bill that he is signing in a representative capacity, he shall be liable on the bill. The person whom the agent purports to represent shall not be liable on the bill.

(4) An agent who is liable on the bill pursuant to paragraph (3) and who pays the bill shall have the same rights as the person for whom he purported to act would have had if that person had paid it.

Article 31

(1) Any party may exclude or limit his liability on the bill by an express stipulation on the bill.

(2) Such exclusion or limitation of liability shall be effective only with respect to the party making the stipulation.

Article 32

Where a person other than the drawee places his signature on a bill he shall be liable thereon as an endorser unless he clearly indicates on the bill that he signed in some other capacity.

Article 33

All drawers, acceptors, endorsers and guarantors of a bill are jointly and severally liable thereon.

B. THE DRAWER**Article 34**

The drawer engages that upon dishonour of the bill by non-acceptance or non-payment and upon any necessary protest he will pay the amount of the bill, and any interest and expenses which may be claimed under articles 67 or 68, to the holder or to any party subsequent to himself who is in possession of the bill and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

C. THE DRAWEE AND THE ACCEPTOR**Article 35**

- (1) The drawee is not liable on a bill until he accepts it.
- (2) The drawing of a bill or its endorsement does not of itself operate as a transfer or assignment to the holder of funds in the hands of the drawee.

Article 36

The acceptor engages that he will pay to the holder:

- (a) At maturity, the amount of the bill.
- (b) After maturity, the amount of the bill and any interest and expenses which may be claimed under articles 67 (b) or 68.

Article 37

An acceptance must be written on the bill and may be effected either by the drawee's signature alone or by his signature accompanied by the word "accepted" or by words of similar import.

Article 38

- (1) A bill may be accepted
 - (a) Before the instrument has been signed by the drawer, or while otherwise incomplete;
 - (b) Before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.
- (2) Where a bill drawn payable at a fixed period after sight is accepted and the acceptor has not indicated the date of his acceptance, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.
- (3) Where a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder shall be entitled to have the acceptance dated as of the date of presentment to the drawee for acceptance.

Article 39

- (1) An acceptance may be either general or qualified.
- (2) By a general acceptance the drawee engages to pay the bill according to its terms.
- (3) By a qualified acceptance the drawee engages to pay the bill according to terms expressly stated in his acceptance. An acceptance is qualified if, *inter alia*, it is
 - (a) Conditional, in that the acceptance states that payment by the acceptor will be dependent upon the fulfilment of a condition therein stated;

(b) Partial, in that the acceptance relates to only part of the amount of the bill;

(c) Qualified as to place, in that the acceptance indicates a place of payment other than the place of payment indicated on the bill or, in the absence of such indication, other than the address indicated on the bill as that of the drawee;

(d) Qualified as to time;

(e) An acceptance by one or more of the drawees but not by all.

Article 40

(1) The holder may refuse a qualified acceptance other than a partial [or local] acceptance. Upon such refusal the bill is dishonoured by non-acceptance.

(2) Where a holder takes a qualified acceptance other than an acceptance which is partial or is qualified as to place, the drawer and any endorser and guarantor who do not affirmatively assent shall be discharged of liability on the bill.

(3) Where the drawee gives a partial acceptance, the bill is dishonoured by non-acceptance as to the part of the amount not accepted.

D. THE ENDORSER**Article 41**

The endorser engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay the amount of the bill, and any interest and expenses which may be claimed under articles 67 or 68, to the holder or to any party subsequent to himself who is in possession of the bill and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

Article 42

(1) Any person who negotiates a bill shall be liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to the negotiation

- (a) A signature on the bill was forged or unauthorized; or
- (b) The bill was materially altered; or
- (c) A party has a valid claim or defence; or
- (d) The bill is dishonoured by non-acceptance or non-payment.

(2) Liability on account of any defect mentioned in paragraph (1) shall be incurred only to a holder who took the bill without knowledge of such defect.

E. THE GUARANTOR**Article 43**

(1) Payment of a bill may be guaranteed, as to the whole or part of its amount, by any person who need not be a party to the bill.

(2) A guarantee must be written on the bill or on a slip affixed thereto. It is expressed by the words: "guaranteed", "aval", "good as aval", or by words of similar import, accompanied by the signature of the guarantor.

(3) A guarantor may specify the party whose payment he guarantees.

(4) In the absence of such specification, the person guaranteed shall be the drawer.

Article 44

(1) A guarantor shall be liable on the bill to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise.

(2) The guarantor shall be liable on the bill even when the party for whom he has become guarantor is not liable thereon, unless that party's lack of liability is apparent from the face of the bill.

Article 45

The guarantor, when he pays the bill, shall have rights on the bill against the party guaranteed and against those who are liable thereon to that party.

Part Five. Presentment, dishonour and recourse

SECTION 1. PRESENTMENT FOR ACCEPTANCE

Article 46

(1) The holder must present a bill for acceptance

(a) When the drawer or an endorser or a guarantor has stipulated on the bill that it shall be so presented;

(b) When the bill is drawn payable at a fixed period after sight; or

[(c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee].

Article 47

(1) The drawer or an endorser or a guarantor may stipulate on the bill that it shall not be presented for acceptance or that it shall not be presented before a specified date or before the occurrence of a specified event.

(2) Where a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1), and acceptance is refused, the bill is not thereby dishonoured in respect of the party making the stipulation.

(3) Where the drawee accepts a bill notwithstanding a stipulation that it shall not be presented for acceptance, the acceptance shall be effective.

Article 48

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

(a) The holder must present the bill to the drawee.

(b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise.

(c) Where the drawee is dead, presentment may be made to the person or authority who, under the applicable law is entitled to administer his estate.

(d) Where the drawee is in the course of insolvency proceedings, presentment may be made to a person who under the applicable law is authorized to act in his place.

(e) Where a bill is drawn payable on, or at a fixed period after, a stated date, any presentment for acceptance must be made before the date of maturity.

(f) A bill drawn payable at a fixed period after sight must be presented for acceptance within one year of its date.

(g) A bill in which the drawer or an endorser or a guarantor has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

(h) A bill in which the drawer or an endorser or a guarantor has stipulated that it shall be presented for acceptance, but without stating a date or time-limit for presentment, [or a bill which is drawn payable elsewhere than at the place of business or residence of the drawee and which is not a bill payable after sight,] must be presented before the date of maturity.

Article 49

Presentment for acceptance shall be dispensed with

(1) Where the drawee is dead or is in the course of insolvency proceedings, or is a person not having capacity to accept the bill; or

(2) Where, with the exercise of reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance;

(3) Where a party has waived presentment expressly or by implication, in respect of such party.

Article 50

(1) If a bill which must be presented for acceptance in accordance with article 46 (1) (a) is not duly presented, the party who stipulated on the bill that it shall be presented shall not be liable on the bill.

(2) If a bill which must be presented for acceptance in accordance with article 46 (1) (b) or (c) is not duly presented, the drawer, the endorser and the guarantor shall not be liable on the bill.

Article 51

(1) A bill is dishonoured by non-acceptance:

(a) When acceptance is refused upon due presentment or when the holder cannot obtain the acceptance to which he is entitled under this Law; or

(b) When presentment for acceptance is dispensed with pursuant to article 49, and the bill is not accepted.

(2) Where a bill is dishonoured by non-acceptance the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorser and the guarantor.

SECTION 2. PRESENTMENT FOR PAYMENT

Article 52

(1) Presentment of a bill for payment shall be necessary in order to render the drawer, an endorser or a guarantor liable on the bill.

(2) Presentment for payment shall not be necessary to render the acceptor liable.

Article 53

A bill is duly presented for payment if it is presented in accordance with the following rules:

(a) The holder of a bill must present the bill for payment to the drawee or to the acceptor.

(b) Where a bill is drawn upon or accepted by two or more drawees, it shall be sufficient to present the bill to any one of them; if a place of payment is specified, presentment shall be made at that place.

(c) Where the drawee or acceptor is dead, and no place of payment is specified, presentment must be made to the person or authority who under the applicable law is entitled to administer his estate.

(d) A bill which is not payable on demand must be presented for payment on the day on which it is payable or on one of the two business days which follow.

(e) A bill which is payable on demand must be presented for payment within one year of its stated date and if the bill is undated within one year of the issue thereof.

(f) A bill must be presented for payment:

(i) At the place of payment specified on the bill; or

(ii) Where no place of payment is specified, at the address of the drawee or the acceptor indicated on the bill; or

(iii) Where no place of payment is specified and the address of the drawee or the acceptor is not indicated at the principal place of business or residence of the drawee or the acceptor.

Article 54

(1) Delay in making presentment for payment shall be excused when the delay is caused by circumstances beyond the

control of the holder. When the cause of delay ceases to operate, presentment must be made promptly [within days]

(2) Presentment for payment shall be dispensed with:

(a) Where the drawer or an endorser or a guarantor has waived presentment expressly or by implication; such waiver shall bind only the party who made it;

(b) Where a bill is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(c) Where a bill is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(d) Where the drawee or acceptor of a bill after the issue thereof, is in the course of insolvency proceedings in the country where presentment is to be made;

(e) Where a bill has been protested for dishonour by non-acceptance;

(f) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to pay the bill and the drawer has no reason to believe that the bill would be paid if presented.

Article 55

If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors shall not be liable on the bill.

Article 56

(1) A bill is dishonoured by non-payment:

(a) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Law; or

(b) When presentment for payment is dispensed with pursuant to article 54 (2), and the bill is overdue and unpaid.

(2) Where a bill is dishonoured by non-payment the holder may, subject to the provisions of article 57, exercise a right of recourse against the drawer, the endorsers and the guarantors.

SECTION 3. RECOURSE

Article 57

Where a bill has been dishonoured by non-acceptance or by non-payment, the holder may exercise his right of recourse only after the bill has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

Article 58

(1) A protest may be effected by means of a declaration written on the bill and signed and dated by the drawee or the acceptor, or, in the case of a bill domiciled with a named person for payment, by that named person, the declaration shall be to the effect that acceptance or payment is refused.

(2) A protest shall be effected by means of an authenticated protest as specified in paragraphs (3) and (4) of this article in the following cases:

(a) Where the declaration specified in paragraph (1) of this article is refused or cannot be obtained; or

(b) Where the bill stipulates an authenticated protest; or

(c) Where the holder does not effect a protest by means of the declaration specified in paragraph (1) of this article.

(3) An authenticated protest is a statement of dishonour drawn up, signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of the place where acceptance or payment of the bill was refused. The statement shall specify:

(a) The person at whose request the bill is protested;

(b) The place and date of protest; and

(c) The cause or reason for protesting the bill, the demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

(4) An authenticated protest may:

(a) Be made on the bill itself; or

(b) Be made as a separate document, in which case it must clearly identify the bill that has been dishonoured.

Article 59

(1) Protest for dishonour by non-acceptance or by non-payment must be made on the day on which the bill is dishonoured or on one of the two business days which follow.

[(2) An authenticated protest must be effected at the place where the bill has been dishonoured.]

Article 60

If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors shall not be liable on the bill.

Article 61

(1) Delay in protesting a bill for dishonour by non-acceptance or by non-payment shall be excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, protest must be made promptly [within . . . days].

(2) Protest for dishonour by non-acceptance or by non-payment shall be dispensed with:

(a) Where the drawer, an endorser or a guarantor has waived protest expressly or by implication; such waiver shall bind only the party who made it;

(b) Where the cause of delay in making protest continues to operate beyond 30 days after maturity or, in the case of a bill payable on demand, where the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(c) As regards the drawer of a bill, where (i) the drawer and the drawee are the same person; or (ii) the drawer is the person to whom the bill is presented for payment; or (iii) the drawer has countermanded payment; or (iv) the drawee or the acceptor is under no obligation to accept or pay the bill;

(d) As regards the endorser, where the endorser is the person to whom the bill is presented for payment;

(e) Where presentment for acceptance or for payment is dispensed with in accordance with articles 49 or 54 (2).

Article 62

(1) Where a bill has been dishonoured by non-acceptance or by non-payment, due notice of dishonour must be given to the drawer, the endorsers and their guarantors.

(2) Notice may be given by the holder or any party who has himself received notice, or by any other party who can be compelled to pay the bill.

(3) Notice operates for the benefit of all parties who have a right of recourse on the bill against the party notified.

Article 63

Notice of dishonour may be given in writing or orally and in any terms which identify the bill and state that it has been dishonoured. The return of the dishonoured bill shall be sufficient notice.

Article 64

Notice of dishonour must be given within the two business days which follow:

(a) The day of protest or, where protest is dispensed with, the day of dishonour; or

(b) The receipt of notice from another party.

Article 65

(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances beyond the control of the holder. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(2) Notice of dishonour shall be dispensed with:

(a) Where the drawer or an endorser or a guarantor has waived notice of dishonour expressly or by implication; such waiver shall bind only the party who made it;

(b) Where the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given;

(c) As regards the drawer of the bill, where the drawer and the drawee are the same person, or the drawer is the person to whom the bill is presented for acceptance or payment, or where the drawer has countermanded payment, or where the drawee or the acceptor is under no obligation to accept or pay the bill;

(d) As regards the endorser, where the endorser is the person to whom the bill is presented for payment.

Article 66

Failure to give due notice of dishonour shall render the holder liable to the drawer, the endorsers and their guarantors for any damages that they may suffer from such failure [provided that the total amount of the damages shall not exceed the amount of the bill].

Article 67

The holder may recover from any party liable.

(a) At maturity: the amount of the bill;

(b) After maturity: the amount of the bill, interest due at (. . .) per cent per annum above the official rate of discount effective at the place of payment [at the place where the holder has his residence or place of business] calculated on the basis of the number of days and of a year of (365) days, and any expenses of protest and of the notices given;

(c) Before maturity: the amount of the bill, subject to a discount from the date of making payment to the holder and the date of maturity, to be calculated at the official rate of discount effective on the date when the recourse is exercised at the place where the holder has his residence or place of business.

Article 68

A party who takes up and pays a bill may recover from the parties liable to him:

(a) The entire sum which he was obliged to pay in accordance with article 67;

(b) Interest due on that sum calculated at the highest permissible legal rate at the place of payment from the day on which he made payment;

(c) Any expenses which he has incurred.

Part Six. Discharge

SECTION 1. GENERAL

Article 69

(1) Liability of a party on a bill is discharged by:

(a) Payment in accordance with articles 70 to 75;

(b) Renunciation in accordance with article 76;

(c) Reacquisition of the bill by a prior party in accordance with article 77;

(d) Discharge of a prior party in accordance with article 78 (1);

(e) Absence of his assent to a qualified acceptance in accordance with article 40 (2);

(2) A party is also discharged of his liability on the bill by any act or agreement which would discharge him of his contractual liability for the payment of money.

SECTION 2. PAYMENT

Article 70

(1) A party is discharged of his liability on the bill when he pays the holder or a party subsequent to himself the amount due pursuant to articles 67 or 68.

(2) A person receiving payment of a bill in accordance with paragraph (1) shall deliver the receipted bill and any such authenticated protest to the person paying the bill.

Article 71

(1) The holder may take partial payment from the drawee or the acceptor. In that case:

(a) The acceptor is discharged of his liability on the bill to the extent of the amount paid; and

(b) The bill shall be considered as dishonoured by non-payment as to the amount unpaid.

(2) The drawee or the acceptor making partial payment may require that mention of such payment be made on the bill and that a receipt therefore be given to him.

(3) Where a bill has been paid in part, a party who pays the unpaid amount shall be discharged of his liability on the bill, and the person receiving the payment shall deliver the receipted bill and any authenticated protest to the party making the payment.

Article 72

(1) The holder may refuse to take payment in a place other than the place where the bill was duly presented for payment in accordance with article 53 (f).

[(2) If payment is not then made in the place where the bill was duly presented for payment in accordance with article 53 (f), the bill shall be considered as dishonoured by non-payment.]

Article 73

(1) Where a bill has been materially altered as to its amount, any person who pays the bill pursuant to such alteration without knowledge of the alteration shall have the right to recover the amount by which the bill was raised from the party who so altered the bill or from any subsequent party except a party who was without knowledge of the alteration at the time he transferred the bill.

(2) In any other case of alteration which is material, as defined in article 29 (2), any person who pays the bill pursuant to such alteration without knowledge of the alteration shall have the right to receive the amount paid by him from the person who altered the bill, or from any subsequent party except a party who was without knowledge of the alteration at the time he transferred the bill.

(3) Where the signature of the drawer has been forged, any person who pays the bill without knowledge of the forgery shall have the right to recover the amount paid by him from the person who forged the signature of the drawer, or from any party subsequent to the drawer except a party who was without knowledge of the forgery at the time he transferred the bill.

Article 74

[This article will contain rules in respect of a bill drawn payable in a currency other than that of the place of payment. At the time of finalizing the draft uniform law consultations had not yet been completed regarding certain implications of such rules and their possible conflict with existing international

agreements and mandatory national rules such as exchange control regulations. It is expected that a draft uniform rule on this issue will be finalized in time for the first meeting of the Working Group.]

Article 75

[(1) Where a party tenders payment of the amount due in accordance with articles 67 or 68 to the holder at or after maturity and the holder refuses to accept such payment:

(a) The party tendering payment shall not be liable for any interest or costs as from the day payment was offered; and

(b) Any party who has a right of recourse against a party tendering payment shall not be liable for such interest or costs.

(2) The provisions of paragraph (1) (b) shall also apply if the person tendering payment to the holder is the drawee.]

SECTION 3. RENUNCIATION

Article 76

(1) A party is discharged of his liability on the bill if the holder, at or after maturity, writes on the bill an unconditional renunciation of his rights thereon against such party.

(2) Such renunciation shall not affect the right to the bill of the party who so renounced his rights thereon.

SECTION 4. REACQUISITION BY A PRIOR PARTY

Article 77

A party liable who rightfully becomes the holder of the bill shall be discharged of liability thereon to any party who had a right of recourse against him.

SECTION 5. DISCHARGE OF A PRIOR PARTY

Article 78

(1) Where a party is discharged of liability on the bill, any party who had a right of recourse against him shall also be discharged.

(2) An agreement, not amounting to partial or total discharge, between the holder and a party liable on the bill shall not affect the right and liabilities of other parties.

Part Seven. Limitation (prescription)

Article 79

[It is expected that the Law will include an article on the limitation of legal proceedings and the prescription of rights arising under an international bill of exchange. The preparation of such an article presents difficult problems of reconciling the divergent approaches of different legal systems¹, and requires further study. It is expected that proposals with respect to this problem can be submitted in time for the first session of the Working Group.]

Part Eight. Lost Bills

Article 80

[This article will deal with the question of lost bills, which is approached differently in the principal legal systems. Consultations with banking and trade organizations have shown that a workable solution is feasible. It is expected that draft proposals dealing with this issue can be submitted in time for the first session of the Working Group.]

¹ See report of the Working Group on Time-limits and Limitations in the International Sale of Goods. A/CN.9/70/Add.1; commentary to opening clauses at para. 4.

2. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
International Payments: negotiable instruments: note by UNIDROIT concerning the effects of the international bill of exchange in the executory process . . .	A/CN.9/72
Bankers' commercial credits, bank guarantees, and security interests in goods: work in progress: note by the Secretary-General	A/CN.9/R.10
International payments: note submitted by the International Chamber of Commerce	A/CN.9/R.13

III. INTERNATIONAL COMMERCIAL ARBITRATION

Problems concerning the application and interpretation of existing multilateral conventions on international commercial arbitration and related matters: report by Mr. Ion Nestor (Romania), Special Rapporteur (A/CN.9/64)*

CONTENTS

	Paragraphs		Paragraphs
INTRODUCTION	1-11	4. Requirement that arbitration agreements shall be in writing	109
GENERAL COMMENTS AND STRUCTURE OF THE REPORT	12-13	5. Dispute not covered by the arbitral clause or the arbitration agreement	110
PART I. GENERAL ACCOUNT OF ACTIVITIES AND RESULTS OF THE WORK ON INTERNATIONAL COMMERCIAL ARBITRATION		6. Capacity to conclude the arbitration agreement	111
Chapter I. Activities undertaken and results achieved in the period 1920-1945	14-43	Chapter II. Problems concerning arbitral procedure	112-117
1. Activities undertaken within the framework of the League of Nations	14-16	1. Law applicable to arbitral procedure. Interpretation of the will of the parties ..	112
2. Activities undertaken outside the framework of the League of Nations	17-26	2. Jurisdiction of the arbitral tribunal dependent on the validity of the arbitration agreement	113
3. Attempts to unify the rules of arbitral procedure	27-35	3. Constitution of the arbitral tribunal when one of the parties fails to appoint an arbitrator	114
4. Observations on the development of commercial arbitration during the inter-war years	36-43	4. Nationality of arbitrators. Selection from an official panel	115
Chapter II. Activities undertaken and results achieved in the period 1945-1970	44-104	5. Possibility of setting aside the arbitral award when the arbitrator and the representative of one of the parties belong to the same organization. Other grounds for setting aside the award	116
1. Activities undertaken under the auspices of the United Nations	44-62	6. Right of the umpire to take a decision without consulting the arbitrators. Conditions	117
2. Activities undertaken under the auspices of international bodies other than the United Nations	63-78	Chapter III. Problems concerning arbitral awards	118-121
3. Work on unification and harmonization undertaken by research organizations ..	79-85	1. Arbitral awards for which no reasons are given	118
4. Seminars, congresses, conferences and other types of international meetings organized in recent years to discuss the main problems of commercial arbitration ..	86-97	2. Renunciation of means of recourse against an arbitral award. Its effects	119
5. Observations on the development of international commercial arbitration since the Second World War	98-104	3. Assumption implying that the parties intend to acknowledge the finality of the arbitral award	120
PART II. PROBLEMS CONCERNING THE APPLICATION AND INTERPRETATION OF EXISTING MULTILATERAL INTERNATIONAL CONVENTIONS ON INTERNATIONAL COMMERCIAL ARBITRATION		4. Operative part of the award expressed in the currency of the country in which arbitration takes place. Limits of the arbitral clause not exceeded	121
Chapter I. Problems concerning the arbitration agreement	106-111	Chapter IV. Problems concerning the enforcement of foreign arbitral awards	122-133
1. Law applicable to the arbitration agreement	106	1. Refusal of enforcement based on the nullity of the arbitration agreement. Public policy	122
2. Law applicable in establishing whether it is necessary to conclude a separate arbitration agreement or whether an arbitral clause suffices	107	2. Refusal of enforcement based on delay in notification	123
3. Autonomy of the arbitral clause and the separate arbitration agreement with respect to the contract to which they relate	108	3. Refusal of enforcement based on the fact that the limits of the arbitral clause have been exceeded	124

* 1 March 1972 [Original: French].

CONTENTS (continued)

	Paragraphs		Paragraphs
4. Authorization to enforce an award rendered by default	125	PART III. POSSIBLE MEASURES FOR INCREASING THE EFFECTIVENESS OF INTERNATIONAL COMMERCIAL ARBITRATION; GENERAL QUESTIONS, FINDINGS AND FINAL PROPOSALS	
5. System of enforcement, when there are no relevant rules of domestic law	126	Chapter I. Possible measures for increasing the effectiveness of international commercial arbitration	134-145
6. Authorization of enforcement provided that the award concerns a dispute capable of settlement by arbitration	127	1. Measures recommended by the United Nations	134-140
7. Priority of bilateral conventions over the 1927 Geneva Convention with regard to the enforcement of foreign arbitral awards	128	2. Co-operation among arbitration organizations	141-145
8. Irrevocability of the substance of foreign arbitral awards	129	Chapter II. General questions, findings and final proposals	146-185
9. Need for foreign arbitral awards to be provided with an order for enforcement in order to have the authority of <i>res judicata</i> in France	130	1. Introductory remarks	146-147
10. Law applicable to the enforcement of a foreign arbitral award not covered by an international agreement	131	2. Definition of international commercial arbitration—national and international arbitration; autonomization of international and commercial arbitration	148-154
11. Authorization to enforce the arbitral award provided that it has become final	132	3. <i>Ad hoc</i> arbitration and institutional arbitration	155-159
12. Means of recourse against orders for enforcement	133	4. <i>Amiable compositeur</i> and arbitration according to the rules of law	160-168
		5. Domain of arbitrability; authorization of legal persons of public law to conclude valid arbitration agreements	169-174
		6. Other general findings and final proposals	175-185

Introduction

1. At its second session (Geneva, 1969), the United Nations Commission on International Trade Law had on its agenda (item 6) the following questions concerning international commercial arbitration:

(a) Steps that might be taken with a view to promoting the harmonization and unification of law in this field; and

(b) The United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

For the discussion, the Commission had before it a report by the Secretary-General on international commercial arbitration (A/CN.9/21 and Corr.1), a bibliography on arbitration law (A/CN.9/24/Add.1 and 2), and a note on the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (A/CN.9/22 and Add.1) indicating the position in respect of ratifications of that Convention and the replies of certain States indicating whether they intended to accede to it.

2. After a broad exchange of views¹ among the representatives of the countries which are members of UNCITRAL on the two questions mentioned under (a) and (b) above, the Commission unanimously adopted, on 26 March 1969, the following decision:

"The Commission decides to appoint Mr. Ion Nestor (Romania) as Special Rapporteur on the

most important problems concerning the application and interpretation of the existing conventions and other related problems. The Special Rapporteur should have the co-operation, for documentary material, of members of the Commission and various interested intergovernmental and international non-governmental organizations.

"The Commission expresses the opinion that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 should be adhered to by the largest possible number of States."

At the 14th meeting, during the 1969 session, the Special Rapporteur stated that he proposed to submit a preliminary report to the third session of the Commission, which would deal in particular with the problems of interpretation and application of the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and other related problems.

3. On the basis of the documentation received² and procured by the Special Rapporteur, making use of the informative documents already prepared for the work on arbitration done under United Nations auspices, the Special Rapporteur drafted a preliminary report (A/CN.9/42), which he submitted to the Commission at its third session.

The Special Rapporteur explained at the third session the manner in which he intended to pursue his study of international commercial arbitration, and referred to the problems which he intended to study in his final report with a view to ascertaining whether they were appropriate for further attention and action by the

¹ See the report of the United Nations Commission on International Trade Law on the work of its second session (*Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, pp. 28 and 29); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

² See the preliminary report (A/CN.9/42), p. 7.

Commission. The Special Rapporteur further stated that he expected to be able to submit his final report to the fifth session of the Commission.

The representatives who spoke on the subject expressed general agreement that the Special Rapporteur's mandate should be extended to the fifth session, at which he would present his final report, and that every assistance in gathering materials should be given him by the members of the Commission and the Secretariat.

4. The view was generally held that the Special Rapporteur, in completing his study, should consider which of the problems set out in his preliminary report offered sufficient indication that they could be successfully resolved within the near future to justify undertaking work at the present time. A number of representatives offered suggestions in this regard for consideration by the Special Rapporteur. Some representatives stated that the problems should be ranked in terms of the possibility of reaching a solution to them rather than in terms of importance.

5. Several representatives expressed the opinion that uniform rules on international commercial arbitration should be prepared, which would become the subject of an international convention. The organization of a world-wide system of international commercial arbitration was also suggested. Other representatives were of the view that, instead of drafting a new convention, the Commission should concentrate on making the existing formulation more acceptable and should seek to ascertain why certain conventions, such as the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention of 1961 have not been adopted by a greater number of countries.

6. It was suggested that consideration should be given to the unification and simplification of national rules concerning the enforcement of arbitral awards and the limitation of judicial control over arbitral awards, including the reduction of means of recourse against enforcement.

7. Some representatives expressed the view that the Commission should promote the organization of new arbitration centres in developing countries and the rendering of technical assistance in this field. It was suggested that encouragement should be given by the Commission to the Economic Commission for Africa and the Organization of African Unity for the creation of an African Arbitration Association, which would have panels of African arbitrators. The widespread inclusion of Africans as arbitrators in arbitral tribunals involving trade with African countries was also mentioned as means for promoting international commercial arbitration in Africa.

8. Some representatives stated that the use of arbitration was impeded by its high cost, and suggested that work should be done towards stabilizing such expense.

9. A number of representatives indicated the progress made in their respective countries toward adherence to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. These statements were made in connexion with the decision of the Commission at its second session, as set out in paragraph 112 of its report, that the

1958 Convention should be adhered to by the largest possible number of States.

10. The Commission, at its 60th meeting, on 29 April 1970, unanimously adopted the following decision:

"The Commission, unanimously expressing its appreciation to the Special Rapporteur, Mr. Ion Nestor (Romania), for his preliminary report, decides:

"(a) To extend the mandate of the Special Rapporteur to the fifth session of the Commission;

"(b) To request the Special Rapporteur to take into consideration the suggestions made by members of the Commission and to submit his final report to the fifth session of the Commission;

"(c) To request the members of the Commission and interested intergovernmental and international non-governmental organizations to assist the Special Rapporteur in his task by giving him information on existing laws and practices in the field of international commercial arbitration;

"(d) To request the Secretary-General to arrange, if possible, for the reimbursement of the Special Rapporteur for his expenses in gathering, translating and reproducing materials for his report."

11. The Special Rapporteur thanks the representatives of the members of UNCITRAL for accepting the proposals he made in his preliminary report regarding the problems to be considered and the manner in which they should be approached and has the honour, in implementation of the above decision, to submit to the Commission the following

General comments and structure of the report

12. As stated in the preliminary report, the Special Rapporteur decided that the subject should be put in its historical perspective, so that the final proposals and conclusions could be firmly anchored in the realm of the real and the possible and take into account the conditions of modern international life. For the past 50 years, virtually unceasing efforts have been made at various levels and in various contexts to develop and unify the rules of international commercial arbitration. In the view of the Special Rapporteur, it would be useful to retrace this process and highlight its essential features and the trends in various periods, in order to give a clearer picture of the problems which arise in this field. Accordingly, the main aim of the Rapporteur is to give concise information on the basis of which the Commission will be able to consider steps that might be taken with a view to promoting the harmonization and unification of law in the field of international commercial arbitration. As far as possible, legal controversies (which abound on this subject) will be avoided, since the Commission, in making its decisions, is only concerned with *identifying the problems, establishing their nature, number and extent and finding a solution to them with pertinent suggestions and proposals*. In adopting this approach, the Special Rapporteur also hopes to comply with the wishes of the UNCITRAL secretariat that the report should be as condensed as possible.

13. Part I of the report consists of a general account of activities and results of the work on international commercial arbitration during the last five years: chapter I will describe the activities undertaken and the results achieved during the inter-war years (1920-1945), while chapter II will deal with the activities undertaken and the results achieved after the Second World War (between 1945 and 1970).

Part II is devoted to problems concerning the application and interpretation of existing international conventions on international commercial arbitration. It is, therefore, primarily a description and analysis of judicial practice on the subject in various countries which are parties to the conventions in question. The subject will be divided into four chapters, each referring to a particular group of problems relating respectively to the arbitration agreement, to arbitral procedure, to arbitral awards and to the enforcement of foreign arbitral awards.

Part III deals with possible measures for increasing the effectiveness of international commercial arbitration (chapter I) and some general questions and final proposals, which will be the subject of chapter II.

Part I. General account of activities and results of the work on international commercial arbitration

CHAPTER I. ACTIVITIES UNDERTAKEN AND RESULTS ACHIEVED IN THE PERIOD 1920-1945

1. Activities undertaken within the framework of the League of Nations

14. The activities undertaken within the framework of the League of Nations after the First World War culminated in the adoption of the first two important multilateral international instruments: the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. The Protocol has been ratified by 53 States and the Convention by 44 States.³

15. Under the Protocol on Arbitration Clauses, each of the Contracting States undertook to recognize the validity of an agreement whether relating to existing or future differences, by which the parties to a contract—being subject to the jurisdiction of different States parties to the Protocol—agreed to submit to arbitration any differences that might arise in connexion with such contract, whether or not the arbitration was to take place in the territory of a country to whose jurisdiction none of the parties was subject.

The Protocol applied to contracts relating either to commercial matters or to any other matter capable of settlement by arbitration or compromise.

However, each State party to the Protocol could, by means of a reservation, limit the obligations assumed to contracts considered as being commercial under its own law.

The arbitral procedure and the construction of the arbitral tribunal were to be governed by the will of the parties and by the law of the country in whose territory the arbitration took place.

States undertook to facilitate all steps in the procedure which required to be taken in their own territories, in accordance with the provisions of their law concerning arbitration, and also undertook to ensure the execution by their authorities and in accordance with the provisions of their laws of arbitral awards made in their own territory.

Finally, attention should be drawn to an important provision of the Protocol, according to which the tribunals of the States parties to the Protocol could not decide a dispute which the parties to the dispute had agreed to settle by arbitration. At least one of the Contracting Parties was, however, required to invoke before the tribunal "an Arbitration Agreement whether referring to present or future differences which is valid . . . and capable of being carried into effect".

The judicial tribunals became competent "in case the agreement or the arbitration cannot proceed or becomes inoperative".

16. The 1923 Geneva Protocol was supplemented in 1927 by the Convention on the Execution of Foreign Arbitral Awards, which was open only to the parties to the Protocol. The States undertake to recognize as binding, in the territory of any High Contracting Party, an arbitral award made in pursuance of an agreement whether relating to existing or future differences, and to enforce it in accordance with the rules of procedure in force in the country where the award was relied upon, provided that the said award was made in the territory of one of the States parties to the Convention and between persons who were subject to the jurisdiction of one of the High Contracting Parties.

In order to obtain such recognition or enforcement, the following additional requirements had to be met:

(a) That the award had been made in pursuance of a submission to arbitration which was valid under the legislation of the country concerned;

(b) That the subject-matter of the award was capable of settlement by arbitration under the law of the country in which the award was sought to be relied upon;

(c) That the award had been by the arbitral tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award had become final in the country in which it had been made, in the sense that it would not be considered as such if it was open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure existed) or if it was proved that any proceedings for the purpose of contesting the validity of the award were pending;

(e) That the recognition or enforcement of the award was not contrary to the public policy or to the principles of the law of the country in which it was sought to be relied upon.

Even if the aforementioned conditions were fulfilled, recognition and enforcement of the award might be refused if the court was satisfied:

³ For the 1923 Protocol, see League of Nations, *Treaty Series*, vol. XXVII, p. 157; for the 1927 Convention, *ibid.*, vol. XCII, p. 301.

(a) That the award had been annulled in the country in which it had been made;

(b) That the party against whom it was sought to use the award had not been given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he had not been properly represented;

(c) That the award did not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contained decisions on matters beyond the scope of the submission to arbitration.

If the award did not cover all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award was sought could, if it thought fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority might decide.

If the party against whom the award had been made proved that, under the law governing the arbitration procedure, there was a ground, other than the grounds referred to in (a), (b) and (c) above, entitling him to contest the validity of the award in a court of law, the court might, if it thought fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

The Convention also specified the documents that were to be supplied by the party relying upon an award.

2. Activities undertaken outside the framework of the League of Nations

17. It is beyond question that the two international instruments mentioned in the preceding paragraph were concluded largely as a result of the efforts made at the national and international levels by certain circles, in various countries, which were actively popularizing and promoting international commercial arbitration. Furthermore, until the aforementioned instruments were concluded, and even afterwards, several governmental and non-governmental organizations or institutions pursued many activities of an organizational nature and worked on the drafting of certain national and international rules. During the period dealt with in this chapter, specialized work was done by the American Arbitration Association, the International Chamber of Commerce in Paris, the London Court of Arbitration, the Union Chamber of Commerce of Moscow, the Court of Arbitration of the Manchester Chamber of Commerce, the Arbitral Chamber of the Paris Bourse de Commerce, the International Institute for the Unification of Private Law in Rome, the International Law Association, and so forth. Frédéric-Edouard Klein views the activity carried out during this period as being linked with the emergence and development of certain arbitration systems established by treaty, which were oriented originally towards the creation of regional systems and later towards continental ones and are now showing a trend towards the creation of a world-wide system.⁴

⁴ Frédéric-Edouard Klein, *Considérations sur l'arbitrage en droit international privé*, Basel, 1955, p. 31. Further information on this problem attributed to the same author elsewhere in this report will also be taken from this source.

18. The American Arbitration Association (AAA) was established in 1926 for the purpose of promoting the practice of arbitration both within and outside the United States.⁵ It has had considerable influence on the development and unification of legislation dealing with arbitration in the various American States and has contributed to the organization of arbitral bodies in the western hemisphere. According to the rules of arbitration adopted by AAA, the place of arbitration was of little importance and parties were free to decide on any other place besides New York.⁶ This was in contrast with the practice of other national arbitral bodies, such as the London Court of Arbitration or the Arbitral Chamber of the Paris Bourse de Commerce, whose rules specify that the arbitration proceedings should always be held at the same place (the headquarters of the arbitral institution).

The arbitrators are chosen by the parties either directly or from a panel, the names of whose members are forwarded to them by the registrar. They are appointed by the Association if the latter is not advised in due time of the decision of the parties. If one of the parties is not a United States citizen or is resident in a foreign country, the parties may request that the sole arbitrator or the third arbitrator should be a national of a third country.

19. As a result of the activities carried out by AAA outside the United States, several regional arbitration systems have been created, the most important of which is the inter-American system, where AAA has co-operated with the Pan American Union. Following discussions at several commercial conferences among North, Central and South American countries,⁷ in 1931, the Fourth Pan American Commercial Conference invited the Pan American Union to prepare a report on problems of trade among those countries. The report, which was submitted in 1933 to the Seventh International Conference of American States, advocated, *inter alia*, the organization of an inter-American arbitration system. The latter Conference further recommended that all American States should adopt legislation to guarantee the enforcement of arbitral clauses or at least to ensure the observance of commercial discipline.⁸ In 1934, the Pan American Union authorized AAA to organize such a system. The Inter-American Commercial Arbitration Commission was established in the same year, with its central office in New York, at AAA headquarters, and National Committees in each of the 21 American republics. The rules of the new organization follow the principles of the United States organization very closely. It was specified that the parties could exercise their free will within the limits permitted by the law governing the arbitra-

⁵ AAA was formed by merger of the Arbitration Society of America (established in 1922) and the Arbitration Foundation, established in 1926, under the sponsorship of the New York Chamber of Commerce.

⁶ The place of arbitration is not specified in the arbitral clause or arbitration agreement recommended by AAA.

⁷ Cf. on the history of inter-American arbitration, the article by M. Domke and F. Keller, "Western Hemisphere System of Commercial Arbitration", in *University of Toronto Law Journal*, vol. VI, No. 2, 1946, p. 308.

⁸ According to Frédéric-Edouard Klein (p. 84), these recommendations were followed only in the Colombian Act of 2 February 1938 and in a Brazilian Act of 18 September 1939.

tion, but it was not indicated how that law was to be determined.

20. The Canadian-United States system was created in 1943 as the result of an agreement between AAA and the Canadian American Commercial Arbitration Commission, with the co-operation of the Canadian Chamber of Commerce. This system comprises two sections, one attached to the Canadian Chamber of Commerce, with headquarters at Montreal, and the other attached to AAA in New York. A standard arbitral clause was drawn up and recommended to businessmen in both countries.

21. It was also in 1943 that the three regional arbitration systems in this part of the world were brought together with the establishment of a permanent Western Hemisphere Conference on Foreign Trade and Arbitration. A joint arbitral clause was adopted which entailed the concurrent application of more than one set of rules where the parties were domiciled in regions governed by different arbitration systems.

The joint arbitral clause procedure was used by AAA and the Inter-American Commercial Arbitration Commission to link their system with organizations outside America, such as the Associated Chamber of Commerce of Australia.

22. After the First World War, western business circles established the International Chamber of Commerce in Paris. One of the main reasons for creating it was to establish an international arbitral system. This led to the creation of the Court of Arbitration of the International Chamber of Commerce, which was to settle disputes between nationals of different countries. There are National Committees or group or individual members in many countries. Any party wishing to have recourse to arbitration submits his request through his National Committee. The Court forwards the request to the other party and invites him to state his position within a certain time-limit. It then proceeds to appoint the arbitrators, or in most cases a sole arbitrator, unless the parties have agreed that there would be three. The parties may propose persons of their choice to the Court. If they do not do so, the arbitrator is appointed *ex officio* on the proposal of the National Committees. A third arbitrator or a sole arbitrator must always be a national of a country other than those to which the parties belong. The country and place of arbitration are determined by the Court of Arbitration, unless the parties have agreed in advance on the place of arbitration.

The parties may agree that the arbitrators are to decide on the basis of documentary evidence. Normally, unless an extension has been granted by the Court, the award is made within 60 days. The award is subject to the approval of the Court, on questions pertaining to form; while the Court may criticize it on matters of substance, the freedom of the arbitrator or arbitrators to decide remains absolute.

The rules of the Court also provide for a conciliation procedure, which is useful when the parties have not concluded an arbitral clause. It should be noted that the rules do not contain any provisions regarding the legislation governing the arbitral clause and the relationship between the parties entering into it.

23. The International Chamber of Commerce (ICC) has entered into agreements with AAA and the

Inter-American Commercial Arbitration Commission which provides for the adoption of joint clauses. Under these, if arbitration takes place outside the United States, the applicable rules of arbitration will be those of ICC (or those of the Inter-American Commercial Arbitration Commission, if the arbitration takes place in Latin America), unless the parties have agreed in writing to adopt the AAA rules. If arbitration takes place in the United States, the AAA rules will apply unless the parties have agreed in writing to adopt the ICC rules of arbitration.

If the place of arbitration is not specified by the parties and if they cannot agree on it, the decision will rest with a Mixed Arbitration Committee set up by the two bodies concerned and presided over by a person belonging to neither one.

24. Although there cannot be said to be any arbitration system in the British Commonwealth comparable to that of the Americas, the Eleventh Congress of Chambers of Commerce of the British Empire, held at Cape Town in 1927, adopted a resolution recommending that the various arbitral bodies should bring their rules into line with a model draft prepared on that occasion with the aim of achieving some degree of uniformity in the matter. The Rules for Commercial Arbitration within the British Empire were adopted (with some changes) by the London Court of Arbitration, the Sheffield and Southampton Chambers of Commerce, the Australia Chamber of Commerce, and so forth.

Although strictly speaking the London Court of Arbitration is a national body, it plays a special role in the relations between British and foreign businessmen. It was created in 1903 through the joint efforts of the Corporation of the City of London and the London Chamber of Commerce and was the outgrowth of the London Chamber of Arbitration, founded in 1892. It is worth noting that, contrary to the practice in the Americas, the rules of the London Court of Arbitration provide for an arbitral clause establishing in advance which law shall apply not only to the arbitration but also to the contract as a whole. The London Court of Arbitration supplemented the clause with a reference to English law.

25. In 1932, the Arbitration Commission for Foreign Trade, attached to the USSR Chamber of Commerce, was established. It is a permanent, non-governmental body established by a decree, dated 17 June 1932, of the Central Executive Committee and the Council of People's Commissars. Its rules of procedure were approved by the Presidium of the Chamber of Commerce of the USSR.

The decree of the Central Executive Committee and the Council of People's Commissars of the USSR, dated 13 December 1930, as amended by the decrees of the Central Executive Committee and the Council of People's Commissars of 8 January 1933 and 7 May 1936, set up the Maritime Arbitration Commission attached to the Chamber of Commerce. Its rules of procedure were approved by the Presidium of the Chamber of Commerce of the USSR.⁹

⁹ Cf. E. Usenko, "L'arbitrage en URSS", in *Union Internationale des Avocats (International Association of Lawyers), Arbitrage International Commercial*, vol. II, pp. 212-242.

The competence of these Commissions to settle foreign trade and maritime disputes was, of course, based on the arbitral clauses concluded by the parties and on the provisions of the treaties entered into by the USSR with foreign countries recognizing the validity of the arbitration agreement.

26. In accordance with the decision of 17 June 1932 of the CEC and the CPC of the USSR, the Arbitration Commission for Foreign Trade was to be made up of 15 members appointed for one-year terms by the Presidium of the Union Chamber of Commerce and chosen from among representatives of commercial, industrial, transport and other organizations, as well as from among persons having special knowledge in the field of foreign trade.

When the Arbitration Commission for Foreign Trade is seized of a dispute, each party nominates an arbitrator from among the members of the Commission.

If this procedure is provided for in the contract concluded between the parties and if one of the parties fails in his obligation to nominate an arbitrator within the period specified in the contract, the President of the Arbitration Commission for Foreign Trade will, at the request of the other party, appoint the second arbitrator.

Within 15 days from the date of their appointment, the arbitrators are required to choose an umpire from among the members of the Commission.

If within this period the arbitrators cannot agree on the choice of an umpire, the latter will be appointed by the President of the Commission from among its members.

The parties may, by mutual agreement, leave the choice of the arbitrators to the Arbitration Commission for Foreign Trade. If this is done, the President of the Commission may entrust the settlement of the dispute to a sole arbitrator, appointed from among the members of the Arbitration Commission.

In settling a dispute, the Arbitration Commission for Foreign Trade may take measures to enforce the claim, at the same time establishing the limits of their application.

The decisions of the Arbitration Commission for Foreign Trade are final and cannot be challenged by any means. The decision is carried out by the party against whom the award is made, within the time-limit specified by the Arbitration Commission.

3. Attempts to unify the rules of arbitral procedure

27. As is well known, even before the Second World War it was felt that, although the League of Nations had done important work, culminating in the adoption of the two Geneva instruments of 1923 and 1927, it had not solved all the problems connected with the proper functioning of arbitration. It was thought that the results achieved were still incomplete and "that they could be considered only as a first step on the as yet ill-charted and uphill road to the unification of the laws on arbitration".¹⁰

¹⁰ René David, "Un projet de loi uniforme sur l'arbitrage", in *Recueil d'études en l'honneur d'Edouard Lambert*, fourth part: "Le droit comparé comme science internationale moderne", Paris, 1938, p. 885.

A brief account is given below of the attempts to unify arbitral procedure made at that time by two of the best-known international scientific organizations, namely, the International Law Association (ILA), which is non-governmental, and the Rome International Institute for the Unification of Private Law (UNIDROIT), which is governmental.

28. The International Law Association, founded in 1873 as the Association for the Reform and Codification of the Law of Nations, drafted and adopted the Rules for the Execution of Foreign Judgements (eleventh Conference, Milan, 1883), the Rules of Procedure for International Arbitration (seventeenth Conference, Brussels, 1885), and the Model Treaty for Execution of Foreign Judgements (twenty-first Conference, Antwerp II, 1899). Immediately after the First World War, it started work also on rules relating to the sale of goods.¹¹ At the thirtieth Conference (The Hague, 1921), Dr. Greandyk noted the emergence of commercial affairs centres and the establishment of commercial associations to promote standard contracts, conditions and arbitration, three factors which could contribute to the modernization of commerce. He considered arbitration to be inseparably linked with standard contracts and conditions: "It makes a whole with these and the co-operation of the three influences in relation to each other is the manifestation of the modernisation of commerce."¹²

At subsequent conferences, it was proposed that the Council of ILA should adopt resolutions to encourage and support the efforts of the International Chamber of Commerce in favour of arbitration and standardization of the laws concerning arbitration and arbitral procedure.¹³

At Budapest, in 1934 (thirty-eighth Conference), discussions began on the adoption of an ILA arbitral clause and the constitution of an ILA Arbitral Court.¹⁴ At Paris, in 1936 (thirty-ninth Conference), the Committee on Arbitration with R.S. Fraser in the Chair, recommended co-operation between existing organizations with a view to achieving unification of the rules governing arbitration. All national branches of ILA were invited to submit reports on this subject, to enable the Committee to decide upon measures to be taken with a view to unifying the rules of arbitration. Also at the thirty-ninth Conference, the French branch (Professor Laparadelle) made a proposal concerning the establishment by means of bilateral agreements, of mixed tribunals, competent to settle international civil or commercial disputes arising between States and private persons or between private persons (physical or legal). At the fortieth Conference (Amsterdam, 1938), the ILA Committee on Arbitration discussed the report submitted by R. S. Fraser and John Colombos containing certain comments on efforts towards

¹¹ See the report by Josephus Jitta, "International rules relating to the sale of goods" (thirtieth Conference, The Hague, 1921), and the report by H. Greandyk on the same subject.

¹² H. Greandyk, *op. cit.*, p. 450.

¹³ See the proposal by R. S. Fraser, thirty-first Conference of ILA, Buenos Aires, 1922, p. 189.

¹⁴ It was decided not to set up such an Arbitral Court, to avoid duplicating the work of the Court of Arbitration of ICC, although that does not imply recognition of an ICC monopoly in that respect (see: Windham Berves, p. 122, thirty-eighth Conference).

unification in the field of arbitration (ICC, the Inter-American Association, UNIDROIT) and proposing a draft model arbitral clause and draft arbitral rules (Amsterdam Arbitral Rules, 1938—AMRUL, 1938).

As a result of the discussions, ILA decided to deal only with the most important points of arbitral procedure (particularly the problems of constituting the tribunal), unlike the UNIDROIT draft, which had broader aims. Furthermore, as stated in the report of the French branch, according to the principles of that Association rules are proposed for international commerce, but it is not envisaged that ILA should take any part in their implementation.

29. The Amsterdam Rules, 1938, again contain provisions concerning the constitution of the arbitral tribunal, the power of arbitrators, the role of the Chairman of the Committee on Commercial Arbitration of the International Law Association, procedures for the transmission of documentation between parties, administration of evidence, the hearings (six stages are mentioned), content of the award, fixing of costs, and so forth.

The arbitral tribunal may be composed of a sole arbitrator, two arbitrators (if these two arbitrators cannot reach agreement, the umpire shall decide in their stead) or three arbitrators. If the parties have made no provision to the contrary in their contract, the arbitral tribunal shall always be composed of three arbitrators. The arbitration agreement may be revoked only with the consent of both parties. The claimant and the respondent must make known their points of claim and points of defence. The parties shall determine where the arbitration is to take place, and if they make no such provision the decision shall be made by the arbitrator or arbitrators or by the umpire. The hearings are normally private, unless the parties request that they should be open. The award must be made in writing, within 10 days (and in complicated cases within 20 days). It must comply with the law of the country chosen for the purposes of the formation, validity and performance of the contract and with all such formalities as are necessary to render it enforceable in the country in which it will be enforced. The award is final and is not subject to appeal, unless the parties have made provision for an appeal in their contract.

30. The Rome International Institute for the Unification of Private Law included the question of arbitration in its working agenda in 1928, the year in which it was founded. After various preparatory studies, a report on arbitration in comparative law was drafted, and in 1933 a Committee was established to prepare a draft uniform law on arbitration. Under the chairmanship of Mr. d'Amelio, President of the Court of Cassation of Italy, and with the collaboration of jurists from different countries, a preliminary draft was prepared. Taking as its basis the concept that a uniform system of arbitration requires a uniform law on arbitration, because the diversity of laws gives rise to serious problems in international arbitration, and aware that the two Geneva instruments, signed under the auspices of the League of Nations, had considerably improved the situation in this respect, UNIDROIT intended its draft uniform law to cover the question of arbitration as fully as possible. Of the 40 articles in the draft, the first six cover "the scope of the law", articles 7-14 "the arbitral

tribunal" (the term "arbitral tribunal" includes any organs which may be provided for in the arbitration agreement, apart from arbitrators), articles 15-21 "the procedure in the arbitration", articles 22-24 "the award", articles 25-28 "the enforcement of the award", articles 29-34 "setting aside the award", article 35 "costs, expenses and fees" and articles 36 and 37 "the competent court", while articles 38, 39 and 40 contain "supplementary provisions".

31. When Professor René David submitted the draft uniform law on arbitration,¹⁵ he explained the general economy of the draft and the reasons why the Committee had adopted certain solutions.

The Committee believed at the time that it would not be possible to apply the uniform law to all arbitration indiscriminately. That is why article 1 specifies two cases in which it may apply; the first is when, *at the time an arbitration agreement is concluded*, the parties thereto have their respective *habitual residences* in different countries,¹⁶ and the second is when the parties have provided that the arbitration upon which they have agreed shall be governed by the uniform law. Article 2 states that the parties may exclude application of the uniform law.

32. In the chapter concerning the arbitration agreement, it should be noted that an arbitration agreement respecting future differences shall only be valid if the differences arise out of a determinate relationship or contract, that an arbitration agreement or any modification thereof must in principle, be proved, in writing,¹⁷ that a party may no longer invoke an arbitration agreement if he has indicated that he does not wish to avail himself thereof, and that the arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of arbitrators.

33. Among the articles of the draft concerning the constitution of the arbitral tribunal, it should be noted that article 7 does not require that the arbitrators be appointed by the agreement itself, that the constitution of an arbitral tribunal composed of an even number of arbitrators is treated as a quite exceptional case, and that the qualifications for an arbitrator are in no way limited by the draft, which allows anyone to serve as an arbitrator. Following a suggestion made at the Pan-American Congress of Montevideo, in 1933, the draft indicates that the nationality of an arbitrator shall be immaterial (article 11), that an arbitrator may be removed if he unduly delays to fulfil his office (article 14) and that an arbitrator may be disqualified from acting if he is a minor and, in general, if any circumstances exist capable of casting doubt on the arbitrator's impartiality or independence.

34. In Professor David's view, the provisions concerning the enforcement and the setting aside of arbitral awards constitute the essence of the draft, and also its greatest novelty and practical value.

¹⁵ René David, "Un projet de loi uniforme sur l'arbitrage", loc. cit., p. 884.

¹⁶ The text states that the nationality of the parties shall not be taken into consideration.

¹⁷ It may also be proved by the report of the arbitrators of the arbitral award, if these documents show that the parties explicitly acknowledged the existence of the agreement.

Where the enforcement of arbitral awards is concerned, the principle continues to be that enforcement is possible only after leave to issue execution has been granted by a judicial authority, the parties having the opportunity of being heard, but once such leave has been obtained in any country in which the uniform law is in force it will, under the system provided for in the draft, be enforceable in all countries which have adopted the uniform law. In 1938, the authors of the draft believed that the time had come to take the decisive step forward which had not been possible at Geneva in 1927.

The enforcement of an award in these countries may be opposed on the ground either that the award is contrary to public policy in the country concerned or that submission to arbitration would not have been allowed in that country in respect of the case to which the arbitrators' award relates.

35. The draft uniform law established a link between the procedure for obtaining enforcement and any action to set aside the award. According to Professor David,¹⁸ it is extremely desirable that, whether in the lower court or in the court of appeal, the same authority should be responsible for granting leave to issue execution and for setting aside an award, in view of the obvious interrelationship of the two matters. It was difficult to specify who that authority should be in an international law, which must take into account the differences in the judicial organization of States. The drafters were therefore obliged to confine themselves to facilitating a solution to the problem along the lines that they thought desirable, by leaving it to firstly, laws of individual countries to determine what recourse was available against the decision on the application for leave to issue execution, and secondly, by establishing that an application to set aside an award must be made in the country where leave to issue execution has been claimed (article 37).

A restrictive list of the cases in which an arbitral award may be set aside appears in articles 29 *et seq.* of the draft. It should be noted that errors of law committed by the arbitrators are not included among those cases. If the parties want to guard against possible errors of law by their arbitrators and to be certain that the general principles of law will be observed in the settlement of their dispute, they must expressly agree on that point; article 30 will then apply and the award can be set aside. An agreement between the parties is also necessary if they intend to reserve the right to contest the award on the grounds that it is based on evidence which the arbitrators did not have the right to accept or had improperly accepted.

Professor David concludes that article 30, in requiring an agreement by the parties in such cases if an award is to be set aside, completely reverses the former rule in Latin countries, and particularly in France: it makes *amiable composition* the rule and arbitration proper the exception. Under the system provided for in draft, the arbitrators are in principle *amiables compositeurs*, that is to say, they should decide in accordance with the law, but their award cannot be set aside if it is not in fact in accordance with the law. The

arbitrators are *amiables compositeurs*, according to the draft, unless the parties have expressly agreed to deny them such powers and require them to decide according to law.

This reversal of the traditional rule was already at that time considered entirely justified: "In international arbitration, to which the international law will primarily apply, the *amiable composition* clause has in fact already become the style; parties do not want to have their desire to settle their dispute rapidly and without publicity frustrated by an appeal; arbitrators, for their part, would not accept their task unless they were freed from the complicated and detailed procedures—the finer points of which are often unfamiliar to them—that are necessary in arbitration proper. Although the new rule constitutes in theory a very important change, in fact it only sanctions a state of affairs which already exists."¹⁹

Another solution in the draft which should be noted is that an award can be set aside on the ground that no reasons have been given only if the parties have required that reasons should be given. The authors of the draft were extremely hesitant to accept this solution; they did so only as a compromise, in order to facilitate the adoption of the uniform law by the English-speaking countries, where it is the practice to make arbitral awards without giving reasons.

4. Observations on the development of commercial arbitration during the inter-war years

36. It was during this period that the institution of arbitration won international acceptance. Under the pressure of economic events and the requirements of international trade, States became increasingly interested in arbitration and aware of its usefulness and there was a move to improve the institution.

As early as 1935, at the Académie de droit international in The Hague, Giorgio Balladore-Pallieri noted that "recent practice has shown a very marked shift towards arbitration, which is increasingly preferred to proceedings instituted by the State and conducted before judges of ordinary law". There were movements both towards and away from arbitration, but all agreed "that the trends towards arbitration prevailed in municipal as well as international law".²⁰

37. A new, favourable climate developed over the years, in business circles and on the national and international scene. Certain misgivings of States with regard to arbitration were overcome, at least so far as commercial relationships were concerned; this paved the way for a certain amount of legislative reform²¹ and created a trend towards court decisions favouring arbitration and even a movement towards the unification of arbitration law.

38. Even when the idea of arbitration had been accepted, many practical problems arose, particularly in international relations. As a result, it soon became necessary to study more attentively the rules which

¹⁸ René David, *ibid.*, p. 888.

²⁰ Giorgio Balladore-Pallieri, "L'arbitrage privé dans les rapports internationaux", *Recueil des cours*, 1935, I, vol. 51, pp. 291 *et seq.*

²¹ For example, the Federal Arbitration Act of 1925 in the United States, the Arbitration Acts of 1924, 1930 and 1934 in the United Kingdom, the Act of 1925 in France, the German Acts of 1924 and 1930 and the three Swedish Acts of 1929.

¹⁸ René David, "Un projet de loi uniforme sur l'arbitrage", *loc. cit.* pp. 887-888.

existed on the subject. There were found to be wide legislative and doctrinal differences as to the very nature of arbitration, the conditions for the validity of the arbitration agreement, capacity to submit to arbitration, arbitrability, judicial checks on arbitral proceedings, and so forth. The provisions of private international law, and particularly the rules of conflict, the problems of definitions, public policy and other problems, became the subject of a whole series of legal discussions in the most varied circles. However, the complete lack of publicity and the quasi-confidential nature of the proceedings (in general, information on arbitration cases is published only if there are judicial proceedings as well as actual arbitration proceedings) made it difficult to study in depth the real, specific problems raised by the use of arbitration in commercial relationships.

39. The discussion centred on the provisions contained in the codes and other laws of civil procedure of different countries. Attention was also given to the general question of arbitral jurisdiction, which covered the variable but always broad subject of private-law relationships, including both civil and commercial relationships at the national level and international commercial relations. In addition, arbitration was considered a strictly private matter and it was therefore thought preferable to avoid intervention by the State authorities as much as possible in the interests of promoting recourse to arbitration.

40. This explains, to a large extent, why arbitration began to acquire a dual autonomy—from national rules of civil procedure and from State courts of law. In the first place, this foreshadows the appearance of commercial arbitration centres. Large commodity exchanges and private associations (often closed groups) formed in various branches of trade followed a simplified arbitration procedure, usually with no requirement that reasons should be given for the awards rendered. Enforcement of the awards was the responsibility of the parties themselves and of the groups of which they were members and provision was made for enforcement action.²²

In the second place, international arbitration organizations were endeavouring to formulate uniform rules of procedure governing, in the fullest detail, such matters as the selection of arbitrators, their removal, the duration of hearings and the rendering of awards, with a view to eliminating, as far as possible, all controversial problems which might be resolved differently depending on the national law applicable.

41. Some people already thought that an international approach to the problem was required and that national laws should not be taken into account. As Balladore-Pallieri wrote, also at The Hague in 1935: "The need for impartiality prevents us from studying arbitration in the context of the private international law legislation of a particular State. Our approach should be as international as possible and we should look at the international problem, independently of any national legal system."²³ This concept has gained

currency but, in the opinion of the Special Rapporteur, has constituted a kind of congenital defect which postponed and sometimes perhaps even prevented the first attempts by States at the legislative level to modernize arbitration law.

42. As Frédéric-Edouard Klein has observed, the efforts of international arbitration organizations to formulate uniform rules of procedure succeeded in "bridging certain differences of legislation" but "this merely obscured a problem of law which remained intact".²⁴ Actually, at that time the only arbitration was national arbitration, which was acknowledged, subject to certain reservations to have extraterritorial effects.

43. Lastly, it may be noted that between the two world wars the principal geographical area in which arbitration was used effectively consisted of the industrialized countries of Europe and America and corresponded closely to the centres of international trade. The decisive factor was obviously trade, as conducted in the first half of the twentieth century, which had generated a movement towards the institutionalization of commercial arbitration and the beginning of a decline in the use of *ad hoc* arbitration in commercial relations. In addition, the appearance of the first arbitration centre in a socialist country (the USSR) created an awareness of the problems involved in arbitration between organizations in countries with different social and economic structures: socialist countries with planned economies, where trade is organized on the basis of a State monopoly, and capitalist countries with market economies.

CHAPTER II. ACTIVITIES UNDERTAKEN AND RESULTS ACHIEVED IN THE PERIOD 1945-1970

1. Activities undertaken under the auspices of the United Nations

44. The growing intensity of modern international trade and the concomitant need to develop facilities for arbitration caused the international business community to consider that the Geneva Agreements were no longer adequate. A first step towards rectifying this situation was taken by the United Nations Economic and Social Council, at the suggestion of the International Chamber of Commerce (ICC) which submitted to the Council a preliminary draft convention on the recognition and enforcement of arbitral awards. The Council decided [resolution 520 (XVII)] to establish an *Ad Hoc* Committee composed of representatives of eight Member States.²⁵ This Committee was instructed to study the preliminary draft convention submitted by the International Chamber of Commerce and to report its conclusions to the Council and to draw up, should it see fit, a draft convention.

The draft (convention) drawn up by the *Ad Hoc* Committee was subsequently submitted, together with a report, to the Economic and Social Council.

²² This consists of corporate penalties in the event of voluntary non-compliance with the award, which authors have divided into three categories: financial penalties, moral penalties and penalties entailing loss of rights or standing (see Philippe Fouchard, *L'arbitrage commercial international*, Paris, 1965, pp. 466-489).

²³ Giorgio Balladore-Pallieri, *op. cit.*, p. 295.

²⁴ Frédéric-Edouard Klein, *Considerations sur l'arbitrage en droit international privé*, Basel, 1955, p. 12.

²⁵ Australia, Belgium, Ecuador, Egypt, India, Sweden, Union of Soviet Socialist Republics and United Kingdom.

In its report, the *Ad Hoc* Committee, analysing the question raised and the study prepared by the International Chamber of Commerce, concluded that it would be desirable "to establish a new convention which, while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of States."²⁶

In resolution 604 (XXI) of 3 May 1956, the Economic and Social Council decided to call a conference of plenipotentiaries to conclude a convention and to consider possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes. This Conference was held in New York, from 20 May to 10 June 1958, and adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁷

45. The New York Convention had not regulated all the problems of international arbitration but it had nevertheless solved the most important one—as had the 1927 Geneva Convention—that of the recognition and enforcement of foreign arbitral awards, by also including in its text (article II) the substance of the Geneva Protocol of 1923. The Geneva Protocol and Convention were to cease to have effect between the Contracting States on their becoming bound by the New York Convention (article VII).²⁸

The final text of the Convention adopted at the New York Conference in June 1958 was in many ways an intermediate solution between the text of the 1927 Geneva Convention and the text of the preliminary draft proposed by the International Chamber of Commerce. Thus, for example, the 1927 Geneva Convention required that an arbitral award should be *national*, that there should be both personal and territorial reciprocity, and that the award should have become final in the country in which it was made.

The preliminary draft of the International Chamber of Commerce was based, in contrast, on a diametrically opposed idea—the concept of the "international award", divorced as far as possible from any national criterion and based exclusively on agreement between the parties exercising the "autonomy of will" taken to have the force of law.

The New York Conference, although it retained the title of the Geneva Convention to the extent that it refers only to foreign arbitral awards and not to international awards as advocated in the preliminary draft of ICC, adopted a text which, without expressing the ideas in the preliminary draft, was nevertheless broader

than the text of the draft prepared by the Economic and Social Council in 1956.²⁹

Indeed, after having specified in the first part of article I, 1, that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the States where the recognition and enforcement of such awards are sought, it says in the following sentence that: "It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought".

This negative formulation left open to each Contracting State the possibility of applying the Convention independently of the territorial concept embodied in the first part of paragraph 1, for example, to the enforcement of an award made on its territory, but containing some elements of extraterritoriality which justified its consideration as a foreign award.³⁰

We note, however, that the text no longer requires the condition imposed by the corresponding article of the Geneva Convention, that the persons involved should be subject to the jurisdiction of one of the high Contracting Parties nor, moreover, the condition of reciprocity (that the arbitral award, for which recognition and enforcement are sought, should have been made in a territory of one of the Contracting States).

Nevertheless, article I, 3 specifies that when signing, ratifying or acceding to the Convention, or notifying extension under article X thereof, States may make certain reservations, including the application of the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State and the application of the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under national law.

46. Another question widely debated at the time of the Conference was that of the capacity of a State or a legal body of public law to conclude valid arbitral clauses. Despite the discussions, the problem was not solved at the time. However, the 1958 New York Convention clarified the situation regarding arbitral awards made by permanent arbitral bodies. Under article I, 2, arbitral awards made by *ad hoc* arbitral bodies are placed on the same footing—for the purposes of applying the Convention—as awards made by permanent arbitral bodies. That explanation is important, since until the New York Convention was adopted the position regarding the value of awards made by permanent arbitral bodies, and particularly by the arbitral bodies attached to the chambers of international commerce of the East European countries, was generally somewhat equivocal.

It should be made clear that the 1958 New York Convention (article II) provides the solution to the problems of the arbitral agreement, in a manner essentially similar to that of the 1923 Geneva Protocol.

²⁶ Official Records of the Economic and Social Council, Nineteenth Session, Annexes, agenda item 14, document E/2704/Rev.1, p. 2.

²⁷ United Nations Treaty Series, vol. 330. As at 1 January 1971 the following 37 States had ratified the Convention: Austria, Bulgaria, Byelorussian SSR, Cambodia, Central African Republic, Ceylon, Czechoslovakia, Ecuador, Federal Republic of Germany, Finland, France, Ghana, Greece, Hungary, India, Israel, Italy, Japan, Madagascar, Morocco, Netherlands, Niger, Nigeria, Norway, Philippines, Poland, Romania, Switzerland, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukrainian SSR, USSR, United Arab Republic, United Republic of Tanzania and United States of America.

²⁸ Pieter Sanders, "La Convention de New York", International Association of Lawyers (IAL), in *Arbitrage international commercial*, 1960, p. 294.

²⁹ Ion Nestor, *Probleme privind arbitrajul pentru comerțul exterior în țările socialiste europene* (Problems of foreign trade arbitration in the European Socialist Countries), Bucharest, 1962, part IV, nos. 138, 139 and 148.

³⁰ See Jean Robert, *La Convention de New York de 10 juin 1958, pour la reconnaissance et l'exécution des sentences arbitrales étrangères*, in *Revue de l'arbitrage*, 1958, No. 3, p. 74 and P. Sanders, loc. cit., p. 298.

It should be noted, however, that the New York Convention contains in addition a whole series of stipulations which are, moreover, extremely welcome, since they made it possible to arrive at a unified approach to certain problems which were solved in different ways by the national legislations of the different countries.

The first of these stipulations that should be mentioned is that referring to the requirement (article II, 1 and 2), that the arbitral agreement (arbitral clause or arbitration agreement) must be concluded *in writing*. This is a stipulation which certain authors consider to be "of capital importance", or "a uniform rule of law of inestimable value constituting the Convention's prime achievement in positive law".³¹

Also very valuable—from the point of view of unification—is the stipulation also appearing in article II, 1, whereby the arbitral agreement must refer to a "defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration". A comment is needed here, since, although the first part of the stipulation "a defined legal relationship, whether contractual or not" makes it possible to achieve a certain unity of approach to a problem resolved differently by the legislation of the different countries,³² the second part (that the subject-matter should be *capable of settlement by arbitration*) leaves in abeyance the problem of the subject-matters (questions) capable of settlement by arbitration.

It is none the less true that it follows from the Convention [article V, 2 (a)] that the problem of knowing whether the subject-matter of a litigation is "capable" of settlement by arbitration is resolved under the law of the country in whose territory the recognition and enforcement of the award is sought. But at the most that means that, if there is any unification, it only concerns the rule of conflict which designates the competent law, while the settlement of the substance remains different according to the provisions of one or the other of the national legislations indicated.

47. As for the requirements laid down for the recognition and enforcement of foreign arbitral awards, the system adopted by the 1958 New York Convention is completely different from that embodied in the 1927 Geneva Convention. Under the Geneva Convention, in order to obtain the recognition and enforcement of foreign arbitral awards it was incumbent on the party seeking recognition of an award or its enforcement to prove that the conditions required for recognition had been fulfilled and that enforcement could be authorized. What is more, once that proof had been given, the enforcing authority could consider *ex officio* the position regarding the other conditions and, if it established that the latter had not been fulfilled, refuse the request.

The New York Convention, on the other hand, adopts a system based on the idea that the award constitutes, in the hands of the person obtaining it, *an instrument to which credit must be given*. Consequently, the fact of presenting that *instrument* accompanied by the text of the arbitral agreement (in the form required by article IV of the Convention) must be considered as *prima facie*, in the sense that the award

is mandatory and that the person seeking its recognition and enforcement has given the proof which authorizes him to obtain them. As from that moment *the burden of rebuttal* passes to the respondent, who, in order to be able to oppose admission of the recognition and enforcement, must prove the existence of one or more of the five grounds stipulated in article V, 1, (a), (b), (c), (d) and (e) of the Convention, on which the request may be refused.

48. Among the provisions governing the reasons for which recognition and enforcement of arbitral awards may be refused, particular note should be taken of those which are of importance in connexion with the problems of private international law raised by the recognition and enforcement of foreign arbitral awards.

The stipulation involved is that contained in the provision appearing in article V, 1 (a), which embodies the principle of autonomy of will in determining the law which governs the validity of the arbitral agreement, in the sense that the agreement must be valid under the law to which the parties have subjected it or, only if the parties have failed to agree on that point in the agreement, under the law of the country where the award was made.

The same is true of the stipulation in subparagraph (d), which also embodies the principle of autonomy of will in determining the law governing the composition of the arbitral authority or the arbitral procedure. The text quoted establishes that the parties may stipulate in their agreement both the way in which the arbitral authority is composed and the arbitral procedure and that, failing such agreement, the law applied is that of the country in which the arbitration took place.

The adoption of the text of article V, 1 (d) put an end to the discussions that arose out of the corresponding provisions of the 1923 Protocol and the 1927 Convention. Those two agreements stipulated that the arbitration procedure was governed "by the will of the parties and by the law of the country in whose territory the arbitration takes place", but without making it possible to ascertain whether two cumulative conditions or (only) a single form of reference were involved. Now, thanks to the New York Convention, the matter is no longer open to dispute, because on this occasion the text is unambiguous and, from that point of view at least, an improvement on the corresponding text in the Geneva Convention.

Finally, a look must also be taken at the provisions of article V, 1 (e), since they are important for two reasons. Under those provisions the foreign arbitral award can no longer be enforced if the defendant proves that the award has not yet become binding, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Let it be remembered, above all, that by adopting that text, the New York Conference abandoned the system proposed in the draft of the Council's *Ad Hoc* Committee, which stated that the award must not only be final, but also enforceable (which would in fact have amounted to a double *exequatur*).

49. Apart from its work at the international level through the Economic and Social Council, which culminated in the adoption of the 1958 New York Convention, which we have dealt with above, the

³¹ Jean Robert, *op. cit.*, p. 75.

³² Pieter Sanders, "L'Arbitrage International Commercial", International Association of Lawyers (IAL), vol. I, 1956, p. 14 and article 3 of the UNIDROIT Draft Uniform Law.

United Nations consistently sought to expand commercial arbitration through the four regional economic commissions: the Economic Commission for Europe (ECE), the Economic Commission for Asia and the Far East (ECAFE), the Economic Commission for Latin America (ECLA) and the Economic Commission for Africa (ECA).

As may be noted from the report of the Secretary-General on the progressive development of the law of international trade (document A/6396 of 23 September 1966, para. 66), the activities of the Economic Commission for Europe had been primarily in the field of international contracts and *commercial arbitration*.

At its third session (20 April to 3 May 1954), the ECE Committee on the Development of Trade expressed the opinion that it would be necessary for the development of East-West trade to study the problem of arbitration in cases of disagreement between parties which should submit any disputes that might arise to one of the existing arbitration institutions. The Committee felt that it was necessary to study the preparation of a uniform international arbitration procedure at the European level, which could be proposed as the subject of an intergovernmental agreement.

The Committee on the Development of Trade established for this purpose the Geneva *Ad Hoc* Working Group on Arbitration, which began its work in 1955.

During its fifth session, the Group instructed the ECE secretariat—having regard to the conclusions contemplated—to prepare the following two drafts and submit them to the Governments of participating countries:

A draft European Convention on International Commercial Arbitration;

Draft arbitration rules including a procedure for settling trade disputes, which parties would be obliged to apply if they had not agreed on some other procedure

At its seventh session, the *Ad Hoc* Working Group on Arbitration, having drawn up the text of a draft European Convention on International Commercial Arbitration, was of the opinion that the draft should be submitted to a Special Meeting of Plenipotentiaries convened for the purpose of negotiating and signing a European convention on international commercial arbitration.³³

That Meeting was held at the European office of the United Nations in Geneva from 10 to 20 April 1961.³⁴

50. The European Convention on International Commercial Arbitration was signed at Geneva on 21 April 1961.³⁵

Unlike the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, the new Convention has a double

purpose: firstly, to resolve the problem of the appointment of arbitrators where the parties to an arbitration agreement do not manage to agree on the choice to be made—a particularly thorny problem if the parties are resident in countries with different economic structures; and secondly, to facilitate recourse to commercial arbitration regardless of the economic structure of the countries in which the parties are resident. Moreover, this time the Convention states [article I, 1 (a)] that it shall apply “to arbitration agreements concluded for the purpose of settling disputes arising from international trade”.

In other words, the Convention is not concerned with arbitral jurisdiction in general for all civil law relations, since it only governs jurisdiction in *international trade relations where*, as the text states, the parties who have concluded the arbitration agreement *must, when concluding the agreement, have had their habitual place of residence or their seat in different Contracting States*.

Article I, 2 defines what is meant, under the European Convention, by “arbitration agreement”, “arbitration” and by “seat”.

It should be noted, regarding the definition of the meaning of “arbitration agreement”, that what is actually regulated here is the form in which such an agreement may be concluded in order to be covered by the Convention, including its submission in writing and the meaning of that concept.

The European Convention follows the 1958 New York Convention in stating that “arbitration” means both as the settlement of disputes by arbitrators appointed for each case (*ad hoc* arbitration) and the settlement of disputes by permanent arbitral institutions. The term “seat” is also defined, in order to avoid any misunderstanding—a solution also adopted in the UNIDROIT Draft Uniform Law Protocol.

51. The European Convention, unlike the others with which we have been concerned up to now, also deals with the right of legal persons of public law to resort to arbitration; agreements concluded by *legal persons considered by the law which is applicable to them as “legal persons of public law”* being, in principle, valid. We say “in principle”, since in view of the categorical opposition of some European countries to that solution, the European Convention also specifies in the same article II (paragraph 2), that each State shall be entitled on signing, ratifying or acceding to the Convention, to make reservations on this provision. The European convention is, however, an advance on the other conventions, since in that way at least, it is clear *ab initio*, to what extent each State that becomes a party to the European Convention intends to undertake to apply the Convention.

Article III and IV contain provisions which cover the organization proper of the arbitration, when the latter is subject to the European Convention. It should be noted that article III provides expressly for the possibility of also designating foreigners as arbitrators in arbitration covered by the Convention. Article IV specifies the courses which the parties to an arbitration agreement (concluded under the European Convention) may adopt to organize the arbitration, to appoint the arbitrators, to determine the place of arbitration, to lay down the procedure to be followed by the arbitrators

³³ See ECE documents E/ECE/TRADE/96 and 34 and annex 1.

³⁴ For more complete details, see document E/ECE/TRADE/47, which contains the report adopted by the meeting of 20 April 1961.

³⁵ United Nations, *Treaty Series*, vol. 484. As at 1 January 1971 the Convention had been ratified by the following countries: Austria, Bulgaria, Byelorussian SSR, Cuba, Czechoslovakia, France, Federal Republic of Germany, Hungary, Italy, Poland, Romania, Ukrainian SSR, USSR, Upper Volta and Yugoslavia.

for settling disputes and also to delegate by default for the party who fails to fulfil his obligations under the arbitration agreement.

Under article IV, 1, the parties to an arbitration agreement are free to:

(a) Submit the dispute (or disputes) to a permanent arbitral institution; in this case, the arbitration is to be held in conformity with the rules of the said institution;

(b) Submit the dispute (or disputes) to an *ad hoc* arbitral procedure; in this case the parties are free *inter alia*:

(i) To appoint arbitrators or to establish means for their appointment in the event of an actual dispute;

(ii) To determine the place of arbitration;

(iii) To lay down the procedure to be followed by the arbitrators.

Under article IV, 2, where the parties have agreed to submit the settlement of their dispute to an *ad hoc* arbitration, and where within 30 days of the notification of the request for arbitration to the respondent one of the parties fails to appoint his arbitrator, the latter shall, unless otherwise provided, be appointed at the request of the other party by the President of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat at the time of the introduction of the request for arbitration.

The same procedure also applies to the replacement of the arbitrators appointed by one of the parties or by the President of the above-mentioned Chamber of Commerce.

Article IV, 3, governs cases where the parties have agreed to submit the settlement of their dispute to an *ad hoc* arbitration, but the arbitration agreement concluded between them contains no indication regarding the necessary measures for the organization of the arbitration, which are referred to in article IV, 1.

These measures are established differently, according to whether the parties have agreed on the place of arbitration or not. Where the parties have not agreed, the claimant may apply either to the President of the competent Chamber of Commerce of the country of the respondent's habitual place of residence or seat at the time of the introduction of the request for arbitration, or to the Special Committee whose composition and procedure are specified in the *annex* to the Convention.

The same paragraph 3 lays down that, where the claimant fails to exercise the rights given to him under the paragraph, the respondent or the arbitrators shall be entitled to do so.

Article IV, 4, sets forth the prerogatives of the President of the competent Chamber of Commerce or the Special Committee when they are seized of a request.

Article IV, 5, regulates cases where the parties, having agreed to submit the settlement of their disputes to a permanent arbitral institution but without having designated it expressly, cannot reach agreement thereon. In such a case the claimant may request the determination of such an institution under the procedure indicated in IV, 3.

Article IV, 6, deals with cases where the parties have not specified in the arbitration agreement the mode of arbitration (permanent arbitral institution or *ad hoc* arbitration) to which they have agreed to submit their disputes. In such a case, if the parties do not agree thereon, the claimant is entitled to have recourse to the procedure referred to in article IV, 3 to determine the question. The President of the competent Chamber of Commerce or, as the case may be, the Special Committee may refer the parties to a permanent arbitral institution or request them to appoint their arbitrators within a time-limit to be notified to them and to agree within such time-limits on the necessary measures for the functioning of the arbitration.

In the latter case, the provisions of article IV, 2, 3 and 4 apply.

The last paragraph of article IV (paragraph 7) establishes that, where the President of the Chamber of Commerce designated in accordance with the procedure outlined in article IV, 2, 3, 4, 5 and 6 has been requested to fulfil one of the functions set out in those paragraphs and has not fulfilled that function within a period of 60 days from the date of the request, the party requesting is entitled to ask the Special Committee to do so.

52. Article V and VI of the European Convention deal at considerable length with the establishment of the jurisdiction of the arbitral courts and the effect of an arbitration agreement on courts of ordinary law. The conditions under which a plea of incompetence may be made are laid down; the draft uniform law, like the UNIDROIT draft, establishes the right of arbitrators to rule on their own competence.

Regarding the *raising of a plea of lack of jurisdiction before a court of law*, the text of the European Convention (article VI, 1) lays down expressly that in such cases the plea must be presented, under *penalty of estoppel*, before or at the same time as the substantial defence, depending upon whether the law of the court seized regards the plea as one of procedure or one of substance.

The text of article VI also contains a series of provisions relating to the law applicable by the courts of contracting States, in ruling on the existence or the validity of an arbitration agreement.

Thus, under article VI, 2, courts decide on the capacity of the parties *under the law applicable to them*,³⁶ and, with reference to other questions, under the law to which the parties have subjected their arbitration agreements. Failing such indication in the parties' agreement, it will be *under the law of the country in which the award is to be made* and, where it is impossible to determine the country of the award at the time the question is raised in court, the competent law will be that indicated by the rules of conflict of the court seized of the dispute.

It is further provided that the court may also refuse recognition of the arbitration agreement if, under the *lex fori*, the dispute is not capable of settlement by arbitration.

³⁶ The same omission as existed in the 1923 Geneva Protocol has been maintained here: the text does not say which law is applicable or how it is to be determined.

Article VI, 3 deals with the situation of the court asked to deal with a case after the initiation of an arbitration procedure, and lays down that the courts of contracting States subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary.³⁷

Article VI, 4 contains the stipulation that a request for *interim measures or measures of conservation* addressed to a judicial authority is not to be deemed incompatible with the arbitration agreement or regarded as a submission of the substance of the case to the court.

53. Unlike the other known conventions—and it is precisely this which constitutes an advance in arbitration—the European Convention contains certain special provisions (article VII) whose purpose is to determine the law applicable to the substance of the dispute. The parties have the right to do this; however, failing any indication by the parties as to the applicable law, the arbitrators are to apply the law indicated (as being competent) under the rule of conflict that the arbitrators deem applicable.

Article VII, 1 also establishes that in both cases the arbitrators are to take account of the terms of the contract and trade usages.

In paragraph 2 of the same article it is laid down that the arbitrators may act as "*amiables compositeurs*" if the parties so decide and if they may do so under the law applicable to the arbitration. We must point out, however, that the law does not define this controversial concept.

54. The European Convention embodies in article VIII the rule on the reasons for the award, namely, that, in the absence of any agreement thereon, the parties shall be presumed to have agreed that reasons are to be given. In order for the arbitrators not to be obliged to give reasons for the award, the parties must have expressly declared that "reasons shall not be given", or they must have assented to an arbitral procedure under which it is not customary to give reasons for awards. And it would appear from the latter condition that the Convention makes a stipulation which, as far as the reasons for the award are concerned would, allow the parties to amend the arbitral procedure that the Convention indicates should be applied by the arbitrators. Indeed, the Convention provides that, even in the case where the parties have assented to an arbitral procedure under which it is not customary to give reasons for awards, reasons must be given, if either party expressly requests before the end of the hearing, or if there has not been a hearing, before the making of the award, that this should be done.

55. The European Convention makes an important stipulation on the setting aside of the arbitral award—a stipulation not recommended in any of the conventions we have considered up to now.

The text concerned is the preamble in paragraph 1 of article IX, according to which the setting aside in

a Contracting State of an arbitral award covered by the European Convention is only to constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award was made, and only for the reasons set out in subparagraphs (a) to (d) of the same paragraph.

The reasons for the setting aside of the award which may also constitute grounds for the refusal of recognition and enforcement, listed exhaustively in article IX, 1 (a)-(d) of the European Convention also appear in article V, 1 (a)-(d) of the 1958 New York Convention.

It was quite natural therefore that article IX of the European Convention which specifies the reasons for setting aside an arbitral award obtained in accordance with the provisions of the Convention, reasons constituting grounds for refusing recognition or enforcement of the award, should also regulate, in paragraph 2, the manner in which the provisions of the European Convention may be combined for this purpose with those of the 1958 New York Convention in relations between countries that are Contracting Parties to the two Conventions.

Article V, 1 (e) of the New York Convention contains in fact another point which may constitute a ground for refusing recognition and enforcement of the award, namely, that the recognition and enforcement of an award may, according to the text quoted, be refused—at the request of the party against which it is invoked—if "the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made". This provision gives the setting aside in the country in which the award was made absolute effect, regardless of the grounds on which the award was set aside.

The 1961 European Convention did not provide for a similar solution, and the system adopted by that Convention in article IX, 1 represents an advance on the New York Convention. In fact, by reducing the number of cases or setting aside of foreign arbitral awards in relations between States Parties to the European Convention, it eliminates to a large extent, right from the moment of enforcement of the award, certain delaying actions to which the losing party might possibly be tempted to resort.

And in order to debar any discussion on the fact that, in relations between Contracting States that are also parties to both Conventions, the number of cases in which a foreign arbitral award may be set aside is reduced only to those listed exhaustively in article IX, 1 (a)-(b) of the European Convention; article IX, 2 stipulates that:

"In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcements of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this article limits the application of article V (1) (e) of the New York Convention solely to the cases of setting aside set out in paragraph 1 above."

56. We feel that this account of the 1961 Geneva European Convention on International Commercial Arbitration would not be complete without pointing

³⁷ The text does not explain what might constitute such good and substantial reasons; this is also left to the discretion of the judge of the ordinary court.

out that one of the most important innovations made by the Convention is the establishment, under article IV, of a Special Committee to which the claimant can apply if the respondent does not agree with him on the appointment of the arbitrator. The Special Committee is composed of three members elected for four years. One of these members is elected by the Chambers of Commerce of countries where there are National Committees of the International Chamber of Commerce and which at the time of the election are parties to the Convention. The second member is elected by the Chambers of Commerce of countries in which there are no National Committees of the International Chamber of Commerce and which at the time of the election are parties to the Convention. The third member, who acts as Chairman, is elected for two years by the Chambers of Commerce of the first group of countries and the Chambers of Commerce of the second group of countries alternatively.

The Special Committee is the only arbitral institution which is common to the market-economy countries and the countries with centrally planned economies.

57. The 1961 Geneva European Convention was supplemented by the publication of the January 1966 Arbitration Rules of the United Nations Economic Commission for Europe.

The preparation and publication of these Rules resulted from the concern of the Economic Commission for Europe to make available to parties model instruments (model contracts, general conditions of sale, etc.) to which they could refer, hence avoiding the delays inherent in drafting the clauses of a contract on the regulation of the various operations performed by the parties in international trade (deliveries of goods, providing services, etc.).

This initiative is also the result of a concern to encourage the extension of arbitration as a means of settling disputes between parties, especially by making available to the parties to an arbitration agreement an arbitration procedure which they can adopt by means of a simple reference clause whenever it is obviously impossible for the parties themselves to establish a procedure for organizing arbitration.

The ECE Arbitration Rules are consequently an optional set of rules which can only be applied to the extent that the parties agree to do so.

58. In speaking of the provisions and solutions embodied in these Rules, we should first mention those concerning the measures to be taken by the parties to an arbitration agreement in order that the arbitral procedure may be continued when the parties do not manage to agree on the form of arbitration, the membership of the arbitral court, the sole arbitrator or arbitrators, the appointment of the Chairman, or if one of the parties fails to appoint an arbitrator.

In all these situations the Rules provide for the parties to have recourse to an "Appointing Authority". As regards determining the "Appointing Authority", the Rules uphold the principle of the autonomy of will. Under article 4 of the Rules, the designation of the Appointing Authority by the parties is decisive, in the sense that, in order to resolve the situations enumerated in that article, the claimant has the right to apply to the Appointing Authority designated by the

arbitration agreement, and it is only failing such designation that he may then apply to the Appointing Authority of the place of arbitration, provided, of course, that the parties have agreed on the place of arbitration.

If, by the arbitration agreement, the parties have determined neither the Appointing Authority, nor the place of arbitration, under article 5, the claimant is free, in order to resolve the situations referred to in article 4, to apply either to the Appointing Authority of the country where the respondent has his habitual residence or his seat, or to the Special Committee set up under article IV of the 1961 Geneva European Convention on International Commercial Arbitration; if the parties have their habitual residence or seat in countries where there exists a National Committee of ICC, the claimant may apply to the Court of Arbitration of ICC.

So that the interested parties will know which institutions may act as "Appointing Authority", for the purposes of applying the Rules, article 2 of the Rules states that, besides the institutions indicated in article 5 for the situation provided in that article (the Special Committee of article IV of the European Convention and the Court of Arbitration of ICC), the Appointing Authority of the place of arbitration or of the country where the respondent has his habitual place of residence or seat shall be the Chambers of Commerce or other institutions set out in the Annex to the Rules.

59. The "Appointing Authority" requested in the manner prescribed in the Rules (article 3) to intervene in order to ensure that the arbitral procedure goes forward, may take the following action as appropriate:

If the parties confirm their agreement thereto in writing, appoint a sole arbitrator, or an arbitral institution to settle the dispute in accordance with its own rules;

If the parties fail to agree on the appointment of a sole arbitrator or an arbitral institution, invite the parties each to appoint an arbitrator, the arbitrators so appointed choosing another arbitrator as presiding arbitrator;

If within a period of 30 days one of the parties has not appointed an arbitrator or if the arbitrators appointed fail within a period of 45 days to agree on the choice of the presiding arbitrator, proceed *ex officio* to such appointment.

Similarly, when a procedure must be established for replacing an arbitrator, a sole arbitrator or the presiding arbitrator following a challenge, death or incapacity, the Rules specify (articles 8 and 12) the cases in which the Appointing Authority may designate a substitute (arbitrator, sole arbitrator or presiding arbitrator).

60. Of the provisions dealing with the organization of the arbitration and of those covering the arbitration procedure proper, the following should be particularly noted:

Provisions relating to the place of arbitration (article 14 of the Rules) which embody the principle of the autonomy of will, in the sense that the place of arbitration is to be determined by the arbitrators only if the parties do not agree thereon;

The general provisions relating to procedure (articles 22, 23, and 24 of the Rules) which, in the absence of any provisions to the contrary in the rules, authorize the arbitrators to proceed to arbitrate in order to settle the dispute (or to conduct the arbitration) in such manner as they see fit, although they must in every case give the parties a fair hearing on the basis of absolute equality. Under the Rules (article 23) the procedure is oral; if the parties consent, however, the arbitrators are authorized to render an award without an oral hearing, solely on the basis of the documents (evidence) filed in the case. As to the submission of evidence, it is provided that the arbitrators are authorized to decide upon what proof they intend to admit and to appoint experts. They may also, at any time during the procedure, require the parties to produce supplementary documents or exhibits within such period as they shall determine;

The provisions regarding the measures of conservation and security for costs of the arbitral procedure (articles 27 and 28 of the Rules) authorized the arbitrators, subject to certain legal provisions to the contrary and the request of the parties, to take any measure of conservation of the goods forming the subject-matter in dispute, such as the ordering of their deposit with a third party, the opening of a banker's credit or the sale of (perishable) goods; they are also authorized to require a party to provide security for the costs of the arbitration proceedings.

The provisions regarding the arbitral award (articles 33-42) also embody a whole series of interesting solutions. Thus, with regard to the role of the presiding arbitrator in the making of awards, article 33 provides that, where the arbitral tribunal consists of two arbitrators and a presiding arbitrator, the award shall be made by a majority of votes, but failing that majority, the presiding arbitrator is entitled to make the award alone; the solution adopted in respect of the time-limit within which the arbitral award must be made (articles 34-35) makes it possible, in our opinion, to interpret the time-limit stipulated in article 34 as a recommended time-limit, since it may be extended by the parties or by the arbitrators for any valid reason; the solution adopted for the place of the award (article 37), although it is new in institutional practice, is considered by commentators to be a very welcome one since it is entirely in accord with the needs of international arbitration and avoids the difficulties of enforcement which are sometimes inherent in international awards;³⁸ the solution adopted on the law applicable for the substance of the dispute (article 38) also embodies here, for the first time, the principle of the autonomy of the parties' will in determining the law applicable and, failing any indication thereof by the parties, it establishes the role of the arbitrators in the choice of the rule of conflict applicable. However, in both cases (whether the law applicable is determined by the parties or according to the rule of conflict chosen by the arbitrators), the text of article 38 specifies that the arbitrators must take account of the

terms of the contract and trade usages.³⁹ Article 42 contains a provision identical to that appearing in the arbitral clauses, namely, that by submitting to the Rules the parties undertake to carry out the award without delay and, subject to any legal provisions to the contrary, renounce any right of appeal either before another arbitral institution or before a court of law.

61. Among the other regional economic commissions of the United Nations, the Economic Commission for Asia and the Far East has undertaken and continues to undertake intensive activities relating to arbitration. In 1958 the ECAFE secretariat and the United Nations Office of Legal Affairs completed a study on arbitral legislation and the possibilities of arbitration in certain countries of Asia and the Far East, and a Centre for Commercial Arbitration was established in the ECAFE secretariat at Bangkok in 1962. The Centre co-operates with the Office of Legal Affairs and with the trade experts and correspondents appointed by member countries, in its efforts to make recourse to commercial arbitration a more general practice and to promote the establishment and improvement of arbitral institutions and arbitration methods in that region.

In January 1966, the ECAFE Conference on International Commercial Arbitration met at Bangkok and recommended the preparation of a set of arbitration rules. This has now been done and the said Rules have been brought to the attention of Chambers of Commerce, legal and trade associations, universities and other bodies.

As is explained in the report of the Secretary-General of the United Nations on the progressive development of the law of international trade,⁴⁰ the Conference also considered it advisable that separate lists of arbitrators and appointing authorities be prepared by the ECAFE Centre in consultation with Governments, national correspondents of the Centre and other appropriate institutions. In another recommendation the Conference dealt with the dissemination of model arbitration clauses and also agreed on certain standards of conciliation which would be appropriate as a guide to parties who wished to have recourse to conciliation for the settlement of their disputes. The Conference recommended that the standards should be adopted by the ECAFE Centre and disseminated throughout the region in the same manner as the rules for arbitration. The Conference also proposed that the ECAFE Centre should invite each of the main Chambers of Commerce of the region, through their respective Governments, to constitute panels of businessmen who would be prepared to sit on conciliation committees whenever so requested by parties.

62. The ECAFE Rules for International Commercial Arbitration are in many respects similar to the 1966 Geneva EOE Arbitration Rules, the drafting of which was in turn largely inspired by a comparative study

³⁸ This provision, like that in article 39 of the Rules, is considered by commentators to be of great importance for the development of commercial arbitration, since it expressly recognizes the possibility of an arbitral award based on the stipulations of the contract and on trade usages and which, consequently, would be independent of any system of municipal law. See Peter Benjamin, in *IAL*, *op. cit.*, p. 350.

⁴⁰ *Official Records of the General Assembly, Twenty-first session, Annexes*, agenda item 88, document A/6396, para. 83; *UNCITRAL Yearbook*, vol. I: 1968-1970, part one, II, B.

³⁸ See Peter Benjamin, "Nouveau Règlement d'Arbitrage pour le Commerce International" in *IAL, Arbitrage International Commercial*, vol. III, The Hague, 1965, p. 348.

of the rules of procedure of the various international arbitration bodies. Thus it may be said that the drafting of the ECAFE Rules was an attempt to establish an arbitration procedure which would represent in fact a harmonization of the rules of arbitration procedure prevailing in different countries.

The ECAFE Rules, according to article I, 1 (a) are applicable to the arbitration of disputes arising from the international trade of the ECAFE region. Point 1 (b) of the same article specifies which disputes are included in the category of disputes arising from international trade, and paragraph 1 (c), which disputes may be considered to have arisen from the international trade of the ECAFE region.

Under article I, 2, the ECAFE rules apply in cases where parties to the types of contract enumerated in paragraph 1 (c) have agreed that disputes which have arisen or which may arise out of a contract made between them shall be referred to arbitration under the ECAFE Rules. Such an agreement by the parties may be included in the contract or concluded separately after a dispute has arisen.

It is also stipulated in article I, 3 that disputes referable to arbitration under the ECAFE Rules may include those to which a government or state trading agency is a party.

The organization proper of the arbitration (the solutions to which the parties may resort to appoint the arbitrators, the method of choosing the place of arbitration, and the rules under which the arbitrators must conduct the arbitration) are regulated in articles II-VI of the Rules.

The ECAFE Rules also embody, as Professor Pieter Sanders has remarked, "the usual pattern"⁴¹ regarding the appointment of arbitrators (article II) in the sense that it is primarily left to the parties to choose the arbitrators (paragraphs 1, 2 and 3). The parties may have recourse to the Special Committee established under article V of the above-mentioned Rules, only if they are unable to agree on the procedure for appointing the arbitrators, or if one of them fails to appoint an arbitrator, or if the arbitrators appointed by them are unable to choose the presiding arbitrator. In such cases the Special Committee has the option of either making the necessary appointment or designation itself or, at its discretion, of selecting an authority to make the necessary designation.

Under the arbitration procedure instituted by the ECAFE Rules, the parties which have agreed to adopt them are free to choose arbitrators of any nationality or any arbitral institution they consider appropriate to arbitrate the dispute (article II, 2). However, under article II, 4 the parties are given some assistance in the appointment of the arbitrators or the choice of an arbitral institution in the sense that the ECAFE Centre has to keep a list of persons who may be chosen by the parties as arbitrators and a list of appointing authorities who may be requested by the parties to designate the arbitrators.

Regarding the place of arbitration (article IV), the ECAFE Rules also uphold the idea that the will

of the parties is decisive. Article IV allows them to agree either by contract, even at some later date, on the place of arbitration or to leave this choice to the arbitrators appointed by them (article IV, 1), or to agree on any other procedure for its determination (article IV, 2). Where no agreement is reached thereon, the parties may then have recourse to the Special Committee established under article V, which will determine the place of arbitration (article IV, 2).

The ECAFE Rules recommend, in cases where the parties themselves agree on the place of arbitration or where the determination is made by the Special Committee, that certain factors [enumerated in article IV, 1 (a), (b), (c), (d) and (e)] should be taken into consideration. The factors are conducive to the determination of the place of arbitration most suitable for ensuring that the arbitration of disputes can be conducted in conditions favourable to the case.

Regarding the rules of procedure to be taken into consideration by the arbitrators for the proper conduct of the arbitration, the ECAFE Rules also provide that the arbitral procedure to be followed should be the most appropriate to the case, and that the parties should be treated with absolute equality (article VI, 1 and 2).

The arbitrators are entitled to decide on the existence and validity of the arbitration agreement, to determine their own competence and, when applying ECAFE Rules, to interpret them (as necessary). It is also their responsibility to determine the periods within which the parties are to fulfil certain obligations incumbent upon them (article V, 3 and 4).

It must be remembered, however, that under the procedure adopted by the ECAFE Rules, oral hearings are not mandatory unless the parties so agree or the arbitrators so decide (article VI, 5).

The award is made—where the arbitration is conducted before an arbitral tribunal—by a majority of votes. Failing a majority, the ruling of the presiding arbitrator constitutes the decision of the arbitral tribunal.

Of the provisions concerning the award (article VII), the one which particularly commands our attention is the solution adopted by the ECAFE Rules on the law applicable. Under article VII, 4 (a), the parties are entitled to determine the law to be applicable to the substance of the dispute. Should the parties fail to indicate that law, however, the text provides that "the arbitrator/s shall apply the law he/they consider/s applicable in accordance with the rules of conflict of laws".

Whether the parties have specified the law applicable or not, the arbitrator or arbitrators must take account of the terms of the contract and trade usages.

The ECAFE Rules also allow the parties to authorize the arbitrators to decide "*ex aequo et bono (amiables compositeurs)*", provided they may do so under the law applicable to the arbitration. It should be noted here that the ECAFE Rules do not expressly provide that the reasons for the decision must be given.

Article VIII, 2, which contains miscellaneous provisions, states that, after the award has been made, either of the parties may within a period of 30 days, with the necessary notice to the other party, request

⁴¹ Pieter Sanders, "ECAFE Rules for International Commercial Arbitration", *Liber Amicorum for Martin Domke*—Martinus Nijhoff, The Hague, p. 257.

the arbitrators for an authentic interpretation of the award. The arbitrators must comply with the request and communicate the decision to both parties.

2. Activities undertaken under the auspices of international bodies other than the United Nations

63. In 1958 the General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (CMEA) came into effect in those countries. Until 1958 the delivery of goods between these countries was regulated by general conditions established annually in bilateral conventions. With the experience acquired from the implementation of the bilateral conventions it was possible to adopt multilateral General Conditions, establishing uniform rules for the delivery of goods between organizations of CMEA member countries. These include numerous rules of substantive and procedural law and some rules concerning the conflict of laws (private international law).⁴² These General Conditions were re-examined after 10 years in the light of the experience gained and were slightly modified and added to,⁴³ and in 1969 the revised General Conditions of Delivery of Goods (CMEA, 1968) came into force.

There is no need to analyse here these General Conditions or the discussions which were held on their nature, character and content.⁴⁴ What must be noted is the way in which the settlement of disputes arising between trading organizations of CMEA member countries over the delivery of goods is regulated.

64. The settlement of disputes is dealt with in paragraphs 90 and 91 of the CMEA General Conditions (1968), which do not differ essentially from paragraph 65 of the 1958 General Conditions. According to these paragraphs, all disputes which may arise out of or in connexion with a contract are to be settled by arbitration before an arbitration tribunal or commission established for such disputes in the country of the defendant or, by agreement of parties, in a third CMEA member country, the competence of general courts being excluded.

The arbitration tribunal which is competent to hear the original suit will also be competent to settle counter-claims and set-offs, provided they relate to the same legal relationship as the original suit; this condition was not included in the 1958 text.

The procedure to be followed in settling disputes is that operative in the arbitration tribunal in which the case is decided.

The text further states that cases are to be considered in the language of the country of arbitration, although translation into another language is to be provided

when requested by one of the parties. This provision also relates to the awards rendered.

Lastly, arbitration awards are to be final and binding on the parties.

65. As may be seen, the two aforementioned paragraphs establish, very succinctly, a real arbitral system with all the minimum rules needed to guarantee the efficient settlement of disputes. For example, of all the many criteria used to determine the venue of the competent arbitration tribunal, it was agreed that, as a general rule, that of the defendant's domicile would be used, that is to say the rule *actor sequitur forum rei* was adopted, on the ground that that criterion best expressed, from the legal viewpoint, the idea of equality between the parties and reflected the partners' mutual trust.

The competence of the arbitration tribunal in which the original suit it considered was extended to include counter-claims and set-offs, thus eliminating any possible legal controversy and saving the parties time, money, and so on.

The jurisdiction of general courts was expressly excluded in the case of disputes concerning foreign trade, since such disputes fall within the jurisdiction of the Arbitration Commissions of the Chambers of Commerce and it was made clear that arbitral decisions rendered by these Commissions are final and binding.

Although no uniform arbitration procedure has been established, this procedure is determined clearly by the express reference to the regulations concerning the organization and operation of the competent Arbitration Commission, that of the Chamber of Commerce of the respective member country. This reference guarantees the effectiveness of the arbitral clause in all cases because, as everyone knows, all the arbitration Commissions of the Chambers of Commerce of CMEA member countries are institutional, permanent and have regulations setting out the necessary procedural rules which do not vary, so far as basic principles are concerned, from one Commission to another.

Since the General Conditions of Delivery of Goods also set out the substantive law applicable to relations between the parties, it can be considered that the arbitral system just described has all the essentials needed for efficient arbitration: a clearly identified, competent arbitration tribunal, a specific arbitral procedure and a clearly indicated law which is applicable to the substance of the dispute.

The system is based on co-operation among the various arbitration institutions of CMEA member countries, which operate on the basis of similar principles.

66. This co-operation is carried out principally through periodic conferences⁴⁵ organized by these countries' Chambers of Commerce to exchange experience concerning the problems arising from the implementation of the General Conditions of Delivery and the regulations of the Arbitration Commissions, in order to ensure that the provisions in question are uniformly interpreted.

⁴⁵ Since 1958 six Arbitration Commission conferences have been held, at Prague, Moscow, Berlin, Warsaw, Varna and Bucharest. For details, see S.N. Bratus, "La coopération entre les organismes d'arbitrage des pays socialistes d'Europe", in *Revue de l'arbitrage* 1969, No. 4 (spécial), pp. 171 et seq.

⁴² The most important of these is the rule contained in paragraph 74, which states that when a problem is not regulated or is incompletely regulated by contracts or by the General Conditions the substantive law of the seller's country shall be applied.

⁴³ One of the most important additions was the insertion of a new chapter, chapter XVI, which provides for the uniform regulation of limitation of action.

⁴⁴ For further details see Peter Katona, "The International Sale of Goods among the Member States of the Council for Mutual Economic Assistance", in *Colombia Journal of Transnational Law*, No. 2/1970, one of the most recent works on the subject.

Important decisions of principle taken by the arbitration bodies are systematically exchanged and nearly all the Arbitration Commissions publish collections of arbitral practice concerning foreign trade or theoretical studies of such practice.

The development and consolidation of economic relations between CMEA member countries lead to still closer relations between these countries' foreign trade arbitration and hence to the improvement of the specific forms of co-operation between them.

Activities designed to further such improvement undertaken by existing foreign trade arbitration bodies of CMEA member countries have the following principal aims:⁴⁶

Enlarging the competence of the bodies concerned to include any civil law dispute between economic organizations stemming from relations concerning any kind of economic, technical and scientific collaboration between CMEA member countries;

Enlarging the exchange of information (including information about arbitral awards) between arbitration bodies, in order to facilitate the uniform implementation by the various arbitration bodies of the provisions of the General Conditions of Delivery of Goods between Organizations of the Member Countries and other instruments regulating their economic, technical and scientific collaboration in various fields;

Harmonizing and unifying the rules of procedure of the national arbitration bodies of the Chambers of Commerce of CMEA member countries.

67. Western European countries, too, have long shown a particular interest in the unification of arbitration rules. Thanks to our distinguished colleague,⁴⁷ Mr. Paul Jenard, of the Belgian delegation, we are in a position to inform members of UNCITRAL of the activities undertaken in those countries. On 24 September 1954 the Consultative Assembly of the Council of Europe expressed the opinion that "arbitration procedure in international private law relations is of sufficient interest to justify finding out without further delay whether it is possible to unify the legislation of member States relating to that subject". The Assembly's Legal Committee then proceeded to examine the draft uniform law prepared by UNIDROIT in Rome and, after making various amendments, the Assembly suggested to the Committee of Ministers in recommendation No. 156 of 17 January 1958 "that a committee of governmental experts be appointed to draft a European Convention on Arbitration in respect of International Relations of Private Law". The Committee suggested that encouragement should be given to the preparation of a convention providing a uniform law on arbitration which would replace the national laws of contracting States. This suggestion was adopted and

the Committee, basing itself on the UNIDROIT draft succeeded in adopting a "European Convention providing a uniform law on arbitration" whose main points we will try to present hereafter.

68. Whereas the UNIDROIT draft dealt with arbitration in international relations, the European Convention seeks to unify the domestic laws on arbitration of the various Contracting States. It was considered that the system adopted "avoided the difficulties that would have resulted from the co-existence in the Contracting States of two sets of arbitration laws, one relating to national and the other to international arbitration. In addition, amendments to codes of civil procedure which several countries are preparing at present would thus be allowed for. Finally and above all, as the adoption of a uniform law would provide an identical regulation of arbitration, wherever the proceedings might take place, it would assure an increase of legal security in international commercial relationships, by putting an end to conflicts of international private law".⁴⁸

The texts adopted at Strasbourg fall into four categories: the Convention, the Uniform Law, reservations and relations between the Convention and other international instruments.

69. Primarily, the Convention binds the Contracting States to incorporate the provisions of the Uniform Law in their own legislation. Ideally, these should be reproduced verbatim in the various legislations and in the order established by the Uniform Law. Given the diversity of the rules of civil procedure and of the system of courts, it was, however, necessary to enable States to take the measures required for the incorporation of the Uniform Law in the entirety of their legal system. Certain alterations are accordingly authorized—those stemming from the exercise of reservations or rights, and such supplementary modifications as are deemed necessary either to regulate questions not provided for in the Uniform Law (for example, the capacity required to act as an arbitrator, counter-claims etc.), or to refer to other provisions of municipal law—for the purpose of ensuring the application of the Uniform Law.⁴⁹

The Convention allows Contracting States to except from the application of the Uniform Law certain specific matters which may, however, be the subject of a compromise. Each Contracting Party can declare that it will apply the Uniform Law only to disputes arising out of legal relationships which are considered to be commercial by virtue of its national law. The Convention bars provisions excluding aliens from being arbitrators.

70. With regard to the Uniform Law the following should be noted: it makes no distinction between an arbitral clause and a separate arbitration agreement (in both cases the term used is arbitration agreement); the dispute must be one which has arisen out of a specific legal relationship and in respect of which it is permissible to compromise; the capacity required to compromise is not regulated in the Uniform Law; an arbitration agreement must be constituted by an instrument

⁴⁶ See the complex programme for strengthening and improvement through collaboration and development of the socialist economic integration of CMEA member countries, chapter 15, part IV, in *Scinteia* of 7 August 1971, Bucharest.

⁴⁷ See Paul Jenard, "Draft European Convention providing a Uniform Law on Arbitration", in *IAL*, op. cit., vol. III, pp. 371 et seq. We also wish to thank our eminent colleague for sending us the bill submitted to the Belgian Chamber of Representatives on 19 May 1971, approving the European Convention providing a Uniform Law on Arbitration, done at Strasbourg on 20 January 1966, and introducing a sixth part on arbitration into the judicial code.

⁴⁸ R. David, "Arbitrage et droit comparé", *Revue internationale de droit comparé*, No. 1/1959.

⁴⁹ Paul Jenard, loc. cit., p. 372.

in writing signed by the parties or by other documents binding on the parties and showing their intention to have recourse to arbitration (it is not clear whether the written form is required *ad validitatem* or *ad probationem*); if, in an arbitration agreement, the parties have referred to a particular arbitration procedure, that procedure is deemed to be included in the agreement (this provision can be omitted from the national laws); an arbitration agreement will not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators; the Uniform Law establishes the principle of an uneven number of arbitrators (article 5 provides for the various situations that may arise); articles 7-14 regulate clearly questions relating to the constitution of the arbitral tribunal (giving of notice, challenges, replacements, role of the "judicial authority", etc.); the parties are free to decide on the rules of the arbitral procedure and on the place of arbitration (but they must observe some basic rules guaranteeing the right to defence, the principle of *audiatur et altera pars*, etc.); the arbitral tribunal may determine its own competence; nullity of the contract does not *ipso jure* imply nullity of the arbitration agreement contained in it;⁵⁰ unless there is a provision to the contrary the arbitral tribunal's ruling is to be final; similarly, unless the parties decide otherwise,⁵¹ arbitrators are to rule according to the rules of law; the award must state the reasons on which it is based in all cases;⁵² an arbitral award may be contested before a judicial authority only by way of an application to set aside and may be set aside only in the cases mentioned in the Uniform Law⁵³ (and is therefore not appealable before the judicial authorities); a decision refusing the enforcement formula is appealable;⁵⁴ an appeal against the decision to appose an enforcement formula (art. 30) must be submitted within one month from the date on which the decision was notified; the law requires that proceedings be consolidated when the party means to contest both the decision apposing the enforcement formula and the award itself;⁵⁵ the law contains no provision concerning the enforcement of foreign arbitral awards.

71. We have already spoken of the activities undertaken prior to the Second World War by the Inter-American Commercial Arbitration Commission, a non-governmental organization established in 1934, and of the inter-American commercial arbitration system.⁵⁶

After the Second World War, efforts to bring about the adoption of uniform rules on international commercial arbitration and the organization of an efficient inter-American system were resumed.

At its first meeting, held at Rio de Janeiro in 1950, the Inter-American Council of Jurists assigned to the Inter-American Juridical Committee the study of the topic "International commercial arbitration" under the topic "Uniformity of legislation".⁵⁷ The Committee prepared a draft uniform law on the question, and after observations had been submitted and amendments made, the draft was approved by the Inter-American Council of Jurists at its third meeting, held in Mexico City in 1956 (resolution No. VIII). The Council recommended that "to the extent practicable, the American Republics adopt in their legislation, in accordance with their constitutional procedures, the draft Uniform Law on Inter-American Commercial Arbitration in such form as they consider desirable within their several jurisdictions".

72. In addition, the Committee deemed acceptable the idea of concluding an inter-American convention on commercial arbitration "but not as a substitute for the Mexico City draft, as a complement to that draft rather than as an alternative to it".⁵⁸

The report of the Inter-American Juridical Committee noted, among other things, that the Governments of the American hemisphere believed that it was not appropriate to participate in the New York Convention of 1958 or the Geneva Convention of 1961, preferring "to preserve an inter-American commercial arbitration system". The European Convention was not acceptable in the Americas since it neither did—nor should it speak of the Inter-American Arbitration Commission, which, in the American hemisphere, was "the key institution for the development of arbitration", and because it "contemplates especially the case of juridical persons under public law who are authorized to conclude valid conventions on arbitration, that is, it refers to associations that direct or carry on foreign trade in the socialist States".⁵⁹ Furthermore, the European Convention "contains desirable stipulations, but its wording is inferior to that of the Mexico City draft, which is more concise and clear and has a better literary and juridical style".

The New York Convention of 1958 would be admissible for the American States which might adhere to it, "however, the Mexico City draft being a draft law is more extensive, encompassing matters not included in the Convention".

73. The draft convention recommended by the Inter-American Committee establishes the validity of the arbitration clause without making any distinction between disputes that have arisen and disputes that may arise; it allows aliens to be arbitrators; it states that the designation of arbitrators may be delegated to a third party who may be a natural or a juridical

⁵⁰ The Contracting Parties may settle this question differently.

⁵¹ The Contracting Parties may provide in their national laws that dispensation from ruling according to the rule of law should be granted only after the dispute has arisen.

⁵² The Contracting Parties may omit a similar provision from their national law or derogate from a similar provision if they so wish.

⁵³ The Contracting Parties may derogate partially from a provision (paragraph 3 (c) of article 25). The Uniform Law establishes the periods within which application must be made, on pain of being barred, except when the award is contrary to *ordre public* or when the dispute was not capable of settlement by arbitration.

⁵⁴ The nature of this appeal and the period within which it must be submitted are not specified.

⁵⁵ Obviously, the application to set aside may be made in so far as the three-month period specified in the Uniform Law has not elapsed.

⁵⁶ See paras. 19-21 above.

⁵⁷ Work accomplished by the Inter-American Juridical Committee during its 1967 regular meeting, Pan American Union, General Secretariat, OAS, 1967, p. 31.

⁵⁸ *Ibid.*, p. 37.

⁵⁹ The Special Rapporteur considers that this assessment is incorrect, since foreign trade associations in the socialist States have always had the capacity to conclude valid arbitration agreements. See para. 25 above.

person;⁶⁰ the procedure to be applied is to be that agreed on by the parties concerned; if there is no such agreement, preference is to be given to the procedure provided by the local arbitration law and if there is no express or presumed agreement, the procedure is to be established by the arbitrators; if the arbitrators are appointed by an Inter-American Arbitration Committee, the procedure is to be that established by the Regulations of the IACAC and the public policy provisions of the local law will be respected. The draft convention also states that arbitration awards have the force of a final judgement and that their execution may be enforced in the same manner as judgements of a court. The party against whom the award is made may oppose its execution only by submitting an appeal⁶¹ to the judicial authority of the place where the award was pronounced.

74. The draft uniform law on international commercial arbitration takes up certain provisions of the draft convention (validity of the arbitral clause, appointment of the arbitrators, capacity of aliens to be arbitrators, arbitral procedure, binding nature of the award, appeal to the judicial authority) and contains 20 articles in all. Mention should be made of article 2 (which states that only those who have the legal capacity to contract according to their personal law can sign the arbitration clause), article 8 (which states that if the arbitration is in law the arbitrators must also be lawyers), article 14 (which states that the Arbitration Tribunal may not function unless all the arbitrators are present) and article 16 (which states that the arbitrators shall decide the controversy as *amiables compositeurs* unless the parties have agreed upon another basis for the decision in the arbitration clause or in a later agreement of which the arbitrators have been informed).

75. In 1967, in the course of the work done by the Inter-American Committee, note was taken of the difficulties of the inter-American arbitration system and mention was made of the somewhat apathetic attitude of the Inter-American Commercial Arbitration Commission established in 1933.⁶² During 1967 the American Arbitration Association with the support of a few leading South American businessmen and lawyers, sponsored a series of three meetings to determine whether there was a need for improved inter-American arbitration facilities and if so, what improvements were indicated.⁶³ The conclusions arrived at during the meetings led to a determination to reorganize IACAC. The decision to reorganize the organization was taken at Mexico City in 1968. The headquarters of IACAC was moved from New York City to Rio de Janeiro and a new Board was formed that included representatives of the national sections. One of the main features of the

reorganized IACAC was that a national of any country could file cases through his own national section; if he were the defendant, he would be notified by his own national section. Standards were developed for each national section as organs of IACAC. The old centralized system thus gave way to a decentralized one based on national sections, one in each country. Among other things, each section is to have a board of directors, the majority of whose members should be nationals of the country, must establish and maintain a list of competent arbitrators and forward copies of their *curriculum vitae* to IACAC, must organize education and training programmes, and so on. The functions of the reorganized IACAC were reduced mainly to providing assistance.

76. Arbitration has recently begun to go beyond the framework of purely commercial transactions and to extend also into the broader field of international co-operation. We have already remarked on this trend.⁶⁴ Another illustration of this trend is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States. The Board of Governors of IBRD, in its resolution 214 of 1964, decided to prepare this Convention at the request of numerous Governments of member countries which had requested its assistance in solving certain investment disputes.

The Convention establishes the International Centre for Settlement of Investment Disputes, whose purpose is "to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States" (art. 1-2). The Centre does not itself act as conciliator or arbitrator, but will make its services available to conciliation commissions and arbitral tribunals established in accordance with the provisions of the Convention. The organs of the centre are: (a) an Administrative Council consisting of a representative of each Contracting State, and (b) a Secretariat. The Centre must maintain a Panel of Conciliators and a Panel of Arbitrators, from which the parties to a dispute may choose the members of the commission or tribunal to which the dispute is submitted.

77. The jurisdiction of the Centre with regard to the settlement of disputes is founded on the written consent of the parties, which must be given for every case and extends to all "legal disputes arising directly out of an investment" (art. 25.1), between a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State (whether a natural or juridical person). It is therefore not enough for a State to have ratified the Convention. It remains free to accept or reject the arbitration organized by the Centre. Any Contracting State may notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre (art. 25.4). Under article 41 of the Convention the arbitral tribunal is to be the judge of its own competence.

It should be noted that the IBRD Convention provides in article 42.1 that the arbitral tribunal shall

⁶⁰ This stipulation was considered very important in America since it authorized the procedure which the Inter-American Commercial Arbitration Commission (IACAC) had advocated since 1934.

⁶¹ Article 5 lists the six cases which may be grounds for the setting aside of the arbitration award.

⁶² In many countries there are no national committees. According to official information, the committees operate fully and successfully only in three countries—Argentina, Colombia and Venezuela—and less intensively in Brazil, Chile, Guatemala and Peru.

⁶³ See Donald Straus "Co-operation amongst Arbitration Organizations of the Americas", first report to the Third Arbitration Congress, Venice, 1969.

⁶⁴ See para. 66 above. The ECAFE Rules also mention disputes arising out of contracts concerning industrial, financial or engineering services; see also para. 57 on the arbitration conducted within the framework of EEC.

apply the law agreed to by the parties and, if the parties give no guidance, it shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws). The arbitrators must state the reasons on which the award is based. Any award which fails to state the reasons on which it is based is invalid (art. 52.1). An award rendered under the Convention is binding on the parties, and is not subject to any appeal or to any other remedy except those provided for in the Convention. The remedies provided for are revision (art. 51) and annulment (art. 52) of the award. Either party may, in addition, request an arbitral tribunal which has omitted to pronounce on a question to complete its award and may also ask it to interpret it.

The Convention came into force on 14 October 1966, that is, 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval.⁶⁵

78. In describing the Convention, G. R. Delaume⁶⁶ notes that unlike other attempts to promote conciliation and arbitration under existing institutions, "the Convention does not simply make available to those concerned mechanisms which are particularly suited to the personality of the parties concerned or to the nature of their disputes. It also tries—and this is one of its principal features—to maintain as far as possible a balance between the opposing interests. For this purpose the Convention contains fundamental provisions which may be applied to the advantage or disadvantage of investors of States and which are designed both to clarify the conditions under which the Centres' mechanisms may be used and to ensure that the obligations voluntarily assumed by the parties in agreeing to accept the Convention are respected".

3. *Work on unification and harmonization undertaken by research organizations*

79. The forty-first Conference of the International Law Association—the first such meeting after the Second World War—was held at Cambridge in 1946, when the discussions on international commercial arbitration, among other topics, were resumed. The report prepared by Sir Lynden Macassey, President of the Institute of Arbitrators in London, proposed the formulation of "an effective system of private international commercial arbitration" dealing with a variety of essential aspects as follows:

The arbitral clause (in which the parties would also indicate the law applicable to the contract);

Rules of arbitration (taking into account the fact that the Amsterdam Rules of 1938 had not for the most part been accepted because they did not provide for the alternative of an *amiable compositeur* and were also too legalistic in form);

The national administrative organization (which would have offices, panels of arbitrators, etc.);

Uniform rules concerning international commercial arbitration (with each State adopting a uniform law on arbitration);

An International Supervisory Authority (to be organized within the framework of the United Nations).

80. It should be noted that shortly before this, but still in 1946, there had been a Conference organized by ICC and attended by representatives of the arbitral associations of the United States, Canada, the United Kingdom and the USSR, or of certain institutions, such as UNIDROIT and ILA, at which it was decided to undertake a joint study on the problems of international commercial arbitration, together with an exchange of information; the committees wishing to participate in the study were to be convened by ICC.

In addition, ICC had been recommended to publish information brochures on arbitration in individual countries (the text of which would be approved by the national committee), and the desire was expressed that the problems to be discussed in committee should include the following: co-ordination among the four major arbitral associations (of the British Empire, the western hemisphere, the USSR and ICC); unification of the laws concerning arbitration, and in particular the rules of arbitral procedure, including the recognition and enforcement of arbitral awards; arbitration between Governments and private persons; and education in the field of international commercial arbitration.

81. At the forty-third Conference of the International Law Association, held at Brussels in 1948, the discussions relating to the adoption of new rules concerning arbitration were continued and it was decided that the draft rules should be finalized at the following Conference, which was held in 1950, when what are known as the "Copenhagen Rules, 1950", were adopted.

The arbitral clause adopted at Copenhagen reads as follows: "Any dispute concerning this contract shall be settled in accordance with the ILA arbitration rules, known as the 'Copenhagen Rules, 1950'." By agreeing to the above arbitral clause or any equivalent thereof, the parties indicate their intention to be subject to the Copenhagen Rules, in so far as they have not expressly stipulated to the contrary. They thus are debarred from having recourse to the courts of law on the substance of the dispute (although the courts still have jurisdiction as regards interim or urgent measures).

The first eight articles of the Copenhagen Rules deal with the composition of the arbitral tribunal. The Chairman of the Executive Council of ILA intervenes in the event of a party's or an arbitrator's failure to act which may prevent the setting up of the arbitral tribunal. The other rules are also very simple: No arbitration agreement is drawn up unless the law of the place of arbitration or of enforcement, if any, so requires; the arbitral tribunal determines the place of arbitration, establishes the procedure and the investigation measures and decides whether the parties must appear in person or be represented. Reasons must be given for the award, which must be in the form required by the law of the country in which it is to be enforced. The award is final, and the parties waive any right of recourse which they can validly waive. Provision is made for the possible rectification or interpretation of the award. Lastly, should any provision of the Rules

⁶⁵ So far over 54 countries have become parties to the Convention.

⁶⁶ G. R. Delaume, "La Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats", *Journal du droit international*, No. 1/1966, pp. 28-29.

be legally prohibited, it would be deemed to be not written (*non écrite*), as would any provisions that were strictly incompatible with the voiding of the provision in question.

82. In 1952, at its Sienna session,⁶⁷ the Institute of International Law discussed the report prepared and the draft resolution proposed by Professor Sausser-Hall on the question of arbitration in private international law. The Special Rapporteur felt that it would be useful to give an outline of this work also, in view of the difference in approach and in resolving the problems involved as compared with the approach adopted by the International Law Association and by the International Institute for the Unification of Private Law at Rome.

The work of the Institute of International Law took as its starting-point the idea that "the formulation of a uniform law is a very long-term undertaking, and no one can say when, or whether, it will be achieved. Moreover, even if it were completed, it is realistic to acknowledge that it would not eliminate all conflicts of laws", and "lastly, it is unlikely that all States would subscribe to any unified law, so that there will always be conflicts of laws to be resolved in relations with dissenting States".⁶⁸ This being so, and "considering that private arbitration, being juridically *sui generis*, cannot be governed in international relations by a single law because, although it derives its effectiveness from the agreed intent of the parties as demonstrated by the arbitration contract, it is of a judicial nature involving the application of rules of procedural law",⁶⁹ Both the report submitted and the draft text adopted confine themselves to resolving conflicts of laws to which it gives rise: conclusion of the arbitration agreement, determination of the arbitral procedure, the making of the award and the means of contesting it and setting it aside, and enforcement of the award in a country other than that in which it was made.

83. With regard to the last-mentioned problem, the draft, after laying down that the governing law shall be that of the place at which the arbitral tribunal has its seat, providing for the deposit of the award and the formalities to be complied with in order to make it final and binding, and specifying how the awards of arbitrators may be contested and before what authorities, goes on to deal (in articles 13-19) with the question of "international recognition and enforcement".

The approach taken in the draft adopted by the Institute of International Law is that foreign arbitral awards must be recognized and enforced by all States in whose territory the awards could be relied upon, as soon as they have become final and binding under the laws of the country in which the arbitral tribunal has its seat. Eight cases are specified in which foreign arbitral awards cannot be recognized or enforced.

1. Where the award has been set aside in the State in which the arbitral tribunal has its seat;
2. Where the parties were not properly summoned or represented;

3. Where the award conflicts with a decision rendered, subsequent to the conclusion of the arbitration agreement, by a judicial or administrative authority of the country in which it is relied upon;
4. Where the arbitrators exceeded their terms of reference;
5. Where the award did not rule on all the submissions of the parties;
6. Where no reasons are given for the award, although the parties agreed that reasons would be given;
7. Where the award is contrary to the public policy of the country in which it is relied upon, including cases where the arbitration agreement or arbitral clause places one of the parties in a privileged position with regard to the appointment of the arbitrators.

In addition to direct action to obtain enforcement through official channels, the draft also provides for action *ex contractu* or, in other words, action based on the contractual nature of the arbitration agreement or arbitral clause, under the conditions laid down by the law of the country in which enforcement is sought.

Both in the case of enforcement obtained through official channels by direct action and in the case of action *ex contractu*, the court seized of the request would not, according to the provisions contained in the draft, be entitled to consider the substance of the dispute.

84. The discussions concerning the rules applicable to arbitration in private international law continued after adoption of the resolutions at the sessions in Amsterdam (1957) and in Neuchâtel (1959), resulting in the formulation of the text of certain unified rules, known as the "Neuchâtel Rules". Generally speaking, the Neuchâtel Rules retain the substance of the solutions recommended in 1952, according special importance to the seat of the arbitral tribunal as a governing criterion.

For example, the capacity to conclude arbitration agreements will be governed by the law indicated by the rules of conflict of the forum (article 4); the validity of an arbitral clause is governed by the law of the seat of the arbitral tribunal (article 5, para. 7); the capacity to submit certain disputes to arbitration is determined by the law applicable to the substance of the dispute, but that law will be determined by the rules of conflict of the country where the arbitral tribunal had its seat (article 5, para. 2); the contractual relationship between the parties and the arbitrators is governed by the law of the country in which the arbitral tribunal has its seat, which also governs the composition of the arbitral tribunal, the arbitration procedure to be followed, and challenges to and replacement of arbitrators (article 8); the law applicable to the substance of the dispute must be determined by the rules of conflict of the country in which the arbitration takes place (article 11). Because of the importance of the place of arbitration, articles 1 and 2 lay down detailed provisions on how it is to be established. Where the recognition and enforcement of foreign arbitral awards are concerned, only five cases of refusal are now provided for, as compared to the eight contained in the 1952 draft. It should be noted in this connexion that the setting aside of the award in the State in which the arbitration took place and the fact that one party was placed in a privileged position with

⁶⁷ See Professor Sausser-Hall's report on arbitration in private international law, in *Annuaire de l'Institut de droit international*, Basel, 1952, I, vol. 44, pp. 469-614.

⁶⁸ Sausser-Hall report, op. cit., p. 515.

⁶⁹ Sausser-Hall report, op. cit., p. 471.

regard to the appointment of the arbitrators are no longer included among the grounds for refusing enforcement. The provision for action *ex contractu* has also been dropped.

85. Unlike the Institute of International Law, an account of whose work has been given immediately above, UNIDROIT has, on the basis of its general conception of the need for the unification of private law, maintained its view that unification of the laws relating to arbitration is possible and would be of very great value to business. This is especially true in view of the fact that the inconvenience resulting from the diversity of laws can be obviated only to a very minor degree by the parties concerned, and in particular the fact that the parties lack the power to regulate for themselves either the question of the enforcement of arbitral awards or the equally vital question of what means may be employed to contest awards. A uniform arbitration system presupposes a uniform law on arbitration. Consequently, after the Second World War, UNIDROIT resumed the work which, as shown above, it had been doing before the war,⁷⁰ by revising in 1953 its draft Uniform Law on Arbitration in respect of International Relations of Private Law.⁷¹ The draft, in its new form, was widely disseminated and formed the basis for nearly all the work done in the succeeding years at the national, regional or international level. Its provisions are, with few exceptions, identical with those of the 1937 draft, which was described in chapter II of this part.

4. *Seminars, congresses, conferences and other types of international meetings organized in recent years to discuss the main problems of commercial arbitration*

86. The International Association of Legal Science, with the assistance of UNESCO, organized a meeting between jurists from Eastern European countries and jurists from Western Europe and the United States of America in March 1958 at Rome. Discussions were held on the special legal aspects of trade relations between countries with different economic structures. One of the working papers circulated at the Conference and discussed by the experts was "*L'Arbitrage dans les différends commerciaux entre représentants ou organisations des pays d'économie planifiée et commerçants privés ou entreprises gouvernementales des pays d'économie libre*".

The work published by IALS⁷² includes three reports on commercial arbitration: "*Le règlement des litiges par voie d'arbitrage en Yougoslavie*",⁷³ "*Le traitement de l'arbitrage communiste devant les cours occidentales*",⁷⁴ and "*L'arbitrage dans les différends commerciaux entre organisations de pays à économie planifiée et contractants de pays à économie libre*". In the final

report and in the general report, Professor Harold Berman of the Harvard Law School, Harvard University (United States of America), makes some comments and draws conclusions showing the usefulness of such discussions between expert jurists. The Belgian Rapporteur, in discussing the fact that Western firms do not willingly accept the jurisdiction of arbitration tribunals in countries with centrally planned economies, notes that: "Such courts do not show partiality in their procedure or awards; on the contrary, their reputation for fairness is excellent. However, because of the link between the arbitrators and the State foreign trade enterprises, there is a feeling, based more on psychological reasons than on fact, that such arbitration lacks impartiality and fairness. None the less, arbitration is preferable to a judicial decision for the settlement of trade disputes between countries with centrally planned economies and countries with market economies, particularly because of the difficulties arising from the selection of a jurisdiction and the problems connected with political acts and the enforcement of awards."⁷⁵

The criticisms formulated concerning the arbitration system of countries with centrally-planned economies (such as the connexions between arbitration and the State, the nationality of the arbitrators appearing on the list, freedom in the selection of arbitrators were discussed). Broad agreement was reached on many points, and particularly on the main question: "it is possible to improve, for the common good, what economists call the techniques and what the jurists call the framework or the legal and institutional structure of trade between countries with centrally-planned economies and market-economy countries".⁷⁶

87. The Indian Council of Arbitration, prompted by the same desire for discussions between qualified jurists and businessmen from various regions with an interest in the problems of international commercial arbitration, organized a seminar in 1968, at New Delhi, under the auspices of the United Nations Conference on Trade and Development. Representatives of the ECAFE Centre for Commercial Arbitration, the International Chamber of Commerce, the American Arbitration Association, the USSR Chamber of Commerce and the Japan Commercial Arbitration Association took part in the seminar, together with delegates from UNCTAD. The following subjects were discussed: the choice of arbitrators, the development of international trade law to facilitate wider recourse to arbitration, the venue of arbitration and some promotional aspects of international commercial arbitration.⁷⁷

88. The Seminar endorsed the criteria concerning the venue of arbitration laid down in the ECAFE Rules and decided that the venue would best be decided by the parties after the dispute had arisen.⁷⁸ The Seminar recommended the establishment of a high level inter-

⁷⁰ See chapter I, paras. 30-35, above.

⁷¹ See UNIDROIT, explanatory report on the draft Uniform Law on Arbitration in respect of International Relations of Private Law, Rome, 1954.

⁷² *Aspects juridiques du commerce avec les pays d'économie planifiée*, Librairie Générale de Droit et de Jurisprudence, Paris, 1961.

⁷³ Aleksandar Golstajn, Professor of Economic Law at the Faculty of Zagreb.

⁷⁴ Samuel Pissar, formerly member of the Bureau of Legal Affairs of UNESCO.

⁷⁵ Paul van Reepinghen, Legal Adviser of the Fédération des Industries belges, Brussels.

⁷⁶ Harold Berman, op. cit., p. 12.

⁷⁷ See *International Seminar on Commercial Arbitration*, New Delhi, 18-19 March 1968, the Indian Council of Arbitration, Federation House, New Delhi, 1968.

⁷⁸ The opposite point of view (agreement by the parties as to the venue of arbitration at the time of the contract and prior to the dispute) had been suggested in the Memorandum submitted to the Bangkok Conference by the Office of Legal Affairs of the United Nations Secretariat.

national agency or an international commercial arbitration commission linking the arbitral organizations of various countries which could be entrusted with the task of deciding the venue of arbitration in international commercial disputes where the parties could not agree on the matter. The Seminar also suggested the conclusion of arbitration agreements between the various arbitral organizations, providing for determination of the venue of arbitration.

89. In a paper submitted to the New Delhi seminar, Donald Straus, President of the American Arbitration Association, suggested the establishment of an international commercial arbitration commission linking the various regional and national arbitration bodies which would, among other things, promote uniformity of arbitration laws and of designation of arbitrators when nationals of several countries are involved. Such a commission, working in close co-operation with national arbitration bodies, without itself undertaking any actual arbitration, would be in a position to overcome difficulties in the enforcement of arbitration awards and problems relating to conflict of laws, and soon, by facilitating and streamlining, on an international scale, the procedure for the submission, hearing and handing down of arbitral awards. The suggestion was approved by the Seminar and was emphasized in its statement of conclusions.⁷⁹

90. At the New Delhi seminar, Dr. Martin Domke submitted a paper which he had prepared for the ECAFE Centre for Commercial Arbitration noting measures which should be undertaken to achieve speedier progress of arbitration in the region, but which could also be very useful for other regions, in the opinion of the Special Rapporteur. Some of those measures deserve special mention, namely the formulation by the countries of the ECAFE region of guidelines of model arbitration laws which might be appropriately adapted to the conditions of the different countries of the region; an analysis of the provisions of the various types of arbitration clauses currently in use in the ECAFE region in various sectors of commerce and industry and a study of the reasons why arbitration clauses are not widely used or not used at all; an examination of the various provisions of the laws of the ECAFE region in regard to enforcement of foreign arbitral awards; and an analysis of the structure and use of the various arbitral institutions in the region.

91. Three important international arbitration congresses have been held in recent years, at which useful exchanges of views took place and recommendations made regarding the solution of problems which at the time were of concern to jurists and to businessmen with an interest in arbitration.

The work of the First International Arbitration Congress⁸⁰ (Paris, 1961) was carried out by four commissions. The first commission discussed the problem of "the autonomous and procedural character of the arbitral clause" on the basis of the report submitted by F. E. Klein. At the conclusion of the debate, the

commission adopted three recommendations: the first was that the arbitral clause should be regarded as an autonomous agreement between the parties, the validity of which is not dependent upon that of the main contract; the second being that arbitrators should be authorized, subject to ultimate judicial control and without depriving themselves of the right to decide on the merits, to inquire into and determine their own jurisdiction and to rule upon the existence and the validity of the arbitration agreement; the third concerned the insertion in future arbitration rules as well as in future arbitration agreements of an arbitration clause which could be used to avoid ambiguity concerning the autonomy of the arbitration clause.

92. The second commission dealt with the harmonization of the rules of procedure of the arbitration centres (Rapporteur: Dr. Glossner) and considered there was no doubt that unification was both necessary and entirely possible "it being understood that much goodwill on the part of the parties and of Governments was essential to the attainment of those objectives". It should be noted that the discussions revealed serious reservations concerning *amiable composition* and the Rapporteur thought it preferable to set that notion aside and speak simply of *equity*. "It would then be an international general law. Bâtonnier Paul van Reepingen considered that use of *amiable composition* was fraught with dangers because 'the party is placed in the greatest uncertainty' by *a priori* renouncing law (prescription, estoppel, penalty clause, damages, etc.). Arbitration should be separate from *amiable composition*. That does not exclude attempts at conciliation, for which the parties would have requested the arbitrator's good offices."

The Commission, guided by considerations relating to the liberty of the parties, minimum formality and maximum flexibility and simplicity, and guarantees of a serious approach and procedural security, specified principles for the four successive stages of the opening of the procedure, instruction of the case, the hearings and the award.

93. The third commission discussed the report on "The creation of an international body or office which would be competent to nominate arbitrators, to determine the arbitral procedure and to register arbitral awards so as to facilitate their enforcement" (P. J. van Ommen). During the discussion, stress was laid, among other things, on the damage caused to the practice of arbitration by the nomination of "advocate-arbitrators". The opinion of the commission was in favour of the establishment of international regional offices in order to promote the working of arbitral procedures, to give advice, to act as depositories for arbitral awards so as to be able to furnish to the parties certified copies of them, and so on.

94. The fourth commission discussed in depth "The problem of arbitration between Governments and legal persons of public and private persons" (report submitted by Professor Vedel) and concluded by recommending that impediments which in some jurisdictions still prevented bodies of public law from resorting to arbitration, be removed and that "access and ratification of the Geneva Convention of April 21, 1961 not be made with reservations and limitations which would in fact deprive of all significance the principle embodied

⁷⁹ See F. N. Krishnamurthi, "Co-operation on a regional scale—the Bangkok experiment", a report submitted to the Third International Arbitration Congress (Venice, Oct. 1969), in *Revue de l'arbitrage*, No. 4/1969, p. 214.

⁸⁰ See *Revue de l'arbitrage*, No. 2/1961, where the reports and a summary of the discussions appear.

in article 2 of the Convention, which authorizes the 'legal persons of public law validly to conclude arbitration agreements'".

95. In 1966 the Netherlands Arbitration Institute organized at Rotterdam the Second International Arbitration Congress on the theme "Arbitration and the Common Market". Because of the theme, the work of the Congress was directly concerned with arbitration under community law, but many of the problems discussed also concern arbitration in general. In particular, we wish to refer to the paper by Professor E. Minoli, which analyses arbitration as a factor in the unification of law and elimination of conflict of laws (Professor Minoli considers that arbitration organizations are prime movers in a trend towards unification), and to the work of the second commission, which recommended that national legislation should be harmonized so that legal persons of public law should have the acknowledged right to conclude arbitration agreements.

96. The Third International Arbitration Congress, held in 1969 at Venice, was the most fruitful and representative congress to date. It was world-wide in character and the general theme was co-operation between arbitration organizations. Thirteen reports and many communications were submitted. In the keynote report Professor Minoli set out the reasons for co-operation between arbitration organizations and outlined the forms which such co-operation meant or should take. Valuable information was supplied on co-operation between arbitration organizations in almost every region of the world: in the Americas (Donald Straus), in eastern European Socialist countries (S. N. Bratus), in countries with different economic systems or degree of development (L. Kopelmanas) and in countries in Asia and the Far East (N. Krishnamurthi). Reports were also presented dealing with general questions of principle, such as the deontology of the international commercial arbitrator (F. Eisemann); standard of arbitration regulations applicable to international commercial affairs (J. Robert); standard of legislation on international commercial arbitration (René David); with problems of development and promotion (N. Pearson, A. Broches, J. Jabukowski, M. Domke), and with practical suggestions (P. Sanders).

97. The Congress concluded that co-operation among arbitration organizations is desirable and possible. "Relations among these arbitration organizations should therefore be organized, without rigidity. The organizations without necessarily being unified, should seek to harmonize their relations while carefully retaining the particularities which justify the existence of each separate organization. To that end, it was probably necessary first to note the existence of arbitration organizations, to become aware of the problems involved in harmonizing their activities and to define at least the broad outline of future co-operation".⁸¹

The notion of organizing co-operation among arbitration organizations was constantly stressed, as was the establishment of a centre for contacts on a world-wide scale. The Congress considered it desirable that similar *Ad hoc* Committees should be held periodically. It established an *ad hoc* Committee to continue the work which

had been initiated. The Committee is currently preparing the next world-wide congress, which is to be held in Moscow, in 1972, on "Arbitration and economic co-operation in the field of industrial and technical development".

5. *Observations on the development of international commercial arbitration since the Second World War*

98. The fifth and last section of this chapter provides an opportunity, as did the last section of chapter I, for some observations on the development of commercial arbitration in the period 1945-1970, in the context of the new social, political, economic and technical conditions prevailing after the Second World War, which undoubtedly created new trends and phenomena in the use of arbitration and new legal and organizational problems.

99. This period witnessed, firstly, the emergence of the world economic system of the socialist countries, based on a planned economy, and the development of international commercial relations based on State monopoly. Secondly, there was the appearance of the third world, composed of States which have recently acceded to political independence and which are among the developing countries. Thirdly, the scientific and technological revolution has over the past few years placed contemporary world relations in a new setting, radically altering the pattern of industrial production and the conditions of participation in the international division of labour and in international trade. It has become necessary to adopt certain organizational measures at the international level to deal with economic co-operation and exchanges of goods between the different regions of the world, between countries with different economic systems, and between the developing countries and the industrialized countries. Many countries in different regions are trying to organize themselves in various economic and political forms and structures in order better to defend their interests, in a world where complexities and contradictions abound. In these circumstances, State participation in economic life is becoming increasingly direct, even in market-economy countries where the means of production are privately owned.

Lastly, it should be noted that, despite all the periods of economic stagnation, cold war and political tension, and despite the restrictions and barriers or discrimination imposed, international trade has expanded and developed constantly. It has almost doubled in the past 10 years, reaching a total of almost \$500,000 million. International commercial relationships (in the wide sense of the term) constitute a special separate category of social relationships and, with interdependence as the keynote, bring the most varied State and social structures into contact, despite the distance involved.

The United Nations, which was created after the Second World War in order "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind" is to be "a centre for harmonizing the actions of nations" for the maintenance of international peace and security and to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

⁸¹ *Compte rendu du III^{ème} Congrès International de l'Arbitrage* (Venise, 1969), *Revue de l'arbitrage*, No. 4 (special issue), p. 137.

All these historical factors are reflected in the development of international commercial arbitration, which is the subject of this report.

100. One stage in that development witnessed the initiation and completion of the process of clarifying the nature of the arbitration systems operating in the Eastern European countries, which have a different economic system. Commercial arbitral bodies with exclusive jurisdiction in respect of international trade relations have been established in those countries. These bodies are institutions of public interest; they were erroneously deemed to be organs of the State, and their system of organization and operation was often considered to be incompatible with the nature of arbitration and to resemble that of judicial organs. This situation gave rise to a definite crisis of confidence, the reasons for which were psychological rather than real,⁸² as was evident at the colloquium organized by the International Association of Legal Science in Rome in 1958; this crisis of confidence adversely affected the development of East-West trade for a long period. Continued contacts were needed to enable the two sides to become more familiar with each other's arbitration systems. As Mr. Kopelmanas of the European Office of the United Nations at Geneva has said:

"It took determination and faith for a small group, centred around Gunnar Myrdal, in the United Nations Economic Commission for Europe, to continue believing that the decline and the intermittent stoppages in East-West trade were primarily due to political circumstances and not to any real incompatibility between the two economic systems into which the countries of Europe were divided."⁸³

101. Once that crisis had passed, the pressure of events led to progress: in a world marked by economic interdependence, the need for co-operation induced States to work together at the world level to improve both the organization and the functioning of arbitration machinery.

We have described the period between the two world wars as the era of international acceptance of arbitration; the following period, which began after the Second World War, is the era of the growth of arbitration—growth in a dual sense: geographical, since it spread to other major regions of the world (the Far East, Latin America), and technical, since it is embodied in all standard contracts, and indeed in all the forms used in every branch of international trade relations. It is also the era of the emergence and development of various types of specialized, permanent, institutional arbitration designed to meet the requirements of international trade and new requirements arising out of international economic co-operation. As Professor Lalive has rightly observed, "the most striking feature of modern international arbitration is undoubtedly its 'institutionalization', that is, the proliferation of arbitration bodies of every type

and appellation".⁸⁴ Institutional arbitration was earlier referred to by Charles Carabiber, at the First International Arbitration Congress,⁸⁵ as "an institution whose irreversible nature is no longer in dispute". Many commentators hold that the future of arbitration lies in institutionalization and that we are witnessing the decline of *ad hoc* arbitration, which has become merely a "poor relation" of institutional arbitration. What was a trend in the first period seems to have become established fact.

102. The historical circumstances described above also explain the success of the New York Convention of 1958, which not only marks an advance, from the technical and other standpoints, over the Geneva Protocol of 1923 and the Geneva Convention of 1927 but also reflects the trend towards world-wide participation in trade, since it recognizes at the international level the arbitral character of all permanent arbitration centres throughout the world. Article I, paragraph 2, of that Convention is considered to be, so to speak, the epilogue to the *Ligna v. Baumgartner* case, as the Swiss representative⁸⁶ observed during the 1958 Conference.

The European Convention of 1961 was the first important convention to contain a clear recognition of the tendency to treat international trade relationships individually, as a separate category of relationships—even its title mentions international commercial arbitration. It may also be noted that commentators have taken the same approach.⁸⁷ Moreover, the European Convention states unequivocally that the term "arbitration" encompasses settlement by permanent arbitral institutions.

Lastly, the 1958 General Conditions for the Delivery of Goods of the Council for Mutual Economic Assistance (CMEA) and those of 1968, which contain provisions on the creation of a system of international commercial arbitration for economic organizations in the member countries of CMEA, on the one hand, and the adoption of the ECAFE Rules and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States on the other hand, all reflect, even if in different ways, the same needs for international co-operation in economic development.

103. Two important problems relating to international commercial arbitration have become more acute in recent years as a result of new factors in the development of the world economy.

One of them is the question of organizing arbitration in trade relations between countries at different levels of development. Professor E. Minoli,⁸⁸ pointing out that "while it is true that differences in economic development may offer occasions for stronger economies

⁸⁴ P. A. Lalive, "Problèmes relatifs à l'arbitrage international commercial", *Recueil des Cours*, Académie de droit international, The Hague, vol. II/1967, p. 694.

⁸⁵ Charles Carabiber, Exposé introductif, *Proceedings of the International Arbitration Congress, Revue de l'arbitrage*, Paris, 1961, p. 45.

⁸⁶ Cf. Philippe Fouchard, *L'Arbitrage commercial international*, Paris, 1965, p. 206.

⁸⁷ See, for example, the works by Professor Fouchard and Professor Lalive mentioned in previous foot-notes.

⁸⁸ Eugenio Minoli, Keynote Report, Third International Arbitration Congress, Venice, 1969, pp. 2 and 3.

⁸² See Paul van Reepinghen, "L'arbitrage dans les différends commerciaux entre organisations des pays à économie planifiée et contractants de pays à économie libre", in *Aspects juridiques du commerce avec les pays d'économie planifiée*, Paris, 1961, p. 231.

⁸³ L. Kopelmanas, "Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différents", report submitted to the Third International Arbitration Congress, Venice, 1969, p. 2.

to exploit the weaker, and arouse in the latter the urge to defend themselves and to organize for defence"—a situation which has sometimes led to the repudiation of international commercial arbitration or the adoption of inoperative clauses—expresses the view that: "the major difficulty involved in fitting business dealings of the kind here referred to within efficient international commercial arbitration schemes is due mostly to the limited experience of such dealings, and to the almost total lack of participation in their organization and implementation by qualified persons from the less developed countries, where the uneasy feeling prevails that such arbitration schemes are 'thought up' by the developed countries, and are manipulated by them in their own interests, and are, in fact, one more factor of their domination".

The second problem is that of so-called mixed arbitration, in which one of the parties is a State; although such arbitration will probably become increasingly common as a result of the frequency of direct State involvement in international trade and economic relations, it seems for the moment to be largely confined to investments but its use is increasing in other forms of collaboration.

104. Since international commercial arbitration is itself an effective means of peaceful co-operation among nations⁸⁹ within the framework of world economic development, regardless of the level of development or the social and political system of the countries of the world, the problem is how to make it as efficacious an institution as possible and bring it into general use. The possible role in solving these problems of the United Nations or the other national or international, governmental or non-governmental organizations concerned, and the technical means for achieving these ends, will be dealt with in part III of the report. What must be stressed now is that the action required will involve the concerted efforts of the United Nations, of Member States and of all the national and international organizations concerned, because international commercial arbitration is one of the fundamental elements in the planning of a steady expansion of world-wide economic, technical and scientific co-operation. Without wishing to look too far ahead, the Special Rapporteur feels that the direction in which these efforts should first be applied is in organizing co-operation among commercial arbitration institutions, including any which may be established in the future. This would be one practical way of fulfilling the general international obligation of economic co-operation, which is now accepted as one of the essential conditions for lasting peace.

Part II. Problems concerning the application and interpretation of existing multilateral international conventions on international commercial arbitration

105. The material which follows relates mainly to cases expressly involving the provisions of the international conventions under discussion. However, reference

has also been made to the judicial practice of countries which are parties to the conventions and may therefore be assumed to bear those provisions in mind, given the circumstances of the case, even if there is no explicit statement to that effect. Moreover, in some instances cases have been included because they resolve legal problems which are posed in the same way in the conventions, even if the provisions of the conventions were not invoked for the purpose and only the application of certain provisions of municipal law was involved.

For the sake of clarity, we decided that the material so far assembled should be divided, for the time being, into the following four chapters, each referring to one general category of problems: chapter I—problems concerning the arbitration agreement; chapter II—problems concerning arbitral procedure; chapter III—problems concerning arbitral awards; and chapter IV—problems concerning the enforcement of foreign arbitral awards. It was thought useful to devote a separate section, wherever possible, to one specific problem in the general category concerned and to identify the legal problem discussed in the heading of each section.

CHAPTER I. PROBLEMS CONCERNING THE ARBITRATION AGREEMENT

1. Law applicable to the arbitration agreement

106. In West German judicial practice, the existence of a valid arbitration agreement is determined according to the law of the country in which the arbitral institution has its seat.⁹⁰

The same view was taken in Swiss judicial practice in the case of an arbitral clause concluded between a company having its seat at Zurich and its Spanish trade partner. In the clause in question it was agreed to set up an arbitral tribunal at Zurich composed of two arbitrators, one appointed by each party, and a presiding arbitrator elected by the two arbitrators. Under the clause, if one of the parties failed to appoint its arbitrator, the other could request the President of the Swiss Federal Court to make the appointment.

A dispute having arisen, the Spanish party refused to appoint an arbitrator, claiming that the arbitral clause was void because it was contrary to Spanish public policy. The Swiss party requested the President of the Swiss Federal Court to appoint the arbitrator.

The ruling was that, under article 2 of the 1923 Geneva Protocol, which governed the arbitral clause in question, the law of the country in whose territory the arbitration takes place was applicable, namely Swiss and not Spanish law.⁹¹

Belgian judicial practice also takes the view that, within the framework of the 1923 Geneva Protocol and

⁹⁰ Hamburg Civil Court, 12 November 1967, in *Revue de l'arbitrage*, No. 4/1959, pp. 126-128.

⁹¹ President of the Swiss Federal Court, Judgement of 7 July 1962, in *Journal du droit international* (Clunet), No. 1/1966, p. 173. The President of the Swiss Federal Court has not yet taken a decision on the request for the appointment of an arbitrator, because under Swiss law he is not competent to determine the validity of the arbitral clause. The ordinary Swiss courts must first rule on the validity of the clause.

⁸⁹ See René David, "La technique de l'arbitrage, moyen de coopération pacifique entre les nations de structures différentes", in *Problèmes contemporains de droit comparé*, I, Tokyo, 1962, pp. 22 et seq.

the 1927 Geneva Convention, the validity of the arbitral clause of commercial contracts is determined in accordance with the law of the State in which the dispute is arbitrated. Czechoslovak law has been applied to the same effect.⁹²

2. *Law applicable in establishing whether it is necessary to conclude a separate arbitration agreement or whether an arbitral clause suffices*

107. When an application was made for the enforcement in France of an arbitral award made in the State of New York, it was submitted that the award was not valid, because it was based on an arbitral clause and not on a separate arbitration agreement.

The court to which the application for enforcement was made, in its interpretation of the content of the arbitral clause, held that since that clause provided that any dispute between the parties and subject to arbitration in the United States of America, the parties had referred implicitly to New York State law.

New York State law was considered as the *lex causae* applicable to the case. That law does not require the conclusion of a separate arbitration agreement, so that the existence of the arbitral clause was sufficient to render the arbitral award valid.⁹³

In another dispute, the parties, having concluded a chartering agreement, agreed that English law would apply, inasmuch as they referred to the Centrocon Arbitration Clause. An arbitral award made in the United Kingdom was submitted for enforcement in France, where the absence of a separate arbitration agreement was invoked. It was ruled, however, that "the applicable texts do not require the signatories of the arbitral clause to conclude a separate arbitration agreement, but allow each party to inform the other of the difficulty by registered letter, under the Arbitration Act, 1950, and the Geneva Convention of 26 September 1927, which requires only that the award should be made on the basis of an arbitral clause or a separate arbitration agreement".⁹⁴

On 6 April 1970, the First Chamber of the Appeals Court of Reims ruled that the arbitral procedure referred to in an arbitral clause is binding upon the parties to the contract. An arbitral clause which specifies the way in which the subject of a dispute is to be defined and the arbitrators appointed is the equivalent of an arbitration agreement.

If the procedure provided for in such an arbitral clause is followed, it is useless for a party to complain that its rights of defence have been violated.⁹⁵

⁹² Belgian Court of Cassation, 16 January 1958, in *Revue critique de droit international privé*, No. 1/1959, p. 122. The Court held, however, that it was not competent to determine whether the Belgian court to which application was made for an enforcement order had correctly interpreted Czechoslovak law in the case mentioned.

⁹³ Paris Appeals Court, First Chamber, 30 May 1963, in *Revue de l'arbitrage*, 1963, No. 3, p. 93.

⁹⁴ Appeals Court of Aix-en-Provence, 29 September 1959, in *Journal du droit international (Clunet)*, No. 1/1961, p. 168.

⁹⁵ Appeals Court of Reims, 6 April 1970, *Société Probrione versus Internationale Graanhandel Thegra NV*, in *Revue de l'arbitrage*, 1970, No. 3, p. 161.

3. *Autonomy of the arbitral clause and the separate arbitration agreement with respect to the contract to which they relate*

108. The close link between a contract and the arbitral clause it contains or an arbitration agreement contained in a separate document relating to the contract raises the problem of the effects of the invalidity of the contract on the arbitral clause or the separate arbitration agreement. For example, when an application was made for the enforcement of an English arbitral award in France, it was submitted that the nullity of the contract of sale concluded by the parties rendered the arbitral clause—and hence the arbitral award—invalid. French judicial practice does not take this view and rules that in international commercial arbitration "an arbitration agreement concluded separately or embodied in the legal document to which it refers always has—save in exceptional circumstances, which are not invoked in this case—absolute legal autonomy and is not affected by the possible invalidity of the document".⁹⁶ Even in cases in which the contract is declared null and void for reasons of public policy, this ruling applies and the arbitral clause remains valid. In support of this it has been argued that, since disputes may arise when the contract is declared null and void on grounds of public policy and since the parties nevertheless have the right to conclude an arbitration agreement with regard to those disputes, the existence of that right proves that that agreement is valid.⁹⁷

In another dispute it was likewise decided that "in determining the validity of the arbitration agreement . . . the judge in the enforcement proceedings is not required to rule on the validity of the contract to which the agreement relates, because of the invalidity of its provisions". The validity of the arbitration agreement cannot be affected even by the considerations on which the arbitrator's award is based: "As the arbitration agreement is the basis of all arbitration, its prior validity must be determined independently of the considerations which led the arbitrators to make the award."⁹⁸

United States judicial practice has also held that the arbitral clause is independent of the contract in which it is incorporated. The problem arose in connexion with a contract for the sale of wool which the buyer contended had been concluded by fraud. The contract contained an arbitral clause by virtue of which any dispute other than those concerning the condition or quality of the goods was to be submitted to the American Arbitration Association. The court of first instance rejected the application for a suspension of judgement until such time as the issue of fraud had been decided. The Second Circuit Court quashed that judgement on the ground that the arbitral clause was separate from the other provisions of the contract, was not alleged to be fraudulent and was worded in terms broad enough to cover even the case of fraud.⁹⁹

⁹⁶ Orleans Appeals Court, 15 February 1966, *Revue de l'arbitrage*, No. 4/1966, p. 109.

⁹⁷ *Ibid.*

⁹⁸ Paris Appeals Court, 9 January 1962, in *Revue de l'arbitrage*, No. 1/1962, p. 12.

⁹⁹ *Revue de l'arbitrage*, No. 4/1959, pp.128-130.

It should be noted, however, that in United States judicial practice one cannot speak of consistent decisions along the lines mentioned above. In fact, it has been decided in other cases that a defence based on fraud may not be the subject of arbitration.

4. Requirement that arbitration agreements shall be in writing

109. The provisions of article II (2) of the New York Convention of 1958, which requires the arbitration agreement to be in writing and may therefore affect the validity of an arbitration agreement, have given rise to discussion as to the exact meaning to be given to them.

For example, a Geneva court refused to enforce in Switzerland, under the United Nations Convention, an arbitral award rendered in the Netherlands, on the ground that the words "and exchange of letters" in article II (2) of the Convention required that the proposal to submit disputes to arbitration, made in the form of a written offer, should be accepted expressly, and not tacitly by the opening of a letter of credit.¹⁰⁰

In French judicial practice, however, another and less rigid view has been taken regarding the written form of the arbitration agreement, as required by the United Nations Convention of 1958. A court has, in fact, decided that:

"When the acceptance of a commercial transaction results from its execution and the (French) seller has not protested against the clause stipulating that in the event of dispute the parties shall submit to arbitration, it also implies acceptance of the said clause and requires the seller to conform to it. This applies even when the clause providing for arbitration in the country of the foreign buyer (English) is printed on a form contract which the buyer has sent by way of confirmation to his French supplier after the conclusion of the transaction by verbal agreement".¹⁰¹

It should be noted that recently there has been a tendency to recognize arbitration agreements. For example, it was decided that the requirement that arbitration agreements be in writing is met in cases where there is between the parties to a dispute a constant flow of commercial orders and transactions which are covered by an arbitral clause, and similar orders or transactions are contested on grounds that they had not been agreed to in writing.¹⁰²

A similar attitude is adopted in Italian judicial practice. In one dispute, for example, an application was made in Italy for an order for the enforcement of an

arbitral award rendered at New York by virtue of an arbitral clause in a chartering agreement, also concluded at New York, between a Norwegian shipowner and an Italian charterer. In the arbitral clause, jurisdiction was assigned to an arbitral body in New York. The clause had, however, not been approved in writing, as required by article 1341 of the Italian Civil Code. The Italian court held that the requirement of approval (confirmation) in writing is a *question of form*, governed by the law of the place in which the contract is concluded, and not a question of procedure, which is governed by the law of the court to which application for enforcement was made. In New York State, where the contract was concluded, no written approval of the arbitral clause is required, and the clause was therefore ruled valid, on the ground that article 1341 of the Italian Civil Code embodies a provision of domestic—not international—public policy.¹⁰³

A similar decision had been taken previously by an Italian court to which an application had been made for the enforcement of an arbitral award rendered in Czechoslovakia by virtue of a contract concluded in Czechoslovakia containing an arbitral clause—which had not been confirmed in writing—in favour of the Czechoslovak arbitral body.¹⁰⁴

According to the practice of the Arbitration Commission of the Chamber of Commerce of Romania, when the claimant submits a dispute to the Arbitration Commission without having previously concluded an agreement in writing with the respondent regarding the Commission's jurisdiction, the respondent mentioned in the request for arbitration must express his agreement before the proceedings can be initiated. For example, in one case where the claimant (an enterprise in Prague) had not attached to its request a copy of the arbitration agreement, the Arbitration Commission asked the respondent (an enterprise in Bucharest) whether it agreed that the Commission should settle the dispute. The Arbitration Commission did not initiate the proceedings until that agreement had been given (case 6/1955).

In another case, a New York firm submitted a request for arbitration against a Bucharest firm, without having concluded an arbitration agreement with the latter (case 7/1955). The Arbitration Commission proceeded in the same way; before initiating the arbitral proceedings, it invited the respondent to indicate whether he considered the Commission competent to arbitrate the dispute.

It may thus be concluded that the Arbitration Commission of the Chamber of Commerce of the Socialist Republic of Romania cannot settle disputes unless the parties have agreed that it has jurisdiction and the agreement has been expressly set out in writing, irrespective of whether the agreement was reached before or after the dispute was submitted to the Commission.

The Commission has considered the requirement that an agreement be set out "in writing" to be fulfilled when the documents accepted by the parties di-

¹⁰⁰ Martin Schwartz, "La forme écrite de l'article II, alinéa 2, de la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères du 10 juin 1958", in *Revue suisse de jurisprudence*, 1968, vol. 64, p. 49; for the text of the decision of 8 June 1967 in the *Walsum v. Chevaliers* case, see *ibid.*, p. 56.

¹⁰¹ French Court of Cassation, Civil-Commercial Chamber, 17 October 1961, in *Revue critique de droit international privé*, No. 1/1962, pp. 129 and 130.

¹⁰² Paris Appeals Court, Fifth Chamber, Decision of 14 February 1970, *Ballais versus* (1) Dubois and Co. (2) Nataf, *Revue de l'arbitrage*, 1970, No. 3, p. 148.

¹⁰³ Italian Court of Cassation, 2 May 1960, in *Journal du droit international* (Clunet), No. 3/1961, p. 860.

¹⁰⁴ Trieste Appeals Court, 13 July 1956, in *Journal du droit international* (Clunet), No. 3/1961, p. 864.

rectly or by implication show clearly and expressly that they are willing to submit their disputes to arbitration, the appointment of an arbitrator being no indication of acceptance of the Commission's jurisdiction. Thus, when the respondent in a case (the Silva Company of Bobigny, France) maintained that the Bucharest Commission was not competent to settle the case, the Commission accepted the argument, since there was no written evidence of an arbitration agreement between the two parties to the dispute. The respondent had concluded such an agreement with Exportlemn, the Romanian sales enterprise, but not with the Bureau of Merchandise Control, which was the claimant in the dispute although it had no direct contractual ties with the respondent.

In examining another aspect of the case, the Bucharest Commission ruled as follows: "The fact that the respondent appointed an arbitrator to serve on the arbitral tribunal while not appearing before the tribunal or submitting substantive information to it is not conclusive and does not constitute proof of acceptance of the Commission's jurisdiction...".¹⁰⁵

In another case, the respondent, an Italian company, contested the jurisdiction of the Bucharest Arbitration Commission on the ground that the arbitral clause in question was not valid under the provisions of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, arguing that "the provision in article II of that Convention that an arbitral clause or agreement shall be in writing means that it must appear in a document which must be signed by the contracting parties in order to be enforceable and binding".

This requirement had not been met because the arbitral clause had not been incorporated in the contract signed by the parties but in the General Conditions of Delivery, of which the respondent had no knowledge and which had not been signed by the contracting parties. The arbitral tribunal rejected the respondent's argument on the ground that both parties acknowledged that the contract they had signed provided expressly that the General Conditions of Sale and Delivery, a printed copy of which was annexed to the contract, was an integral part of the contract and equally binding on both parties. The fact that the respondent had signed the contract with no reservations meant that it also subscribed to the General Conditions in which the arbitral clause was included.¹⁰⁶

In West German judicial practice, the question of the form of the arbitration agreement is posed in the context of article 1027 of the West German Code of Civil Procedure. Although this text is a regulation of municipal law, it is nevertheless of some interest in relation to article II (2) of the New York Convention.

According to article 1027 (2) of the West German Code of Civil Procedure, the arbitration agreement must be expressed and in writing and contain only clauses relating to the arbitration. That formal require-

ment was not fulfilled in an agreement providing for the settlement of certain disputes by the arbitral tribunal of the Association of Grain Merchants of the Hamburg Commodity Exchange.

It was, however, argued that in that particular case the form of the arbitration agreement was regulated not by article 1027 (1) but by article 1027 (2), which imposes no special formal conditions when the agreement between the parties is a bilateral act of commerce between merchants.

This raised the subsidiary problem whether the French party, an agricultural co-operative, was a merchant. If West German law, particularly article 17 (2) of the West German Act on Co-operatives, had been applicable, the respondent would have been considered a merchant because it was a co-operative. However, it was decided that the question whether the respondent was a merchant must be decided according to French law, not West German law, for according to West German private international law, the quality of merchant is determined according to the law of the place in which the professional establishment is situated. According to French law the respondent was not a merchant, since it was an agricultural sales co-operative. Consequently, article 1027 (1) of the West German Code of Civil Procedure was applied in this particular case, the arbitration agreement concluded by the agents of the parties (who had written notes to that effect which were transmitted to the parties concerned) having been deemed invalid from the point of view of form.¹⁰⁷

In an extremely interesting case judged by the Federal Court of the Federal Republic of Germany on 25 May 1970, it was ruled that an arbitral clause in a seller's letter of confirmation was valid since the buyer had remained silent. According to West German law, the clause was valid since the party which received the letter of confirmation should have refused to accept it if it did not wish the content of the letter to be enforceable against it.

The West German judge to whom application was made for enforcement of the award rendered by the foreign arbitral tribunal provided for in the clause in question followed West German judicial practice relative to cases where merchants remain silent on receipt of a letter of confirmation. In making his decision, he referred to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and the European Convention on International Commercial Arbitration signed at Geneva in 1961. The provisions of those Conventions were applicable since the two countries concerned were parties to them. Unfortunately, neither the Appeals Court nor the Federal Court based their decisions on the requirement laid down in those two Conventions that arbitral clauses be set out in writing. Instead, they had recourse to the private international law of the Federal Republic of Germany. A commentator on this decision has observed:

"The two courts thus followed a doctrine which minimizes the effect of the rule regarding form laid down in the 1958 New York Convention and maintained in an attenuated version, in the 1961 Geneva

¹⁰⁵ Arbitration Commission of the Chamber of Commerce of Romania, arbitral award No. 30 of 7 July 1967, Case 432/1967.

¹⁰⁶ Arbitration Commission of the Chamber of Commerce of Romania, interlocutory award of 30 November 1971, Case 621/1970.

¹⁰⁷ Hamburg Civil Court, Commercial Chamber, 12 November 1957, in *Revue de l'arbitrage*, No. 4/1959, pp. 126-128.

Convention, and which is more favourable to the recognition of arbitration agreements and arbitral awards. Article 1, paragraph 2 of the Geneva Convention is intended to ensure legal security and uniformity of solutions among Member States. Both security and uniformity are jeopardized when jurists in individual countries consider that they are entitled to apply national principles of private international law. . . . Some advocates of arbitration may nevertheless find it preferable to apply ordinary law, since by so doing it is possible to avoid the awkward situation in which an application for enforcement of an award rendered in accordance with the law of another contracting State and which can no longer be contested in that State is refused because a formal defect renders the arbitration agreement non-existent in the eyes of the judge to whom the application for enforcement is made, while the time-limit for appeal under the law of the State in which the award was rendered has expired. However, this situation can be avoided only by interpreting the rules with regard to form laid down in article II of the 1958 Convention and article 1, paragraph 2 of the 1961 Convention as limiting the freedom of contracting States not to respect an arbitration agreement, their ordinary law remaining intact in so far as it is more favourable to recognition."¹⁰⁸

5. *Dispute not covered by the arbitral clause or the arbitration agreement*

110. In view of the special importance of the arbitration agreement, which constitutes the basis of arbitral competence, it is essential to establish the existence of these agreements and to define *their content*.

For example, although it is true that the Arbitration Commission of the Bucharest Chamber of Commerce possesses general jurisdiction with regard to foreign trade relations, the parties may, by agreement, limit that jurisdiction to certain categories of foreign trade relations. The Commission can only exercise the jurisdiction which empowers it to give a ruling *within the limits provided for by the parties, as defined in the relevant clause of their agreement*. This clause must express not only the will of the parties to resort to arbitration, but also the categories of relations they intend to submit to arbitration.

For example, in one dispute¹⁰⁹ the claimant requested the Arbitration Commission to establish the price and specification of the goods which were the subject of the contract and to change the delivery periods. In giving the reasons for its decision, the Commission declared that it could in principle accept those requests if the *arbitration agreement between the parties* empowered it to do so. However, on studying the arbitral clause, the Commission found that the parties had not given it that right: "Only the parties, by agreement, could have empowered a third party or

an arbitral body to establish the price and specification. However, that agreement should have been expressly stated, for it cannot be deduced from a clause, which, as in this case, provides on the contrary that the price and specification shall be determined *by the parties themselves*." The Commission therefore decided that it did not have jurisdiction.

In other cases, the Commission was obliged to determine whether the subject of the request—payment of an amount representing the equivalent of defects—could be included in the category of disputes which the parties had intended to submit to arbitration. The arbitral clause provided that the Bucharest Arbitration Commission could not give a ruling on disputes concerning the quality of the goods, since *quality control* was to be carried out by the buyer's expert, *whose decision* was final and binding upon the parties.¹¹⁰

The respondent had raised a plea relating to jurisdiction, contending that the act of claiming payment of the amounts in question constituted a dispute concerning *quality*, which, as such, was outside the jurisdiction of the Bucharest Commission. The Commission decided that the claimant's claim to payment of a sum of money representing the equivalent of the defects found by the expert designated in the contract between the parties could not be considered a dispute concerning quality; it therefore agreed to arbitrate the case.

In another dispute,¹¹¹ settled in 1966, the Commission had occasion to state that the content of the arbitral clause should be clear and unequivocal. Special attention should be paid to this clause, for although it is usually inserted in a contract, it retains its own autonomous character and produces specific effects.

The Commission was obliged to disavow itself specifically because the contractual clauses concerning the competent arbitral body seemed equivocal:

"Whereas the arbitration agreement, when it consists of a clause inserted in the contract, retains its own autonomous character, with its special juridical effects of a jurisdictional nature, thus imposing on the parties the obligation to pay special attention to this clause in order to avoid possible misunderstandings;

"Whereas the documents and the pleas of the parties show that in this case they did not act in this manner and *that they did not conclude an agreement regarding the jurisdiction of the Bucharest Arbitration Commission*; since there are two arbitral clauses which are contradictory, one providing that the Arbitration Commission attached to the Chamber of Commerce of the Socialist Republic of Romania shall have jurisdiction, and the other that the arbitral body H.J.A. or Privates shall have jurisdiction, and it is impossible to establish that the parties expressed a preference for the Bucharest Commission. The two clauses. . ."

This is followed by a detailed statement of the reasons why the Commission considered that the parties had

¹⁰⁸ E. Meger, "Du consentement en matière d'*electio juris* et de la clause compromissoire" (on the decision taken by the Federal Court of Germany on 25 May 1970), in *Revue critique de droit international privé*, 1971, No. 1, p. 37 et seq.

¹⁰⁹ Case 245/1964, in which the claimant was a firm in the Federal Republic of Germany and the respondent Exportlehn (Socialist Republic of Romania). The case was settled by decision No. 9 of 19 March 1965.

¹¹⁰ Award No. 38 of 19 September 1966 (Case 367/1966: claimant, a Romanian firm; respondent, a firm in Aleppo).

¹¹¹ Case 322/1965, award No. 28 of 19 March 1966 (claimant, a Romanian enterprise; respondent, a firm in Vaduz, Liechtenstein).

not agreed that it had jurisdiction to settle their dispute, and decided to disavow itself of the case.

6. Capacity to conclude the arbitration agreement

111. In practice, this problem arose in connexion with the capacity of an Italian commercial company, having its seat at Milan, which had agreed to submit to the Bucharest Arbitration Commission any dispute which might arise concerning a contract to deliver goods concluded with a Romanian foreign trade organization. The capacity of the Italian party to conclude such an arbitral clause gave rise to discussion, because "according to article 2 of the Italian Code of Civil Procedure, the jurisdiction of the Italian courts may not be derogated from by agreement in favour of the jurisdiction of foreign courts or arbitrators who render their decisions abroad, except in the case of obligations between aliens or between an alien and an Italian citizen who is neither resident nor domiciled in Italy, provided that the derogation is in writing".

It was nevertheless decided that since Italy and Romania were parties to the 1923 Geneva Protocol on Arbitration Clauses, ratified by Italy on 8 May 1928 and by Romania on 21 March 1925, the capacity of the Italian party should be established in accordance with article 1 of the Protocol, which had been incorporated in Italian law following its ratification by the Italian State, and not in accordance with article 2 of the Italian Code of Civil Procedure. In view of the provisions of article 1 of the Protocol, it was decided "that the respondent enterprise could conclude a valid arbitral clause derogating from the jurisdiction of the Italian courts in favour of the Romanian arbitral body".¹¹²

A similar view has been taken in Italian judicial practice with regard to applications for the enforcement of foreign arbitral awards. It has been decided that article 2 of the Italian Code of Civil Procedure is no longer applicable if the jurisdiction of the Italian courts has been derogated from by an international convention, either the 1923 Geneva Protocol or the 1927 Geneva Convention.¹¹³

The Italian courts have also decided that article 1 of the 1923 Geneva Protocol is applicable (by derogation from article 2 of the Italian Code of Civil Procedure), even if the arbitral award has been rendered in a State which is not a party to this international agreement (in the case in question, the State of New York), provided that the parties to the dispute (in this case, an Italian and a Norwegian) are nationals of States which are parties to the Convention.¹¹⁴

France and Belgium do not allow public entities to submit to arbitration. This interdiction still exists with regard to problems relating to municipal law, but in

France the obstacle which it constituted has recently been removed in the case of international law, as a result of a welcome development in judicial practice.¹¹⁵

Since 1957, judges of the merits have on several occasions refused to accept a plea by the French State, which contended that it could not validly be committed by an arbitral clause inserted in an international contract.¹¹⁶

The Court of Cassation took the same view¹¹⁷ in a decision of 14 April 1964, explaining that the legal provision prohibiting public establishments from subscribing to arbitration agreements relates to municipal and not to international public policy and does not prevent a public establishment, like any other contractant, from submitting a private law agreement to which it is a party to a foreign law when the contract in question has the characteristics of an international contract. In 1964 and 1966, the same Court of Cassation decided that the prohibition in question related to the law of contract and not to the personal law of the contracting parties:

"But whereas the prohibition deriving from articles 83 and 1004 of the Code of Civil Procedure does not raise a question of capacity in the sense of article 3 of the Civil Code;

"Whereas the Appeals Court was called upon only to decide whether this rule, drawn up for domestic contracts, should also be applied to an international contract concluded for the requirements, and in conditions which conform to the usage, of maritime trade;

"Whereas the contested decision rightly states that the aforementioned prohibition is not applicable to such a contract, and whereas the Appeals Court, by declaring valid the arbitral clause thus subscribed to by a legal person of public law, setting aside all other reasons which may be regarded as superfluous, legally justified its decision."

CHAPTER II. PROBLEMS CONCERNING ARBITRAL PROCEDURE

1. Law applicable to arbitral procedure. Interpretation of the will of the parties

112. An arbitral institution in London complied with the English legislation relating to procedure (Arbitration Act, 1950). One of the parties, a Franco-Tunisian shipping company, opposed the enforcement in France of the arbitral award thus rendered, arguing that it had contested the application of the English law in a letter. However, it was decided "that the parties had accepted the procedure provided for in the English law, in application of the Geneva Convention of 24 September 1923, when they provided for arbitration according to the Centrocon Arbitration Clause", with

¹¹² Bucharest Arbitration Commission, award No. 34 of 29 November 1958, cited by I. Nestor and O. Căpățînă, "Chronique de Jurisprudence roumaine", *Journal du droit international* (Clunet) No. 2/1968, pp. 419-422.

¹¹³ Italian Court of Cassation, Joint Civil Section, decision No. 466 of 2 March 1964; Milan Appeals Court, 23 April 1965; both decisions recorded in the *Journal du droit international* (Clunet), No. 3/1966, p. 702.

¹¹⁴ Italian Court of Cassation, 2 May 1960, in *Journal du droit international* (Clunet) No. 3/1961, p. 860.

¹¹⁵ See Maurice André Flamme, *L'Arbitrage dans les relations entre personnes de droit public et personnes de droit privé*, Report to the First International Arbitration Conference, p. 21.

¹¹⁶ Paris, 10 April 1957, JCP II-10078, note Motulsky, and D.1958, 702, note Jean Robert; 21 February 1961, *Revue de l'arbitrage*, 18; Aix, 5 May 1959, *Revue de l'arbitrage*, 1960, p. 28.

¹¹⁷ *Revue de l'arbitrage*, 1964, pp. 82 et seq.

the appointment of "two arbitrators at London... members of the Baltic, who could appoint a referee".¹¹⁸

2. *Jurisdiction of the arbitral tribunal dependent on the validity of the arbitration agreement*

113. A challenge to the validity of the arbitration agreement or the arbitral clause calls in question the jurisdiction of the arbitral body which has been seized of the case on that basis to settle the dispute. It has been decided that "the clause in question produces effects with regard to the jurisdiction of the arbitral body in so far as it is valid in the terms of the law which is applicable to it."¹¹⁹ From this was deduced the procedural corollary that the plea regarding the invalidity of the arbitral clause must be resolved in advance, in order to establish whether the arbitral body has jurisdiction. Under Romanian legislation, the Bucharest Arbitration Commission is empowered to rule on its own competence.

3. *Constitution of the arbitral tribunal when one of the parties fails to appoint an arbitrator*

114. A Japanese firm, which had been invited to appoint its arbitrator in connexion with arbitration which took place in London, did not respond to that invitation and subsequently opposed the enforcement in Japan of the award rendered, contending that the arbitral body had not been validly constituted. That view was not accepted and it was decided that "applying the English law as the law of procedure, the failure of one party to appoint its arbitrator made it legitimate for the arbitrator appointed by the other party to act as sole arbitrator".¹²⁰

4. *Nationality of arbitrators. Selection from an official panel*

115. It has been decided that the obligation to choose an arbitrator from the panel of the Chamber of Commerce of Czechoslovakia, which includes only arbitrators of Czechoslovak nationality domiciled in Czechoslovakia, is not contrary to the public policy of Switzerland.¹²¹

5. *Possibility of setting aside the arbitral award when the arbitrator and the representative of one of the parties belong to the same organization. Other grounds for setting aside the award*

116. An arbitral award was rendered in Sweden by an arbitrator who worked for the *Comité central des assureurs maritimes de France*. One of the parties, a French commercial company, was represented at the hearings by an employee of the *Comité des assureurs maritimes de Paris*, who presented the case of the French party to the dispute. After the award had been rendered its enforcement in France was applied for.

At that point the other party, a Polish firm, opposed the enforcement, contending that the rights of the defence had been violated because the arbitrator and the representative of one party belonged to the same organization.

It was nevertheless decided that the rights of the defence had not been violated, because there was no professional relationship between the arbitrator and the representative which would make the former dependent on the latter or deprive the arbitrator of the independence and impartiality necessary for the performance of his functions. Furthermore, there was no connexion between the interests of the French party and those of the institutions by which the representative and the arbitrator were employed. It was also noted that the Polish party had not challenged the arbitrators, although it could have done so before the hearing began.¹²²

The United States Supreme Court has ruled that the fact that an arbitrator has not disclosed his former business relationship with one of the parties to the dispute justifies the setting aside of the arbitral award in accordance with article 10 of the United States Arbitration Act. The fact that an arbitrator has had a business relationship with one of the parties does not imply automatic disqualification, provided that the parties are informed in advance of an existing business relationship or, if they are not aware of it, that the relationship is of little importance.

In a dissenting opinion it was contended that the fact that an arbitrator did not disclose his business relationship with one of the parties could lead to an application for an inquiry to determine whether the arbitrator was impartial, but that if the arbitrator was not proved to have acted incorrectly, the simple fact of having failed to disclose his relationship with the parties was not enough to disqualify him.

6. *Right of the umpire to take a decision without consulting the arbitrators. Conditions*

117. In a dispute between two parties who, in an arbitral clause, had accepted the application of English law, the claimant informed the respondent in a registered letter of the appointment of his arbitrator. The respondent accepted arbitration and in turn appointed his own arbitrator. The arbitrators could not agree and an umpire was appointed, who rendered an award alone. When an application was made for leave to enforce the award in France, it was contended that the award was not valid because the umpire had not consulted the arbitrators in conformity with article 1028 of the French Code of Civil Procedure. It was nevertheless decided that, since English law and not French law was applicable, the umpire was not obliged to consult the arbitrators because he had been appointed in conformity with English law, which specifies that in case of disagreement the umpire "shall replace the two arbitrators", which does not oblige him to consult them. Consequently, the arbitral award was considered valid and the application for leave to enforce was allowed.¹²³

¹²² Rouen Appeals Court, Second Civil Chamber, 21 October 1965, in *Revue de l'arbitrage*, No. 1/1966, p. 22.

¹²³ Appeals Court of Aix-en-Provence, 29 September 1959, in *Journal du droit international* (Clunet), No. 1/1961, p. 168.

¹¹⁸ French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, in *Revue de l'arbitrage*, No. 2/1964, p. 46.

¹¹⁹ Arbitration Commission of Bucharest, 29 November 1953, in *Journal du droit international* (Clunet), No. 2/1968, p. 419.

¹²⁰ Tokyo Appeals Court, Second Civil Section, in *Revue de l'arbitrage*, No. 3/1964, p. 102.

¹²¹ Swiss Federal Court, decision of 12 February 1958, in *Revue de l'arbitrage*, No. 1/1959, pp. 26-31.

CHAPTER III. PROBLEMS CONCERNING ARBITRAL AWARDS

1. *Arbitral awards for which no reasons are given*

118. Most legislations—especially those of continental Europe—require that reasons shall be given for the decisions of all jurisdictional bodies (including arbitral bodies), but some common-law systems do not require the reasons for the solution to be stated in the decision.

Of course, decisions containing a statement of reasons are considered fully valid in countries whose legislation does not include that requirement, for *quod abundat non vitiat*.

In the States which require decisions to contain a statement of reasons—a requirement whose non-fulfilment generally entails the annulment of the decision concerned—certain difficulties have arisen with regard to the validity of foreign arbitral awards for which no reasons are given. After some hesitation, French judicial practice has concluded that “the fact that a foreign arbitral award does not contain a statement of reasons is not in itself contrary to French public policy in the sense of private international law”.¹²⁴ In other words, this opinion indicates that, although the foreign award for which no reasons are given violates a legal provision of the State in which it is invoked, such a derogation can be tolerated, because the requirements of public policy in private international law are less rigid than the requirements of public policy in municipal law, which would have rendered the foreign award null and void. It should be noted, however, that this liberal solution is not possible if the party against whom the award is invoked claims that “the failure to give reasons for the award concealed a violation of the rights of the defence or a substantive solution which was contrary to public policy”.¹²⁵

It has also been decided in France that “although under French law the statement of reasons for arbitral awards, and for any decision by a court, is a matter of public policy, this is not a requirement of international public policy when the English law applicable to the contract does not require the arbitrators to give reasons for their award”.¹²⁶

Similarly, it has been ruled that “French international public policy does not require reasons to be given for a foreign award when this is not required by the law governing that award”.¹²⁷

It has also been decided that “the lack of a statement of reasons for an award, which, is in principle contrary to the French procedure, is not contrary to French international public policy when it is in conformity with the applicable foreign law”.¹²⁸

¹²⁴ French Court of Cassation, First Civil Chamber, 22 November 1966, *Revue de l'arbitrage*, No. 1/1967, pp. 9-11. See also a similar decision by the same Chamber, 14 June 1960, *Revue critique de droit international privé*, No. 3/1960, p. 393.

¹²⁵ French Court of Cassation, 22 November 1966.

¹²⁶ Paris Appeals Court, 27 March 1962, *Revue de l'arbitrage*, No. 2/1962, p. 45.

¹²⁷ Paris Appeals Court, 30 May 1963, *Revue de l'arbitrage*, No. 3/1963, p. 93.

¹²⁸ Nancy Appeals Court, First Chamber, 29 January 1958, *Revue de l'arbitrage*, No. 4/1958, p. 122.

Swiss judicial practice is more exacting. It states that public policy “opposes the enforcement of a foreign arbitral award for which no reasons are given, even if the award was rendered validly according to the competent *lex fori* (in this case, California law), at least when the award was rendered in a State which is not linked to the Swiss Confederation or the canton concerned by a treaty guaranteeing enforcement”.¹²⁹ As an exception, however, the arbitral award, for which no reasons are given may be considered as not violating Swiss public policy if it can be shown “that at the time of agreeing to submit to arbitration, the two parties knew that no reasons would be given for the award, or if they had waived the statement of reasons”.¹³⁰

According to Italian judicial practice, article 1 of the 1927 Geneva Convention constitutes a derogation from the provisions of the Italian Constitution, which requires that reasons be given for all judicial decisions; consequently, a foreign arbitral award can be enforced in Italy, even if it does not contain a statement of reasons.¹³¹

2. *Renunciation of means of recourse against an arbitral award. Its effects*

119. It has been decided that renunciation of appeals against an arbitral award cannot be considered as acquiescence in the award rendered. The renouncing party is in the same position as if he had allowed the time-limit for the submission of an appeal to pass without having appealed, and his position is not aggravated.

From this, it has been deduced that renunciation of appeal “does not prevent the renouncing party from opposing the enforcement abroad of the arbitral award, on the basis of article 2 of the 1927 Geneva Convention”.¹³²

3. *Assumption implying that the parties intend to acknowledge the finality of the arbitral award*

120. When an application was made in France for leave to enforce an arbitral award rendered in English by an umpire in accordance with the Arbitration Act, 1950, it was contended that the award was not final. However, it was decided, in accordance with the applicable law on arbitral procedure (section 16 of the Arbitration Act) that “unless a contrary intention is expressed therein, every arbitration agreement shall . . . be deemed to contain a provision that the award to be made by the umpire shall be final and binding on the parties”. Since in the case in question “no contrary intention has been expressed, the award must be considered final and binding”.¹³³ Consequently, after the court had ascertained that the legal requirements had been fulfilled, it issued an enforcement order in accordance with the 1927 Geneva Convention.

¹²⁹ Swiss Federal Court, Public Law Chamber, 11 November 1959, *Revue de l'arbitrage*, No. 3/1960, p. 105.

¹³⁰ *Ibid.*

¹³¹ Florence Appeals Court, 7 March 1957, *Journal du droit international* (Clunet), No. 3/1961, p. 864.

¹³² Geneva Court of Justice, First Section, 5 July 1963, *Revue de l'arbitrage*, No. 4/1964, p. 152.

¹³³ Appeals Court of Aix-en-Provence, 29 September 1959, *Journal du droit international* (Clunet), No. 1/1961, p. 168.

4. *Operative part of the award expressed in the currency of the country in which arbitration takes place. Limits of the arbitral clause not exceeded*

121. An arbitral body in London called upon a Franco-Tunisian shipping company to pay a sum in pounds sterling, although the claimant had claimed the sum due in French francs. This raised the problem whether in so doing the arbitral body had taken a decision *ultra petita*, which would have rendered the award null and void. It was decided that the limits of the arbitral clause had not been exceeded because "one of the headings in the request was expressed in pounds, and, since the arbitration took place in London and was entrusted to English arbitrators, they naturally converted the sums awarded into pounds at the rate of exchange prevailing on the date when the award was rendered".¹³⁴

CHAPTER IV. PROBLEMS CONCERNING THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

1. *Refusal of enforcement based on the nullity of the arbitration agreement. Public policy*

122. A French company, against whom the enforcement of an English arbitral award was invoked, contended that the arbitral clause was null and void, because French law prohibits submission to arbitration in the case of matters concerning public policy (article 1020 of the French Code of Civil Procedure).

That view was accepted by the French court to which application was made for an enforcement order. Basing its decision on the 1927 Geneva Convention, which was applicable to that particular case, the court refused to issue an enforcement order because the arbitral clause and, hence, the arbitral award were contrary to French public policy. The Court noted that the arbitral award called upon the French company to pay damages to the Danish claimant for failure to deliver a quantity of cereals which it had sold him. However, the failure to perform the obligation resulted from suspension of the deliveries by the competent French administrative body, and the court therefore considered that the dispute "could be solved only by applying the rules of public policy of the French economic organization which regulated the performance of the contract". It accordingly deduced "that the dispute concerns public policy and the arbitral agreement is null and void whenever the solution resulting from the arbitration implies the interpretation and application of a rule of public policy".¹³⁵

2. *Refusal of enforcement based on delay in notification*

123. Pursuant to article 2 (b) of the Geneva Convention of 26 September 1967, the enforcement in Switzerland of a French arbitral award was refused because of the delay in notifying the Swiss firm that it should appoint an arbitrator (24 May for 12 May

1960) and in indicating the date of the substantive hearing (the Swiss firm was informed on 17 November 1960, the day on which the hearing was actually being held).¹³⁶

3. *Refusal of enforcement based on the fact that the limits of the arbitral clause have been exceeded*

124. Pursuant to article 2 (c) of the 1927 Geneva Convention, the enforcement in Switzerland of a French arbitral award was refused because the arbitral body had exceeded the limits of the arbitral clause "by annulling the agreement, on the ground that one party was at fault, and awarding damages, when its task was merely to settle 'new difficulties' which might arise in the application of the agreement".¹³⁷

4. *Authorization to enforce an award rendered by default*

125. A Japanese firm, validly summoned to attend arbitration proceedings held in London, failed to appear and subsequently opposed the enforcement in Japan of the award rendered, arguing that its right of defence had been violated. That argument was rejected; it was decided that "the failure of the party, which had been duly notified of the date and place of the arbitral hearing, to appear before the arbitrator justified the continuation of the arbitration proceedings in its absence. The party cannot, therefore, validly invoke the violation of its right of defence in order to oppose the enforcement in Japan of the award thus rendered in its absence".¹³⁸

Hence, a party cannot plead that his right of defence is violated when he has quite voluntarily refrained from participating in the hearing set for consideration of the substance, when the date appointed for that hearing had been agreed to by the parties and the arbitrators had previously rejected a request for postponement submitted by the same party. Nor can a party complain that his right of defence is violated when, in the arbitral hearing from which he chose to be absent, the other party had, without his knowledge, changed the substance of the claim as previously submitted to the arbitrator and notified to him, if the change consisted only in a reduction of the amount of the original claim and thus did not adversely affect his interests.¹³⁹

5. *System of enforcement, when there are no relevant rules of domestic law*

126. In Japan, the law relating to civil procedure contains no provisions relating to the enforcement of foreign arbitral awards, but only provisions on the enforcement of domestic awards, whose effects in that respect are similar to those of judicial decisions. In those circumstances, it was decided that "the fact that

¹³⁶ Geneva Court of Justice, First Section, 5 July 1963, *Revue de l'arbitrage*, No. 4/1964, p. 152.

¹³⁷ *Ibid.*

¹³⁸ Tokyo Appeals Court, 14 March 1963, *Revue de l'arbitrage*, No. 3/1964, p. 102.

¹³⁹ Paris Appeals Court, 5 June 1970, *Cie. France Participation (Cofrapar) v. La société navale d'Afrique du Nord*, in *Revue de l'arbitrage*, No. 3/1970, p. 2.

¹³⁴ French Court of Cassation, Civil-Commercial Chamber, 17 March 1964, *Revue de l'arbitrage*, No. 2/1964, p. 46.

¹³⁵ Orleans Appeals Court, 15 May 1961, *Journal du droit international (Clunet)*, No. 1/1962, p. 140.

Japan has signed the Geneva Protocol and Convention and the New York Convention obliges it to give foreign awards the same treatment as domestic awards, in so far as the latter satisfy the conditions set out in those Conventions".¹⁴⁰

6. *Authorization of enforcement provided that the award concerns a dispute capable of settlement by arbitration*

127. An application was made in Japan for leave to enforce an arbitral award rendered in England. Since both States were parties to the 1927 Geneva Convention, the court ascertained whether all the conditions required by that Convention had been fulfilled. It was found that the subject of the dispute was capable of settlement by arbitration according to English law. The same verification was made from the point of view of Japanese law. When it was found that the latter allowed arbitration, enforcement was authorized.¹⁴¹

7. *Priority of bilateral conventions over the 1927 Geneva Convention with regard to the enforcement of foreign arbitral awards*

128. When an application was made for the enforcement in France of an English arbitral award, there was some discussion as to whether to apply the 1927 Geneva Convention or the 1934 Convention between the United Kingdom and France providing for the Reciprocal Enforcement of Judgements in Civil and Commercial Matters. It was decided that, since the legal force of the English arbitral award derived from the authorization of the English High Court of Justice, the arbitral award could be treated in the same way as a judicial decision. Consequently, the 1934 Convention between the United Kingdom and France was applied and not the 1927 Geneva Convention.¹⁴²

8. *Irrevocability of the substance of foreign arbitral awards*

129. An arbitral award rendered in Romania in the absence of the respondent, an Italian company, was submitted for enforcement proceedings in Italy. The respondent invoked article 798 of the Italian Code of Civil Procedure, which allows review of the substance of foreign judgements rendered by default. However, that defence was rejected, because the arbitral award was based on the 1927 Geneva Convention, which prohibits review of the substance. Since Italy was a party to that Convention, article 798 was considered inapplicable. Consequently, the application for leave to enforce was allowed without a review of the substance.¹⁴³

A similar decision was taken in Italy in connexion with an arbitral award rendered at Hamburg (Federal

Republic of Germany) against an Italian citizen. The refusal to apply article 798 of the Italian Code of Civil Procedure was based on the provisions of the 1927 Geneva Convention. It was explained that "this Convention is mentioned in the notes exchanged between Italy and the Federal Republic of Germany, which refer to all agreements reactivated by the two countries".¹⁴⁴

9. *Need for foreign arbitral awards to be provided with an order for enforcement in order to have the authority of res judicata in France*

130. A final English arbitral award was invoked in France as having the authority of *res judicata*. The court ruled otherwise, because "an arbitral award rendered abroad which has become final in the country in which it was made and thus fulfils the conditions set out in article 1, paragraph 2, of the 1927 Geneva Convention is nevertheless still a private jurisdictional decision and will not have the authority of *res judicata*, will not be enforceable and cannot be invoked in France until an order for its enforcement in this country has been obtained".¹⁴⁵

Furthermore, the Strasbourg District Court decided, pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, that, since the plaintiff had conformed to the requirements of the Convention, its application for leave to enforce was admissible without enforcement order's having been obtained in the country where the award was made.¹⁴⁶

10. *Law applicable to the enforcement of a foreign arbitral award not covered by an international agreement*

131. It has been decided that the enforcement in Switzerland of an arbitral award rendered in California is governed by the legislation of the canton in which it was applied for—in the case in question, the Geneva Code of Civil Procedure—since there is no agreement between Switzerland and the United States concerning the enforcement of such awards. Furthermore, the United States is not a party to the 1927 Geneva Convention.¹⁴⁷

11. *Authorization to enforce the arbitral award provided that it has become final*

132. In England, the Arbitration Act, 1950, permits the enforcement of foreign arbitral awards to which the 1927 Geneva Convention is applicable. In one case, an application had been made for the enforcement in England of an arbitral award rendered in Denmark. Since the award was not open to appeal or to an application for review, it could be considered

¹⁴⁰ Tokyo Appeals Court, Second Civil Section, 14 March 1963, *Revue de l'arbitrage*, No. 3/1964, p. 102.

¹⁴¹ Tokyo District Court, 20 August 1959 in *Quarterly of the Japan Commercial Arbitration Association*, No. 26-27/1967.

¹⁴² Paris Appeals Court, First Chamber, 20 October 1959, *Revue de l'arbitrage*, No. 2/1960, p. 48.

¹⁴³ Milan Appeals Court, 23 April 1965, *Journal du droit international*, No. 3/1966, p. 702.

¹⁴⁴ Italian Court of Cassation, 9 May 1962, *Journal du droit international*, No. 2/1964, p. 356.

¹⁴⁵ Paris Appeals Court, Fifteenth Chamber, 4 January 1960, *Revue de l'arbitrage*, No. 4/1960, p. 123.

¹⁴⁶ Strasbourg District Court (Commercial Chamber), October 1970, *Animal Feeds International v. Becker*, in *Revue de l'arbitrage*, No. 3/1970, p. 166.

¹⁴⁷ Swiss Federal Court, Public Law Chamber, 11 November 1959, *Revue de l'arbitrage*, No. 3/1960, pp. 105-109.

final in the sense of articles 37 and 38 of the Arbitration Act, 1950; its enforcement was therefore authorized.¹⁴⁸

12. Means of recourse against orders for enforcement

133. The Belgian courts have decided, on the basis of the provisions of article 1, of the 1927 Geneva Convention, that Belgian legislation is applicable with regard to means of recourse against orders for enforcement issued in Belgium. It was observed, however, that article 1028 of the Belgian Code of Civil Procedure allows recourse against the arbitral award, and not against the order for enforcement. Since that recourse may lead to the annulment of the order for enforcement, the remedy provided for in article 1028 may also lead to the withdrawal of the order, so that recourse "is not precluded by the Geneva Convention".¹⁴⁹

Part III. Possible measures for increasing the effectiveness of international commercial arbitration; general questions, findings and final proposals

CHAPTER I. POSSIBLE MEASURES FOR INCREASING EFFECTIVENESS OF INTERNATIONAL COMMERCIAL ARBITRATION

1. Measures recommended by the United Nations

134. In 1958, the United Nations was not concerned solely with promoting the adoption of a multilateral convention on the recognition and enforcement of foreign arbitral awards.

Economic and Social Council resolution 604 (XXI), adopted in May 1956, shows that the United Nations intended to support and recommend much wider and more complex action in the future in the field of commercial arbitration. The Council envisaged a stimulation of the activities of the regional economic commissions and various intergovernmental organizations interested in promoting arbitration with a view to promoting international trade. For that reason it was decided that, if time permitted, the 1958 Conference of Plenipotentiaries should consider "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes and . . . make such recommendations as it may deem desirable".

135. In order to prepare for the discussions at the Conference, the Secretary-General drew up a report, dated 24 April 1958 (United Nations document E/CONF.26/4), which was followed by a note (E/CONF.26/6) on other possible measures for increasing the effectiveness of international commercial arbitration. On 26 May 1958, a "Committee on Other Measures" was established, open to any of the 45 Governments wishing to participate. On 6 June 1958, the Committee adopted unanimously a resolution which was subsequently discussed by the full Conference and incorporated in paragraph 16 of the Final Act of the

Conference. In accordance with the resolution adopted on 10 June 1958 by the United Nations Conference on International Commercial Arbitration, the subject of arbitration was included in the agenda of the twenty-seventh session of the Economic and Social Council, held at Mexico City on 17 April 1959, at which resolution 708 (XXVII) was adopted. In the International Association of Lawyers' volume II on International Commercial Arbitration (editor P. Sanders), Martin Domke describes clearly the work done and the essential content of the resolutions adopted concerning the principal measures to be taken to promote international commercial arbitration in general.¹⁵⁰

136. As a first measure, a "wider diffusion of information on arbitration laws, practices and facilities" was recommended in order to facilitate access to arbitration and at the same time constitute a first step towards any further activities aimed at the improvement of arbitration facilities and legislation. The International Chamber of Commerce,¹⁵¹ the International Association of Lawyers,¹⁵² the Economic Commission for Europe¹⁵³ and the Economic Commission for Asia and the Far East have already done a great deal of work in these fields. It has been rightly observed that mere publication of the text of arbitration statutes, even when accompanied by their translation, or by the rules of procedure of arbitral institutions, is not sufficient. One must also be able to obtain information on the interpretation of statutory law in court decisions and administrative practice. This practical aspect is still too little known, despite the efforts of some of the national and international bodies which issue arbitration publications that include references to court practice in the various countries.

There is the problem of a publication with worldwide coverage, the expansion of the activities of existing publications and the creation of arbitration publications in areas where they do not yet exist.

137. There is also the problem of the "establishment of new arbitration facilities and the improvement of existing facilities", which is of special importance to some geographic regions and certain branches of trade. Effective commercial arbitration could be greatly enhanced by the establishment of new arbitration centres in those countries where they do not exist. It has also been suggested that the adaptation of existing national arbitration centres to the requirements of international trade should be encouraged by appropriate measures such as adding foreign nationals to the domestic panel of arbitrators and permitting the designation of an arbitration locale in a third country. Other useful steps would be a greater uniformity in the rules of procedure of arbitral institutions and more precise drafting of standard arbitration clauses recommended

¹⁵⁰ See Martin Domke, "Possible measures for increasing the effectiveness of international commercial arbitration", in IAL, *Arbitrage International Commercial*, vol. II, 1960, pp. 328 et seq.

¹⁵¹ *Commercial arbitration throughout the world, 1949*, with supplements for 1951 and 1958.

¹⁵² IAL, *Arbitrage International Commercial*, vol. I (1956), vol. II (1960) and vol. III (1965).

¹⁵³ *Handbook of national and international institutions active in the field of international commercial arbitration*, United Nations Economic Commission for Europe, document TRADE/WP.1/15.

¹⁴⁸ Court of Appeal, 13 March 1959, *Journal du droit international* (Clunet), No. 4/1961, p. 1177.

¹⁴⁹ Belgian Court of Cassation, 16 January 1958, *Revue critique de droit international privé*, No. 1/1959, p. 122.

by arbitral institutions for inclusion in standard contracts and in general conditions of trade. A move should be encouraged to reduce to one standard procedure the rules employed in arbitration practice by the main commercial arbitration centres of the various countries.

138. Technical assistance in the development of effective arbitral legislation and institutions should be provided for countries that lack adequate institutional arbitration facilities or need modern arbitration laws. Use must be made of experts able to advise on appropriate arbitral legislation and to contribute to the setting up of adequate arbitration machinery. It has also been recommended that "regional study groups, seminars or working parties" should be organized to agree on the solutions best suited to the needs of the various countries. Exchanges of views and personal contacts may well lead to practical results. This report has already mentioned many activities which have taken place throughout the world with and without United Nations assistance. The problem now is to intensify such activities and organize more sustained and systematic action. Some people have advocated the use of educational programmes.¹⁵⁴

139. In 1969, Martin Domke, in his report to the Third International Arbitration Congress,¹⁵⁵ noted the progress achieved in recent years with regard to the diffusion of arbitral information.

Firstly, a number of new publications, mostly quarterlies, have joined the older ones which have been in existence for many years, namely *Arbitrale Rechtspraak* in the Netherlands, *Arbitration*, of the Institute of Arbitrators in the United Kingdom, and *Arbitration Journal* in the United States. The new publications are the *News Bulletin* of the ECAFE Centre for Commercial Arbitration, the *Revue de l'arbitrage* of the Comité Français de l'Arbitrage, the *Arbitration News* of the Inter-American Commercial Arbitration Commission, the *Rassegna dell'Arbitrato* of the Associazione Italiana per l'Arbitrato, the *Quarterly* of the Japan Commercial Arbitration Association, and the *Arbitration Quarterly* of the Indian Council of Arbitration. Other publications publish articles and court decisions on arbitral issues, for example, the *Journal of Business Law* in the United Kingdom and *Zeitschrift für Konkurs, Treuhand und Schiedsgerichtswesen* and the monthly *Aussenwirtschaftsdienst des Betriebs-Berater* in the Federal Republic of Germany.

In addition, numerous collections or chronicles of arbitral practice in international trade are published by the arbitration commissions of Moscow, Warsaw, Bucharest, Prague, and so on. Other means, too, are used for the diffusion of arbitration and the study of its known problems as, for example, the Training Course on Commercial Arbitration, held in February 1969 at Bombay, organized by the Indian Council of Arbitration. The trainees were sponsored "by Trade Associations, Chambers of Commerce, Export Promotion Councils, Commodity Boards, Export-oriented

industries, Export houses, Government Trading Agencies and the Central and State Governments".

Similar, symposiums or seminars were held, with the co-operation of various arbitration bodies and individuals interested in international commercial arbitration, in London in 1966¹⁵⁶ and in Hamburg in May 1968, the latter under the auspices of the German Lawyers Association and the German Committee for Arbitration.¹⁵⁷

140. Lastly, there is a need for greater uniformity of national laws on arbitration, a movement whose various stages have been described in this report. A greater measure of uniformity in arbitration law would undoubtedly contribute to the development of this juridical institution. This could be done by amending the rules relating to arbitral procedure contained in the various Codes of Civil Procedure so as to make them uniform, a step which would greatly aid the expansion of international commercial arbitration. The Special Rapporteur is thinking here in particular of the limitation of the means of review of the arbitral award by ordinary judges and in general of the reduction of extraordinary means of recourse against the same award. This calls to mind the passage in which Mr. Fouchard, citing an article by Mr. Bredin, uses France as an example to demonstrate the need for a legislative reform that would co-ordinate and limit the means of recourse in respect of arbitration at both the national and international levels, which would "suffice to discourage from the outset abusive resistance to enforcement". He cites the example of the Orleans Court, which admits no less than five means of recourse against the enforcement order or the award itself. Under these circumstances, one can justifiably speak of a certain "paralysis of foreign arbitral awards through the abuse of means of recourse".¹⁵⁸

2. Co-operation among arbitration organizations

141. Co-operation among the various arbitration organizations is a very important and also a very topical problem. We have already mentioned it several times. In view of the role played by the United Nations in the development of multilateral international co-operation, it seems quite natural that the Organization should also be concerned with co-operation in the field of arbitration. From the earlier part of this report, it is clear that the need for co-operation has been felt for some time and that some progress has been made, especially with regard to co-operation among States for the adoption of international conventions. The United Nations has played a leading role in arranging contacts between the parties concerned, organizing the work and so on.

At the end of his study on possible measures for increasing the effectiveness of international commercial arbitration, on which this part of the report is largely based, Martin Domke expressed the hope that the encouragement given by the resolutions adopted by the

¹⁵⁴ The United Kingdom representative rightly considered that one urgent problem in the field of arbitration could be solved by "educating businessmen in the spirit and practice of arbitration—a necessarily slow process" (E/CONF.26/C.2/SR.2, p. 4).

¹⁵⁵ See the account of the Third International Arbitration Congress, in *Revue de l'arbitrage*, No. 4/1969.

¹⁵⁶ International arbitration: A symposium, in *International and Comparative Law Quarterly*, vol. 15, p. 718 (1966).

¹⁵⁷ On the previous Arbitration Congresses in Paris in 1961, see *Revue de l'arbitrage*, 1961, No. 2, and at Rotterdam in 1966, *ibid.* 1966, No. 3 (Special).

¹⁵⁸ See Philippe Fouchard, *op. cit.*, pp. 523-524.

United Nations Conference on 10 June 1958 and by the Economic and Social Council on 17 April 1959 would largely facilitate the development of international commercial arbitration, not only by co-ordinating the efforts of Governments interested in the settlement of international trade disputes, *but also through the co-operation of arbitration institutions*. There is thus a need for complex multilateral co-operation at two levels, between States and between arbitration centres, which must be organized between States in various parts of the world. However, the elements of its complexity are becoming increasingly numerous.

142. As Professor Minoli observed in his excellent Keynote Report to the Third International Arbitration Congress, "the arbitration organizations are the natural meeting points for social forces that exert pressure to strengthen the international commercial arbitration network, extend it to world areas that still remain uncovered and, above all, to bring it to the 'standard' of full working efficiency". Reference has already been made to the agreements concluded between various arbitration centres for co-operation at the international level.¹⁵⁹ But the efforts of one or several arbitration institutions are no longer sufficient; what is needed is practical co-operation among arbitration bodies throughout the world.

International economic relations are becoming increasingly complex, and "from straightforward trade we have now got to the stage of commercial relations which involve stationing the primary productive organizations of one country in the territory of another; bilateral relations have given place to multilateral ones, and to those that come under so-called 'trans-national' organizations, which are linked from the beginning to more than one State".

Bearing in mind the fact that "economic relations are far more complex than they were in the period immediately following the First World War, when the International Chamber of Commerce promoted international commercial arbitration for the first time", and bearing in mind also the needs and desires of the developing countries and other considerations mentioned in his report, Professor Minoli advocates the organization of arbitration organizations into an "International Commercial Arbitration network (ICA)", which would make it possible to use all arbitration organizations as promotion centres for close co-operation that would be the real driving force towards progress, in order to achieve in the field of international commercial arbitration, "valid uniform results all over the world or at least over vast areas of it".

143. The most reasonable and practical course would therefore seem to be to settle on the arbitration organizations as centres for promoting the further development of international commercial arbitration. According to Professor Minoli, however, it is still difficult to organize world-wide co-operation on international commercial arbitration, mainly because of the existing

relations between countries with differing levels of development.

One might think that the major difficulty involved in fitting business dealings into efficient international commercial arbitration schemes is due mostly to limited experience and to the almost total lack of participation in the organization and implementation of such schemes by qualified persons from the less-developed countries. As a result one can see in those countries a growing feeling that such arbitration is the prerogative of the more developed countries, and that the latter run the arbitration organizations with their own interests at heart; in a word, that such arbitration is in the final instance one more element and factor in the developed countries' preponderance. The elimination of that situation is the main task of those who wish to make the ACI an instrument of truly universal application.¹⁶⁰

144. Again, at the Third International Arbitration Congress, L. Kopelmanas noted that one feature common to the problems of international commercial arbitration in relations between countries with differing economic structures on the one hand, and between countries with differing levels of development on the other, was the mutual distrust between both private and governmental undertakings belonging to countries with differing forms of economic organization or differing levels of development. He also noted, however, that the two types of problems differed in the extent to which it had been possible to overcome that distrust. In relations between the countries of Eastern and Western Europe the difficulty of agreeing on the choice of arbitrators or on a procedure for their nomination—the most obvious manifestation of distrust that could arise between undertakings belonging to different economic systems—hardly ever arose nowadays. The same could not be said of relations between the industrialized countries and the developing countries. The fact that it has been possible to reduce gradually, or eliminate, mutual distrust concerning trade relations in general, and the organization of international arbitration in particular, from economic relations between the countries of Eastern and Western Europe was the result of a constant effort supported by goodwill on both sides and involving great ingenuity. Mr. Kopelmanas believed that the experience thus acquired might well serve as a precedent for a similar exercise in arbitration relations between industrialized countries and developing countries. The arbitration organizations of the various countries concerned had played a leading role in solving the problems of international commercial arbitration between the countries of Eastern and Western Europe; the same approach might produce comparable results in relations between the industrialized countries and the developing countries.¹⁶¹

145. With regard to the organization of world-wide co-operation in respect of commercial arbitration, it is interesting to note some of the conclusions and observations made by Mr. Donald B. Straus, President of

¹⁵⁹ For example, the agreements concluded by the International Chamber of Commerce, the American Arbitration Association, the Inter-American Commercial Arbitration Commission, the Japan Commercial Arbitration Association, the Federation of Indian Chambers of Commerce and Industry and the Pakistan Federation of Chambers of Commerce and Industry.

¹⁶⁰ Eugenio Minoli, Keynote report, Third International Arbitration Congress, op. cit., p. 143.

¹⁶¹ L. Kopelmanas, "Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différent", Third International Arbitration Congress, in *Revue de l'arbitrage*.

the American Arbitration Association, in his report to the Third International Arbitration Congress. In dealing with the question of co-operation among arbitration organizations in the Americas, he makes a number of comments on co-operation among arbitral bodies in general.

Mr. Straus observes that, so far, many opportunities to create the conditions necessary for the growth of international commercial arbitration have been missed. He refers to the gap between theory and practice and says that the technical differences in the rules and procedures of the various organizations are of more interest to lawyers than to the businessmen who use arbitration services. In his view the obstacles to co-operation and utilization of facilities have been greatly exaggerated by lawyers, a fact that partly explains the delay in the progress of arbitration.

He refers to the problem of adapting existing arbitration organizations to meet the growing needs of the multinational corporations and notes the existence of certain facts which run counter to the need for co-operation among existing arbitration organizations. He concludes that co-ordinated but decentralized arbitration organizations can strengthen arbitration and make it more widely acceptable, and suggests that a worldwide network of national and regional arbitration organizations could best serve the dispute settlement needs of multinational corporations.

Mr. Straus advocates an organization that would simplify matters, so as to avoid waste of time in the consideration of technicalities and legal subtleties that are mainly theoretical in nature, since arbitration is essentially a simple concept which should be based on a few basic principles and a simplified set of arbitration rules.

He proposed that a committee should be established to develop a simplified set of rules that could be used by any arbitration organization; the committee would submit a report on the question to the third session of UNCITRAL.

The American Arbitration Association offered to make its facilities available for the meetings of such a committee.

CHAPTER II. GENERAL QUESTIONS, FINDINGS AND FINAL PROPOSALS

1. Introductory remarks

146. In his preliminary report, which was submitted and discussed at the third session of UNCITRAL, in 1970, the Special Rapporteur enumerated the following important problems, which are both theoretical and practical in nature, and suggested that they should be discussed with a view to taking a decision concerning possible steps which might be taken under UNCITRAL's auspices (A/CN.9/42, para. 74):

Definition of international commercial arbitration;

Autonomization of international commercial arbitration; scope and purpose of that autonomy;

The interpretation of existing multilateral international conventions relating to commercial arbitration. The need to make them universal;

Adopting of uniform rules. The need to adopt certain basic arbitral principles;

The unification and simplification of national laws concerning arbitration;

Authorization of legal persons of public law to conclude valid arbitration agreements;

Domain of arbitrability;

Unification and simplification of national rules concerning the enforcement of arbitral awards. Limitation of judicial control of arbitral awards. Reduction of means of recourse against enforcement orders;

Arbitration as a factor in the unification of law and the elimination of conflicts of law. Autonomy of the will of the parties;

Amiables compositeurs and arbitrators deciding according to the rules of law;

Publication of arbitral awards, educational programmes, conferences of arbitral bodies, etc.;

Ad hoc arbitration and institutional arbitration.

147. Members of UNCITRAL made certain suggestions to the Special Rapporteur, some stating that the problems should be ranked in terms of the possibility of reaching a solution to them rather than in terms of importance, and others recommending that they should be approached from the standpoint of whether there was enough likelihood of their being resolved in the near future to justify undertaking work on them at the present time.

The representatives of the various countries drew attention to other problems, closely related to the 12 mentioned above. These are reproduced in this report (Introduction paras. 9-12) and the Special Rapporteur feels they should also be studied. Most of the problems mentioned by the representatives had already been mentioned in the preliminary report. The Special Rapporteur, bearing in mind the suggestions made and the wishes expressed, has re-examined all the problems mentioned, re-assessing their content and importance, and grouping together those which were closely related. The following paragraphs present an analysis of these problems, as well as certain final proposals.

2. Definition of international commercial arbitration—national and international arbitration; autonomization of international and commercial arbitration

148. Before any proposals concerning the organization and operation of international commercial arbitration are put forward, it seems useful to agree first on the meaning of the concept of "international commercial arbitration". This expression would appear to require further clarification, even though it has been officially and internationally recognized and used by theoreticians in the field.

Philippe Fouchard says that the expression is commonly used, particularly nowadays, because it is convenient and apparently precise, but that it actually conceals a highly complex phenomenon, or rather the development of a phenomenon, i.e., arbitration in respect of international economic relations; this development has many facets and its outcome is as yet difficult to perceive.¹⁶²

¹⁶² Philippe Fouchard, *L'Arbitrage commercial international*, pp. 4-5.

The Special Rapporteur, too, believes that since the expression "international commercial arbitration" is already in general use it should be retained, provided that everyone gives it the same meaning. What might that meaning be?

149. It is well known that questions have been raised concerning the existence and definition of international commercial arbitration. Some people contest its very existence. For example, R. Martin states that, "Strictly speaking, international arbitration does not as yet exist, because every arbitration is tied to the legal system of a specific country and subject to its national laws and rules."¹⁴⁸ International commercial arbitration has been defined in terms of what is considered to be its opposite. It has thus been contrasted with the concept of national arbitration. Any arbitration that is not national would thus be considered international. We must therefore define national arbitration.

National arbitration would seem, at first sight, to be any arbitration where "all the elements (the subject of the dispute, the nationality of the parties and of the arbitrators, the applicable law, the place of arbitration) are solely and equally tied to a given State".¹⁴⁹ Since in the case of international trade at least one of the elements is by definition tied to a foreign country, that would mean that in this particular field, arbitration could never be defined as "national".

In referring to international trade it would thus only be proper to speak of "foreign" or "international" arbitration. In order to avoid the purely negative definition of arbitration as "foreign" which would result from the practical impossibility of attributing a given nationality to an arbitration proceeding in which all the elements are not tied to a single country; and also in order to avoid conflicts of "nationality" between national systems concerned with the same arbitration proceeding, it is suggested that the idea of "national" or "foreign" arbitration should be abandoned and that the existence of "international arbitration" should be recognized.

150. It would be a broad concept—a purely economic, or, to be more precise, a purely geographical one. Arbitration would be considered to be international even if only one material or juridical element of the dispute or of the arbitration procedure involved a country other than the country concerned with the remainder of the case.

The international character of arbitration would be corroborated, on the one hand, by the entire history of international treaty law on the subject, which tends to ensure a truly international system for arbitration relating to international trade—particular reference is made here to the European Convention on International Commercial Arbitration (Geneva, 1961)—and, on the other, by the increasing recognition accorded by national and international systems to autonomy of will.

It has been suggested that, in order to give the expression "international commercial arbitration" a more precise, although seemingly more revolutionary meaning, consideration should be given to the possibility of

going even further and making international commercial arbitration independent of any State framework, subject in every regard to truly international norms and authorities, in other words—although these expressions may be barbarisms—supranational, extranational or better yet, anational system.¹⁵⁰

151. Two theories have been advanced to support the idea of international commercial arbitration independent of any national legal system. According to certain authors the first one consists of making arbitration which is independent of municipal law directly subject to international law. This would be possible, given the current trend towards considering even individuals as subjects of international law and the increasing participation of legal persons of public law and international organizations in international economic relations, which has blurred the theoretical borderline between private persons subject to private international law and public persons subject to public international law. The second theory consists of viewing the community formed by persons engaged in international trade as a group sufficiently coherent to be equivalent to a society in formation,¹⁵¹ of which arbitration would be an essential element that would help to reinforce its autonomy, providing this extranational community with a substitute jurisdictional organization whose efficacy would no longer depend exclusively on the goodwill of the two parties to the dispute.¹⁵²

152. Nevertheless, this "very precise" notion of international commercial arbitration as being completely independent of State law and State authorities cannot be upheld without reservations, even if it can be proved that it is widely accepted in practice and even to a large extent in positive law, because there are still obstacles connected with the as yet incomplete development of this new international society of traders. It is claimed there are three obstacles: the fact that most of the structures of such arbitration—essentially the permanent arbitration centres, their organization and their methods—are still not completely independent of national structures, the existence of gaps in international trade law (requiring the application of municipal law) and, finally, the intervention of State authorities which cannot be totally excluded either during the arbitration proceedings or, more particularly, at the time of enforcement of the award.

153. The Special Rapporteur feels that it is not essential to analyse in depth the meaning and definition of international commercial arbitration as set forth above. We do not wish to become involved in controversies which are for the most part of a theoretical nature. Theoretical arguments lead to generalizations and absolute statements, to extreme solutions which may be intellectually rewarding but are too often unrelated to practical realities.

We shall, however, express serious reservations regarding the validity of the points of departure of the arguments outlined above, particularly when they are presented as enjoying general recognition. We have in mind, in the first place, the two theories set forth in

¹⁴⁸ R. Martin, "Preface", in IAL, op. cit., vol. I, p. 5.

¹⁴⁹ Philippe Fouchard, op. cit., p. 16.

¹⁵⁰ Cf. Philippe Fouchard, op. cit., pp. 18-23.

¹⁵¹ Battifol, *Traité élémentaire de droit international privé*, No. 557.

¹⁵² Philippe Fouchard, op. cit., p. 25.

paragraph, 151 regarding the trend towards considering individuals as subjects of international law and the existence of an extranational community in formation for which arbitration would serve as a substitute jurisdictional organization. These theories are not accepted widely enough to justify using them as grounds or premises for measures which should be valid and acceptable throughout the world.

Secondly, we are thinking of the arguments advanced to support the international character of arbitration, including the one which refers to a "truly international" system which would be set up under the European Convention on International Commercial Arbitration of 1961. The Special Rapporteur also has serious reservations regarding the description of such a system as "truly international". As far as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is concerned, it is known that the notion of an "international award" was rejected.

Lastly, the three obstacles mentioned in the preceding paragraph, which, presumably would prevent the realization of the "very precise" concept of international commercial arbitration within the framework of the new international society of traders, can only be considered valid if one accepts the basic premise that national arbitration is arbitration where *all* the elements (the subject of the dispute, the nationality of the parties and of the arbitrators, the applicable law, the place of arbitration) are solely and equally tied to a given State and that international arbitration is to be understood as "international" not only as regards its substance and form, but also by virtue of its being *independent of any national framework*. It is our belief that these are extreme formal positions and we reject as unrealistic the conclusion which follows from them, i.e., that *in international trade, arbitration is always international*. Actually, what is *always* international in international trade is not arbitration as a whole (the arbitral body plus the dispute) but rather the *dispute* submitted to arbitration, as it arises from international relations. A distinction must be made between "arbitration" as a structure, as a jurisdictional body, and the competence of that body (jurisdictional competence). An arbitral body may well be an internal, domestic one, but it may have international competence (jurisdictional competence). In general, internal, ordinary bodies may take cognizance of disputes involving foreign elements, i.e., they may have international competence. However, the fact that a tribunal has international competence does not make it an international tribunal. This is also true of arbitral bodies. The fact that a dispute is international, that is, arises out of international trade relations, is not enough to make the entire arbitration proceeding international. Furthermore, some national arbitral bodies have both internal and international competence (for example, the American Arbitration Association) and some national arbitral bodies have only international competence (for example, the Arbitration Commission of the Chamber of Commerce of Romania). In order for arbitration to be "international", the structure and composition of the arbitral body must be international as well as the dispute (a case in point is the Court of Arbitration of the International Chamber of Commerce). This does not mean that such an "international" arbitral body

would necessarily be independent of any national framework.

Some authors hesitate to call arbitration international on purely procedural grounds,¹⁶⁸ for example, in a case where the arbitrator is a foreigner. Pierre Lalive argues, for example, that if two Swiss parties to a dispute on the interpretation of an "internal" contract accept, by compromise, an award rendered by a French or a German arbitrator domiciled in Switzerland, the arbitration can hardly be called "international". Lalive goes on to state that it is superfluous to seek a single definition of private "international" arbitration that could be generally employed, whether it be based on the applicable law, on competence or any other problem. Each particular case should be examined individually to determine whether what might be called "international" aspects of the dispute justify the application of a special system, different from the one used for internal arbitration.¹⁶⁹ The Special Rapporteur fully agrees with this view.

154. To conclude our discussion on this point, we consider that international commercial arbitration is presently carried out by both national and international arbitral bodies. We agree with Berthold Goldmann's observation that the settlement of substantially international disputes is still entrusted to "national" arbitral bodies.¹⁷⁰ This is a fact, and it is in the light of this fact that we must act if we are to devise any proposal regarding the organization of arbitration throughout the world.

UNCITRAL should therefore avoid supporting or opposing the idea on internationalizing the arbitration of present or future disputes arising from international trade transactions with a view to seeking to render up commercial arbitration autonomous through "internationalization". Present practice shows that two types of arbitration are used and that they are both tied to the various national legal systems.

The problem is how best to put these two types of arbitration at the service of the parties, who alone must make their choice, bearing in mind their own interests.

3. Ad hoc arbitration and institutional arbitration

155. Generally speaking, there are two kinds of arbitration: *ad hoc* and institutional (permanent). The latter appears to have become characteristic of modern international arbitration. As already mentioned, there are authors who speak of a veritable proliferation of arbitration bodies of all kinds and denominations: "courts of arbitration", "centres", "associations", "offices", etc.¹⁷¹ Many commentators believe that the future of arbitration lies in its institutionalization and that *ad hoc* arbitration is on the decline, reduced to the status of a "poor relation" beside institutional arbitration.

As already indicated, there are very different kinds of institutional arbitration. Some are professional, limited

¹⁶⁸ C. N. Fragistas, "Arbitrage étranger et arbitrage international en droit privé", in *Revue critique de droit privé*, 1960,

¹⁶⁹ P. A. Lalive, "Problèmes relatifs à l'arbitrage international commercial", *Recueil des Cours*, Académie de droit international, The Hague, 1967, p. 581.

¹⁷⁰ See Berthold Goldmann in the preface to Philippe Fouchard, op. cit., p. vii.

¹⁷¹ See para. 101 above.

to a particular activity; others are general, i.e. open to all businessmen, whatever their line. Some are national (like the Netherlands Arbitration Institute, the Arbitral Chamber of Paris, the Arbitral Tribunal of the Chamber of Commerce of Manchester and the Zurich Chamber of Commerce). Others are "international" (although they do not have legal international status, properly speaking, because they are private), of which the classic example is the International Chamber of Commerce.¹⁷²

In the handbook prepared by the Economic Commission for Europe, 127 institutions of all kinds are described and analysed.¹⁷³

156. It is customary to use the expression "institutional" arbitration in opposition to *ad hoc* arbitration, but these terms do not have a very precise legal meaning and there is no substantial difference between the two categories.

As a rule, institutional arbitration involves a permanent body which does not itself take part in the settlement of the dispute but plays a part at the administrative level. It assists, as necessary, in constituting the arbitral tribunal and in initiating the arbitration proceedings by appointing the arbitrators, the presiding arbitrator, the place of arbitration, etc., in cases where one of the parties wishes to block the arbitral procedure. Hence this body does more than make its rules of procedure, premises and administrative services available to the parties; it also has a say in the application of these arbitral rules. The criterion of institutional arbitration would seem to lie "in the existence or absence of the parties' willingness to be bound in advance by the rules of a body which enforces them".¹⁷⁴

Ad hoc arbitration is not just arbitration agreed upon in each particular case by the parties, but also arbitration in which the parties follow the rules of a given institution or association which participates in the conduct of the proceedings.¹⁷⁵

Obviously, there are borderline cases, as always in business and law, falling somewhere between *ad hoc* arbitration and institutional arbitration. One example of this is when parties agree to follow, in their disputes, the "rules of Copenhagen", 1960, of the International Law Association (ILA), because those rules do in fact provide for intervention by the President of the Executive Council of ILA in appointing the arbitrator of a defaulting party and in replacing an arbitrator who resigns without giving reasons.¹⁷⁶ However, since ILA is a private international association and not an arbitration body, it cannot be called an institution.¹⁷⁷

157. With regard to institutional or permanent arbitration, there is no need to refer in detail to divergent views on definitions of these kinds of arbitra-

tion or to consider the rise of institutional arbitration or the decline of *ad hoc* arbitration. It should, however, be noted that there is no substantial difference between the two. Permanent arbitration has the practical advantages of organized arbitration, with the result that a larger number of international commercial disputes are submitted to permanent arbitration bodies nowadays. Such advantages are probably not a decisive factor in important cases, where the parties have the necessary means to organize arbitration for the occasion at their own cost, thereby retaining more extensive control over the rules applied for the dispute and particularly over the choice of arbitrators. However, basically, the arbitration tribunal (sole arbitrator or several arbitrators) is always "for the occasion" even where permanent arbitration is involved. The only permanent feature of institutional arbitration is the "technical facilities", organized services at the parties' disposal. The arbitration tribunal is always constituted for each particular case.

The basic difficulties involved in the settlement of disputes (enforcement of the appropriate law, administration of evidence, witnesses, experts, etc.) are almost exactly the same in both permanent and *ad hoc* arbitration. The advantages of permanent arbitration are really those deriving from systematic organization which makes it possible, once the dispute arises, to deal with any dilatory manoeuvres more simply and efficiently. The material conditions in which international trade is carried on today should also be borne in mind. Relationships are made over a distance and, generally speaking, the parties do not know each other before a contract is signed. The personal element is becoming less important. That is why the parties' trust (a decisive factor in arbitration) is transferred from the arbitrators to the arbitration institution or body itself through which the arbitrators are chosen.

On the other hand, it would seem that there are serious objective reasons which indicate the limited possibilities for developing institutional arbitration. Indeed, private contacts in legal or business circles clearly show that a fair number of disputes are never submitted to arbitration bodies.¹⁷⁸ Unfortunately, it is impossible to obtain more complete information on occasional arbitration, but both kinds of arbitration will undoubtedly continue to coexist. That is why UNCITRAL, while giving priority to the problems of permanent arbitration, should also take into account the practice of *ad hoc* arbitration. Moreover, as will be seen below, the two important international conventions on international commercial arbitration (New York, 1958, and Geneva, 1961) deal expressly with both categories of arbitration.

158. There is no need to go into the details of the controversies concerning the problem which is worth mentioning here, although, in the Rapporteur's view, it should not have constituted a problem. It continues, however, to figure as such in certain specialized literature, published in the countries of Western Europe, concerning permanent arbitration centres associated with the chambers of commerce in the Eastern European countries. This problem was mentioned in the first part of the report,¹⁷⁹ where it was indicated that the entry

¹⁷² Cf. P. A. Lalive, op. cit., p. 666.

¹⁷³ According to the final version of the Handbook of National and International Institutions Active in the Field of International Commercial Arbitration. United Nations Economic Commission for Europe, document TRADE/WP.1/15/Rev.1 (see above foot-note 153).

¹⁷⁴ P. J. Van Ommeren, Rapport au Congrès international de l'arbitrage, Paris, 1961, in *Revue de l'Arbitrage*, No. 2/1961, p. 101.

¹⁷⁵ See P. A. Lalive, op. cit. p. 665.

¹⁷⁶ See paras. 28 and 29 above.

¹⁷⁷ See P. A. Lalive, op. cit. p. 670.

¹⁷⁸ See P. A. Lalive, op. cit. p. 670.

¹⁷⁹ See para. 46 above.

into force of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was tantamount to recognition at the international level of the arbitral nature of all permanent arbitration centres in all areas of the world. Article 1, paragraph 2, of this Convention states that "the term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted".

In 1961, the European Convention on International Commercial Arbitration also stated in article 1, paragraph 2 (b), that arbitration was "not only settlement by arbitrators appointed for each case (*ad hoc* arbitration) but also by permanent arbitral institutions".

Although the adoption of the above texts should have solved the problem, the controversies have continued among jurists. Some people—although gradually fewer—still affirm that permanent arbitration in the Eastern European countries is on the borderline of arbitration, or even that it cannot be considered arbitration in view of its preconstituted structure, lack of independence, violation of the fundamental principle of equality of the parties, lack of guarantees of impartiality, because the bodies concerned are constituted under a system of closed lists which only include nationals, because the arbitrators are civil servants (teachers, people in charge of foreign trade, etc.).

In 1965, in the Milan Court of Appeal, INTERFERRO of Milan raised similar questions, in contesting the application for execution made by the Romanian firm METALIMPORT. The following are the findings and appraisals of the Court of Milan concerning the nature of the Arbitration Commission of Bucharest:

"It is therefore evident that the arbitral body is not a preconstituted legal authority even if its members are elected by the parties from a closed list."

"Actually the nature of the arbitral body cannot relieve the parties of the obligation to appoint the two arbitrators from among those indicated on the list, since the law requires fulfilment of a subjective condition for inclusion on the list, in the same way as our law lays down certain preconditions for a person to be appointed as arbitrator (Italian citizenship, capacity to act, solvency, etc.: Code of Civil Procedure, article 812).

"Limiting the choice to a specific category of people does not necessarily prevent freedom of choice by the parties, within that limitation, from being a determining factor in the constitution of the court . . .".¹⁸⁰

Not to over-emphasize the problem, it may be useful to quote the points made by Italo Telchini concerning the award granted by the Milan Court of Appeal.

"Without repeating the other relevant observations on the award it seems that, in this particular case, the solution to the problem could be based on whether or not the parties involved could avoid having recourse to the Arbitration Commission of the Romanian Chamber of Commerce. In fact, there is no specific provision in the legislation of that country,

and still less in that of our own country, which obliges the parties to submit to that Commission any disputes that may arise from the execution of the contract concluded between them. Indeed, as stated in a recent publication,¹⁸¹ the inclusion of arbitration clauses in favour of Romanian arbitration is merely 'recommended' to the firms dealing with foreign trade in Romania. It therefore follows that, wherever that clause is not accepted by both parties and included in the contract, any disputes that may arise may be settled by a different procedure.

"Hence, since the possibility of choosing not to submit disputes of that kind to the Arbitral Commission is not excluded, the question whether the parties had more or less freedom in selecting arbitrators was less important in this case. It should be recognized, furthermore, that there was still a certain margin of freedom in this case, although it was limited to the choice in a list, which was undoubtedly somewhat restricted, being composed of only 15 persons. The fact that those included in the list were appointed from above and that the arbitrators were bound to apply preset rules of procedure is by no means exceptional."¹⁸²

159. Philippe Fouchard also analyses all the aspects of the problem in detail.¹⁸³ He points out that several Western institutions draw up lists of arbitrators which include only their nationals and that certain Western legislations do not allow foreigners to be arbitrators (Greece, Italy, Portugal). It should be noted that the "national" concept of arbitration in international commerce is not peculiar to socialist institutions and that this practice is becoming more flexible.

On the other hand, the choice of arbitrators must be made from among qualified persons who therefore have certain responsibilities in the legal or economic life of the countries concerned. This is so in the case of the Western countries in which the arbitrators are most often businessmen. There again, the situation is not basically different from that found in Western arbitral institutions, particularly those which are constituted within a specific corporate group or local chamber of commerce.

I consider that I can draw the following conclusions on the subject: *that there is no substantial difference between the existing permanent arbitral centres in the different regions of the world; that all are suitable for use in international commerce; and that they will continue to exist only in so far as they can win and retain the confidence of the parties concerned in view of the voluntary nature of their competence. Therefore, from that point of view, co-operation at the world level between the various arbitration centres could be organized without too much difficulty.*

4. Amiable compositeur and arbitration according to the rules of law

160. In his introduction to volume I of the IAL on international commercial arbitration, the general Rap-

¹⁸¹ Cf. IAL, op. cit., vol. II, p. 174.

¹⁸² Italo Telchini, "In tema di efficacia in Italia di una sentenza arbitrale straniera", in "Rivista di diritto internazionale privato e processuale", No. 1/1966, pp. 72-73.

¹⁸³ Philippe Fouchard, op. cit., p. 195 et seq.

¹⁸⁰ Milan Court of Appeal, decision of 23 April 1965, in *Rivista di diritto internazionale privato e processuale*, No. 3/1965, pp. 580 and 581.

porteur Pieter Sanders states that much would be gained if "the misunderstandings about the true character of the *amiable compositeur* disappeared. This would mean removal of an important obstacle to every attempt at international co-operation in the field of arbitration".¹⁸⁴

We, too, feel that the problem is very important and some clarification of the matter might be useful, particularly since proposals have been made for unifying arbitration by abolishing arbitration according to the rules of law,¹⁸⁵ some authors have noted that the rules of a number of arbitration centres refer to such criteria as equity or natural justice,¹⁸⁶ and some arbitration centres are even considering separating arbitration completely from any pre-established rule (arbitration *in equity*, by *amiable composition*, *ex aequo et bono*) as a general solution or as a solution which might be applied at the request of either party.¹⁸⁷

161. At the 1946 Conference of the ICC in Paris, the main problem discussed was that of the *amiable compositeur*, or arbitrator *de facto* to whom, in contrast to the arbitrator *de jure* the following characteristics were attributed: (a) he is not bound by the rules of legal proceedings, (b) he is not bound to apply the rules of material law but decides in equity, and (c) his award is final.

In an article published in the Arbitration Journal in 1947, Dr. Robert Marx spoke of the Anglo-Saxon aversion to the *amiable compositeur*, which had been demonstrated clearly as early as 1937 by the attitude of the British, United States and Australian delegations to the preliminary draft of a uniform law on arbitration prepared by UNIDROIT. Indeed, at the 1937 ICC Congress those delegations specifically rejected the UNIDROIT draft precisely because it introduced the system of *amiable compositeur*.

Commenting on the above Dr. Marx states:

"In my opinion, the real danger which in these circumstances seems to be the problem of *amiable compositeur* for unification of international commercial arbitration law, comes from an erroneous interpretation of the notion of *amiable composition*.

"The *amiable compositeur* in fact does not differ from the arbitrator recognized by those legislations which do not know the antagonism between the arbitrator *de jure* and the *amiable compositeur*. The building up of two or even three systems of arbitrators—arbitrator *de jure*, *amiable compositeur*, arbitrator who takes into consideration the rules of law but whose award, which is final, cannot be set aside for error in law—is lacking of a scientific basis and does not correspond to the interests and intentions of the parties.

"There should be only one kind of arbitrator as there exists only one kind of public judge".¹⁸⁸

Dr. Marx, referring in 1947 to how things had developed, notes that, owing to the fact that *amiable composition* was more expeditious, simpler and provided a final settlement of disputes it had developed "as an antagonist against the arbitration *de jure*". However, although it would have been logical for the *amiable compositeur* to replace the arbitrator *de jure*, that did not happen; instead both kinds of arbitration continued to develop side by side in many countries.

Dr. Marx raises the following question: is the *amiable compositeur* really able to refuse deliberately to apply the rules of law? "Certainly not. The *amiable compositeur* as any other arbitrator must observe the fundamental rules which govern judicial procedure and material law. For instance, he is not allowed to base his opinion on secret information or on hearing of the witnesses in the absence of the other party or his representative. Witnesses or experts cannot be sworn by him when the legislation of the country where arbitration is held reserves the authorization to administer an oath to the public judge."¹⁸⁹

A little further on he concludes that the fact that the *amiable compositeur* is not bound to apply the rules of law has been exaggerated by his "too eager" enemies and friends. The *amiable compositeur* cannot go beyond the limits of public policy, and must obey certain compulsory rules and fulfil his jurisdictional duties just as any other arbitrator must.

Even with regard to the finality of the award there does not seem to be any essential difference between the *amiable compositeur* and the arbitrator *de jure*. Certain countries consider the finality of the award a characteristic of any arbitration. Sweden and Finland, for example, refuse to apply the legislation on arbitration in case parties want to reserve the right of appeal. Such a reservation is inadmissible whether the arbitrator involved is an arbitrator *de jure* or an *amiable compositeur*.

Dr. Marx concludes his article by stating that the existence of the arbitrator *de jure* side by side with the *amiable compositeur* is superfluous and merely gives occasion to doctrinal misunderstandings and complications.

"The existence of one arbitrator is to conform to the interests and intentions of the parties, and, on the theoretical plane, clears up a situation which was unfavourable to the unification of international commercial law".¹⁹⁰

162. In the circumstances a survey of current arbitration procedure and the law applicable thereto in various countries is necessary to establish whether the misunderstandings about the true character of the *amiable compositeur* and the correctness of the classification of arbitration into "arbitration according to the rules of law" and "*amiable composition*", still applies. On the basis of such a survey we shall be able to define our views on the current possibilities concerning unification and harmonization in this field.

¹⁸⁸ Dr. Robert Marx "Amiable compositeur: Contribution to the problem of uniform international commercial arbitration", in *Arbitration Journal*, vol. 2, 1947, p. 212.

¹⁸⁹ *Ibid.*, p. 214.

¹⁹⁰ *Ibid.*, p. 217.

¹⁸⁴ Pieter Sanders, introduction, in IAL, *Arbitrage International Commercial*, vol. I, p. 22.

¹⁸⁵ See, for example, Dr. Robert Marx, "Amiable compositeur: Contribution to the problem of uniform international commercial arbitration", in *Arbitration Journal*, 1947, pp. 211-217.

¹⁸⁶ See Peter Benjamin "A comparative study of international commercial institutional arbitration in Europe and in the United States of America", in IAL, *Arbitrage International Commercial*, vol. II, p. 386.

¹⁸⁷ O. Riese and Eugenio Minoli "L'arbitrage, facteur d'unification du droit et d'élimination des conflits de lois" in *Revue de l'arbitrage*, 1966, No. 3 (special), Paris, p. 70.

Some countries still recognize the existence of the *amiable compositeur* and the arbitrator who decides "according to the rules of law"; others recognize only one method of arbitration which is either similar to *amiable composition* or similar to arbitration "according to the rules of law". The three volumes published in 1956, 1960 and 1965 by the International Association of Lawyers and edited by Professor Sanders provide valuable information and give us an idea of the situation throughout the world.

163. In the first category, countries which recognize two kinds of arbitration, we can classify most of the European countries. There are also quite a number of such countries in the other continents. Following is an account of the situation in a few countries in various regions of the world:

In France, states Jean Robert, although arbitrators must decide according to the rules of law, they must respect all the rules, even supplementary rules, just as any court of law would do; indeed, as far as the administration of the law is concerned there is no difference between an arbitrator and a court of law.

Parties may confer on the arbitrators the role of *amiable compositeurs*, but to act as such is a mere right and not a duty, in cases where arbitrators are of the opinion that it would be equitable to apply the rules of law. Thus, when serving as "*amiables compositeurs*", if they think that equity demands it, arbitrators may dispense with all the rules of law, both strict and supplementary. In such cases they are bound only by the principles of public policy.¹⁹¹

In Spain, since the passing of the Act of 22 December 1953, states Juan de Leyva y Andía,¹⁹² there is only one type of arbitration whereas formerly there had been two, namely, arbitration in law and *amiable composition*. Only one type is left, although the former dualism still exists in so far as arbitrators may resolve disputes either in accordance with the rules of law (*con arreglo a derecho*) or else in accordance with "their knowledge and insight" (*con sujeción a su saber y entender*). In the former case (arbitration in accordance with the rules of law) the arbitrators must be practising lawyers, whereas in the latter case (arbitration *ex aequo et bono*) they may be laymen.

In Spain, therefore, there is no more "*amiable composition*", but there is a type of arbitration *ex aequo et bono* in which the procedure followed does not have to be in accordance with the legal forms. The only recourse against an award thus rendered is an action before the First Chamber of the High Court to have the award set aside on the grounds determined in the Code of Civil Procedure (articles 1774-1780).¹⁹³

With regard to Italy, although Italian law distinguishes between awards made according to the rules

of law on the one hand and awards *ex aequo et bono* on the other, this does not preclude the possibility of awards being made partly in accordance with the rules of law and partly *ex aequo et bono*. All arbitration awards, whether made according to the rules of law or *ex aequo et bono*, must state the grounds on which they are based. Appeals to set aside awards made *ex aequo et bono* are not receivable. Italy also has "free arbitration" in which the decision need not be filed with the clerk of the *Pretura*. It merely has the effect of a contract and is comparable to an agreement concluded by the parties themselves. The persons designated by the parties thereby acquire the powers of arbiters (mediators) rather than of arbitrators in the strict sense of the word. The decision of the arbiters in such cases cannot be enforced, however, without further proceedings. If one party refuses to comply with the award appeal must be made to an ordinary judge who, without examining the merits of the matter will issue an injunction ordering performance of the obligation established by the arbiters.¹⁹⁴

In Norway, in the absence of any agreement to the contrary, the arbitrators must render judgement in accordance with the prevailing rules of law and must not decide the case *ex aequo et bono*. *Amiable composition* is therefore permitted side by side with arbitration in accordance with the rules of law. Sven Arntzen states that occasionally an arbitration agreement may contain the stipulation that the arbitral tribunal shall make its award in accordance with "law and equity" (*ex aequo et bono*), implying thereby that the arbitral tribunal will be less bound by the letter of the law than the ordinary courts.¹⁹⁵

In the Netherlands it is customary for the parties to confer on the arbitrators the quality of *amiables compositeurs*. However, arbitrators who act as *amiables compositeurs*, as well as those adjudicative in accordance with the rules of law, are obliged to state the reasons of their award and to observe the imperative rules of law. It is only with regard to the supplementary rules of law that they have greater freedom than arbitrators who adjudicate according to rules of law.¹⁹⁶

164. With regard to Latin America, Argentina recognizes both categories of arbitration. There are two separate chapters in the Code of Procedure entitled "Procedure for arbitrators" and "Procedure for *amiables compositeurs*". The former is also known as *arbitri juris*; and is governed by the same rules as proceedings before the courts of law. The *amiable compositeur* is not bound by rules of procedure. He decides according to his knowledge and conscience.¹⁹⁷ In Brazil, arbitration procedure is determined by agreement between the parties. Only in cases where the parties have not mentioned procedure do the rules of law apply.¹⁹⁸ In Mexico, as a rule, the arbitrators adjudicate according to the rules of law but they may act as *amiables compositeurs* if they have been so authorized in the arbitration agreement.¹⁹⁹ Peru, too, recognizes both

¹⁹¹ Jean Robert, in IAL, *Arbitrage International Commercial*, vol. I, p. 255. He also mentions the possibility of free arbitration in which arbitrators are charged with the task of determining the contents of the contractual relations between parties (p. 269). There are no judicial precedents concerning free arbitration in France.

¹⁹² Juan de Leyva y Andía, op. cit., vol. I, p. 169. He also mentions free (informal) arbitration used in matters of little importance (for example cases brought before the jury of the irrigation communities).

¹⁹³ Because of this we have classified Spain as a country which recognizes two types of arbitration.

¹⁹⁴ Mario Braschi, Bernardo Ansbacher, Enzo Caratti, Giorgio Jarach, Raffaele Nobili in IAL, op. cit., pp. 339, 341, 345, 357.

¹⁹⁵ Sven Arntzen, *ibid.*, p. 361.

¹⁹⁶ Pieter Sanders, *ibid.*, pp. 397 and 407.

¹⁹⁷ Mauricio A. Ottolenghi, *ibid.*, vol. II, p. 3.

¹⁹⁸ Celso A. Frazao Guimaraes, *ibid.*, vol. II, p. 23.

¹⁹⁹ Raul Cervantes Ahumada, *ibid.*, vol. II, p. 45.

categories of arbitration; the *amiable compositeur* is dispensed from following the ordinary rules of procedure and may adjudicate in accordance with his knowledge and conscience, observing the customs of the trade, reasonable justice and good faith.²⁰⁰ In Uruguay the situation is slightly different. Arbitrators must apply the provisions of the Code of Commerce stating in the arbitral award which provisions have been applied. They therefore judge according to the rules of law. With regard to the procedure, they are not bound by the rules of law unless the parties have so agreed in the arbitration agreement. If the parties have not determined the procedure in the agreement the arbitrators adjudicate without regard to the rules applicable in court proceedings. Usually the arbitrators establish a simplified procedure which assures the parties equal rights and equal opportunities to present their case.²⁰¹

165. In other regions of the world, too, there are countries where both categories of arbitration are recognized and although there are slight variations they are basically the same as those we have already described. There are also countries which are hard to classify in either category. For example, in India—as in Uruguay—arbitrators must adjudicate according to the rules of law, except those rules which are clearly procedural. But even as regards procedure although the strict rules of the Evidence Act are not directly applicable to the arbitration proceedings, the rules of natural justice have got to be observed. For example, the arbitrators cannot proceed to hear evidence in the absence of a party unless the party is absent after notice has been given of the hearing.²⁰²

In Iran as regards procedure the law specifically releases arbitrators from any obligation to observe the rules of civil procedure. The arbitrators are expected to comply in this respect with the wishes of the parties as expressed in the arbitration agreement or otherwise. Where no directions are given as to rules of procedure, they are determined by the arbitrators. If the parties have agreed to give the arbitrators the status of "*amiable compositeur*" the arbitrators can base their award on general considerations of reasonableness and equity. However, an arbitrator cannot validly issue an award which conflicts with substantive laws.²⁰³

166. We feel that the countries of Eastern Europe can be included in the category of countries that recognize both types of arbitration even though *amiable composition* as such is not actually mentioned in the various laws. Generally speaking, the procedures followed in *ad hoc* arbitration are closer to what we call arbitration "in equity" or "*amiable composition*", whereas the permanent arbitration bodies of the Chambers of Commerce of these countries operate in accordance with the rules of law, although their awards are final.

For example, in Poland the Code of Civil Procedure provides in general that procedure before an arbitral tribunal shall be left to the parties' discretion. If, however, the parties do not avail themselves of that right, it becomes the right and duty of the arbitrators to establish the procedure (while respecting the binding rules). Polish law makes no distinction between arbitrators acting as *amiables compositeurs* and arbitrators who decide a case according to the rules of law. Their award must not be contrary to public policy or the principles of the social community; otherwise the award may be set aside.²⁰⁴

In the German Democratic Republic arbitral procedure is based on the German Code of Civil Procedure of 1879, which is applied in both German States, with a few amendments. The arbitral procedure therefore depends in the first place upon the agreement of the parties but, if the parties have not determined the procedure, it is up to the arbitrators to do so at their discretion. As for arbitration at the Chamber of Commerce, the arbitration tribunal makes its decision on the basis of the legislation agreed on by the parties in so far as that does not go against the private international law of the German Democratic Republic. The Court of Arbitration takes account of commercial customs applicable to disputes provided that the parties have agreed to negotiate on the basis of those customs or that the latter are explicitly recognized in the legislation to be applied.

In Romania, *ad hoc* arbitration is regulated by the Code of Civil Procedure, which stipulates that arbitrators, making their award, shall apply the rules of law, unless they have been authorized by the arbitration agreement to decide according to their conscience and appreciation. Arbitration under the authority of Chamber of Commerce, which is permanent, is carried out in accordance with that institution's regulations governing its organization and operation. The arbitrators are obliged always to adjudicate in accordance with the rules of law and cannot be authorized by the parties to decide as *amiables compositeurs*.

The same seems to apply as regards permanent arbitration in the USSR,²⁰⁵ Czechoslovakia²⁰⁶ and Hungary,²⁰⁷ judging from the fact that the awards rendered under such arbitration are final and binding, although that does not mean that *ad hoc* arbitration on the basis of *ex aequo et bono* would not be valid. The situation in Bulgaria is different. The regulations of the Arbitration Commission of Sofia state that arbitrators shall assess the evidence on the basis of their own conviction and shall state the grounds for the award in accordance with the laws and commercial customs as indicated by the rules of private international law; in cases where the laws and customs are inadequate they are to adjudicate in accordance with conscience and equity.²⁰⁸

²⁰⁰ Ulises Montoya Manfredi, *ibid.*, vol. II, p. 67.

²⁰¹ Quintin Alfonsin, *ibid.*, vol. II, p. 89.

²⁰² Tanubhai D. Desai, *ibid.*, vol. III, p. 39. The same regulations also exist in Pakistan. See J. P. A. Burton, *ibid.*, vol. III, p. 113.

²⁰³ Fuad Rouhani, *ibid.*, vol. III, p. 61. Mention must also be made of the existence in Iran of a set of rules for oil arbitration embodied in the existing law between the Iranian Government (including the National Iranian Oil Company) and the consortium of oil companies concerning disputes arising from the operation of the oil agreement. For details see Fuad Rouhani, *ibid.*, pp. 65-67.

²⁰⁴ Henryk Trammer, *ibid.*, vol. II, p. 137.

²⁰⁵ See E. Usenko, *ibid.*, vol. II, pp. 213 *et seq.*

²⁰⁶ Théodor Donner, *ibid.*, vol. II, p. 205.

²⁰⁷ See Imre Mora, *ibid.*, vol. II, p. 107. He states that there is no *amiable composition* in Hungary. However, one should mention that opinions differ on that subject and that it is asserted that the possibility of arbitration in equity exists.

²⁰⁸ See the regulations of the Arbitration Commission for External Trade, art. 47, Sofia, 1965.

167. Finally, some countries have only one type of arbitration, for example the Federal Republic of Germany, Denmark, Austria, Finland and the United States. In such countries the notion of *amiable compositeur* as such is not used but, generally speaking, the procedure before arbitral tribunals is determined by agreement between the parties. The same freedom seems to exist as regards the substance.

Under Japanese law, arbitrators are bound neither by provisions of procedure, nor by substantive provisions of statute law. They must render their award in accordance with commercial usage, good faith or natural justice, with the sole restriction that they are not permitted to contravene the public order. Therefore Japanese law does not know the distinction between arbitrators deciding as *amiables compositeurs* and arbitrators deciding according to the rules of law. Further, the court of law has no power to examine the correctness of the law applied in an arbitral award.²⁰⁹

Among the countries which recognize only one type of arbitration the United Kingdom is considered to occupy a special place. Its system is unknown in the other countries.²¹⁰ The arbitrator may judge only in accordance with the rules of law and he can always refer a particular question of law to the Court for decision. Here we find co-operation between the courts and the arbitrators in order to reach a decision which is right in law ("special case stated").²¹¹ Sir Lynden Macassey states that the only kind of arbitration recognized by law throughout the whole of the United Kingdom is what is generally known among international jurists as "judicial arbitration". The laws of England, Scotland and Northern Ireland do not recognize the validity of *amiable composition*.²¹² However, it seems that arbitrators may, if they are expressly authorized to do so by the parties, settle questions in accordance with their own judgement and experience. The author in question explains that arbitrators must act "judicially" but that that does not mean they must "follow meticulously the procedure of the English law courts". They must observe the fundamental rules of natural justice. They must decide according to the legal rights of the parties, "unless the arbitration agreement authorizes them, which it seldom does, to decide according to what they think is equitable". They are bound by substantially the same "rules of evidence" as bind an English court of law "though not necessarily by all the same formal rules of proof".²¹³

168. From this general survey certain conclusions can be drawn:

²⁰⁹ Junichi Nakata, in IAL, op. cit., vol. III, p. 85.

²¹⁰ It seems, however, that a similar system also exists in Australia (see Arthur Francis Rath, *ibid.*, vol. III, p. 12). The "special case stated" procedure also exists in India and Pakistan but unlike England there is no provision which states that arbitrators must thus refer to the courts (Tanubhai D. Desai, *ibid.*, vol. III, p. 37 and J. P. A. Burton, vol. III, p. 113).

²¹¹ Cf. Pieter Sanders, *ibid.*, vol. I, p. 21. However, one should remember that Robert Marx (*ibid.*, pp. 215-216) considers that this rule is not a matter of public policy and that the parties can therefore oust the jurisdiction of the court by agreement. We refer the reader to art. 17 of the rules of the London Court of Arbitration.

²¹² Sir Lynden Macassey, *ibid.*, vol. I, p. 63.

²¹³ Sir Lynden Macassey, *ibid.*, vol. I, p. 75.

(a) Nearly all countries recognize arbitration by *amiable compositeur*, even if it is sometimes called arbitration ("in equity", "*ex aequo et bono*" and so on). Even in England, which is cited as an example of a country which recognizes only "judicial" arbitration, arbitrators are not—as we have seen—always obliged to follow meticulously the procedure of the English law courts. In some cases they may decide "according to what they think is equitable" (if they have been authorized to do so in the arbitration agreement).

(b) "*Amiable composition*" does not mean "separating arbitration completely from any pre-established rule" as some authors think (see above). An *amiable compositeur* is bound to respect the fundamental principles of procedural law at least, and as regards rules of substance is also bound by public policy or prohibitive provisions.

(c) *Amiables compositeurs* are never conciliators. They represent a form of justice for they settle disputes by deciding on the basis of rules or principles which can be generally and equally applied to all people in the same circumstances. As Pierre Lalive²¹⁴ has rightly observed, *amiable composition* does not necessarily mean basing one's decision on purely "practical" consideration. Equity does not necessarily fall outside the realm of law. In the Special Rapporteur's opinion, if *amiable composition* was really extrajudicial (outside the realm of law) it should not be a subject of concern for the United Nations Commission on International Trade Law.

(d) *Amiable composition* is always legal, simply because the source of its validity and effectiveness is not solely the will of the parties but the law which recognizes the will of the parties. Besides, that is the concept underlying article VII of the 1961 European Convention on International Commercial Arbitration which states that "arbitrators shall act as *amiables compositeurs* if the parties so decide and if they may do so under the law applicable to the arbitration".²¹⁵

(e) As Pieter Sanders rightly notes, although *amiable composition* may be preferred in practice, there are no particular objections to arbitration "according to the rules of law" particularly as with a few exceptions the "national judge does not investigate whether the award complies with the rules of law; in other words, the arbitral award is final in each type of case".²¹⁶

(f) Not only is there a difference between arbitration "in accordance with the rules of law" and the "*amiable compositeur*" but there are also differences within each category.

(g) Unification must be achieved within each category because there is still, even now, a certain amount of confusion about the notion of arbitration "in accordance with the rules of law" and the "*amiable compositeur*".

(h) Although currently the term *amiable compositeur* is widely used, we would prefer to introduce the

²¹⁴ Pierre Lalive, *ibid.*, p. 578.

²¹⁵ Naturally, as regards arbitration procedure the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral awards had already established the autonomy of the will of the parties.

²¹⁶ Pieter Sanders, in IAL, op. cit., p. 21.

terms "arbitration in strict law" and "arbitration in equity" to show that the law is involved in both cases.

(i) To achieve such unification it is not essential for countries that recognize both categories of arbitration to eliminate and have only one category, that of the *amiable compositeur*. This is true not only because, as Professor Sanders says,²¹⁷ the adoption of such a proposal would be very problematic as the countries which have both categories of arbitration are inclined to maintain them, but also because arbitration "according to the rules of law" (in strict law) can quite well co-exist with the "*amiable compositeur*" (arbitration inequity) so long as the parties are allowed to choose freely either system and provided that the differences between the two categories are uniformly and clearly stated.

5. *Domain of arbitrability; authorization of legal persons of public law to conclude valid arbitration agreements*

169. Two very important points have been mentioned in connexion with the arbitration agreement, which is rightly considered to be a basic element of arbitral jurisdiction. Firstly, there is no uniformity in national bodies of law regarding disputes which may be the subject of arbitration agreements and secondly, there are also a number of differences regarding the capacity of certain natural or legal persons to submit to arbitration the settlement of disputes to which they are parties.

170. In principle, all the rights that the parties are free to exercise may be submitted to the arbitrator. The extent of that freedom of exercise is established by the various national bodies of law. In Norway, for example, no arbitral clause may be included in a credit-sale agreement, this provision being one of the protective measures established with regard to credit-sale transactions.²¹⁸ In France, there may be no recourse to arbitration in connexion with questions relating to the validity of company registrations, bankruptcy, the ownership and validity of patents and trademarks and, in general, all disputes affecting the rights of third parties or which involve problems concerning prescribed rates of exchange and official price regulations. All such problems are considered incompatible with the rules of public policy.²¹⁹ In the Federal Republic of Germany arbitration agreements may be made with respect to all matters of a financial nature, i.e. practically all civil and commercial claims, but "matters pertaining to public law or involving public policy"²²⁰ (bankruptcy, for example are precluded). In Austria, India, Japan, Switzerland and the United States, any dispute of a commercial nature may, in principle,²²¹

be ruled on by arbitrators. The same is true, in general, in the East European countries for any trade dispute involving the trading enterprises. In Argentina, a number of matters, including those concerning public or municipal property and those which, for one reason or another, require the intervention of the tax authorities, are excluded from arbitration for reasons of public policy.²²² In Mexico, questions relating to the validity of patents, the registration of trademarks, the validity of commercial company registrations, bankruptcy and so on may not be submitted to arbitration.²²³

171. It was not possible to define directly the idea of an "arbitrable trade dispute" in recent international conventions, and divergences between national legislations still persist. The 1923 Geneva Protocol recognizes the validity of an arbitration agreement concluded "relating to commercial matters or to any other matter capable of settlement by arbitration", but each Contracting State reserves the right to limit its obligation to contracts which are considered as commercial under its national law, which amounts to a statement that each State remains virtually free to decide which matters it considers to be arbitrable.

The 1958 New York Convention, too, allows States to restrict its application to "legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration"; that law is competent to decide whether the arbitration agreement relates to a legal relationship "whether contractual or not" concerning a subject matter "capable of settlement by arbitration" (article II, paragraph 1). It was not possible to define, in the 1961 European Convention, the international trade questions to which it was to be applied. Moreover, a definition of the "commercial nature" of a dispute would not have solved all the problems that might arise in each particular case. In 1956, Pieter Sanders, in his introduction to volume I of *International Commercial Arbitration*, concluded that in his opinion, "this matter can hardly be standardized; there will always remain differences between the laws of various countries."²²⁴ Ten years later, Philippe Fouchard noted that the question of the arbitrability of a dispute is so complex, and the national concepts it involves are so specific, that it cannot be decided abstractly by an international text or even by a national text.²²⁵

172. In the opinion of the Special Rapporteur it would be extremely difficult to reduce the diversity concerning the extent of arbitrability by adopting an international convention for that purpose; the solution is still to be found in the techniques of private international law which have already defined the *lex fori* of the judge seized of a dispute as the rule of conflict applicable to arbitrability. That solution was adopted by the 1927 Geneva Convention which states that in

²¹⁷ Pieter Sanders, *ibid.*, p. 21.

²¹⁸ See Sven Arntzen, in IAL, op. cit., vol. I, p. 365.

²¹⁹ See Jean Robert, *ibid.*, p. 243.

²²⁰ See D. J. Schottelius, *ibid.*, p. 39.

²²¹ We have underlined the words "in principle", because even in those countries, despite the general trend towards the promotion of arbitration and the broadening of its sphere of application, recent cases show that some problems are not arbitrable. There are, for example, three decisions of 1968 handed down by the Court of Appeal of New York, quashing decisions of lower courts which allowed "anti-trust" problems to be settled by arbitrators (*Aimcee Wholesale Corp. v. Tomar Products and American Safety Equip. Corp. v. J. P. Maguire*

and Co. v. Hickok Mfg. Co.) on the grounds that very important and complex problems were involved and, moreover, that arbitrators are not bound by the norms of law and their decisions are final. Such a procedure might lead to contradictory interpretations (see AAA, *Lawyers Arbitration Letter*, No. 35, 15 August 1968).

²²² See Mauricio Ottolenghi, in IAL, op. cit., vol. II, p. 8.

²²³ See Raul Cervantes Ahumada, *ibid.*, vol. II, p. 46.

²²⁴ *Ibid.*, vol. I, p. 15.

²²⁵ Philippe Fouchard, op. cit., p. 107.

order to obtain recognition or enforcement of an award, the subject-matter of the award must be capable of settlement by arbitration (article I (b)), under the law of the country in which the award is sought to be relied upon. That solution was also retained by the 1958 New York Convention which, in article V, paragraph 2, provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the subject-matter of the difference is not capable of settlement by arbitration under the law of that country. The 1961 Geneva Convention likewise stipulates (article VI, paragraph 2) that the judge seized of the dispute may also refuse recognition of the arbitration agreement if under the *lex fori* the dispute is not capable of settlement by arbitration.

We know this solution is not perfect and gives rise to uncertainties, since at the moment when the arbitrator makes the award he cannot be certain of the law according to which he should rule on the arbitrability of all or part of the dispute submitted to him, in order to avoid invalidation of the award. We think that if a new international convention on arbitration is prepared it should embody the solution which makes all international trade disputes arbitrable, in principle, subject to the rules of international public policy of each country. Philippe Fouchard observes that such a solution would reinforce the stability of the system since the likelihood of such a case arising would be remote. The Special Rapporteur is of the opinion that even if a new arbitration convention is a remote possibility, practical steps could be started immediately: the drawing up of a list of non-arbitrable questions, for each country, the publication of those lists, and consideration of the possibility of establishing a generally acceptable list that could be annexed to a possible new convention.

173. Difficulties have arisen for "legal persons of public law" in connexion with their right to accept arbitration in international trade disputes. This is an important question in view of the growing role played by States or bodies depending more or less directly on them. In modern international trade, States and legal persons of public law, whatever their political and economic structures may be, are becoming increasingly active in economic matters and particularly in international trade. This is a general phenomenon although the reasons for it are varied.

The economic activity of States or legal persons of public law brings them into contact with private parties to contracts and consequently with the subject-matter and methods of trade law. The problems raised by the settlement of disputes arising from such mixed relations are complex,²²⁶ and opinions are divided as to how they should be resolved. Without wishing to enter the controversy, the Special Rapporteur is of the view that arbitration is nevertheless to be recommended,

since for such disputes recourse to ordinary national jurisdiction raises still more delicate problems. We believe that this is partly a question of the social relations arising from international trade, so that it is a commercial matter even if one of the parties is subject to international law. In such a case, the contracting State or legal person of public law must bow to the needs of international trade and be able, among other things, to accept validly the competence of an arbitral tribunal.

174. There are countries like Greece, the Netherlands, Belgium and France, which have passed a general interdiction preventing legal persons of public law from resorting to private arbitration, *save in exceptional instances*. The problem that has arisen was to see if those interdictions relating to internal relations were equally valid for international relations. In recent judicial practice in France there has been a trend towards the solution restricting that incapacity solely to internal relations.²²⁷ Reference has even been made to "international public policy" as distinct from national public policy. This would involve an appeal to general principles of law or to purely doctrinal analysis of legal situations made by the arbitrators, who would be more concerned with discovering an internationally applicable rule than with reliance on a particular body of municipal law.²²⁸

Leaving aside the problem of the capacity of legal persons of public law to resort to arbitration to settle disputes arising from their internal legal relations, since UNCITRAL does not have to concern itself with such relations, the Special Rapporteur is of the opinion that the trend to admit such capacity in international trade relations should be encouraged, in any event, the discussion is mainly of academic interest, without much practical value, since cases of the incapacity of legal persons of public law to resort to arbitration in private international law relations are very rare. In the field of such relations, a uniform solution such as that adopted in article II of the 1961 European Convention seems satisfactory to us. As a general rule, legal persons considered by the law which is applicable to them as "legal persons of public law" have the right to conclude *valid* arbitration agreements, but on signing, ratifying or acceding to the Convention any State is entitled to declare that it limits that faculty to such conditions as may be stated in its declaration.

6. Other general findings and final proposals

175. The Special Rapporteur was instructed to study "the most important problems concerning the application and interpretation of the existing conventions and other related problems".²²⁹ Unfortunately the innocent expression "other related problems" covers almost every aspect of international commercial arbitration. The Special Rapporteur has nevertheless made every effort to give UNCITRAL as complete a picture as possible

²²⁶ What is involved here is the immunity from jurisdiction that States may invoke regarding the law applicable etc. See C. Carabiber, *Le concept des immunités de juridiction doit-il être révisé et dans quel sens?* Clunet, 1952, pp. 440-494; J. F. Lalive, *L'immunité de juridiction des États et des organisations internationales*, *Recueil des Cours*, Académie de droit international, The Hague, 1953, vol. III.

²²⁷ This refers to a series of judgements beginning with the judgement of the Paris Appeals Court, of 10 April 1957, confirmed by the judgement of the supreme court of 14 April 1964.

²²⁸ P. Fouchard, *op. cit.*, p. 102.

²²⁹ See the decision unanimously adopted by UNCITRAL on 26 March 1969 (report on the second session, para. 112; *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970, part II, chapter II, A).

of the situation in that domain, which is generally acknowledged to be very important for the development of international trade.

The Special Rapporteur is aware that a great deal of information has probably been omitted from the report. He believes, however, that he has covered the most important aspects of international commercial arbitration and given a general impression of the related problems, and that he is in a position to make proposals that can be discussed by UNCITRAL.

176. With regard to the application of the existing conventions (the 1923 Geneva Protocol, the 1927 Geneva Convention, the 1958 New York Convention, the 1961 Geneva Convention and the Agreement relating to application of the 1961 Convention concluded in Paris in 1962 under the auspices of the Council of Europe, the 1965 Washington Convention and the 1966 Strasbourg Convention), an initial distinction can be drawn on the basis of the States which can participate in those Conventions. The definition of that participation ranges from "all States" (1923 Geneva Protocol) to "any Member of the United Nations and . . . any other State which is or hereafter becomes a member of any specialized agency . . . or . . . a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations" (1958 New York Convention), to "States members of the [International Bank] [for Reconstruction and Development]" and "any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council [of the Centre established by the Convention], by a vote of two thirds of its members, shall have invited to sign [the Convention]" (1965 Washington Convention). Although these three provisions allow the great majority of States to become parties to the conventions in question, it should be noted that actual participation is still small in comparison with potential participation:²³⁰ 52 contracting States and 10 unratified signatures for the 1965 Washington Convention, 37 contracting States and 9 unratified signatures for the 1958 New York Convention, and 33 contracting States with 13 unratified signatures for the Geneva Protocol.²³¹ The 1961 European Convention, which is given as an example of a regional convention, is open for signature or accession by countries members of the Economic Commission for Europe, countries admitted to the Commission in a consultative capacity and such countries as may participate in certain of its activities. There are 14 contracting parties to this Convention, with 6 unratified signatures. This Convention, which according to its provisions could be applied in its entirety to arbitration involving Eastern countries only as well as to arbitration involving Western countries only, is in practice applied solely to disputes relating to trade between Eastern countries and Western countries, because disputes between the foreign trade organizations of CMEA member countries are covered by

the relevant provisions of the 1968 CMEA General Conditions of Delivery of Goods, while the members of the Council of Europe and, upon invitation, other States where there is a national committee of ICC, concluded in the 1962 Agreement relating to application of the Convention which in the case of these parties precludes the application of those provisions of the 1961 Convention which concern the organization of the arbitration, and in particular the ones concerning the settlement of differences relating to the establishment and functioning of arbitral tribunals (art. IV, paras. 2-7).

With regard to the relationship between some of the aforementioned international conventions, we would mention that between the 1927 Geneva Convention, which is open only to the signatories to the 1923 Geneva Protocol, and the 1958 New York Convention. As States parties to the 1927 Geneva Convention become parties to the 1958 New York Convention, the 1927 Convention ceases to be applicable between them, thus eliminating any conflicts between the two conventions so far as those States are concerned.

In any case, the Special Rapporteur has noted that so far there have been virtually no complications in the application of the two aforementioned conventions, and that consequently there is no need to raise the question of amendments. Furthermore, the 1923 Geneva Protocol has diminished in importance, since its substance has been absorbed into most national legislations or into the conventions adopted since the Second World War. As we have seen, the fate of the 1927 Convention is closely linked to that of the 1958 New York Convention, which is gradually replacing it. This represents a step forward, for an analysis of the content²³² of the New York Convention shows that it improves on the 1927 Geneva Convention in that it greatly simplifies the conditions for enforcement of foreign arbitral awards; this explains the favourable trend towards ratification of the New York Convention in recent years.

The Special Rapporteur considers that UNCITRAL should note with satisfaction the favourable trend towards ratification of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and recommend other States to ratify it as soon as possible.

Similarly, in view of the part which the 1961 European Convention on International Commercial Arbitration can play in relations between countries with different economic structures, UNCITRAL could recommend that countries which have not yet ratified the Convention should do so.

In making this recommendation, the Special Rapporteur is aware that reservations have been expressed about the latter Convention, which is said to contain "essentially a rather complicated system for making arbitral agreements work with the help of a special committee".²³³ The system established to make arbitral agreements work when the parties cannot agree on the choice of arbitrators or the place of arbitration is considered to be unsatisfactory, although at the same

²³⁰ See A. Broches, "Promotion du perfectionnement des conventions en matière d'arbitrage", in *Revue de l'arbitrage*, No. 4 (1969), p. 274.

²³¹ These figures are subject to a number of reservations and uncertainties, owing to the changes which have taken place in the status of some contracting parties or to subsequent agreements which replaced the preceding ones.

²³² See paras. 44-51 above.

²³³ P. Sanders, "Travaux du 2^{ème} Congrès international de l'arbitrage" in *Revue de l'arbitrage*, No. 3 (numéro spécial), 1966, p. 17.

time the value and usefulness of the other provisions of the European Convention are acknowledged, particularly in the case of the provisions relating to the applicable law, the right of legal persons of public law to conclude valid arbitration agreements and the right of foreign nationals to be designated as arbitrators.

The Special Rapporteur feels that the 1961 Geneva Convention is the outcome of a sustained effort and that it would be a pity not to support it. Basically, the system established by this Convention does not become complicated *unless the parties cannot agree on the choice of arbitrators or on the place or nature of the arbitration*. But what system does not become complicated in such circumstances?

The system offered by the 1961 Geneva Convention establishes, in normal cases, relationships based on mutual confidence; it is a modern and advanced system, in which concordance between the will of the parties is the key to the solution of most problems.

The difficulties mentioned can be overcome if the recommendation concerning the avoidance of "blank" arbitral clauses is implemented. We therefore deem it advisable to recommend the use of this Convention as a model to be imitated and, of course, improved upon in so far as better solutions can be found, particularly in the case of relations between countries with different economic and social systems or different levels of development.

177. The question of the uniformity of interpretation and application of the provisions of multilateral international conventions and the related problems are dealt with mainly in part II of this report. The Special Rapporteur feels he is in a position to state that these problems are not numerous. Although more extensive research—which could not be carried out by one person in the limited time available to the Special Rapporteur—would certainly have revealed a number of specific cases which could have been included in part II, it is none the less true that very few problems have arisen in connexion with the interpretation and application of the aforementioned Conventions.

It is truly encouraging to note that very few foreign arbitral awards have had to be enforced with the co-operation of the courts on the basis of these international conventions. That proves, first, that arbitration has, generally speaking, enjoyed the confidence of the parties, who have implemented arbitral awards of their own free will, and secondly, that the existing conventions on the enforcement of foreign arbitral awards have a preventive effect in that they discourage those who might be tempted not to comply with those awards of their own free will.

In any event, no problems remain with regard to the interpretation of the New York Convention, apart from a number of cases concerning the form of the arbitration agreement,²³⁴ the law applicable to that agreement or the capacity to conclude such an agreement. We therefore consider that the problem of divergent interpretations, which jeopardized or appreciably reduced the value of the unification achieved by the 1958 New York Convention, has been virtually eliminated for some time.

²³⁴ See part II, paras. 106-112.

The Special Rapporteur therefore maintains the view he expressed during the discussion on his preliminary report, namely that from this point of view there is no need at the present time to envisage a revision of parts of the aforementioned Convention. Of course, the Convention must be compared with international practice. To that end, more active efforts should be made to disseminate the relevant information and encourage discussion of the solutions embodied in the New York Convention by every means (specialized periodicals, arbitration bulletins, monographs, meetings, seminars and so on) so as to permit the definition of common views and thus improve the stability of the Convention, on which general agreement was so difficult to obtain.

178. This report has described the untiring efforts made to unify the rules of arbitral procedure. Comparative studies concerning the content of the rules of the various arbitration centres²³⁵ have been prepared and informative documentation on this subject is now available, which points out both the differences and the similarities between the rules of the various centres. In any case, all the studies tend to contain a conclusion along the following lines: "Even in the absence of evident harmony among the various provisions of the rules, the Economic Commission for Europe was able to deduce the general principles of those rules".²³⁶

In 1961, in Paris, the second commission of the International Arbitration Conference reconsidered the problem of the harmonization of the rules of procedure of the arbitration centres, and the Congress adopted a whole series of recommendations concerning the content of rules "covering the four successive stages of the opening of the procedure, the instruction, the hearings and finally the award", as follows:

The opening of the procedure

The claim should take the form of a request addressed to the arbitration centre.

The claim should always contain:

- An identification of the two parties;
- The terms of the arbitral agreement;
- The nature of the controversy;
- The object of the request.

The defendant's answer should:

- Be submitted within a time-limit to be determined by the centre;
- Have a content corresponding to that of the claim;
- If appropriate, contain a counter-claim.

The procedure

The arbitral tribunal must have the direction of the proceedings.

The parties must exchange their "mémoires".

The language of the arbitration must be determined by the arbitral tribunal and provision must be made for translation.

The hearing

It should, if possible, include an oral hearing.

The place of the hearing should be determined by agreement between the parties or by the arbitral tribunal.

²³⁵ We are referring here mainly to the documents prepared prior to 1958 by the United Nations Economic Commission for Europe (Committee on Development of Trade). See document E/ECE/TRADE/WP.1/15/Rev.1.

²³⁶ See the report by Dr. Glossner submitted to the Second International Arbitration Congress in *Revue de l'Arbitrage*, No. 2 (1961), p. 78.

Hearings should be public.

If the parties or their representatives do not appear, the arbitral tribunal should have the power to continue the proceedings, to be considered as contradictory proceedings.

Witnesses should be heard at the request of the parties or of the arbitral tribunal.

The arbitral tribunal may have the right to issue a technical statement, if necessary.

The arbitral tribunal should, if it considers it possible, make a conciliation effort.

The award

It should include the arbitration agreement and a chronological outline of the proceedings.

The arbitral tribunal should determine the applicable law unless the parties have agreed upon it in advance.

It would seem advisable for awards to contain a statement of the reasons on which they are based.

At the Third International Arbitration Congress, held at Venice in 1969, the emphasis was placed, not on harmonization, but on the study of the basic principles of the various rules, with a view to facilitating a rapprochement between arbitration centres. Jean Robert²³⁷ thinks that "in the necessary diversity which must characterize an institution whose essential trait is its contractual character, we need only seek to determine how the provisions of the rules differ or agree in relation to certain questions". He leaves aside the differences which will never constitute an obstacle preventing the parties from accepting a certain set of rules and concentrates on the following points, which could create such obstacles:

Means of choosing arbitrators (the panel system, freedom of choice, mixed system consisting of a panel with the possibility of choosing an arbitrator not included in the panel):

Existence and role of an administrative organ within the arbitration centre;

Determination of the arbitral procedure;

Law applicable to the substance;

Production of evidence;

Freedom of arbitrators to adjudicate on questions of law or obligation to refer such questions to another body;

Formal content of arbitral awards.

179. After analysing the aforementioned points, Jean Robert observes that "one has the impression that the convergence of solutions is greater than one imagines, showing that an arbitration community is coming into being", as a result of a number of factors, including the existence of common arbitral usages corresponding more or less to the requirements of a common business ethic, the effect of which international conventions have produced on arbitration and particularly on rules, and the unification of the general principles which govern arbitration law. He even goes so far as to speak of the imperceptible but definite creation of "an international legal spirit of arbitration, common to representatives of all nations".

Jean Robert²³⁸ goes on to state that the search for the guiding principles which govern arbitration rules is

ultimately encouraging. The differences, although sometimes great, are not, in the final analysis, essential, and in any case the means of effecting a rapprochement are becoming apparent. Among those means, Mr. Robert stresses the technique of judicial practice, "which separates the requirements relating to the institution in the municipal law of each country from the freedom required for the exercise of international arbitration".

Similarly, Pieter Sanders suggests the preparation of a code of principles to be incorporated in the rules for international arbitration. The code of principles would cover the place of arbitration, the nomination of arbitrators, the applicable law (including international usage) and so on, and would be based on the arbitration rules which provide solutions to those questions (ECE Rules of 1963, ECAFE Rules, etc.). Arbitration institutions would incorporate those principles in their rules in their own way. The code would thus function as a set of guidelines for arbitration institutions.²³⁹

180. Taking into account the information given in the report on the adoption of uniform rules, the efforts made thus far to that end, the current favourable attitude towards reexamination of this question, the effect produced by the multilateral conventions adopted under the United Nations auspices, and the documentation and information collected, the Special Rapporteur proposes that within UNCTAD a study group (or working group) should be established which, alone or in co-operation with the representatives of certain interested arbitration centres, would re-examine the question of drawing up a model set of arbitration rules. The Special Rapporteur would prefer model rules containing basic provisions which would subsequently be recommended to all arbitration centres for gradual inclusion in their rules on organizations and operation. The model rules would be designed to cover exclusively the settlement of disputes relating to international commercial relationships.

181. The Special Rapporteur feels that the same suggestion could be made with regard to the unification and simplification of national legislation on arbitration and the unification and simplification of national rules relating to the enforcement of arbitral awards, including the problem of the limitation of judicial control over arbitral awards and the reduction of means of recourse against enforcement orders. The same study group (or working group) would analyse the results obtained thus far in that sphere and define the scope of the unification envisaged. Generally speaking, development in this direction is slow and in our view could not be too extensive.

The Special Rapporteur feels that a practical and realistic solution would be to draw up a uniform law that could serve as a model, containing certain basic norms (for example, the form of the arbitration agreement and its effects, principles for the establishment of the arbitral tribunal, possibility of choosing a foreign arbitrator, definitive character of the arbitral award, possibility of choice between arbitration according to the rules of law and arbitration according to equity, means of recourse).

²³⁷ See Jean Robert, "Principes directeurs des règlements d'arbitrage applicables aux affaires commerciales internationales" in *Revue de l'arbitrage*, No. 4 (special issue), 1969, p. 237.

²³⁸ Jean Robert, *op. cit.*, p. 251.

²³⁹ See P. Sanders, Report to the Third International Congress in *Revue de l'arbitrage*, No. 4 (1969), p. 314.

This model law would relate directly only to disputes concerning international trade (excluding domestic commercial relationships and civil law relationships) and would be limited to procedures which determine the extent to which the State, through its judicial institutions, intends to retain what Professor René David calls "a legitimate and necessary control over the conditions in which the arbitration foreseen by the parties is to be administered and the award of the arbitrators rendered".²⁴⁰

René David is quite right when he states that insufficient account has been taken of "the fact that arbitration in international commercial relationships, differed from arbitration in civil relationships or even in domestic commercial relationships and required a different approach".

182. The Special Rapporteur is gratified to be able to inform UNCITRAL that his research has shown that, in accordance with the resolution adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 and Economic and Social Council resolution 708 (XXVII) of 17 April 1959, action has been undertaken to promote international commercial arbitration. Account has been taken of the suggestion made in the latter resolution "that inter-governmental and non-governmental organizations active in the field of international private law arbitration co-operate with each other and with the United Nations organs concerned, especially in the diffusion of information on arbitration laws, practices and facilities, educational programmes and studies...".

Action has in fact been taken to ensure a wider diffusion of information on national and international arbitration laws and existing arbitration practices and facilities. Various means have been used to disseminate this information; in recent years they have also covered lesser-known aspects of the question. We are referring here to the increase in the number of publications containing information on arbitral practice in various countries, which has helped to spread knowledge of the interpretation and application of the various rules relating to procedure and to the substance of the dispute. In this connexion we would also mention the exchanges of information and co-operation between the various arbitration centres, the organization of congresses, symposia, seminars, exchanges of experience and so on, as well as the particularly encouraging progress being made with regard to mutual acquaintance, which is directly related to mutual trust between arbitration organization and the various organizations and undertakings which have recourse to them. This progress has permitted the re-evaluation of bilateral and multilateral co-operation agreements concluded between different arbitral systems or different arbitration organizations, irrespective of the social and economic systems and the level of development of the countries concerned, and the conclusion of new agreements of that type.

In view of his findings in this respect, the Special Rapporteur proposes that UNCTAD, after noting the progress made with regard to the implementation of the resolution included in the Final Act of the United

Nations Conference on Arbitration and the aforementioned Economic and Social Council resolution, and taking into account also General Assembly resolution 2205 (XXI) of 17 December 1966, should invite Governments and governmental and non-governmental organizations to support and encourage the concentration of efforts on information and research activities in the field of arbitration in all its forms, as well as the organization of more regular and systematic bilateral and multilateral co-operation in that field with a view to achieving a balance in the organization of arbitration procedures between developing countries and industrialized countries and between countries having different economic systems in all regions of the world.

183. The information contained in this report has shown that the recommendation in Economic and Social Council resolution 708 (XXVII) concerning the inclusion in the programme of work of the regional economic commissions of the United Nations of a study of "measures for the more effective use of arbitration by member States in their regions" has not yet been fully implemented by all the commissions.

With regard to what has been called the "Bangkok experiment", Mr. Krishnamurthi has observed that "Much has been achieved but much more remains to be done. It is somewhat disappointing to know of the slow progress made in popularizing and practising international arbitration in almost all the countries of the region."²⁴¹ L. Kopelmanas speaks of the need to take steps in Africa, under the auspices of the United Nations Economic Commission for Africa, to ensure that "the geographic base for co-operation among arbitration organizations becomes really representative of the world as a whole."²⁴²

However, since equilibrium in the organization of arbitration procedures cannot be achieved in the countries of the aforementioned regions unless those regions have arbitration organizations which can provide the foundation for co-operation on an equal basis with the organizations of other regions, the Special Rapporteur considers that the United Nations should help those regions to obtain the technical and material assistance needed for the establishment or strengthening of arbitration centres. That would represent an important step toward the achievement of equilibrium between the industrialized and the developing countries with regard to arbitration.

184. It should be remembered that so far co-operation between arbitration centres at the international level has been mainly bilateral. Examples of this type of co-operation are the 15 agreements concluded by the Japan Commercial Arbitration Association, the numerous agreements concluded by the Polish Chamber of Foreign Trade,²⁴³ those of the American Arbitration

²⁴¹ "Co-operation on a regional scale—the Bangkok experiment", Report No. 4 to the International Arbitration Congress, *Co-operation Among Arbitration Organizations*, pp. 258-259.

²⁴² "Coopération entre organismes d'arbitrage de pays ayant des systèmes économiques ou un degré de développement différent", Third International Arbitration Congress, in *Revue de l'arbitrage*, loc. cit.

²⁴³ A detailed account of these documents is given in the article by Z. L. Nanowski entitled "Arbitration agreements concluded by the Polish Chamber of Foreign Trade" (in Polish), in *Prawo w handlu zagranicznym (Law in Foreign Trade)*, 1965, vol. 8, pp. 40-49.

²⁴⁰ "Principes directeurs des règlements d'arbitrage applicable aux affaires commerciales internationales", in *Revue de l'arbitrage*, No. 4 (special issue), 1969.

Association²⁴⁴ and so on. Multilateral co-operation is not developing at the same pace. One example of such co-operation at the regional level is the co-operation between the foreign trade arbitration courts of the member countries of CMEA. Means of establishing co-operation at the world-wide level are being considered. This idea has been gaining momentum in recent years and, as has been seen, the Special Rapporteur considered it useful to inform UNCITRAL on that point.

It has been suggested that a non-governmental International Organization of Commercial Arbitration (IOCA) should be established, because international commercial arbitration will become increasingly important for all arbitration institutions. It has been pointed out that "mutual acquaintance should not be limited to the familiarity with legal provisions and judicial practice, but should pertain also to the realities of activity and, last but not least, to the operators".²⁴⁵ Generally speaking, it is felt that lack of familiarity with the real state of affairs in a given country leads to exaggeration of differences and of the significance to be attributed to differences of secondary importance. Furthermore, mutual acquaintance of people operating in the field of international commercial arbitration is indispensable for the elimination of the appearance or perpetuation of the erroneous or even tendentious information which is sometimes encountered. Experience has shown that the creation of the atmosphere of mutual trust essential to the development of international commercial arbitration depends to a large extent on close and direct contacts. Experience has also shown that mutual acquaintance does not necessarily imply institutionalization in the form of special agreements, although such institutionalization can contribute to the frequency and durability of contacts.

As Professor Jakubowski, the distinguished representative of Poland on UNCITRAL has said, "What we mean is the co-operation of arbitration organizations on a universal scale. Hitherto the only form of this kind of co-operation has been arbitration congresses. They are of great importance because they offer an opportunity for personal acquaintance, for the discussion of certain problems and for the adoption of certain recommendations. But this is a rather loose and occasional form of co-operation. It is necessary meanwhile to transform this co-operation into regular and organized co-operation. I am of the opinion that it would be desirable to set up an International Organization of Commercial Arbitration—IOCA. It could be a non-governmental organization composed of national arbitration organizations and affiliated to the United Nations."²⁴⁶ The structure of IOCA "should be acceptable to arbitration organizations of countries with different socio-economic systems and different levels of economic development". The tasks of IOCA would include the provision of a permanent framework for co-operation between arbitration organizations, the establishment of a documentation and information

centre in the field of international commercial arbitration,²⁴⁷ the publication of an international journal,²⁴⁸ the preparation of draft laws on international commercial arbitration for submission to UNCITRAL, the organization of congresses and symposia and the standardization of the rules of procedure of permanent arbitration centres. However, IOCA would not have any executive powers with regard to its member organizations or in any way impede bilateral or regional multilateral co-operation.

Similarly, Mr. N. Krishnamurthi stated at the Venice Congress in 1969 "We would like to propose that we lay down the guidelines for the establishment of an agency which would strive for the widest possible representation from the developed and developing countries and the planned economies. The paramount objective should be to evolve principles which would be universally acceptable by harmonizing the basic principles under the various legal and economic systems, standardizing commercial practices and where necessary, by innovating new procedures. Such a body would be able in course of time to bring about desirable solutions to many of the problems of international arbitration. This is a consummation to be devoutly wished for. The task is not easy, but nevertheless the attempt has to be made."²⁴⁹

The Special Rapporteur considers that UNCITRAL cannot disregard all these facts and all the opinions expressed and that it would be in the general interest for UNCITRAL to encourage such steps, to agree—if a suitable proposal is submitted to it by a sufficiently representative number of arbitration organizations—to sponsor the establishment of a world-wide organization for co-operation in the field of arbitration of the type envisaged, and to declare itself ready to co-operate with that organization on terms to be laid down on an agreed basis.

185. Arbitration is often regarded as "a substitute for a true international commercial jurisdiction, which flourishes in the shade and dies in the sun, which is always, or almost always, ahead of the law or on the fringe of the law, which defies analysis and is somewhat mysterious". These fine words may contain a measure of truth. There has certainly been no basic change in the situation. We believe, however, that the psychological battle in the realm of international commercial relationships has now virtually ended with a victory for arbitration, and that the "substitute" for a true jurisdiction has won a permanent, and not merely temporary, place among the rules of international trade. "Arbitration seeks to settle the dispute, that is to adjudicate between the parties."

²⁴⁷ See also in this connexion the offer made by Donald Straus, President of AAA, concerning the organization of a bibliographical centre which could be extended to libraries throughout the world.

²⁴⁸ In this connexion, see also Pieter Sanders, who considers that the establishment of a world arbitration journal would lead to contacts which could subsequently be developed through a world centre of contact (*Revue de l'arbitrage*, No. 4 (1969), p. 313).

²⁴⁹ N. Krishnamurthi, "Co-operation on a regional scale—the Bangkok experiment", Report No. 4 to the Third International Arbitration Congress, *Co-operation among arbitration organizations*, p. 258.

²⁴⁴ See Donald B. Straus, *op. cit.*, pp. 161-162.

²⁴⁵ Jerzy Jakubowski, "Promotion of co-operation in the domain of international commercial arbitration practice", report No. 10 to the Third International Arbitration Congress, *Co-operation among Arbitration Organizations*, p. 344.

²⁴⁶ *Ibid.*, p. 348.

The businessmen who have regarded arbitration as "a substitute for a true international commercial jurisdiction" have perhaps sought to strengthen it, but it has been rightly observed that "although their efforts have been prompted by certain mistrust of the legislative and the judicial authorities of States, the latter have not sought to check this development, and have even facilitated it in many ways, either through liberal judicial practice, which endows the concept of international public policy with a new and positive content, or by the adoption of international conventions which definitely favour international commercial arbitration."²⁵⁰

Without calling in question the contractual origin of arbitration, it has been stressed that arbitration is evolving towards a rapprochement between jurisdiction and jurisdictional machinery, so that it can now play "the part of a real international jurisdiction, which is to adjudicate."²⁵¹

It should also be noted that the "hidden part of the iceberg", to which arbitration has often been com-

pared, has begun to emerge from the shade into the light without further hindrance. Many publications provide information about arbitral practice, thus diffusing information about the rules of international trade and the related difficulties. In this way arbitration can play a useful part, by contributing to the unification and harmonization of the rules of international trade.

In view of UNCITRAL's responsibilities with regard to the unification and harmonization of the rules of international trade law, it is directly concerned with obtaining a thorough knowledge of, and disseminating, the information provided by the "observation post" constituted by international commercial arbitration.

That being so, the Special Rapporteur believes—and this is his last proposal—that it would be useful for the United Nations to publish a compilation of the arbitral awards of the greatest significance for international trade (provided, of course, that the parties are not opposed to their publication). If sufficient funds cannot be found to publish a special periodical on arbitration, which would form a "world centre of contact" in that sphere, it might be possible to devote part of the UNCITRAL *Register of Texts* to arbitral practice in the field of international trade.

²⁵⁰ Philippe Fouchard, *op. cit.*, p. 544.

²⁵¹ *Ibid.*

IV. INTERNATIONAL LEGISLATION ON SHIPPING

Report of the Working Group on International Legislation on Shipping on the work of its third session, held in Geneva from 31 January to 11 February 1972 (A/CN.9/63* and Add.1**)

CONTENTS

	Paragraphs		Paragraphs	Page
INTRODUCTION	1-10	C. Applicability of the Hague Rules with respect to the carrier's responsibility during loading and unloading: possible clarification	22-27	267
I. THE PERIOD OF CARRIER'S RESPONSIBILITY (BEFORE AND DURING LOADING; DURING AND AFTER DISCHARGE)	11-21	1. Ambiguity under the Hague Rules	22-25	267
Report of the Drafting Party: Period of Responsibility	14	2. Possible clarification with respect to loading and discharge	26-27	268
Consideration of the report of the Drafting Party	15-21	D. Responsibility of the carrier prior to loading and subsequent to discharge	28-41	268
II. RESPONSIBILITY FOR DECK CARGOES AND LIVE ANIMALS	22-34	1. Introduction	28-29	268
A. Deck cargoes	23-29	2. Comparison with other transport conventions and modern national legislation	30-41	269
Report of the Drafting Party: Deck Cargo	25	<i>Part two: responsibility for deck cargoes and live animals</i>	42-74	270
Consideration of the report of the Drafting Party	26-29	A. Introduction	42-44	270
B. Live animals	30-34	B. Deck cargo	45-66	271
III. CLAUSES OF BILLS OF LADING CONFINING JURISDICTION OVER CLAIMS TO A SELECTED FORUM	35-57	1. Analysis of relevant laws and practices	45-51	271
Choice of forum clauses	35	(a) Practices	45-47	271
Report of the Drafting Party: Jurisdiction Clauses, Choice of Forum	39	(b) The international Convention (Hague Rules)	48-51	271
Consideration of the report of the Drafting Party	40-49	(i) The meaning of "on deck" carriage	49	271
Arbitration clauses	50-57	(ii) Conditions for excluding deck cargo from the Rules: the validity of non-responsibility clauses	50-51	272
IV. APPROACHES TO BASIC POLICY DECISIONS CONCERNING ALLOCATION OF RISKS BETWEEN THE CARGO AND THE CARRIER	58-71	2. Suggested alternative solutions ...	52-66	272
FUTURE WORK	72-76	(a) Inclusion of all deck cargo within the scope of the Rules	53-60	272
		(b) Amendment of the Hague Rules to include only containers carried on deck	61-64	273
		(c) Amendment to clarify what constitutes "on deck" cargo excluded from the Rules ...	65-66	274
		C. Responsibility for live animals	67-74	274
		1. Introduction	67	274
		2. Risks in the carriage of live animals	68-70	274
		3. Alternative solutions	71-74	275

ANNEX

	Paragraphs	Page
<i>Responsibility of ocean carriers for cargo—bills of lading: report of the Secretary-General</i>		
INTRODUCTION	1-6	263
<i>Part one: the period of carrier's responsibility (before and during loading; during and after discharge)</i>	7-41	265
A. Problems and issues	7-9	265
B. The factual setting: the practical operation of ports	10-21	265

* 29 February 1972.

** 17 March 1972.

	Paragraphs	Page		Paragraphs	Page
<i>Part three: clauses of bills of lading confining jurisdiction over claims to a selected forum</i>	75-149	275	<i>Part four: approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier</i> ..	150-269	287
A. The setting	75-85	275	A. Introduction	150-151	287
1. Decision to examine choice of forum clauses	75	275	B. Varying approaches to carrier responsibility employed in the Hague Rules	152-177	287
2. Examples of choice of forum clauses	76-79	275	1. Carrier not liable even if at fault	153-156	287
3. Interests of the parties	80-85	276	2. Carrier liable if at fault	157-162	288
(a) The carrier	80-81	276	3. Carrier liable for fault of certain employees only: fire	163-166	289
(b) The cargo owner	82-85	276	4. Burden of proof	167-177	289
B. Existing legal rules with respect to choice of forum clauses	86-96	277	C. Policy considerations relevant in a re-examination of the Rules	178-214	291
C. Possible alternatives	97-126	279	1. Promoting a desirable standard of care	179-189	291
1. No new provision in the Convention	99-101	279	2. The relationship between allocation of risks and the cost of insurance	190-204	292
2. Provision declaring all choice of forum clauses to be invalid	102-104	280	3. The costs of administering claims: "friction"	205-209	294
3. Provision setting out general criteria for effectiveness of choice of forum clause	105-107	280	4. Effects of increased carrier liability	210-214	295
4. Provision specifying several alternative places before which a claim may be brought	108-122	280	D. Bases of liability and burden of proof under international conventions on carriage of cargo by air, by rail and by road	215-230	296
5. Requirement that specified limitations on choices, to be effective, must be set forth in the contract of carriage	123-126	283	1. International air transport of cargo (The Warsaw Convention)	216-221	296
D. Arbitration clauses	127-149	284	2. International rail carriage of cargo (The CIM Convention)	222-226	296
1. Present legal rules with respect to the choice of the place for arbitration in the contract of carriage ..	128-129	284	3. International motor carriage of cargo (The CMR Convention) ..	227-230	298
2. Possible alternatives	130-149	284	E. Alternative approaches to implement the relevant policy considerations ..	231-269	298
(a) No change in the existing legal rules	130	284	1. Strict liability	232-235	298
(b) Provision declaring arbitration clauses to be ineffective	131-132	284	2. Simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo	236-239	299
(c) Provision specifying alternative places where arbitration may be brought	133-139	285	3. Modification of specific substantive provisions of the Hague Rules ..	240-255	300
(d) Provision imposing no restriction on the power of a body or person designated in the arbitration clause to select the place for arbitration	140-141	285	4. Modification and simplification of the Hague Rules on burden of proof	256-269	302
(e) Provision requiring application of the rules of the Convention	142-149	286	Appendix. Questionnaire on certain matters regarding the responsibility of carriers for loss or damage to cargo in the context of bills of lading		304

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 was

enlarged by the Commission at its fourth session and now consists of the following 21 members of the Commission:¹ Argentina, Australia, Belgium, Brazil,

¹ The Working Group was enlarged from its original membership of seven.

Chile, Egypt, France, Ghana, Hungary, India, Japan, Nigeria, Norway, Poland, Singapore, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.

2. The Working Group at its second session (22 to 26 March 1971) made several recommendations concerning topics and methods of work, including a recommendation that the subject of "bills of lading" should be considered by the Commission.² These recommendations were considered and approved by the Commission in a resolution at its fourth session.³

3. In accordance with paragraph 3 of that resolution, the Working Group on International Legislation on Shipping held a meeting on 6 April 1971, during the fourth session of the Commission. At this meeting the Working Group unanimously adopted a decision setting forth specific steps to carry forward its work.⁴

4. The Working Group held its third session in Geneva from 31 January to 11 February 1972 and considered the subjects assigned to it.

5. Nineteen members of the Working Group were represented at the session.⁵ The session was also attended by observers from Iran and Mexico and the following intergovernmental and international non-governmental organizations: United Nations Conference on Trade and Development, Economic Commission for Europe, European Insurance Committee, Inter-Governmental Maritime Consultative Organization, International Institute for the Unification of Private Law (UNIDROIT), Baltic and International Maritime Conference, International Chamber of Commerce, International Chamber of Shipping, International Union of Marine Insurance.

6. The Chairman of the Working Group was Mr. Nagendra Singh (India). The Chairman and a Vice-Chairman, Mr. Gervasio Colombres (Argentina), had been elected at the meeting of the Working Group on 6 April 1971 for a term to continue through the third session of the Working Group. The Vice-Chairman was unable to attend the session. The Working Group, by acclamation, elected the following officers:

Second Vice-Chairman: Mr. Stanislaw Suchorzewski (Poland)

Rapporteur: Mr. Richard St. John (Australia).

7. The documents placed before the Working Group were:

² Working Group on International Legislation on Shipping, report on the work of its second session, 22-26 March 1971 (A/CN.9/55); UNCITRAL Yearbook, volume II: 1971, part two, III.

³ Report of the United Nations Commission on International Trade Law on the work of its fourth session (1971) (hereinafter referred to as UNCITRAL report on the fourth session (1971)), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 18* (A/8417), para. 19; *ibid.*, part one, II, A.

⁴ UNCITRAL, Report on fourth session (1971), paras. 22-23; *ibid.*

⁵ In accordance with paragraph 2 of the resolution adopted at the fourth session of the Commission, Mr. Krzysztof Dabrowski (Poland), Chairman of the UNCTAD Working Group on International Shipping Legislation, was invited to the session but was unable to attend.

(a) Provisional agenda and annotations (A/CN.9/WG.III/WP.5);

(b) Report by the Secretary-General, entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/WG.III/WP.4 (vols. I, II and III), hereinafter cited as report of the Secretary-General);

(c) Replies to the questionnaire on bills of lading and studies submitted by Governments for consideration by the Working Group (A/CN.9/WG.III/WP.4/Add.1 (vols. I and II));

(d) Report by the UNCTAD secretariat; bills of lading (TD/B/C.4/ISL/6);

(e) Report of the UNCTAD Working Group on International Shipping Legislation on its third session held at the Palais des Nations, Geneva, from 5 to 18 January 1972 (TD/B/C.4/ISL/12).

8. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of the Rapporteur
3. Adoption of the agenda
4. Consideration of the substantive items selected by the Working Group at its meeting on 6 April 1971
5. Future work
6. Date of the fourth session of the Working Group
7. Adoption of the report

9. The Working Group decided to use the report of the Secretary-General on the "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/WG.III/WP.4) as its working document. The report of the Secretary-General is annexed to this report in an addendum. In response to the Working Group's decision concerning the programme of work (para. 3, *supra*), the report of the Secretary-General examined the following subjects:

- I. The period of carrier's responsibility (before and during loading; during and after discharge) [part one of the report of the Secretary-General]
- II. Responsibility for deck cargoes and live animals [part two of the report of the Secretary-General]
- III. Clauses of bills of lading confining jurisdiction over claims to a selected forum [part three of the report of the Secretary-General]
- IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier [part four of the report of the Secretary-General]

10. The Working Group considered the above subjects in the order in which they were presented in the report of the Secretary-General; this report will also consider these subjects in that order.

I. The period of carrier's responsibility (before and during loading; during and after discharge)

11. The Working Group considered the question of the period of the carrier's responsibility on the basis of part one (paras. 7-41) of the Secretary-General's report. The report noted that the scope of the Hague

Rules⁶ determined the area of protection afforded shippers against clauses in bills of lading relieving carriers of some or all of the responsibility for loss or damage to cargo. It was pointed out that under article I (e) of the Rules the period of applicability was defined as extending from the time goods were "loaded on" until they were "discharged from" the ship, and that under article VII the Rules did not apply to the loss or damage of goods "prior to the loading on and subsequent to the discharge from the ship . . .".

12. The Secretary-General's report analysed two problems concerning the operation of the provisions of the Hague Rules cited above:⁷ (1) doubt as to whether the Rules apply to loss or damage occurring during loading and unloading operations; and (2) the fact that the Rules do not cover loss or damage occurring prior to loading or subsequent discharge even while the goods are in the charge or control of the carrier or its agents. With respect to the first of these problems, the report (para. 26) suggested a draft amendment designed to clarify the application of the Hague Rules to loading and unloading operations. With respect to the second problem, the report (paras. 37 and 39) set forth alternative amendments designed to extend the scope of the Hague Rules to periods, before loading and after discharge, while the goods were in the possession of or in the charge of the carrier.

13. In plenary sessions of the Working Group, general support was expressed for the proposal that the period of application of the Hague Rules should be extended beyond that specified in the existing articles I (e) and VII. It was generally agreed that the Hague Rules should be applied with respect to the periods before loading and after discharge during which cargo is in the custody or charge of the carrier or his agents. However, it was thought that the period of responsibility under the Hague Rules should not begin prior to the carrier's custody at the port of loading and should not continue beyond the port of discharge. The Working Group requested a drafting party to develop a draft text reflecting the consensus that had been reached, and it was generally agreed that the text proposed in paragraphs 37 and 39 of the Secretary-General's report could serve as a basis for the drafting party's work.

14. The drafting party decided on a revision of article I (e) and related provisions in article III (2) of the Hague Rules. These draft provisions, and comments concerning corresponding amendments that might be needed if the revised article I (e) is adopted, were

set forth in a report which was submitted by the drafting party.⁸ That report, with minor amendments made by the Working Group,⁹ is as follows:

Report of the Drafting Party: Period of Responsibility

1. Drafting Party No. 1 has considered textual revision of the 1924 Brussels Convention to reflect the views on policy expressed in the discussion of the Working Group with respect to the period of carrier's responsibility. The Drafting Party recommends the following definition of the period of responsibility:

[Revision of article I (e) "Carriage of goods"]¹⁰

- (i) "Carriage of goods" covers the period during which the goods are in the charge of the carrier at the port of loading, during the carriage, and at the port of discharge.
- (ii) For the purpose of paragraph (i), the carrier shall be deemed to be in charge of the goods from the time the carrier has taken over the goods until the time the carrier has delivered the goods:
 - (a) by handing over the goods to the consignee; or
 - (b) in cases when the consignee does not receive the goods, by placing them at the disposal of the consignee in accordance with the contract or with law or usage applicable at the port of discharge; or
 - (c) by handing over the goods to an authority or other third party to whom, pursuant to law or regulations applicable at the port of discharge, the goods must be handed over.
- (iii) In the provisions of paragraphs (i) and (ii), reference to the carrier or to the consignee shall mean, in addition to the carrier or the consignee, the servants, the agents or other persons acting pursuant to the instructions, respectively, of the carrier or the consignee.

2. The language of article III (2) should be conformed to the revision of article I (e). The Drafting Party recommends the following revision. (The opening phrase, which now appears in the Convention, is put in square brackets to note that this reference to article IV may have to be reconsidered after the Working Group has taken action on the rules on liability in article IV.)

⁶ International Convention for the Unification of Certain Rules relating to Bills of Lading (also known as the Brussels Convention of 1924), League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764. The substantive provisions of this Convention are often referred to as the Hague Rules.

⁷ As was noted in paragraph 7 of the report, these problems and the other problems taken up by the Working Group at this session were raised in the documentation and discussions at meetings of the UNCTAD Working Group on International Shipping Legislation (TD/B/C.4/86) and the UNCITRAL Working Group on International Legislation on Shipping (A/CN.9/55; UNCITRAL Yearbook, vol. II: 1971, part two, III). They were also raised in replies to questionnaires and studies transmitted to the Secretary-General prior to and during the preparation of the Secretary-General's report.

⁸ A/CN.9/WG.III(III)/CRP.14.

⁹ The amendments made by the Working Group are the following: (a) in paragraph (ii) (b) of the revised article I (e), brackets around the words "or usage" were removed by the Working Group; (b) in paragraph (iii), the word "the" was added immediately before the word "agents", and the word "or" was substituted for the word "and" immediately after the word "agents". The last amendment was made in order to make it clear that the words "acting pursuant to the instructions" referred only to "other persons".

¹⁰ The brackets around this and following headings are intended to indicate that no decision has as yet been taken as to what form the new rules shall take.

[Revision of article III (2)]

[Subject to the provisions of article IV] the carrier shall properly and carefully take over, load, handle, stow, carry, keep, care for, discharge and hand over the goods in his charge.

3. It is noted that certain other provisions of the 1924 Brussels Convention may call for reconsideration because of the decision with respect to the period of carrier's responsibility reflected in paragraph 1. Thus, consideration should be given to the revision or possible deletion of article VII.¹¹

4. Other provisions which may need attention in the light of the recommendation made in paragraph 1 above, include article III (6) and article IV (2). It is recommended that the question of such conforming amendments be considered in connexion with the Working Group's substantive review of these and related provisions.

5. One representative expressly reserved his position regarding subparagraph (ii) (c) of article I (e) as modified.

Consideration of the report of the Drafting Party

15. The Working Group reviewed carefully this report of the Drafting Party, and took the following decisions:

(a) To accept the definition of the period of responsibility as set forth in relation to article I (e) above:

(b) To accept the revision of article III (2) of the Hague Rules, as set out in paragraph 2 of the Drafting Party's report, in order to conform that article to the revision of article I (e);

(c) To delete article VII of the Hague Rules on the ground that this article was inconsistent with the above revision (article I (e)) and that, in view of the revision of article I (e), no further provision was necessary;

(d) To accept paragraph 4 of the Drafting Party's report, which suggests that other provisions (including article III (6) and IV (2)) may need attention in light of the revision of article I (e).

16. Two representatives expressly reserved their positions regarding subparagraph (ii) (c) of the revised article I (e).

17. Some representatives expressed reservations concerning the deletion of article VII.

18. It was proposed, with the support of a number of representatives, that the following new article be added to the Hague Rules:

"Subject to the provisions of article V there shall be no liability on the carrier for loss or damage to goods at the port of loading, during the carriage of goods or at the port of discharge except in accordance with these Rules."

The Working Group decided that consideration of this proposal should be deferred.

19. Some representatives, while noting that the revisions of articles I (e) and III (2) constituted improvements over the present Hague Rules, indicated that these revisions could be further improved. Some of these delegations suggested that the structure of the amended article I (e) was confusing in that the distinction between (i) private warehouses or other private intermediaries and (ii) public port authorities or customs warehouses was not made sufficiently clear.

20. One representative noted that the proposed revision was incomplete since it left to one side the régime of the responsibility of the stevedore-warehouseman.¹² This representative referred to his country's national law which has unified the responsibility of stevedore-warehousemen and carriers and makes the former exclusively liable towards the person (carrier or shipper) who has requested his services. This representative also observed that this law had regulated satisfactorily the problems relating to loss or damage to goods while they are under the care of the stevedore-warehouseman. In States where the responsibilities of stevedore-warehousemen and of carriers are not unified, these difficulties will persist; however, he concluded that pending such unification the new rules on the period of responsibility of the carrier in the draft proposal for revised articles I (e) and III (2) would constitute a helpful improvement in the Hague Rules.

21. Some representatives considered that in the opening sentence of paragraph 1 (ii) of the Drafting Party's report the words "at the port of loading" should be added after the words "taken over the goods", and the words "at the port of discharge" should be added following the words "has delivered the goods". Several representatives proposed that the word "usage" should be deleted from paragraph 1 (ii) (b) of the Drafting Party's report. One representative questioned whether the provisions in paragraph (ii) of article I (e), as revised, were sufficiently broad to cover a case in which one carrier discharged goods, in the course of transit, when the goods were subsequently reloaded onto another ship. Another representative suggested that a shorter alternative solution to the problem of article I (e) would be to alter article VII to make it specifically prohibit clauses in bills of lading which exempted carriers from liability before loading and after discharge. On the other hand, another representative observed that bill of lading clauses that were inconsistent with the Rules would be invalid under article III (8), which presumably would be retained in any revision of the Convention.

II. Responsibility for deck cargoes and live animals

22. The Working Group gave consideration to problems presented by the fact that the definition of "Goods" in article I (c) of the Hague Rules excludes "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so

¹¹ As will be noted in paragraph 15 (c) below, the Working Group considered this matter and decided to delete article VII, subject to reservations by some representatives.

¹² "Manutentionnaire" in the French text.

carried". Separate consideration was given to the exclusion of (a) deck cargo and (b) live animals.

A. DECK CARGOES

23. The report of the Secretary-General discussed three problems that have arisen as a result of the exclusion of deck cargoes:¹³

(1) Carriers might escape liability for losses or damage to deck cargoes resulting from causes wholly unrelated to any special risks that might exist in the carriage of such cargoes on deck;

(2) Freight containers, which could be carried as safely on deck as below deck, were not covered by the Rules when they were stated to be carried on deck; and

(3) It was not clear whether cargoes stowed above the main deck but within certain types of protective enclosures were "deck cargo" for purposes of the Hague Rules' exclusion.

The report suggested amendments addressed to these problems.¹⁴ The Working Group took the discussion and draft amendments contained in the report as the basis for its discussion of "deck cargoes".

24. In plenary sessions of the Working Group, widespread support was expressed for removing the exclusion of deck cargo from the definition of "goods" in article I (c), so that the provisions of the Hague Rules should apply to cargo carried on deck. Some representatives expressed the view that if this action were taken a provision should be added to the Hague Rules relieving the carrier of liability for loss or damage resulting from the special risks inherent in deck carriage. Other representatives thought that there was no need for a special provision of this kind. In their view a general standard of carrier's responsibility based upon the principle of fault could apply to deck cargo as well as to other cargo. A carrier would only be responsible for loss or damage to deck cargo if he failed to take the protective measures reasonably required in relation to such cargo.

25. Following discussions by the Working Group, this subject was referred to the Drafting Party. The Drafting Party agreed on an amendment to article I (c) and made a number of other recommendations and observations which were included in its report to the Working Group.¹⁵ This report, with minor amendments made by the Working Group,¹⁶ is as follows:

Report of the Drafting Party: Deck Cargo

1. Drafting Party No. 1 has considered textual revision of the 1924 Brussels Convention to reflect the views on policy expressed in the discussion of

¹³ The report of the Secretary-General discussed this subject at paragraphs 42 to 66.

¹⁴ The suggested draft amendments are found in paragraphs 58, 60, 63 and 66 of the report of the Secretary-General.

¹⁵ A/CN.9/WG.III(III)/CRP.19.

¹⁶ The amendments made by the Working Group are the following: (a) the language of paragraph 3 was revised on the ground that the original wording was ambiguous; and (b) in paragraph 4 (a) the words "with usage", which had originally followed immediately after the word "shipper", were deleted, and the words "and possibly with usage" were added at the end of the subparagraph.

the Working Group with respect to the exclusion of deck cargoes from the definition of "Goods" contained in article I (c). The Drafting Party recommends the following definition of "Goods":

[Revision of article I (c) "Goods"]

"Goods" includes goods, wares, merchandise and articles of every kind whatsoever [except live animals].

2. The Drafting Party further recommends that the following provision be placed before the Working Group:

[Possible addition to article IV]

[In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention.]¹⁷

It was felt by the Drafting Party that the question of inclusion of this provision should be decided in connexion with the consideration of rules of liability in article IV of the Convention. In considering the provision quoted above, the Working Group should take note of the following suggestions which were made by various members of the Drafting Party:

(a) That the words "incident to" be deleted from the text;

(b) That the phrase "which by the contract of carriage is stated as being . . . and is so carried" be deleted, so that the clause would read as follows: "In respect of cargo carried on deck", etc.;

(c) That the provision be modelled upon article 17, paragraph 4, of the Convention on the Contract for the International Carriage of Goods by Road (CMR) done at Geneva on 19 May 1956. This Convention states in part:

" . . . The carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

"(a) Use of open unsheeted vehicles, when their use has been expressly agreed and specified in the consignment note; . . ."

3. The Drafting Party agreed that it was not necessary to define the term "deck cargo", as had been suggested in paragraph 66 of the Secretary-General's report.

4. The Drafting Party considered that further provisions on deck cargo were needed and agreed that such provisions should reflect the following principles:¹⁸

¹⁷ As noted in paragraph 28 below, the Working Group did not reach agreement on this provision, and considered that it should be taken up at a future session of the Working Group.

¹⁸ As noted in paragraph 29 below, some representatives expressed reservations about this paragraph.

(a) The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, or with statutory requirements, and possibly with usage.

(b) Any agreement between the carrier and the shipper to the effect that the goods can or may be carried on deck must be reflected in a statement in the bill of lading.

(c) If the bill of lading does not contain the statement referred to in paragraph (b) above, it shall be presumed that the carrier and shipper have not entered into such an agreement, but as against the shipper, the carrier shall be entitled to prove and invoke the true agreement.

The Drafting Party also agreed that the following principles should be given further consideration:

(d) If an agreement with the shipper that cargo shall be carried on deck is not reflected in the bill of lading, then the carrier shall not be entitled to invoke such agreement against a consignee who has acquired the bill of lading in good faith.

(e) If goods are carried on deck in breach of the principles referred to in paragraph (a) above, then the carrier shall be liable for all losses direct and indirect of on-deck storage.

Members of the Drafting Party expressed views both in favour and against the principles referred to in paragraphs (d) and (e) above. The Drafting Party recommended that these questions be given further consideration in order that a decision might be taken at the next session of the Working Group.

Consideration of the report of the Drafting Party

26. The Working Group reviewed the report of the Drafting Party, and accepted the revision of article I (c) of the Hague Rules as set out above.

27. The Working Group took note of paragraphs 2-4 of the Drafting Party's report.

28. Views were expressed both for and against the draft provision presented in brackets in paragraph 2 of the report under the heading "possible addition to article IV". This provision would have the effect of relieving the carrier from liability for loss or damage resulting from the special risks associated with on-deck carriage. Some representatives objected to the future consideration of this provision on the ground that deck cargo should be included within the Hague Rules on the same footing as all other cargo, and that the question should not be reopened. On the other hand, other representatives felt that a provision such as the "possible addition to article IV" should be included in the Hague Rules, and that its inclusion should be considered at a future session of the Working Group. Some representatives considered that this effect would in any case follow from the general rules of liability, provided that these rules were based on fault; these representatives concurred with the view expressed by the Drafting Party that this proposal should be considered in connexion with the rules of liability in article IV.

29. Some representatives stated that the principles set out in paragraph 4 of the Drafting Party's report

would be relevant only if a provision containing special rules regarding the carrier's responsibility for deck cargo were subsequently added to the Hague Rules. On the other hand, one representative noted that these provisions are not related to the issue of liability for deck cargo but rather to the requirement that the carrier insert in the bill of lading a statement that the goods are or may be carried on deck in accordance with an agreement with the shipper. The legal effect of the failure of the carrier to insert such a statement in the bill of lading would be that such carriage of goods on deck would constitute a breach of contract.¹⁹

B. LIVE ANIMALS

30. As was noted above, the Working Group also considered the problems related to the exclusion of "live animals" from the definition of "goods" in article I (c) of the Hague Rules. The Secretary-General's report (paras. 64-74) pointed out that as a result of this exclusion the Hague Rules give no protection for loss or damage to live animals, and presented alternative approaches to resolving this problem.

31. Several representatives favoured the inclusion of live animals within the scope of the Hague Rules, but also noted that it would be appropriate to include a provision relieving carriers of liability for loss or damage resulting from the special risks involved in the carriage of animals. Two of these representatives proposed provisions which would take account of those special risks, and which are set out below:

(a) "Live animals, whether carried on deck or below deck, shall be considered as 'goods' within the meaning of this article, if it is proved that damage or loss resulted exclusively from unseaworthiness of the ship or from careless action by the carrier."²⁰

(b) (To be added to article I (c))—"However, with respect to the carriage of live animals, all clauses relating to liability and compensation arising out of the risks inherent in such carriage shall be permitted."²¹

32. Some other representatives who favoured the inclusion of live animals within the scope of the Hague Rules felt, however, that the provisions of article IV

¹⁹ The following proposal designed to achieve such objective was submitted by one representative:

"1. The carrier shall be entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper, with usage or with statutory requirements.

"2. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier shall insert in the bill of lading a statement to that effect. In the absence of such a statement the carrier shall have the burden of proving that an agreement for carriage on deck has been entered into; however, the carrier shall not be entitled to invoke such an agreement against a third party who has acquired the bill of lading in good faith.

"3. Where the goods have been carried on deck contrary to the provisions of paragraph 1, the carrier shall be liable for loss of or damage to the goods which result solely from the carriage on deck in accordance with the provisions of [article 4, paragraph 5, as amended by the 1968 Additional Protocol]. The same shall apply when the carrier in accordance with paragraph 2 of this article is not entitled to invoke an agreement for carriage on deck."

²⁰ A/CN.9/WG.III(III)/CRP.3.

²¹ A/CN.9/WG.III(III)/CRP.4.

(2) were sufficient to protect carriers against any special risks inherent in the carriage of animals.

33. Several other representatives indicated their opposition to the inclusion of live animals within the scope of the Hague Rules. They thought that difficulties in ascertaining the cause of loss or damage to live animals would lead to dispute ("friction") between carriers and cargo owners if live animals were included. They suggested that the carriage of live animals should be regulated, if at all, in separate rules. However, they did not see the problem as an important one in practice. On the other hand, other representatives did regard the problem as important and saw no reason why shippers of live animals should be without any protection for loss, without regard to whether the loss resulted from special risks resulting from such carriage.

34. In view of the lack of agreement on the approach to be followed in dealing with live animals, the Working Group decided to defer a decision on the subject. Some representatives indicated that they would need more information in order to decide upon an appropriate approach to the problem. The observer from UNIDROIT suggested that the Commission might find it appropriate to request UNIDROIT to prepare a study on the rules which should apply to the carriage of live animals.

III. Clauses of bills of lading confining jurisdiction over claims to a selected forum

CHOICE OF FORUM CLAUSES

35. The Working Group considered part three, sections A, B and C, of the report of the Secretary-General (paras. 75-125), which look up problems presented by clauses in bills of lading providing that claims arising from the contract may only be asserted in a designated forum. The report noted that the place specified for suit in the bill of lading is often so inconvenient to cargo owners as to impede the fair presentation and adjudication of claims. The 1924 Brussels Convention (Hague Rules) contains no provision addressed to this question. The report summarized existing legal rules in the field; it indicated that those rules vary widely among different legal systems and that their impact is in doubt in many systems.

36. Five possible approaches were outlined in this part of the Secretary-General's report. The first approach was not to add any provision on the subject. The second approach called for a provision declaring all choice of forum clauses to be invalid. The third approach envisaged a provision setting out general criteria for the effectiveness of choice of forum clauses. The fourth approach, which was embodied in draft proposal A,²² called for a provision specifying several alternative places before which a claim may be brought. The fifth approach, which was embodied in draft proposal B,²³ would give effect to choice of forum clauses in the contract so long as they set forth at least the alternative places for suit specified in the statute.

²² Report of the Secretary-General, para. 113.

²³ *Ibid.*, para. 125.

37. In the discussion of the subject by the Working Group there was general support for the insertion of a provision in The Hague Rules regulating choice of forum clauses. A few representatives, however, suggested that a separate protocol containing the provision on choice of forum would be desirable because it would make it possible for States to adopt the rules on carrier responsibility contained in The Hague Rules even if they were opposed to a provision on jurisdiction. Most of the representatives who spoke favoured the approach taken in draft proposal A in the Secretary-General's report, subject to certain amendments and additions.

38. After the discussion of this subject by the Working Group, a drafting party was requested to develop a provision reflecting the consensus reached in the plenary sessions.

39. The Drafting Party decided that a provision on choice of forum clauses should be added to the Hague Rules. The draft provision was set forth in a report which was submitted to the Working Group. That report, with certain amendments made by the Working Group, is as follows:

Report of the Drafting Party: Jurisdiction Clauses, Choice of Forum

1. Drafting Party 1 considered the addition to the 1924 Brussels Convention of a provision to reflect the views on policy expressed in the discussion of the Working Group with respect to choice of forum clauses.

2. The Drafting Party agreed to base its work on the provisions in draft proposal A in paragraph 113 of the report of the Secretary-General, in accordance with the views expressed in the Working Group. It was also agreed that the proposal contained in CRP.11²⁴ should be used as the basis for style of drafting.

3. The Drafting Party recommends the following provision on choice of forum clauses:

[Proposed draft provision]

A. (1) In a legal proceeding arising out of the contract of carriage the plaintiff, at his option, may bring an action in a contracting State within whose territory is situated:

(a) The principal place of business or, in the absence thereof, the ordinary residence of the defendant; or

(b) The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

(c) The port of loading; or

(d) The port of discharge; or

(e) A place designated in the contract of carriage.

²⁴ A/CN.9/WG.III(III)/CRP.11.

(2) (a) Notwithstanding the preceding provisions of this article an action may be brought before the courts of any port in a contracting State at which the carrying vessel may have been legally arrested in accordance with the applicable law of that State. However, in such a case, at the petition of the defendant, the claimant must remove the action, at his choice, to one of the jurisdictions referred to in paragraph A for the determination of the claim, but before such removal the defendant must furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action.

(b) All questions relating to the sufficiency or otherwise of the security shall be determined by the court at the place of the arrest.

B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above. The provisions which precede do not constitute an obstacle to the jurisdiction of the contracting States for provisional or protective measures.

C. (1) Where an action has been brought before a court competent under paragraph A or where judgement has been delivered by such a court, no new action shall be started between the same parties on the same grounds unless the judgement of the court before which the first action was brought is not enforceable in the country in which the new proceedings are brought.

(2) For the purpose of this article the institution of measures with a view to obtaining enforcement of a judgement shall not be considered as the starting of a new action.

(3) For the purpose of this article the removal of an action to a different court within the same country shall not be considered the starting of a new action.

D. Notwithstanding the provisions of the preceding paragraphs, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

Notes on the proposed draft provision

4. The attention of the Working Group is drawn to the following matters:

(a) *Paragraph A (1) (e)*: Some representatives reserved their position.

(b) *Paragraph A (2)*: Consideration should be given to the relationship between this provision and the International Convention for the Unification of certain Rules relating to the arrest of sea-going ships (Brussels 1952) which also contains rules relating to jurisdiction.

(c) *Paragraph B*: The second sentence is based on article 4 of the Convention on the Jurisdiction of the Selected Forum in the case of International Sale of Goods (1958).

(d) *Paragraph C (1)*: The Drafting Party also considered the inclusion of the provision contained in article 1 (3) of the International Convention on certain rules concerning civil jurisdiction in matters of collision (Brussels, 1952).

Consideration of the report of the Drafting Party

40. The Working Group considered the above-quoted report of the Drafting Party. Many representatives stated that they assumed that the provision on choice of forum clauses that was being considered was a preliminary draft, and that this provision would be subject to review. On this assumption, the Working Group approved the report, subject to the comments which are set out below. These comments are presented in the order in which the provisions appear in the proposed draft provision.

41. *Paragraph A. General structure.* Paragraph A(1) provides a plaintiff with five possible places for bringing an action. The first four, in subparagraphs (a) to (d), are independent of any contract provision. The fifth possible place, provided by subparagraph (e), would be available if designated in the contract of carriage, but the contract may not eliminate any of the choices set forth in paragraphs (a) to (d). The provision, it will be noted, applies to any legal proceedings arising out of the contract of carriage; the "plaintiff" to which this provision applies could be either the cargo owner or the carrier.

42. One representative suggested that the word "plaintiff" in paragraph A(1) of the draft provision be bracketed to reflect his position that paragraphs (a) through (d) should be applicable only to shippers and consignees as their interests may appear.

43. Another aspect of paragraph A that led to comment was the opening provision that a plaintiff may bring an action in a contracting State "within whose territory is situated" one of the places listed in the five subparagraphs (a) to (e). Thus the action need not be brought at the "place" of business or at the "port" of loading or of discharge. Some representatives proposed a change in this approach; under one formulation the words "in a contracting State within whose territory is situated" would be replaced by the following words: "in a following place in a contracting State". It was considered by these representatives that the present formulation of the provision which referred to the territory of a State did not sufficiently specify where an action should be brought and might result in the bringing of an action in an inconvenient forum, especially with respect to large States. In opposition to this proposed change it was noted that the concept of "place" was vague, and in relation to paragraphs (c) and (d) the tribunal located in the port may not be the competent one. It was further noted that in many legal systems the problem was minimized by rules on the appropriate court for suit (*venue*), and that as a practical matter plaintiffs will bring their actions in a court where the evidence may conveniently be presented rather than in a place remote from the transaction.

44. With respect to the second line of paragraph A(1) of the proposed draft provision, a few repre-

representatives stated that the word "contracting" introduced an element which deserved careful examination. It was observed that this element might defeat the underlying purpose of the draft provision which was to give the claimant a choice of jurisdictions in which to bring suit; consideration should thus be given to its deletion.

45. With respect to paragraph A(1) (b) of the proposed draft provision, one representative indicated a preference for the deletion of the word "agency", and added that the insertion of this word could create the risk of actions being brought in places unduly remote from the place where the damage occurred. Another representative stated that clause (b) is superfluous and increases unduly the number of places available to the claimant.

46. With respect to paragraph A(1) (e) of the proposed draft provision, several representatives expressed reservations, and some expressed the view that this clause should be deleted. These representatives indicated further that they could support a provision permitting the parties by contract to add a place for suit to the choices specified in (a) to (d) only if such a choice provided by contract were available to parties interested in the cargo, and not to the carrier. It was indicated that such a distinction was made because the contract of ocean carriage was a contract of adhesion which was normally prepared by carriers; the Hague Rules should permit only forums freely chosen by the parties.

47. With respect to paragraph A(2) of the draft provision, other representatives referred to the note on this provision in paragraph 4 (b) of the Drafting Party's report on the subject and indicated that this was a provision which might give rise to difficulties for States parties to the International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships (Brussels, 1952), and that it would be better to delete it, or at any rate to place it in brackets. One representative further stated that this paragraph was unacceptable since it would result in an unjustified extension of the number of competent jurisdiction available to claimants. He observed that this paragraph covered substantive claims made on the basis of the arrest of a ship and not only the provisional and protective measures set out in the second sentence in paragraph B of the draft provision. This latter provision, it was suggested, strengthened the view that paragraph A(2) is meant to confer jurisdiction for purposes of presenting claims in places where the ship may be arrested.

48. The Chairman of the Drafting Party set out the view of the Drafting Party on the relationship of paragraph A(2) to the second sentence of paragraph B. He stated that the second sentence of paragraph B makes it clear that the proposed draft provision was not meant to confer the right of arrest of ships; this right is left to national laws. Paragraph A(2) (a) provides only that once a ship is arrested (in accordance with national law) an action may be brought under the circumstances prescribed in this paragraph, and subject to the removal and security provisions set forth therein.

49. One representative suggested that any provision on jurisdiction clauses should be based on the principle of the autonomy of the wills of the parties, and therefore such a provision should recognize as valid any forum agreed to by the parties. This provision might designate alternative competent courts in cases where the parties have not agreed to a forum in the bill of lading. On the other hand, in view of the potential difficulties in finding a balanced approach to this subject, and in view of the complexities of the procedural aspects of the problem, it was suggested by the same representative that an alternative solution might be that no provision on jurisdiction clauses be included in the Hague Rules.

ARBITRATION CLAUSES

50. The Working Group considered part three, section D, of the Secretary-General's report (paras. 127-149) which takes up arbitration clauses. The 1924 Brussels Convention (Hague Rules) contains no provision on arbitration. It was noted in the report that regulation of choice of forum clauses by a new provision in the 1924 Brussels Convention could result in a more widespread insertion by carriers of arbitration clauses in bills of lading in an attempt to control the place for presentation of claims.

51. A number of possible alternatives are suggested in the report. Alternative (a) would call for no change in the existing legal rules. Alternative (b) would call for a provision declaring arbitration clauses to be ineffective. Alternatives (c) and (d) which are embodied in draft proposals C and D²⁵ would call for a provision specifying alternative places where arbitration may be brought. Alternative (e), which is embodied in draft proposal E,²⁶ relates to the application of the rules of the 1924 Brussels Convention in arbitration proceedings.

52. In plenary sessions of the Working Group there was general support for the view that the Hague Rules should include a provision on arbitration clauses with special reference to the place where the proceedings may be held. It was also stated by most representatives that any provision on arbitration should assure that the Hague Rules would be applied in such arbitration proceedings. In this connexion many representatives supported the approach in draft proposal E of the report of the Secretary-General (para. 147), which provides: "The contract of carriage may contain a provision for arbitration only if that provision states that this Convention shall be applied in the arbitration proceedings."

53. Three draft proposals were put forward and each received support from some representatives.

54. One of these draft proposals reflected the view of several representatives that the approach to arbitration clauses should be the same as the one taken by the Working Group with respect to choice of forum clauses. (See alternative A in the report of the Secretary-General, para. 113.) This approach called for a provision which would permit the insertion of an arbi-

²⁵ Report of the Secretary-General, paras. 136, 141.

²⁶ *Ibid.*, para. 147.

tration clause in the bill of lading, but which would give the plaintiff the right to choose his arbitral forum from a limited number of places. This draft proposal²⁷ reads as follows:

1. In legal proceedings arising out of the contract of carriage, provision may be made in the contract for arbitration proceedings in accordance with an arbitration clause. These proceedings may take place, at the option of the plaintiff, in a contracting State within whose territory is situated:

(a) The principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

(b) The place where the goods were taken in charge by the carrier; or

(c) The place designated in the contract for delivery of the goods to the consignee; or

(d) The place designated in the contract of carriage [or selected by the person or body designated in the arbitration clause].

2. The arbitration clause shall state that the designated arbitrator must apply this Convention; otherwise, such clause shall be null and void.

3. After a dispute has arisen, the parties may enter into an agreement selecting the territory of any contracting State as the place of arbitration [or any person or body in a contracting State]. The parties may agree that the arbitrator shall act as an *amiable compositeur*.

55. Another draft proposal presented in two alternatives reads as follows:

*Alternative I**

Notwithstanding the provisions of the preceding article [... dealing with jurisdictional matters ...] arbitration clauses in a contract of carriage shall be allowed provided the designated arbitration shall take place within a contracting State and shall apply the [substantive] rules of this Convention.

*Alternative II***

Notwithstanding the provisions of the preceding article [... dealing with jurisdictional matters ...] arbitration clauses in a contract of carriage shall be allowed provided it has been thereby stipulated that the arbitral body or arbitrators designated in the contract:

(a) shall apply the [substantive] rules of this Convention, and

(b) shall hold the [arbitration] proceedings within a contracting State at one of the places re-

ferred to in the [said] article [...] or at the place chosen by such arbitral body or arbitrators.²⁸

56. A third proposal presented to the Working Group would confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose. This proposal states as follows:²⁹

Notwithstanding the provisions of the preceding paragraph, after the occurrence of an event giving rise to a claim the parties may agree on a jurisdiction where legal action may be commenced or submit the case to arbitration for a final decision in accordance with the rules of this Convention.

57. The Working Group was unable, within the time available at this session, fully to consider these various proposals. It was therefore decided to defer further consideration of this subject until the next meeting of the Working Group.

IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier

58. Part four of the report of the Secretary-General (paras. 150-269) responded to the request that the Secretary-General prepare a report "analysing alternative 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,³⁰ with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier". Section B of part four of the report (paras. 152-177) summarized the law on the bases of liability and the present burden of proof scheme under the Hague Rules. Section C (paras. 178-214) described and analysed certain major factors, or policy considerations, that should be weighed in formulating the rules as to carrier liability for cargo loss or damage. Section D (paras. 215-230) compared the rules on liability and burden of proof established by international conventions on carriage of cargo by air, by rail and by road. The final section of part four, section E (paras. 231-269), considered the pertinent provisions of the Hague Rules in the light of the above policy considerations and considered possible amendments to the Rules that would implement these considerations.

59. Section E of the report of the Secretary-General drew attention to three possible approaches to substantive responsibility: (1) strict liability, regardless of fault, for loss or damage of cargo while in the custody of the carrier (paras. 232-234); (2) simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo (para. 236); (3) modification of specific substantive provisions of the Hague Rules, e.g. article IV (2) (a) (paras. 240-245) and article IV (2) (b) (para. 246). Section E also analysed in detail the complexities and uncertainties that had developed in connexion with

* Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposal E (para. 147 of the report).

** Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposals D and E (paras. 141 and 147 of the report).

²⁷ A/CN.9/WG.III(III)/CRP.17.

²⁸ A/CN.9/WG.III(III)/CRP.18.

²⁹ A/CN.9/WG.III(III)/CRP.21.

³⁰ UNCITRAL, Report on fourth session (1971), para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

burden of proof under the Hague Rules and in paragraph 269 set forth a draft proposal for amendment to the Hague Rules to simplify and strengthen the Rules on this question.

60. Most representatives who spoke on the subject agreed that the liability scheme in the Hague Rules should be revised to reflect a more balanced allocation of risks between carriers and shippers. These representatives also agreed that the rules on liability and burden of proof should be simplified.

61. The Working Group focused its discussion on the three alternative approaches to substantive responsibility and on the simplified rules on burden of proof set forth in the Secretary-General's report.

62. *Responsibility not based on negligence.* The first alternative approach considered by the Working Group was to place responsibility upon the carrier for safe delivery of cargo, subject only to limited exceptions such as fault of the shipper—an approach sometimes referred to as "strict liability". It was the general view of the Working Group that the imposition of strict liability on the carrier would not provide an acceptable solution to the problem of ocean carrier liability. Several representatives stated that the adoption of such a liability principle might cause an increase in insurance premiums and thus a rise in ocean freight rates. Other representatives thought that strict liability was inappropriate in view of the special characteristics of ocean transport.

63. On the other hand, some representatives favoured an approach which would make the carrier fully responsible for the arrival of the goods in a satisfactory state unless he proves a fault of the shipper, inherent vice in the goods, or case of *force majeure* which consists in an event that is unforeseeable, external to the carrier and cannot be overcome by the carrier or his servants. Under this approach the system of exemptions would be simplified, and the responsibility would be placed on a clearer and firmer basis.

64. *Conformity with approach of other international conventions.* The second alternative approach was conformity of standards of responsibility for ocean carriers to the approach of international conventions governing other types of transport—by air (the Warsaw Convention), by rail (CIM) and by road (CMR). Some representatives stated that the liability scheme of the other transport conventions deserved the Working Group's close attention. On the other hand, caution was expressed against uncritical application of the solutions provided in those conventions, because ocean transport was different in nature and had different requirements from other modes of transport. However, harmonizing the bases of liability of the transport conventions was accepted as a desirable goal to the extent that this would be practical; in this connexion, attention was drawn to the fact that combined transport encounters practical difficulties because of the differences between the liability of ocean carriers and other types of carriers.

65. *Specific provisions on liability.* The Working Group focused most of its discussion on the exemptions from liability for fault of the agents or servants of the

carrier contained in article IV (2) (a) (navigation and management of the ship) and article IV (2) (b) (fire). Many representatives who spoke on the subject stated that the exception in article IV (2) (a) should be deleted. On the other hand some representatives expressed doubts about the necessity of the total deletion of this exception, and suggested that the exception with respect to navigation might be more readily justified than the exception with respect to management of the ship. Several representatives stated that the exception in article IV (2) (b) should be deleted. In the view of some other representatives the deletion of this exception would have the effect of placing strict liability for fire on the carrier since it might be difficult or impossible to establish that fire did not result from a lack of due care.

66. It was felt by some representatives that it was necessary to examine in more detail the effects of deleting the various exemption clauses in article IV (2) of the Hague Rules. They referred to the lack of data on the effects that a shift in the allocation of risks would have on freight and insurance.

67. *Burden of proof.* Many representatives stated that rules on burden of proof under the Hague Rules were complex and unclear, and thus interfered with the efficient and just adjustment of claims. In the view of many representatives the rule on burden of proof proposed in paragraph 269 of the Secretary-General's report formed a sound basis for discussion and should be adopted by the Working Group as a broad basis for its future considerations. They noted that under this proposal, once the shipper proved specified preliminary facts on which he had information (see paragraph 269, article IV (2) (a) (1-5)), the burden of proof would shift to the carrier as to all other matters (see paragraph 269, article IV (2) (b)). These representatives observed that only the carrier had reasonable access to information concerning events occurring during the voyage; the proposal consequently made a fair allocation of the burden of proof. A number of representatives suggested that the language in the first paragraph of the draft proposal should be cast in positive form.

68. Some representatives expressed reservations about the above approach to burden of proof. Others indicated that further consideration should be given before a decision could be taken concerning such a change in existing relationships that a simplification of the rules on burden of proof would result from the adoption of a system of full responsibility whereby the carrier would have to overcome the presumption against him.

69. Some representatives expressed the view that in considering the revision of the Hague Rules UNCITRAL should confine itself to legal questions and should not re-examine policy considerations based on economic and commercial aspects that had been taken into account by the UNCTAD Working Group on International Legislation on Shipping, since UNCTAD has a major responsibility in the economic and commercial aspects of shipping. Other representatives observed that UNCITRAL, in shaping its recommendations on the precise provisions of the revised Rules, should take fully into account the considerations reflected in the UNCTAD Working Group and any

further facts elicited in the course of UNCITRAL's examination of the subject, because this would be necessary in order to form appropriate judgements on the various questions arising when formulating particular draft texts.

70. In conclusion, most representatives were of the view that further work should proceed along the following lines:

(a) Retention of the principle of the Hague Rules that the responsibility of the carrier should be based on fault;

(b) Simplification and strengthening of the above principle by (e.g.) the removal or modification of exceptions that relieved the carrier of responsibility for negligence or fault of his employees or servants (see articles IV (2) (a) and (b));

(c) Simplification and unification of the rules on burden of proof; to this end careful consideration should be given to the proposal in paragraph 269 of the report of the Secretary-General.

71. It was noted that many representatives had reservations or doubts concerning some of the foregoing principles and that other representatives felt that further information was needed before final decisions could be taken. It was therefore agreed that the above should be considered further.

Future work

72. The Working Group noted that it had been unable to take final action on all of the subjects assigned for consideration at the present session. In view of the urgency attached to the expeditious completion of the pending work on bills of lading, most representatives expressed the view that it would be advisable to hold a special session for the completion of the topics assigned to the present session. At this special session,

priority should be given to the basic question of the carrier's responsibility. It was suggested that an appropriate time for the special session would be the autumn of 1972, and that such a session preferably should be scheduled for two weeks. It was agreed that a final decision on the holding of such a session should be taken at the fifth session of UNCITRAL.

73. The Working Group also considered what new topics should be taken up in addition to those that have been assigned for the present session. It was decided that at the next regular session the Working Group should take up the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session.³¹ It was agreed that emphasis should be given to those topics that relate particularly to the basic question of the carrier's responsibility (see para. 72, above).

74. It was further decided that the Secretary-General should be requested to prepare a report setting forth proposals, indicating possible solutions, with respect to the above topics, and to circulate this report to members of the Working Group and to observers in time for its consideration in advance of the next regular session of the Working Group.

75. To provide material needed in the preparation of the above-mentioned report, the Secretary-General was requested to invite comments and suggestions from Governments and from international and intergovernmental organizations active in the field. To the same end, members of the Working Group were invited to prepare studies and proposals and to transmit them to the Secretary-General.

76. For consideration at the next regular session, the Secretary-General was also requested to prepare a report identifying any related problem areas in the field of ocean bills of lading not specifically named in the list adopted by UNCITRAL at its fourth session.

³¹ UNCITRAL, Report on fourth session (1971), par. 19, *ibid.*

Annex

RESPONSIBILITY OF OCEAN CARRIERS FOR CARGO—BILLS OF LADING: REPORT OF THE SECRETARY-GENERAL

INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its fourth session approved a programme of work for the examination of rules and practices relating to the responsibility of ocean carriers for cargo in the context of bills of lading.¹ This programme of work was developed by the UNCITRAL Working Group on International Legislation on Shipping which was established by the Com-

mission at its second session² and by an enlarged Working Group which was established by the Commission at its fourth session.³ As will be seen, this programme was developed in the light of recommenda-

² UNCITRAL Working Group on International Legislation on Shipping, report on its second session (22-26 March 1971) (A/CN.9/55) (herein cited UNCITRAL Working Group, report on second session (1971)); UNCITRAL Yearbook, vol. II: 1971, part two, III. This report set forth recommendations on the field for inquiry and the general objectives of further work in this area.

³ The enlarged Working Group met in the course of the Commission's fourth session and developed a plan for specific steps to implement the programme of work. The Commission approved this plan. UNCITRAL, Report on the Fourth Session (1971), paras. 22 and 23; UNCITRAL Yearbook, vol. II: 1971, part one, II, A. A fuller account of the historical background appears in the above-cited reports of UNCITRAL, and of the Working Group.

¹ Report of the United Nations Commission on International Trade Law on the work of the fourth session (1971), *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8417) (herein cited UNCITRAL, report on the fourth session (1971)), chap. II, paras. 10-23; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

tions made by the UNCTAD Working Group on International Shipping Legislation.⁴

2. The programme of work included a request that the Secretary-General prepare a report on four specific topics for consideration by the UNCITRAL Working Group at its third session, which is to meet from 31 January to 11 February 1972. The present report is prepared in response to this request. (The topics are listed in para. 6, *infra*.)

3. The objective and scope of this report can best be considered against the background of the resolution unanimously adopted by UNCITRAL at its fourth session. The resolution reads, in part, as follows:⁵

"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, 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,

"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, 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) 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 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 subparagraphs (a) through (i);"

...

4. Following the adoption of the above resolution and during the fourth session of the Commission, the UNCITRAL Working Group met and unanimously adopted a decision setting forth specific steps to carry the work forward. This decision, which was reported to and approved by the Commission, included the following:⁶

"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, 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.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,

⁴ Report of the UNCTAD Working Group on International Shipping Legislation on its second session (TD/B/C.4/86), herein cited, UNCTAD Working Group, report on second session (1970).

⁵ UNCITRAL, Report on the fourth session (1971), para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A. Foot-notes are omitted.

⁶ UNCITRAL, report on the fourth session (1971), para. 22; UNCITRAL Yearbook, vol. II: 1971, part one, II A; foot-notes are omitted.

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 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;..."

5. The decision also requested the Secretary-General, to the extent necessary for the preparations of the report on the foregoing items, "to invite comments and suggestions from Governments and from international intergovernmental and non-governmental organizations active in the field". Accordingly, questionnaires were prepared and circulated to Governments and to organizations indicated in the above-quoted decision.⁷ In addition, pursuant to the above decision, members of the Working Group were invited to prepare studies and proposals and to transmit them to the Secretary-General. Numerous replies and studies have been received, and have been used in the preparation of the present report.⁸ This report also draws on the UNCTAD secretariat report on bills of lading, which was placed before the UNCTAD and UNCITRAL Working Groups.⁹

6. The present report, prepared in response to the request by the UNCITRAL Working Group, is divided into four parts and deals with the following topics.

Part one: The period of carrier's responsibility (before and during loading, during and after discharge)

Part two: Responsibility for deck cargoes and live animals

Part three: Clauses of bills of lading confining jurisdiction over claims to a selected forum

Part four: Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier.

PART ONE: THE PERIOD OF CARRIER'S RESPONSIBILITY (BEFORE AND DURING LOADING; DURING AND AFTER DISCHARGE)

A. Problems and issues

7. This part of the report is concerned with the basic question of scope of the Hague Rules embodied in the International Convention for the Unification of Certain Rules relating to Bills of Lading (the Brussels

Convention of 1924).¹⁰ This Convention was to provide shippers with a measure of protection against clauses in bills of lading which usually were drafted by ocean carriers so as to relieve themselves of much of the responsibility for cargo which the general maritime law had imposed upon them.¹¹ The scope of the Convention thus fixes the area of protection afforded to shippers.

8. The definition of the scope of the Convention also calls for careful examination from the point of view of clarity. The opportunity for dispute and litigation over the basic question of the applicability of the protective provisions of the Convention seriously impairs the effectiveness of these provisions and leads to disharmony and conflict in an area in which international uniformity is particularly important.

9. The documentation and the discussions at the meetings of the UNCTAD and UNCITRAL Working Groups, and the replies and studies which have subsequently been transmitted to the Secretary-General, raise substantial questions concerning the scope of the Hague Rules in the following important areas: (1) the responsibility of the carrier for damage to the goods while they are being loaded on the ship and unloaded (discharged) from the ship; (2) the responsibility of the carrier, prior to the loading and subsequent unloading, while the goods are in the possession, charge or control of the carrier or of wharfingers, warehousemen or other intermediaries.

B. The factual setting: the practical operation of ports

10. The provisions of the Hague Rules can be examined more clearly against the background of the complex arrangements for the handling of goods in ports before and after the carriage of goods by sea.¹²

11. The shipper, carrier and the consignee usually do not deal directly with each other, but act through intermediaries. The most important of these intermediaries are: (a) warehousemen, wharfingers, master porters and port authorities or similar entities, to whom goods may be delivered before shipment, pending loading, and to whom goods may be delivered after discharge from the ship pending delivery to the consignee or receiver, and (d) stevedores, who may load and

¹⁰ League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764. The substantive provisions of this Convention are often referred to as the Hague Rules.

¹¹ UNCTAD secretariat report on bills of lading, paras. 58-59, 63-64. See also S. Dor, *Bill of Lading Clauses and the International Convention of Brussels, 1924 (Hague Rules)*, London, 2d ed. 1960, p. 20.

¹² The description of practical operations presented in this section is necessarily somewhat generalized, because operations vary among different ports. Similarly, terms such as "shipper" and "consignee" may not be precisely accurate in all cases, but are used here to designate any person who delivers goods for shipment ("shipper"), or who takes delivery of goods at the port of destination ("consignee"). In preparing this section, the secretariat has drawn upon information contained in several published sources, including: A. W. Knauth, *The American Law of Ocean Bills of Lading*, Baltimore, 4th Ed., 1953; W. Tetley, *Marine Cargo Claims*, London, 1965; C. L. Sauerbier, *Marine Cargo Operations*, New York, 1956; UNCTAD Secretariat report on Bills of Lading. The above treaties will be cited as Knauth, Tetley and Sauerbier.

⁷ A copy of the questionnaire addressed to Governments appears in an appendix following part four of this report. A similar questionnaire, modified to omit inquiries concerning the rules of specific legal systems, was addressed to international intergovernmental and non-governmental organizations active in the field.

⁸ It is expected that additional replies and studies will be received subsequent to the preparation of this report. Copies of the replies and studies, in their original languages, will be available at the session of the Working Group.

⁹ Document TD/B/C.4/ISL/6 and Corr.1 (herein cited as UNCTAD secretariat report on bills of lading).

unload the goods as servants or agents of the carrier or of the shipper or consignee.

12. In the process of moving cargo from its point of origin until it is delivered to a consignee, at least six distinct periods can be identified:

(1) The period from inland point of origin to a port depository or warehouse that takes possession or charge of the goods.

(2) The period from the time goods are received in the port depository or warehouse until they are removed for loading.

(3) The period of loading from the time goods are removed from the port depository or warehouse for loading until they are loaded onto the ship. (These operations may be performed either by employees of a stevedore company or of the carrier.)

(4) The period, primarily of ocean carriage which extends from the time after goods are loaded until the goods are ready for unloading.

(5) The period of unloading from the time when the goods are removed from the ship until they are delivered to the port depository or warehouse. (These operations, as in (3) *supra*, may be performed either by employees of a stevedore company or of the carrier.)

(6) The period after unloading when the goods may be held in a port depository or warehouse until their delivery to the consignee or other bill of lading holder.

13. Inevitably there is an interval, often of substantial length, between the time when the shipper parts with possession of his goods and the loading of the goods on to the carrier's ship (period (2) above). There is a similar interval between the time when the goods are discharged from the ship and their delivery to the consignee (period (6) above). During these periods, the following situations may exist:

(1) The goods may be in the carrier's actual possession; that is, in possession of his servants or agents on the quayside or in a warehouse or other facility owned or operated by the carrier.

(2) The goods may be in the possession of a port depository, warehouse or other facility designated (a) by the carrier, or (b) by the consignor or his agent.¹³ Most frequently this facility is designated by the carrier. The facility may be treated under local law¹⁴ as bailee for the carrier, for the cargo owner, or for both. In many instances the facility will be operated by a public authority.

14. In the situations described above, complex questions may arise concerning (a) who is responsible for loss or damage to goods occurring during these periods; and (b) what law governs such responsibility. The situation is complicated further by the fact that the documents evidencing possession or charge (bail-

ment documents) may be issued to the order of the carrier or his agent, the cargo owner, or his representative, or the port depository or warehouse. The bailment documents usually contain provisions that seek to disclaim or limit liability differently from the Hague Rules, and the extent to which such provisions will be given legal effect may or may not be regulated by local law.

15. Frequently the carrier will receive possession of the goods in advance of the loading operation. On such receipt of the goods, the carrier will normally issue a document evidencing this fact, which may be in the form of a warehouse receipt, a dock receipt or a "received for shipment" bill of lading.

16. As goods are loaded onto the ship, an inspection and tally¹⁵ of the goods is made by tally clerks appointed by the carrier. This may be done at the quayside, as goods are lifted aboard, or on board the ship. After the tally has been taken one of the carrier's employees, usually the ship's chief officer, issues a document acknowledging to the shipper receipt of the goods on board the ship, and noting any appropriate qualifications as to condition and quantity of the goods. If the carrier has issued a "received for shipment" bill of lading, this document will then be stamped or endorsed "On Board", to evidence the fact that the listed goods have been loaded. In other situations, the first document issued by the carrier acknowledging receipt of the goods may be the mate's receipt, or an equivalent document, which is based on the tally of the goods as they are loaded. This receipt then serves as the document on which the bill of lading is based.

17. A discrepancy between the quantity or condition of the goods noted on the document issued by the depository and that recorded on the mate's receipt or bill of lading indicates that loss or damage occurred after receipt of the goods into the depository and before the inspection and tally by the carrier, which may occur at the quayside or after loading. Difficult questions arise concerning when the loss or damage occurred, who is responsible, and what law is to be applied. There would appear to be at least four different possibilities:

(1) If the loss occurred during loading, the carrier may be liable under the terms of his contract of carriage, subject to the protective provisions of the Hague Rules. (As will be seen,¹⁶ the applicability of the Hague Rules to loading is subject to doubt.);

(2) If the loss occurred prior to loading, the responsibility of the carrier is determined pursuant to the terms of the depository document, subject to the local law and regulations of the port;

(3) If the loss resulted from the faults of the depository or stevedores, the carrier may be liable under

¹³ The choice of point of receipt and delivery of goods at ports of loading and discharge is almost invariably governed by local regulations, custom or practice.

¹⁴ As used throughout this study, the term "local law" means any national legislation, case-law, by-laws or regulations, etc., other than the Hague Rules.

¹⁵ A "tally" is the physical observation and notation of the number, marks, type and apparent condition of goods being loaded on board ship. This inspection and notation forms the basis of the statement in the mate's receipt concerning the quantity and condition of goods; this statement in turn forms the basis for the statement on these matters in the bill of lading. Systems of taking tallies at some ports will vary from the general system described herein.

¹⁶ See paras. 22-25 *infra*.

local law (regardless of the terms of the depository document), as in instances where the depository or stevedoring company is owned or operated by the carrier, or acts as the carrier's agent;

(4) In the situation described in (3), the depository or stevedoring company may be liable (either in addition to or in place of the carrier) under the terms of the depository document, pursuant to the local law and regulations of the port.

18. Usually there is a considerable difference between the scope of responsibility under (a) depository documents as regulated by the local law and (b) the bill of lading as regulated by the Hague Rules. Application of the local law, instead of the Hague Rules, could be highly favourable either to the carrier or to the cargo owner, depending upon the circumstances. Therefore, it is extremely important to know as precisely as possible the point at which the Hague Rules begin to apply; however, for practical reasons indicated above, this basic fact is very difficult to ascertain when loss or damage occurs after the goods have been received into the depository but before they have been loaded onto the ship.

19. The situation during the period between the discharge of the goods from the ship and delivery to the consignee differs in some respects from that prior to loading. At the ship's side after discharge there is often no officially recognized inspection and tally made jointly by the carrier and the consignee or depository. Nor is any generally acceptable document issued which could in most cases authoritatively establish the condition of the goods at that point.¹⁷ A joint inspection and tally is usually possible in most ports only many days (sometimes even weeks) after the goods have been physically discharged from the ship. Thus, it will often be very difficult to ascertain whether loss or damage occurred during carriage, during unloading, or after unloading during the period preceding the inspection and tally.¹⁸

20. To sum up: In the course of carriage of goods from the port of origin to the port of destination there normally are three different documents which establish the condition of the goods at three different points: (a) the warehouse or other bailment documents which establish the condition of the goods upon receipt at the port; (b) the dock's or mate's receipt and the bill of lading which establish the condition of the goods upon loading; and (c) the receipts which are given after inspection and tally at some point after discharge usually at a warehouse or other depository.

21. As we shall see, the only period during which it is clear that the Hague Rules apply is while the goods are on board the ship; the Rules may (or may not)

apply during loading or unloading;¹⁹ the protective provisions of the Hague Rules clearly do not apply before loading or after discharge.²⁰ Since it may be impossible to determine whether the loss occurred on board the ship or during unloading or on the wharf or in a warehouse at the port of discharge, the consignee-claimant faces virtually insuperable barriers (1) of identifying who was in possession at the time of damage or loss and (2) (even if this can be determined) of ascertaining which legal rules are applicable to the claim.

C. *Applicability of the Hague Rules with respect to the carrier's responsibility during loading and unloading, possible clarification*

1. *Ambiguity under the Hague Rules*

22. As was suggested earlier in this report (para. 9, *supra*), the following questions arise concerning the scope of the Hague Rules: (1) whether the Rules, within their present general scope, can be clarified with respect to the responsibility of the carrier for loss or damage occurring while goods are being loaded on or discharged from the ship; (2) whether the scope of the Hague Rules should be expanded to reach loss or damage prior to loading or subsequent to discharge while the goods are in the possession of the carrier or of wharfingers, warehousemen or other intermediaries. The present part of the report will be addressed to the first question; section D (paras. 28 to 39, *infra*) will be addressed to the second.

23. Article VII of the Hague Rules provides:

"Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connexion with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea."

24. The above language states that the protective provisions of the Hague Rules have no applicability to loss or damage of the goods "prior to the loading on and subsequent to the discharge from the ship...". Consequently, the Hague Rules do not impair the effectiveness of contract provisions drawn by the carrier limiting or negating his responsibility for loss or damage even while the carrier is in possession and control of the goods on the dock or in his warehouse at the port of origin or at the port of receipt; whether such contract provisions will be effective would depend on varying local rules.

25. While language of article VII clearly states that the Hague Rules do not apply prior to loading and subsequent to discharge, other provisions create uncertainty as to when the Rules do apply within this defined period; the area of doubt concerns the "processes of loading and unloading (discharge)."²¹ Thus,

¹⁹ See paras. 22 to 25, *infra*.

²⁰ Article VII of the Hague Rules quoted at para. 23, *infra*.

²¹ See, for example, Dor, *op. cit.*, p. 109; Knauth, *op. cit.*, p. 144.

¹⁷ Carriers themselves often tally goods at point of discharge. However, such unilaterally undertaken tallies are not usually accepted as conclusive evidence of the condition of the goods upon discharge.

¹⁸ In countries where it is possible to take a joint inspection and tally at ship's side after discharge, the condition of goods at that point as readily established in a generally acceptable form by all parties, i.e., the evidence is usually held to be conclusive. The allocation of liability for loss or damage to the goods, as between the carrier and the depository at port of discharge thus poses little difficulty in such countries.

article I (e) defines "carriage of goods" as "the period from the time the goods are loaded on to the time they are discharged from the ship". The above phrase "loaded on" could be read to exclude the process of loading; this wording, however, is out of harmony with the balance of the phrase, which includes the process of unloading. The reference to "loaded on" in article I (e) is also inconsistent with articles II and III (2). Article II provides:

"Subject to the provisions of article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth." [emphasis added]

Article III provides in paragraph 2:

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." [emphasis added]

The ambiguities and inconsistencies of the Hague Rules concerning the carrier's responsibility for loading has led to litigation; the resulting case-law leaves important questions unsettled in many countries.²² The next section consequently considers the possibility of clarifying the text of the Rules.

2. Possible clarification with respect to loading and discharge

26. Inconsistency between the various provisions of the Hague Rules would be reduced by amending article I (e) to read as follows:

"'Carriage of goods' covers the period from the commencement of loading operations until the completion of discharge of the goods from the ship."²³

²² One interpretation attempts to resolve these ambiguities by emphasizing the scope of the carrier's undertaking in the "contract of carriage of goods by sea" (see art. II, quoted *supra*): Loading comes within the Rules if, and only if, the carrier undertakes to load. This approach requires a narrow reading of the provision in art. III (2) that "the carrier shall properly and carefully load . . . and discharge the goods carried"; the extent to which actual loading and discharge are brought within the carrier's obligations under the Rules is left to the parties themselves to decide. *Pyrene Co. v. Scindia Steam Navigation Co. Ltd.* (1954), Lloyd's Rep. 321; 2 Q.B. 402. See also *Renton v. Palmyra Trading Corporation* (1956) 1 Q.B. 462; 2 Ll. L. Rep. 722, affirmed by House of Lords (1957) A.C. 149; 2 Ll. L. Rep. 379, T. G. Carver, *Carriage by Sea*, 11 Edition (London, Stevens and Sons Limited, 1963), vol. I, para. 268. On the other hand doubt has been expressed as whether this reading gives adequate effect to the Rules. Dor, *op. cit.*, at pp. 126-129; Com. Court of Le Havre, 27 June 1947, D.M.F. 1949, p. 75; Court of Appeal of Venice, 22 January 1931, Dor, p. 451. In some situations the carrier can contend that the damage during loading or discharging was due exclusively to an act or omission of the shipper or consignee or their agents, and that the carrier is exempt from liability under art. IV (2) (i). See Com. Court of Rouen, 14 March 1955, p. 309.

²³ Italics indicate the significant changes in wording. Should this amendment be adopted, article III (2) could remain unchanged. Article III (2), it should be recalled, states in part: ". . . the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." It might, however, be advisable to amend article VII in order to

27. While bringing more internal consistency to the language of the Rules, this amendment would clarify the point that the carrier may not relieve himself from responsibility for defective performance of the loading and discharge operations that he undertakes to perform or supply. However, this clarifying amendment, standing alone, would not appreciably alleviate the practical problems summarized in section B (paras. 10-21 *supra*). This problem is especially serious when the period commencing with loading and ending with discharge comprises only a portion of the period during which the carrier is in the charge or control of the goods. This larger and more significant problem is dealt with in section D, which follows.²⁴

D. Responsibility of the carrier prior to loading and subsequent to discharge

1. Introduction

28. As has been noted, the Hague Rules provide no protection against contract clauses limiting or nullifying the responsibility of the carrier prior to loading and subsequent to discharge of the goods.²⁵ However, the carrier is often in charge or control of the goods for substantial periods of time prior to loading and subsequent to discharge. As a result, different legal rules may be applicable to parts of what is functionally a unified operation commencing with receipt of the goods and ending with their delivery. The rules applicable to operation at the ports of origin and destination will often be different from those of the Hague Rules and, of course, will lack uniformity from port to port. Most serious of all (as is explained in detail in section B, *supra*) is the fact that the owner of the goods will often have no practicable means of knowing with certainty where the loss or damage occurred.

29. For these reasons, the resolutions of the UNCTAD and UNCITRAL Working Groups called for examination of the question of:

"responsibility for cargo for the entire period it is in the charge or control of the carrier or his agent".

make that article consistent with the amended article I (e). The present Article VII states that "nothing herein contained shall prevent a carrier or shipper from entering into any . . . exemption . . . of the carrier . . . for loss or damage . . . prior to the loading on, and subsequent to the discharge from the ship . . .". In order to make article VII consistent with the amended article I (e), the terms "prior to the commencement of the loading on, and subsequent to the completion of discharge from" might be substituted for the underlined terms in the current article VII. [emphasis added]

²⁴ The above clarifying amendment for article I (e) would not be needed if the scope of the carrier's responsibility is expanded along the lines discussed in section D, *infra*. However, if the only amendment in this area is along the lines of the clarifying amendment for article I (e), consideration might be given to a possible further clarification that would prevent the carrier from narrowing the scope of the Rules by making separate agreements (1) to load (or unload) and (2) to carry the goods. Specifically, the problem would be presented by an agreement, separate from the bill of lading, whereby the carrier was hired to use its equipment or labour to load or unload the goods, under terms that would exonerate the carrier from liability—a result that would be barred by the Rules if the carrier undertook loading (or unloading) as part of the contract of carriage.

²⁵ See paras. 23 to 25, *supra*, and especially article VII of the Hague rules, quoted in para. 23.

2. Comparison with other transport conventions and modern national legislation

30. It will be useful to examine the relevant provisions of international conventions governing other means of carriage.

31. The Warsaw Convention²⁶ governing international carriage by air, in article 18, defines as follows the period of the carrier's responsibility:

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

"2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever."

32. The CMR Convention,²⁷ governing international carriage by road, provides in article 17:

"1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery."

33. The CIM Convention,²⁸ governing international carriage by rail, provides in article 27:

"1. The carrier is responsible for the results of delay in delivery, of damage resulting in the total or partial loss of the goods, as well as shortage in the goods, from the time of acceptance for carriage until delivery."

34. It should be noted that in all three of these conventions, the period of the carrier's liability commences before the period of "loading" and continues after "discharge". The terms employed in describing the point at which the carrier's responsibility begins and ends may be useful in considering possible clarification and expansion of the Hague Rules.²⁹

35. At the meetings of the UNCTAD and UNCTRAL Working Groups, and in the replies to the questionnaire, attention was directed to the provisions on the period of ocean carriers' responsibility established under the Law of 18 June 1966 enacted by France.³⁰ The relevant provisions of this Law are as follows:

"Article 27: The carrier is responsible for loss or damage suffered by the goods from taking charge

of the goods (*prise en charge*) until delivery, unless he proves that such loss or damage resulted from: . . . [There follow nine exceptions based on Hague Rules article IV (2).]

"Article 29: Any clause is void and of no effect, which has directly or indirectly as its object or its effect: (a) to relieve the carrier of the responsibility set out in article 27."³¹

36. Many replies to the questionnaire endorsed the view that the carrier's responsibility should commence with his receipt of the goods and continue until delivery of the goods.³² On the other hand, other replies indicated satisfaction with the present scope of the Hague Rules.³³

³¹ The replies reported similarly broad provisions in the Civil Code of Quebec (arts. 1674 and 1676), the Civil Code of the Philippines (arts. 1736 and 1738) and the Commercial Code of Iraq (art. 315, and art. 195 of the Iraqi Maritime draft law). Somewhat similar approaches seem to be applied in Argentina and Brazil. It is, however, not always clear whether the responsibilities of the carrier are subject to derogation by contract. The replies of Austria, Denmark, Italy, Norway, Poland and Sweden reported that while the period of responsibility is broadly defined, contractual provisions reducing the carrier's responsibility may be effective with respect to acts occurring before loading or after discharge.

³² This is the tenor of the replies of Argentina ("period of custody of carrier or his agents"), Australia, Brazil, France, Greece, Hungary, India (period from time goods "delivered to the carrier or his agent or otherwise pursuant to the instructions of the carrier" to the time they are delivered to the consignee), Iraq (period of "custody"), Norway (period of "custody and control"), and Sweden ("custody and control"). The reply of Austria suggested that the period of responsibility should be widened. The reply of the United Kingdom, after stating grounds for caution, noted that "loss and damage are generally minimized by matching as closely as possible responsibility for and physical control of cargoes. If therefore liability is to be placed on the carrier for the period in which the goods are under the control of stevedores, warehousemen, etc., it would seem essential that the carrier should have a right of recourse against such parties. . . . The establishment of a general rule for this will be a difficult exercise . . . and the Government of the United Kingdom anticipate that considerable work will be necessary to establish suitable rules worldwide. However, they would be in favour of a solution along these lines."

³³ Cambodia, Canada, Ceylon (satisfactory "from a ship-owner point of view"), Denmark, Japan, Korea, Nigeria. In its reply the Government of Japan stated:

"It is indispensable for the carrier to be able to hold warehouses or sheds completely controlled by him or to secure highly reliable warehousemen as his subcontractors* [*It should be noted that, whenever such conditions are fulfilled, the carriers, in the case of transport by the container ship, assume the same responsibility as under the Convention despite the absence of any regulation to that effect.]. At the present stage it will be quite difficult to secure the above conditions throughout the world, since in many ports not every carrier can obtain his private berth or warehouse for his exclusive use because of the much restricted capacity of the ports at the present time. Further, it is not likely that, in the near future, the above conditions will be fulfilled in each and every port in the world.

"In certain countries, the carrier is compelled by law to take the delivery of the goods to be loaded aboard from port authorities or customs authorities, and to deliver the goods discharged from the vessel also to these authorities. Under such system, it will not be equitable to make the carrier responsible for the custody of the goods with respect to the period before receiving them at the ship-side for loading or the period after sending them in port area upon discharge. This is because the carrier can neither exert effective control on the warehouses or sheds placed under the control of the authorities or on their employees, nor carry out exact tallying, weighing or checking of the goods discharged at the time of their delivery to the authorities."

²⁶ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929. Emphasis is added throughout. In the Conventions cited in this section, there are certain qualifications and exceptions to basic rules quoted herein.

²⁷ Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva, 19 May 1956.

²⁸ International Convention on the Transport of Goods by Rail, signed at Berne, 25 February 1961. See also the Protocol of 25 February 1961 and Protocol A of 29 April 1964.

²⁹ The replies to the questionnaire by India and Australia drew attention to the Rules of the Warsaw Convention.

³⁰ Loi No. 66-420 du 18 juin 1966 sur les contrats d'affrètement et de transport maritime (*Journal Officiel* du 24 juin 1966). This approach was recommended in the questionnaires transmitted by France and by Greece.

37. The general tenor of the replies and the practical considerations developed above indicate that consideration should be given to broadening the scope of the Hague Rules to conform more closely to the approach of the other international transport conventions and the recent national legislation reported above in section D-2. Such a proposal could be considered in the context of a possible amendment of article I (e) of the Hague Rules. Article I (e) as amended (with possible alternative modifications indicated in brackets) might read as follows:

"'Carriage of goods' covers the period from the time the goods are [in charge of] [accepted for carriage by] [received by] the carrier to the time of their delivery."³⁴

38. Even such a brief modification might provide a more coherent and satisfactory approach than the present narrow scope of the Rules.³⁵ However, it may be useful to consider possible clarification of the application of the concepts that define the point at which the responsibility of the carrier begins and ends.

39. To this end, the foregoing provision might be amplified along these lines:

"The carrier shall be deemed to have [taken charge of] [accepted for carriage] [received] the goods when they have come into the possession of the carrier or his agent or any third person acting pursuant to the carrier's instructions. The carrier shall be deemed to have delivered the goods when he has surrendered possession of the goods to the consignee or to a third person either pursuant to the instructions of the consignee or on failure by the consignee to give required instructions."³⁶

40. The foregoing alternative amendments have been presented in a context designed for maximum conformity with the present structure of the Hague Rules. To this end, the alternative substantive provisions

³⁴ The modification is indicated by underscoring. If this approach is accepted, appropriate adjustments would be called for in the language of articles II and III (2) and VII.

³⁵ Extension of the Hague Rules to periods prior to loading and subsequent to discharge was supported by the UNCTAD Working Group, where it was stated: "It was also felt that the carrier should assume responsibility for the cargo during the entire period for which it remained in his or his agent's charge or control." UNCTAD Working Group, report on second session (1971), para. 8.

³⁶ The need for a general provision dealing with the situation when the consignee fails to give instructions is suggested by the provision of article 1738 of the Civil Code of the Philippines, which was quoted in the reply to the questionnaire, as follows:

"Art. 1738. The extraordinary liability of the common carrier continues to be operative even during the time the goods are stored in a warehouse of the carrier at the place of destination, until the consignee has been advised of the arrival of the goods and has had the reasonable opportunity thereafter to remove them or otherwise dispose of them." The first sentence of the above definition is similar to a proposal set forth in a reply by India, suggesting that the carrier's responsibility should commence when the goods have been "delivered to the carrier (or his agent or otherwise pursuant to the instructions of the carrier)".

With respect to the second sentence, consideration might be given to whether the reference "required instructions" should be expanded to refer to local regulations, custom or practice governing delivery.

dealing with the period of the carrier's responsibility have been directed to article I (e) which defines the period of time embraced within the concept "carriage of goods". This seems to be an appropriate setting for the discussion of alternative solutions to the problem at hand; however, once a substantive decision is taken, that decision may call for corresponding modifications in other provisions of the Rules. In this connexion it may be useful to bear in mind that article I (e) is only a definition; operative provisions imposing responsibility must be found elsewhere. The most important of the operative provisions is article III (2) which states: "The carrier shall properly and carefully..." perform specified functions with respect to the goods. If article I (e) is broadened so that "contract of carriage" embraces the period while the goods are within the carrier's "charge" (or following "receipt" and before "delivery") there might still be doubt as to whether the lack of due care during this period by a stevedore or other legal entity is the act of the "carrier".³⁷

41. The above problem relates to the proper phrasing of a provision that is concerned with the standard for the carrier's responsibility. This question is related to the basic issues discussed in part four of this report. It seems premature to seek to solve the problem of drafting at this time;^{37a} it should be sufficient to note the problem for further attention after decisions have been taken concerning the appropriate standard for the carrier's responsibility.

PART TWO: RESPONSIBILITY FOR DECK CARGOES AND LIVE ANIMALS

A. Introduction

42. A second subject on which the UNCITRAL Working Group invited the secretariat to prepare a report is that of "responsibility for deck cargoes [and] live animals...".³⁸ The provisions of the Hague Rules that presents the current problem is article I (c), which provides:

"[I (c)] 'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried."

³⁷ So long as the test is one of improper conduct by the "carrier", responsibility for the acts of third persons to whom the carrier commits aspects of the contract of carriage might depend on local rules of "agency" or of "respondeat superior". Such rules are not uniform, and may not be sufficient to implement the policy objectives implicit in the amendment of article I (e).

^{37a} Some of the alternative proposals in part four of this report would make this problem moot.

³⁸ The resolution of the new UNCITRAL Working Group, (quoted in the Introduction to this report at para. 4) referred to item 2 (e) of the UNCTAD Working Group resolution. This latter resolution is incorporated in the UNCITRAL resolution quoted in para. 3 of the introduction to this report.

"Transshipment" originally was included, along with "deck cargoes" and "live animals", under item 2 (e). Analysis disclosed that "transshipment" was related to "deviation", which appears in 2 (d) of the resolutions, and was not related to the other problems raised in paragraph 2 (e). Since, under the decision of the Working Group "deviation" is reserved for later examination, "transshipment" is not examined in this part of the study.

The concluding phrase, removing "live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried" from the definition of "goods" leads to the result that the Rules provide no protection against clauses in the bill of lading relieving the carrier of responsibility for loss or damage to such cargoes, regardless of the cause that leads to loss or damage.

43. Problems relating to the exclusion of deck cargoes and live animals from the scope of the Rules were discussed by the UNCTAD secretariat report on bill of lading, which concluded:

"There appears to be no justification for maintaining this exclusion; if it were abolished carriers would still be protected adequately by the exceptions in the Rules and the limitation of liability. Moreover, a large number of containers are now carried on deck, and it appears reasonable that the same principles should apply to containers carried on deck as to those carried below deck."³⁹

"In order to avoid the present conflicts among the laws of different countries, and also to do justice to cargo owners, deck cargo and live animals might be included in the definition of 'goods' so that the Rules would apply to them as to other cargo."⁴⁰

The report of the UNCTAD Working Group includes the following:

"The representatives of several developing countries stated that the definition of 'goods' in article I (c) of the Hague Rules should be extended so as to cover the carriage of containers on deck, deck cargo and live animals. In their view cargo traditionally carried on deck was particularly important to the economies of the developing countries."⁴¹

"The representatives of several developed market economy countries agreed that containers carried on deck should be included within the definition of 'goods' in the Hague Rules. Some others favoured inclusion of all deck cargo in the definition of 'goods' to be covered by the Hague Rules."⁴²

44. The problems presented by the exclusion of deck cargoes will be considered in section B (paras. 45 to 66), the exclusion of live animals will be considered in section C (paras. 67 to 74).

B. Deck cargo

1. Analysis of relevant laws and practices

(a) Practices

45. In the past, it was considered that "generally the deck is not a proper place for cargo. Goods placed there obstruct the working of the ship, and are under peculiar risks".⁴³ When the Hague Rules were introduced, deck cargoes seem to have consisted mainly of

timber,⁴⁴ and it has been suggested that deck cargoes were excluded from the scope of the Rules "for the relief of the Baltic timber trades, which were thus given local freedom of contract".⁴⁵

46. The carriage of goods on deck has increased considerably since the introduction of the Hague Rules in 1924 and no longer is timber the main type of deck cargo.⁴⁶ Moreover, the traditional reasons for relieving the carrier of responsibility for deck cargo no longer seem valid, since methods of stowage and security measures for deck cargo have improved considerably in recent years.⁴⁷

47. Goods may be stowed on deck for a number of reasons. For example, some goods (such as explosives, chemicals, or fertilizers) may not be permitted below deck because they are considered to be hazardous; others (such as railroad cars, boilers, transformers or timber) are too large or unwieldy to fit below; others might fit below deck, but because of their size occupy an excessive amount of space or, because of their irregular shape, waste space that cannot be filled with other cargo. Finally a large proportion of all containers are stowed on deck.

(b) The international Convention (Hague Rules)

48. The exclusion from the Hague Rules of "cargo which by the contract of carriage is stated as being carried on deck and is so carried" has presented certain problems in application. These include: (i) What is meant by the term "deck cargo"? and (ii) What are the required terms, and effect, of clauses in bills of lading relating to deck cargo.

(i) The meaning of "on deck" carriage

49. "On deck" carriage is not always implied when goods are stowed above the main deck.⁴⁸ In some jurisdictions, case law has taken a narrow view of the phrase "on deck". It has been held that stowage within a permanent steel enclosure, such as a hatch-trunk, a bridge-deck, or a hospital space, is included within the Hague Rules. It has also been held that stowage, even though above the main deck, that is covered so that the cargo is afforded the same security as if it were stowed below deck may not fall within the "on deck" exclusion.⁴⁹ In many States the scope of this exclusion remains unclear.

⁴⁴ See proceedings, International Law Association meeting, 30th Conference, Proceedings of Maritime Law Convention, 1921, page 79. Sweet and Maxwell, London, 1922.

⁴⁵ Knauth, op. cit., at p. 236.

⁴⁶ See C. L. Sauerbier, *Marine Cargo Operations*, New York: John Wiley and Sons, 1956, p. 194.

⁴⁷ It has been stated in a modern text that, with regard to deck cargo, "lashings and bracing should be applied with the assumption that during the first night at sea the ship will pass through a full hurricane. Using this philosophy, the ship will generally be stowed safely." *Ibid.*, p. 195.

⁴⁸ One leading author has stated that "it is difficult, if not impossible, to make any general definition of what is and what is not deck stowage". W.E. Astle, *Shipowners' Cargo Liabilities and Immunities*, London, H. F. and G. Witherby Ltd., 1967, p. 43.

⁴⁹ *The Lissie-Bank*, 1938 A.M.C. 1033 (St. Cal); *The Fred W. Sargent*, 1940 A.M.C. 670 (Ed Mich). Knauth, op. cit., at p. 237; Rodière, *Traité général de droit maritime*, Tome II, p. 155. The shelter deck is still a controversial matter. See Paris, 1925, RDMC, pro; and Rodière, op. cit., contra; Astle, op. cit., p. 43.

³⁹ TD/B/C.4/ISL/6, para. 93.

⁴⁰ *Ibid.*, para. 188.

⁴¹ TD/B/C.4/ISL/8, para. 53.

⁴² *Ibid.*, para. 66.

⁴³ Carver, op. cit., at p. 732.

(ii) *Conditions for excluding deck cargo from the Rules: the validity of non-responsibility clauses*

50. It will be recalled that article I (c) of the Hague Rules excludes from the Rules' coverage "cargo which by the contract of carriage is *stated as being* carried on deck and is so carried". As a result of the phrase "*stated as being* carried on deck" a clause merely stating that the carrier has *liberty to carry* goods on deck (although in common use) is not sufficient to exclude the application of the Rules: the bill of lading must state that the goods *are in fact* carried on deck.⁵⁰ Consequently, when cargo is stowed on deck, carriers customarily insert in their bills of lading (either by rubber stamp or by typing) an additional clause stating that the specific goods covered by the bill of lading are being carried on deck at shipper's risk and that the carrier accepts no responsibility for loss or damage to them from any cause whatsoever.⁵¹ In most cases, the insertion of such a clause is effective to remove deck cargo from the scope of the Rules.

51. Clauses that disclaim all responsibility for deck cargo are widely used and are generally valid. The practical result is that carriers rarely are legally responsible for loss or damage to deck cargo, regardless of the cause or extent of loss or damage.

2. *Suggested alternative solutions*

52. Alternative approaches that may be considered include the following: (a) Inclusion of all deck cargo within the protection of the Hague Rules; (b) Inclusion only of "containers" carried on deck; (c) Amendment to clarify what constitutes "deck cargo" excluded from the Rules.⁵²

(a) *Inclusion of all deck cargo within the scope of the Rules*

53. The inclusion of all deck cargo was suggested by the UNCTAD secretariat report on bills of lading.⁵³

⁵⁰ See *Svenska Traktors v. Maritime Agencies* (1953), 2 Ll.L. Rep. 124.

⁵¹ An example of this type of clause is one that was widely recommended by protection and indemnity (P and I) clubs to their members:

"Carried on deck without liability for loss or damage however caused".

See Selected Circulars 1951-1958, United Kingdom Mutual Steamship Assurance Association Ltd., No. 1, Burrup Mathieson and Co. Ltd., London, undated. Other, similar forms of this clause are: "Goods carried on deck at shipper's risk", or "at the sole risk of owners of the goods". See also the Model "P and I" bill of lading (see "Bills of Lading", Report by the UNCTAD secretariat (TD/B/C.4/ISL/6, Annex III), which states in clause 4 (A): "The carriers shall be under no responsibility . . . in the case of . . . cargo which in this bill of lading is stated as being carried on deck and is so carried (none of which is subject to the Hague Rules at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier)."

⁵² A fourth alternative would be to maintain the present provisions of the Hague Rules concerning "on deck" cargo. The tenor of the replies received to the questionnaire suggests that this alternative would receive little support.

⁵³ Op cit., para. 93: "There appears to be no justification for maintaining this exclusion [of deck cargo]; if it were abolished carriers would still be protected adequately by the exceptions in the Rules and the limitation of liability . . .".

by representatives both of developing countries and of some developed market economy countries in the UNCTAD Working Group,⁵⁴ and by many replies to the Secretariat's questionnaire.⁵⁵

54. In support of this alternative it may be suggested that the fact that the carriage of deck cargo may be subject to certain special risks hardly justifies total removal of responsibility for deck cargo without regard to the risk that may lead to loss or damage. For example, under the Hague Rules as they now stand, the carrier may be free of responsibility under article III (1) toward owners of deck cargo to "use due diligence" to: (a) "Make the ship seaworthy"; or (b) "Properly man, equip and supply the ship". Similarly, under the Hague Rules, the carrier may be completely relieved responsibility under article III (2) to "properly and carefully load, handle, stow, carry, keep, care for and discharge" deck cargo which he had accepted for carriage.⁵⁶

55. The lack of any carrier responsibility for deck cargo has significant commercial consequences. International sales of goods often provide for payment under letters of credit on the presentation of specific documents including a bill of lading. Unless specifically authorized in the letters of credit, it is considered a violation of the credit to stow goods on deck, and thus most banks will not accept bills of lading for deck cargo.⁵⁷ Naturally this creates practical difficulties in the transfer of such goods. Moreover, many ordinary marine insurance policies exclude deck cargo from their coverage, as underwriters often require that on deck shipments be separately noted and declared in "shipped" bills of lading, and that an additional insurance premium be paid for deck cargo.

56. To some extent, such practical difficulties with resale and insurance may result from the fact that it may be feared that some types of deck cargo may be subject to greater risk as a result of deck carriage. Nevertheless, a contributing factor to the difficulties in resale and insurance is the fact that under the present system it is virtually impossible for the cargo owner (or his insurer) to recover from the carrier for loss/damage to deck cargo. The inclusion of deck cargo within the scope of the Rules might cause bills of lading covering deck cargo to become more effective vehicles for the transfer of such goods, and might improve the terms of their insurance.

57. Problems presented by the exclusion of deck cargo from the Hague Rules have arisen in the preparation of the Draft Convention on the Combined

⁵⁴ See para. 43 above.

⁵⁵ See para. 59 below.

⁵⁶ Should deck cargo be included within the scope of the Rules, the carrier would be protected by several of the provisions contained in article IV of the Rules.

⁵⁷ See article 20 of the *Uniform Customs and Practice of the ICC*: "Banks will refuse a bill of lading showing the stowage of goods on deck, unless specifically authorized in the credit." See also Knauth, p. 237: "A 'clean' bill of lading is an unwritten representation that the cargo will be carried under deck, unless there is a custom or usage of the trade permitting on deck carriage, or custom or usage as between the carrier and the particular shipper." citing *The St. Johns, N.F.*, 1923 A.M.C. 1131, 263 U.S. 119; *Davidson v. Flood Brothers*, 1929 A.M.C. 213 (9th Circuit Court of Appeals).

Transport of Goods (known as the TCM Convention) which is to be considered for international adoption at a joint IMCO/UN Conference in November 1972. This Draft Convention embodies a concept known as the "network system" of liability, which can be explained (briefly) by the following example: In a Combined Transport Operation, part of which was by sea and part by rail, if it can be proved that a loss or damage occurred during the sea leg, then the liability of the Combined Transport Operator for that loss or damage is to be governed by the Hague Rules instead of the terms of the Draft TCM Convention.⁵⁸ And if the Hague Rules are applied under the "network system" of liability, the Draft Convention specifically stipulates that the provision of the Rules "shall apply to all goods whether carried on deck or under deck".⁵⁹

58. Should it be decided to amend the Hague Rules to cover deck cargo, the simplest approach would be to omit this exception from article I (c); the relevant language would then read:

"'Goods' includes goods, wares, merchandise and articles of every kind whatsoever . . .".⁶⁰

59. A majority of the replies that expressed an opinion on article I (c) support such an amendment to this effect.⁶¹

⁵⁸ Similarly, if it could be proved that the loss/damage occurred during the Rail leg, then the CTO's liability would be governed by the CIM (*Convention internationale concernant le transport des marchandises par chemin de fer*, 25 February 1961.)

⁵⁹ See art. 11 (b) (ii) Draft Convention on the Combined Transport of Goods (TCM Convention) (draft text prepared by the Drafting Committee set up at the third and fourth sessions of the Joint Meeting). Report of the Third Session of the Joint IMCO/ECE Meeting to Study the Draft Convention on the Combined Transport Contract (TCM Convention) (28 June-2 July 1971) (TRANS/370 CTC/III/1). Although Combined Transport Operations would in large measure involve containerized shipment the scope of the current drafts is not so restricted. See also BIMCO Combined Bill of Lading (COMBICONBILL).

⁶⁰ The question of whether "live animals" also should be included is considered below at para. 6.

⁶¹ Replies supporting removal of the exclusion for "deck cargo" are those of Brazil, Hungary, Greece, India, Iraq, Nigeria and Norway. In addition, the reply of Sweden suggested that removal of the exclusion be given "serious consideration", the reply of Korea stated that the present rules on this topic need improvement; the replies of France and Austria suggested that "deck cargo" should be brought within the Rules, but indicated that it should be possible to limit responsibility by contract. Finally, the reply of the United Kingdom stated that, with regard to deck cargo, "there is no reason why the shipowners should not be subject to the Rules except for damage arising from the deck carriage itself"; and Poland appeared to favour removal of the exclusion but cautioned that "cargo not resistant to atmospheric conditions . . . would not be duly protected". Replies supporting the continued exclusion of "deck cargo" are those of Cambodia, Canada, Ceylon ("as shipowners") Japan, the Philippines and Saudi Arabia. In its reply the Government of Japan stated:

"It is impracticable to specify and make an express agreement beforehand which containers shall be stowed on deck, and it is indispensable for container ships to be able to stow the containers both under deck and on deck. Furthermore, judging from the design and structure of container ships and that of containers themselves, it is safe for the goods in containers to be stowed on deck and so carried. Therefore, it is possible for the carrier to assume the same responsibility with respect to those goods both on deck and under deck."

The replies summarized here relate only to the "on deck" exclusion; the responses with respect to live animals will be summarized in Section C, *infra*.

60. A more qualified approach, proposed in the United Kingdom reply to the questionnaire, would supplement the amendment suggested above by the following addition to article IV:

"In respect of cargo which by the contract of carriage is stated as being carried on deck and is so carried, all risks of loss or damage arising or resulting from perils inherent in or incident to such carriage shall be borne by the shipper and the consignee but in other respects the custody and carriage of such cargo shall be governed by the terms of this Convention."

(b) *Amendment of the Hague Rules to include only containers carried on deck*

61. The enormous expansion of containerized transport in the past decade has presented special problems concerning the adequacy of the existing Hague Rules provisions on deck cargo.⁶² A significant proportion of all containers carried are loaded on deck, and generally very little attention is paid as to which containers are loaded on deck and which ones under deck. As a result, usually none of the parties—carrier, cargo owner, consignee or insurance company—knows in advance which of the containers will be loaded under deck (hence covered by the Hague Rules) and which will be loaded on deck (hence not covered).⁶³

62. If the "on deck" exclusion is not completely removed, consideration might be given to an alternative approach whereby the Hague Rules would be revised to apply to all containers regardless of whether they are carried on deck or in the hold.⁶⁴

63. Revision of the Hague Rules to implement this approach could take several possible forms. Two examples of such an amendment to article I (c) are offered below. (Additions to the present provision are in *italics*.)

Art. I (c): "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo (*other than freight containers*) which by the contract of carriage is stated as being carried on deck and is so carried." or

Art. I (c): "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. *However, 'goods' shall*

⁶² As of 1 July 1970, the world fleet included 167 fully cellular container ships with a combined tonnage of 1,907,301 gross registered tons, an average of 11,424 grt. per vessel. As of 31 July 1970, 180 container ships were on order, with a combined capacity of 3,636,020 dead weight tons, an average of 20,200 dwt. per vessel. Review of *Maritime Transport*, 1970, Report by the UNCTAD secretariat (TD/B/C.4 82, 19 January 1971, United Nations publication, Sales No.: 71. II. D. 8).

⁶³ Moreover, it is felt by many that containers can be carried as safely on deck as below deck. For example, the Swedish Government, in its reply to the questionnaire, stated that "the risks involved . . . in the carriage of containers 12 metres above sea level are not substantially different from the risks to which goods carried in the holds are exposed". This alternative was supported by the reply of Denmark.

⁶⁴ Such a revision is anticipated by a bill of lading used by one leading company engaged in the container trade (Associated Container Transportation (Australia) Ltd.), which incorporates the provisions of the Hague Rules, but which defines "goods" as "the cargo accepted from the shipper and includes any containers supplied by or on behalf of the carrier".

include all freight containers, whether carried on deck or below deck."

64. Amendments such as these suggested above might raise questions concerning precisely what is meant by the term "container".⁶⁵ To meet this problem, consideration might be given to the definition in recommendation R-668 of the International Organization for Standardization which is as follows:

"A freight container is an article of transport equipment,

"(a) Of a permanent character and accordingly strong enough to be suitable for repeated use;

"(b) Specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading;

"(c) Fitted devices permitting its ready handling, particularly its transfer from one mode of transport to another;

"(d) So designed as to be easy to fill and empty;

"(e) Having an internal volume of 1 m³ (35.3 ft.³) or more.

"The term freight container includes neither vehicles nor conventional packing."

(c) *Amendment to clarify what constitutes "on deck" cargo excluded from the Rules*

65. Uncertainties concerning exactly what constitutes "deck cargo" were discussed at paragraph 49 above. Should deck cargo remain outside the scope of the Rules, it would be useful to amend article I (c) to clarify what is meant by "deck cargo". For example, it was pointed out above that cargo which is stowed above the main deck but within certain types of enclosures, such as hatch-trunks, bridge-decks or hospital spaces, is sometimes considered to be "under deck" and is included within the Hague Rules. It was stated that the test in many cases appears to be whether covered stowage, even though above the main deck, gives the cargo the same security as if it were stowed below deck.

66. There is, however, no uniform acceptance of this test for determining what is to be considered "deck cargo" for the purpose of exclusion from the Rules. Should no other action be taken to amend article I (c)

it might be desirable to incorporate into article I (c) the test given above for determining what constitutes deck cargo. This could be done by adding to article I (c) a sentence such as the following:

"However, cargo that is stowed above the main deck but within permanent enclosures that provide for the cargo substantially the same security as if it were stowed below deck shall not be considered to be 'deck cargo' within the meaning of this article."

C. Responsibility for live animals

1. Introduction

67. As noted above⁶⁶ the definition of "goods" in article I (c) of the Hague Rules includes the phrase "except live animals..." so that the carriage of live animals is excluded from the coverage of the Rules. Virtually all carriers insert clauses in the contract of carriage⁶⁷ disclaiming all responsibility for the loss of live animals.⁶⁸ Any limitations upon the carrier's freedom to contract out of responsibility for live animals must be found outside the Hague Rules—in the general rules of bailment or contract law of national commercial codes or case-law. The objections that have been raised to this result have been noted in paras. 43 *supra*.

2. Risks in the carriage of live animals

68. The carriage of live animals involves several risks that do not exist in the carriage of inanimate objects. Animals are susceptible to disease and injury, and have requirements of feeding, watering and ventilation about which the carrier may have insufficient knowledge. Animals (especially wild animals) may be accompanied by an attendant or keeper over whom the carrier has no authority.⁶⁹ Other international conventions have made special provision for live animals.⁷⁰

⁶⁶ See para. 40 above.

⁶⁷ Frequently carriers do not issue bills of lading when carrying live animals. Instead they issue a consignment note, or some other form of receipt, the terms of which purport to exempt them from any liability arising from any cause whatsoever. Carriers usually agree with shippers on arrangements to accommodate and feed the animals.

⁶⁸ See, for example, the ALAMAR (Association latino-americana de armadores, or Latin American Shipowners' Association) bill of lading (contained in the UNCTAD secretariat report on bills of lading, *op cit.*, annex III), para. 24: "This bill of lading shall not apply to the carriage of live animals. If it should be utilized for that purpose, however, the carrier shall be in no way liable for any injuries, deaths or illnesses of the animals during carriage, loading or unloading, and the immunities and limitations provided for in article 4, paras. 1, 2, 4 and 5 of the [Hague Rules] and such other clauses of this bill of lading as may be appropriate, shall apply." See also the "Model P and I" bill of lading (UNCTAD secretariat report on bills of lading, annex III) para. 4 (a): "The carrier shall be under no responsibility; . . . (ii) in the case of live animals . . . at any time when, but for the provisions of this clause such goods would be the responsibility of the carrier."

⁶⁹ It was an exception at common law that a carrier is not responsible for a loss or damage which has resulted from an inherent quality or defect of the thing carried. In the case of animals, he was "not responsible for the progress of disease in them, or for injuries arising from their own vice or timidity". Carver, *op cit.*, at p. 15.

⁷⁰ The International Convention Concerning the Carriage of Goods by Rail (CIM), Berne 1956, art. 27 (3) (g); the Convention on the Contract for the International Carriage of Goods by Road (CMR), Geneva 1961, art. 17 (4) (f).

⁶⁵ "There are various types of containers, including non-collapsible containers of rigid construction and collapsible ones. Moreover, containers can be classified according to their size, the material used in their construction and the nature of the commodity to be placed in them. . . . Containers are usually framed with iron, but the walls may consist of various materials, such as plywood, aluminum, steel or stainless steel, or reinforced fiberboard. . . . From the point of view of specialized accommodation and structure, there are also many kinds of containers, for example, open-top containers for bulk cargoes, mesh containers for livestock, humidity-controlled and air-conditioned containers for vegetables and fruit, refrigerated containers for cold storage cargoes, tank containers for liquid cargoes, etc." *Unitization of Cargo*, Report by the UNCTAD secretariat, New York; United Nations, 1970, p. 12 (TD/B/C.4/75; United Nations publication, Sales No.: E.71.II.D.2).

69. The exclusion of "live animals" from the Hague Rules seems to have resulted from such special hazards presented by this type of cargo. However, it has not been suggested that carriers should be made liable for losses caused by such hazards but rather that carriers should not be able to avoid responsibility for losses arising from causes other than inherent vice of live animals—such as the seaworthiness of the ship.⁷¹

70. If live animals should be brought within the scope of the Rules, carriers could have the benefit of the provision in article IV (2) (m) that the carrier is not responsible for loss or damage arising from "inherent defect, quality or vice of the goods". On the other hand, it might be considered that the scope of this exception is not clear, and presents particularly difficult problems in relationship to live animals, since the cause that leads to the death or injury of an animal may be difficult to ascertain.

3. Alternative solutions

71. One alternative, supported by several replies, would be to maintain the present provision of the Hague Rules excluding live animals from the scope of the Rules.⁷²

72. A second alternative would include live animals within the scope of the Hague Rules. This would be accomplished by the deletion of the phrase "except live animals" from article I (e). Article I (c) would then read, in relevant part: "'Goods' includes goods, wares, merchandise and articles of every kind whatsoever."

73. If action is taken to include "live animals", it might be considered that the exception in article IV (2) (m) with respect to "inherent vice" does not give sufficient protection with respect to the problems of live animals; if so, consideration might be given to this question in connexion with the review of article IV.

74. Alternatively a provision might be modelled on the appropriate provisions in the International Convention Concerning the Carriage of Goods by Rail (CIM), and the Convention on the Contract for the International Carriage of Goods by Road (CMR).⁷³ Article 27 (3) of the CIM Convention provides in part:

"3. . . . the railway shall be relieved of liability when the loss or damage arises out of the *special risks* inherent in one or more of the following circumstances:

⁷¹ Removal of the exclusion of "live animals" from the Hague Rules was supported by the replies of Brazil, India and Iraq. The replies of France and Austria suggested that "live animals" should be brought within the Rules, but indicated that it should be possible to limit responsibility by contract. Removal of this exclusion was strongly opposed in the reply of Japan, which stated that it is a "considerable risk, almost tantamount to gambling, to undertake the carriage of live animals, while ensuring their life or health" (except "in the trade of sheep on a large scale, where certain mortality rate is agreed upon . . ."). Removal of this exclusion was further opposed in the replies of Cambodia, Canada, Ceylon ("as ship-owners"), Denmark, Greece, Norway, Philippines, Poland ("the problem of carrying live animals calls for a separate and detailed regulation"), Saudi Arabia, and Sweden. Other replies made no specific mention of the subject.

⁷² For a summary of the replies see note 65 *supra*.

⁷³ Those provisions are discussed *infra* in part four of this report at section D.

" . . .

"(g) the carriage of livestock"

Article 17 (4) of the CMR Convention provides in part:

" . . . the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

"(f) the carriage of livestock."

PART THREE: CLAUSES OF BILLS OF LADING CONFINING JURISDICTION OVER CLAIMS TO A SELECTED FORUM

A. The setting

1. Decision to examine choice of forum clauses

75. In response to the programme of work developed at the fourth session of UNCITRAL,⁷⁴ this part of the report deals with "jurisdiction" clauses in bills of lading, i.e., clauses providing that claims arising from the contract of carriage may only be asserted in a designated forum.⁷⁵ These clauses are normally prepared by carriers in the interest of their convenience in presenting their defences to cargo owners' claims for loss or damage to cargo. On the other hand, it has been contended that the place for suit specified in the bill of lading is often so inconvenient to cargo owners as to impede the full and fair presentation and adjudication of claims. These conflicting interests are analysed more fully in section 3, *infra*.

2. Examples of choice of forum clauses

76. Bills of lading are usually prepared by the carrier, often on the basis of model standard forms prepared by associations of shipowners or liner conferences. One such standard form is the "CONLINE" bill of lading, which is a set of Liner terms approved by the Baltic and International Maritime Conference (BIMCO). The CONLINE bill of lading is typical with respect to the choice of the place where claims must be brought. The bill of lading states:

"3. Jurisdiction

"Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business, and the law of such country shall apply except as provided elsewhere herein."⁷⁶

⁷⁴ See Introduction to the report *supra*, paras. 1-6.

⁷⁵ "Jurisdiction" has various meanings but clauses on choice of forum have received primary attention and present the most serious unsolved problems.

⁷⁶ The full text of the CONLINE bill of lading is set out in annex III of the UNCTAD secretariat report on bills of lading (TD/B/C.4/86, annex III) p. 14. In Socialist countries the general conditions of liner bills of lading are based on the "CONLINE" terms. Emphasis here and elsewhere has been added.

In January 1971, the Baltic and International Maritime Conference adopted model terms called the Combined Transport Bill of Lading ("COMBICON BILL") whose choice of forum clause is quoted *infra* in connexion with the ALAMAR Model Bill of Lading. The COMBICON clause provides the plaintiff with a choice of *fora*.

77. In the standard "Trident Bill of Lading" the place where claims must be brought is a specified city. The choice of forum clause provides:

"Jurisdiction

"All actions under the present contract of carriage shall be brought before the Court at Caracas, Venezuela, if *Compañía Anónima Venezolana de Vabegación* is the carrier, before the Judge or Tribunal at Bogotá if *Flota Mercante Grancolombiana S.A.* is the carrier and before the Court at Amsterdam if the *Koninklijke Nederlandsche Stoomboot-Maatschappij N.V.* is the carrier and no other judge or tribunal shall have jurisdiction with regard to any such actions unless the carrier appeals to another jurisdiction or voluntarily submits himself thereto."⁷⁷

78. The Model "P and I" bill of lading, which is frequently employed, is designed for the designation of a single forum. Although the designated forum is left blank in the model clause, the litigated cases indicate that the carriers usually designate their principal place of business. The model clause provides:⁷⁸

"32. Jurisdiction

"The contract evidenced by this bill of lading shall be governed by _____ law and any dispute thereunder shall be determined in _____
[Place]

_____ according to _____ law to the exclusion of the jurisdiction of the courts of any other country."

79. Unlike the foregoing bills of lading, the ALAMAR (Latin American Shipowners Association) model bill of lading gives the plaintiff a choice of three fora. It will be noted that one of the choices is "the defender's country of domicile"; the other two, expressed in general terms, refer to places for performance of the contract of carriage. The relevant provision is as follows:

"3. Competent court

"In any action derived from this contract of carriage, the courts of the place in which the obligation whose performance is claimed to be performed shall have jurisdiction, unless the plaintiff opts for the courts of the defender's country of domicile or for those of the place in which the voyage terminated."⁷⁹

⁷⁷ The "Trident Bill of Lading" was annexed to the reply by the Government of Venezuela to the questionnaire.

⁷⁸ The full text of the Model "P and I" bill of lading is set out in the UNCTAD secretariat report on bills of lading, annex III, pp. 21, 24 and 40.

⁷⁹ The full text of the ALAMAR bill of lading is set out in annex III of the UNCTAD secretariat report on bills of lading, pp. 1, 2. The COMBICON model bill of lading (see *supra* foot-note 76) adopted by BIMCO provides with respect to choice of forum:

"5. Law and jurisdiction

"Disputes arising under this B/L shall be determined at the option of the Claimant by the courts and subject to clause 12 of this B/L in accordance with the law at:

3. Interests of the parties

(a) The carrier

80. The carrier, in preparing a bill of lading clause requiring that claims only be asserted in a designated forum, is interested in restricting litigation to a place that is convenient. To minimize expense, the carrier is interested in having claims brought in the courts of the country in which he has his headquarters, or at least an office. Moreover, since there are likely to be a number of claims against him, either arising out of one incident or over a period of time, he would not wish to have to defend in as many countries as there are claimants or in all the ports of call of his ships. In some instances, claims arising from damage to the ship and to cargo may be interdependent; in such circumstances there may be a special reason for concentrating the litigation of these claims in a single court.⁸⁰

81. The carrier also has an interest in assuring that any litigation would be brought to a court with whose procedures and rules the carrier is familiar. The carrier may also fear that the claimant, in selecting the *forum* for suit, might choose a tribunal with legal rules and outlook that would be favourable to the claimant and hostile to the carrier. Even if both the courts of the country selected by the owner and the courts selected by the carrier in the bill of lading would apply the same legislation there may be differences in interpretation that would have decisive effect on the outcome of litigation; all these factors may be taken into account in drafting the clause in the bill of lading.

(b) The cargo owner

82. Whether the shipper (seller) or the consignee (buyer) will be the owner of the cargo and therefore the claimant in an action against the carrier for damage or loss of goods depends on the contract of sale. The terms of shipping in the sales contract, such as f.o.b., f.a.s., c.i.f., and c. & f., will normally determine when the property passes and when the buyer assumes the risk of loss. The partners to sales transactions involving maritime shipment usually employ a contract term that places the risk of transit loss on the buyer. One reason is the fact that damage in transit is usually discovered only after arrival of the cargo; at that point the buyer

"(a) the place where the carrier has his habitual residence or his principal place of business or the branch or agency through which the contract of combined transport was made, or

"(b) the place where the goods were taken in charge by the Carrier of the place designated for delivery.

"No proceedings may be brought before other courts unless the parties expressly agree on both the choice of another court or arbitration tribunal and the law to be then applicable."

⁸⁰ If the 1924 Brussels Convention is modified to regulate choice of forum clauses, account will have to be taken of the manner in which the appropriate court is determined under international legislation and rules such as International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Seagoing Vessels (Brussels, 25 August 1924), Conventions on Maritime Law, Ministère des affaires étrangères et du commerce extérieur de Belgique, I.V. 1968, p. 19, the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (Brussels, 10 October 1957), *ibid.*, at p. 67, and the York-Antwerp Rules, 1950 (general average) adopted by the International Maritime Committee and the International Law Association.

is in a better position than the seller to salvage damaged goods, ascertain the extent of the loss, and press a claim for the damage. As a result, the buyer-consignee is more likely to be the plaintiff.

83. The shipper and the consignee (like the carrier) have an interest in the selection of a court that is not remote, or foreign or hostile. Litigating in a foreign court will involve the expense of retaining foreign lawyers, and other costs incidental to the prosecution of a suit such as translation of documents and testimony, travel of witnesses, cables, mailings and telephone communications. Particularly in connexion with small claims, these burdens may be so heavy that the cargo owner may be discouraged from pressing even a clearly valid claim.

84. To avoid possible inconvenience both in expense of litigation and availability of witnesses the cargo owner would prefer to have his claim litigated in his own country's courts or those selected by him in a convenient place. For the shipper, this would generally be the courts of the place of shipment and for the consignee the courts of the place of delivery.⁸¹

85. The foregoing analysis suggests that the interests of the carrier and cargo owner are often inconsistent. The central problem of this study is whether it will be possible to reconcile the parties' essential interests in a manner that will be reasonably fair to both.

B. Existing legal rules with respect to choice of forum clauses

86. The effectiveness of a choice of forum clause is tested when an action is brought in a court other than a court chosen in the bill of lading. It would appear that "as a practical matter such a clause can have little efficacy unless the courts of the other states will, out of deference to it, refuse to hear suits brought in violation of its terms".⁸²

87. The International Convention for the Unification of Certain Rules Relating to Bills of Lading (the 1924 Brussels Convention or "Hague Rules") contains no provision specifically aimed at regulating either choice of forum clauses or arbitration clauses.⁸³ As a result,

⁸¹ Often the claimant is the insurer who has paid a claim with regard to which the cargo owner has rights against the carrier. The insurer then becomes the owner of these rights and brings an action to assert such rights. His interests are similar to those of the party to whose rights he was subrogated, except that in some instances the insurer will have branches in the *fora* selected by the carrier, and may have more experience than the cargo owner with foreign rules and procedures. However, the insurer would have problems comparable to the cargo owner in transporting witnesses and other evidence to a tribunal remote from the point of delivery or other place where the damage was discovered. It may be assumed that the expenses borne by the insurer in the prosecution of a claim before courts in a distant or inconvenient place will eventually be passed on to the insured in the form of higher insurance premiums. See Gilmore and Black, *op cit.*, at 86-86.

⁸² Reese, "The Contractual Forum: Situation in the United States", 13 *Am. J. Comp. L. L.* 187 (1964).

⁸³ In some situations choice of forum clauses have run afoul of article III (8) of the Hague Rules, on the ground that such clauses (in effect) relieved or lessened the carrier's liability as established in the Convention. These cases will be discussed at para. 92, *infra*.

the effectiveness of such clauses depends on the rules of the national legal systems. These rules vary widely in their answers to this decisive question: Will the national courts stay or dismiss an action arising out of a contract of carriage on the ground that the contract of carriage states that the claim may only be presented to some other tribunal? Attention will first be given to jurisdictions that deny effect to choice of forum followed by jurisdictions that, in varying degrees, give effect to such clauses.

88. In a few countries statutory rules deny effect to choice of forum clauses. For example, the Australian Sea-Carriage of Goods Act, 1924, provides in article 9:

"(1) All parties to any bill of lading or document relating to the carriage of goods from any place in Australia to any place outside Australia shall be deemed to have intended to contract according to the laws in force at the place of shipment, and any stipulation or agreement to the contrary, or purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of the bill of lading or document, shall be illegal, null and void, and of no effect.

"(2) Any stipulation or agreement, whether made in the Commonwealth or elsewhere, purporting to oust or lessen the jurisdiction of the Courts of the Commonwealth or of a State in respect of any bill of lading or document relating to the carriage of goods from any place outside Australia to any place in Australia shall be illegal, null and void, and of no effect."⁸⁴

89. The maritime codes of Lebanon and Syria contain similar restrictions.⁸⁵

90. A somewhat less sweeping prohibition, not limited to maritime cases, may be found in the Code of Civil Procedure of Italy. Article 2 provides that the jurisdiction of the Italian courts may not be ousted in favour of foreign courts unless the parties to the contract are foreigners or one of the parties is foreign and the other party, although Italian, is not domiciled or resident in Italy. This general provision has been applied to maritime cases.⁸⁶

91. In other countries courts have denied effect to choice of forum clauses, in bills of lading, forbidding

⁸⁴ The refusal of a stay pursuant to the statute was affirmed by the High Court of Australia in *Compagnie des Messageries Maritimes v. Wilson*, 94 C.2.R.577 (Austl 1954). Dixon, C. J. stated: "It can hardly be doubted that its object was to insure that Australian consignees of goods imported might enforce in Australian courts the contracts of sea-carriage evidenced by the bills of lading which they held" (at p. 583). The Merchant Shipping Act No. 57 of 1951 of the Republic of South Africa contains a provision similar to article 9 of the Australian Sea-Carriage of Goods Act.

⁸⁵ Article 212 of the Lebanese Code de commerce maritime 1947 and article 212 of the Syrian Code de commerce maritime 1950 are identical and include a provision nullifying clauses in bills of lading which would derogate from the competence of the court.

⁸⁶ For examples of the application of the Code to maritime cases see Siesby, "On Jurisdiction and Arbitration Clauses in Maritime Contracts" 4 *Arkiv for Sjørett* 388 (1960). A similar provision is article 99 of the Portuguese Code of Civil Procedure of 1939.

suit in the national courts; these include Spain,⁸⁷ Argentina,⁸⁸ and Pakistan.⁸⁹

92. In one jurisdiction, choice of forum clauses have been held inconsistent with article III(8) of the Brussels Convention, which provides:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in this Convention shall be null and void and of no effect..."

It has been concluded that requiring a claimant to sue in a foreign court, in effect, relieves the carrier of responsibility which is established by the Convention and which is protected from contractual derogation by article III(8) above. The United States Court of Appeals for the Second Circuit in *Indussa Corporation v. S. S. Ranborg*,⁹⁰ stated its view of the effect of article III(8):

"A clause making a claim triable only in a foreign court would almost certainly lessen liability if the law which the court would apply was neither the Carriage of Goods by Sea Act nor the Hague Rules. Even when the foreign court would apply one or the other of these régimes, requiring trial abroad might lessen the carrier's liability since there could be no assurance that it would apply them in the same way as would an American tribunal... and [article III(8)] can well be read as covering a potential and not simply a demonstrable lessening of liability. . . . We think Congress meant to invalidate any contractual provision in a bill of lading for a shipment to or from the United States that would prevent cargo able to obtain jurisdiction over a carrier in an American court from having that court entertain the suit and apply the substantive rules Congress had prescribed."

93. The Belgian courts have also reacted to the possibility that choice of a foreign forum would impair the protection intended by the Brussels Convention. Although there is a general rule that choice of forum clauses are to be given effect, it appears that this rule will not be followed if the chosen forum is not required to apply the rules of the Brussels Convention as interpreted by the Belgian courts or if it is unknown whether those rules will be applied.⁹¹

94. In English law, the effectiveness of choice of law clauses depends on the examination and balancing of a number of considerations.⁹² Brandon, J. in *The*

*Eleftheria*⁹³ provided the following description of English law on the subject:

"The principles established by the authorities can, I think, be summarized as follows: (I) Where the plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respect; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for that claim, (ii) be unable to enforce any judgement obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

The Canadian courts appear to have developed a similar attitude. The reply of the Government of Canada to the questionnaire included the following summary:

"The courts in Canada have held on various occasions that they have discretion to decide whether or not they should honour jurisdiction clauses incorporated into bills of lading. This discretion will be exercised upon proof of facts concerning the country of the ship's flag, the domiciles of the shipowner, the shipper and the consignee, the countries from where and to where the shipment was being carried, the place and circumstances under which the shipment was damaged and from where the witnesses will have to be brought to trial; in other words, in what jurisdiction, be it in the country where the action was instituted or the country mentioned in the jurisdiction clause, would it be most convenient and inexpensive to the parties to have the case heard."⁹⁴

⁸⁷ *Revista de derecho privado* 1956, p. 374.

⁸⁸ See reply of Government of Argentina to the questionnaire. See also Schwind, "Derogation Clauses in Latin America", 13 Am. J. Comp. L. 167, 171 (1964).

⁸⁹ *Chowdhury v. Mitsui D.S.K. Lines, Ltd.* (Pakistan Supreme Court) [1970] 2 LLR 272.

⁹⁰ 377 F. 2d 200, 203, 204 (2d Cir. 1967).

⁹¹ Rodière, *Traité général de droit maritime*, tome II, p. 450-452.

⁹² See *The Fehmarn* (1957) 1WLR 815; (1957) 2 All England Law Reports 707 where the rule was applied and the choice of forum clause was not given effect.

⁹³ (1969) 2 All England Law Reports 641, 645. The cargo was loaded on a Greek ship in Romania and was consigned to a port in England; the carrier unloaded in Holland on the ground that strikes in England justified this deviation. The plaintiffs were residents of England; it was assumed that Greek law was applicable. A choice of forum clause, requiring suit in Greece, was given effect; an action in England was consequently subject to a stay.

⁹⁴ The following cases were listed as authority in the Canadian Government's reply: *Birks Crawford Limited v. the*

95. The reply of the Government of India to the questionnaire on bills of lading states that "there is no hard and fast rule in India for honouring 'jurisdiction clauses' in bills of lading. . . . Although the *prima facie* leaning of the court is that a contract should be enforced and the parties should be kept to their bargain, if the court finds that the point about foreign jurisdiction is being raised so as to defeat the claim, our courts may not force the parties to foreign jurisdiction. The Indian courts exercise their discretion guided by considerations of justice and take into account the balance of convenience, the nature of the claim and of the defence, the history of the case, the proper law that governs the contract, the connexion of the dispute with the several countries concerned and the facilities for obtaining evenhanded justice from foreign tribunals."

96. It has been reported that, in a number of States, general principles support the effectiveness of choice of forum clauses in bills of lading.⁹⁵ However, doubt has been expressed as to whether the general principles would be applied in some of these States if the effect of the clause would be to deny effect to the mandatory provisions of the Hague Rules.⁹⁶

C. Possible alternatives

97. Alternative approaches to dealing with choice of forum clauses are set out below. These alternatives will be measured against two basic policy objectives which emerge from the foregoing discussion. These objectives are:

- (1) Minimizing those inconveniences that are related to the place where the dispute will be adjudicated.
- (2) Minimizing the opportunity to escape the protective provisions set forth in the Convention.

98. The following alternatives are concerned with the question whether provisions should be added to the Hague Rules to deal with choice of forum clauses.⁹⁷

ship "STROMBOLI" 1955 Ex C.R.1; *R. J. Polito v. Gestioni Esercizio Navi Sicilia Gens* 1960 Ex C.R. 233; *A. S. May and Co. Ltd. v. Robert Reford Co. Ltd. et al* (1966) 6 D.L.R. (3d 288).

With respect to the Province of Quebec, the reply of the Canadian Government states: "In the Province of Quebec, Civil Law courts which have concurrent jurisdiction with the admiralty courts in marine and admiralty matters will only honour a jurisdiction clause if the facts do not indicate that the case falls into the areas of competency mentioned in article 68 C.C.P."

⁹⁵ Replies to the questionnaire state such rules for Denmark, Federal Republic of Germany, France, Greece, Netherlands, Norway, Poland and Sweden.

⁹⁶ Replies to the questionnaire by Netherlands, Norway and Sweden. The reply to the questionnaire by Norway states: "A jurisdiction clause not affecting the choice of law would consequently be enforced in most cases. The possibility cannot be entirely excluded, however, that such a jurisdiction clause could be held invalid for the reason that it makes it so difficult or expensive for the cargo owner to maintain his rights if he has to bring suit to the foreign court upon which jurisdiction is conferred, that for all practical purposes the carrier is exempted from liability as effectively as by virtue of express exemption clauses of a type ordinarily invalid under the Hague Rules." Cf. Federal Republic of Germany. Giles, *Uniform Commercial Law* (1970), p. 106.

⁹⁷ Neither the discussion nor the proposals will be concerned with national rules regarding venue, the subject-matter competence of specific courts and the acquisition of jurisdiction (personal, *in rem*) over the defendant.

It should be noted that a suggestion for including a provision on choice of forum was advanced prior to the diplomatic conference which resulted in the 1924 Brussels Convention; the suggestion was not adopted.⁹⁸

1. No new provision in the Convention

99. The analysis of existing rules and the replies to the questionnaire supports the decision of the UNCTAD and UNCITRAL working groups to examine the existing rules on choice of forum clauses in bills of lading. The Brussels Convention of 1924 (the "Hague Rules") does not deal directly with this question, and national rules vary from complete outlawry of choice of forum clauses to enforcement of such clauses without regard to whether the forum selected in the bill of lading is reasonable in relation to the needs of the claimant.

100. When the bill of lading designates a forum to which a claim can be presented only with substantial difficulty and expense, the cargo owner may be forced to choose among the following unsatisfactory alternatives: (a) bringing an action in an inconvenient forum; (b) settling on poor terms; (c) dropping the action; and (d) violating the choice of forum clause and facing delay and expense while the issue on the effectiveness of the choice of forum clause is litigated.

101. The situation appears to be inconsistent with the two objectives set out above. Most of the replies to the questionnaire support international unification to deal with the problems.⁹⁹ It therefore is appropriate to explore alternative approaches to the framing of an international rule governing choice of forum clauses.

⁹⁸ During the discussion in the International Law Association prior to the diplomatic conference which resulted in the 1924 Brussels Convention a proposal was made to include the following:

"Action arising from the contract of affreightment shall be brought in the Courts of the place of delivery of the cargo. Clauses establishing the contrary shall be null and void and of no effect."

(ILA Report of the 31st Conference—Proceedings of the Maritime Committee, vol. 2, pp. 79-80 (1923). For a later proposal, see: International Maritime Committee, *XXVth Conference*, Stockholm, 1963, pp. 101-102.

⁹⁹ See, *inter alia*, replies from Argentina, Australia, France, India, Iraq, Japan, Norway and Poland. (Proposals made in various replies will be set out later in this report.) *Contra*, see reply of the Government of Greece: "The existing rules of jurisdiction clauses, as far as Greece is concerned, appear to be satisfactory". The reply of the United Kingdom on the question reads as follows "The Government of the United Kingdom consider that the practice of giving effect to the wishes of the parties is desirable. It is recognized that this will normally mean that jurisdiction will be that of the country where the carrier has his principal place of business (such a provision reflects the logic of taking proceedings where assets are available). It is arguable that any hardship caused, e.g., by an importer being in theory forced to sue abroad, is already sufficiently mitigated by the laws in most countries, who either by legislation or as a matter of public policy make such clauses either voidable or to be over-ruled by the courts." (This reply also sets forth a suggestion for a rule dealing with choice of forum clauses for consideration in the event that legislative regulation is to be instituted. See *infra*, footnote 115.) Cf. replies of Canada, Hungary, Sweden, Madagascar.

2. *Provision declaring all choice of forum clauses to be invalid*

102. If regulation is considered, the most sweeping approach would be to deny any effect to choice of forum clauses.¹⁰⁰ This is the approach of the Convention on the Carriage of Passengers by Sea (1961). Article 9 of that Convention reads as follows:

"Any contractual provision, concluded before the occurrence which caused the damage, purporting to relieve the carrier of his liability towards the passenger or his personal representatives, heirs or dependants or to prescribe a lower limit than that fixed in this Convention, as well as any such provision purporting to shift the burden of proof which rests on the carrier, or to require disputes to be submitted to any particular jurisdiction or to arbitration, shall be null and void, but the nullity of that provision shall not render void the contract which shall remain subject to the provisions of this Convention."¹⁰¹

103. Under such a provision, the claimant would be able to bring his claim in any country where he can get jurisdiction.

104. This approach would completely satisfy the interests of cargo owners. However, it would hardly reflect a balanced approach to the problem, for it would open up opportunities for obtaining jurisdiction at places unrelated to either the transaction or the business operations of the carrier. This approach thus would fail to implement the first basic policy objective set out above, namely, minimizing the inconveniences to be faced by both parties in the adjudication of disputes.

3. *Provision setting out general criteria for effectiveness of choice of forum clause*

105. Consideration might be given to rules framed in terms of general criteria for deciding on the effectiveness of a choice of forum clause. An example of this approach is found in the Convention on the Choice of Court (1965).¹⁰² Article 6 provides:

"Every court other than the chosen court or courts shall decline jurisdiction except—

"(1) where the choice of court made by the parties is not exclusive,

"(2) where under the internal law of the State of the excluded court, the parties were unable, because of the subject matter, to agree to exclude the jurisdiction of the courts of that State,

"(3) where the agreement on the choice of court is void or voidable in the sense of article 4,

¹⁰⁰ This approach is supported in the reply of the Government of Argentina to the questionnaire, p. 19. Argentina also favours a separate protocol on the subject, deeming the subject very delicate, in order not to endanger the success of the items relating to the substantive law.

¹⁰¹ (Emphasis is added.) *British Shipping Laws*, vol. 8, Singh ed., pp. 1,067, 1,069.

¹⁰² *Recueil des Conventions de la Haye*, Conférence de la Haye de Droit International Privé 97, 99 (1966).

"(4) for the purpose of provisional or protective measures."

106. Article 6 (3), above, referred to article 4, which reads as follows:

"For the purpose of this Convention the agreement on the choice of court shall have been validly made if it is the result of the acceptance by one party of a written proposal by the other party expressly designating the chosen court or courts.

"The existence of such an agreement shall not be presumed from the mere failure of a party to appear in an action against him in the chosen court.

"The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means." (Emphasis added.)¹⁰³

107. It should be borne in mind that these provisions had to be drafted in general terms since the Choice of Court Convention was meant to apply to all types of choice of forum clauses. Consequently, this provision could not be cast in terms of specific situations arising in ocean transport, nor could it deal concretely with choice of forum clauses that might derogate from the mandatory rules of the 1924 Brussels Convention.¹⁰⁴ Moreover it would appear that litigation to determine questions on whether the particular agreement was obtained by "abuse of economic power" would involve substantial costs, and the outcome would be too uncertain to make this alternative effective. As we shall see, it may be possible in the specific setting of bills of lading to draft rules that will provide greater predictability, certainty, and uniformity of result.

4. *Provision specifying several alternative places before which a claim may be brought*

108. One approach to the problem is a Convention provision which prescribes alternative places for suit.

¹⁰³ Another example of this approach is to be found in the Model Choice of Forum Act, which was approved at the 1968 annual meeting of the National Conference of Commissioners on Uniform State Laws (United States). Section 3 [Action in another place by agreement] states:

"If the parties have agreed in writing that an action shall on a controversy be brought only in another state and it is brought in a court of this state, the court will dismiss or stay the action, as appropriate, unless

"(1) The court is required by statute to entertain the action;

"(2) The plaintiff cannot secure effective relief in the other state, for reasons other than delay in bringing the action;

"(3) The other state would be a substantially less convenient place for the trial of the action than this state;

"(4) The agreement as to the place of the action was obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; or

"(5) It would for some other reason be unfair or unreasonable to enforce the agreement."

"The Model Choice of Forum Act", 17 *American Journal of Comparative Law* 292, 294-295 (1969) (Emphasis added).

¹⁰⁴ It would be possible to set out general criteria which are more closely relevant to these problems. These criteria might be along the lines of those listed by the English court in the *Eleftheria*, *supra* paragraph 94. However, each one of these criteria, as set out in V of the portion of the judgement quoted, involve questions of degree which would open the way for dispute and divergent interpretations by the various national courts.

109. Such a provision may give no effect to an agreement by the parties designating the place for suit. An example of this approach is article XXVIII of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, 1929 (the Warsaw Convention):

"ARTICLE XXVII¹⁰⁵

"(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the high contracting parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

"(2) Questions of procedure shall be governed by the law of the court to which the case is submitted."

110. An approach that designates alternative places for suit and, in addition, gives limited effect to an agreement by the parties, is illustrated by article 31 of the Convention on the Contract for the International Carriage of Goods by Road (CMR):¹⁰⁶

"1. In legal proceedings arising out of carriage under this Convention, the plaintiff may bring an action in any court or tribunal of a contracting country designated by agreement between the parties and, in addition, in the courts or tribunals of a country within whose territory;

"(a) The defendant is ordinarily resident, or has his principal place of business, or the branch or agency through which the contract of carriage was made, or

"(b) The place where the goods were taken over by the carrier or the place designated for delivery is situated, and in no other courts or tribunals."

A feature of this provision, which is not to be found in article XXVIII of the Warsaw Convention, is that under the first sentence of paragraph 1 effect is given an agreement designating an additional place for suit. However, the plaintiff is not restricted to the place specified in the agreement; the effect of the agreement is to afford the plaintiff a *forum* which, at his option, he may select in preference to the *fora* designated in paragraphs (a) and (b).

¹⁰⁵ League of Nations, *Treaty Series*, vol. CXXXVII, p. 13. For discussion of the manner in which article XXVIII has been construed see Villaneuve, "Le Forum Shopping dans la Convention de Varsovie", 30 *Revue Générale de l'Air et l'Espace* 221 (1967). See also, McKenry, "Judicial Jurisdiction under the Warsaw Convention", 29 *Journal of Air Law and Commerce* 205 (1963).

¹⁰⁶ United Nations, *Treaty Series*, vol. 399, pp. 189, 216. An early version of the draft convention on the Combined Transport Contract (TCM Convention) contained the provision in article 14. At the third session of the Joint IMCO/ECE Meeting to study the draft convention the following action was taken as stated in the report:

"Article 14

"104. Many representatives felt that the retention of this provision was superfluous as a body of law existed to determine the appropriate jurisdiction. Some representatives were of the opinion that its retention might lead to conflict with other international conventions. The meeting decided to delete article 14."

(TRANS/370/III/I, p. 20.)

111. Under these conventions the plaintiff is guaranteed the right to bring his claim in a place which is related to the transaction, and which is likely to be convenient for him.¹⁰⁷ This, of course, neutralizes the advantage which the carrier usually has in drafting the bill of lading.

112. These Conventions also provide protection to the carrier. The Warsaw Convention and the Carriage of Goods by Road Convention (CMR) confine actions by the claimant to a specific number of places related to the transaction or the transaction or the location of the defendant.^{107a}

113. The provisions of the foregoing conventions with respect to the designation of alternative states for legal action are employed in the following draft proposal:

[Draft proposal A]

A. In a legal proceeding arising out of the contract of carriage the plaintiff, at its option, may bring an action.

1. In a state within whose territory is situated:

(a) the principal place of business of the carrier or the carrier's branch or agency through which the contract of carriage was made; or

[(b) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or]

(c) the place where the goods were delivered to the carrier; or

(d) the place designated for delivery to the consignee; or

2. In a [contracting state] [place] designated in the contract of carriage.

B. No legal proceedings arising out of the contract of carriage may be brought in a place not specified in paragraph A above.

C. Notwithstanding the provisions of paragraphs A and B above, an agreement made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

114. Each item in the above draft will be discussed separately.

The specified places for suit—paragraph A 1

115. Subparagraph 1 (a). The choices provided under this subparagraph are given under the Warsaw Convention and the Carriage of Goods by Road Convention (CMR). The carrier's principal place of business is often the place designated in the bill of

¹⁰⁷ These types of provisions are primarily concerned with assuring that the convenience of the parties is served. It is assumed that since the claimant has a choice of places he would choose one whose courts would apply the rules of the 1924 Brussels Convention, if it were appropriate to do so.

^{107a} As was noted in para. 110, *supra*, under the CMR Convention the parties by agreement may extend the choice.

lading.¹⁰⁸ It is assumed that the carrier would not object to this place for suit although under the above draft the claimant would not be restricted to this forum. For the claimant, it may be important to be able to sue in the carrier's courts if that is the only place (of the permissible places under the Convention provision where suit may be brought) where the carrier has assets.

116. *Subparagraph 1 (b)*. This subparagraph, referring to the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that state, is based on one of the choices given under article 13 of the International Convention for the Unification of Certain Rules Relating to the Carriage of Passenger Luggage by Sea (1967). Article 13 (1) (c) provides that one of the choices of a forum the plaintiff may make is "(c) the Court of the State of the domicile or permanent place of residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that state",¹⁰⁹ claimant's state of domicile or permanent residence is obviously convenient for him. On the other hand, the claimant's state of domicile or habitual residence might have no reasonable relation to the shipment and therefore may be inconvenient from the standpoint of the carrier. For this reason, this subparagraph adds a further requirement—that the defendant have a place of business in the State. Serious difficulties of interpretation may be presented by the term "a place of business"; for this reason, subparagraph (b) is presented in brackets. Wording such as "a permanent place of business" appears somewhat less ambiguous, and therefore may be considered if an alternative along the lines of subparagraph 1 (b) is desired.¹¹⁰

117. *Subparagraphs 1 (c) and 1 (d)*. These subparagraphs, referring to the place of delivery to the carrier (1 (c)) and the consignee (1 (d)), are based on choices given under the Carriage of Goods by Road Convention (CMR) and the Carriage of Passenger Luggage Convention. Subparagraph (d) is also based on one of the choices given in the Warsaw Convention. The place of shipment will be a choice which the shipper and in some cases the cargo owner's insurer would wish to have. The place of delivery will be the most convenient for the consignee in most circumstances. Since, as has been explained earlier, the consignee is likely to be the claimant it would appear that the courts most convenient to him should be made available to him. In many cases the carrier will have a

branch or office in the port of shipment or port of delivery; in these instances, it seems likely that the carrier could have little objection to the alternative. However, in some instances, there will be no branch office. In this case, the provision must be justified on the basis of convenience to the claimant, and the relationship of the ports of shipment and delivery to the transaction of carriage.¹¹¹

Contractual alternative for suit

118. *Subparagraph 2*. This subparagraph states one of the choices given under the Carriage of Goods by Road Convention (CMR) and would give the parties to the contract of transport the power to add to the list of places for the adjudication of disputes. As a result of this paragraph, when a dispute arose and the claimant appeared before the courts of the place selected in the choice of forum clause, those courts could hear the suit even if they were not located in any of the places set out in the first four items above. It the carrier inserts or agrees to such a choice in the bill of lading the place selected should not be objectionable to him. It will be noted that the claimant would not be obliged to bring his action in the forum selected in the bill of lading, and would retain the choice of alternative places set out in subparagraph 1 of the draft provision. Subparagraph 2, following the pattern of the CMR Convention, limits the choice of forum to a "contracting State", in the first bracketed language.¹¹²

Limits to choices

119. *Paragraph B*. This paragraph is based on provisions in the Warsaw Convention, the Carriage of Goods by Road Convention (CMR) and the Carriage of Passenger Luggage Convention. It confirms the limits within which the claimant may choose his forum.

Contractual alternative once dispute has arisen

120. *Paragraph C*. Paragraph C states: "Notwithstanding the provisions of paragraphs A and B above, an agreement, made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective".^{112a}

121. Paragraph C would give the parties involved in a dispute the opportunity to agree to a mutually convenient place for litigation. After a claim has arisen, each side would have the opportunity to weigh the

¹⁰⁸ The bill of lading may refer in general terms to the carrier's principal place of business or may designate the courts of a specified country—in which the carrier maintains his principal place of business. A widely used example of the first method is the choice of forum clause in the CONLINE bill of lading, set out above. Attention is also directed to the alternative choice in paragraph (a) of the state in which is situated the branch or agency through which the contract was made.

¹⁰⁹ Conventions on Maritime Law (Brussels Conventions) Ministère des Affaires Étrangères et du Commerce Extérieur de Belgique I.V.1968, p. 97. For the full text of article 13 and further discussion of the Convention see *infra* paras. 123-124.

¹¹⁰ The phrase "principal place of business", which he used in subparagraph 1 (a), seems less ambiguous than "a place" or "a permanent place" of business. However, the use of that text in paragraph 1 (b) would make this choice narrower than that of paragraph 1 (a), and consequently would make 1 (b) redundant.

¹¹¹ The report of the UNCTAD secretariat on bills of lading states, at paragraph 303 that "if jurisdiction were required to be either in the country of shipment or in that of delivery, at the option of the plaintiff there might be certainty as well as fairness to cargo owners. This would also be fair to carriers as it is arguable that, by agreeing to trade between the two ports, they implicitly consented to the probability of submitting to the jurisdiction of either port".

¹¹² The alternative bracketed language "[place]" gives wider effect to the agreement of the parties. This may be appropriate since this additional alternative need not be employed unless the claimant finds it desirable at the time of suit; the other party (normally the carrier) will have agreed to this choice in drafting the bill of lading.

^{112a} This paragraph is based on paragraph 3 of article 13 of the Carriage of Passenger Luggage Convention. See *infra*, paragraph 123 for the text of article 13.

advantages and disadvantages of litigating in a particular forum. The claimant would presumably agree to litigate in a particular forum, other than the ones before which he would otherwise have the right to appear, only because it was more convenient for him to do so. The agreement on a choice of forum made under these circumstances would be unlikely to contain the essential elements of an adhesion contract.

122. A number of States have, in their replies to the questionnaires, made suggestions and proposals that indicate support for the approaches envisaged in the draft proposal.¹¹³

5. *Requirement that specified limitations on choices, to be effective, must be set forth in the contract of carriage.*

123. The International Convention for the Unification of Certain Rules Relating to the Carriage of Passenger Luggage by Sea (1967)¹¹⁴ offers an approach to the relationship between an agreement by the parties and a statutory list of optional *fora* which differs from that of the Warsaw Convention and the Carriage of Goods by Road Convention (CMR).

Article 13 of the Carriage of Passenger Luggage Convention reads as follows:

"1. Prior to the occurrence of the incident which causes the loss or damage, the parties to the contract

of carriage may agree that the claimant shall have the right to maintain an action for damages, according to his preference, only before:

"(a) the Court of the permanent residence or principal place of business of the defendant, or

"(b) the Court of the place of departure or that of destination according to the contract of carriage, or

"(c) the Court of the State of the domicile or permanent place of residence of the claimant if the defendant has a place of business and is subject to jurisdiction in that State.

"2. Any contractual provision which restricts the claimant's choice of jurisdiction beyond that permitted under paragraph (1) shall be null and void, but the nullity or such provision shall not render void the contract which shall remain subject to the provisions of this Convention.

"3. After the occurrence of the incident which caused the loss or damage, the parties may agree that the claim for damages shall be submitted to any jurisdiction or to arbitration."

124. The distinctive feature of this approach is found in the language of paragraph 1 that "the parties to the contract of carriage may agree that the claimant shall have the right to maintain an action for damages, according to his preference only before . . ." [the Courts listed in subparagraphs (a), (b) and (c)]. Thus the claimant's choice of places is limited only if he and the other party to the contract of carriage have agreed to the limitation of *fora* as prescribed in the Convention. It would appear that in the absence of such an agreement the claimant is not barred from bringing his action in any forum where he can obtain jurisdiction over the defendant. This approach has the merit of requiring the carrier to inform the cargo owner in the contract of carriage itself that the plaintiff in an action has a choice of *fora* and what the choices are.

125. Following is a draft provision reflecting this distinctive feature of the Carriage of Passenger Luggage Convention.¹¹⁵ (The choices of alternative places for suit are the same as those set forth in draft proposal A.)^{115a}

[Draft proposal B]

A. *The parties to a contract of carriage may agree to limit the plaintiff's choices of places where a legal proceeding arising out of the contract of carriage may be brought to the following:*

(1) *The principal place of business of the carrier or the carrier's branch or agency through which the contract was made; or*

[(2) *The domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or*]

¹¹³ In its reply, the United Kingdom doubted the need for a Convention provision on the subject but stated that there is diversity of law on the subject "an alternative solution might be along the lines of" article 13 of the "Carriage of Passenger Luggage Convention".

^{115a} The provision in paragraph A2 of draft proposal A appears as the last sentence in paragraph B of draft proposal B. In addition, this sentence makes use of the second alternative "[place]" set forth in subparagraph A2 of draft proposal A. See *supra* foot-note 112.

¹¹³ In its reply to the question, the Government of France suggests a formulation of the provision which would consist of items like 1 (a) and 1 (c), 1 (d) of draft proposal A. The specific formulation proposed reads as follows:

"Pour tous litiges auxquels donnent lieu les transports soumis à la présente Convention, le demandeur peut saisir les juridictions de l'Etat (contractant) sur le territoire duquel:

"(a) le défendeur a sa résidence habituelle, son siège principal ou la succursale ou l'agence par l'intermédiaire de laquelle le contrat de transport a été conclu, ou

"(b) le lieu de la prise en charge de la marchandise ou celui prévu pour la livraison est situé,

"et ne peut saisir que ces juridictions".

The Government of Japan suggests in its reply a possible provision which would consist of items like 1 (a), 1 (c), 1 (d) and 2 of the draft proposal A.

The Government of Norway suggests in its reply a provision which would consist of items like 1 (a), 1 (d) and 2 of draft proposal A. The provision formulated would read as follows:

"No provision in the bill of lading shall deprive the claimant of the right, at his choice, to bring proceedings relating to disputes arising out of the bill of lading:

"(a) In any court or tribunal of a Contracting State designated by agreement between the parties as indicated in the bill of lading; or

"(b) In the courts or tribunal of a country within whose territory is situated the place where the defendant has his habitual residence or his principal place of business through which the contract of carriage was made; or

"(c) In the courts or tribunals of a country within whose territory is situated the place where the goods were taken in charge by the owner or the place designated for delivery."

In its reply the Government of India suggested a provision which would consist of items like 1 (c) and 1 (d) which would provide "for instance, that jurisdiction would lie either in the country of shipment or that of destination, at the option of the party claiming the loss, regardless of what the bill of lading may provide". A similar proposal is made in the reply of the Government of Iraq.

¹¹⁴ See paragraph 116 *supra*.

(3) The place where the goods were delivered to the carrier; or

(4) The place designated for delivery to the consignee.

B. Any contractual provision that restricts the plaintiff's choice of places for legal proceeding more narrowly than as set forth in paragraph A shall be null and void, but the nullity of such provision shall not render void the contract which shall remain subject to the provisions of this Convention. The agreement may, however, add to the plaintiff's choices of places for legal proceedings.

C. Notwithstanding the provisions of paragraphs A and B above, an agreement, made by the parties after a claim under the contract of carriage has arisen, which designates the place where the claimant may bring an action, shall be effective.

126. Under this provision the carrier would have the choice of inserting a provision in the bill of lading limiting the *fora* available to the plaintiff to those set out in the Convention provision, or of being ready to face suit in any forum the plaintiff may choose. Since it is normally the carrier that drafts the bill of lading and since limiting the claimant's choice is to the carrier's advantage, as a practical matter, it is expected that the carrier would insert the appropriate provision on the subject in the bill of lading.

D. Arbitration clauses

127. At present few bills of lading contain arbitration clauses. However, if provisions are adopted restricting the choice of the judicial forum greater use may be made of arbitration in bills of lading.¹¹⁶ Therefore it seems appropriate at this time that consideration be directed to the use of arbitration clauses to control the place for presentation of the claim.¹¹⁷

1. Present legal rules with respect to the choice of the place for arbitration in the contract of carriage

128. In discussing the aspect of the arbitration clause dealing with the place where arbitration will be held, one must distinguish between: (a) arbitration clauses that specify the place of arbitration

and (b) clauses that delegate the setting of the place of arbitration to the arbitrator, arbitral organization or other body.

129. The first type is like the choice of judicial forum clause described and discussed above.¹¹⁸ The second type would, in most cases, permit the designated person or body to consider the appropriateness of the place after a dispute has arisen. In such cases, the contract of transport could not be considered to be a contract of adhesion as to the designation of the arbitral forum. Barriers to effective recovery resulting from an inconvenient place would arise only if the designating body or the arbitrator makes an unfair selection of a place.

2. Possible alternatives

(a) No change in the existing legal rules

130. It will be recalled that the 1924 Brussels Convention contains no provision concerning clauses choosing a judicial forum or arbitration. It might be suggested that since arbitration clauses are not often used in bills of lading, nothing need be done until it is shown that the use of such clauses is widespread and generates substantial difficulties. On the other hand, it might be suggested that a review of the basic rules governing bills of lading occurs infrequently, and consequently the problems that may reasonably be anticipated should be dealt with at this time.

(b) Provision declaring arbitration clauses to be ineffective

131. The International Convention for the Unification of Certain Rules Relating to the Carriage of Passengers by Sea (April 1961)¹¹⁹ provides in article 9 that any contractual provision requiring disputes to be submitted to arbitration "shall be null and void".

132. In considering whether such a provision should be applied to bills of lading attention should be given to the fact that arbitration enjoys widespread favour as an efficient and inexpensive process for the settlement of disputes. This is particularly true in the adjustment of commercial disputes. In view of this generally favourable attitude toward arbitration, less drastic measures may be envisaged for dealing with the problems relating to the choice of the place for arbitration.

¹¹⁶ The arbitration clause may well be more effective than a choice of judicial forum. E.g., in *Indussa Corporation v. S.S. Ranborg*, 377 F. 2d 200, 204 (2d Cir. 1967) the United States Court of Appeals rejected both a choice of law and choice of forum clause under which the 1924 Brussels Convention as enacted in Norway would have been applied, but stated in a foot-note: "Our ruling does not touch the question of arbitration clauses in bills of lading which require this to be held abroad. The validity of such a clause in a charter party, or in a bill of lading effectively incorporating such a clause in a charter party, has been frequently sustained."

The reply of the Government of Japan to the questionnaire states that if legislation should be enacted which does not allow the parties to make agreements regarding jurisdiction, "the result would be that the arbitration clause which makes the award final and binding will be frequently used in the bills of lading".

¹¹⁷ After consideration of the place for arbitration, consideration will be given to the possible effect of the arbitration clause in avoiding the protective provisions of the 1924 Brussels Convention (*infra*, paras. 142-148).

¹¹⁸ Selection in the contract of carriage of certain courts of arbitration or organizations which administer arbitrations would be tantamount to the choice of a specific place for arbitration since according to the rules (and in some cases legislation) under which these bodies operate the place of arbitration is fixed at a particular place or within a particular country. E.g., USSR Maritime Arbitration Commission of USSR Chamber of Commerce, Handbook of National and International Institutions Active in the Field of International Commercial Arbitration (hereinafter called Handbook) TRADE/WP.1/15/Rev.1, vol. II, pp. 416, 419. Maritime Arbitration Chamber (France) (Handbook, pp. 335, 338), Arbitration Court of the Bremen Chamber of Commerce (Handbook, vol. II, pp. 101, 104). Foreign Trade Arbitration Commission of the Romanian Chamber of Commerce (Handbook, vol. II, pp. 180, 182). Cf. Arbitration Court of the Chamber of Commerce of Czechoslovakia according to whose rules the normal seat of the arbitral tribunal is Prague, but the arbitrators may sit in a foreign country upon request of the parties (Handbook, vol. II, pp. 93, 95).

¹¹⁹ This Convention is discussed in paragraphs 102-104, *supra*.

(c) *Provision specifying alternative places where arbitration may be brought*

133. Consideration might be given to a provision restricting the places for arbitration that may be chosen in the contract of carriage or by a body or procedure designated in the contract.

134. In this regard consideration might be given to article 32 of the Warsaw Convention which reads as follows:

"Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. *Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.*" (Emphasis added.)

135. The first paragraph of article 28, to which the above provision refers, has been quoted in paragraph 109, *supra*.

136. To achieve the objectives described above, consideration might be given to the following draft:

[Draft proposal C]

1. An arbitration proceeding initiated pursuant to an arbitration clause in a contract of carriage must be held within one of the following States:

- [(a) the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or]¹²⁰
- (b) the place where the goods were delivered to the carrier; or
- (c) the place designated for delivery to the consignee.

2. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place of arbitration.

137. Paragraph 1 of the draft would permit a binding choice in the bill of lading of one of three places for arbitration listed in subparagraphs (a), (b) and (c). It may be recalled that draft proposal A on the choice of judicial forum, in addition, included the principal place of business of the carrier; this alternative seemed appropriate in that setting since the claimant remained free to select among the various alternatives at the time of suit. However, draft proposal C dealing with arbitration clauses presents a different problem since a binding choice as to the place of arbitration can be made in the contract of carriage. Earlier in this report, it was noted that shippers seldom can negotiate effectively concerning specific terms in bills of lading. Attention was also directed to the tendency of the carrier to specify in standard bills of lading that all claims must be brought for adjudication to the carrier's place of

business. Hence, if a binding choice for arbitration at the carrier's place of business could be made in the contract of carriage, some of the present problems with respect to choice of forum clauses might reappear. It is thought that this restriction on a binding choice in the contract of carriage does not produce excessive rigidity with respect to the place for arbitration in view of the flexibility afforded by paragraph 2 of the draft, which will be discussed below.

138. Paragraph 1 of draft proposal C would also limit the places for arbitration that may be designated by a body or person specified in the contract of carriage. Considerations supporting such a restriction are related to the abuses that may develop from contracts of adhesion. It may be assumed that most arbitral bodies would select a place for arbitration that would take into account the needs of both parties. On the other hand, it may be considered hazardous to assume that this will always be the case.¹²¹ Flexibility in this regard is also provided by paragraph 2 of the draft, to which attention may now be directed.

139. Paragraph 2 of the draft proposal provides that once a dispute arises the parties may agree to another place for arbitration. As in the case of choice of judicial forums, such an agreement is not subject to the abuses of contracts of adhesion, since the claimant has the opportunity to negotiate concerning the place for arbitration. As has been noted above,¹²² this policy has been reflected in provisions of the Carriage of Passenger Luggage Convention and seems useful to provide the maximum flexibility consistent with a degree of restraint on the abuses of contracts of adhesion.

(d) *Provision imposing no restriction on the power of a body or person designated in the arbitration clause to select the place for arbitration*

140. Often one of the functions of the arbitration body or the arbitrator designated in the arbitration clause is to choose the place where arbitration will be held. It will be recalled that under draft proposal C the designating body or person is restricted to the choice of a specified number or places. Such restrictions may not be deemed to be desirable on the ground that the designating body or person will normally take into account the needs of both parties.

141. A provision reflecting this approach follows. (The provision that differs from the preceding draft is subparagraph (d).)

[Draft proposal D]

1. An arbitration proceeding initiated pursuant to an arbitration clause in contract of carriage must be held:

- [(a) Within the State of the domicile or permanent place of residence of the plaintiff if the defendant has a place of business in that State; or]¹²³

¹²¹ A delicate choice of policy is involved at this point. A draft reflecting a choice different from that outlined here appears *infra* as draft proposal D.

¹²² See *supra* paragraphs 120-121.

¹²³ See discussion in paragraph 116, *supra* on possible ambiguities with regard to the term "a place of business". Any decision with respect to the use of this phrase in draft proposal A presumably would be followed here.

¹²⁰ See discussion in paragraph 116 *supra*, on possible ambiguities with regard to the term "a place of business". Any decision with respect to the use of this phrase in draft proposal A presumably would be followed here.

- (b) Within the State of the place where the goods were delivered to the carrier; or
- (c) Within the State of the place designated for delivery to the consignee; or
- (d) *At the place chosen by the body or person designated in the arbitration provisions of the contract of carriage.*

2. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place of arbitration.

(e) *Provision requiring application of the rules of the Convention*

142. It will be recalled that the 1924 Brussels Convention laid down mandatory minimum standards of carrier responsibility; the Convention precludes reducing those standards by contract. In certain circumstances the choice of a judicial forum in a bill of lading may be rejected on the ground that this choice indirectly nullifies the mandatory rules of the Convention. Does a similar problem arise when the parties choose an arbitral forum?

143. In some countries arbitration proceedings are similar to judicial proceedings. The appropriate rules of law must be used in reaching a decision; the arbitrator's reasons for his decision must be written out. In other countries, however, the arbitrator may not be obliged to follow the applicable rules of law, and even if such an obligation exists the arbitrator may not be required to give the reasons for his award.¹²⁴ In still other countries the parties may choose in their arbitration clause between the two types of arbitration.¹²⁵ Furthermore, the courts of many States will enforce an award made on the basis of a valid arbitration clause without reviewing the decision of the arbitrator on the merits of the dispute. This approach is reflected in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).¹²⁶ Article V sets out the grounds upon which the recognition and enforcement of an award may be refused:

"Article V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- "(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

¹²⁴ However, almost all legal systems will honour the specific instruction in the arbitration clause that the parties wish the appropriate rules of law to be applied, and the arbitrator's reasons for his decision stated in the award.

¹²⁵ In France, for example, the parties may choose between arbitration according to strict legal rules or *amiable composition*. Robert on "Arbitration in France" in *International Commercial Arbitration* 240, 255 (Sanders Rep. Gen., 1956).

¹²⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). United Nations, *Treaty Series*, vol. 330, pp. 38, 40 and 52.

- "(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

- "(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

- "(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

- "(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- "(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

- "(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

144. It will be observed that under the above convention there are only limited grounds for refusing recognition and enforcement of an award; more particularly this means that the court is not obligated to review whether the arbitrator applied the legal rules applicable to the dispute and if he did so whether they were applied correctly.

145. In States where the courts will not inquire as to whether the appropriate substantive rules were applied by the arbitrator, is there reason to fear that the arbitrator will fail to implement policies for the protection of cargo owners established by the Convention? The question is not whether this might occur in isolated cases; courts also on occasion may fail to give full effect to provisions of a statute or a convention. The relevant question is whether arbitrators in general would give less effect than courts to the protective provisions of the Convention.

146. The Convention on the Carriage of Goods by Road (CMR) contains a provision dealing with this question. Article 33 reads as follows: "the contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention."

147. The following draft provision, drawing on article 33 of the CMR Convention but adapted to fit the requirements of the 1924 Brussels Convention, might read as follows:

[Draft proposal E]

The contract of carriage may contain a provision for arbitration only if that provision states that this Convention shall be applied in the arbitration proceedings.

148. Such a provision would at least serve to encourage the arbitrator to use the rules of the Convention.¹²⁷

149. Draft proposal E, it will be observed, does not deal with the appropriateness of the place for arbitration. (See paras. 130-141, *supra*.) If the Working Group decides to recommend both a provision concerning the place for arbitration and a provision concerning application of the Convention by the arbitrator (as in draft proposal E), it would be feasible to combine both provisions into one consolidated draft.¹²⁸

PART FOUR. APPROACHES TO BASIC POLICY DECISIONS CONCERNING ALLOCATION OF RISKS BETWEEN THE CARGO OWNER AND THE CARRIER*

A. Introduction

150. The scheme of carrier liability in the carriage of goods by sea is the mechanism for allocating the risk of cargo loss and damage between cargo owner and carrier. For much of the world the Brussels Convention of 1924,¹²⁹ incorporating the Hague Rules, provides the scheme and sets the allocation.¹³⁰

*This part of the report is based on the research and analysis in a study prepared by Robert Hellawell, Professor of law, Columbia University, as consultant to the Secretariat.

¹²⁷ A possible provision based on article 33 of the CMR Convention is supported in the replies of the Governments of Denmark and France. The reply of the Government of France further states that in order to facilitate the application of article 33 and in the interest of all the parties concerned in the contract of maritime carriage, the following alternatives could be studied: (a) the application, in a manner appropriately adapted to maritime transport, of the 1961 Geneva Convention in International Commercial Arbitration; (b) the creation and organization of an International Maritime Chamber of Commerce within which the interests of both carriers and cargo owners would be represented, whether they be from market economy countries or developing countries.

¹²⁸ To facilitate analysis and decision by the Working Group, the various alternatives with respect to choice of forum and choice of arbitration have been presented separately, without an attempt to present a single consolidated draft. It is possible that the Working Group may recommend proposals on these issues that would contain identical provisions—as in the listing of the places for recourse to a judicial forum and to arbitration. In this event, the consolidation of these provisions could produce a more concise total draft than would appear if the provisions are considered separately.

¹²⁹ International Convention for the Unification of Certain Rules Relating to Bills of Lading, League of Nations, *Treaty Series*, vol. CXX, p. 156, No. 2764 (1931-1932).

¹³⁰ It was estimated in 1955 that about four fifths of world tonnage was under flags which adhere to the Convention on Rules or which, without adhering thereto, have enacted national legislation incorporating the Rules. UNCTAD secretariat report on bills of lading dated 14 December 1970 (TD/B/C.4/ISL/6, p. 68) (hereinafter cited as UNCTAD report) citing Stoldt, *Zur Statuten-Kollisions im Seefrachtvertrag*, in *Liber Amicorum of Congratulations to Algot Bagge*, 220-225 (1955).

151. This part of the report responds to the request that the Secretary-General prepare a report "analysing alternative 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,^{129a} with special reference to establishing a balanced allocation of risks between the cargo owner and the carrier". Section B summarizes the law on the bases of liability and the present burden of proof scheme under the Hague Rules, Section C describes and analyses certain major factors, or policy considerations, that should be weighed in formulating the rules as to carrier liability for cargo loss or damage. Section D compares the rules on liability and burden of proof established by international conventions on carriage of cargo by air, by rail and by truck. The final part, section E, considers the pertinent provisions of the Hague Rules against the policy considerations—particularly considering the exceptions of article IV—and considers possible amendments to the Rules that would implement the relevant policy considerations analysed in the earlier parts of the report.

B. Varying approaches to carrier responsibility employed in the Hague Rules

152. Three different approaches to liability are found in the present Hague Rules. These are: (1) the carrier is not liable even when the carrier's employees are at fault; (2) liability is based on fault; and (3) liability is based on the fault of only certain employees. This section will discuss the provisions of the Hague Rules that implement each of the above approaches, and then will turn to rules on burden of proof under the Rules.

1. Carrier not liable even if at fault

153. One provision in the Hague Rules exempts the carrier from any liability even when its fault causes loss or damage to cargo. This is found in article IV (2) (a) which covers the "act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

154. The reasons for the provisions are to be found in the early background of maritime law. Historically, the carrier was liable for loss or damage to cargo whether or not the carrier was negligent and regardless of the cause of the loss. The only exceptions were loss or damage caused by act of God, the public enemy, the inherent vice of the goods, the fault of the shipper or a voluntary sacrifice for the common safety. And even these exceptions would not obtain if the carrier were negligent.¹³⁰ These rules were, however, modified by provisions inserted by shipowners in the bills of lading which have served as contracts of carriage. The

^{129a} 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)*, para. 19.

¹³⁰ See 2 Carver, *British Shipping Laws* 11-20 (11th ed., Colinaux 1963). The common law exceptions are stated somewhat differently by different authors, e.g., Robinson, *Admiralty Law* 493 (1939); Gilmore and Black, *The Law of Admiralty* 119 (1957). (These treatises will be cited herein by the name of the author.)

bargaining position of the shipowners, often organized into conferences, was far stronger than that of the cargo interests; shippers had little choice but to accept the bills of lading prepared by the carrier. By 1890 bills of lading commonly contained exceptions covering almost every cause or type of cargo damage, including loss or damage caused by negligence of the carrier. British courts upheld such provisions¹³¹ while the United States Supreme Court struck them down on the ground that it was against public policy for a carrier to exonerate itself for its own negligence.¹³²

155. In response to this conflict of outlook, the United States Congress enacted the Harter Act in 1893¹³³ to effect what was then considered a compromise. The act invalidated bill of lading provisions which attempted to exculpate the carrier for negligence in making the ship seaworthy or in the care of cargo. But it then provided that, upon fulfilment of certain conditions, the carrier would not be liable for faults or errors in the navigation or management of the ship.¹³⁴ The factors that supported this departure from the principle of *respondent superior* included the following: the lack of contact during the voyage (under early conditions) between the owners of the ship and the master; the delicacy of the judgement and the gravity of the perils presented by problems of navigation; the concept that the owner of the ship, the owner of the cargo and the master and crew shared the perils of a hazardous venture.

156. It was this compromise, in somewhat different form, which was ultimately included in the Hague Rules. At a later point (section E) attention will be given to the question whether this aspect of the compromise is consistent with current conditions of shipping.

2. Carrier liable if at fault

157. In most situations, the carrier is liable if cargo is lost or damaged by reason of the fault or negligence of carrier or any of its employees. The two basic duties of the carrier are set out in article III. Article III (1) requires, essentially, that the carrier exercise due diligence to provide a seaworthy ship, fit for the intended voyage. Article III (2) provides that:

"Subject to the provisions of article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

158. Taken in conjunction with paragraph (2) (q) of article IV—which exempts carrier from liability for loss except that caused by negligence—these provisions establish the general rule that carrier will be liable for the results of negligence (and only for the results of negligence).

¹³¹ *In re Missouri S.S. Co.*, 42 Ch.D. 321 (1889).

¹³² *Liverpool and Great Western Steam Co., v. Phenix Ins. Co.*, 129 U.S. 397 (1889). Some state courts, however, followed the British rule. See *Rubens v. Ludgate Hill S.S. Co.*, 65 Hun 625, 20 N.Y.S. 481 (Sup. Ct. 1st Dep't 1892), *aff'd without opinion*, 143 N.Y. 629, 37 N.E. 825 (1894); *Robertson v. National S.S. Co.*, 139 N.Y. 416, 34 N.E. 1053 (1893); *Gleadell v. Thomson*, 56 N.Y. 194 (1874).

¹³³ Harter Act of 1893, ch. 105, 27 Stat. 445 (now 46 U.S.C. §§ 190-96 (1964)).

¹³⁴ Harter Act of 1893, ch. 105, § 27 Stat. 445 (now 46 U.S.C. § 192 (1964)).

159. Attention must, however, be given to certain provisions of the Hague Rules that might appear to free the carrier from liability in spite of negligence. One of these is paragraph (a) of article IV (2) which exempts carrier from liability for loss or damage resulting from perils, dangers and accidents of the sea. In application, this exception does not apply if carrier's negligence contributed to the loss.¹³⁵ Only if the situation is such that the loss would occur despite all reasonable precautions can it be said that the loss results from a peril of the sea. Paragraph (a), exempting carrier from loss caused by an act of God is similarly interpreted.¹³⁶ The exemption of paragraph (p) covering "Latent defects not discoverable by due diligence", by express provision, does not exempt a negligent carrier.

160. Exemption of the carrier only when he is free of negligence also appears to be the result under the balance of the exemptions, although this conclusion is less clear. The exemptions in several paragraphs of article IV (2) might be classified as superhuman force exemptions: These exculpate the carrier from liability for loss to cargo caused by an act of war (e); an act of public enemies (f); an arrest or restraint of princes, rulers or people, or seizure under legal process (g); quarantine restrictions (h); strikes or lockouts or stoppage or restraint of labour (j); and riots and civil commotions (k).¹³⁷ Four other paragraphs exempt carrier for damage caused by a matter in the control of the shipper: act or omission of the shipper (i); inherent defect, quality or vice of the goods (m); insufficiency of packing (n); and insufficiency or inadequacy of marks (o). And one final paragraph excuses carrier for loss to cargo resulting from saving or attempting to save life or property at sea (l).

161. Where one of the above exemptions applies, the Rules do not clearly indicate what the effect will be of carrier's negligence, either as a concurring cause of the loss or as a cause of the particular exempted peril. This problem is presented, for example, by a case where there is a riot and, because of carrier's negligence, rioters manage to get on the vessel and destroy a portion of the cargo, or a case where a fault of carrier touched off the riot. Despite the paragraph (j) exception for riots, the dominant view seems to be that carrier would be liable in such cases.¹³⁸ In short, these various exemptions (unlike that of article IV (2) (a), discussed *supra*) do not appear to cut into the general rule that carrier is liable for the consequences of its negligence and also for the negligence of its employees.

162. Such is the legal rule, but the practical operation of the rule may be quite different. It is frequently very difficult, if not impossible, for the shipper to prove carrier negligence. And, as will be discussed below, (section B 4) shipper may bear the burden of proof once carrier has brought itself within certain excep-

¹³⁵ Carver, *op. cit. supra*, at pp. 138-141.

¹³⁶ *Idem*, at 11-14, 148.

¹³⁷ Tetley, *Marine Cargo Claims* 128 (1965) considers these six exceptions (as well as (l)) in essentially the same category as (c), (d) and (p). Gilmore and Black, however, distinguish them on this question, although concluding that the better view is that they will not exculpate carrier for the consequences of its negligence. See pages 147 *et seq.* of Gilmore and Black, *op. cit. supra*.

¹³⁸ This assumes that the carrier's negligence was not in management of the ship.

tions. Accordingly, although carrier may legally be liable for the consequences of its negligence, once carrier fits within an exception the shipper may be unable to win the case as a practical matter.¹³⁹

3. Carrier liable for fault of certain employees only: fire

163. Generally under the Hague Rules, apart from the practical considerations just noted, a carrier is legally responsible for the fault or negligence of any of its employees including the master and crew. Article IV (2) (b), the fire provision, stands as an exception to this, providing that the carrier shall not be responsible for loss or damage resulting from:

"Fire, unless caused by the actual fault or privity of the carrier".

164. The striking feature of the fire exception is that it is necessary to distinguish between the negligence of the shipowner and that of its employees. The negligence of carrier's employees will not necessarily result in carrier liability; the fault must be that of carrier itself. In the case of corporate shipowners some decisions have held that only the negligence of a senior employee or officer will result in carrier liability, not that of a "mere employee or agent".¹⁴⁰

165. In Great Britain, the question of corporate privity has been likened to "something personal to the owner, something blameworthy in him, as distinguished from constructive fault or privity... as of his servants or agents".¹⁴¹ The normal liability in law for one's servants to exercise reasonable care does not apply.¹⁴² However, liability has been imposed upon the carrier where the negligent employee was the "person with whom the chief management of the company's business resides".¹⁴³ On this theory, the negligence of an expeditor, a contractor for repair work, and that of the Master was imputed to the corporate shipowner.¹⁴⁴ On the other hand, the negligence of a shore-side superintendent and an outside adviser (chemist) was not so imputed.¹⁴⁵

166. In Italy, the shipowner will be exonerated from liability if he shows damage by fire. Again, the shipowner must not have "provoked (the fire) by his actual fault or privity".¹⁴⁶

4. Burden of proof

167. The foregoing analysis of the bases of liability under the Hague Rules helps to illustrate the following fact basic to the practical application of the Rules: the events relevant to the liability of the carrier for the most part occur out of the presence of the shipper and under circumstances making it exceedingly difficult for the shipper to ascertain (or prove) the cause of damage or loss. Because of this, rules on burden of proof assume decisive importance.¹⁴⁷

168. In countries using the Hague Rules the burden of proof in some situations is placed on the carrier and sometimes on the shipper.^{147a} Exactly how the burden is allocated is often a matter of some uncertainty and may vary among countries.

169. The shipper must make out a *prima facie* case of damage by proving delivery of the goods to the carrier in good order and receipt in bad order, or non-receipt. This done, the burden of proof passes to carrier and the carrier must then show that it falls within an article IV exception. If it manages to do so the burden may shift back again to shipper, as will be discussed, this depends on which exception is relied on.

170. The article IV (2) exceptions in paragraphs (e) through (o) involve the overwhelming force of a third party, fault of the shipper or the goods or an attempt to save life or property at sea. A common rule with regard to all of these is that once carrier has brought itself within the exception the burden passes back to shipper to prove that the carrier's fault or negligence caused the excepted act or concurred with the excepted act in producing the loss or damage.¹⁴⁸ For example, a delay causes loss or damage to cargo and the carrier proves that the delay was the result of the ship being quarantined at a port en route. This proof would bring carrier within the article IV (2) (h) exception; the burden would then shift to shipper to prove, for example, that the carrier's own fault or negligence caused the quarantine.

171. While the shift in burden described above is a common rule for the (e) through (o) exceptions, some cases and jurisdictions take a different approach. Tetley

¹³⁹ This important practical consideration is well brought out in the UNCTAD secretariat report at paras. 39-41.

¹⁴⁰ M. Tetley, op. cit., *supra*, at p. 112. *Earle and Stoddart*, 287 U.S. 420, 425 (1932); *Gilmore and Black*, op. cit., *supra*, at p. 698.

¹⁴¹ *Buckley, L. J., Lennard's Carrying Co. Ltd. v. Asiatic Petroleum Co. Ltd.* (1914) 1 K.B. 419, 432.

¹⁴² *Beauchamp v. Turrel* (1952), 2 Q.B. 207.

¹⁴³ *Hamilton, L. J. in Lennard's Carrying Co., Ltd. v. Asiatic Co. Ltd.* (1914), 1 K.B. 419, 437.

¹⁴⁴ *The Edmund Fanning*, 201 F.2d 281 (2d Cir. 1953); *Riverstone Meat Co., Pty., Ltd. v. Lancashire Shipping Co.* (1961) 1 Lloyd's List L.R. 57; *Maxine Footwear Co., Ltd. v. Canadian Merchant Marine, Ltd.* (1959), 2 Lloyd's List L.R. 105. (The negligence of the master occurred prior to breaking ground for the voyage; the court indicated that had the incident occurred during the voyage a different result might have been reached.)

¹⁴⁵ *The Warkworth* (1884) 9 P.D. 145; *Dominion Glass Co. v. The Anglo-Indian* (1944), Can. S. Ct. [SCR] 409.

¹⁴⁶ 2 Manca, *International Maritime Law*, 494 (1970).

In France, it must be shown that the fire resulted from an outside force; this is the *force majeure* exception of article IV (3) of the Law of 2 April, 1936. The convention's liability exclusion will prevail as long as the shipowner is not responsible for causing the fire. See Tetley, op. cit., *supra*, at p. 108.

¹⁴⁷ Under the UNCITRAL resolution, quoted in the introduction to this report, subparagraph 2 (c) called attention to "burden of proof" as one of the areas calling for particular attention. The implications of practical problems on burden of proof are further explored in section E-4, *infra*.

^{147a} In its reply the Government of France explains that under the Hague Rules carrier's responsibility is based on a relatively complex system of proof. It concludes that the system of the Hague Rules is such that the burden of proof falls on both the carrier and the cargo owner.

¹⁴⁸ *Gilmore and Black*, op. cit., *supra*, at 163. Cf. Brunetti *Manuale del diritto della navigazione, marittima e interna*, §§ 308-309, pp. 214-215 (1947) Righetti "La responsabilità del vettore marittimo per i danni da causa ignota o non provata." 25 (1959) *Riv. dir. nav.*, I, 48. Some examples of cases are: *The Southern Cross*, 1940 A.M.C. 59 (S.D.N.Y.) (If carrier shows damage from an excepted cause [insufficient packing], shipper must show negligence. Where there are concurrent causes, carrier must distinguish damage due to excepted cause, to escape liability for that portion.); *Shaw, Savill v. Powley* [1949] N.Z.L.R. 668 (Carrier showed *prima facie* damage from inherent vice, so onus shifted to shipper to show carrier negligence.) *Quaere* the very broad holding in *George F. Pettinos, Inc. v. American Export Lines*, 68 F. Supp. 759 (D.C.Pa. 1946), *aff'd* 159, F. 2d 247 (under all exceptions (a) through (p), burden of proof of carrier negligence is on shipper).

asserts the rule to be that the carrier must not only prove an excepted cause, but also he must prove due diligence to make the vessel seaworthy at the beginning of the voyage in respect of the loss before the burden will shift back to the shipper.¹⁴⁹ Carver and Astle note that English cases have held that once the shipper has shown damage the carrier must affirmatively show reasonable care in addition to bringing itself within an excepted cause.¹⁵⁰ Payne finds the matter unsettled in English law.¹⁵¹

172. Paragraph (b), the fire exception (subject to the fact that carrier will only be liable for the negligence of certain of its employees), follows a burden of proof scheme similar to that of (e) through (o). Once carrier has shown that the loss or damage was caused by fire the burden is on shipper to show that the cause of the fire was due to the fault or neglect of persons for whom carrier would bear liability.¹⁵²

173. Under the perils of the sea exception (c) and the act of God exception (d), the carrier must prove its lack of negligence before it will be considered to fit within the exception.¹⁵³ Cases hold that the carrier is

exempt only from perils against which all reasonable precautions of a prudent carrier proved to be unavailing. Under these exceptions, therefore, the burden falls on and stays with carrier once the shipper has carried its initial burden of showing the loss. The latent defect exception, (p) may also fall in this category.¹⁵⁴ Article IV (1) relating to unseaworthiness has an explicit burden of proof provision:

"Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of the diligence shall be on the carrier or other person claiming exemption under this article."

Thus, after shipper has proven the loss, if carrier's explanation shows the cause to have been unseaworthiness the burden remains with carrier to prove its freedom from fault.¹⁵⁵

174. Like IV (1), the catchall exception (q) has specific burden of proof language. It provides that carrier will not be liable for damage arising from any cause without the fault or neglect of carrier.

"...but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage".¹⁵⁶

It is not necessary, under the (q) exception, for the carrier to show the exact cause of the loss if it shows that damage was not due to negligence.¹⁵⁷ But it is not enough to state that the loss is unexplained; the burden of proof is still on the carrier to show absence of fault or neglect.¹⁵⁸ United States cases have held that the

¹⁴⁹ Tetley, op. cit., supra, at pp. 35, 93-95.

¹⁵⁰ Astle, *Shipowners' Cargo Liabilities and Immunities* 13, 134-166 (1967); Carver, op. cit., supra, at p. 226. Carver feels, however, that on this construction (b) to (p) would have little purpose, for if a carrier must always disprove negligence under (b) through (p), he would be protected by (q) at any rate, if he succeeded. Carver would prefer that the common-law rule of *The Glendaroch* [1894] p. 226, were still good law in England, so that when the carrier proved *prima facie* an excepted cause, the shipper would have to prove negligence or unseaworthiness. Cf. *Scrutton on Charter parties* 424 (17th ed. 1964) (Would retain the apparently abandoned common-law rule of *The Glendaroch*, that aside from exemptions dealing expressly with negligence or privity, carrier protected on his proving that cause within the exemption, unless shipper proves negligence).

¹⁵¹ Payne's *Carriage of Goods by Sea* 124 (8th ed. 1968). See e.g. *Svenska Traktor Aktiebolaget v. Maritime Agencies (Southampton) Ltd.* [1953] 2 All E.R. 570, [1953] 2 Q.B. 295; and *J. Kaufman, Ltd. v. Cunard S.S. Co., Ltd.* [1965] 2 Lloyd's L. Rep. 564 (Exchequer Court, Quebec Admiralty District). Both hold that the carrier is liable even if damage was shown due to excepted perils, unless the carrier can prove he has taken proper care in fulfilling his article 3 duties. But see *Albacora S.R. L. v. Westcott and Laurance Line, Ltd.* [1966] 2 Lloyd's L. Rep. 53 at 64 H. L. (no express provision and no implied provision in the Hague Rules that carrier must prove absence of negligence. But, in a particular case proof of an excepted cause might require that carrier disprove negligence. Did not discuss specific exceptions in this regard). Accord, *Jahn v. Turnbull Scott Shipping Co., Ltd.*, [1967] 1 Lloyd's L. Rep. 1Q.B.D. (Commercial Court) (Roskill, J. follows Lord Pearson's view in *Albacora*).

¹⁵² Manca, *International Maritime Law* 205 (1970), citing Corte di Cassazione 13 aprile 1957, in 23 Riv. dir. nav. 1957, II. 217. *The Shell Bar*, 1955 A.M.C. 1429 (shipper failed to sustain burden of proving fire resulted from owner design or neglect); *The Rio Gualaguay*, 1953 A.M.C. 1348 (shipper has burden of proving cause of fire was fault or neglect of vessel owner). Accord, Cour d'Appel d'Aix (*Marvia*, 21 June 1960). [1961] D.M.F. 340.

¹⁵³ *Lady Drake*, 1937 A.M.C. 290 (where carrier alleges peril of the sea, carrier must show that weather was cause of damage; that damage from weather was not foreseeable or preventable as probable incident of voyage; and that fault or neglect of carrier was not a contributory cause); *Blackwood Hodge (India) Private Ltd. v. Ellerman Lines Ltd.* [1963] 1 L. Rep. 454 (Damage from exceptionally severe weather not under perils of the sea exception, because carrier failed to sustain burden of showing the loss was directly caused by weather and was not contributed to by his unsatisfactory

stowage.). See also Gilmore and Black, op. cit. supra, at pp. 140, 147. But see Corte di Cassazione 4 aprile 1957, in *Dir. mar.* 1958, p. 67 (shipper has burden of proving carrier negligence under perils of the sea exception).

¹⁵⁴ *The Tulsa*, 63 F. Supp. 895 (S.D. Ga. 1941) (Carrier must show there was latent defect, that it was cause of damage, and that there was no fault or neglect by carrier. Unclear whether requirement of proving absence of fault is based on (p) or (q)). Compare *Corporación Argentina v. Royal Mail* [1939] 64 Ll. L. Rep. 188 (if carrier gives certain evidence that damage caused only by latent defect, no burden of proof on carrier to prove also exercise of due diligence). See Manca, op. cit., supra, at pp. 213-214; Tetley, op. cit., supra, at 151; *Waterman S.S. Co. v. U.S.S.R. and M. Co.*, infra; Astle, op. cit., supra, at p. 160 (purpose of (p) has not yet been established, since article IV (1) seems to cover the same ground).

¹⁵⁵ Gilmore and Black, supra, at p. 163; Tetley, op. cit., supra, at pp. 94-95; Astle, op. cit., supra, at 13; *The Cypria*, 46 F. Supp. 816 (D.C. N.Y. 1942), *aff'd* 137 F.2d 326 (carrier must show due diligence to make ship seaworthy, where damage due to unseaworthiness); *Petition of Reliance Marine Transport and Construction Corp.*, 206 F.2d 240 (C.A. Conn. 1953) (carrier has burden of proving due diligence to determine seaworthiness of vessel).

¹⁵⁶ *Potts v. Union S.S. Co. of New Zealand* [1946] N.Z.L.R. 276 (under (q), carrier may avoid liability for loss by pillage if he shows absence of fault); see also Brunetti, *Manuale del diritto della navigazione marittima e interna*. §§ 308-309, pp. 214-215; Astle, op. cit., supra, at p. 166.

¹⁵⁷ See *City of Baroda v. Hall Line* (1926) 42 T.L.R. 717, 719 (carrier failed to discharge burden of proving theft occurred without fault of his servants, but dictum stated that carrier need not prove all circumstances which would explain an obscure situation).

¹⁵⁸ *Heyn v. Ocean S.S. Co.* (1927) 43 T.L.R. 358 (because carrier failed to establish that independently contracting stevedores had not stolen the missing cargo, carrier was liable.

burden of proof under (q) of showing freedom from contributory fault is not merely the burden of going forward with the evidence, but also the burden of persuasion, coupled with the risk of non-persuasion.¹⁵⁹

175. Article IV (2) (a), which exempts carrier even if there is negligence in the navigation or management of the ship, is in a class by itself. Once carrier proves that the cause of the loss lies with the navigation or management of the ship, presumably the shipper would have to carry the burden of showing that some other fault of carrier, such as improper stowage of cargo, was a concurrent cause of the loss. But there is little authority on the point.

176. Where there are concurrent causes of damage, one of which is excepted and the other of which is not, courts are not in agreement on the burden of proof. However, the general rule seems to be that in order to qualify for any exception, carrier has the burden of proving the extent of the damage attributable to an excepted cause. If it cannot do so, it is liable for all damages.¹⁶⁰

177. In summary, the rules on burden of proof are quite uncertain and appear to vary among countries in several respects.

Stevedores were treated as agents or servants within the meaning of (q)); *Pendle and Rivet v. Ellerman Lines* (1928) 33 Com Cas. 70 (carrier had burden of proof to explain when case of piece goods became empty, and to show absence of fault or neglect); *Herald Weekly Times v. New Zealand Shipping Co.* [1947] 80 Ll. L. Rep. 596 (carrier had burden of proof under (a) that water damage was due to act of servant in navigation or management of the ship; or under (q) that there was no carrier neglect or fault). See also *Manca*, op. cit., *supra*, at 201, citing *Brunetti, Manuale di diritto della navigazione*, § 308, p. 215 (under (q), carrier must show due diligence to make ship seaworthy).

¹⁵⁹ *The Vizcaya*, 63 F. Supp. 898, 902, 904 (E.D. Pa. 1945), *aff'd. sub nom Bech v. The Vizcaya*, 182 F.2d 942 (3d Cir. 1950), *cert. den.* 340 U.S. 877 (1950). See also *Waterman S.S. Co. v. U.S.S.R. and M. Co.*, 155 F.2d 687 (5th Cir. 1946), *cert. den.* 329 U.S. 761 (1946) (carrier has burden of going forward to show peril of sea or latent defect not discoverable by due diligence, and also has the risk of non-persuasion).

¹⁶⁰ Tetley, op. cit., *supra*, at pp. 104-105; Astle, op. cit., *supra*, at p. 166; *Tri-Valley Packing Assn. v. States Marine Corp. of Delaware*, 310 F.2d 89 (C.A. Cal. 1962) (carrier remains liable for all damages where unable to show portion of loss due to act of God or sea peril); *The General Artigas*, 1955 A.M.C. 725 (damage to cargo due to both negligence in care of cargo and to fault in management of the ship; carrier had burden of proving what damage was attributable to excepted cause; if he cannot distinguish, is liable for all damage); *The Southern Cross*, op. cit., *supra*, note 148. There seem to be few cases on burden of proof where shipper negligence is an alleged concurrent cause. But see *American Tobacco Co. v. The Katingo Hadjipatera*, 81F. Supp. 438, 445 (S.D.N.Y. 1948) *aff'd* 194 F.2d 449 (2d C. Cir. 1951), *cert. den.* 343 U.S. 978 (1952) (suggests that whenever damage could have been caused by internal defects shipper must disprove such defects, even if carrier's failure to exercise due diligence in stowing or car caring for cargo may have caused or contributed to damage); *Contra: The Nichiyo Maru*, 89 F.2d 539 (4th Cir. 1937). See Tetley, op. cit., *supra*, at p. 142: "Where there is insufficiency of packing and any other cause of loss, the burden is, of course, on the carrier to show what percentage was due to insufficient packing and what was due to the other cause. The carrier will be responsible for the whole loss if he is unable to separate the two causes."

See *Kawsay* 1944 A.M.C. 133 at 138; *Cour d'Appel d'Aix (Djohiba)*, 11 October 1960, [1962] D.M.F. 276.

C. Policy considerations relevant in a re-examination of the Rules

178. The present section is concerned with an analysis of the more important policy considerations that should be borne in mind in a re-examination of the allocation of risks and responsibility under the Hague Rules. These policy considerations will be discussed under the following headings: 1. promoting a desirable standard of care; 2. the relationship between the allocation of risks and the cost of insurance; 3. the cost of administering claims: "friction"; and 4. effects of increased carrier liability: the rate structure.¹⁶¹

1. Promoting a desirable standard of care

179. It would be generally agreed that the rules of carrier liability to cargo—the allocation of risks—should be arranged so as to encourage the carrier to set and maintain an optimum standard of care.¹⁶² However, the proper content of the term "optimum standard of care" and the rules of carrier liability that will promote it may not be immediately apparent.¹⁶³

180. The basic question is whether a more desirable standard of care can be induced by an increase in legal liability for loss or damage to cargo. Consideration of this requires a closer look at what the optimum standard of care is.

181. Roughly, at least, a higher standard of care may be equated to a greater expenditure of funds. The more carriers spend for the purpose of preventing loss or damage to the ship and the cargo on safety devices, maintenance, better equipment, more expensive ship construction and other such things—the less loss and damage to ship and cargo there will be.

182. It seems a reasonable assumption that each higher level of care will cost more and save less damage than the preceding one. This is likely since presumably carriers will employ the less expensive and more productive measures first. Accordingly, the optimum level of care will be that where the costs of attaining the last level of care are just exceeded by the savings.

¹⁶¹ In its reply the United Kingdom Government states that while it is difficult to define objective criteria for the establishment of a balanced allocation of risks, it should be noted that maritime transport is the servant of trade and therefore "any legal framework established must therefore not only be clear and balanced but must also not increase unduly the over-all cost of world trade". This reply also observes that the revised Rules would have to have world-wide applicability; it is "therefore important to recognize the diversity of situations that must be covered, in particular the varied trades and different interests of large and small shippers". See also replies of the International Chamber of Shipping, the Baltic and International Maritime Conference (BIMCO) and the International Chamber of Commerce.

¹⁶² The Canadian Government's reply states that "a fundamental policy aim should be the reduction in the incidence of loss of or damage to cargo. Any significant reduction in the extent or magnitude of losses or damage would be reflected in a reduction in the cost of insurance which in the case of the carrier's risks, should, in turn, result in a reduction in freight rates".

¹⁶³ There are inducements to careful carrier operation apart from any legal liability to cargo. One of these is the carrier's natural desire to keep its customers. However, the present report is concerned only with carrier's liability and the comparative effect of alternative rules of liability on various aspects of commercial practices.

Or to put it another way, to achieve the optimum level carriers would stop raising their standard of care just before their *marginal* costs exceed the savings that will occur as a result of those costs. (For reasons that will be explained more fully later, such is the standard that carriers will set for themselves even if they are absolutely liable for loss of cargo.) Such a standard of conduct would minimize world shipping costs, resulting in a saving of resources compared to any lesser or higher standard of care and consequently is the optimum standard.

183. What rule of liability would promote such a standard? This question cannot be answered with certainty on the evidence now available, but the following considerations appear relevant.

184. *Liability for fault.*¹⁶⁴ Liability for fault or negligence—the more widely used standard of liability under the Hague Rules—may tend to promote a standard of care near the optimum. With the carrier financially responsible for the consequences of its error, it should logically be prepared to spend 99 cents to avoid an error causing \$1.00 of cargo damage. There are some problems with this standard of liability, however. With certain types of errors or certain kinds of damage claims, carriers may be able, on the average, to settle the claims for less than the full amount of the loss. If, with certain kinds of errors or types of claims, carriers could reasonably expect to settle for 75 cents for each \$1.00 of loss then logically they should be willing to spend 75 cents or less to raise their standard of care enough to save \$1.00 of loss. A lower than optimum standard of care will result.

185. Perhaps a greater defect in the liability for fault standard is that fault, error negligence, or due diligence (however it is described) does not exist as a constant and does not have an objective content. This calls for some explanation. The content of "fault" changes over time. The navigational equipment which would have satisfied the requirement of due diligence to make the ship seaworthy in 1910 would obviously not suffice today. The content of "fault" depends, to some extent, on the normal practice of the industry. A carrier that follows normal industry practice will, in many cases, not be considered to be at fault. In a time of technological change the result may be that the "fault" liability basis fails to induce the carriers to keep their standard of care at the optimum level—since industry practice is to some extent determinative of fault they are likely to lag behind the technology. This would be particularly likely with regard to matters that concern care of cargo and do not concern the safety of the ship. Thus the carrier may hesitate to spend money on a recent innovation to save some damage to cargo when it is not yet the practice of the industry and when the carrier will therefore not incur any liability for a failure to make the innovation.

186. The above comments are directed to a fault standard involving carrier responsibility for the negligence of all of its employees. Analysis for a liability

basis limited to the negligence of certain employees only, as under Article IV (2) (b), the fire exemption would be very similar. Such a liability basis, however, would obviously tend to induce a somewhat lower, and less desirable, standard of care than one involving liability for the negligence of all employees.

187. *Strict liability.* Strict liability of the carrier for all loss or damage to cargo regardless of fault (assuming no fault of shipper) would tend to promote an optimum standard of care. Carriers would spend up to \$100,000 to prevent loss or damage of \$100,000, regardless of whether the damage was their fault or not. This is an economically desirable result. Carriers would not adopt an uneconomically high standard of care because they would prefer to pay claims of \$100,000 rather than take preventive measures costing more than \$100,000.¹⁶⁵

188. Of course, carriers will not be able to determine with precision what measures to adopt to balance their marginal expenditures with damage prevention, as required for an optimum standard of care. While unfortunate, this is not significant in assessing different bases of liability. The basis of liability should ideally point the carrier in the right direction. The fact that the carrier will have to estimate some matters rather than determine them with precision is irrelevant. An estimate of the right factors is better than not taking them into account at all.

189. *Shipper fault.* Much of the reasoning just applied to promoting an optimum standard of care on the part of the carrier also applies to the shipper. The liability arrangements should be so made that shipper is induced to pack and mark the cargo properly and otherwise exercise due care. Accordingly, shipper should bear the loss caused by improper packing or marking of cargo or by any other of shipper's acts or omissions.¹⁶⁶

2. *The relationship between allocation of risks and the cost of insurance*

190. Insurance considerations run throughout the problem of dividing risks between carrier and cargo interests. Most losses are covered by insurance held by the carrier as well as by insurance held by the shipper, so that some insurance company normally makes good the loss whether legal liability falls on carrier or cargo

¹⁶⁵ Anticipating the following section, some mention should be made here of insurance. Carriers generally insure against their liability for loss or damage to cargo. Accordingly, even if liable they will not be out-of-pocket the amount of the loss. At first glance one might think this cuts against the earlier reasoning but consideration of the nature of insurance will show that it does not. In short, as described in the next section, carrier's insurance premiums will reflect its losses.

¹⁶⁶ It should be noted that insurers now play a constructive role in advising shippers of measures designed to prevent loss; it might be suggested that a change in the present rules would remove some of the incentive for this activity. P and I insurers cover whatever cargo may be received by the ocean carrier; these insurers consequently are not in a good position to advise shippers concerning shipping practices. On the other hand, there is reason to believe that shippers will continue to carry insurance, and cargo insurers have to face the likelihood that subrogation to the shipper's claim would not be fully effective because of the defence of improper packing and because of limits on unit liability. On these assumptions the loss prevention activities of cargo insurers could be expected to continue even if carrier liability were substantially strengthened.

¹⁶⁴ For theoretical completeness, the analysis might include the possibility of complete exemption of the carrier for liability even when loss or damage resulted from the carrier's fault. This alternative, however, presents such serious problems both as to policy and acceptability that extensive discussion seems unnecessary.

interests. However, since insurance rates are based on experience—that is, the number and amount of claims paid—the ultimate burden of loss falls either on carrier or cargo interests through the mechanism of insurance rates. If losses increase, the insurance companies will raise their rates to cover them.

191. Similarly if there is a shift in the legal rules as to whether the burden of some category of loss falls on carrier or cargo interests this will ultimately be reflected in the respective insurance premiums of carriers and cargo. Suppose, for example, that the Hague Rules were changed to make the carrier liable for damage or loss of cargo caused by negligent navigation or management of the ship. This would result (assuming other influences on insurance rates do not change) in a rise in the cost of the carriers' Protection and Indemnity (P and I) insurance, which covers the liability of the carrier for loss or damage to cargo. The rise might take place along with the change in the law in anticipation of a rise in claims against the carriers—or it might wait until experience verified the anticipated rise in claims. Conversely cargo insurance rates would fall as the experience of cargo insurers improved.

192. It should be noted that cargo insurance policies ordinarily cover a loss even though the carrier is liable. And in such a case the cargo owner almost always will collect from his insurer, simply because that is usually easier than collecting from the carrier. When that happens the cargo insurer is subrogated to the claim of the cargo interest against the carrier—that is, the insurer steps into the shoes of the cargo owner and itself presses the cargo owner's claim against the carrier. Accordingly, even if cargo owners continued collecting from their insurers after a change in law making carrier liable for negligent management of the ship, cargo insurance rates would fall. They would fall because insurers' experience would improve—not because of fewer claims against them but because they could reimburse themselves for more losses through subrogation.

193. The question of this section is, which of the various bases of liability is preferable from the standpoint of insurance?

194. Is there a basis of liability that would eliminate or reduce the duplication of insurance costs? It has already been noted that under present practice the carrier's P and I insurance policy and the shipper's cargo insurance policy will cover some of the same losses—essentially the losses for which carrier is liable. This does not necessarily mean that there is a duplication of cost, however. As described above insurance rates are based upon experience, or the record of claims paid. Although there may be two insurance policies covering the same loss there will be only one payment. If the cargo owner initially collects from his insurer, his insurer may be reimbursed by the carrier and the carrier in turn reimbursed by its insurer. Or alternatively the cargo owner may initially collect from the carrier and the carrier be reimbursed by its insurer. In no event will both insurance companies be out-of-pocket the amount of the claim: the cargo owner, for example, may not collect from both the carrier and his own insurer. Since only one insurance company will be out-of-pocket, the amount of the loss will go in the

experience record of only one insurer and will contribute to only one set of insurance rates.

195. There is, however, a way in which duplication can occur. Premiums must cover not only the claims against an insurer but all of the insurer's sales, management and administrative costs. The percentage of the premium which is allocated to these costs varies from insurer to insurer and from one type of policy to another. But there will be more of such costs when both carrier and shipper insure than if only one were to do so. Where both insure there are two policies and two customers to be sold and serviced instead of one.

196. A system of liability, therefore, that would facilitate having all insurance taken out by one party—herein called a single insurance arrangement—would tend to avoid duplication and lower total insurance costs. A system based on fault or negligence does not facilitate this. Carriers buy P and I insurance to cover claims against them when they are negligent and shippers buy cargo insurance to cover losses, *inter alia*, when carriers are not negligent. It may be possible to devise an arrangement that would avoid duplication of insurance costs even under a liability system based on negligence but it would be cumbersome and difficult.

197. Single insurance arrangements would be facilitated by a system where carrier would not be liable for loss or damage to cargo under any circumstances, regardless of fault. Under such a system of no-liability the carrier would have no need to insure against loss or damage to cargo. Such a system is undesirable for other reasons, however, and many would find it repugnant to exonerate the carrier even from intentional damage to cargo.

198. Theoretically, a single insurance arrangement could be facilitated by a system of strict liability, that is, carrier to be liable for all damage to cargo, regardless of fault. The idea, of course, would be that carrier would then buy a policy covering all loss or damage to cargo and the shipper would have no need to take out insurance. The carrier's insurance rates would go up, of course, and carrier might raise its freight rates appropriately so that the shipper would indirectly pay for the insurance. But if the idea worked out there would be a saving of administrative costs because of elimination of one insurance policy.

199. There is great practical difficulty with this approach, however. First, unless coupled with other major changes, a switch to strict carrier liability would almost certainly not lead to elimination of double policies. Cargo interests would still find it advantageous to insure for several reasons. One is to cover the possibility that the carrier would be financially irresponsible, and would not carry insurance to benefit the shippers.

200. A second reason is that the carrier's liability may be limited by provisions of law quite apart from those discussed here. The package limitation of the Hague Rules, for example, limits a carrier's liability to 100 pounds sterling per package or unit.¹⁶⁷

¹⁶⁷ Article IV (5). The 1968 Protocol, done at Brussels on 23 February 1968 amends this to raise the limit to "the equivalent of Frs. 10,000 per package or Frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is

201. A third reason arises from the availability to shipowners of a distinct type of limitation on their liability—an over-all limit on their liability, to all persons, resulting from a single accident or occurrence.¹⁶⁸ The over-all limitation fund, in which all parties may share and to which they are limited, has been fixed in a variety of ways. Great Britain has long fixed the amount of the limitation fund for both personal and property claims at a specified amount per ship ton.¹⁶⁹ Civil law countries have tended to fix the limitation amount as the value of the ship and freight at the conclusion of the voyage.¹⁷⁰ In the United States, for claims relating to property loss, that amount is the value of the ship and freight pending at the conclusion of the voyage during which the loss occurs. This may, of course, be only the value of a few bits of flotsam from the wreck.¹⁷¹ The Brussels Convention of 1957 on limitation of liability provides for a limitation fund which amounts to \$140 per ton for personal injury and death recoveries and an additional \$67 per ton to be shared ratably by property loss claims and personal claims not satisfied upon exhaustion of the \$140 per ton fund.¹⁷² More than 30 nations have adopted the Brussels Convention, including many developing countries.¹⁷³ In addition many other countries have shipowner's limitation legislation.¹⁷⁴

higher". The Protocol has not yet come into force. The package limitation is inapplicable if "the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading". Shippers rarely make such a declaration, however, because carriers impose a very substantial extra charge if they do so. See Hellawell, "Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty", 7 Colum. J. Transnat'l L. 203, 208-09 (1968).

¹⁶⁸ The prime condition of limitation is that the owner not be at fault. See e.g., International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships, 10 October 1957, article I (1). In the words of the Convention "actual fault or privity" of the owner precludes limitation. The Convention entered into force on 31 May 1968. The comparable phrase in the United States Limitation of Liability Act is "privity or knowledge", 46 U.S.C. §183 (a) (1964).

¹⁶⁹ Merchant Shipping Act of 1854, 17 and 18 Vict., c. 104, §§ 504-05, as amended, 6 and 7 Eliz. 2, c. 62 (1958), as further amended, Public General Acts and Measures 1970, Eliz. 2, c. 36.

¹⁷⁰ R. Marsden, *British Shipping Laws* (The Law of Collisions at Sea) 1969 (11th ed., K. McGuffie 1961).

¹⁷¹ 46 U.S.C. § 183 (a) (1964). Claims for bodily injury and death are guaranteed a certain limitation fund, 46 U.S.C. § 183 (b) (1964).

¹⁷² International Convention Relating to the Limitation of Liability of Owners of Sea Going Ships, 10 October 1957. The Convention entered into force on 31 May 1968.

¹⁷³ Among these nations are Algeria, Denmark, Egypt, Fiji, Finland, France, Federal Republic of Germany, Ghana, Greece, Guyana, Iceland, India, Indonesia, Iran, Israel, Madagascar, Mauritius, Netherlands, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, United Kingdom and Zaire. See Astle, *Shipowner's Cargo Liabilities and Immunities*, pp. 470-71 (1967); 4 Marsden, *British Shipping Laws*, § 1291 (1961 and 1970 Supp.); Knauth, ed. *Benedict on Admiralty*, pp. 635-36 (7th ed. 1969).

¹⁷⁴ See, e.g., Philippine, Commercial Laws Annotated, arts. 809-10, 837-38 (promulgated on 6 August 1888, by Queen Maria Cristina of Spain, extended to the Philippines by Royal Decree of 8 August 1888, and made effective on 1 December 1888) (J. Espiritu and C. Alvendia ed. 1947) and (Philippine Code of Commerce, ed. 1969); Law of 4 June 1963, The Merchant Shipping Act of 1963, [1963] Acts of Ghana (No. 183) §§ 274-85, at 117-23; Proclamation of 25 Sep-

202. To summarize, even if the Hague Rules were changed to impose liability on carriers without regard to fault, shippers would still find it advantageous to purchase cargo insurance. They would do so to protect against the case of an uninsured bankrupt and to cover losses beyond limits imposed by the package limitation and the shipowners liability limitation. Some other considerations also point in this direction. If the carrier's strict liability covered only the period from tackle to tackle—that is from the time of loading onto the ship until the time of unloading—the shipper might well require cargo insurance for the period of time after the goods left its possession and before loading on the ship as well as for the period after unloading and before delivery to the consignee. While this consideration might be eliminated by extending the time period of the carrier's liability, such action has not yet been taken. (See part one of this report.)

203. Next, with regard to elimination of the cargo insurance policy, one must consider exactly what is meant by strict liability of the carrier. Would the carrier be liable for loss or damage to cargo occurring while in possession of the carrier but caused solely by the fault or negligence of the shipper—for example, damage caused by negligent crating or packing of the goods? To hold carrier liable to shipper in that case would be going a step further than imposing liability where there was no fault (or when a third party was at fault) and many would object to it. But if carrier were not liable in that case many shippers would find it expedient to take out insurance to protect themselves.

204. For all of the above reasons it will be difficult to eliminate the shipper's motivation to insure even with a system imposing strict liability on the carrier. And unless the cargo insurance policy is eliminated for a particular shipper (not just reduced in price) there can be little saving in administrative cost.

3. The costs of administering claims: "friction"

205. By friction is meant the negotiation of claims, the arbitration of claims, the litigation of claims, the consideration of claims, the investigation of claims, legal work in connexion with claims, arranging the subrogation of claims and all such matters. It is immediately apparent that friction is uneconomic, wasteful and altogether undesirable. In setting the bases of carriers' liability to cargo one aim should be the reduction of friction.

206. Friction cannot be eliminated entirely except by preventing all loss and damage to cargo—and even in that unlikely event some claims would undoubtedly

tember 1953, Maritime Proclamation No. 137 of 1953, [1953] Negarit Gazeta No. 1, pt. B (VII) §§ 16-17, at 26-27 (Ethiopia); Law No. 66-007 of 5 July 1966, amending the Maritime Code [1966] Journal Officiel of 16 July 1966, annex II, art. 8.5.03, at 1486 (Malagasy); Law No. 1000 of 20 January 1962, Commercial Code (bk. V. Maritime Commerce) arts. 746-52, in Laws of Rep. of Korea 984-88 (Korean Legal Center transl. 1969). For a collection of the domestic legislation on this subject in Germany, England, France, Italy, Netherlands, Switzerland and the United States, see Sotiropoulos, *Die Beschränkung der Reederhaftung*, in 30 *Übersee Studien zum Handels-Schiffahrts- und Versicherungsrecht* 406-22 (1962).

be filed. But, other things being equal, anything that reduces loss and damage will reduce friction. Accordingly the considerations of the section on the promotion of an optimum standard of care are also relevant here.

207. Apart from reducing loss and damage the most hopeful means of reducing friction is to make the rules of liability simple and clear. The simpler and the clearer they are the less likely it is that in any given case there will be room for argument about whether the carrier is liable or not. Hence, less friction.¹⁷⁵

208. Theoretically, the simplest and clearest rules would be one of these: (1) that the carrier would not be liable for loss or damage to cargo whatever the circumstances and regardless of fault, or (2) that the carrier would be liable for all loss and damage to cargo whatever the circumstances and regardless of fault.¹⁷⁶ The first of these alternatives is, of course, unacceptable on grounds of policy that have been developed above. The second (a rule that carrier was liable regardless of fault) would still leave room for some friction. For one thing, there would be the question whether the loss or damage occurred while the cargo was in carrier's possession, or during whatever period of time carrier was responsible. In the second place, presumably the rule would not charge the carrier with responsibility for normal evaporation or wastage of the cargo or for normal, unavoidable, decay or other such loss occurring through a natural tendency, defect or vice of the cargo itself—issues that provide ground for debate and disagreement. Finally, a strict carrier liability rule presumably would not allow shipper to collect from carrier for loss or damage caused solely by a fault of the shipper, as for example, faulty packing; this issue could provide some scope for argument.

209. Thus, a rule of strict carrier liability will not eliminate friction. However, a fault or negligence standard of liability, as is mostly the case under the Hague Rules, is worse from the standpoint of friction. Negligence is a difficult factual question which invites contention.

4. Effects of increased carrier liability

210. As described earlier, the present system of carrier liability is a mixture, with carriers exempt from liability for negligence in one major area—navigation and management of the ship—and otherwise, with limitations, liable for the consequences of their negligence. At first glance it might seem that a change in the system imposing greater liability on the carrier would inevitably be of economic advantage to cargo interests to the disadvantage of the carriers. Lest unwarranted expectations (and fears) be aroused, this issue needs to be examined.

211. As with so many other maritime matters, the examination starts with insurance. As noted in a previous section, both the cargo and the shipowner are insured in most cases. Accordingly, if a change of the rules on carrier liability is to benefit cargo interests in the normal case, the benefit will come by a lowering

of cargo insurance rates.¹⁷⁷ On the assumption that there is competition among cargo insurers, there is reason to suppose that a change of the rules which substantially increased the cargo owners' right to recover against carriers would improve the experience of cargo insurers and would result in lower rates.

212. There is, however, another side to the matter. As the carrier pays off more claims it will in turn collect more from its P and I insurer. Consequently, the experience of the P and I insurer will worsen and sooner or later it will raise the rates. This raises the key question in the analysis: When the carriers' P and I rates go up will they raise freight rates to recover the higher insurance cost? If so, cargo interests may be left about where they were before the increase in carrier liability, paying lower insurance rates but higher freight rates. If not, cargo interests would benefit from the increase in carrier liability. The answer to the key question is by no means certain, and leads into the difficult area of conference ratemaking.

213. With more than 100 conferences throughout the world, policies, considerations and methods in ratemaking presumably vary a good deal. The pressures of competition from non-conference liners, charters, other forms of transportation, and perhaps from other conferences will also vary widely. So it is doubtful that any valid generalization can be made about the effect of a rise in P and I rates or freight rates. It will depend on the policies, practices and situation of the conference as well as the bargaining position and other circumstances of the particular cargo in question.¹⁷⁸

214. There is one type of improvement in the Hague Rules where the benefits are less speculative: the removal of ambiguities and bases for responsibility that turn on propositions that are difficult to establish and hence are productive of expensive litigation and resistance to just claims. The cost of administering claims (or "friction") is aggravated, with respect to ocean carriage, by the requirement that a party prove facts that are difficult or impossible to ascertain, and by legal ambiguities that are productive of litigation; reduction of such costs would constitute a net gain to shippers and carriers. Consequently, in considering possible changes in the Hague Rules (section E *infra*)

¹⁷⁷ In the case where cargo is uninsured the benefit will come, of course, from being able to recover from carrier for losses that would not otherwise be recoverable. But apart from this the analysis of this section is substantially the same whether cargo is insured or not.

¹⁷⁸ See: UNCTAD secretariat reports, "The Liner Conference System" (TD/B/C.4/62/Rev.1) and "The Regulation of Liner Conferences" (TD/104); Federal Maritime Commission Fact-Finding Investigation No. 6, The Effect of Steamship Conference Organization, Procedure, Rules, Regulations and Practices upon the Foreign Commerce of the United States, ordered 22 October 1963, 28 Fed. Reg. 12066 (1963). Report submitted 16 August 1967. 9 *Pike and Fischer Shipping Regulation Reports* 547-636 (1967); Note, Ratemaking Procedure of International Shipping Conference, 4 *Stanford Journal of International Studies* 84 (1969); W. Grossman, *Ocean Freight Rates* 60 (1954); A. Svendsen, *Liner Conferences and the Determination of Freight Rates* (1957); Sturme, "Economics and International Liner Services", 1 *Journal of Transport Economics and Policy*, 190 (1967); Abrahamsson, "A Model of Liner Price Settings", 2 *Journal of Transport Economics and Policy* 321 (1948); Hyde, *Shipping Enterprise and Management 1830-1839* pp. 63-68 (1967).

¹⁷⁵ See the UNCTAD secretariat report on bills of lading.

¹⁷⁶ Comment, *Cargo Damage at Sea: The Ship's Liability*, 27 *Texas L. Rev.* 525, 536 (1949).

close attention will be given to ways of reducing such unproductive costs.

D. Bases of liability and burden of proof under international conventions on carriage of cargo by air, by rail and by road

215. This section describes briefly the bases of liability and the burden of proof systems of the major conventions dealing with international carriage of cargo by rail, road and air. These bodies of law may provide two sources of experience and consensus to the extent that these other systems of transportation present problems comparable to those of carriage by sea. In addition, the present variations in the scope of liability of different types of carriers has proved to be troublesome in connexion with work towards a single set of rules governing combined transport operation; for this reason, reducing these variations could have significant practical consequences.

**1. International air transport of cargo
(The Warsaw Convention)**

216. The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 and called the Warsaw Convention has been widely adopted and provides rules on air carrier liability when international air cargo is lost or damaged.

217. Article 18 (1) appears to lay down a rule of strict liability stating:

"The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."¹⁷⁹

Article 20 (1), however, provides a broad exception to the seemingly strict rule of article 18 stating that:

"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."¹⁸⁰

The key words to be interpreted in this provision are "necessary" and "impossible". Literally they could be read to exempt the carrier only for events completely out of its control—*vis major* or act of God. However, despite the literal wording of the provision the prevalent view is that article 20 (1) requires a standard of reasonable care only.¹⁸¹

¹⁷⁹ League of Nations, *Treaty Series*, vol. CXXXVII, pp. 11, 23.

¹⁸⁰ The Protocol done at Guatemala City on 8 March 1971 alters the language of articles 18 and 20 somewhat but not the substance.

¹⁸¹ See Bin Cheng, "The Rules of 'International' and 'Non-International Carriage by Air'", 61 *Law Society's Gazette* 37 (1964); Hardman, "International Air Cargo Shipments under the Warsaw Convention", 29 *Insurance Counsel Journal* 120, 123 (1962); Hjalsted, "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Law", 27 *J. Air L. and Com.* 1, 6-11 (1960); *Grein v. Imperial Airways* [1937] 1 K.B. 50; *City of Montreal v. Watt and Scott* [1922] 2 A.C. 195; *Chisholme v. British European Airways* [1963] 1 Lloyd's Rep. 626. But see *American Smelting and Refining Co. v. Philippine Air Lines, Inc.* U.S. and C. Av. R. 221 (1954) (N.Y. Sup. Ct.).

218. Michael Milde describes this in his monograph, *The Problem of Liabilities in International Carriage by Air*.¹⁸²

"... The authors of the Warsaw Convention evidently had not in mind a requirement of all the necessary measures, but the requirement of reasonable and normal measures, taken with such a care '*qualem quisque diligentissimus pater familias suis rebus adhibet*'."

"They proceeded from the concept that the carrier cannot be held liable for all—even accidental—risks of air traffic. At the time of the signature of the Warsaw Convention, and naturally even at present, carriage by air has not yet reached such a level of security as, for instance, railway traffic after almost 150 years of experience. In carriage by sea [the Hague Rules of 1924, art. 4 (1)] the carrier is also made liable only if he did not act with due diligence; and this provision served as an example for the authors of the Warsaw Convention."

219. The Warsaw Convention, as originally adopted, included a provision analogous to article IV (2) (a) of the Hague Rules. Article 20 (2) provided:

"In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all respects, he and his agents have taken all necessary measures to avoid the damage."

The 1955 Hague Protocol, which came into force in 1963, deleted article 20 (2) so that it is now applicable only in cases governed by the original Warsaw Convention.

220. Article 20 (quoted above) places the burden of proof on the carrier. To escape liability it must show the cause of the loss or damage. Consequently, carrier will be liable for an unexplained accident or loss.¹⁸³

221. The Warsaw Convention, like the Hague Rules, allocated responsibility on the basis of fault rather than on a basis of strict (or absolute) liability. It has been stated that "the protection of a foundling airline industry was a primary objective of the [Warsaw] Convention"¹⁸⁴ and that "the reason the Convention adopted the 'fault' doctrine instead of the more stringent one of 'risk' was for the purpose of aiding the development of this new and growing branch of transportation."¹⁸⁵

2. International rail carriage of cargo (The CIM Convention)

222. The International Convention Concerning the Carriage of Goods by Rail (hereafter called CIM) was done at Berne on 25 October 1952 and came

¹⁸² Published by the Charles University, Prague, Czechoslovakia in 1963, pp. 66-67.

¹⁸³ Hjalsted, "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Law", 27 *J. Air L. and Com.* 1, 119 (1960) with reservations and some contrary cases as noted therein.

¹⁸⁴ Levine, "Warsaw Convention: Treaty under Pressure", 16 *Cleveland-Marshall L. Rev.* 327 (1967).

¹⁸⁵ Note, *The Liability of Domestic and International Air Carriers for Loss or Damage to Cargo*, 20 *Temple L. Q.* 118 (1946).

into force for most European states, including the United Kingdom, on 1 March 1956. A new CIM was concluded in 1961 and came into force 1 January 1965. In addition to many other things CIM provides the rules on carrier liability to shippers. The key provisions are in article 27 which states:

1. The railway shall be liable for exceeding the transit period, for total or partial loss of the goods, and for damage thereto occasioned between the time of acceptance for carriage and the time of delivery.

2. The railway shall, however, be relieved of liability if the exceeding of the transit period or the loss or damage was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as a result of the wrongful act or neglect on the part of the railway, by inherent vice of the goods (decay, wastage, etc.) or through circumstances which the railway could not avoid and the consequences of which it was unable to prevent.

Article 27 (3) lists cases involving special risks where carrier is to be relieved of liability and is set out in the margin.¹⁸⁶

223. Article 27 appears to follow, in form at least, the common law rule of strict liability on the carrier for all loss or damage to goods, with exceptions. Paragraph one provides the strict liability and paragraph two the exceptions. Moreover, two of the exceptions are familiar: wrongful act of the shipper or claimant and inherent vice of the goods. But the last of the exceptions in paragraph two—"circumstances which the carrier railway could not avoid and the consequences of

which it was unable to prevent"—is clearly broader. As Otto Kahn-Freund says of this exception:¹⁸⁷

"[It includes] a great deal more than what at common law is comprised by the terms 'act of God' and 'act of the Queen's enemies' and even by the term 'casualty (including fire and explosion)' used in the Railways Board's General Conditions. If it had been the intention to restrict the carriers' defence to events of this kind, the words '*force majeure*' would have been used. In the Convention of 1924 '*force majeure*' was a defence against a claim for loss or damage, and 'circumstances which the railway could not avoid and the consequences of which it was not able to prevent' could only be pleaded against a claim based on 'delay'. The present Convention has made the wider defence available in all cases and thus considerably modified the standard of liability in favour of the carriers. Much the most important consequence of this is that the defence now covers acts of strangers. Theft, arson and sabotage, not to mention negligence on the part of strangers, are not '*force majeure*' but they may come within the excepted peril as now formulated. This, however, presupposes that the carrier can prove that his servants had done all in their power to avoid the loss, damage or delay e.g., by protecting the consignment against theft, and that all was done in order to minimize the loss."

224. While there are not yet enough cases and comments on article 27 (2) to state its meaning with certainty it may well amount to a rule of liability only for fault or negligence. Of course, this leaves open the question of how rigorous a standard of care is required. Whether rail carriers under CIM will be held to a higher standard of care than they would be under an express negligence standard or to a higher or lower standard than air carriers under the Warsaw Convention cannot be stated with certainty.

225. Article 28 of CIM sets out the rules on burden of proof. Paragraph one states:

The burden of proving that loss, damage or exceeding of the transit period was due to one of the causes specified in article 27 (2) of this Convention shall rest upon the railway.¹⁸⁸

226. In speaking of the burden of proof provisions Otto Kahn-Freund states:¹⁸⁹

As in English law, it is for the carrier to prove any excepted peril on which he relies. He must also

¹⁸⁶ 3. "Subject to article 28 (2) of this Convention, the railway shall be relieved of liability when the loss or damage arises out of the special risks inherent in one or more of the following circumstances:

(a) Carriage in open wagons under the conditions applicable thereto or by an agreement made with the sender and referred to in the consignment note;

(b) The absence or inadequacy of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(c) Loading operations carried out by the sender or unloading operations carried out by the consignee under the conditions applicable thereto, or by agreement made with the sender and referred to in the consignment note, or by agreement with the consignee; faulty or improper loading when performed by the sender under the conditions applicable thereto or by agreement made with the sender and referred to in the consignment note;

(d) The carrying out by the sender, the consignee or the agent of either, of the formalities required by the Customs or other administrative authorities;

(e) The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation or leakage;

(f) The forwarding under irregular, incorrect or incomplete description of articles which are not to be accepted for carriage; the forwarding under irregular, incorrect or incomplete description of articles accepted only subject to certain conditions, or the failure on the part of the sender to observe the prescribed precautions in respect of such articles;

(g) The carriage of livestock;

(h) The carriage of consignments which, under this Convention, or under the conditions applicable or by special agreement made with the sender and referred to in the consignment note, must be accompanied by an attendant, in so far as the risks are those which it is the purpose of the attendant to avert."

¹⁸⁷ *The Law of Carriage by Inland Transport* 433 (4th ed. 1965).

¹⁸⁸ Paragraph 2 relates to burden of proof with respect to the particular cases of article 27 (3), which is quoted in part in note 186, *supra*. Paragraph 2 provides:

When the railway establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 27 (3) of this Convention, it shall be presumed that it was so caused. The claimant shall, however, be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks.

This presumption shall not apply in the circumstances envisaged in article 27 (3) (a) of this Convention if there has been an abnormal shortage, or a loss of any package.

¹⁸⁹ *The Law of Carriage by Inland Transport* 437 (4th ed. 1965).

prove those special circumstances which protect him against liability arising from the carriage of certain types of goods, such as livestock, or from certain contingencies such as improper packing. In these special circumstances he is not, however, as we have seen, relieved of all liability, but only of liability for loss or damage arising from the special risks inherent in those circumstances. To claim this relief all he has to do is to prove that the loss or damage could have so arisen, and if the possibility of the causal connexion between the special risk and the loss or damage has thus been established, it is for the claimant to prove that the loss or damage was not in fact attributable wholly or partly to the risk which might have caused it, e.g., that an injury suffered by a living animal in transit was not due to the inherent propensity of animals to be so injured. If, however, the carrier relies on the special risk of carriage in open wagons and the claim is not for damage to the goods but for the loss of an entire package or for abnormal short delivery, it is not presumed in his favour that the particular method of carriage was the cause of the loss.

3. *International motor carriage of cargo (The CMR Convention)*

227. The Convention on the Contract for the International Carriage of Goods by Road (hereafter called CMR) was done at Geneva on 19 May 1956 and came into force on 2 July 1961 with the ratification or accession of Austria, France, Italy, Netherlands and Yugoslavia.

228. The general provisions on carrier liability are contained in paragraphs 1 and 2 of article 17 and read as follows:

1. The carrier shall be liable for the total or partial loss of the goods and for damage thereto occurring between the time when he takes over the goods and the time of delivery, as well as for any delay in delivery.

2. The carrier shall however be relieved of liability if the loss, damage or delay was caused by the wrongful act or neglect of the claimant, by the instructions of the claimant given otherwise than as the result of a wrongful act or neglect on the part of the carrier, by inherent vice of the goods or through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent.

229. The language is essentially the same as the provisions of article 27 (1) and (2) of CIM and presumably will be interpreted in like manner. The remaining provisions of article 17 deal with particular situations and again are similar to provisions of CIM. They are set out in the margin.¹⁹⁰

¹⁹⁰ 3. The carrier shall not be relieved of liability by reason of the defective condition of the vehicle used by him in order to perform the carriage, or by reason of the wrongful act or neglect of the person from whom he may have hired the vehicle or of the agents or servants of the latter.

4. Subject to article 18, paragraphs 2 to 5, the carrier shall be relieved of liability when the loss or damage arises from the special risks inherent in one or more of the following circumstances:

230. The burden of proof provisions of article 18, set out below, are also essentially the same as those provisions in CIM except for paragraphs 4 and 5 which have no CIM counterparts.

1. The burden of proving that loss, damage or delay was due to one of the causes specified in article 17, paragraph 2, shall rest upon the carrier.

2. When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the special risks referred to in article 17, paragraph 4, it shall be presumed that it was so caused. The claimant shall however be entitled to prove that the loss or damage was not, in fact, attributable either wholly or partly to one of these risks.

3. This presumption shall not apply in the circumstances set out in article 17, paragraph 4 (a), if there has been an abnormal shortage, or a loss of any package.

4. If the carriage is performed in vehicles specially equipped to protect the goods from the effects of heat, cold, variations in temperature of the humidity of the air, the carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (d) unless he proves that all steps incumbent on him in the circumstances with respect to the choice, maintenance and use of such equipment were taken and that he complied with any special instructions issued to him.

5. The carrier shall not be entitled to claim the benefit of article 17, paragraph 4 (f), unless he proves that all steps normally incumbent on him in the circumstances were taken and that he complied with any special instructions issued to him.

E. *Alternative approaches to implement the relevant policy considerations*

231. In considering the appropriate approach to risk allocation between carrier and cargo interests, attention may be given to the three alternative approaches that follow:

1. *Strict liability*

232. Although rendered illusory by bill of lading exceptions in the 19th century the general law of mari-

(a) Use of open unsheathed vehicles, when their use has been expressly agreed and specified in the consignment note;

(b) The lack of, or defective condition of packing in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed;

(c) Handling, loading, stowage or unloading of the goods by the sender, the consignee or persons acting on behalf of the sender or the consignee;

(d) The nature of certain kinds of goods which particularly exposes them to total or partial loss or to damage, especially through breakage, rust, decay, desiccation, leakage, normal wastage, or the action of moth or vermin;

(e) Insufficiency or inadequacy of marks or numbers on the packages;

(f) The carriage of livestock.

5. Where under this article the carrier is not under any liability in respect of some of the factors causing the loss, damage or delay, he shall only be liable to the extent that those factors for which he is liable under this article have contributed to the loss, damage or delay.

time carriage imposed a standard of strict liability on the carrier for all loss or damage to cargo with only a few exceptions. Strict liability has also been imposed on other types of carriers, with various exceptions and modifications.¹⁹¹

233. A system of strict liability—assuming always an exception for inherent vice of the cargo and where the shipper is at fault—has two major factors to recommend it. First, it would tend to induce carrier to adopt a somewhat closer to optimum standard of care than a system of liability for negligence. Second, a system of strict liability would result in lower costs of administering claims (i.e., “friction”) than one based on negligence. Although it seems that these are factors of substantial importance there is at present no way to measure their economic significance accurately.

234. On the other hand, caution has been advised with respect to readjustment of the present commercial patterns reflected in insurance rates and practices, and in the structure of freight rates.¹⁹²

235. These various factors should be considered and balanced in deciding, as a matter of policy, whether existing law should be changed to impose a form of strict liability on carriers. If strict liability is not to be imposed then various lesser changes in the liability scheme should be considered as described below.

2. Simplified standards for liability and burden of proof based on other international conventions governing carriage of cargo

236. Section D, above, discussed the basic provisions on liability and burden of proof contained in international conventions for carriage of goods by air (the Warsaw Convention), by rail (the CIM Convention) and by road (the CMR Convention). Examination of these conventions shows that they are built on two short, basic provisions: (1) the carrier shall be liable for all damage or loss occurring while the goods are in the carrier's possession,¹⁹³ (2) however, the carrier shall not be liable if he proves that:

(a) [Air: The Warsaw Convention] “he and his agents have taken all necessary measures to avoid the

damages or that it was impossible for him or them to take such measures”;

(b) [Rail: The CIM Convention] the loss or damage resulted “through circumstances which the railway could not avoid and the consequences of which it was unable to prevent”;

(c) [Road: The CMR Convention] “through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent”.

237. The fuller text of these conventions (see section C, *supra*) shows that carrier may also avoid liability by proof that the loss resulted from the wrongful act of the claimant or from inherent vice of the goods or that the loss could have resulted from specified circumstances involving special risks (such as the absence of packing).¹⁹⁴ However, these exceptions do not cover the usual shipment and do not substantially modify the basic structure outlined above.

238. The structure of responsibility established under these conventions does not establish liability of the carrier regardless of the carrier's fault, and thus is less strict than the basic rules of maritime law (apart from exculpation by contract) and the rules of some national rules governing the responsibility of carriers.¹⁹⁵ On the other hand, the burden of proof is placed on the carrier to show his lack of responsibility for the loss or damage. In considering whether the basic approach of these international conventions would be useful for present purposes, attention may be directed to: (1) the simplicity of their basic structure; and (2) the advantages of harmony among the rules of liability of various types of carriers in view of the increasing significance of combined transport operations.

239. This approach is developed in detail in the Reply to the Questionnaire by the Government of France and is supported in other replies.¹⁹⁶

¹⁹⁴ Similar exceptions, reflecting the circumstances of marine carriage, would be feasible if this approach should be adopted in connexion with re-examination of the Hague Rules.

¹⁹⁵ See section B-1, *supra*, at note 130.

¹⁹⁶ It is not feasible to set out the entire proposal; the following is a summary. Under the scheme put forward in the French proposal the carrier is fully responsible if the goods do not arrive in a satisfactory state unless he proves that he was entitled to an exemption from responsibility.

The instances of exemption of the carrier would be simplified. There would be two guiding principles: (1) loss resulting solely from the fault of the cargo owner, i.e., a false declaration by the cargo owner, defective or insufficient packaging, or marking of goods, and inherent vice of the goods; (2) cases of *force majeure*, i.e., an event which is unforeseeable, insurmountable, independent of the carrier. Examples of *force majeure* would be war, fire and strike. The carrier would have the burden of proving the fault of the cargo owner, or *force majeure*.

Under this proposal certain of the present exemptions in article IV (2) would be set aside. The exemptions for fire (IV (2) (b)) and perils of the sea (IV (2) (c)) would be retained only in so far as they fit within the *force majeure* exemption. Since the exemption in article IV (2) (a) (neglect, etc. in the navigation or management of the ship) does not have the characteristics of *force majeure*, this exemption would be set aside. The removal of this exemption would eliminate uncertainty which has given rise to much litigation.

The French reply noted that to conform with the objective set up by UNCTAD for a balanced allocation of risks, a ceiling for liability must be maintained. The limitation of liability should be set aside only in cases (already provided for in

¹⁹¹ Under some legal systems, rail carriers have virtually absolute liability subject to narrow exceptions such as *force majeure* and fault of the shipper. As to such liability in the United States of America under the standard bills of lading governing shipments by rail, truck and air see Honnold, *Sales and Sales Financing* (3rd ed., 1968), 281-83. For liability in the United Kingdom under the standard contract forms published by the Railways Board see Kahn-Freund, *The Law of Carriage by Inland Transport* (4th ed., 1965).

¹⁹² The Canadian Government's reply states that “any rearrangement in the allocation of risks which imputes greater responsibilities on the carrier can be had only at the price of the surrender by the shipper of: (a) his existing freedom of choice respecting whether to insure or not to insure against the related risk; and (b) his existing freedom of choice respecting the market in which insurance against the related risk will be placed”. For a similar view see Poor, “A New Code for Carriage of Goods by Sea”, 33 *Yale C.J.* 133, 135 (1923). For caution with respect to possible changes in carrier liability on freight rates see also the replies of Japan and the United Kingdom.

¹⁹³ The varying ways of stating the period during which the carrier is responsible are discussed in part one of this report.

3. Modification of specific substantive provisions of the Hague Rules

(a) Article IV (2) (a): navigation or management of the ship

240. This provision exempts carrier from liability for loss to cargo caused by neglect in the management or navigation of the ship. It is the only provision of the Hague Rules which grants complete exemption from liability for the consequences of fault. Under the reasoning spelled out earlier, it appears that holding carrier liable for the consequences of its fault in the navigation or management of the ship would tend to promote a closer to optimum standard of care than the present rule. From this standpoint a change in the present rule appears to be desirable.

241. It was pointed out earlier that a fault standard of liability is high in friction, compared to a standard of strict liability or no liability, because fault or negligence is complicated to prove. While this is true as a general rule, the change to a fault standard for navigation and management, within the over-all framework of the Hague Rules, would be likely to reduce friction rather than increase it. This calls for some explanation. Under the present rules three major categories into which the cause of loss may fall are—failure to provide a seaworthy ship; failure to properly care for the cargo; and negligence in navigation or management of the ship. The lines between these categories are very unclear. Moreover, the carrier is liable to cargo for the consequences of its negligence as to two of the categories but not for negligence in navigation or management and as a result responsibility under the present system is subject to basic doubts and confusion—in other words, friction. As Gilmore and Black point out, the question of what is navigation or management is rarely asked in isolation. Rather, given a particular set of facts, the question is this: Did the loss result from fault in the management or navigation of the ship (for which carrier is not liable) or, on the other hand, did the loss result from fault in caring for cargo or fault in not providing a seaworthy ship (for which faults carrier is liable)? Consequently, the parties must not only debate whether the carrier was negligent but must, in addition, debate the difficult question of the proper characterization of the event. Again as Gilmore and Black point out:

"The difficulty in drawing the line arises from the fact that read naturally, the two clauses overlap, for many actions which might be spoken of as faults or

errors in management or even in navigation might equally well be viewed as failures in the duty to use due care with respect to the cargo. Few clearcut concepts have appeared for dealing with the problem; the feel of it can only be acquired by reading cases."¹⁹⁷

242. If carrier is made liable for the consequences of its negligence in the navigation and management of the ship the area of debate will be narrowed considerably. It will no longer be necessary to decide whether a particular set of facts involves, for example, fault in the care of cargo or fault in the management of the ship. If negligent, carrier will be liable in either event. Only the question whether carrier's fault caused the loss need be debated. Thus friction is likely to be reduced.

243. A change in the rule on navigation and management would have no major effects in the area of marine insurance but would tend slightly to lower cargo insurance rates and slightly to raise P and I rates. This could result in some minor economic benefit to shipping interests, depending upon the circumstances of carriers and their conferences. As to the matter of fairness, few would argue that it was unfair to charge carriers with damage to cargo caused by their negligence in the navigation or management of the ship. On balance, therefore, substantial reasons support a change in the Hague Rules to hold carrier liable for loss or damage to cargo caused by carrier's fault in the navigation or management of the ship.¹⁹⁸

244. As to effecting the change, the simple elimination of article 4 (2) (a) would in most (possibly in all) cases have the effect of making carriers liable for

¹⁹⁷ Op. cit., *supra*, at p. 135.

¹⁹⁸ The replies of Austria, Canada, France, Korea, Khmer Republic, Madagascar, Saudi Arabia, Nigeria, India, Hungary, and Australia, indicate support for deletion of article IV (2) (a). The reply of India seems also to support this result. Cf. reply of Ceylon which states that in fairness to the shipper/consignee, the carrier should be responsible for the default of his master or servants but cannot be held responsible for the defaults of mariners, pilots and others who are not his servants. On the other hand, the observations of Japan state that this exemption has traditionally been accepted, and that "although scientific techniques have been remarkably developed nowadays, modern types of danger have appeared and the danger involved in sea navigation has not yet diminished". If the carrier is made responsible in the context of the situations set out in article IV (2) (a) the carrier will have to arrange for insurance with respect to that risk. The cost of the premium will be added to the freight; the amount of increase in freight would not be less than the decrease in premium for the insurance taken out by the cargo owner. A further reason set out in the Japanese reply for maintaining the exemption is that claims arising in cases of collision of vessels can be disposed of more simply and expeditiously in cases of collision of vessels if the carrier is relieved of his liability for fault in navigation. In its reply the Government of Greece indicates its opposition to the modification of the exemptions listed in article IV (2) of the Hague Rules. The reply states the following: "The exemptions set out in article 4 (2) of the Hague Rules and in particular those under paragraphs (a), (b) and (c) constitute the well-known concession made by the International Convention of 1924 to the carrier against giving up his freedom to contract with the shipper. If those exemptions have to discontinue, the carrier should be allowed to recover his contractual freedom. Shipping enterprises are private business operations under international competition and they cannot be assimilated to carriers of other means of transportation enjoying monopoly or other privileged systems."

the 1968 Protocol) of intentional or inexcusable fault of the carrier or his servants. Such a system would eliminate existing uncertainties and ambiguities and, as a consequence, would reduce litigation while insuring the prompt and satisfactory compensation of the cargo owner. The reply added that the system proposed would bring the regulation of maritime transport closer to that of other modes of transportation. (The reply noted that before adopting new legal solutions, it would be desirable to undertake studies on the economic effects of modifications of the present system.)

In its reply the Government of Austria indicated that the grounds for exemption from liability should be "adjusted to the grounds provided by the international conventions on aviation (Warsaw Convention), railways (CIM) and road transport (CMR)". The Indian reply supports redrafting article IV "somewhat along the lines of article 20 of the Warsaw Convention".

loss to cargo caused by the negligent navigation or management of the ship. Presumably this result would come about as follows:

(1) The shipper would prove that the cargo had been delivered to the ship in good condition and returned at destination in damaged condition.

(2) Thereupon, carrier would be obliged to show that it came within some specific provision exempting it from liability, which we assume it could not do.

(3) Carrier would be obliged to show that it came within the catchall exemption (IV (2) (q)) which requires that carrier show that its fault or negligence did not contribute to the loss. This, by assumption, it could not do.

(4) Therefore, since carrier could not fit within a specific exemption provision it would, presumably, be liable.

245. However, this leaves much to inference. It would seem distinctly preferable—in addition to eliminating IV (2) (a)—to adopt language stating the carrier's duty to exercise due diligence in the navigation and management of the ship. The appropriate place for this would be in a new section 3 in article 3 following statement of the carrier's duty to exercise due diligence to provide a seaworthy ship and the duty to care properly for cargo. The provision might read as follows:

3. The carrier shall properly and carefully navigate and manage the ship

(b) *Article IV (2) (b): fire*

246. The fire provision is unusual in that, as described earlier, it exempts carrier from liability for the negligence of some employees but not others. The merits of carrier liability for negligence have been discussed earlier. As a general rule there seems little reason to adopt the approach of the fire provision. Carrier is in a better position than the shipper to eliminate, mitigate or guard against the negligence of even its minor employees. It appears, therefore, that holding carrier liable for the consequences of their negligence would tend to promote an optimum standard of care. There does not appear to be anything unique about loss or damage from fire to warrant a special rule. Considerations of insurance, economics, fairness and friction all seem to bear on liability for fire loss in the same manner as on liability for other types of losses. Accordingly, it appears that it would be desirable to treat fire loss in the same manner as other types of loss and, therefore, to eliminate article IV (2) (b).¹⁹⁹

¹⁹⁹ The replies of Austria, France and Nigeria support deletion of article IV (2) (b). The Australian reply states: "In the light of current technological advances it is doubtful whether retention of this exception is warranted. If it is retained, present uncertainty as to its application could be eliminated by placing the onus on the carrier to show that the fire was caused by fault or privity of the cargo owner." On the other hand, the Japanese Government notes, *inter alia*, that the exemption for fire has been approved for the reasons that the origin of a fire is unknown in many cases and that a fire frequently causes extensive damage; requiring the carrier to prove the cause of the fire would deny the exemption of its effect. Cf. reply of the Government of Greece.

(c) *Article IV (2) (c): perils of the sea*

247. This clause provides that the carrier shall not be liable for loss or damage caused by perils, dangers and accidents of the sea. It is said that the clause "denotes accidents peculiarly incident to navigating the sea . . . arising from the peculiar physical conditions under which navigation upon the sea takes place."²⁰⁰ The test is stated as ". . . whether the accident which occurred was or was not one which could have happened on land, so far as its general character was concerned".²⁰¹

248. Although not clear from the face of the provision, cases hold it will not apply where the loss would not have occurred but for lack of due diligence on the part of the carrier.²⁰² The carrier is exempt only from sea perils against which all reasonable precautions by a prudent carrier proved to be unavailing. Only then can it be said that the loss was caused by a peril of the sea. The absence of negligence as a concurring cause is sometimes even said to enter into the very definition of sea peril.²⁰³ Cases also have held, although again the provision is not clear on its face, that carrier bears the burden of proof: carrier must show that it took all reasonable precautions, that it was not negligent.²⁰⁴

249. The results of the peril of the sea exception, as outlined above, fit in with the general reasoning in favour of charging carriers with the results of their negligence. Moreover, since the facts relevant to determining whether its fault contributed to the loss are peculiarly within the control of the carrier, it also seems reasonable to give carrier the burden of proving that it took all reasonable precautions.

250. Even if one assumes that the results developed by the above case-law should be continued, article IV (2) (c) appears to be unnecessary for these same results would be reached under the catchall provision of article IV (2) (q).²⁰⁵ Indeed article IV (2) (q) is far clearer. It explicitly states that carrier will not be liable for loss from any cause "arising without . . . the fault or neglect . . . of the carrier . . .". It is also explicit that the burden of proof shall be on the carrier to show that its fault or neglect did not contribute to the loss.

251. Consideration should therefore be given to eliminating article IV (2) (c). It is unnecessary and ambiguous. Although courts have interpreted it in a desirable way, there would be merit in doing away with the possibility of undesirable and unwanted results in the future.²⁰⁶

²⁰⁰ Carver, *op. cit.*, *supra*, at p. 134.

²⁰¹ *Idem* at 135.

²⁰² *Idem* at 141.2 Manca *op. cit.*, *supra*, at p. 206 UNCTAD report, pp. 88-89.

²⁰³ Gilmore and Black, *op. cit.*, *supra*, at p. 140. But see *Blackburn v. Liverpool* [1902] 71 K.B. 177.

²⁰⁴ Gilmore and Black, *op. cit.*, *supra*, at p. 163. But see Carver *op. cit.*, *supra* at p. 131 (foot-note 36).

²⁰⁵ See para. 174, *supra*.

²⁰⁶ In its reply the Australian Government states: "Judicial construction of this provision has varied from country to country between the lenient and the strict. This is, of course, confusing and does not make for certainty. It is suggested that amendment is needed so that the stricter judicial interpretations are adopted and it is made clear that the peril must have been one which the ordinary safeguards of skilful vigilant

(d) *Article IV (2) (d): acts of God*

252. This provision exempts carrier for loss resulting from acts of God, and is very similar in operation to the perils of the sea clause. That is, first, it does not apply where carrier's negligence is a concurring cause of the loss²⁰⁷ and, second, carrier bears the burden of proof.²⁰⁸ Accordingly, like the perils of the sea clause, it is redundant and could be eliminated, leaving carrier to rest on the more explicit language of article IV (2) (q).²⁰⁹

(e) *Article III (1), article IV (1): seaworthiness*

253. Article III (1) binds the carrier "before and at the beginning of the voyage" to exercise due diligence to "(a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which the goods are carried, fit and safe for their reception, carriage and preservation." Under article IV (1) neither the carrier nor the ship is liable for damage or loss resulting from unseaworthiness unless such damage or loss is caused by "want of due diligence" on the part of the carrier to carry out the duties set out in article III (1). When loss or damage due to unseaworthiness is shown, the burden of proof as to the exercise of due diligence is on the carrier or other person claiming exemption from liability.

254. Modifications of the present provisions on seaworthiness have been suggested in the replies of the Governments of Australia and of India. These include extension of the period during which the carrier is required to exercise due diligence to assure the seaworthiness of the ship, and simplification of the rules on burden of proof.²¹⁰

seamen could not have prevented." The Austrian, French and Indian replies indicate that under a scheme of liability which might be modelled on the conventions on other modes of carriage of goods this exemption would be deleted. See *supra* foot-note 196. On the other hand, the reply of the Government of Madagascar indicates that a modification of the exemption on "perils, damages or accidents of the sea" does not seem called for since neither the carrier nor his servant has any influence over such perils, dangers or accidents.

²⁰⁷ Gilmore and Black, *op. cit.*, *supra*, at pp. 141, 147. 2 Manca *op. cit.*, *supra*, at p. 207.

²⁰⁸ Gilmore and Black, *op. cit.*, *supra*, at pp. 146-147.

²⁰⁹ The same reasoning may also apply to (p), the latent defect exception.

²¹⁰ The Indian reply suggests that article III (1) should be revised to require the carrier to make the ship seaworthy "at all times and before leaving every port", and that corresponding changes should be made in article IV (1) if that provision is maintained. Changes in article IV (1) would include removing from the cargo owner the burden of proving that the loss or damage was due to unseaworthiness. The Indian reply concludes that it would be sufficient for the cargo owner to prove that the loss or damage occurred during the course of carriage.

The Australian reply points out that at the present time matters such as those set out in article III (1) are already subject to rigorous standards prescribed in the 1960 Safety of Life at Sea Convention (SOLAS). In these circumstances, according to the reply, it seems reasonable that the cargo owner is entitled to assume "that a ship will be seaworthy and that it will be operated efficiently and safely". Consequently, the reply states, the following modifications of the Hague Rules would not impose hardship in the carrier: "(a) deleting the present articles III (1) and IV (1), and (b) writing in a provision that the carrier should be responsible for loss or damage to the goods during such times as they were in his

255. Comments with respect to other substantive provisions were made in a number of replies.²¹¹ Some of these do not relate directly to the structure of the present report but will be appropriate for consideration in connexion with those items reserved for later consideration under the resolution adopted by UNCITRAL at its fourth session. For the provisions of the resolution see paragraph 3 (Introduction *supra*).

4. *Modification and simplification of the Hague Rules on burden of proof*

256. The burden of proof is a device for determining the winner of a dispute when there is not sufficient evidence to know what occurred or when the evidence presented on either side is closely balanced. While a case decided on the basis of the burden of proof is decided in an essentially arbitrary manner, the shaping of the burden itself need not be arbitrary. In deciding which party should bear the burden of proof in the area under consideration two considerations seem to be of primary importance.

257. First, the burden should be placed on the party most likely to have knowledge of the facts. So placed the burden is more likely to promote the production of evidence; it is less likely to result in an arbitrary decision made on the basis of the burden of proof itself. In short, the party with greater knowledge of the facts is more likely to be able to prove what happened and less likely to suffer from bearing the burden of proof.

258. Second, the burden should be placed so that when invoked the loss will fall in a manner consistent with policy objectives discussed in prior sections.

259. Both these considerations suggest that carrier should bear the burden of proof (with exceptions to be noted later) as to matters occurring while the cargo is in its possession. Little needs to be said on the first consideration: carrier is most likely to have knowledge of matters bearing on loss or damage which occur while cargo is in its possession.²¹²

charge, except as otherwise provided." The Australian reply adds that these modifications would bring the rules on sea carriage into line with those relating to air carriage (the 1929 Warsaw Convention and the 1944 Chicago Convention). See also discussion on the subject of, seaworthiness in the UNCTAD secretariat report, paras. 203-206.

²¹¹ Suggestions and proposals regarding the modification of other substantive provisions of the Hague Rules were made in a number of replies. The problem of delay in delivery is taken up in the Australian and Indian replies. The desirability of changes in article IV (4) (deviation) is taken up in the Australian and Indian replies and in the Japanese observations. The Indian reply makes suggestions regarding article III (3). This reply also proposes a provision on contributory negligence of the shipper along the lines of article 21 of the Warsaw Convention. The Hungarian reply makes suggestions regarding article III (4) and article III (8) (benefit of insurance). The Austrian reply discusses needed changes in article IV (5) of the Rules with respect to preventing the carrier from taking advantage of the limitation of liability when damage or loss is due to reckless or wilful action on his part or that of his servants or agents. The Australian reply also comments, *inter alia*, on the need to require the issuance of a bill of lading.

²¹² Justifying a rule of strict liability for carriers, see Lord Holt in *Coggs v. Bernard* (1703) 2 Ld. Raym. 909; 1 Smith's L.C., 13th ed., 175, 186.

Tetley, *op. cit.*, *supra*, at p. 156: "... virtually all the information, if available at all, is available to the carrier alone. To exculpate a carrier when the cause of the loss is unknown is to make it beneficial for carriers not to discover the cause."

260. The second consideration requires more explanation. As noted above, a decision made on the basis of burden of proof is essentially an arbitrary one. The basis of liability may be negligence, but if carrier bears the burden, and if there is a failure of proof, carrier will be liable, regardless of whether it was actually negligent or not. Placing the burden on carrier then is a move in the direction of strict carrier liability. By the same reasoning, placing the burden on cargo interests is a move in the direction of exemption of the carrier from the consequences of its negligence. As a result, an important consideration in placing the burden of proof is the merit of strict liability of carriers as compared to the merit of exoneration of carriers for their own negligence. One or the other must be favoured.

261. On the basis of previous discussion it appears that the better choice would be to place the burden of proof on the carrier and thus take a step toward strict carrier liability. Applying the earlier analysis of policy considerations this would tend to promote an optimum standard of care on the part of the carrier—while placement of the burden on shipper would not.

262. As to reduction of friction, the main consideration is clarity. The clearer the rule, the less the friction. A rule placing the burden squarely on carrier for all matters occurring while cargo is in its possession (with sharply delineated exceptions) would be clearer than the present set of rules and would therefore tend to reduce friction.

(a) *Exceptions to carrier bearing the burden of proof*

263. Although there appears to be good reason for generally placing the burden of proof upon carrier, five exceptions to such a general rule should be considered. These are essentially the five preliminary matters that shipper must prove under present law.²¹³

(1) That the claimant is the owner of the goods and/or is the person entitled to make the claim.

(2) The contract.

(3) That the loss or damage took place during the period for which carrier is responsible. (See part one, paras. 7-41.)

(4) The physical extent of the damage or loss.

(5) The monetary value of the loss or damage.

264. It seems reasonable to continue to place the burden of proof for these matters on shipper.

(b) *Consequences in specific situations of a suggested burden of proof scheme*

265. The following set of examples is designed to illustrate how the suggested burden of proof scheme would work—that is, carrier bearing the burden on all issues except those specifically excepted. It should be noted that this scheme is very similar to the burden of proof arrangement used in the catchall exemption section of the Hague Rules (article IV (2) (q)). Thus the suggested scheme might roughly be described as an extension of the article IV (2) (q) arrangement.

Example: a case involving the detention of a vessel in a harbour by government authorities. Assume there is a shipment of cheese on board which spoils:

(1) Shipper would have the burden of proving that the cheese was delivered to the carrier in good condition and was received back in bad condition as under present law.²¹⁴ Also, as under present law, shipper would win if it bore its burden on this point and there were no other showings or allegations.

(2) Carrier would bear the burden of showing that the cause of the loss was the delay in a hot harbour occasioned by the restraint of princes. If carrier can bear its burden here it will win in the absence of any other showings or allegations.

(3) If shipper alleges that carrier's improper stowage of the cargo in an inadequately ventilated part of the ship was a contributing cause of the damage, carrier will have the burden of proving that the stowage was not faulty or, alternatively, that it was not a contributing or concurring cause of the loss.

(4) If carrier fails to bear its burden under 3 above, carrier will then have the burden of showing how much of the loss is attributable to the restraint of princes and how much to the faulty stowage. If carrier fails to bear this burden it will be liable for the entire loss, in the absence of any further showing or allegations.

(5) As an alternative to shippers allegation in paragraph 3 above, if shipper alleges that the carrier's fault provoked or caused the restraint of princes (as by refusal to pay just taxes or fees, inciting riot and the like) the carrier will bear the burden of proving that it did not cause or provoke the restraint of princes.

(c) *Amendments to the Hague Rules for implementation of the suggested burden of proof scheme*

266. Earlier parts of this report have suggested the elimination of some paragraphs of article IV (2). Adoption of the suggested burden of proof scheme would eliminate or alter the rest of article IV (2). This can be illustrated by taking article IV (2) (g) as an example. Article IV (2) (g) exempts carrier from loss or damage caused by, *inter alia*, an arrest or restraint of princes. This provision on analysis appears to only a specific and perhaps redundant illustration of the fault principle. Thus, if a restraint of princes causes the loss rather than any fault of carrier, the carrier will not be liable regardless of article IV (2) (g). Carrier will be protected by the catchall provision, article IV (2) (q) which relieves carrier of liability for any and all loss or damage except that caused by the fault of carrier. Paragraph (q), however, places the burden on the carrier to prove that its fault did not contribute to the loss or damage. Under paragraph (g), on the other hand, it has been held that once carrier proves that a restraint of princes occasioned the loss the burden shifts to shipper to prove that the carrier's fault caused or provoked the restraint of princes or concurred with the restraint of princes to produce the loss.²¹⁵ The

²¹⁴ Shipper would also bear the burden on the various other preliminary matters noted above.

²¹⁵ As noted earlier there may be jurisdictions where this shift does not occur and the burden remains with carrier as it does under article IV (2) (q). In such jurisdictions elimination of article IV (2) (g) will effect little change.

²¹³ They are taken from Tetley, *op. cit.*, *supra*, at pp. 34-35.

general rule placing the burden of proof on the carrier would be inconsistent with the shifting burden that now results from article IV (2) (g); if the general rule is accepted, article IV (2) (g) should be deleted.

267. It is possible, although not likely, that as the Hague Rules are presently written a court might hold that if a restraint of princes "causes" the loss or damage, carrier would not be liable even if its negligence caused the restraint of princes or concurred with the restraint of princes to produce the loss. Such an interpretation of article IV (2) (g) cannot be completely ruled out on the face of the Hague Rules, and to the extent a court might adopt it, the elimination of article IV (2) (g) will effect a substantive change, in addition to changing the burden of proof. If so, on the basis of prior reasoning, there would appear to be reasons to support the substantive change effect by eliminating article IV (2) (g).

268. The various other paragraphs of article IV (2) which have not been discussed previously are for purposes of analysis the same as article IV (2) (g). These are paragraphs (e), (f), (h), (i), (j), (k), (l), (m), (n), and (o).²¹⁶ The reasons supporting clarification of the rules on burden of proof, mentioned above, would also support the elimination of these paragraphs.²¹⁷

269. Article IV (1) could also be eliminated if the suggested burden of proof scheme is adopted.

(d) *Summation: form of article IV (1) and (2) as amended*

Article IV (1)

Neither the carrier nor the ship shall be responsible for loss or damage from any cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.

Article IV (2)

(a) The burden of proof shall be on the shipper to show:

- (1) That the claimant is the owner of the goods or is otherwise entitled to make the claim.
- (2) The contract.
- (3) That the loss or damage took place during the period for which carrier is responsible.
- (4) The physical extent of the loss, or damage.
- (5) The monetary value of the loss or damage.

²¹⁶ See Gilmore and Black, *op. cit. supra*, at pp. 147-52.

²¹⁷ Paragraph (p) should also be eliminated, either on the above reasoning or because it is redundant as suggested in para. 252 *supra*. The Australian reply suggests that with respect to the exemptions in the Hague Rules for inherent vice (IV (2) (m)) and insufficiency of packing (IV (2) (n)) the carrier should have the burden of proof in attempting to avoid responsibility on these grounds. With regard to the exemption for latent defect (IV (2) (p)) "proof that a defect was latent and that it caused the damage will always involve extensive litigation. As the state of the vessel is the responsibility of the carrier anyway, it is suggested that this exception could also be deleted". It is also suggested that the catchall exemption (IV (2) (q)) should be deleted.

The Australian reply also suggests that the carrier should be obliged to prove that he has fulfilled the obligations of article III (2) before he may invoke the exceptions in article IV. The Indian reply makes a similar point.

(b) The burden of proof shall be on the carrier as to all other matters: carrier must show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier caused, concurred in or contributed to the loss or damage.

APPENDIX

Questionnaire on certain matters regarding the responsibility of carriers for loss or damage to cargo in the context of bills of lading

PART I

1. Period during which the carrier is responsible for damage or loss of goods

Attention is directed to the provisions of the Brussels Convention of 1924 (the Hague Rules) which impose certain restrictions on clauses in bills of lading during "the period from the time when the goods are loaded on to the time they are discharged from the ship" (article 1 (e)). The question has been raised as to the protection that should be afforded cargo owners with respect to loss or damage to the cargo during the two following periods: (i) the period after delivery by the shipper to the carrier (or to the carrier's agent or otherwise pursuant to the carrier's instructions) but before they have been "loaded on" the ship and (ii) the period after discharge of cargo from the ship but prior to delivery to the consignee.

(a) In what circumstance under your country's legal rules is the carrier responsible for loss or damage before the goods have been "loaded on" the ship or after they have been "discharged from" the ship?

(b) Are there any existing applicable legal rules in your country attributing responsibility to persons (such as port authorities) other than the carrier or his agent during the period after delivery by the shipper and before loading on ship, and during the period after discharge from ship and before delivery to the consignee? If so, please state provisions of such legislation and relevant case law.

(c) If, according to existing applicable legislation, the carrier is responsible only for "the period from the time when the goods are loaded on to the time they are discharged from the ship" (article 1 (e)), when according to such legislation and relevant case law are the goods considered to have been "loaded on" and when are the goods considered to have been "discharged"?

(d) Do you consider the existing international legislation in this area satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for modification of such international legislation and the reasons therefor.

2. Jurisdiction clauses

(a) Under legal rules (legislation and case law) applicable in your country, in what circumstances is effect given to "jurisdiction clauses", whereby jurisdiction over claims with respect to contracts of carriage of goods may only be brought before the courts of a particular country or before arbitration proceedings in a specific location, or whereby a specific system of law is chosen to govern the substantive aspects of the contract?

(b) Do you consider the existing rules on "jurisdiction clauses" satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for international legislation on this subject and the reasons therefor.

3. Cargo carried on deck and related problems

Attention is directed to article 1 (c) of the Hague Rules which provides as follows: "Goods" includes goods, wares, merchandise and articles of every kind whatsoever except live

animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried". Questions have been raised under this provision with respect to its applicability to containers and certain other types of cargo which are customarily carried on deck. Attention has also been directed to the above provision relating to "live animals".

(a) Do existing legal rules in your country attributing responsibility to the carrier for loss or damage to the cargo contain special rules with respect to cargo which is stated as being carried on deck and which is so carried? If so, please indicate the nature of these rules. Do these rules apply to the carriage of containers on deck? Are live animals also the subject of special rules in so far as carrier's responsibility is concerned?

(b) Do you consider the exclusion of deck cargo and live animals from the operation of the Hague Rules to be satisfactory? If so, please set forth any reasons that you may wish to provide. If not, please indicate any desired proposals for modifications of such international legislation and the reasons therefor.

PART II

The Working Group on International Legislation on Shipping at its meeting during the fourth session requested the Secre-

tary-General to prepare a report analysing alternative 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 2 of the Commission's resolution. Special reference was made to the objective of establishing a balanced allocation of risks between the cargo owner and the carrier.

To assist the Secretary-General in the preparation of the above report, it would be appreciated if you would suggest policy approaches implementing the objective mentioned above. It would be helpful if such suggestions could be illustrated by concrete proposals relevant, *inter alia*, to the exceptions set out in article 4 (2) of the Hague Rules providing that:

"2. Neither the carrier nor the ship shall be responsible for loss or damages arising or resulting from:

"(a) Act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship;

"(b) Fire, unless caused by the actual fault or privity of the carrier;

"(c) Perils, dangers and accidents of the sea or other navigation waters;

"..."

CHECK LIST OF UNCITRAL DOCUMENTS

Documents of the fifth session of the Commission

<i>Title or description</i>	<i>Document reference</i>
A. GENERAL SERIES	
Register of experts and scholars in international trade law: supplement to the register of experts and scholars in international law	A/CN.9/61
Progress report of the Working Group on the International Sale of Goods on the work of the third session: Geneva, 17 to 28 January 1972	A/CN.9/62 and Corr. 1* and Add. 1 and 2
International Legislation on Shipping: Report of the Working Group on the work of its third session, held in Geneva from 31 January to 11 February 1972	A/CN.9/63 and Corr.1** and Add.1
International Commercial Arbitration: Report by Mr. Ion Nestor, Special Rapporteur	A/CN.9/64
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/65
Timing and contents of the UNCITRAL Yearbook: report of the Secretary-General	A/CN.9/66
International Payments: Negotiable Instruments: Draft Uniform Law on International Bills of Exchange and Commentary; report of the Secretary-General	A/CN.9/67 and Corr. 1**
Provisional agenda and annotations: note by the Secretary-General	A/CN.9/68
General conditions of sale and standard contracts: report by the Secretary-General	A/CN.9/69
Report of the Working Group on Time-limits and Limitations (Prescription) in the International Sale of Goods, on its third session held at New York from 30 August to 10 September 1971	A/CN.9/70 and Rev. 1*** and Corr.1**** and Add.1 and 2
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	A/CN.9/71
International payments: negotiable instruments: note by UNIDROIT concerning the effects of the international bill of exchange in the executory process	A/CN.9/72
B. LIMITED SERIES	
Proposal by the Spanish delegation concerning the method of work for the fifth session of the United Nations Commission on International Trade Law ..	A/CN.9/L.22

* In English and French only.
 ** In English only.
 *** in Spanish only.
 **** In French only.

<i>Title or description</i>	<i>Document reference</i>
C. RESTRICTED SERIES	
Amendments proposed by Norway to the text of the draft Convention on Prescription (Limitation) in the Field of International Sale of Goods	A/CN.9/R.9
Bankers' commercial credits, bank guarantees, and security interests in goods: work in progress: note by the Secretary-General	A/CN.9/R.10
Draft Convention on Prescription (Limitation) in the Field of International Sale of Goods: consideration of the report of the Working Group on Prescription; note by the Secretariat	A/CN.9/R.11
Alternative methods for the final adoption of the draft Convention on Prescription (Limitation) in the Field of International Sale of Goods: note by the Secretariat	A/CN.9/R.12
International payments: note submitted by the International Chamber of Commerce	A/CN.9/R.13
<i>Convention on Prescription</i>	
Amendments by Austria	A/CN.9/V/CRP.1
Amendments by Spain	A/CN.9/V/CRP.2 and Corr.1
Amendments by Austria	A/CN.9/V/CRP.3
Amendments by Belgium and France	A/CN.9/V/CRP.4
Suggestions by the representative of the Hague Conference on Private International Law	A/CN.9/V/CRP.5
Amendment by Guyana	A/CN.9/V/CRP.6
Amendment by Nigeria	A/CN.9/V/CRP.7
New article by Guyana	A/CN.9/V/CRP.8
Amendments by Ghana	A/CN.9/V/CRP.9
Amendments by Spain	A/CN.9/V/CRP.10
Amendment by Austria	A/CN.9/V/CRP.11
Amendment by Hungary	A/CN.9/V/CRP.12
Amendment by Guyana	A/CN.9/V/CRP.13
Amendments by the United States of America	A/CN.9/V/CRP.14
Observations and proposals by the Union of Soviet Socialist Republics	A/CN.9/V/CRP.15 and Rev.1*
Amendments by Australia	A/CN.9/V/CRP.16
Amendments by Spain	A/CN.9/V/CRP.17
Amendments by Belgium, Egypt and France	A/CN.9/V/CRP.18
Proposal by the Union of Soviet Socialist Republics	A/CN.9/V/CRP.19
Report of Drafting Party I	A/CN.9/V/CRP.20 and Rev.1**
<i>New draft proposed by the Working Group on Prescription</i>	A/CN.9/V/CRP.21; Add.1 and Corr.1, Add.2 21/Rev.1; and 21/Rev.1/Add.1 to 10***

* In English only.

** In French and Russian only.

*** In English, French and Russian only.

<i>Title or description</i>	<i>Document reference</i>
Amendments by Norway	A/CN.9/V/CRP.22
Recommendation of the Working Group on Methods of Work	A/CN.9/V/CRP.23
Draft report of the Committee of the Whole to the Commission	A/CN.9/V/CRP.24
International legislation on shipping: draft resolution by Brazil, Egypt, France, Ghana, India, Union of Soviet Socialist Republics and United States of America	A/CN.9/V/CRP.25
Draft decision proposed by the Working Group on Prescription	A/CN.9/V/CRP.26
Proposal by Singapore for the addition of a new article governing the maximum over-all limitation period in the draft Convention on Prescription ..	A/CN.9/V/CRP.27
Draft report of the United Nations Commission on International Trade Law on the work of its fifth session (10 April to 5 May 1972)	A/CN.9/V/CRP.24/ Rev.1 and CRP.28 and Add.1 to 5
D. INFORMATION SERIES	
List of delegations	A/CN.9/INF.4

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