

**United Nations
Commission on
International
Trade Law**

YEARBOOK

Volume IV: 1973



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NOTE

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

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INTRODUCTION

This is the fourth volume in the series of Yearbooks of the United Nations Commission on International Trade Law (UNCITRAL).¹ The third volume covered the period from April 1971 to the end of the Commission's fifth session in May 1972. This volume covers the period from May 1972 to the end of the Commission's sixth session in April 1973.

The 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 fifth session by including material, such as action by the General Assembly, which was not available when the manuscript of the third volume was prepared. Part one also includes the Commission's report on the work of its sixth session.

Part two reproduces most of the documents considered at the sixth session; the material is organized in terms of the Commission's priority topics: 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 comments and proposals submitted by Governments, and reports of the Secretary-General. At the end of each section are references to any documents that have not been included in this volume.

The final item in the Yearbook is a bibliography of recent writings related to the Commission's work.

¹ *Yearbook of the United Nations Commission on International Trade Law* (hereunder referred to as UNCITRAL Yearbook), *Volume I: 1968-1970* (United Nations publication, Sales No. E.71.V.1); *Volume II: 1971* (United Nations publication, Sales No. E.72.V.4) and *Volume III: 1972* (United Nations publication, Sales No. E.73.V.6).

I. THE FIFTH SESSION (1972); COMMENTS AND ACTION WITH RESPECT TO THE COMMISSION'S REPORT

A. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (22 September 1971-25 October 1972) *

B. *Progressive development of the law of international trade: fifth annual report of the United Nations Commission on International Trade Law*

238. At the 318th meeting, on 6 October 1972, the Secretary of the Working Group of UNCITRAL, which had just concluded its session in Geneva, made a statement in which he drew attention to the report of UNCITRAL on its fifth session ⁵⁶ and in particular to chapter III thereof concerning, more specifically the subject of inter-

national shipping legislation.⁵⁷ He referred to paragraph 51 of the UNCITRAL report concerning co-operation between that body and UNCTAD in the matter of work relating to international shipping legislation, and explained that the UNCITRAL Working Group, at its latest session, had dealt with the question of the liability of ocean carriers for cargo, in connexion with its work on bills of lading (revision and amplification of the "Hague Rules") undertaken at the request of UNCTAD.

Action by the Board

239. At the same meeting, the Board took note of the report of UNCITRAL on its fifth session.

* *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 15 (A/8715/Rev.1).*

⁵⁶ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717).*

⁵⁷ For the discussion in the Working Group concerning the UNCTAD programme of work in the field of international shipping legislation and its financial implications, see part two, paras. 102 to 107 below.

B. General Assembly: report of the Sixth Committee (A/8896) **

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** 21 November 1972.

I. INTRODUCTION

1. At its 2037th plenary meeting, on 23 September 1972, the General Assembly included the item entitled "Report of the United Nations Commission on International Trade Law on the work of its fifth session"¹ as item 86 on the agenda of its twenty-seventh session, and allocated it to the Sixth Committee for consideration and report.

2. The Sixth Committee considered this item at its 1328th to 1336th meetings, held from 10 to 18 October 1972, and at its 1345th and 1354th meetings, held on 27 October and 8 November 1972.

3. At its 1328th meeting, on 10 October 1972, Mr. Jorge Barrera Graf (Mexico), Chairman of the United Nations Commission on International Trade Law at its fifth session, introduced the Commission's report on the work of that session (A/8717).²

4. At the 1354th meeting, on 8 November, the Rapporteur of the Sixth Committee raised the question whether the Sixth Committee wished to include in its report to the General Assembly a summary of the views expressed during the debate on agenda item 86. After referring to paragraph (f) of the annex to General Assembly resolution 2292(XXII) of 8 December 1967, the Rapporteur informed the Committee of the financial implications of the question. At the same meeting, the Committee decided that, in view of the nature of the subject, the report on agenda item 86 should include a summary of the main trends of opinions expressed during the debate.

II. PROPOSALS

5. At the 1345th meeting, on 27 October 1972, the representative of Ghana introduced a draft resolution on the report of the Commission sponsored by Australia, Canada, Ghana, Greece, Guyana, Japan, Kenya and Norway (A/C.6/L.861). In the course of his introduction, the representative of Ghana, on behalf of the sponsors orally revised the draft resolution and later submitted a new version (A/C.6/L.861/Rev.1), which differed from the original only in that in operative paragraph 2 the words "in the enhancement" were replaced by the words "to enhance the efficiency". At the same meeting, Egypt, Haiti, Hungary, India, Singapore, Spain, Uruguay and Zaïre were added to the list of sponsors of the draft resolution. At the 1354th meeting on 8 November, Romania was also added to the list of sponsors of the draft resolution. The revised draft resolution was adopted by the Sixth Committee without objection.

[For the text, see para. 48 below, draft resolution I.]

¹ See UNCITRAL Yearbook, volume III: 1972, part one, II, A.

² 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 (UNCITRAL Yearbook, volume I: 1968-1970, part two, I, B, 2).

6. At the same meeting, the representative of Ghana introduced a draft resolution on a proposed international conference of plenipotentiaries on prescription (limitation) in the international sale of goods, which was sponsored by Australia, Egypt, Ghana, Greece, Guyana, India, Indonesia, Japan, Romania, Spain, the Sudan and the United Kingdom of Great Britain and Northern Ireland (A/C.6/L.864). At the same meeting, Kenya, Norway and Singapore were added to the list of sponsors. The draft resolution was adopted by the Sixth Committee without amendment.

[For the text, see para. 48 below, draft resolution II.]

7. The statement of the financial and administrative implications of the draft resolution contained in document A/C.6/L.864 appears in document A/C.6/L.865 and Corr.1.

III. DEBATE

8. The main trends of opinions expressed in the Sixth Committee on the item are summarized in sections A to G below. Section A deals with general observations on the Commission's report and its working methods. The succeeding sections, relating to specific topics on the Commission's programme of work, are set out under the following headings: International sale of goods (section B), International legislation on shipping (section C), International payments (section D), International commercial arbitration (section E), Training and assistance in the field of international trade law (section F) and Future work (section G).

A. General observations on the report of the United Nations Commission on International Trade Law and its working methods

9. Most representatives who took the floor expressed appreciation for the rapid and substantial progress the Commission had made towards the unification and harmonization of international trade law. The view was advanced that the fifth session was particularly productive and had resulted in concrete and significant achievements. It was emphasized that, by removing or reducing legal obstacles to the flow of international trade, the Commission would greatly contribute to the economic growth of all nations and to the development of friendly relations among States.

10. Several representatives expressed satisfaction with the Commission's working methods and with the pragmatic and flexible manner in which it had been discharging its tasks. Other representatives, while appreciating the efforts made by the Commission at its fifth session to enhance the efficiency of those working methods, were of the opinion that there was room for improvement. In this connexion, several representatives took note with appreciation of the proposal by Spain concerning the Commission's working methods,³ with special reference

³ A/CN.9/L.22.

to the need for longer drafting sessions by small groups, and expressed the hope that due attention would be given to it at the sixth session of the Commission.

11. Several representatives were of the opinion that, in order to achieve a balanced and accelerated progress in all matters included in the Commission's programme of work, the Commission should make more use of the expertise of its members and of the services of international organizations with special competence in these fields. It was also suggested that working groups should meet more frequently between sessions of the Commission and for a longer period of time. Some representatives, however, cautioned against excessive use of intersessional working groups because of the cost involved.

12. One representative suggested that while the preparation of uniform substantive rules on the various subjects before the Commission was a useful unification technique, other methods, such as the harmonization of the rules of conflict of laws, should not be overlooked. It was also suggested that the Commission should not confine its attention to revision of the rules embodied in existing conventions, but should also endeavour to formulate new instruments.

B. International sale of goods

13. All representatives who spoke on the subject welcomed the draft articles on prescription (limitation) in the international sale of goods that had been prepared by the Commission (see A/8717, para. 21). The view was expressed that the draft articles constituted a significant contribution to the goal of unification and harmonization in an important area of international trade law. Both the Commission and its Working Group on Time-Limits and Limitations (Prescription) in the International Sale of Goods were commended for the speed with which the draft articles were prepared, and for the spirit of compromise and accommodation that prevailed throughout their deliberations.

14. Several representatives stated that, while they had some reservations about certain of the provisions of the draft articles on prescription, they were of the opinion that the draft articles on the whole provided a good basis for further discussion in a suitable forum with a view to concluding an international convention on the subject. In this connexion, it was noted with satisfaction that the Commission had decided to circulate the draft articles, together with a commentary thereon, to Governments and interested international organizations for comments and proposals. It was also noted that the Secretary-General had been requested to prepare an analytical compilation of the comments and proposals received and to circulate the same to Governments and interested international organizations.

15. In view of the highly technical and specialized nature of the draft articles in question, many representatives endorsed the Commission's recommendation that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft articles approved by the Commission, a convention on prescription (limitation) in the international

sale of goods. Taking into consideration the Secretary-General's appeal for limitation of the United Nations budgetary expenses, some representatives were of the opinion that the proposed conference should be held in New York.

16. Some representatives were of the opinion that it might be premature to convene the proposed conference of plenipotentiaries since the Commission was unable to reach a consensus on a number of provisions in the draft articles. Consequently it was suggested that the question of convening the conference should be postponed until next year and that the Commission should, in the meantime, try to reach agreement on those provisions in the light of the comments and proposals of Governments and interested international organizations.

17. Some representatives expressed the view that there was a close relationship between the Commission's work on uniform rules on the international sale of goods and the draft articles on prescription. It was, therefore, suggested that the convening of an international conference of plenipotentiaries should be postponed until the Commission completed its work on the uniform law on the international sale of goods, so that the draft articles on both subjects could be considered at one conference. In the view of other representatives, the draft articles on prescription should be dealt with by an international conference of plenipotentiaries as soon as possible independently of the Commission's work on a uniform law on sales, since the two instruments dealt with different matters, the former with the period of limitation of legal proceedings, and the latter with the substantive rights and duties of the parties where the action was not time-barred. Furthermore, it was mentioned that the revision of the uniform rules embodied in The Hague Convention relating to a Uniform Law on the International Sale of Goods of 1964 (ULIS) was a highly complex and controversial matter that would require several years.

18. Some representatives stated that since the draft articles on prescription dealt with a matter concerning international trade in which all nations had been taking part, participation at the conference should be open to all States without discrimination.

19. Several representatives welcomed the progress made by the Working Group on the International Sale of Goods, at its third session, in the revision of the rules embodied in The Hague Convention of 1964. It was stated that the existing rules of ULIS did not take sufficient account of the interests of all States, especially those of developing countries.

20. Some representatives expressed concern at the slow rate of progress in this vital area of the Commission's work and hoped that the Commission would find new ways of accelerating its work in this field. The suggestion was made that the Working Group on the International Sale of Goods should hold at least two sessions a year, each lasting for a period of three weeks. It was also suggested that a small group of experts might be established to work on the complex and difficult aspects of the work of revision.

21. Some representatives stated that in view of the fact that ULIS had been ratified by some States and had already entered into force, it might be advisable to postpone the revision of ULIS until some experience had been acquired in the operation of its rules in practice. The same representatives hoped that, at any rate, the Commission's revision of the rules of ULIS would not discourage additional ratifications of that Convention.

22. Several representatives emphasized the importance of developing general conditions of sale that would embrace a wide scope of commodities, and expressed the hope that the Commission's activity to that end would soon be brought to fruition. Some representatives observed that the Commission should make a wider use of the general conditions of sale elaborated by the Economic Commission for Europe.

23. Some representatives suggested that the proposed general conditions of sale should be based on the general principles of any future uniform law on the international sale of goods that the Commission might recommend.

24. Some representatives expressed doubt as to the commercial need for the Commission to draw up general conditions of sale in view of the fact that only those general conditions of sale that were drawn up for particular commodities by trade associations having specialized knowledge of the trade had gained wide acceptance in business circles.

C. International legislation on shipping

25. Many representatives observed that the subject of international legislation on shipping was of particular importance to their respective countries. These representatives were of the opinion that the International Convention for the Unification of certain Rules relating to Bills of Lading, done at Brussels in 1924,⁴ was not responsive to contemporary needs and was heavily weighted in favour of the carriers.

26. Many representatives welcomed the progress achieved by the Working Group on International Legislation on Shipping in the examination of the rules governing the responsibility of ocean carriers for cargo in the context of bills of lading, and agreed with the Commission's suggestion that the Working Group should consider preparing a new convention on the subject instead of merely revising and amplifying the rules embodied in the Brussels Convention of 1924 and the Protocol amending that Convention, done at Brussels in 1968.⁵ Some representatives stated that, while there was a need for the revision of the rules embodied in the Brussels Convention of 1924 in view of recent technological developments, it was important to retain the fundamental

principles of that convention since they were based on considerable experience and were adopted by the overwhelming majority of States. One representative agreed that there was a need for the revision of the Brussels Convention of 1924, but indicated that it was not for the Commission to undertake the drafting of a new convention.

27. Several representatives suggested that the new convention should be based on the carrier's contractual responsibility for the safe delivery of the cargo. It was also suggested that the new convention should take account of the rules embodied in international conventions concerned with other modes of transport of goods, and that the correlation of the rules for the different types of carriage was essential in view of the growing importance of combined transport operations and containerization and unitization of cargo.

28. Several representatives observed that recent technological advances has considerably reduced the hazards of ocean transportation, thereby decreasing insurance risks for shipowners; consequently, it was suggested that this fact should result in lower freight rates and assumption of greater responsibility by the carrier.

D. International payments

29. Many representatives who spoke on the subject expressed appreciation for the progress made on the subject of negotiable instruments and welcomed the draft uniform law on international bills of exchange and the commentary thereon that were embodied in a report of the Secretary-General.⁶ Several representatives observed that the draft uniform law in question was a notable advance in the field. It was observed that the establishment of uniform rules for negotiable instruments used in international payments when the parties opted for such rules would be the best solution for the many problems arising from divergencies among the rules of different legal systems.

30. Many representatives also welcomed the establishment of the Working Group on International Negotiable Instruments and noted with satisfaction that the size of the Working Group had been kept to a minimum without detriment to its representative character.

31. Several representatives endorsed the Commission's decision to extend the scope of the draft uniform law to cover promissory notes and possibly cheques. Some representatives, however, suggested that cheques served distinct commercial functions, and should be governed by a separate uniform law.

32. Several representatives expressed the view that, in examining the draft uniform law on international bills of exchange, the Working Group should take account of recent technological developments in payment methods and practices. One representative, however, observed that rules premised solely on such technological develop-

⁴ League of Nations, *Treaty Series*, vol. CXX, 1931-1932, No. 2764. Text reproduced in *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, volume II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

⁵ See Société du Journal de la Marine marchande, *Le Droit maritime français*, 20^e année, No. 235 (July 1968), p. 396.

⁶ A/CN.9/67 and Corr.1; UNCITRAL Yearbook, volume III: 1972, part two, II, 1.

ments might not meet the conditions of developing countries.

33. One representative was of the opinion that there was no pressing need for a new convention on negotiable instruments and that the international business community had adapted itself to the differences between the Geneva Conventions of 1930 and 1931 providing uniform laws for bills of exchange and promissory notes and for cheques, respectively, on the one hand, and the common law rules on the other.

34. Several representatives welcomed the Commission's co-operation with the International Chamber of Commerce (ICC) on the work it initiated on the subjects of bankers' commercial credits and bank guarantees, and welcomed the measures taken by the Commission to ensure that the views of countries not represented in the International Chamber of Commerce were taken into account by it.

35. Some representatives suggested that the Commission should not entrust its work on these subjects to the International Chamber of Commerce in view of the fact that not all States were represented in the latter.

E. International commercial arbitration

36. Many representatives stressed the importance of arbitration as an effective means for the settlement of international trade disputes. Special tribute was paid to the Commission's Special Rapporteur, Mr. Ion Nestor (Romania), for the valuable report he had submitted on problems concerning the application and interpretation of the existing conventions on international commercial arbitration and other related matters.⁷ Several representatives expressed the view that the recommendations embodied in the Special Rapporteur's report constituted a sound basis for future action by the Commission on the unification and harmonization of the law in this important area, and endorsed its decision thereon.

37. Some representatives observed that in view of the importance of the recommendations of the Special Rapporteur, these recommendations should have been circulated to all States Members of the United Nations, and not just to members of the Commission.

F. Training and assistance in the field of international trade law

38. Many representatives emphasized the need of developing countries for an expanded and vigorous programme of training and assistance in the field of international trade law. Several representatives endorsed the Commission's decision on the subject and expressed the hope that the Secretary-General would accelerate and intensify the activities relating to the implementation of the Commission's programme of training and assistance in the field of international trade law.

39. Several representatives suggested that, in addition to the activities included in the Commission's programme of training and assistance, it would be profitable to explore the possibility of arranging seminars which would be held in the developing countries and would be conducted by visiting professors and experts from the developed countries. It was observed that such seminars would make it possible to reach a considerable number of personnel from the developing countries with minimum cost.

40. One representative indicated that a programme of instruction of a rather general and basic character in international trade law would prove valuable to lawyers and civil servants from developing countries. In this connexion, this representative outlined the programme of instruction that his Government had evolved in the past few years for the benefit of developing countries, and announced his Government's intention to intensify this programme.

G. Future work

41. Many representatives expressed the view that multinational enterprises, because of their structure and orientation, had interests and objectives which might not always accord with national economic objectives. It was further stated by some representatives that these enterprises had a tendency to circumvent national legal jurisdictions in many diverse fields such as trade policy, foreign exchange regulations, taxation and business practices, and had served as a medium for the extraterritorial extension of the laws and policies of other Governments. Many representatives supported the proposal that the Commission should undertake an examination of the possible implications of the activities of multinational enterprises for international trade law. In this connexion, some representatives suggested that the Commission might appoint a small group of experts to study the question and to submit recommendations on how best to regulate the activities of those enterprises.

42. Several representatives stated that it would be premature for the Commission to be seized of the matter at this stage. It was observed that other United Nations organs and specialized agencies, such as the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, had already commissioned studies on the social, economic and political aspects of the activities of multinational enterprises. Consequently, it was suggested that Commission should await the results of those studies before considering the legal implications of the activities of multinational enterprises, thereby avoiding duplication and overlapping. In this connexion, several representatives agreed with the proposal that the Commission might, in the meantime, seek the views of Governments and interested international organizations on the legal problems presented by the different kinds of multinational enterprises and the implications thereof for the unification and harmonization of international trade law.

43. Some representatives were of the opinion that the legal implications involved in the activities of multi-

⁷ A/CN.9/64; UNCITRAL Yearbook, vol. III: 1972, part two, III.

national enterprises were closely related to basic political and economic policies and doubted whether it was feasible for the Commission to prepare uniform rules on the subject.

44. Some representatives were of the opinion that, in planning its future work, the Commission should concern itself not only with technical legal rules, but also with the broad principles governing international trade in order to achieve a transformation in international trade relations that would accelerate the rate of economic growth of the developing countries. The view was also expressed that the Commission should direct its attention to the development of such rules and principles relating to international trade as would strengthen co-operation among all nations on the basis of equality and mutual advantage. It was also suggested that the Commission should systematically review its programme of work and concentrate its attention on the most urgent questions.

IV. VOTING

45. At its 1354th meeting, on 8 November, the Sixth Committee unanimously adopted the draft resolution on the report of the Commission on the work of its fifth session (A/C.6/L.861/Rev.1).

46. At the same meeting, the Sixth Committee, by a vote of 73 to 1, with 8 abstentions, adopted the draft reso-

lution on the proposed conference on prescription (limitation) in the international sale of goods (A/C.6/L.864).

47. Explanations of vote were given before the voting by the representatives of Brazil, Canada, France, Hungary, India, Jamaica, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania and Uruguay, and, after the voting, by the Netherlands.

RECOMMENDATION OF THE SIXTH COMMITTEE

48. The Sixth Committee recommends to the General Assembly the adoption of the following draft resolutions:

Draft resolution I

Report of the United Nations Commission on International Trade Law

[Draft resolution I was adopted unanimously by the General Assembly as resolution 2928 (XXVII), reproduced below in section C.]

Draft resolution II

United Nations Conference on Prescription (Limitation) in the International Sale of Goods

[By a vote of 112 to 1, with 5 abstentions, draft resolution II was adopted by the General Assembly as resolution 2929 (XXVII), reproduced below in section C.]

C. General Assembly resolutions 2928 (XXVII) and 2929 (XXVII) of 28 November 1972

2928 (XXVII). 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 fifth session,¹

Recalling its resolution 2205 (XXI) of 17 December 1966 by which is established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission,

Further recalling its resolution 2421 (XXIII) of 18 December 1968, 2502 (XXIV) of 12 November 1969, 2635 (XXV) of 12 November 1970 and 2766 (XXVI) of 17 November 1971 concerning the reports of the United Nations Commission on International Trade Law on the work of its first, second, third and fourth 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,

Bearing in mind that the Trade and Development Board, at its twelfth session,² took note of the report of the United Nations Commission on International Trade Law,

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law on the work of its fifth session;

2. *Commends* the United Nations Commission on International Trade Law for the progress made in its work and for its efforts to enhance the efficiency of its working methods;

3. *Notes with satisfaction* the completion of draft articles for a convention on prescription (limitation) in the international sale of goods;³

4. *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;

¹ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)* (see UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

² *Ibid.*, Supplement No. 15 (A/8715/Rev.1), part one, para. 239 (see above, Section I, A).

³ *Ibid.*, Supplement No. 17 (A/8717), para. 21 (see UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

(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) Keep its programme of work and its working methods under constant review;

5. *Invites* the United Nations Commission on International Trade Law to seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and to consider, in the light of this information and the results of available studies, including those by the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, what further steps would be appropriate in this regard;

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

2091st plenary meeting

2929 (XXVII). United Nations Conference on Prescription (Limitation) in the International Sale of Goods

The General Assembly,

Having considered chapter II of the report of the United Nations Commission on International Trade Law on the work of its fifth session,⁴ which contains draft articles for a convention on prescription (limitation) in the international sale of goods,

Recalling its resolution 2205 (XXI) of 17 December 1966 by which it established the United Nations Commission on International Trade Law and defined the object and terms of reference of the Commission,

Noting that at its fourth and fifth sessions, held in 1971 and 1972, the United Nations Commission on Inter-

national Trade Law, in the light of observations and comments submitted by Governments, considered and revised provisional draft articles on prescription (limitation) in the international sale of goods that had been prepared by the Commission's Working Group on Time-Limits and Limitations (Prescription) in the International Sale of Goods, and that the Commission, at its fifth session, approved the draft articles as set forth in paragraph 21 of its report.

Bearing in mind that the United Nations Commission on International Trade Law at its fifth session recommended that the General Assembly should convene an international conference of plenipotentiaries to conclude, on the basis of the draft articles adopted by the Commission, a convention on prescription (limitation) in the international sale of goods,⁵

Convinced that conflicts and divergencies among the existing national rules governing prescription (limitation) in the international sale of goods constitute obstacles to the development of world trade and that the harmonization and unification of such rules would promote the flow of world trade,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for its valuable work on prescription in the international sale of goods;

2. *Decides* that an international conference of plenipotentiaries shall be convened in 1974, in New York or at any other suitable place for which the Secretary-General receives an invitation, to consider the question of prescription (limitation) in the international sale of goods and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;

3. *Further decides* to consider at its twenty-eighth session any other matters requiring decision in connexion with the conference and to include in the provisional agenda of that session an item entitled "United Nations Conference on Prescription (Limitation) in the International Sale of Goods";

4. *Refers* to the conference the draft articles contained in chapter II of the report of the United Nations Commission on International Trade Law on the work of its fifth session, together with the commentary thereon and the analytical compilation of comments and proposals to be prepared by the Secretary-General pursuant to the decision of the Commission,⁵ as the basis for consideration by the conference.

2091st plenary meeting

⁴ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)* (see UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

⁵ *Ibid.*, para. 20.

II. THE SIXTH SESSION (1973)

A. Report of the United Nations Commission on International Trade Law on the work of its sixth session (Geneva, 2-13 April 1973) (A/9017) *

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* Official Records of the General Assembly: Twenty-eighth Session, Supplement No. 17.

INTRODUCTION

The present report of the United Nations Commission on International Trade Law covers the Commission's sixth session, held at Geneva from 2 to 13 April 1973.

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 sixth session on 2 April 1973. The session was opened on behalf of the Secretary-General by Mr. Vittorio Winspeare Guicciardi, Director-General of the United Nations Office at Geneva.

B. *Membership and attendance*

2. 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 on 30 October 1967 and 12 November 1970, are the following States:¹

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

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

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.

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

(a) *United Nations organs*

Economic Commission for Europe (ECE);
Economic Commission for Latin America (ECLA);
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); Hague Conference on Private International Law; International Institute for the Unification of Private Law (UNIDROIT); League of Arab States; World Intellectual Property Organization (WIPO).

(d) *International non-governmental organizations*

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

C. *Election of officers*

5. At its 126th and 127th meetings, on 2 April 1973, the Commission elected the following officers² by acclamation:

Chairman	Mr. Mohsen Chafik (Egypt)
Vice-Chairman	Mr. László Réczei (Hungary)
Vice-Chairman	Mr. Akira Takakuwa (Japan)
Vice-Chairman	Mr. Paul Jenard (Belgium)
Rapporteur	Mr. Nehemias Gueiros (Brazil)

D. *Agenda*

6. The agenda of the session as adopted by the Commission at its 126th meeting, on 2 April 1973, was as follows:

- Opening of the session
- Election of officers
- Adoption of the agenda; tentative schedule of meetings
- International sale of goods:
 - Uniform rules governing the international sale of goods;
 - General conditions of sale and standard contracts
- International payments:
 - Draft uniform law on international bills of exchange and international promissory notes;
 - Bankers' commercial credits
- International legislation on shipping
- International commercial arbitration

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)*, para. 14 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. I, para. 14).

8. Training and assistance in the field of international trade law
9. Multinational enterprises
10. Establishment of a union for *jus commune* in matters of international trade
11. Future work; working methods
12. Other business
13. Date and place of the seventh session
14. Adoption of the report of the Commission

E. Decisions of the Commission

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

F. Adoption of the report

8. The Commission adopted the present report at its 142nd meeting, on 13 April 1973.

CHAPTER II

INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

9. The Commission, at its second session, established a Working Group on the International Sale of Goods and requested it 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.³

10. At its fourth session, the Commission decided that, "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".⁴

11. At the present session, the Commission had before it the progress report of the Working Group on the International Sale of Goods on its fourth session, held in New York from 22 January to 2 February 1973 (A/CN.9/75).⁵

12. The report was introduced by the Chairman and the Rapporteur of the fourth session of the Working Group. In the course of that introduction it was pointed out that the Working Group had made considerable progress in its work at that session by completing the revision of chapter III of ULIS providing for the obligations of the seller. Significant results as to the simplification of the law had been achieved. In particular, it was mentioned that on the basis of a study by the Secretary-General the Working Group had succeeded in consolidating in a single unified system the various provisions of ULIS relating to the remedies of the buyer.⁶ It was noted that the consolidation of six separate remedial systems that appeared in ULIS achieved a substantial simplification of the law, and solved problems of the separate remedial systems, which resulted from overlapping and inconsistent provisions.

13. All representatives who spoke on the subject expressed their appreciation for the progress made and commended the Working Group for the results of its work.

14. Several representatives stated their views in respect of the question raised at the session of the Working Group whether the time-limit established in article 39, paragraph 1, of ULIS conflicted with the rules on limitation of article 10 (2) of the draft Convention on Prescription (Limitation) in the International Sale of Goods, with special reference to situations in which defects in goods appeared after their delivery to the buyer. Some representatives held the view that these provisions were basically different. Other representatives were of the opinion that the above provisions of ULIS and of the draft convention on prescription, while technically distinct, presented similar issues of policy which should be brought into conformity. One representative expressed the opinion that, in view of its complexity, this question required deeper analysis and should, therefore, be considered at a later session. Another representative suggested that the problem should be brought to the attention of the diplomatic conference on the draft convention on prescription. Drafting changes addressed to this question were also suggested.

Decision of the Commission

15. The Commission, at its 142nd meeting, on 13 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Takes note with appreciation of the report of the Working Group on the International Sale of Goods on the work of its fourth session;

"2. Recommends that the Working Group consider the comments and proposals made at the sixth session of the Commission;

"3. Requests the Working Group to continue its work under the terms of reference set forth by the Commission at its second session and complete that work expeditiously.

³ Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 38, subpara. 3 (a) (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II, para. 38, subpara. 3 (a)).

⁴ Ibid., Twenty-sixth Session, Supplement No. 17 (A/8417), para. 92, subpara. 1 (c) (UNCITRAL Yearbook, vol. II: 1971, part one, chap. II, para. 92, subpara. 1 (c)).

⁵ The Commission considered the report at its 127th meeting, on 2 April 1973.

⁶ The study by the Secretary-General appears as annex II to the report of the Working Group (A/CN.9/75).

B. General conditions of sale and standard contracts

16. The Commission, at its second session, decided to commence its work in this field of law by ascertaining whether certain general conditions of sale prepared under the auspices of the Economic Commission for Europe could be utilized in other regions.⁷ At its third session, the Commission extended its work to the examination of the feasibility of developing general conditions embracing a wide scope of commodities and requested the Secretary-General to commence a study of the subject.⁸

17. The Secretary-General submitted to the Commission at its fourth session a report including the first phase of the study (A/CN.9/54). At the fifth session the Secretary-General presented a progress report to the Commission (A/CN.9/69). In view of the progress made in this study, the Commission, at that session, decided to defer final action regarding the promotion of the general conditions drawn up under the auspices of the Economic Commission for Europe and requested the Secretary-General to submit to the Commission at its sixth session his final study on the feasibility of developing general conditions embracing a wide 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.⁹

18. The Commission had before it a report of the Secretary-General containing his final study (A/CN.9/78). All representatives who spoke on the subject commended the study.

19. Several representatives stressed the importance of the work on the subject. It was stated that the existence of general conditions prepared under the auspices of the United Nations would facilitate international trade and eliminate fears on the part of economically weaker parties. One representative expressed the view that such a formulation, while promoting certainty in international transactions, could also contribute to a fair balancing of the rights of seller and buyer. Another representative pointed out that in international trade, especially in East-West trade, both parties often proposed their own detailed forms; as a result substantial time was spent in reaching agreement on the provisions of the contract. A set of uniform conditions could simplify this procedure.

20. Some representatives, however, expressed doubts in connexion with the subject. One of these representatives questioned whether the subject was within the terms of reference of the Commission. He pointed out that the Commission had as its main task the unification of law and that the question of general conditions, therefore,

was only marginal to that task. Another representative expressed the view that many questions could better be served by the revision of ULIS and that it was doubtful whether general conditions drawn up by the Commission would be widely used. However, in the opinion of that representative, such a formulation might nevertheless help existing organizations, such as trade associations, in improving their own standard contracts. He suggested that the secretariat should be given wide flexibility as to approach in order to expedite the completion of the project.

21. One observer was of the opinion that in view of the special problems presented by various commodities, such as perishable goods, uniform rules could only be useful for the sale of those commodities in respect of which there were no specific general conditions. He pointed out that the ECE general conditions, although of regional character, were drawn up with the assistance of experts from different parts of the world and, therefore, could be easily and quickly adjusted to the needs of other regions. One representative pointed out that, at a seminar held on general conditions, several delegations doubted that the ECE general conditions were widely used, even in Europe.

22. Most delegations who spoke on the issue agreed with the proposal, set forth in paragraph 199 of the report of the Secretary-General (A/CN.9/78), to set up a group of experts which would have as its object the preparation of a final draft of "general" general conditions. One representative suggested that the Secretariat entrust this task to an expert who would be helped by representatives of different trade organizations.

23. Some representatives suggested that, instead of "general" general conditions, the Commission should use the term "uniform" or "global" general conditions, or another appropriate term.

Decision of the Commission

24. The Commission at its 141st meeting, on 11 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Requests the Secretary-General:

"(a) To continue work on the preparation of a set of uniform general conditions;

"(b) To co-operate in this work with the regional economic commissions and with interested trade associations, chambers of commerce and similar organizations from different regions;

"(c) To set up, and consult if considered necessary, a group of experts composed of representatives of the various organizations mentioned in subparagraph (b) above;

"2. Further requests the Secretary-General to report to the Commission at its seventh session on the progress made in respect of this project."

⁷ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 60, subpara. 1 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II, para. 60, subpara. 1).

⁸ *Ibid.*, *Twenty-fifth Session, Supplement No. 17 (A/8017)*, para. 102, subpara. (b) (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. III, para. 102, subpara. (b)).

⁹ *Ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 43 (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 43).

CHAPTER III

INTERNATIONAL PAYMENTS

A. Negotiable instruments

(i) *Draft uniform law on international bills of exchange and on international promissory notes*

25. 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, the Commission requested the Secretary-General to prepare draft uniform rules accompanied by a commentary.¹⁰ In response to that decision, a report entitled "Draft Uniform Law on International Bills of Exchange and Commentary" (A/CN.9/67 and Corr.1) was placed before the Commission at its fifth session. The draft was concerned with bills of exchange in the narrow sense of the term and did not include within its scope promissory notes and cheques. At its fifth session, the Commission took note of the result of inquiries made by the Secretariat amongst banking and trade circles concerning the use and importance of promissory notes in international trade and requested the Secretary-General to modify the draft uniform law on international bills of exchange with a view to extending its application to international promissory notes.¹¹ At the same session, the Commission established a Working Group¹² and entrusted it with the preparation of a final draft uniform law on international bills of exchange and international promissory notes.¹³

26. At the present session, the Commission had before it the report of the Working Group on International Negotiable Instruments on the work of its first session (A/CN.9/77). The Working Group met in Geneva from 8 to 14 January 1973, and considered articles 12 to 40 of the draft uniform law relating to the transfer and negotiation of an international bill of exchange or an international promissory note (articles 12 to 22), the rights and liabilities of the signatories of such instruments (articles 27 to 40), and the definition and the rights of a "holder" and a "protected holder" (articles 5, 6 and 23 to 26). The Working Group reached conclusions on the substance of these articles and requested the Secretariat to prepare a revised draft which would reflect these conclusions and also deal with problems of terminology and style.

¹⁰ *Ibid.*, Twenty-sixth Session, Supplement No. 17 (A/8417), para. 35 (UNCITRAL Yearbook, Vol. II: 1971, part one, chap. II, para. 35).

¹¹ *Ibid.*, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61, subpara. 2 (c) (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 61, subpara. 2 (c)). The draft uniform law so modified, with commentary, is found in A/CN.9/WG.IV/WP.2.

¹² *Ibid.*, para. 61, subpara. 1 (a). The Working Group on International Negotiable Instruments consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

¹³ *Ibid.*, para. 61, subpara. 1 (b).

27. In its consideration of the report of the Working Group,¹⁴ the Commission expressed its appreciation to members of the Working Group for the progress achieved in this complex and technical subject.

28. Representatives who spoke on the subject expressed their appreciation for the draft uniform law prepared by the Secretariat and also for the valuable assistance rendered throughout the preparatory work by interested international organizations and banking and trade institutions. In the view of those representatives, the interaction thus achieved between law and practice was vital for the successful outcome of the Commission's work in this field and the collaboration with banking and trade circles should therefore be continued.

29. Some representatives drew attention to the importance of the legal terminology to be used in the proposed draft, particularly in connexion with the future interpretation of the proposed uniform law by the courts of countries having different legal systems. The view was expressed that, in this respect, the Secretariat draft gave too much emphasis to concepts and terms that were drawn from Anglo-American law. It was essential that the final draft uniform law establish a just equilibrium between the main systems of negotiable instrument law.

30. One representative, referring to the text prepared by the Secretariat, expressed the view that the definition of endorsement and the concepts of transfer, negotiation and "protected holder" should be reconsidered. In particular, the definition of endorsement should be linked more closely and explicitly with the concept of endorsee. With respect to the concepts of "transfer" and "negotiation", the uniform law should deal only with the effects of the transmission of an instrument by endorsement and leave the effects of transmission without endorsement and those of assignment to national law. The provision of article 26 of the draft, under which, if the obligor (defendant) establishes the existence of a defence, it falls to the holder (plaintiff) to prove that he is a protected holder, was probably unacceptable to civil law countries, since it was virtually impossible for the holder, under the procedure of these countries, to prove the negative fact that he took the instrument without knowledge of a claim or defence.

31. It was pointed out that the draft uniform law placed before the Working Group comprised concepts from both the civil law and common law systems and that, for the most part, the choice between diverging concepts or substantive rules had been made after thorough consultations with banking and trade circles and on the basis of inquiries through means of detailed questionnaires. Whilst this had led, in some instances, to the adoption of rules that were similar to those found in the common law statutes on negotiable instruments, in other instances rules found in the Geneva Uniform Law of 1930 had been followed, such as those relating to the effects of a forged endorsement or the effects consequent

¹⁴ The Commission considered this subject in the course of its 127th and 131st meetings, held on 2 and 4 April 1973.

upon the failure to protest dishonour of a bill by non-acceptance or by non-payment or to give notice of such dishonour. On the other hand, the draft uniform law sought to avoid legal terms which could be understood only in one of the legal systems. For this reason, the draft employed, for instance, the term "protected holder" instead of the term "holder in due course" found in the common law statutes or the term "lawful holder" found in the Geneva uniform law.

32. Some representatives noted that the report of the Working Group suggested that the final draft might not use the term "negotiable" or "negotiation". They expressed the hope that the Working Group would reconsider the use of this term in the draft in view of the fact that it was well understood and defined in international banking practice.

33. The Commission was agreed that it should defer consideration of the substantive provisions of the draft uniform law until the Working Group had completed its work and submitted a final draft with commentary.

(ii) *International cheques*

34. The Commission, at its fifth session, also requested the Working Group to consider the desirability of preparing uniform rules applicable to international cheques and to report its conclusions to the Commission at a future session.¹⁵ The Working Group decided to defer consideration of this question until a future session in order to permit the Secretariat to make inquiries regarding the use of cheques in international payment transactions and the problems presented, under current commercial practice, by divergencies between the rules of the principal legal systems.

35. The Commission expressed agreement with this approach of the Working Group. Several representatives, pointing out that the use of detailed questionnaires and appropriate consultations with other international organizations and banking and trade institutions had proved to be invaluable during the preparatory stages of the work on the draft uniform law, urged that the same method of work should be used in respect of cheques.

Decision of the Commission

36. The Commission at its 141st meeting, on 11 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. *Takes note with appreciation* of the report of the Working Group on International Negotiable Instruments on the work of its first session;

"2. *Requests* the Working Group to continue its work under the terms of reference set forth by the Commission in the decision adopted at its fifth session¹⁶ and to complete that work expeditiously;

¹⁵ *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 61, subpara. 1 (c) (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 61, subpara. 1 (c)).

¹⁶ *Ibid.*, para. 61.

"3. *Request* the Secretary-General to carry out further work in connexion with the draft uniform law and with the inquiry to be conducted regarding the use of cheques in settling international payments, in consultation with the Commission's Study Group on International Payments composed of experts provided by interested international organizations and banking and trade institutions, and for these purposes to convene meetings as required.

B. Bankers' commercial credits

37. This subject is 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 revised by it in 1951 and 1962. A third revision is at present being carried out by ICC. At its previous sessions,¹⁷ the Commission stressed the importance of letters of credit in assuring payment for international trade transactions and expressed the opinion that the views of countries not represented in ICC should be taken into account by ICC in its work of revision.

38. At the present session,¹⁸ the Commission had before it a note by the Secretary-General reproducing in an annex the substantive parts of three reports of a working party of the Commission on Banking Technique and Practice of ICC, setting forth the revisions proposed by it. The proposed revisions have been communicated to Governments and interested banking and trade institutions and, in accordance with previous decisions of the Commission, the comments received will be transmitted to ICC.

39. According to information received by the Secretariat, ICC intends to give further consideration to the text proposed by the working party of its Commission on Banking Technique and Practice in the light of comments received from its national committees and, through the Secretary-General of the United Nations, from Governments and from banking and trade institutions in countries not represented in ICC. It was also understood that ICC had decided to await the result of work at present being carried out in connexion with a combined transport document, made necessary by the carriage of goods by containers.

¹⁷ *Ibid.*, *Twenty-third Session, Supplement No. 16 (A/7216)*, paras. 23 and 28 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. I); *ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 90-95 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II); *ibid.*, *Twenty-fifth Session, Supplement No. 17 (A/8017)*, paras. 119-126 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. III); *ibid.*, *Twenty-sixth Session, Supplement No. 17 (A/8417)*, paras. 36-43 (UNCITRAL Yearbook, Vol. II: 1971, part one, chap. II, A); and *ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, paras. 65 and 66 (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, paras. 65 and 66).

¹⁸ The Commission considered this subject in the course of its 132nd meeting, held on 5 April 1973.

40. Several representatives expressed their regret that ICC had not sent an observer to be present at the discussion of a subject in which ICC was actively engaged.

41. The view was expressed that the revisions proposed by the ICC working party represented in general an amelioration of the 1962 text. It was hoped that the revision would adopt rules regarding documents that could be used effectively in transactions involving combined transport operations.

42. Several representatives expressed satisfaction at the increased co-operation between the Commission and ICC and between ICC and countries not represented in it.

43. In the view of many representatives, the Commission should at some stage examine closely the revision of "Uniform Customs" proposed by ICC. The Commission was agreed that, to this end, it should request the Secretariat to submit to it an analysis of observations on the proposed revision to be received by the Secretary-General.

44. Several representatives expressed the hope that ICC would submit to the Commission at the seventh session a progress report on its work in respect of bank guarantees.

Decision of the Commission

45. The Commission at its 132nd meeting, on 5 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law"

"1. Takes note of the draft revision of the "Uniform Customs and Practice for Documentary Credits (1962)", proposed by a working party of the Commission on Banking Technique and Practice of the International Chamber of Commerce;

"2. Requests the Secretary-General:

"(a) To prepare an analysis of observations on the proposed revision received from Governments and from banking and trade institutions not represented in the International Chamber of Commerce;

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

"3. 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;

"(b) The proposed revised text of "Uniform Customs" and the draft uniform rules on contract and payment guarantees before their final adoption by the International Chamber of Commerce."

CHAPTER IV

INTERNATIONAL LEGISLATION ON SHIPPING

(a) *Introduction*

46. The Commission, at its fourth session, decided to examine the rules governing the responsibility of ocean carriers for cargo.¹⁹ The Commission's resolution concluded 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".

47. To carry out this programme of work, the Commission established an enlarged Working Group on International Legislation on Shipping consisting of twenty-one members of the Commission.

48. The Working Group, at its third session, considered the following subjects: I. The period of carrier's responsibility (before and during loading, during and after discharge); II. Responsibility for deck cargoes and live animals; III. Clauses in bills of lading confining jurisdiction over claims to a selected forum; IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier.²⁰ In response to the Working Group's request, the Commission, at its fifth session, decided that the Working Group should hold a fourth (special) session in the last quarter of 1972 and a fifth session in February 1973.

49. The reports of the fourth and fifth sessions of the Working Group were introduced at the present session of the Commission by the rapporteur of the session in question.²¹

¹⁹ *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)*, paras. 10-23 (UNCITRAL Yearbook, Vol. II: 1971, part one, chap. 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, *ibid.*, *Twenty-fourth Session, Supplement No. 18 (A/7618)*, paras. 114-133 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II, paras. 114-133), and the report of the Commission on the work of its third session, *ibid.*, *Twenty-fifth Session, Supplement No. 17 (A/8017)*, paras. 157-166 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. III, paras. 157-166). See also the report of the Commission on the work of its fifth session, *ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, paras. 44-51 (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, paras. 44-51).

²⁰ 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 Corr.1 and Add.1).

²¹ The Commission considered this subject at its 133rd and 134th meetings, on 5 and 6 April 1973.

(b) *Report on the fourth session
of the Working Group*

50. During the introduction of the report of the Working Group on the fourth session (A/CN.9/74), it was pointed out that the Working Group had prepared draft legislative texts on the basic rules governing the responsibility of the carrier.²² These provisions included a unified rule for the carrier's responsibility based on fault, and a unified rule as to burden of proof.

51. It was noted that the draft provisions, in establishing unified rules on responsibility and burden of proof, omitted the "catalogue of exceptions" to the carrier's responsibility contained in the Brussels Convention of 1924. It was further noted that as part of a compromise to secure general agreement, the general rule that the carrier had the burden of proving due care was subject to an exception in the case of fire.

52. It was further noted that the Working Group, at its fourth session, had also prepared draft provisions on arbitration clauses in bills of lading (A/CN.9/74, paras. 38-52).²³ These draft provisions provided, *inter alia*, that agreements referring disputes that may arise under a contract of carriage to arbitration shall be allowed; they also indicated the places where, at the option of the plaintiff, the proceedings shall be instituted.²⁴

(c) *Report on the fifth session
of the Working Group*

53. During the introduction of the report of the Working Group on its fifth session (A/CN.9/76),²⁵ it was pointed out that the Working Group had taken decisions with respect to the rules on limitation of the carrier's liability. It was noted that the Working Group had decided to follow the approach of the Brussels Protocol of 1968 which prescribes alternative upper limits based on (a) the number of packages or units and (b) the weight of goods lost or damaged. However, the Working Group proposed revision of the language of the Protocol, *inter alia*, to remove ambiguities and to take account of problems presented by containerized transport.

²² General principles on the basic rules governing the responsibility of the carrier had been approved by most members at the Working Group's third session (A/CN.9/63, para. 70). The working document for the third session was the first report by the Secretary-General, "Responsibility of Ocean Carriers for Cargo: Bills of Lading" (A/CN.9/63/Add.1). The working document for the current topic at the fourth session was a report by the Secretary-General entitled "Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier"; this report was annexed to the report of the fourth session of the Working Group (A/CN.9/74, annex I).

²³ The Working Group, at its third session, had prepared a preliminary draft on clauses in bills of lading specifying where suit shall be brought (A/CN.9/63, para. 39).

²⁴ A/CN.9/74, para. 47.2. Under these draft provisions (subpara. (5)), these rules do not affect "the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen".

²⁵ The working document for this session was the second report of the Secretary-General, entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/76/Add.1).

54. It was reported that the Working Group had also drafted provisions on the following additional topics: the effect of trans-shipment of the goods on the responsibility of the contracting carrier and of the on-carrier (or "actual" carrier); the effect of measures to save life or property at sea; and the period of limitation within which legal or arbitral proceedings may be brought against the carrier.

(d) *Discussion of the reports of the Working Group*

55. In considering the reports of the Working Group, it was noted that the drafting of revised rules on the responsibility of ocean carriers had not been completed. The Commission therefore decided that it should adhere to the approach that had been generally followed when a working group was in the course of preparing a legislative text, and confine action to noting the progress made by the Working Group. Consequently, decision on the action by the Working Group was deferred until the proposed legislative provisions could be reviewed as a whole.

56. Many representatives expressed their satisfaction with the progress being made by the Working Group; appreciation was also expressed for the spirit of compromise which had made it possible for the Working Group to reach agreement on a large number of difficult issues.

57. Some representatives expressed their support for the approach, to which the Working Group had given preliminary consideration, that the revised provisions should be embodied in a new convention rather than in a second Protocol to the 1924 Brussels Convention. It was suggested that preparing a new convention would make possible a unified text that would be easier to construe. In addition, a new convention should embody modern terminology and approaches that had been developed in the conventions applicable to transport by air, by rail and by road, and that harmony among the provisions governing responsibility for carriage by the various means of transport was becoming increasingly important with the rapid development of combined transport.

58. Some representatives regretted the compromise provision adopted by the Working Group at its fourth session (para. 51 above) whereby the carrier did not have the burden of proving his due care in the case of loss or damage to the goods because of fire. Nevertheless, one representative pointed out that the suggestion with respect to harmonizing the rules applicable to the different modes of transport should take account of the special circumstances and risks inherent in transport by sea.

59. One representative supported the suggestion, made in connexion with the future programme of the Working Group, that the rules of the convention should be applicable to contracts of carriage which might not be embodied in a "bill of lading" under a narrow definition of that term. Another representative supported the emphasis which the Working Group had given to the unified obligation of the carrier on his contractual undertaking. The representative also welcomed the removal of the limitation of liability where damage was caused by wilful misconduct of the carrier or of any of his servants or agents, but would

have wished the same rule to apply in the case of damage resulting from reckless acts or inexcusable fault.

60. One representative drew attention to the rules on arbitration clauses prepared by the Working Group at its fourth session (paragraph 52 above). The representative stated that the provision as to the method of selecting the place for arbitration was unacceptable to his delegation, and required further consideration.

Decision of the Commission

61. The Commission at its 134th meeting, on 6 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Takes note with appreciation of the reports of the Working Group on International Legislation on Shipping on the work of its fourth and fifth sessions;

"2. Requests the Working Group to continue its work under the terms of reference set forth by the Commission in the resolution adopted at its fourth session and to complete that work expeditiously."

CHAPTER V

INTERNATIONAL COMMERCIAL ARBITRATION

62. 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.²⁶

63. At the Commission's third session, the Special Rapporteur submitted a preliminary report (A/CN.9/49 and Add.1); at the fifth session, the Special Rapporteur presented his final report (A/CN.9/64).

64. After consideration of the final report of the Special Rapporteur, the Commission, at its fifth session, requested the Secretary-General to invite States members of the Commission to submit to the Secretariat their comments on the proposals made by the Special Rapporteur and any other suggestions and observations they might wish to make in respect of the subject.²⁷

65. At the present session, the Commission had before it a report of the Secretary-General summarizing the comments, suggestions and observations of States members of the Commission, and setting forth proposals regarding further work on the subject (A/CN.9/79).

66. Most representatives who spoke on the subject focused their comments and suggestions on the proposals of the Special Rapporteur relating to (a) the promotion of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (b) the promotion of the 1961 European Convention on International Commercial Arbitration, (c) the setting up of a study group or working group to examine the desirability of drawing up a model set of arbitration rules and the feasibility of unification and simplification of national rules on arbitration, and (d) the publication of arbitral awards.

67. As to the promotion of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, all representatives agreed that countries which had not yet ratified or acceded to that Convention should be urged to do so. It was also agreed that the Commission should ask the General Assembly to make such a recommendation.

68. Several representatives expressed doubts as to whether the Commission should take any action in respect of the 1961 European Convention on International Commercial Arbitration. It was held by some representatives that before any positive recommendation could be made concerning ratification of, or accession to, that Convention, the text would have to be studied by the Commission itself in order to decide whether it was suitable for commendation. Other representatives agreed with the proposal made by the Special Rapporteur that the Commission should recommend ratification of, and accession to, the above Convention. Most representatives, however, who supported that proposal were of the opinion that the Commission, instead of making such a recommendation itself, should invite the Economic Commission for Europe to do so. One representative suggested that before taking any final decision, the Commission should request the Economic Commission for Europe to ascertain whether the Convention was being widely used and whether it had been found unsatisfactory in any respect.

69. The proposal was also made that the 1961 European Convention on International Commercial Arbitration should be promoted in regions other than Europe. Several representatives commented on this proposal. Some representatives suggested that the Commission should transmit the Convention to the regional economic commissions other than that for Europe and should invite them to study the Convention in order to ascertain whether it could be adapted to the needs of international trade in their parts of the world. Other representatives were of the opinion that the economic commissions should be encouraged to take into consideration the provisions of the 1961 European Convention in elaborating a convention that would satisfy their needs. Several representatives expressed the view that the Commission should not contact directly the interested economic commission but that it should instead invite the Economic Commission for Europe to request the other regional commissions to indicate the changes, if any, which in their opinion seemed to be necessary in order to make the Convention acceptable to countries in their regions. Some representatives, however, suggested that the Commission, without

²⁶ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618)*, para. 112 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II, para. 112).

²⁷ *Ibid.*, *Twenty-seventh Session, Supplement No. 17 (A/8717)*, para. 87 (1) (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 87 (1)).

seeking the opinion of economic commissions, should recommend that States outside Europe ratify the Convention. One representative pointed out that such recommendation would have to be addressed to the economic commissions, to the Council for Mutual Economic Assistance and to States which were not members of any regional economic commission.

70. Some representatives objected to the above proposals and suggested that the Commission should take no action in respect of the 1961 Convention before it had the opportunity to form an opinion on the provisions thereof. Moreover, those representatives were of the view that the promotion of the 1961 Convention, which was regional, was not within the terms of reference of the Commission.

71. With respect to the proposal referred to under (c) in paragraph 66 above, most representatives who spoke on the issue agreed that it was premature to set up a study group or working group at this time. It was suggested that any preparatory work that the Commission might wish to be made could be best carried out by the Secretariat. Representatives, however, expressed opposing views as to whether the Commission should include in its programme of work the implementation of the proposal of the Special Rapporteur that a model set of arbitration rules be drawn up and the national rules on arbitration be unified. Some representatives were of the opinion that the implementation of this proposal was virtually impossible and, therefore, did not justify an expenditure of the limited financial and other resources of the United Nations. One of these representatives pointed out that procedural law was much more difficult to unify than substantive law. In most countries, the code of civil procedure was one of the branches in which national traditions were strongest. The unification of these codes or any rules thereof was made especially difficult by the fact that the procedure in the common law countries was totally different from that in force in the civil law countries. For these reasons, unification of procedural law could not be carried out on a universal but only on a regional basis.

72. In respect of the proposed model arbitration rules, a representative noted that, in the course of the preparation of the 1966 European Arbitration Rules, the Economic Commission for Europe had assembled some 100 sets of such rules each of which had claimed to be a model; there was no purpose in adding one more set to these rules. Another representative expressed the opinion that one set of arbitration rules would not be enough to cover all needs because a set of arbitration rules that would be suitable to less important transactions could not be applied to disputes involving considerable amounts of money.

73. The representatives referred to in the above paragraphs concluded that the Commission should request the Secretary-General to prepare a study on the desirability and feasibility of drawing up a set of model arbitration rules and of the unification of national laws.

74. Several representatives expressed their disagreement with this, in their view, negative attitude. The

opinion was expressed that the Commission could do effective work on the unification of arbitration rules and on the unification of national laws on arbitration.

75. One observer pointed out that, at a meeting organized some years ago to discuss the relationship between unification on a regional and on a universal level, it had been concluded that universal unification was the desired goal and only if such unification was not obtainable should an effort be made at regional unification. This opinion was supported by one representative.

76. Another observer noted that the member States of the Council for Mutual Economic Assistance had signed in 1972 a Convention on the settlement by arbitration of disputes resulting from economic, scientific and technical co-operation, and had decided to prepare a set of uniform rules for the arbitration courts in their States.

77. The majority of representatives agreed with the proposal that the Commission should decide to prepare a set of arbitration rules for use in *ad hoc* arbitration. One representative pointed out that such rules were needed by businessmen and would help to overcome problems arising from trade between countries with different legal systems. Another representative suggested that, in drawing up such rules, account should be taken of the difficulties which small businessmen of developing countries encountered in settling their disputes by arbitration.

78. Most of the representatives who supported the preparation of a set of arbitration rules suggested that this task should be carried out by the Secretariat, in co-operation with the Special Rapporteur and interested international organizations. It was also suggested that the Secretariat, in the performance of this task, should base its work on existing arbitration rules drawn up by regional economic commissions and other organizations and should take into consideration international practices. One representative suggested that the Secretariat should seek the co-operation, *inter alia*, of the Inter-American Commission for Commercial Arbitration and that in its work it should also take into consideration the 1972 Convention on settlement of disputes by arbitration, concluded by member States of the Council for Mutual Economic Assistance.

79. Several representatives objected to the Special Rapporteur's proposal that the Commission should publish a compilation of arbitral awards relating to international trade, provided that the parties concerned agreed to such publication. It was pointed out that the reason for submission of a dispute to arbitration was often the desire to avoid publicity. It was also noted that the proposed compilation would not be of substantial value since such work was bound to be very incomplete and would contain only a few scattered rulings on the rules of conflict and the substantive national laws of different countries. In addition, such publication would largely duplicate existing compilations and would only contain awards which had already been published in legal periodicals.

80. Other representatives, on the other hand, expressed the view that a compilation of arbitral awards would contribute to the use of arbitration and would promote the exchange of information. One observer suggested that the best course would be to publish a general review of trends without mentioning the names of the parties or specific details of the award. Such publication could be incorporated in the Commission's Yearbook.

81. Some representatives also commented on the Special Rapporteur's proposal that the Commission should encourage and sponsor the establishment of an International Organization of Commercial Arbitration. However, these representatives were of the opinion that the establishment of arbitration centres was a matter for arbitration organizations and not for Governments. One representative noted that the International Congresses on Arbitration had shown that there was no need for a permanent organization. These periodic Congresses were accessible to all, and attended by most interested organizations, while a costly permanent organization would probably have only limited membership.

82. One representative suggested that the Commission should place more emphasis on technical assistance and training in developing countries by sending experts to acquaint such countries with arbitration procedure.

83. The Commission established a drafting party composed of the representatives of Australia, Austria, France, Nigeria, Romania, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics, and requested it, in view of the comments and proposals made at the session, to prepare a draft resolution on the questions set forth under (a), (b) and (c) in paragraph 66 above.

84. One representative suggested that the Commission should also take a decision on the work that it might wish to carry out in respect of other proposals of the Special Rapporteur.

Decision of the Commission

85. The Commission at its 140th meeting, on 11 April, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. *Recommends* that the General Assembly should invite the States which have not ratified or acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to consider the possibility of adhering thereto;

"2. *Invites* the Economic Commission for Europe to draw the attention of the States which are eligible to ratify or accede to the 1961 European Convention on International Commercial Arbitration but have not done so, to the existence of that Convention and to invite them to indicate whether they intend to adhere thereto;

"3. *Requests* the Secretary-General:

"(a) In consultation with regional economic commissions of the United Nations and centres of international commercial arbitration, giving due consideration to the Arbitration Rules of the United Nations Economic Commission for Europe and the ECAFE Rules for International Commercial Arbitration, to prepare a draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade;

"(b) To submit the draft to the Commission at its eighth session or a report, should his studies and the consultations with the above-mentioned organizations indicate that the drawing up of such rules is not desirable;

"4. *Reserves* the right to consider at a later session what further work it might usefully undertake in the field of international commercial arbitration."

86. Some representatives expressed reservations regarding paragraph 2 of the above decision since the Commission thereby encouraged the promotion of unification of regional trade law as opposed to international trade law. Several representatives stated that the adoption of paragraph 2 of the decision should not constitute a precedent.

CHAPTER VI

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

87. The Commission, at its fifth session, requested 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. The Secretary-General was also requested to explore the feasibility of organizing an international symposium on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law.²⁸

88. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/80), setting forth the activities that had been undertaken to implement the Commission's programme on training and assistance and the outcome of the inquiry that was undertaken pursuant to the Commission's decision concerning the feasibility of organizing the above-mentioned symposium.²⁹

89. In the course of introducing this report, the Secretary of the Commission drew attention to the fact that the practice of allocating some of the fellowships of the United Nations Institute for Training and Research (UNITAR) to candidates who had special interest in international trade law, would be continued in 1973.

²⁸ *Ibid.*, para. 97 (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 97).

²⁹ The Commission considered this report in the course of its 132nd and 133rd meetings, on 5 April 1973.

These fellows from developing countries would receive training in international trade law under supervision of members of the International Trade Law Branch.

90. The Secretary of the Commission also explained the financial difficulties that had been encountered in securing sufficient voluntary contributions that would enable a young scholar from a developing country to travel to a centre with adequate library facilities where he could develop teaching materials for use in his own university and possibly in universities in his region.

91. The Commission was also informed of a request by the Secretary-General to developed countries, Members of the United Nations, inviting banking and trade institutions within their respective countries to provide internships for nationals from developing countries. It was reported that positive replies to this request had been received from the Governments of Austria, Belgium, Norway and the United Kingdom of Great Britain and Northern Ireland.

92. With respect to the proposed international symposium on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law, the Secretary of the Commission suggested that the symposium could best be organized in connexion with the eighth session of the Commission, to be held in 1975 at the United Nations Office in Geneva. The Commission was informed that if the symposium was held towards the end of the session, the free time that was usually devoted to preparation of the report of the session could be utilized for the symposium. In addition, the Commission could use, for the discussion of the theme of the symposium, the two meetings that were usually allocated for the discussion of the subject of training and assistance. The Commission was also informed that UNITAR had expressed its willingness to co-operate with the Secretariat in the administrative organization of the symposium.

93. With respect to the production of teaching materials in the field of international trade law, several representatives stressed the importance of the project and expressed gratitude to the Government of Australia whose representative had announced that his Government was prepared to offer a fellowship of \$A5,000 to enable a young scholar from a developing country to undertake the compilation of the material in Australia.

94. Several representatives expressed the hope that an increasing number of universities would include the subject of international trade law in their curricula.

95. The representative of France announced that although no communication from his Government had been received by the Secretariat, his Government had none the less agreed to offer some fellowships to nationals from developing countries with a view to enabling them to gain practical experience in international trade law at financial and trade institutions in France. The representative of Australia indicated that his Government would be prepared to assist nationals from developing countries to find internships or fellowships with commercial and financial institutions in Australia.

96. Many representatives expressed appreciation to the Governments which had responded favourably to the Secretary-General's appeal for internships for which there was a pressing need in developing countries. One representative said that the lack of positive response to the Secretary-General's appeal from other developed countries was somewhat disappointing. Some representatives supported the suggestion set forth in the Secretary-General's report that he should inform developing countries of the offers of assistance for training and internships in international trade law made by developing countries.

97. Some representatives were of the opinion that what lawyers and government officials from developing countries needed most at this stage was not a programme of narrow specialization in the various fields of international trade law, but a programme of instruction of a rather general and basic character. These representatives were, therefore, particularly appreciative of the efforts made by certain Governments to provide this kind of training in their academic institutions for nationals of developing countries.

98. Several representatives agreed with the view that it would be highly beneficial to arrange seminars on international trade law in the developing countries themselves. Such seminars, conducted with the help of visiting professors from developed countries, would make it possible to reach a considerable number of lawyers, businessmen and government officials from developing countries with minimum cost. In this connexion, the suggestion was made that UNITAR should be encouraged to continue to organize such seminars.

99. The observer from the Inter-Governmental Maritime Consultative Organization (IMCO) informed the Commission that the organization had developed concrete plans for a programme of assistance to developing countries in the field of laws and regulations applicable to ships and shipping, to be jointly sponsored by IMCO, UNCTAD and UNCITRAL. The details of the programme would be communicated to UNCITRAL's secretariat in the near future.

100. All representatives who spoke on the subject were of the opinion that the organization of an international symposium of teachers and prospective teachers of international trade law on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law would be of great value. In addition to disseminating the work of the Commission, the symposium would help in promoting the introduction of the subject of international trade law in the curricula of national universities.

101. All representatives also agreed that the symposium should be held in connexion with the eighth session of the Commission, as suggested by the Secretary of the Commission. Some representatives, however, were of the opinion that two days were too short a period for a meaningful exchange of views on the theme of the symposium. In the view of these representatives, a minimum of four or five days was required.

102. Other representatives were of the opinion that, in view of the need to avoid incurring additional expen-

diture by the United Nations, a two-day discussion would be adequate, provided that the participants were given the opportunity to observe the Commission in action during the last week of the session and that members of the Commission volunteered to address the participants on the work of the Commission between meetings.

103. One representative suggested that it might be possible to extend the symposium by additional meetings at one of the national universities in his country, provided that the timing of the symposium coincided with the Easter vacation when students' lodgings could be used by the participants.

104. Many representatives expressed the view that participants from developing countries would have to be paid travel expenses and subsistence allowances so that they could attend the symposium in sufficient numbers. In the opinion of these representatives, the value of the symposium would be vastly diminished if attendance at the symposium was practically restricted to participants from developed countries. The secretariat of the Commission was therefore requested to seek voluntary contributions from Governments, international organizations and foundations to cover the cost of travel and subsistence of participants from developing countries. In this connexion, the representative of Australia said that he would take up with his Government the possibility of its making a contribution towards the travel of participants from these countries and appealed to other representatives of developed countries to do likewise. The observer from the Commission of European Communities suggested that his Commission, within the framework of the special agreement with associated countries, might be in a position to make a contribution for the travel and subsistence of participants from African countries.

105. One representative suggested that the title of the symposium should include a reference to "international payments" so that the uniform law that the Commission was elaborating in this field could be brought to the notice of academic and business circles. In the opinion of this representative, such a reference would attract participants from banking and financial institutions and would prompt them to make voluntary contributions to meet the costs of attendance of professors from developing countries.

106. Several representatives suggested that, in order to ensure the success of the symposium, its subject-matter should be limited in advance to two or three informative topics. The secretariat of the Commission was therefore requested to consult with individual members of the Commission on the organization and planning of the symposium.

Decision of the Commission

107. The Commission at its 133rd meeting, on 5 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. *Expresses its appreciation* to those Governments which have made voluntary contributions for the

implementation of its programme of training and assistance in the field of international trade law;

"2. *Expresses the hope* that further contributions will be made in any appropriate form;

"3. *Expresses the view* that universities should be encouraged to promote the study of international trade law and hopes that the symposium, referred to in paragraph 4 (c) below, will help in this regard;

"4. *Requests the Secretary-General:*

"(a) To accelerate and intensify the activities relating to the above programme of training and assistance, with special regard to the needs of developing countries;

"(b) To organize, in connexion with its eighth session, an international symposium on the role of universities and research centres in the teaching, dissemination and wider appreciation of international trade law, and to seek voluntary contributions from Governments, international organizations and foundations to cover the cost of travel and subsistence of participants from developing countries;

"(c) To explore the possibility of the United Nations Institute for Training and Research arranging seminars in developing countries on international trade law."

CHAPTER VII

MULTINATIONAL ENTERPRISES

108. At its twenty-seventh session, the General Assembly adopted resolution 2928 (XXVII) of 28 November 1972, on the report of the United Nations Commission on International Trade Law. In paragraph 5 of the resolution, the General Assembly invited the Commission:

"To seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and to consider, in the light of this information and the results of available studies, including those by the International Labour Organisation, the United Nations Conference on Trade and Development and the Economic and Social Council, what further steps would be appropriate in this regard."

109. At the present session,³⁰ the Commission had before it a note by the Secretary-General (A/CN.9/83) setting forth background information pertaining to paragraph 5 of the General Assembly resolution and suggesting possible action by the Commission in response thereto.

³⁰ The subject was considered by the Commission at its 134th and 135th meetings, on 6 April 1973.

110. Some representative noted that the term "multinational enterprises" was not a legal term; the law, at its present stage of development, recognized only enterprises incorporated under national law and the Commission ought therefore to define the term. Other problems as to the scope of the mandate conferred on the Commission arose. For instance, the General Assembly resolution referred to "different kinds of enterprises" and it could be asked whether this expression comprised not only manufacturing enterprises but also financial, servicing or distributing enterprises or enterprises that were engaged in transport. Doubts also arose about the meaning of "multinational"; that term could refer to a single enterprise with many branches in different countries or to an enterprise whose shareholders were nationals of different countries. Under one view, the term "multinational enterprise" could be replaced by the term "transnational enterprise". Further, it was not clear whether the resolution envisaged only private enterprises or also State and other public enterprises. These representatives were of the opinion that the immediate problem facing the Commission was to define the scope of its mandate and that therefore a study of that question would be necessary before issuing a questionnaire to Governments and interested international organizations.

111. Other representatives were of the view that the mandate given by the General Assembly left no doubt as to what was requested from the Commission, even if the terminology used did not always fit into existing legal concepts. Some representatives stated that a number of countries were disturbed about the negative aspects inherent in the operations of multinational enterprises which, they said, posed a threat to national sovereignty and led to the dispersion of economic resources. Several representatives took the view that the Commission was not, at this stage, asked to formulate rules but to seek "information relating to legal problems presented by the different kinds of multinational enterprises". A questionnaire to Governments was one of the means to obtain such information. These representatives suggested that the secretariat should be asked to prepare a questionnaire, to equip itself with knowledge on the subject, and to report at each session of the Commission on the state of the work.

112. In the view of some representatives, members of the Commission should assist the secretariat in formulating the questionnaire. The questionnaire should relate to the concept of a multinational enterprise and to the legal problems that resulted from the activities of such enterprises. The Commission, after examining a report by the Secretariat based on a thorough compilation and analysis of replies to the questionnaire and perusal of pertinent studies, would then be in a position to consider what further steps, if any, it could appropriately take.

113. The observer for the Commission of European Communities stated that the European Economic Community had a special interest in the question at issue and that his organization was prepared to reply to the questionnaire and otherwise to assist the secretariat. He suggested that the definition of a multinational enterprise

should be conceived in both legal and economic terms. The hallmark of such enterprises was that the decision-making body had its centre in one country and that its subsidiaries, which were dependent on it in law or in fact, were dispersed in a number of countries; in addition, each subsidiary (manufacturing, financial, distributing or otherwise) was a unit whose importance or influence was considerable in the country where it was located.

114. The observer for the International Chamber of Commerce (ICC) referred to an ICC report prepared for the ICC Congress in Istanbul in 1969. He expressed the hope that any framework, guidelines or rules that might be proposed should be such as to protect legitimate business interests.

115. The Commission, after deliberation, appointed a drafting party composed of the representatives of Australia, Austria, Chile and Nigeria and requested it to prepare a draft decision for consideration by the Commission.

Decision of the Commission

116. The Commission, at his 140th meeting, on 11 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law,

"Having regard to General Assembly resolution 2928 (XXVII) of 28 November 1972,

"Requests the Secretary-General:

"1. To draw up a questionnaire designed to obtain information concerning legal problems presented by multinational enterprises, and the implications thereof for the unification and harmonization of international trade law, and seeking suggestions as to the areas in respect of which measures might appropriately be taken by the Commission, and to address that questionnaire to Governments and interested international organizations, taking into account the views expressed by representatives during the discussion of the item;

"2. To prepare a report for the Commission's consideration, setting forth:

"(a) An analysis of replies to the questionnaire;

"(b) A survey of available studies, including those by United Nations organs and agencies, in so far as those studies disclose problems arising in international trade because of the operations of multinational enterprises, which are susceptible of solution by means of uniform legal rules;

"(c) Suggestions as to the Commission's future course of action, in terms of programme of work and working methods in this particular area;

"3. To place his report before the Commission at a future session, with the timing of submission dependent on the time at which the replies to the questionnaire reach the Secretariat and the studies mentioned above are available, and to submit a progress report at the seventh session."

CHAPTER VIII

ESTABLISHMENT OF A UNION FOR *jus commune* IN MATTERS OF INTERNATIONAL TRADE

117. At the Commission's second session, the representative of France submitted a proposal which was designed to promote ratification of conventions concerning international trade law. According to this proposal, States would, pursuant to a general convention, agree to accept the rules established by the Commission or under its auspices, as a body of common law governing international trade. These rules would be binding upon States unless they expressly declined to accept them.³¹

118. The Commission, at that session, gave preliminary consideration to the proposal and requested the representative of France to submit a working paper on the subject.³² Pursuant to this request, the representative of France submitted to the Commission at its third session a working paper setting out his proposal in greater detail (UNCITRAL/III/CRP/3). The Commission gave further consideration to the proposal and decided to defer final action thereon until its fourth session.³³

119. The Commission, at its fourth session, considered a document submitted by the representative of France which set forth a preliminary draft of a convention establishing a union for *jus commune* in matters of trade; the document also contained a statement of the reasons supporting the proposal (A/CN.9/60). Following a general debate on the subject, the Commission requested the Secretary-General to communicate the document to members of the Commission and to invite them to make comments and observations, and decided to include the subject in the agenda of its sixth session.³⁴

120. At the present session, the Commission had before it a report of the Secretary-General (A/CN.9/81) containing an analysis of comments and observations by Governments on the proposal of the French delegation and annexing thereto the text of those comments and observations. The Commission also had before it the document that was submitted by the representative of France at the Commission's fourth session which set forth the text of the draft convention for the establishment of a union for *jus commune* in matters of international trade (A/CN.9/60).³⁵

121. In introducing his proposal, the representative of France explained that the practical purpose of the

proposal was to seek certainty and security for international trade transactions by clearly identifying the applicable law and the particular rules of that law. Progress in achieving this goal was hampered by the failure of States to ratify or to accede to international conventions which attempted to achieve some measure of unification and harmonization of international trade law. In the view of the French representative, it was not enough for the international community to continue to elaborate conventions concerning international trade law; it must also seek to establish a régime which would bring these conventions into force. Such a task was clearly within the mandate of UNCITRAL.

122. The representative of France also mentioned that the proposal for the establishment of a union for *jus commune* had for its immediate object the persuasion of as many States as possible to accept the idea that international commercial transactions should be governed by a single body of uniform law. The role of the proposed international union with respect to such uniform law involved no infringement of national sovereignty. Article X of the preliminary draft convention establishing a union for *jus commune* fully respected the sovereignty of States inasmuch as they would be able, under that article, to declare at any time that a particular rule of the *jus commune* would not apply in their territories.

123. The representative of France, however, mentioned that his delegation, after consulting members of the Council of Europe, had decided that perhaps the time was not ripe for establishing a union for *jus commune* as he had previously suggested and that the proposal should perhaps be regarded as an aim for the future. In the meantime, a less ambitious system for accelerating the process of ratification of conventions should be found.

124. The representative of France suggested that a régime along the lines of the system followed by the International Labour Organisation might be an acceptable solution. Under that system, States members of the organization were bound to consider ratification of labour conventions within a prescribed period. Periodic reports were obtained on the progress made on ratification by individual States. Another possible solution might be a system under which one signatory State would be requested to keep under review the status of a particular convention and the progress made on its ratification. In view of the various possible solutions to the problem of lack of speedy ratification of conventions, the representative of France proposed that the Commission set up a working group to study the causes for the failure by States to bring into force conventions concerning international trade law and to make recommendations with respect to steps that might be taken to accelerate the process of adherence to such conventions.

125. Many representatives congratulated the representative of France on the initiative he had taken in this important field and shared his view that the present situation was far from satisfactory. It was generally agreed that it was within the competence of the Commission to consider ways and means of accelerating the process of bringing to force conventions concerning international trade law.

³¹ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), paras. 168-172 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. II, paras. 168-172).

³² *Ibid.*, para. 176.

³³ *Ibid.*, *Twenty-fifth Session, Supplement No. 17* (A/8017), para. 217 (UNCITRAL Yearbook, Vol. I: 1968-1970, part two, chap. III, para. 217).

³⁴ *Ibid.*, *Twenty-sixth Session, Supplement No. 17* (A/8417), para. 155 (UNCITRAL Yearbook, vol. II: 1971, part one, chap. II, para. 155).

³⁵ The Commission considered this item in the course of its 136th and 137th meetings, on 9 April 1973, and 140th and 141st meetings, on 11 April 1973.

126. Most representatives, however, were of the opinion that although the proposal to establish a union for *jus commune* was undoubtedly attractive, it would, at the present time, give rise to practical constitutional and administrative difficulties in many States. These representatives were, therefore, gratified to note that the representative of France was prepared to modify his proposal.

127. Several representatives were also of the opinion that it would be premature to establish a working group on the subject as suggested by the representative of France. In the view of these representatives it would be more profitable to request the secretariat of the Commission to submit to a future session of the Commission a report on the question which would identify the causes for the delay in adhering to conventions on international trade law and recommend measures for the elimination of those causes. It was also suggested that the question should be included periodically in the Commission's agenda (e.g., every three years) for critical examination by the Commission.

128. Several representatives supported the proposal to set up a small working party to prepare the suggested report.

129. Some representatives expressed the view that both the establishment of a working party and the preparation of a report by the secretariat would be premature. In the opinion of these representatives there was no need to inquire into the reasons why existing conventions were not adhered to by a sufficiently large number of States since the Commission itself was working on the elimination of those reasons by undertaking the revision of the rules embodied in those conventions. On the other hand, if the study by the working party or the secretariat was to be directed to future conventions elaborated by the Commission, such a study would prejudice the fate of these conventions, none of which had so far been finally concluded. Some of these representatives further emphasized that it would be improper to embark on a general programme of promoting adherence to existing international conventions since many States had not had the opportunity to participate in the formulation of most of these conventions.

130. One representative suggested that in view of the heavy work-load of the secretariat of the Commission, the Commission should designate one of the representatives of its members as special rapporteur to prepare the required study. Another representative was of the opinion that the question of promotion of adherence to international conventions belonged to the domain of public international law. Consequently, the International Law Commission, which dealt with this field, should first be consulted to ensure that the establishment of a working group on the subject did not encroach upon the competence of that body.

131. One representative further suggested that it was not enough to achieve uniform rules on matters relating to international trade law; arrangements should also be made to ensure the consistent interpretation of those rules. To this end, the same representative suggested that

a provision for a permanent world trade court should be included in the preliminary draft convention on the establishment of a union for *jus commune*.

Decision of the Commission

132. The Commission at its 141st meeting, on 11 April 1973, after considering various proposals, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. *Decides* to maintain on its agenda the question of the widest ratification of or adherence to conventions concerning international trade law;

"2. *Requests* the Secretary-General to prepare, if appropriate with the assistance of representatives of members of the Commission, a report examining the causes of delay in ratification of or adherence to such international conventions and the means of accelerating such ratification or adherence, based on the studies made and the experience gained by other United Nations organs or specialized agencies, in particular the United Nations Institute for Training and Research, the International Labour Organisation, the World Health Organization, International Civil Aviation Organization and the Inter-Governmental Maritime Consultative Organization, and to submit such report to the Commission, if practicable, at its seventh session;

"3. *Decides* to re-examine at its seventh session if time allows, and in the light of the Secretary-General's report, the desirability of establishing a small working party, to be entrusted with the formulation of proposals, for consideration by the Commission at a later session, regarding ways and means that would accelerate the ratification of or adherence to conventions concerning international trade law."

CHAPTER IX

[FUTURE WORK; WORKING METHODS

A. *General Assembly resolution 2928 (XXVII) on the report of the Commission on the work of its fifth session*

133. The Chairman of the fifth session of the Commission, who had introduced the report of the Commission on the work of its fifth session to the Sixth Committee of the General Assembly at the Assembly's twenty-seventh session, reported on the action taken by the General Assembly on the Commission's report.

B. *General Assembly resolution 2929 (XXVII) on the United Nations Conference on Prescription (Limitation) in the International Sale of Goods*

134. The Commission took note of this resolution, by which the General Assembly decided that an international conference of plenipotentiaries shall be convened

in 1974 and referred to the conference the draft Convention on Prescription (Limitation) in the International Sale of Goods, together with the commentary thereon and the analytical compilation of comments and proposals to be prepared by the Secretary-General pursuant to the decision of the Commission.³⁶

C. *Message from the Secretary-General of the United Nations to United Nations Councils, Commissions and Committees*

135. At the 126th meeting of the Commission, on 2 April 1973, the Secretary of the Commission read out a message from the Secretary-General. In that message, the Secretary-General expressed the view that, owing to the continuing financial difficulties of the Organization, some measure of budgetary restraint was unavoidable. For this reason, it was essential to enlist the full support of the Secretariat and of the various United Nations bodies where new programmes and activities are originated. Although the Secretary-General did not suggest that new programmes and activities could not be undertaken, he invited such bodies 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.

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

D. *Date and place of sessions of the Commission and its Working Groups; United Nations Conference on Prescription (Limitation) in the International Sale of Goods*

137. After hearing a statement on financial implications, the Commission decided to hold its seventh session at United Nations Headquarters in New York from 10-14 June 1974.

138. The sessions of the Working Groups of the Commission were scheduled to take place as follows:

- (a) Second session of the Working Group on Negotiable Instruments, at New York from 7-18 January 1974.
- (b) Fifth session of the Working Group on the International Sale of Goods, at Geneva from 21 January-1 February 1974.
- (c) Sixth session of the Working Group on International Legislation on Shipping, at Geneva from 4-22 February 1974.

The Secretary of the Commission stated that current plans with respect to the United Nations Conference on Prescription (Limitation) in the International Sale of Goods indicated that the Conference could be held in New York from 17 June-12 July 1974. It was noted that this schedule reflected with the availability of conference services and

the Commission's plan to hold its seventh session during the week immediately preceding the United Nations Conference on Prescription. The Commission gave general approval to these plans.

E. *Expiration of terms of office of members of the Commission; membership of Working Group*

139. The Secretary informed the Commission that the term of 15 of its members would end on 31 December 1973 and that the election to be held by the General Assembly at its twenty-eighth session might affect the present membership of working groups. In order to ensure the proper functioning of the working groups, he proposed that, after the election of the 15 members by the General Assembly, representatives of the member States of the Commission should meet to decide, if necessary, on the replacement of outgoing members of the Commission in any working group that would meet prior to the seventh session of the Commission. The Commission expressed its agreement with this proposal.

F. *Methods of work*

140. At the fifth session of the Commission, the representative of Spain introduced a proposal of his delegation regarding the working methods of the Commission (A/CN.9/L.22). At that session, the Commission had decided to consider this question further at its present session.

141. In commenting on the proposal of his delegation, the representative of Spain expressed satisfaction at the fact that the Commission, in planning its work, had adopted certain of the suggestions made therein, such as the establishment of small working groups, the holding of longer sessions of these groups and of shorter sessions of the Commission, and the use of experts.

142. Representatives who spoke on the subject expressed their appreciation for the proposals made by the Spanish delegation with a view to improving the working methods of the Commission. One representative, however, advocated caution with regard to reliance on the work of experts. The primary aim of the Commission's work should not be the technical perfection of legal texts, but the elaboration of uniform rules which were acceptable to the international community as a whole.

143. The Commission at its 142nd meeting, on 13 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Expresses its appreciation for the contribution to its working methods provided by the suggestions submitted by the delegation of Spain to the Commission at its fifth session;

"2. Expects to bear these suggestions in mind in planning its work."

³⁶ Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 20 (UNCITRAL Yearbook, Vol. III: 1972, part one, chap. II, para. 20).

CHAPTER X

OTHER BUSINESS

Uniform rules relating to the validity of contracts of international sale of goods

144. By a letter dated 10 March 1973, the President of the International Institute for the Unification of Private Law (UNIDROIT) transmitted to the Secretary-General of the United Nations the text of a "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods" prepared by a working group appointed by UNIDROIT, and an accompanying explanatory report.³⁷

145. The observer for UNIDROIT stated that the purpose of the draft uniform law was to fill a gap left by the uniform law on the international sale of goods, adopted at the Hague Conference in 1964, which omitted from its scope "the validity of the contract or of any of its provisions" (article 8 of the uniform law). The Commission might deem it desirable that the uniform law on the international sale of goods, at present being revised by the Working Group on Sales, be supplemented by rules on the validity of contracts of international sale, and might wish, at some stage, to refer the draft to its Working Group for consideration.

146. Representatives who spoke on the subject expressed their appreciation for the work accomplished by UNIDROIT and for the decision taken by UNIDROIT's Governing Council to submit the draft for further consideration by the Commission.

147. Some representatives were of the opinion that the Commission should refer the draft uniform law to its working group on sales for an opinion as to whether this should be included in the Commission's work programme. Other representatives opposed this on the ground that they had not yet had the occasion to study the draft. According to the representatives, the Commission ought first to examine whether the draft uniform law fell within the scope of international sale of goods and, if so, what priority it should be given within the Commission's programme of work.

148. The Commission, at its 142nd meeting on 13 April 1973, adopted unanimously the following decision:

"The United Nations Commission on International Trade Law

"1. Takes note of the letter, dated 10 March 1973, from the President of the International Institute for the Unification of Private Law, transmitting to the Commission the text of a "draft of a law for the unification of certain rules relating to the validity of contracts of international sale of goods" and inviting the Commission to include the consideration of this draft as an item on its agenda;

"2. Requests the Secretary-General to communicate the draft to the members of the Commission;

"3. Decides to consider at its seventh session what further steps should be taken on the subject."

ANNEX

List of documents before the Commission

[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume].

³⁷ Etude XVI/B, Doc. 22; U.D.P. 1972.

B. List of relevant documents not reproduced in the present volume

<i>Title or Description</i>	<i>Document reference</i>
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/80
The establishment of a union for <i>jus commune</i> in matters of international trade—analysis of comments and observations by Governments: report of the Secretary-General	A/CN.9/81
Multinational enterprises: note by the Secretary-General	A/CN.9/83
Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General	A/CN.9/84
Uniform rules relating to the validity of contracts of international sale of goods: note by the Secretary-General	A/CN.9/L.24
Draft report of the United Nations Commission on International Trade Law on the work of its sixth session (2 to 13 April 1973)	A/CN.9/VI/CRP.1 and Add.1 to 9
List of delegations	A/CN.9/INF.5
Summary records of the sixth session of the Commission	A/CN.9/SR.126 to 142

I. INTERNATIONAL SALE OF GOODS

A. Uniform rules on substantive law

1. *Note by the Secretary-General: analysis of comments and proposals by Governments relating to Articles 56 to 70 of the Uniform Law on the International Sale of Goods (ULIS) (A/CN.9/WG.2/WP.15) **

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* 16 November 1972.

INTRODUCTION

1. The UNCITRAL Working Group on the International Sale of Goods at its third session 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".¹ It also 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".²

2. Pursuant to the above decision the Working Group on the International Sale of Goods met during the fifth session of the Commission and decided, *inter alia*, to request the representatives of those members listed below to examine articles 56 to 70 of ULIS and to submit the results of their examination to the Secretariat. The allocation of articles was as follows:

- Articles 56-60: USSR, in co-operation with Austria, Ghana, Iran, Mexico and the United Kingdom
Articles 61-64: United Kingdom, in co-operation with Austria, Brazil, Iran, Tunisia and the USSR
Articles 65-68: Japan, in co-operation with France, Hungary, India, Kenya and the United States
Articles 69-70: France, in co-operation with Hungary, India, Japan and the United States

3. The following reports relating to articles 56 to 70 of ULIS have been received and appear in document A/CN.9/WG.2/WP.15/Add.1.

¹ A/CN.9/62, para. 15 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5).

² *Ibid.*, para. 17.

On articles 56 to 60:

- (a) Comments and proposals of the representative of the USSR (annex I)
- (b) Comments and proposals of the representative of Ghana (annex II)
- (c) Comments and proposals of the representative of Mexico (annex III)
- (d) Comments and proposals of the representative of the United Kingdom (annex IV)

On articles 61 to 64:

- (e) Comments and proposals of the representatives of Austria and the United Kingdom (annex V)

On articles 65 to 68:

- (f) Proposal of the representative of Japan on article 68 (annex VI)
- (g) Comments by the representative of Hungary on the proposal of the representative of Japan on article 68 (annex VII)

On articles 69 and 70:

- (h) Comments and proposals of the representative of France (annex VIII)

4. Pursuant to the decision of the Working Group, the Secretariat circulated the above reports among representatives of the members of the Working Group for comments. No such comments have been received.

5. The proposals and comments made in the above reports that deal with a single issue are considered together in this analysis. This report also includes comments on articles 56-70 that appear in previous documents of the Commission.

ANALYSIS OF THE COMMENTS AND PROPOSALS

Article 56

6. Article 56 of ULIS reads:

"The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present Law."

7. The representatives of the USSR, Ghana, Mexico and the United Kingdom, in compliance with the request of the Working Group, examined this article; no change was suggested.

8. The representative of Czechoslovakia at the second session of the Commission submitted that the provision in article 56 concerning the obligations of the buyer was not complete and suggested that the obligation of the seller to co-operate in the fulfilment of the transaction should be more fully regulated.³

Article 57

9. Article 57 of ULIS reads:

"Where a contract has been concluded but does not state a price or make provision for the determination

of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract."

10. This article deals with the determination of the price where neither the price nor the means for its determination are stated in the contract. According to the Commentary on ULIS such silence is not extraordinary; it is even normal practice where sellers publish and distribute catalogues and where the order forms do not repeat the prices.⁴ A great number of comments has been submitted on this article. All comments focused mainly on the following two issues: (a) the validity of contracts which do not state the price and (b) the appropriateness of the expression "generally charged" in the text.

11. The representative of the USSR pointed out that the law of many countries considered the price as an essential element of the contract and provided that contracts which did not state the price were void. He suggested that the law should not allow the conclusion of contracts which did not state the price or the mode of its determination and, therefore, this article should be deleted.⁵ The representative of Hungary made similar objections to this article at the second session of the Commission and expressed the view that exception of the rule that no valid contract could be concluded without determination of the price should only be made where the price could be inferred from a previous contract between the same parties for the same goods.⁶

12. The representative of Ghana in his comments supported the views expressed by the representative of the USSR except for the proposal that this article be deleted. He thought that there was need for an appropriate text to settle the status of sales contracts which provided for all questions except for the price. He suggested the following text:

"No contract shall be enforceable by either party under the present law unless it states a price or makes express or implied provision for the determination of the price; unless the parties thereto expressly or by implication otherwise agree."⁷

13. Contrary to the views referred to in paragraphs 10 to 12 above, the representative of the United Kingdom concluded that the present text of the article should be maintained.⁸ It was noted that the article was expressly confined to cases where a contract has been concluded. Although this would occur without fixing the price only in exceptional cases, the article was needed for such cases.

14. As indicated in paragraph 10 above, the other issue on which the comments concentrated was the question whether the expression "price generally charged

³ A/7618, annex I, para. 91 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A). See also A/CN.9/31, para. 124 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

⁴ Commentary by Mr. André Tunc on the Hague Conventions of 1 July 1964, page 70.

⁵ Annex I.

⁶ A/7618, annex I, para. 92-93 (UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A). See also A/CN.9/31, para. 126 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

⁷ Annex II.

⁸ Annex IV.

by the seller at the time of the conclusion of the contract" was sufficiently exact to enable the determination of the price in cases where it was not determined in the contract.

15. In the view of the representative of the USSR, whose first preference was for the deletion of this article (cf. para. 11), the above expression was not appropriate because it was difficult to prove what price was "generally charged" by the seller and also because the price often depended upon a variety of factors.⁹ These objections were supported by the representative of Ghana.¹⁰ On the other hand, the representative of the United Kingdom came to the conclusion that no change in the language of article 57 was needed. Where the contract did not state a price, the previous price between the parties (by virtue of article 9 on course of dealing) would be the agreed price; in the absence of previous dealings between the parties the price generally charged by the seller to the third parties would be applied.¹¹

16. Austria in its comments previously submitted to the Commission also objected to the above provision. It expressed the opinion that the provision in question would oblige the buyer to pay the price generally charged by the seller at the time of the conclusion of the contract even if that price was unknown to the buyer or even if that price was much higher than the usual price for such goods. Austria further noted that the said expression left unresolved the rather common situation where there was no price generally charged by the seller.¹² This situation was also mentioned by the representative of Mexico who, in order to avoid this gap in the law, suggested that the following text be added to the end of paragraph 2:

"... or, in the absence of such a price, the one prevailing in the market at the time of the conclusion of the contract."¹³

17. In addition to the above comments relating to the existing text of article 57, the representative of Mexico suggested that article 57 should contain two further provisions. One would provide for the place and method of payment while the other for the currency in which payment of the price should be effected. These provisions, to be included in ULIS as paragraph 1 and 3, respectively, of article 57, read as follows:

"1. Payment of the price consists in the delivery to the seller or to another person indicated by the seller of the monies or documents provided for in the contract.

"2. ...

"3. Except as otherwise provided in the contract or established by usages, the price shall be paid in the currency of the country of the seller."¹⁴

⁹ Annex I.

¹⁰ Annex II.

¹¹ Annex IV.

¹² A/CN.9/11, pp. 8-9. See also A/CN.9/31, para. 125 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1). This situation is also mentioned in the Commentary on the Uniform Law. According to the Commentary, in such cases no valid contract of sale would come into being. See *supra* note 4, *op. cit.*, pp. 70-72.

¹³ Annex III.

¹⁴ *Ibid.*

Article 58

18. Article 58 of ULIS reads:

"Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight."

19. The representative of the USSR recommended that the words "in case of doubt" be replaced by "unless otherwise agreed by the parties."¹⁵ A similar proposal was made by the representative of Ghana who considered that cases of "doubt" could be difficult to identify.¹⁶

20. The representative of Mexico suggested that the rule on the currency of payment, which he proposed to include in article 57 as paragraph 3 (cf. para. 17 above), should be supplemented by a new paragraph 1 in article 58 to read as follows:

"1. When the currency indicated in the contract for the payment of the price gives rise to doubts, the currency of the country of seller shall be deemed as applicable."

The present text of the article would become paragraph 2.¹⁷

Article 59

21. Article 59 of ULIS reads:

"1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.

"2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller."

22. The representatives of Ghana and Mexico submitted comments on this article. Both comments doubted the appropriateness of the present text in cases where exchange control regulations existed in the country of either party. Thus, the representative of Ghana noted that exchange control regulations in the buyer's country might forbid the buyer to pay the price at the seller's place of business while the existence of such regulations in the seller's country might cause the seller to ask for payment of the price in a country with convertible currency, i.e. in a country other than his own. He suggested, therefore, that in order to allow the parties to agree freely on the place of payment, the first paragraph of the article should commence with the words "unless otherwise agreed."¹⁸

23. Based on similar considerations, the representative of Mexico suggested that a new paragraph (3) be added to article 59, reading:

¹⁵ Annex I.

¹⁶ Annex II.

¹⁷ Annex III.

¹⁸ Annex II.

"3. The buyer shall comply with all the requirements of his national laws in order to permit the seller to receive the price as provided in the contract."¹⁹

Article 60

24. Article 60 reads:

"Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date."

25. The representative of Mexico expressed the view that there was no need for this article since its provisions ensued from the rules contained in articles 1 and 9.²⁰

26. It was suggested by the representatives of the USSR that the words "without the need for any other formality", the meaning of which was not clear, be deleted and the language of this article be brought in line with that of article 22 as revised by the Working Group at its third session.²¹ The representative of Ghana supported this proposal.²² The deletion of the above-quoted expression was also recommended by the representative of the United Kingdom.²³

Articles 61 to 64

27. Articles 61 to 64 of ULIS read:

"Article 61

"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."

"Article 62

"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."

"Article 63

"1. Where the contract is avoided because of failure to pay the price, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with articles 82 and 83."

"Article 64

"In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price."

28. The representatives of Austria and the United Kingdom expressed the opinion that articles 61 to 64 should be harmonized with articles 24 *et seq.* as revised by the Working Group at its third session. Such revision would require, *inter alia*, the replacement of "*ipso facto* avoidance" by another remedial system.²⁴

29. In respect of article 61 the representative of the United Kingdom noted further that it might be doubtful in practice whether "it is in conformity with usage and reasonably possible for the seller to sell the goods". It might, therefore, be difficult in a given situation to decide which are the remedies that the seller is entitled to claim.²⁵

30. It is recalled in connexion with the proposal in paragraph 28 above that Norway in its comments at an earlier stage of the revision of ULIS also expressed the opinion that the remedies in article 62 of the seller should be harmonized with those of the buyer. This comment suggested that there should be included in that article a provision, corresponding to that in article 26, paragraph 2 of ULIS, regarding the right of interpellation in favour of the buyer, whereby the seller may request the buyer to make known his decision. It was further suggested that another provision, corresponding to that in article 26, paragraph 3, should be included according to which the seller would be obliged to inform the buyer of his decision if payment was made later than on the date fixed and he nevertheless wished to declare the contract avoided.²⁶ The fact that no such provisions were included in article 62 was also mentioned in the Commentary on ULIS. According to this document, the non-inclusion in article 62 of such provisions can "be explained by the fact that a payment can ordinarily be made much more quickly than a delivery of goods or merchandise. Such corresponding provisions may, however, be implied."²⁷

31. In respect of article 62, paragraph 2, Norway made the suggestion that in cases where the price has not been paid and where delivery had not taken place, the right of the seller to declare the contract avoided should be maintained as long as the delay continued.²⁸

²⁴ Annex V, paras. 1 and 3.

²⁵ *Ibid.*, para. 4.

²⁶ A/CN.9/11, p. 26. See also A/CN.9/31, para. 127 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

²⁷ See above note 4, *op. cit.*, p. 76.

²⁸ A/CN.9/11, p. 26. See also A/CN.9/31, para. 128 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

¹⁹ Annex III.

²⁰ Annex III.

²¹ Annex I.

²² Annex II.

²³ Annex IV.

32. Both Norway²⁹ and Sweden³⁰ made comments concerning revision of the rules providing for *ipso facto* avoidance of the contract. It will be recalled, however, that the Working Group at its third session agreed that the concept of *ipso facto* avoidance should be omitted from the remedial system of the Uniform Law.³¹

Article 65-67

33. Articles 65-67 of ULIS read:

"Article 65

"Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over."

"Article 66

"1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.

"2. Where the failure to take delivery of the goods 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 taken delivery of the goods at the expiration of the additional period, the seller may declare the contract avoided, provided that he does so promptly."

"Article 67

"1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may declare the contract avoided, provided that he does so promptly, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

"2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding."

34. No comments were made on these articles.

Article 68

35. Article 68 of ULIS reads:

"Article 68

"1. Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with articles 84 to 87.

"2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with article 82."

36. The representatives of Japan³² and Hungary³³ suggested that the word "accept" in paragraph 1 of this article be replaced by the word "take".

Article 69

37. Article 69 of ULIS reads:

"The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee."

38. The representative of France recalled the comments in document A/7618, annex I, paragraph 94,³⁴ of the representative of Japan noting that the provisions of this article did not provide for the many disputes that could arise between buyers and sellers regarding documentary credits. In the opinion of the representative of France, such provision would overburden the text.³⁵

Article 70

39. Article 70 of ULIS reads:

"1. If the buyer fails to perform any obligation other than those referred to in Section I and II of this chapter, the seller 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 seller may also require performance by the buyer of his obligation, unless the contract is avoided."

40. The representative of France suggested that article 70 should be given the same language as article 55.³⁶ The suggestion was based on the comments of Austria that the seller should be given a longer period within which to declare the contract avoided, and that the provisions of article 55 were identical to those of article 70.³⁷

²⁹ Annex VI.

³⁰ Annex VII.

³¹ See also A/CN.9/31, para. 130 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

³² Annex VIII.

³³ A/CN.9/11, page 9.

³⁴ Annex VIII.

³⁵ Annex VIII.

²⁹ *Ibid.*, para. 127.

³⁰ A/CN.9/11/Add.5, p. 4. See also A/CN.9/31, para. 129 (UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 1).

³¹ A/CN.9/62/Add.1, para. 31 (UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, Annex II). Cf. para. 28 above.

2. *Report of the Secretary-General: obligations of the seller in an international sale of goods; consolidation of work done by the Working Group on the International Sale of Goods and suggested solutions for unresolved problems (A/CN.9/WG.2/WP.16) **

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* 7 December 1972.

INTRODUCTION

1. The UNCITRAL Working Group on the International Sale of Goods at its third session (Geneva, January 1972) reviewed the provisions of chapter III of the Uniform Law on the International Sale of Goods (ULIS);¹ chapter III (articles 18-55) sets forth the obligations of the seller. The Working Group approved some

of the articles of this chapter, revised others (in some cases subject to further review) and, with respect to certain articles, considered alternative solutions to the problems raised by provisions of ULIS but deferred action until its next session. (Progress report of the Working Group on the work of its third session, A/CN.9/62 and Add.1 and 2;² this progress report will be referred to herein as "report on third session" or as "report".)

¹ The Uniform Law (ULIS) 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, reproduced in the *Register of Texts of Conventions and Other Instruments concerning International Trade Law, Vol. I, ch. I, 1* (United Nations publication, Sales No. E.71.V.3). (The Convention will be referred to as the "1964 Hague Convention on Sales".)

² The conclusions of the Working Group on specific articles are set forth in annex I to document A/CN.9/62. The reasons for these conclusions (including the general trends of opinion with respect thereto) are reported in annex II (A/CN.9/62/Add.1). The text of articles 1-55, as adopted or as deferred for further consideration, appears in annex III (A/CN.9/62/Add.2, UNCTRAL Yearbook, vol. III: 1972, part two, I, A, 5).

2. The Working Group at the conclusion of the third session "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 for the problems raised during that session". (Report, para. 16.) The present report by the Secretariat is presented in response to this request.

3. The following presentation considers, article by article, the draft provisions prepared or approved by the Working Group for chapter III (obligations of the seller). The text of each article is followed by comments explaining the action taken by the Working Group and setting forth proposed solution for unsolved problems presented by these provisions.

4. Certain symbols used in this report call for explanation. Where the Working Group recommended that the text of ULIS be retained unchanged or that revision should be deferred, the original text of ULIS is reproduced; this fact is indicated in the heading as follows: "Article 18 (ULIS)". Where an article was revised by the Working Group, this is indicated as follows: "Article 19 (WG.III)". For ease in reference, the original numbering of the articles of ULIS is retained even though the consolidation effected by the Working Group produced gaps in the numbering and changes in the order of presentation. As a step towards the final arranging and numbering of the articles, the suggested order of the articles on the seller's substantive obligations (as contrasted with articles dealing with remedies) is indicated by "(S.1)", "(S.2)", etc.

CHAPTER III : OBLIGATIONS OF THE SELLER

Article 18 (ULIS) (S.1)

"[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.]"

Comments

5. The Working Group decided that since article 18 serves as an introduction to all of chapter III, final action on this article should be deferred until the revision of the chapter is completed. (Report, annex II, para. 16.)

6. It will be noted that this article introduces the reader to the structure of chapter III. It seems likely that the decisions made by the Working Group at its third session, and those suggested in this working paper, would not compel revision of the above language. In any event, it seems advisable, as the Working Group decided, to defer a decision on this question until completion of the work on this chapter.

SECTION I. DELIVERY OF THE GOODS

Article 19 (WG.III) (S.2)

"[Delivery consists in the seller's doing all such acts as are necessary in order to enable the buyer to take over the goods.]"

Comments

7. The above revised version of ULIS 19 was prepared by the Working Group at its third session. This draft was accepted as a working hypothesis (report, annex II, para. 21); to indicate the need for further consideration, this language was placed in square brackets.

8. The Working Group found that the treatment of "delivery" in ULIS, and the definition of that term in ULIS, were unsatisfactory. One of the basic reasons seems to be the failure clearly to differentiate between two objectives: (1) the attempt to define the *act* that constitutes delivery; and (2) the specifications of what the seller is *obliged to do* in performance of his contract. This confusion is exemplified in the first paragraph of ULIS 19 which states: "Delivery consists in the handing over of goods which conform with the contract." This language ("Delivery consists in") purports to be a definition of the act of delivery. However, the second half of the sentence shifts to the seller's *contractual obligation* (set forth in ULIS 33) *to deliver* goods which conform with the contract. This shift in focus gives article 19 of ULIS surprising and unnatural consequences as a definition of the *act* of delivery, since this provision seems to say that if the goods are non-conforming (for which the buyer will of course have a claim against the seller) the goods are never "delivered" to the buyer even though he keeps possession of the goods and uses (or even consumes) them. The Working Group concluded that such difficulties made it impractical to include the question of conformity of the goods in a definition of the act of "delivery" (Report, annex II, para. 19.)

9. The report by the Secretary-General on "Delivery" in ULIS (A/CN.9/WG.2/WP.8),* presented to the Working Group at its third session, pointed to further difficulties that result from the fact that ULIS attempts to use the concept of "delivery" to solve a variety of distinct practical problems, such as risk of loss and the time for paying the price. The results of this attempt were explored in the setting of typical commercial situations; it was found that in significant situations the results were unintended and unfortunate. In addition, the attempt to solve so many problems by a single concept produced a definition of "delivery" that was unnatural and, in some languages, was virtually untranslatable (report on "delivery" in ULIS, A/CN.9/WG.2/WP.8, paras. 6 *et seq.*). This report recommended and the Working Group decided that, in view of these difficulties, problems of risk of loss (chapter VI of ULIS) would not be controlled by the concept of "delivery" (report, annex II, para. 17).

10. As has been noted, "delivery" in ULIS is often used in defining what the seller is obliged to do. Under article 18, the seller "*shall effect delivery*". Under article 19, "delivery" consists in the "handing over" of goods. Members of the Working Group pointed out that in many situations the act of "handing over" calls for the co-operation of the buyer in *taking delivery*. Hence, the Working Group concluded that the "delivery" that the seller was

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 1.

required to perform should be stated in terms of those acts that are necessary "in order to enable the buyer to take over the goods". The Working Group noted that this language paralleled the corresponding provision of article 65 of ULIS on the buyer's duty to "take delivery" (report, annex II, para. 21). The Working Group also noted that paragraphs 2 and 3 of ULIS 19 dealt with certain obligations of the seller when the contract involves carriage of goods. Consequently, the Working Group consolidated these provisions with articles 20 and 21 which also deal with these problems. (ULIS 19 (2) on handing goods over to the carrier is transferred to paragraph 1 (a) of article 20, which deals with the place at which delivery shall be effected. ULIS 19 (3), on the obligation to notify the buyer that the goods have been despatched and to specify which goods are covered by the carriage, is transferred to paragraph 1 of article 21, which deals with various aspects of despatch of the goods by carrier.) (See articles 20 and 21, *infra*.)

11. The Working Group may wish to consider a minor drafting change in article 19, as prepared at the third session. It appears that the intended function of the provision is to lead into the use of the term "delivery" in chapter III, which is entitled "Obligations of the seller". In other words, the chapter states what the seller *shall do* to fulfill these obligations.

12. The provision tentatively adopted by the Working Group, if understood as an attempt to define the act of "delivery" ["Delivery consists in . . ."], would lead to unnatural results in some situations. One example is a contract calling for delivery "ex works"; the buyer is obliged to come to seller's works to take the goods. In making the goods available, the seller has done all the acts necessary "in order to enable the buyer to take over the goods". Thus, the seller has performed his obligations with respect to delivery—the only question that is of significance under the law. Difficulty, however, arises if the section is drafted as a *definition* of delivery. If the buyer never comes for the goods, it would be difficult to conclude that "delivery" to the buyer has occurred, or that the goods were *delivered*. It will be recalled that in the discussion of this subject various representatives have stressed that, in normal usage, "delivery" requires the concurrence of *both* parties in the transfer of possession—an element that is lacking if the draft of article 19 is considered as a definition of the concept of "delivery".

13. Such difficulties are avoided if the provision speaks in terms of the seller's *obligations* to deliver—and it seems likely that the Working Group intended the provision to have this meaning. The following draft is designed to express this intent more clearly.

Article 19 (WG.III, as modified)

"The seller performs his obligation to deliver by doing all the acts that are required by the contract and the present Law to enable the buyer to take over the goods."

14. It will be noted that the above draft is built on the substantive test established for this article by the Working Group: the seller shall do those acts required

"in order to enable the buyer to take over the goods". In addition, the redraft adds a reference to those acts "required by the contract and the present Law".³

Article 20 (WG.III) (S.3)

"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.]"

Comments:

15. The above provision, drafted by the Working Group at its third session, was designed to present a complete and unified answer to this question: At what point (more specifically, at what *place*) does the seller complete his obligations as to delivery of the goods? Paragraph 1 (a) is drawn from ULIS article 19 (2); paragraph 1 (b) from article 23 (2) (first sentence); paragraph 1 (c) from article 23 (1).

16. Certain comments and suggestions were addressed to the above draft (report, annex II, paras. 25-27). Further consideration of this provision in the setting of the other articles in this chapter tends to support the view that the organization and drafting of the new article 20 have produced a more coherent and clearer statement than in the original provisions of ULIS.

Article 21 (WG.III) (S.4)

"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

³ At the third session of the Working Group one representative suggested that the definition should read: "Delivery consists in the seller's accomplishing the final act necessary in order to enable the buyer to take control of the goods". Report, annex II, para. 27.

It is not now clear that there is any provision of ULIS that needs to be implemented by a definition of the act of "delivery", in the narrow sense, as contrasted with a statement of the seller's obligation to deliver. If such a need develops, the following definition might be considered:

"Delivery of goods occurs when goods are taken over by the buyer or by a person acting on his behalf, including a carrier to whom the goods are handed over pursuant to article 20 (a) of the present Law."

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.]"

Comments:

17. The above article, prepared by the Working Group at its third session, brings together provisions, placed at widely-separated places in ULIS, that deal with a single question: What steps must the seller take when the contract calls for carriage of the goods from the seller to the buyer? The first sentence of paragraph 1 is drawn from ULIS 54 (1); the second sentence from ULIS 19 (3). Paragraph 2 is drawn from ULIS 54 (2) (report, annex I, para. 4; annex II, paras. 22-27).

18. Certain comments and suggestions were addressed to the above text (annex II, paras. 25-27). On review, the Working Group's unified handling of these provisions appears to present a much clearer and more satisfactory presentation than that of ULIS.

Article 22 (WG.III) (S.5)

"[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 case, within a reasonable time after the conclusion of the contract.]"

Comments:

19. This article, prepared by the Working Group at its third session, consolidates into one article the rules on the *time* for performance by the seller that appear in articles 20, 21 and 22 of ULIS. The result is a shorter and more unified statement. There is no record of objection to this revision.

20. The Working Group placed brackets around the words "[hand the goods over, or place them at the buyer's disposal]". The phrase "hand the goods over" relates to contracts calling for carriage of the goods (article 20(1)(a)); in such contracts, the seller has the duty to effect a transfer of possession to a carrier who will take over the goods.⁴

⁴ Arranging for a carrier to take possession of goods does not present the practical difficulties that are presented by arranging for the buyer to take over the goods: The buyer may reject the goods for breach of contract; carriers normally accept goods for carriage without difficulty and in any event in shipment contracts it is normally the seller's duty to effect the transfer of possession to the carrier. It will be noted that seller's duty under article 20 (1) (a) arises only where "no other place for delivery has been agreed upon...".

The second phrase, "place them at the buyer's disposal" relates to contracts that do not call for carriage of the goods (article 20 (1)(b) and (c)); in such contracts the seller's contractual obligation is performed by placing the goods at the buyer's disposal at the appropriate place. It might be thought that the bracketed expression, in articulating these two obligations, is unnecessarily awkward and detailed. On the other hand, the two expressions remind the reader of the two types of acts that, depending on the nature of the contract, are required of the seller under article 20. On balance, in view of the clarification and simplification which the Working Group brought to this group of sections, it probably would be sufficiently clear, and somewhat simpler, to use the words "deliver the goods" in place of the bracketed language.

Article 23

(ULIS 50, with revisions proposed by Japan) (S.6)

"1. Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage."

Comments:

21. The Working Group at the third session considered various alternatives with respect to the provisions concerning documents appearing in articles 50 and 51 of ULIS. These included: deleting these provisions as unnecessary; revising these provisions; and transferring the provisions to the articles dealing with the seller's obligations as to delivery of the goods (report, annex II, paras. 122-127). The Working Group deferred final action to permit further study of the issues, and requested the representative of Japan, in consultation with the representatives of Australia, India and the United Kingdom, to submit a study on these articles. The representative of Japan submitted a proposed revision of article 50; the substantive provision of this proposal, as set forth in paragraph 1 of the redraft, appears above (the full text of this study appears in annex II to the present report (document A/CN.9/WG.2/WP.16/Add.1)).

22. ULIS devoted a separate section (section II) to the question of documents. However, the only substantive provision in this section is the one sentence in ULIS 50; the balance of the section consists of the incorporation by reference of remedial provisions of other articles of ULIS. Creating a separate section (with separate provisions on remedies for breach which duplicate other remedial provisions) for one short substantive sentence, complicates the structure of the Law and needlessly extends its length.

23. In addition, there is strong basis for the suggestion, made at the third session of the Working Group, that delivery of documents relating to the goods is, in substance, closely connected with delivery of the goods and that these issues should be dealt with together (report, annex II, para. 125). Indeed, in some situations, the only delivery under the contract may be a delivery of documents. This would be true, for example, when the contract relates to goods that are known to be in storage or in the course of shipment, controlled by a document such as

a warehouse receipt or bill of lading, and when the only act of delivery contemplated by the parties is the surrender of the document that controls possession over the goods.

24. The present consolidation sets forth the one substantive provision on documents (as redrafted by the representative of Japan) as article 23. (The Working Group incorporated article 23 of ULIS into article 20.)

25. Alternative places for this provision might be considered. Article 19 might be expanded to include a reference to the seller's obligation to provide documents. This, however, would detract from the simplicity and clarity of this article as envisaged by the Working Group. Another alternative would be to add the above provision as a second paragraph of article 20. However, article 20, as presently drafted, concentrates on the *place* for delivery; adding a paragraph on documents would depart from that theme. Article 21 would provide a more suitable setting, since both paragraphs deal with documents relating to the goods; the general provision on documents could be added as a third paragraph. However, article 21 seems addressed to contracts requiring carriage; documents may be necessary where the seller is not required to despatch the goods by carrier. Hence, adding the above provision to article 21 would, to some extent, detract from its unity. Article 22 is confined to the question of *time*, and hence is not suitable.

26. Consequently, on balance, the most suitable place would appear to be a new article 23. (It will be noted that the above draft on documents deals with both "time and place" and thus may appropriately follow a group of articles some of which deal with "time" and the others with "place".)

SECTION II. REMEDIES FOR FAILURE OF SELLER TO PERFORM HIS OBLIGATIONS AS REGARDS THE DATE AND PLACE OF DELIVERY

Introductory note:

merger of remedy provisions as to date and place

27. The Working Group at its third session decided that the articles of ULIS specifying the buyer's remedies as regards the *date* of delivery (ULIS 26-29) and the articles specifying the buyer's remedies as regards the *place* of delivery (ULIS 30-32) should be consolidated (report, annex II, para. 32).

28. The reasons for this decision included the view that issues concerning the date and the place of delivery were closely related: if goods are delivered at the wrong *place*, the practical problem is to get them to the right *place* and this will ordinarily present a problem of delay (i.e., the *date*). If goods are still in transit on the agreed date, it is possible to state either that (a) on the right *date* the goods are at the wrong *place* (i.e., in transit) or (b) at the later *date* of arrival, the goods are at the right *place* but at the wrong *time*. The differences between (a) and (b), above, seem to reflect differences in expression rather than differences of substance.

For these reasons, the Working Group drafted articles 24, 25, 26 and 27 to state consolidated rules on the buyer's remedies when the breach by the seller relates to *either* the date *or* the place of delivery. As a result, five articles of ULIS (28-32) become unnecessary.

29. The added unity and clarity resulting from consolidating the provisions on the buyer's remedies with respect to the date and place of delivery by the seller may indicate that attention should be given to consolidating the provisions which deal separately with the buyer's remedies regarding other aspects of the seller's performance of the sales contract. Two such proposals will be set forth herein. One proposal would retain two sets of remedial provisions. (See paras. 27-57 and 111-156, *infra*.) The second would provide a unified remedial structure applicable to breach of contract by the seller. (See paras. 158-176, *infra*.)

Article 24 (WG.III)

"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 articles 82 or in articles 84 to 85.]

"3. [In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.]"

Comments

30. The principal function of this article, like that of article 24 of ULIS, is to help the reader find the provisions on remedies that appear in various parts of the Law. Thus, paragraphs 1 and 2 of this article serve as indices, and do not have independent operative effect. Paragraph 1 refers to articles 25-27, which deal with the question of whether breach of contract by the seller with respect to the time or place for delivery authorizes the buyer to refuse to take the goods ("avoid the contract"). Paragraph 2 refers to articles which set forth the damages that may be recovered when the contract is *not* avoided (82) and when the contract is avoided (84-87). Thus, to ascertain the remedies of the buyer in any case it is necessary to consult the provisions of articles 24-27 and also those of articles 82 and 84-87.

31. The manner of presentation parallels that developed by the Working Group for article 41, which serves as an index for the provisions on the buyer's remedies for failure of the goods to conform with the contract.

32. The action taken by the Working Group reflected in article 21, *supra*, includes obligations other than those of the date and place of delivery; i.e., the terms of the contract of carriage and action with respect to insurance. Thus, the phrase in paragraph 1 in article 24 "as regards the date and place of delivery" may be too narrow. Consideration might be given to supplanting this phrase by "under articles 20-23".

33. Paragraph 3 of the redrafted article 24 is the same as ULIS 24 (3). This provision emphasizes that the remedial provisions of this Law, which do not provide for

applications to courts or arbitral tribunals for periods of grace, are not to be modified by provisions of some national laws that do contain such provisions.

Article 25 (WG.III)

"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 requests, 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.]"

Comments

34. As has been noted in the comments to article 24, article 25 defines the circumstance in which the buyer may refuse to take delivery of the goods when the seller fails to deliver the goods on the date or at the place fixed in the contract. The article amalgamates provisions on this subject found in ULIS in article 26 (date) and in article 30 (place).

35. In redrafting these provisions, the Working Group made one important change of substance. ULIS had stated that in several different circumstances the sales contract would be *ipso facto* avoided: that is, the right to continue performance under the contract would come to an end without a declaration by a party that he was "avoiding" the contract. E.g., ULIS arts. 25, 26 (1) and (2), 30 (1) and (2). A study by the Secretary-General of *ipso facto* avoidance in ULIS (A/CN.9/WG.2/WP.9)* was considered by the Working Group at its third session. The Working Group decided that *ipso facto* avoidance should be eliminated from the remedial system of the Law on the ground that it led to uncertainty as regards the rights and obligations of the parties (report, annex II, para. 29). Instead, 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 in force. (*Ibid.*, para. 31.)

36. The change of substance decided by the Working Group can be illustrated by the following example: the seller is late in shipping the goods to the buyer. On their arrival at the port in the buyer's city, the buyer rightfully decided that the delay was so serious that he was justified in refusing to take the goods. (In the language of ULIS, the breach was "fundamental" justifying "avoidance" of the contract.) Under ULIS, the buyer need not inform the seller that he refused to accept the goods. Under the decision and redraft by the Working Group, if the buyer refuses to take the goods he must "by notice to the seller declare the contract avoided". Among the reasons favouring this change in policy is the seller's need to know that he must reship or resell the goods or take other action to prevent their wastage or spoilage.

37. The basic rule implementing this policy is stated in the above redrafted article 26 in paragraph 1: where failure to deliver the goods at the date or place fixed amounts to a fundamental breach of contract, the buyer may either retain the right to performance by the seller "or by notice to the seller declare the contract [avoided]".

38. Square brackets were placed around the word "[avoided]" since the Working Group wished to give further consideration to whether the appropriate word in English might be "terminated" or "cancelled" (report, annex II, para. 38). It is perhaps more common to speak of "avoiding" a contract for grounds (such as fraud) relating to the *making* of the contract; the word "cancel" seems more customary in connexion with actions based on *breach* of the contract.

39. The Working Group's redraft of article 25 includes alternative provisions for the second paragraph. Both are based on ULIS 26 (2) (date) and 30 (2) (place). However, these provisions of ULIS provided for *ipso facto* avoidance; instead, the Working Group's draft provides that when the buyer does not respond to the seller's request seeking information as to whether the buyer will refuse to take the goods, the seller may effect delivery of the goods. The two alternative versions of paragraph 2 were considered by the Working Group.

The Working Group requested the representative of Hungary to prepare a study, for use at its next session, on these two alternatives (report, annex I, para. 8; annex II, paras. 40-41). The study submitted by the representative of Hungary appears as addendum 2 to this report.⁵

40. Paragraph 3 of the Working Group's redraft is based closely on the provisions of ULIS 26 (3) (date) and 30 (3) (place). Under ULIS, as under the redraft, when the goods are delivered to the buyer, the buyer's right to declare the contract avoided must be exercised "promptly". As has been noted (para. *supra*) the seller needs to act to prevent wastage, loss or expense to the goods when the buyer refuses to accept them on delivery;

⁵ This study was received subsequent to the preparation of the present report. Consequently, it has not been possible to discuss the study in the present report.

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 2.

for these reasons the buyer's decision must be communicated "promptly". (See article 11.)⁶

41. It will be noted that the time for the buyer to make a declaration of avoidance begins to run when "the buyer is informed that" the seller has effected delivery. The quoted phrase did not appear in ULIS 26 (3) or 30 (3), but seemed to be appropriate since the buyer's short period for decision should not begin to run until he had the relevant facts on which a decision could be based.

42. Paragraph 4 is derived from ULIS 26 (4) but has been rewritten to describe more fully and accurately the various situations to which this article is addressed: a request to perform the contract followed either by (a) performance or (b) non-performance or (c) a refusal to perform.

Requiring performance; co-ordination with provisions on non-conformity of the goods

43. It will be noted that in para. 1 of article 25, as drafted by the Working Group, when the seller's failure to deliver the goods at the agreed date or place amounts to a fundamental breach of 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]". A similar provision appears in ULIS 26 (1) (place) and 30 (1) (time). However, the Working Group modified the language of ULIS as follows: "the buyer may either [require] retain the right to performance by the seller...". The Drafting Group reported that it deleted the word "require" and substituted the phrase "retain the right to" on the ground that the language of ULIS "(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" (report, annex II, para. 39).

44. The Working Group has taken steps to make the buyer's remedies for non-delivery (articles 24 *et seq.*) consistent with the buyer's remedies for non-conformity of the goods. Such consistency is important to make the structure of the Law intelligible.

45. In addition, consistency between the two sets of remedial provisions is important since the two areas, —non-delivery and non-conformity—overlap. For instance, failure to ship part of the goods could either be regarded as a delay in their delivery or as a non-conforming shipment of "part only of the goods" (ULIS 33 (1) (a)). Furthermore, in terms of the issues at

stake and the remedial needs of the parties, it is difficult to distinguish between (a) shipment of nothing; (b) shipment of empty boxes and (c) shipment of boxes containing goods that are worthless or entirely different from those agreed in the contract. If different remedial provisions may be invoked in the same factual situation, grounds are created for uncertainty and litigation. Consequently, the Working Group may wish to consider establishing a single set of remedies for breach by the seller of the contract of sale. (See paras. 158 *et seq.*, *infra.*) It may be advisable to postpone action on this question until decisions have been taken on the substance of the rules; none the less, at this stage it seems advisable to pay close attention to the compatibility of the two sets of remedial provisions.

46. A step towards further compatibility between the two sets of remedial provisions may be considered in connexion with article 25. As we have seen, this article deals primarily with the circumstances in which the buyer may refuse to take the goods ("declare the contract avoided"); the same issue, in the setting of non-conforming delivery, is dealt with in ULIS 43 and 44. These latter articles (in ULIS and in the Working Group's redrafts) do not attempt to deal with the buyer's right to require performance (i.e., to invoke the remedy of specific performance). Confining these articles to the single issue of avoidance of the contract has been important to reduce the complexity of the law.

47. If the Working Group would decide that the remedial provisions for non-delivery should more closely parallel those for non-conforming delivery, consideration might be given to the following redraft of article 25. The minor modifications in the earlier redraft will be explained immediately following the suggested text.

Article 25

(Alternative A)

"1. Where the failure by the seller to perform his obligations under articles 20-23 amounts to a fundamental breach of the contract, the buyer may be notice to the seller declare the contract avoided.

"2. If the seller requests the buyer to make known his decision as to whether he will take delivery of the goods and the buyer does not comply promptly, the seller may effect delivery. [Finalizing the remaining language on the period within which the buyer may deliver would await consideration of the study by Hungary.]

"3. If, before he has made known to the seller his decision as to whether he will take delivery of the goods, 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. (No change.)"

48. Two changes made by alternative A, above, should be noted: (a) in paragraph 1, the phrase "either retain the right to performance by the seller or" is deleted; (b) in paragraphs 2 and 3, the phrase "his decision as to whether he will take delivery of the goods" is used in place of "his decision under paragraph 1 of this article".

⁶ In article 39, a less rigorous standard—"a reasonable time"—is applicable to notice of the lack of conformity of the goods. Failure to give this notice has drastic consequences: "the buyer shall lose the right to rely on a lack of conformity...". Thus, the buyer would not be able to use his claim that the goods were defective to diminish his liability to pay the price. In contrast, under article 25, if the buyer fails promptly to "declare the contract avoided" the only consequence is that the buyer is obliged to take over the goods: he still may recover from the seller for any breach of contract related to the goods—either from the delay in delivery or from the failure of the goods to conform to the contract.

49. The first of these changes is to simplify the text; is this is done, separate provision would be made for the buyer's right to compel performance. The substance of such a provision would presumably parallel the action taken by the Working Group in connexion with article 42, *infra*, which deals with the same question in the setting of non-conforming deliveries. (See the comments to article 42 at para. 117 *et seq.*)

50. The second change in article 25—referring to the buyer's "decision as to whether he will take delivery of the goods"—seems more consistent with the normal communications of merchants who face a delay in delivery than does a reference to the buyer's "decision under paragraph 1". That decision is whether to "retain the right to performance by the seller or by notice to declare the contract avoided".

51. Indeed, this latter language from paragraph 1 does not describe accurately the buyer's choice, for even if he "declares the contract avoided" he retains the right to recover damages for breach of contract. (As has been noted, the Working Group did not intend to grant the right to require performance (i.e., specific performance), by stating that the buyer retains "the right to performance".)

Article 26 (WG.III)

"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].]"

Comments

52. This article is based closely on the provisions of ULIS 27 (date) and 31 (place), with the parallel provisions on date and place consolidated into one article.

53. With respect to the concluding phrase of paragraph 1, the corresponding language of ULIS 27 and 31 is that the buyer shall "retain the right to require performance by the seller". The Working Group deleted the word "require" for reasons that were set forth in comments to Article 25.

54. The first sentence of paragraph 2 is identical with the first sentence of ULIS 27 (2) and 31 (2). The second sentence makes the necessary stylistic changes involved in merging rules on date and place, and in addition expresses the result of the ULIS provision in a more direct fashion. Under ULIS 27 (2) and 31 (2), if the seller failed to deliver within a reasonable period of time set by the buyer, this failure "shall amount to a fundamental breach of contract". The Working Group draft provides that on such failure "the buyer may by notice to the seller declare the contract [avoided]". The provision thus states what the buyer may do—an approach that seems a more

helpful guide to the parties than speaking, as does ULIS, of a legal conclusion—the "fundamental breach of contract".⁷

Article 27 (WG.III)

"[Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.]"

Comments

55. The above provision is based on the first part of ULIS 29, subject to the following stylistic adjustments: "the buyer may [accept] *take delivery* or [reject] *refuse to take delivery*". The use of the phrases "take delivery" and "refuse to take" delivery are consistent with the decision to conform the provisions on delivery to article 56 of ULIS, which provides that the buyer shall "*take delivery*" of the goods.

56. The Working Group decided not to preserve the closing phrase of ULIS 29 which states that if the buyer "accepts, he may reserve the right to claim damages in accordance with article 82". The phrase "he may reserve" the right to claim damages might be construed to require some formal statement of reservation at the time he takes delivery of the goods; merchants might not be aware that such a formality was required, and thus might lose their rights. It is not necessary to provide that the buyer may recover damages he suffers when the time of delivery is in breach of contract; this is made clear by redrafted article 24 (2), which states: "The buyer may *also* claim damages...".

[Articles 28-32 of ULIS: deleted by Working Group]

57. As has been noted in the introductory note that precedes article 24, paras. 27-29, *supra*, the consolidation by the Working Group of the separate remedial provisions concerning date of delivery and place for delivery effected a saving of five articles of ULIS. Consequently, in this redraft, there are no articles numbered 28 through 32.

SECTION III. CONFORMITY OF THE GOODS [AND RELATED OBLIGATIONS OF THE SELLER]

Article 33 (WG.III) (S.7)

"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 of circumstances or the contract indicate otherwise, the seller shall deliver goods:

"(a) Which are fit for the purposes for which goods

⁷ This more direct manner of expression was facilitated by the deletion of the concept of *ipso facto* avoidance. See comments to article 25, *supra*, at paras. 35-37.

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.]

"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."

Comments

58. The above version of article 33 is the result of redrafting in order to reduce the complexity of article 33 of ULIS and also to bring out more clearly the basic principle that the seller's obligation as to quantity and quality is to be ascertained from the contract between the seller and the buyer. Article 33 of ULIS, in paragraphs (a) to (f), sets forth six specific propositions with respect to conformity of the goods without clearly stating the above basic principle.

59. In the revision prepared by the Working Group, this principle is established in the first paragraph. The style of expression is also designed to express more directly the nature of the seller's legal obligation: "The seller shall deliver goods which are of the quantity and quality and description required by the contract...". (In addition, "shall deliver" was preferred to the wording of article 33 of ULIS ("shall not have fulfilled his obligation to deliver") in order to avoid the possible argument that if the goods do not conform with the contract, no goods have ever been delivered.)

60. The redraft prepared by the Working Group accepts the proposition that the basic question is the obligation established by the contract, either expressly or by implication. Implied expectations are of importance, since it is not normal or feasible for a contract to specify all of the various flaws from which goods shall be free. (E.g., it would not be normal for a contract involving steel beams to state that the beams shall be free of cracks even though that would be a basic expectation of the parties.) However, the draft prepared by the Working Group is designed to express, more clearly than does ULIS 33, the basic idea that quality implied from the contract is to be ascertained in the light of the normal expectations of persons buying goods of *this contract description*. This thought is clearly articulated in subparagraph (a) of the second paragraph (paragraph 1 *bis*) of the Working Group's redraft. It will be noted that subparagraphs (a), (b), and (c) express the central ideas contained in the six subparagraphs of ULIS 33 (1). The fourth subparagraph adds a further obligation which had not been expressed in ULIS—that the goods must be

"contained or packaged in the manner usual for such goods".

61. The third paragraph of the Working Group's draft is the same as ULIS 33 (2) with the exception of a stylistic change in the English version: the expression "clearly insignificant" was substituted for "not material" in the interests of clarity and conformity with the French version (*sans importance*).⁸

Deletion of article 34 of ULIS

62. The Working Group decided that article 34 of ULIS should be deleted (report, annexe I, para. 12, and annex II, paras. 56-61).

63. This decision did not indicate disagreement with the objective of this article. That objective presumably was to protect the uniformity of the Law by prohibiting recourse to other remedies provided under some national rules that would be different than those established by the present Law for failure to perform the contract of sale. The Working Group found, however, that this objective had not been clearly expressed. The expression "exclude all other remedies based on lack of conformity of the goods" seemed so broad as to exclude remedies to which the parties had agreed in the contract.

64. It is also doubtful whether a provision like article 34 was needed. There will be varying national rules on most of the provisions covered by the Uniform Law; these, of course, are displaced by virtue of the general obligation to give effect to the Uniform Law. In addition, this obligation has been reinforced by the Working Group's revision of article 17 which specifically directs attention to the international character of the law and the need to promote uniformity in its interpretation and application. It is, of course, impractical to repeat that inconsistent national laws are displaced in connexion with each of the rules of the Uniform Law; inserting such a statement in isolated instances could lead to misunderstanding.

⁸ The question has been raised as to the purpose of a provision like ULIS 33 (2). If the seller's performance deviates in a very slight, but measurable, degree from the performance required under the contract, would this provision deny the buyer the right to make a claim (or reduce the price) for a corresponding small amount? One possible explanation of the provision is to prevent the buyer from refusing to take the goods ("avoid the contract") when a breach is trivial. Refusal to take the goods can entail substantial expenses in reshipping and redispensing of goods—and thus may not be justified when the breach is insignificant, although a small reduction of the price would be justified. Under ULIS, the definition of seller's duty is linked with the buyer's right to refuse to take the goods ("avoid the contract"). Under ULIS 44 (2), if the buyer fixes an additional period of time of reasonable length for the delivery of conforming goods, and the seller does not comply, the buyer may declare the contract avoided; the failure of conformity apparently need not be a "fundamental" breach. Thus, in the absence of a provision like ULIS 33 (2), refusal to take the goods ("avoidance of the contract") might theoretically be based on a trivial breach of contract. If ULIS 44 (2) should be modified to restrict the right to avoid the contract where the non-conformity is "not material" or "without significance" it might be possible to delete paragraph 2 of article 33. See the further discussion to this effect in the comments to articles 43 and 44 at para. 138-140, *infra*.

* The report of the third session erroneously used the word "buyer" instead of "seller".

Article 35 (WG.III) (S.8)

"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.]"

Comments

65. The first sentence of article 35 (1), as prepared by the Working Group, is the same as in ULIS. The purpose of the provision is to avoid confusion in dealing with the following common situation: let us assume that under the sales contract (or under the rules in chapter VI of ULIS) the buyer bears the risk of loss during transit. (E.g., the sale is "f.o.b. Seller's City".) The seller dispatches goods that comply with the contract: i.e., "No. 1 cane sugar". However, during transit the goods are damaged by water so that they no longer meet the contract specification as "No. 1"; in addition, we may assume that the goods, on arrival, would fail to meet various requirements of article 33 regarding conformity of the goods. Does the condition of the sugar on arrival give the buyer a claim for lack of conformity with the contract? The answer, of course, is no. The goods did comply with the contract at the time that the risk of loss passed to the buyer; the buyer's responsibility for deterioration after that point is the necessary consequence of the provisions of the contract (or of the law) as to risk of loss. Although the above principle may appear self-evident, it has seemed useful in the interest of clarity to state the principle explicitly.

66. The second sentence of ULIS article 35 (1) was occasioned by complex provisions of chapter VI of ULIS (articles 96-101) concerning the effect of non-conformity of the goods on the transfer of risk. See especially ULIS 97 (2). The Working Group concluded that the substance of this provision of article 35 (1) could not be considered until the rules on risk of loss had finalized (report, annex I, para. 13; annex II, para. 63).

67. ULIS 35 (2) carves an exception from the basic principle of the first paragraph that conformity of the goods is to be determined by their condition when risk passes. The Working Group, however, concluded that the provision was drawn too narrowly to take account of express contractual provisions that are widely used: i.e., contractual guarantees that the goods shall remain fit or shall perform for a specified period after delivery (e.g., for three years, 10,000 miles, or the like). The language of ULIS 35 (2) used very restrictive language in dealing with this problem: the seller would be liable only if the consequence of the lack of conformity "was due to an act of the seller or of a person for whose conduct he is responsible". This language is, of course, too narrow to cover the case of a machine, guaranteed for three years,

that breaks down at the end of one year. Theoretically, one might argue that in such cases where the seller is liable, there must have been a flaw latent in the machine at the time of delivery. But the existence of such a latent flaw is difficult to prove, and need not be proved under a contract that guarantees performance for a period of time. For such reasons the Working Group proposed deletion of the concluding language of paragraph narrowing the seller's liability to "acts" done by the seller or his agents.

68. It has been suggested that the redrafted language of paragraph 2 still does not give full effect to contractual guarantees of continued performance, since this provision (following ULIS) speaks only of the "consequences of any lack of conformity": this language might still require that the defect of flaw be shown to exist at the time of delivery. A member of the Working Group has submitted a study on various aspects of the problem of guarantees. See addendum 1 to this report at annex I. For reasons set forth therein, it was proposed that paragraph 2 of article 35 should read as follows:

"The seller shall be liable for any lack of conformity occurring after the time fixed in paragraph 1 of this Article, if it constitutes a breach of an express undertaking of the seller whereby the goods have been guaranteed to remain fit for ordinary or particular purpose or to retain its specified qualities or characteristics for a certain period of time whether expressed in terms of a specific period of time or otherwise."

69. One might ask why it is necessary to include a special statutory provision stating (in effect) that the seller shall be liable for breach of a specific and defined type of promise in the sales agreement. All of the various promises made in sales contracts cannot be identified and implemented in separate and specific provisions of the Law. Would it not be enough to rely on a basic rule that the parties shall perform all the promises they make as part of an international sales contract? Such a rule might be a sufficient basis for enforcement of guarantees of performance, even though the breach relates to conditions that develop after risk passes. See ULIS 35 (1).

70. The problem is that, surprisingly, it is difficult to find in ULIS such a general rule giving effect to the agreement of the parties. Various provisions approach such a principle, but a general rule requiring performance of all the promises of the sales agreement is not explicitly stated in ULIS. For example, the rules of ULIS on conformity (quality) of the goods are stated in terms of "delivery" of the goods—the feature that raises the question as to guarantees of performance subsequent to delivery. The general provision of Article 18 is similarly limited: "The seller shall effect delivery . . . as required by the contract and the present Law."

71. The provision of ULIS that has the most general significance in giving effect to the sales agreement is article 3. However, in ULIS (as contrasted with the Working Group draft) this article speaks only of freedom "to exclude the application" of the Law either entirely or partially. This falls short of giving positive enforcement

to the promises made in the contract.⁹ The revision of this language effected in December 1970 at the second session of the Working Group alleviates this difficulty (see report on second session, A/CN.9/52, paras. 44-46 *). The language of ULIS 3 was redrafted (as article 5) to provide that the parties may not only "exclude" the application of the Law, but may also "derogate from or vary the effect of any of its provisions". This language seems more clearly to express the probable intent of ULIS—that the agreement of the parties is to be given full effect as a source of affirmative legal obligations; the rules of the Law are supplementary and yield to the agreement.

72. The need for specific statutory provisions giving effect to contractual guarantees of performance (and to various other types of promises that may be part of the agreement) has been diminished by the Working Group's revision of ULIS 3. However, in view of the importance of contractual guarantees, and the explicit provision in article 35 (1) that conformity of the goods is to be determined as of the time when risk passes, it may be helpful to have an explicit provision along the lines of the proposed substitute for paragraph 2 of article 35, quoted in paragraph 68, *supra*.

Article 36 (ULIS) (S.9)

"[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.]"

Comments

73. The above provision is the same as ULIS 36. It will be noted that this provision is closely linked to article 33, and operates as an exception or supplement to three subparagraphs ((d), (e) and (f)) of ULIS 33 (1). Consequently, the Working Group concluded that the drafting of this article could not be finalized until a final decision is taken concerning article 33 (report, annex II, para. 67).

74. It may be helpful to consider why this article of ULIS applies to subparagraphs (d), (e) and (f) of ULIS 33 (1), and does not apply to subparagraphs (a), (b) and (c). The theory may be as follows: the buyer's knowledge of defects in the goods may modify the implied obligations, based on normal expectations, but not the promises on undertakings by the seller that relate to this specific transaction.

75. It will be recalled that the redraft of article 33, as prepared by the Working Group, established in paragraph 1 a general rule giving effect to the "quantity and quality and description required by the contract". A

second paragraph (designated 1 *bis*) was designed to articulate the expectations that are normal, but which may not be expressly stated in the contract (see comments to article 33, *supra*).

76. Subparagraphs (d) and (e) of ULIS 33 (1) correspond, in substance, to subparagraphs (a) and (b) of paragraph 1 *bis* as redrafted by the Working Group. Subparagraph (f) of ULIS 33 (1) does not appear in the redraft. Consequently, if the redraft of article 33 is finally adopted by the Working Group, the corresponding references in article 36 would be to "subparagraphs (a) and (b) of paragraph [1 *bis*] of article 33".

77. Article 36 states that the seller "shall not be liable for the consequences of any lack of conformity" under specified provisions of article 33. The quoted language may present problems of interpretation. This article probably intends to provide that characteristics of the goods of which the buyer was aware would not constitute a lack of conformity. However, the quoted language of article 36 might be construed to mean that the buyer has a claim for lack of conformity, but not for the "consequences" thereof—such as damage which these goods might cause to other goods, or to the business relations of the buyer. If the Working Group wishes to clarify this aspect of the drafting of article 36, it might consider language such as the following:

"Facts regarding the goods which, at the time of the conclusion of the contract; the buyer knew or could not have been unaware of, shall not constitute a lack of conformity under subparagraphs . . ."

Article 37 (WG.III) (S.10)

"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."

Comments

78. The above article, as approved by the Working Group, is the same as ULIS 37, except for the following two modifications:

(a) ULIS 37, in the opening phrase, referred to "the date fixed for delivery". The word "fixed" was deleted since it might be construed to limit the provision to contracts in which the delivery date is specifically stated in the contract.

(b) The second sentence was added to make it clear that if early delivery, in violation of the contract, causes the buyer any damages, the buyer can recover these damages from the seller, although damages may not be so "unreasonable" as to justify the buyer in refusing to take the goods.

* UNCITRAL Yearbook, vol. II: 1971, part two, I, A, 2.

⁹ The problem is not solved by ULIS 55 (1), since this provision in section IV may be construed to implement the obligations established by that section. It is the lack of a clear substantive obligation to perform the contract that presents the difficulty.

Article 38 (WG.III) (S.11)

"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.]

Comments

79. Article 38, in specifying the time when the buyer shall examine the goods, is prefatory to article 39, which requires a buyer to notify the seller of a lack of conformity within a reasonable time after he has discovered, or *ought to have discovered* the lack of conformity. Under article 39, if the buyer fails to notify the seller within the required time, the consequences are severe: the buyer shall "lose the right to rely on" the lack of conformity. The rules of article 38, on the time for inspection, start the running of the notice period, and are of considerable importance.

80. The Working Group at its first session concluded that paragraphs 2 and 3 of ULIS 38 required the buyer to inspect the goods under circumstances in which examination often might be impractical or inconvenient. The problems were particularly serious when the buyer redispaches goods to his customer, and the goods are packed in a manner that would make it impractical to open the containers before they reach their final destination. The Working Group consequently redrafted the article to make the rules on inspection more flexible (report on first session, A/CN.9/35, paras. 109-111 *). The Working Group at its third session reiterated its approval of this redraft of paragraphs 1, 2 and 3 of Article 38 (report on third session, annex I, para. 19; annex II, paras. 70-71).

81. Paragraph 4 states that, in the absence of agreement, the methods of examination shall be governed "by the law on usage of the place where the examination is to be effected". One representative suggested that the methods of examination should be governed "by the law and usages of the seller". The Working Group at its third session decided to defer action on the fourth paragraph until its next session (report, annex II, paras. 72-73).

82. In considering paragraph 4, attention may be drawn to The Hague Convention of 1955 on the Law Applicable to International Sales of Goods.¹⁰ Article 3 establishes, in paragraph 1, a general rule pointing to

"the domestic law of the country in which the vendor has his habitual residence at the time he receives the order"; paragraph 2, in certain cases, points to "the domestic law of the country in which the purchaser has his habitual residence . . .". However, article 4 states more specific rules governing, *inter alia*, "the form in which . . . the inspection of the goods . . . is to take place . . .". It will be noted that this rule is somewhat similar to that of ULIS 38 (4).

83. As has been noted in comment 2, above, the Working Group found that the rules on the place of examination needed to be flexible to take account of the fact that, in many situations, the buyer needs promptly to reship the goods in their original containers. The place where it would be feasible to open the goods for inspection may not be known at the time of the making of the contract and may depend on the circumstances that develop in the course of the buyer's handling and resale of the goods. Except where the goods present a threat to safety or to health, the Government of the place where the inspection takes place has little concern with the method of examination; in many places there probably are no established rules governing "the methods of examination" for most commodities. In such circumstances, the methods of inspection would be determined by the expectations of the parties in the light of the practicalities of the transaction in question and the usages of trade for such goods—rather than the usages of the place of inspection (see ULIS 9). It is doubtful whether any general provision pointing to the place of inspection as determinative of the methods of inspection would be consistent in all cases with the expectations of the parties or with commercial practices. It might not be necessary or advisable to attempt to lay down a general rule on which law (or usage) governs the methods of inspection. If the Working Group agrees with this line of thought, paragraph 4 could be deleted.

Article 39 (WG.III) (S.12)

"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."

* UNCITRAL Yearbook, vol. I: 1968-1970, part three, I, A, 2.

¹⁰ See *Register of Texts of Conventions and Other Instruments Concerning International Trade Law*, Volume I, chap. I, 1 (United Nations publication, Sales No. E.71.V.3).

Comments

84. Under this article, the buyer will lose the right to rely on a lack of conformity of the goods if he fails to give the seller the required notice of the lack of conformity. This provision is distinct from rules on prescription (limitation). Rules on prescription set outer limits for instituting a legal proceeding before a tribunal. The present article requires a notice to the other party; on failure to give a required notice the buyer loses the right to rely on the lack of conformity. The notices required under this article may serve various purposes: (i) When the seller learns that the buyer is dissatisfied with the goods, the seller is afforded the opportunity to substitute conforming goods or otherwise to "cure" the defect (cf. ULIS 37, 43 and 44 (1)); (ii) On receiving such a notice the seller has the opportunity to preserve evidence of the quality of the goods.

85. Paragraph 1 of the above article, as approved by the Working Group at its third session, is the same as ULIS, with one exception: in paragraph 1, "within a reasonable time" was substituted for "promptly". Failure to give the notice required by this article is serious: the buyer may not rely on the non-conformity and must pay the full price for goods he considers to be defective. The term "promptly" was thought to set too rigorous a standard (see ULIS 9, redrafted by the Working Group as article 11). On the other hand, the Working Group concluded that the expression "within a reasonable time" was sufficiently flexible to adapt to the varying circumstances in which inspection might be required (see report, annex II, paras. 74-78).

86. ULIS 39 (1) closes with a sentence that sets an outer limit of two years for the giving of notice; if the defect is discovered more than two years after delivery, the buyer cannot rely on the lack of conformity. However, the two-year requirement is subject to an exception: "... unless the lack of conformity constituted a breach of a guarantee covering a longer period". To illustrate: the seller guarantees that a machine will perform for four years, and a defect is discovered during the fourth year. Under the quoted provision, the two-year cut-off period would not apply, and the buyer would be required to give notice to the seller "within a reasonable time after he discovered the lack of conformity or ought to have discovered it".¹²

87. A study submitted by a member of the Working Group (A/CN.9/WG.2/WP.16/Add.1, annex I) proposes that the "unless" clause at the end of paragraph 1 be replaced the following sentence:

¹² The "unless" clause of ULIS 39 (1) might be read as follows: if the contract guarantees performance for four years, the notice must be given within the four-year period. However, this reading does not seem to be required by the language of ULIS 39 (1) and could produce unreasonable results if the defect comes to light at the very end of the guarantee period. Of course in practical operation the exact provisions of the contractual guarantee would be important. E.g., does the guarantee in the contract (a) simply guarantee performance throughout the guarantee period, or (b) does it also specify that the guarantee is effective only if notice is given during the period? In the latter case, the decisive issue might be the power of the parties by agreement to modify the notice period set forth in the Law.

"If a lack of conformity of the goods constituted a breach of a guarantee referred to in paragraph 2 of article 35, the buyer shall lose the right to rely on such lack of conformity if he has not given notice thereof to the seller within [30] days upon expiration of the period of guarantee [provided the lack of conformity was discovered during that period]."

If the approach of the foregoing language is employed, consideration might be given to its application in the following situation: the contract guarantees that a machine will perform for four years. A defect appears as soon as the machine is delivered. Is the period for notice: (a) a reasonable time after discovery of the lack of conformity or (b) four years and thirty days after delivery? Result (a) seems reasonable and probably was intended. If so, it may be appropriate to make sure that this intent is clearly expressed.¹³

88. It will be noted that the outer limit of two years on giving notice established by ULIS 39 (1) creates complex problems of drafting to accommodate the provisions of guarantees of performance. This cut-off period of two years may also conflict with the policy of article 10 of the Draft Convention on Prescription (Limitation) in the International Sale of Goods, as adopted by UNCITRAL at its fifth session. Article 10 (2) states:

"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."¹⁴

It will be noted that the policy underlying this article is to assure that the buyer will have an opportunity to exercise his claim from the date on which "the defect or lack of conformity is or could reasonably be discovered"—subject to a cut-off period of *eight* years from the time when the goods are handed over to the buyer.

89. ULIS 39 specifies the time for giving notice to the seller while the Convention on Prescription deals essentially with the time allowed for asserting a claim before a tribunal. The issues presented by these laws are technically distinct, but it is difficult to reconcile the policies underlying these provisions. For example, let us

¹³ Compare the language of article 10 (3) of the draft convention on prescription (limitation) in the international sale of goods: the limitation period "... 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 the date of the expiration of the period of the undertaking". (UNCITRAL, report on fifth session (1972) (A/8717), para. 21; UNCITRAL Yearbook, vol. III: 1972, part one, II, A).

¹⁴ *Ibid.* Article 10 reflects changes made by the Commission in the draft prepared by the Working Group on Time-Limits and Limitations (Prescription) (see A/CN.9/70, annex I, art. 9; UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 2) and commentary on this draft in A/CN.9/70/Add.1 (commentary on art. 9 at paras. 6-7). The commentary on the draft convention approved by the Commission appears as document A/CN.9/73 (UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

assume that defects in a machine come to light for the first time three years after delivery. Article 10 of the Convention on Prescription expresses the policy that the buyer should have an opportunity to exercise his claim. However, pursuant to ULIS 39 (1) the buyer's opportunity to exercise his claim would be illusory, since he cannot give the required notice to the seller and consequently may not rely on the lack of conformity.

90. If the Working Group decides that the law on sales should not conflict with the policies established by the Commission in preparing the convention on prescription, the following approaches may be considered: (a) redrafting the last sentence of ULIS 39 (1) to conform to the approach of article 10 of the Convention on Prescription (e.g. by changing "two years" to "eight years"); (b) deletion of the last sentence of ULIS 39 (1). There may be merit in leaving cut-off periods, expressed in fixed periods of years, to the Convention on Prescription; indeed, the insertion of a two-year cut-off period in ULIS 39 (1) may have been influenced by the lack of uniform rules on prescription¹⁴—a lack that has been remedied by the Commission's approval of a draft Convention on this subject. Deletion of the last sentence of article 39 (1) of ULIS would, of course, leave unimpaired the requirement that the buyer must give the seller notice of a lack of conformity "within a reasonable time after he has discovered the lack of conformity or ought to have discovered it".

91. Paragraph 2 of the draft approved by the Working Group is the same as ULIS 39 (2), except that the Working Group deleted the concluding phrase "and invite the seller to examine the goods or to cause them to be examined by his agent". Such an "invitation" was required in every case of non-conformity. Apparently, if this part of the notice should be omitted, the buyer would lose his right to rely on the lack of conformity. The Working Group concluded that such an "invitation", as a necessary and invariable part of a notice of non-conformity, was not supported by commercial practice (report on third session, annex II, para. 79). Notices of non-conformity are often sent by merchants in an informal manner and without legal advice concerning applicable formalities. Consequently, requiring an "invitation" in each notice could serve as a technical trap leading to the loss of substantial rights.

Article 40 (ULIS) (S.13)

"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.)"

Comment

92. The above language is the same as in ULIS, and was adopted by the Working Group without change.

This article relaxes the notice requirements of articles 38 and 39 where the lack of conformity relates to facts which the seller knew (or of which he could not have been unaware) and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

Note: location of substantive provision on transfer of property; possible further consolidation of the remedial provisions of ULIS

93. ULIS sets forth six separate sets of remedial provisions. Thus, separate remedial provisions are provided for the following substantive obligations: (1) date of delivery (arts. 26-29); (2) place of delivery (arts. 30-32); (3) lack of conformity (arts. 41-49); (4) handing over documents (art. 51); (5) transfer of property (arts. 52-53); (6) other obligations of the seller (art. 55).

94. The Working Group, at its third session, merged the first two of the above sets or provisions: (1) date of delivery and (2) place of delivery. (The reasons were summarized in the introductory note that precedes article 24, at paras. 27-29 *supra*.) This step seems to have produced considerable gains in clarity and unity, as well as brevity (five articles, 28-32, become unnecessary). There remains this question: can this consolidation be carried further?

95. The Working Group may wish to consider consolidating all six of the above sets of remedial provisions. However, it seems premature to present this issue for decision until the substantive provisions on the obligations of the seller, and the various remedial provisions, can be viewed as a whole. Consequently, this study has reproduced, above, the remedial provisions (articles 24-27) for breach by the seller of his obligations as to date and place of delivery. These separate provisions could either be retained by the Working Group or consolidated into a single unified set of remedial provisions, as will be suggested below at paras. 158-176 *infra*.

96. However, it does not seem feasible to postpone the question of consolidation of the remaining remedial provisions for breach by the seller. As was noted in para. 93, *supra*, these remedial provisions are: (3) lack of conformity (arts. 41-49); (4) handing over documents (art. 51); (5) transfer of property (arts. 52-53); and (6) other obligations of the seller (art. 55).

97. The issue has, in part, been foreshadowed by the suggestion, referred to above in paragraph 21, that the substantive provision on delivery of documents relating to goods (article 50), as submitted by a member of the Working Group, should be placed with the articles on delivery of goods as article 23. See the comments to article 23 at paras. 21-26. This location for a single substantive provision of one sentence would make unnecessary an entire section of the law (section II) and the separate remedial provisions in group (4), *supra*.

98. Such consolidation seems also foreshadowed by the decision of the Working Group at the third session that all of the substantive provisions to which the remedial provisions in group (6), *supra*, are attached should also be transferred to an integrated group of sections on

¹⁴ Under some national rules, the period of prescription may be very long; periods of 10, 20, and even 30 years have been encountered.

delivery of the goods. Under this decision, the provisions of article 54, on the contractual arrangements the seller should make when he despatches goods to the buyer, will appear as article 21. See the comments to article 21, *supra*, at paras. 17-18.

99. There remains for consideration only the remedial provisions in group (5), *supra*; transfer of property (arts. 52-53). Comments made by members of the Working Group support the view that there is a close relationship between the seller's obligation to deliver conforming goods and his obligations that the buyer will be able to keep and enjoy the goods. Indeed, it is difficult to find grounds for separate and different treatment of remedies for (i) the delivery of empty boxes—or of goods that are worthless and (ii) the delivery of goods that the buyer cannot keep because they are owned by a third person.

100. For these reasons, articles 41-48, on remedies for non-conformity of the goods, do not appear at this point in the Study, and are deferred until after the provisions on the seller's substantive obligations have been presented. Actually, these remaining substantive provisions prove to be only one article: article 52 on transfer of property.

101. The structure of ULIS, which has been widely criticized as complex and repetitive, would thereby be simplified. An important group of substantive provisions would be brought together. These rules on what the seller *shall do* are the provisions which are of prime interest to merchants; freeing these rules of the complexities of repetitive remedial provisions makes the Law more comprehensible to those who most need clear guidance. Such consolidation of repetitive provisions will also shorten the Law—a result to which the Working Group has already contributed by its consolidation of the provisions on remedies concerning date and place of delivery. See the introductory note that precedes article 24 at paras. 27-29, *supra*.

102. The following will explain the gap in numbering between articles 40 and 52:

(a) *Articles 41-48*: follow article 52, for reasons set forth in preceding comments at paras. 93-101.

(b) *Article 49*: deleted by the Working Group in response to a decision by UNCITRAL (report of the Commission on its third session). A/8017, para. 34 (UNCITRAL, Yearbook, vol. I: 1968-1970, part two, III, A); report on third session, annex I, para. 31.

(c) *Article 50*: revised and transferred to article 23. See paragraphs 21-26 and 97.

(d) *Article 51*: separate provisions on remedies for failure to hand over documents would no longer be necessary if the substantive provisions of article 50 become part of rules of section I: Delivery of goods. See paragraph 97, *supra*.

Article 52 (Revised to state affirmatively the seller's substantive obligation) (S.14)

"[1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.]

[2. "(For the text of a second paragraph that might be added, see para. 108, *infra*.)"]

Comments

103. Article 52 of ULIS has been subject to substantial criticism (Working Group, report on third session, annex II, paras. 128-138; A/CN.9/WG.2/WP.10, paras. 71-76,* and Add.1 and annex XIV). The Working Group at the third session deferred action on these articles.

104. A problem which calls for attention at the outset is the failure of article 52 to state a general rule or principle with respect to the obligation of the seller to deliver goods that are free of rights or claims of third persons. Instead of stating the seller's obligation, article 52 commences by stating an obligation by the *buyer* (the wronged person) to *notify* the seller and to make specified requests. The rules of article 52 of ULIS are addressed to either (a) compliance with a request (para. 2) and (b) failure to comply with a request (para. 3). This approach, in spite of its complexity, proves to be incomplete, since in some circumstances no request need be made. Thus, under article 52 (1), the request need not be made if "the seller already knows" of the right or claim of the third person—a circumstance that would seem to be common when the goods are subject to such a right or claim. ULIS provides no explicit rule (or remedy) for such cases, and it is difficult to imply a rule since the Law does not lay down a general rule or principle that the goods shall be free of rights or claims of third persons. It seems clear that this gap in the Law should be corrected.¹⁵ Paragraph 1 of the above redraft is designed to set forth a general principle that is consistent with what the drafters of ULIS probably meant to express.

105. The next problem that requires attention is that of the purpose and effect of the request procedures in article 52. Analysis of the language exposes the following puzzling feature. Although the buyer's rights seem to depend on his making a specified request, such a request (unlike the notice of non-conformity of the goods under articles 28-39) need not be made "promptly", with a "reasonable time", or within any time requirement. There probably are good reasons for not imposing a time requirement for such a request.¹⁶ However, without such a time requirement it is difficult to grasp the substance of the requirement that the buyer "shall notify" the seller. If the buyer sues for damages because of a right or claim of a third person, and the seller states that the claim is

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 3.

¹⁵ A draft provision that seems to have been addressed to this problem is introduced at the third session of the Working Group. See report, annex II, para. 137.

¹⁶ It will be recalled that under ULIS 39 the "buyer shall lose his right to rely on" the defect in the seller's performance unless he has notified the seller of the defect "within a reasonable time". Some of the important reasons requiring notice of defects in goods (such as preserving samples of the goods for future litigation) do not apply to an outstanding right or claim. To deprive the buyer of all rights based on this section—so he would be compelled to pay for goods which he could not retain because of a third person's right—would seem harsh in relation to the seller's need for notice.

defective since no request was made, the buyer could thereupon make the required "request" and (under modern procedural arrangements) could amend the pleadings to allege the missing fact.

106. In searching for the function of the notice and request by the buyer to the seller described in article 52, one might suppose that such a notice and request would put the seller on notice that he must remedy the defect or else be subject to avoidance of the contract. This *Nachfrist* principle is used in other parts of ULIS to provide definiteness for the ambiguous test of "fundamental breach"—a test that generally must be satisfied if the contract is to be avoided. Thus, failure by the seller to comply with a reasonable period of time set by the buyer gives the buyer the right to avoid the contract—where the seller is in default as regards date (ULIS 27 (2)), place (ULIS 31 (2)) or conformity of the goods (ULIS 44 (2)). However, the request specified in ULIS 52 does not perform this clarifying function. Under paragraph 3, the buyer may declare the contract avoided 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 . . .". Unlike the above-cited provisions of articles 27 (2), 21 (2) and 44 (2), the failure of the seller to comply with the request specified in the statute *does not* establish the buyer's right to declare the contract avoided, and rights of the parties would depend on the application of the general definition of "fundamental breach" (article 10).

107. The complex rules of article 52, on analysis, seem to boil down to little substance, although they present large opportunities for confusion and litigation. It seems preferable to state the seller's obligation to deliver goods that are free from rights or claims in general and positive terms, and to have recourse to the general remedial provisions when this obligation is broken. Under the remedy provisions which follow, the failure of seller to perform his obligation under article 51 would (under article 41) give the buyer the right to recover damages. If the buyer fixes a reasonable time within which the seller is requested to free the goods of the outstanding right or claim, failure by the seller to cure this default would amount to a fundamental breach of contract empowering the buyer to declare that contract avoided (articles 43-44 (R.3)).

108. The above discussion suggests advantages in confining the rules on the subject to a short, general statement of the seller's obligation—an obligation which would be implemented by consolidated and unified provisions on remedies. However, it might be thought that "request" provisions comparable to those appearing in ULIS article 52 should be retained. (For reasons indicated at para. 104, above, it seems essential to recast article 52 to state a general obligation by the seller that the goods shall be free from the rights or claims of third persons, and thereby close the gap which now exists in article 52 for situations where no "request" is required since the seller already knows of the third party's right or claim.) The substance of the "request" provisions of article 52 would be preserved by a second paragraph which might read as follows:

Possible addition to redraft of article 52 (S.14)

"2. Unless the seller already knows of the right or claim of the third person, the buyer shall notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract."

109. It is not easy to recast the "request" provision of article 52 into acceptable form. The first sentence, based on the present language of article 52, preserves the difficulties that underly that language: what is the operative effect of the request provision? (In other words, what happens if there is no request? See para. 105 *supra*.) The second sentence of the redrafted second paragraph, above, would specify a significant consequence of the making, and failure to respond, to a request for "cure" of the defect: the failure constitutes a fundamental breach and this would empower the buyer to avoid the contract.

110. The following points need to be noted: (1) the suggested second sentence would modify the rule as it now stands in article 52 (see para. 106, *supra*); (2) making this change would bring the article into conformity with other parts of ULIS (articles 27 (2), 31 (2) and 44 (2)—the *Nachfrist* principle) whereby failure to comply with such a request constitutes fundamental breach of contract; (3) the rule of ULIS 52 that the buyer must, even in cases of fundamental breach, specifically offer the seller the opportunity to cure the defect, before avoiding the contract, is preserved in the above redraft; this rule, however, is inconsistent with the protection given the buyer where the goods are non-conforming.

SECTION IV. REMEDIES FOR FAILURE OF SELLER TO PERFORM HIS OBLIGATIONS AS REGARDS CONFORMITY OF THE GOODS, PROPERTY AND RELATED MATTERS

Introductory note

111. The Working Group at its third session considered, and redrafted portions of, articles 41-49 of ULIS. This group of articles appeared in ULIS as section 1-2-C: *Remedies for lack of conformity*. For reasons that have already been set forth (paras. 27-29, 44, *supra*), it appears that the Working Group would wish to consider applying this set of remedial provisions to the substantive obligations of the seller that have not been transferred to section I on delivery of the goods. As a result of rearrangements by the Working Group at its third session, and related rearrangements, the remedial provisions of article 41 *et seq.* need take account of only one additional substantive provision—that of ULIS 52 on transfer of property.

112. This step involves placing articles 41 *et seq.* after article 52. To facilitate comparison with the original provisions of ULIS, the articles have not been renumbered. However, following the number of the article based on ULIS, these remedial provisions are given a second identifying number: (R.1), (R.2), etc.

Article 41 (WG.III) (R.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:

"(a) Exercise the rights provided in articles 42 to 46;

"(b) Claim damages as provided in article 82 or articles 84 to 87."

Comments

113. The above provision was drafted at the third session of the Working Group (report on third session, annex I, para. 24; annex II, paras. 82-85). Like ULIS 41, this provision serves as an "index" to other articles and shows the relationship between the different type of remedies.

114. The redrafted provision closely parallels the redrafted version of article 24, which indexes the remedies with respect to the date and place of delivery. (See the comments to article 24, *supra*.)

115. If the Working Group decides to include the provision on seller's obligation to deliver goods that are free of the rights and claims of third persons (article 52) with the provisions on delivery of goods that conform as to quality, it would seem advisable to broaden the language of the opening phrase. Consideration might be given to the following:

"[1] Where the seller fails to perform his obligations under articles 33 (S.7) to ... (S.14),¹⁷ the buyer may ...".

116. It will be noted that the above language does not refer to the notice requirement prescribed by article 39. The language which the Working Group borrowed from ULIS 41 seems to imply that notice must be given in every case, whereas article 40 specifies circumstances in which notice is dispensed with. It may be doubted whether the general rules on remedies need to (or can) refer to all the rules that control the buyer's right of recovery. However, if it should be concluded that special reference to the provisions on notice should be made, a second paragraph could be added:

"2. The exercise of such rights and claims is subject to the requirements of articles 39 to 40¹⁸ with respect to the giving of notice to the seller."

Article 42 (WG.III) (R.2)

"The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law."

¹⁷ If the Working Group should decide to further broaden the scope of the provisions on remedies, the references to specific articles could be replaced by "in accordance with the contract and the present Law".

¹⁸ It is assumed that the right to claim damages for failure to provide good title (article 52) is not cut off by failure to give notice. See para. 105, above, and foot-note thereto.

Comments

117. ULIS 42 (1) (a) (b) and (c) specified three situations in which the "buyer may require the seller to perform the contract". This provision of ULIS deals with this question: shall a court *compel* specific performance by the seller—as contrasted with prescribing damages to compensate the buyer for non-performance.

118. At the third session of the Working Group, several representatives expressed the view that article 42 of ULIS unnecessarily limited the right of specific performance; it was also suggested that this article was unnecessarily complex (report on third session, annex II, para. 88).

119. It should also be noted that ULIS 42, as well as the other provisions of ULIS on the right "to require" performance (e.g., ULIS 26, 27, 30, 34, 61 and 62), is subject to an important qualification. ULIS 16 draws attention to Article VII of the Convention of 1964 to which the Uniform Law is attached. Article VII of the Convention provides that where, under the Uniform Law, one party "is entitled to require performance" by the other:

"... a court shall *not be bound* to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of *similar contracts of sale not governed by the Uniform Law*."

120. As a result, several complex provisions of ULIS that purport to grant the right to require performance (articles 26, 27, 30, 31, 42, 61 and 62) and also to limit that right (article 25) all come to little more than this: the "right" to require performance under ULIS is subject to the rules of the *forum* to which the action is brought.¹⁹

121. The complexity of the detailed rules of ULIS on the "right to require" performance led the Working Group to delete such provisions from the articles 24-27 on the date and place for delivery. Instead, as has been noted in the comments to article 25, the drafts prepared at the Working Group's third session use the expression "retain the right to performance of the contract". This same language is employed in the above simplified version of article 42. This revised language was not intended by the Drafting Party to deal with the question whether the court should compel specific performance. (Report on third session, annex II, para. 39.)

122. The statement in revised article 42 that the "buyer shall retain the right to performance of the contract" may present problems of interpretation, particularly in relation to the further statement: "unless he has declared the contract avoided under this Law". Under

¹⁹ Technically, the rule is more complex: The uniform Law provides a "right" to require performance, but a court "shall not be bound to enter or enforce" such a judgement except in accordance with its domestic rules. In practical result this means that the *right* of specific performance is not greater than that provided under national law. In some circumstances ULIS may restrict the right of specific performance available under the rules of the forum: i.e., where the national rules provide for specific performance and ULIS does not.

ULIS (and under the revision by the Working Group) a declaration of avoidance does not prevent the recovery of damages. See ULIS 41 (2). Hence, the reference in the redraft to a "right to performance" that ends on a declaration of avoidance cannot refer to a right that is enforceable by damages. As we have seen, this language was not intended to refer to a right that is enforceable specifically—i.e., a right "to require performance". Finding a third alternative meaning for these words is difficult.

123. The articles outlining the buyer's remedies probably should make some reference to the remedy of specific performance, in the sense intended in ULIS 42 by the phrase "require the seller to perform". The absence of any reference to this remedy in a group of articles devoted to the buyer's remedies would suggest that the remedy of specific performance was abolished by the Uniform Law a result that was not intended.

124. One basic question is whether the Working Group wishes to adhere to the general policy of ULIS 16 and article VII of the Convention that procedural rules of the *forum* set an outer limit on the right to specific performance. If so, consideration might be given to redrafting article 42 along the following lines:

Article 42
(Alternative A)

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. [See ULIS 16 and Art. VII of 1964 Convention.]

"(2) The buyer shall not, however, 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. [See ULIS 25, 42 (1) (c).]"

125. Alternative A, above, would reach results, in practice, that are closely comparable to those that could be derived from the interplay of several articles of ULIS and article VII of the underlying Convention. The redrafted provision is, however, more flexible and more simple than the original version of ULIS which required the reader to work through several detailed provisions only to find that rights based on these provisions might be nullified under the provision of the underlying convention.

126. If the Working Group feels that it is not necessary to defer to the rules of the *forum* on specific performance, as does ULIS, the following simplified draft might be considered:

Article 42
(Alternative B)

"The buyer may require the seller to perform the contract unless it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. (See ULIS 25, 42 (1) (c).)"

127. Finding a generally acceptable provision on the right to require performance has been difficult. However,

it would be easy to exaggerate the practical importance of this "right". Enforcing this right is subject to the delays of litigation. Since a seller who is resisting performance will usually claim some justification, such as a dispute over required quality or breach by buyer in providing for payment, the buyer can seldom anticipate a final decision by the trial and appellate courts—and eventual coerced performance—within the period required by his business needs. Instead, he will supply his needs elsewhere; if damage results he can pursue this claim without interrupting his business activity.²⁰ Hence, even in legal systems where specific performance is theoretically available in the normal case, this remedy is seldom invoked in legal proceedings. In practical operation, the threat of a damage claim (and the loss of confidence by the buyer and others in the trade) seem to be more effective sanctions than the threat of an action compelling specific performance.

*Article 43 (WG.III, Alternative C, as revised, merging
ULIS 43 and 44) (R.3)*

"1. Where the failure by the seller to perform his obligations under articles 33 (S.7)-52 (S.14) amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract [avoided].

"2. After the date for the delivery of the goods, 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 other failure to perform his obligations under articles 33 (S.7)-52 (S.14), but only if the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under articles 33 (S.7)-52 (S.17) does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for the performance of such obligation. If at the expiration of the additional period the seller has not performed such obligations, the buyer, by prompt notice to the seller, may declare the contract avoided."

Comments

128. Articles 43 and 44 of ULIS are concerned with this question: under what circumstances does the buyer have the right to refuse to take (or to keep) goods because of their non-conformity with the contract? The right to refuse the goods has important legal and practical consequences: (1) the buyer has no obligation to pay the agreed price;²¹ (2) the costs and risks of redispal of the goods fall on the seller; (3) the loss resulting from a decline in the market price, which under the contract

²⁰ Compelling a seller in a foreign country to perform presents even greater practical difficulties than when the parties are in the same country.

²¹ A claim for damages which might be applied to reduce or extinguish the obligation to pay the price, does not, of course, depend on the right to refuse to take (or keep) the goods.

would normally fall on the buyer, must be borne by the seller.²² Under ULIS, such rights may be derived from the right "to declare the contract avoided".²³

129. The Working Group at its third session gave extended consideration to articles 43 and 44 of ULIS. Several representatives were of the view that these rules on when the buyer may refuse to take the goods were complex and difficult to follow, and that some of the provisions appeared to be redundant and unnecessary (report on third session, annex II, paras. 99-100). A drafting party prepared three alternative revisions of the substance of these articles. The Working Group deferred further consideration of these articles until its next session (*ibid.*, para. 105). These three alternative drafts (designated A, B and C) may be found in the Working Group's report (annex I, para. 26).

130. A significant issue of policy, which was discussed by the Working Group, can be analysed in the context of the following illustration: a large and expensive machine is delivered to the buyer on the delivery date stated in the contract. On installation, the machine fails to operate because of a defect in one of its constituent parts. The seller proposes to replace the defective part within one week. Without replacement of the defective part (which only the seller is in a position to provide) the machine is worthless to the buyer. But the delay of one week is of relatively slight importance to the buyer. On such facts, where the defect (in the absence of repair) is so serious as to constitute a "fundamental breach" but where the delay in making the repair would not constitute a "fundamental breach", may the buyer declare the contract avoided?

131. Under article 43 of ULIS the answer to the question is no. ULIS 43 (1) states that 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* amounts to fundamental breach of contract". In the above case, the delay of a week in providing a machine that was in conformity with the contract did not amount to a fundamental breach, and hence one

of the essential elements for avoidance of the contract was lacking.

132. It will be noted that the above quoted provision of ULIS 43 is based on the premise that in assessing the seriousness of a breach by the seller it is necessary to view the situation as a whole, and that it is not feasible to isolate non-conformity of the goods from the date of performance. This same principle is illustrated in ULIS 44 (1) which states that "in cases not provided for in article 43" (i.e., cases where either the non-conformity of the goods or the delay does *not* constitute a fundamental breach) the seller "shall retain, *after* the date fixed for the delivery of the goods" the right to "cure" the defect in the goods. (This may be done by delivering missing goods, by substituting conforming goods or by remedying defects—provided that this does not cause the buyer "unreasonable inconvenience or unreasonable expense".)

133. It will be observed that articles 43 and 44 (1) of ULIS provide for a unified appraisal of the seriousness of the seller's breach, in the light of both non-conformity of the goods and delay in performance. This unified approach may be strongly supported. It is true that, as representatives have pointed out, the drafting is complex (report on third session, annex II, paras. 93-94). However, the complexity results from the fact that ULIS deals in one place with remedies for delay in performance (articles 24 *et seq.*) and in another place with remedies for non-conformity of the goods (articles 41 *et seq.*). The overlapping and detail in articles 43 and 44 in part result from the necessity to build bridges between these two parts of ULIS's remedial system. So long as separate remedial structures are provided for delay in performance and non-conformity of the goods, such bridging is necessary. As the example illustrates, a realistic decision as to avoidance of the contract calls for the unified consideration of the two parts of the total situation: the seriousness of the non-conformity and the time required for its cure. This approach is reflected in the alternative drafts prepared by the Drafting Party,²⁴ and in the slightly revised version of alternative C that was reproduced above.

134. This redraft consolidates the provisions of articles 43 and 44 of ULIS. As has been noted, these two articles deal with a single issue: under what circumstances may the buyer refuse to take (or keep) the goods because of their lack of conformity (i.e. may he "declare the contract avoided"). The attempt in ULIS to divide the treatment between two articles required internal cross-referencing and produced a text which members of the Working Group concluded was too complex.

135. The first paragraph of the above text seeks to enunciate the basic rule in simple and general terms.

²² It will be observed that consequences (2) and (3) flow from the conclusion that the buyer has no obligation to pay the agreed price.

²³ *Ipsa facto* avoidance (i.e., avoidance that occurs without a declaration) is not provided in ULIS in the setting of non-conformity of the goods. On the deletion of *ipsa facto* avoidance elsewhere in the Law, see comments to article 25. The Working Group placed the brackets around [avoided] to indicate that some other term (such as "cancelled") might be preferable. See comments to article 25, para. 38.

In some meetings, ULIS refers to the buyer's right to "reject" delivery. See ULIS 29 (early delivery); 92 (preservation of goods). One of the problems presented by ULIS is whether the buyer may both (a) reject defective goods and (b) require the seller to supply conforming goods. Various provisions of ULIS contrast "avoidance" of the contract with "requiring performance" of the contract. See ULIS 24 (1) (a) and (b); 25; 30 (1); 41 (1) (a) and (b); 42 (2); 44 (2). Such a contrast is attractive from the literary point of view, but gives rise to difficulties in practical application, particularly since a decision as to rejection may need to be taken promptly and long before the buyer can ascertain whether he will succeed in compelling performance by the seller through the delivery of substitute goods. Most, if not all, of these practical problems have been solved by revisions tentatively adopted by the Working Group.

²⁴ See report of third session, annex I, para. 26. Consideration of both time and non-conformity is explicitly provided for in alternative B (art. 43 (1) and art. 44 (2) (a)) and in alternative C (art. 43 (2)). The same unified approach seems implicit in alternative A, in providing that the buyer may declare the contract avoided "if the *delivery*" of goods which do not conform to the contract amounts to a fundamental breach. The general reference to "the delivery" might be broadly construed as including all aspects of the delivery (i.e., both time and quality), or as referring only to the defective quality of the goods.

The reference to the failure to perform obligations under specified articles (rather than referring to non-conformity of the goods) meets two difficulties: (a) the complex references in ULIS 43 to interrelated problems of time and non-conformity; (b) the consolidation of the provision on transfer of property (article 52) with articles on defects in the goods.²⁵

136. The second paragraph is based on ULIS 44 (1). Similar language is also employed in alternative B (art. 43 (1)) and in alternative C (art. 43 (2)).²⁶ The end of the paragraph sets forth two circumstances when the buyer may not "cure" a defective delivery after the date for the delivery of the goods. The first is when the delay constitutes a fundamental breach of contract—a requirement that is specified in article 43 of ULIS. The second is when the late "cure" causes the buyer unreasonable inconvenience or expense—a requirement specified in article 44 (1) of ULIS.²⁷ This second requirement probably duplicates the first: if the late performance causes the buyer "unreasonable inconvenience or unreasonable expense", the delay would presumably constitute a "fundamental breach of contract".²⁸ Consequently, the concluding language of proposed article 43 (2) is placed within square brackets. On the other hand, the Working Group may conclude that this second requirement should be retained to give added emphasis to the limited scope of "cure" by the buyer—especially in situations calling for replacement or repair of goods that have been delivered to the buyer.²⁹ But even if this second requirement is retained, it is believed that paragraph (2) of the proposal provides a clearer statement of the rules governing the "cure" of defective performance than in that provided by the provisions scattered between article 43 and article 44 (1) of ULIS.

137. The third paragraph of the proposed redraft, based on ULIS 44 (2), preserves the substance of one of the most important and successful provisions of ULIS: the opportunity, given to a party facing breach of contract, to define the circumstances in which later perform-

ance will be acceptable. (This *Nachfrist* principle was also employed in ULIS 27 (2) (date) and 31 (2) (place); these provisions were consolidated by the Working Group in redrafted article 26 (2), *supra*.) This principle is set forth in each of the three alternative drafts of articles 43 and 44 and seemed to have the approval of the Working Group. The proposed redraft follows closely the wording of ULIS 44 (2), subject to adjustment to clarify the relationship between this provision and those that precede, and to reflect other decisions by the Working Group.³⁰

138. One further adjustment of paragraph 3 might be considered. It will be recalled that article 33, after setting forth tests for conformity of the goods to the contract, states in paragraph 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." In the comments to article 33 it was noted that this provision is of questionable value where the buyer presents a monetary claim (or reduces the price) for a very small sum that corresponds to a slight deviation from the contract. (E.g., the seller promised to deliver 1,000 bushels of wheat but delivered only 999.) See note 8 at para. 61 *supra*. On the other hand, the provision may be useful to preclude the buyer from avoiding the contract (a harsh and sometimes wasteful remedy) where the breach is trivial.

139. Under ULIS 44 (2), and the corresponding provision of paragraph 3 of the above consolidated redraft, if the buyer gives a *Nachfrist* notice, apparently the seller must provide *perfect* performance within the specified reasonable time; if the performance then deviates in any respect from the contract, it would seem that the buyer may "declare the contract avoided".

140. There are strong reasons in support of the procedure established by ULIS 44 (2) (and para. 3 of the consolidated redraft) whereby the buyer may supplant the flexible rules on "fundamental breach" by a notice giving a further reasonable time for performance. However, the rule that only *perfect* performance after such a notice can prevent avoidance of the contract may be a bit too strict. Some slight leeway is now provided by the above-quoted provision of ULIS 33 (2). However, as has been noted, it is difficult to understand why this provision should be applicable to damage claims (or reduction of the price). For these reasons, it might be advisable to transfer the substance of ULIS 33 (2) to the end of paragraph 3 of the above consolidation of articles 43 and 44. If this should be deemed desirable, the following might be added at the end of paragraph 3:

²⁵ See paras. 93-110, above. In the interest of simplicity, the redraft states that the notice must be given "promptly" without adding that the notice must be given promptly "after the buyer discovers or ought to have discovered" the facts constituting the seller's breach. The substance of this requirement seems to be supplied by the definition of "promptly" in ULIS 11 which, under the Working Group redraft requires action "within as short a period as is practicable in the circumstances". See also article 38 on the time for examination.

²⁶ For reasons indicated above at note 24, a similar result may be implicit in alternative A.

²⁷ The fact that ULIS divided the provisions, bearing on this single problem, between two separate articles is one of the reasons that have led to the criticism that these provisions are too complex for practical application.

²⁸ The Working Group has not completed action on the definition of "fundamental breach" in ULIS 10. However, it seems likely that under any conceivable definition delay in performance that causes unreasonable inconvenience or expense would be a fundamental breach.

²⁹ Stylistically, it would be simpler to express those restrictions as follows "... unless the delay in taking such action constitutes ..." etc. The "but only if" wording, however, may be preferable to emphasize the importance of these restrictions on "cure".

³⁰ The redraft omits the reference to "requiring the performance of the contract". For action by the Working Group, see the comments to articles 25 and 42, *supra*. For difficulty with the concept of reduction of the price—as a remedy separate from a claim for damages—see report on third session, annex II, paras. 109-115 and comments to article 46, *infra*. Alternative A presented to the Working Group at the third session (at art. 44 (1)) states the *Nachfrist* principle in a somewhat more direct and clear manner than in ULIS. However, it may be doubtful whether the stylistic advantage is sufficient to justify abandonment of the language of ULIS. (It will be noted that alternative A, like the above proposal, omits the references to "requiring" performance and to reduction of the price.)

"Such declaration may not be based on a difference in quality, lack of part of the goods or any quality or characteristic which is clearly insignificant."

If this is done, ULIS 33 (2) should, of course, be deleted.

141. A member of the Working Group has submitted a study directed to the need for provisions dealing explicitly with guarantees of performance (A/CN.9/WG.2/WP.16/Add.1, annex I). Proposals made in this study have been considered, above, in connexion with articles 35 and 39. (See paras. 68 and 87 *supra*.) This study also proposes that article 43 be supplemented by the following paragraph:

"In case of the replacement or remedying of defective goods, or defective parts of the goods, pursuant to the guarantee referred to in paragraph 2 of article 35, the period of the guarantee shall be extended for the time during which the goods have not been used due to the discovered defect."

142. In the above proposal, the phrase "pursuant to the guarantee referred to in paragraph 2 of article 35" refers to a new paragraph which the above study suggested as an addition to article 35. This proposal is quoted and discussed in the comments to article 35 at paragraphs 68 to 72. In considering the proposed addition to article 43, consideration might be given to the question whether the proposal, as presently drafted, is directly related to the buyer's right to declare the contract avoided—the issue which seems to be central to articles 43 and 44. Instead, the proposed language seems to be directed to the length of "the period of the guarantee", a period that would be stated in the sales contract.

Article 45 (ULIS) (R.4)

"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.)"

Comments

143. The Working Group decided that this article of ULIS should be adopted without change (report on third session, annex II, paras. 107-108).

144. This article deals with two problems of considerable practical importance on which national rules are in conflict. The first problem is whether the buyer may refuse to take or keep less than all of the goods required under the contract. In the language of ULIS, the issue is whether the buyer may "avoid the contract" as to only part of the contract.³¹ This question is answered in the

affirmative in paragraph 1 of article 44. The most significant application of this paragraph occurs where "part only of the goods handed over is in conformity with the contract". By virtue of this provision the buyer may refuse to take (or keep) the non-conforming goods while retaining the rest; his right to avoid the contract as to the non-conforming goods is governed by the general rules on avoidance in articles 43 and 44. (If the Working Group decides to consolidate these two articles, the cross-reference in article 45 (1) would be modified.)

145. The second paragraph of article 45 is addressed to the question whether the delivery of only part of the goods justifies the buyer in declaring that he will not receive the missing part.³² Paragraph 2 indicates that the buyer may "declare the contract avoided in its entirety", subject to the general rules on fundamental breach of contract.³³

Article 46 (ULIS) (R.5)

"[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.]"

Comments

146. At the third session, members of the Working Group noted several difficulties with ULIS 46, with respect to both substance and form (report, annex II, paras. 109-114). The Working Group concluded that action on article 46 should be deferred, and requested the Secretariat to submit a study on this article at the current session. (*Ibid.*, para. 115.)

147. The first problem encountered in examining article 46 is the relationship between this article and the general rules of ULIS on the recovery of damages for breach of contract. ULIS 41 states that even though the buyer "reduces the price" he "may also claim damages as provided in article 82 . . .".³⁴ The relationship between these provisions is hardly clear.

148. One preliminary question is whether article 46 provides a basis for an affirmative claim against the seller. Under this article "the buyer may reduce the price". The wording suggests that the article is limited to a

as "avoidance of the contract". This approach has sometimes led to the view that logic forbids "avoidance" of "the contract" for only a part of the goods. Of course, "avoidance" of the contract for breach does not really "avoid" the contract in the full sense of the word, for the seller remains liable for breach of the contract. See articles 24 and 41.

³² Avoidance with respect to future instalments is governed by ULIS 75.

³³ See ULIS 10.

³⁴ ULIS 41 (2) also refers to damages recoverable under articles 84 to 87. These articles relate to the recovery of damages when the contract is avoided and hence are not relevant at this point: article 46 expressly states that reduction of the price is not available when the buyer has "declared the contract avoided".

³¹ In ULIS, as in certain other legal systems, the question is confused by the fact that the familiar commercial act of refusing to take or keep defective goods is described in conceptual terms

deduction by the buyer to reduce his obligation for the price which he has not yet paid. Buyers often pay the price before they receive the goods. (A common contractual arrangement requires the buyer to establish a letter of credit before the seller ships; the seller receives payment under the letter of credit on the presentation of specified documents including a bill of lading.) If the buyer has paid for the goods, will he have the benefit of article 46 when he sues the seller to recover damages resulting from non-conformity of the goods? As we have seen, the language of article 46 ("the buyer may reduce the price") implies that the article is not applicable to affirmative claims. This restriction would be appropriate if the article employed the same standard for measurement as is employed for recovery of damages after payment of the price. However, as we shall see, this is not the case, with the result that significant differences in the parties' rights depend on whether or not the buyer has paid before he learns of the defect.

149. The standard of ULIS 46 for measuring the buyer's loss is as follows: the price is reduced "in the same proportion as the value of the goods at the time of the contract has been diminished because of their lack of conformity with the contract". This standard has special significance when the price-level changes between the time when the contract has been made and the time the goods are delivered. For example, suppose that in January the parties make a sales contract for 1,000 bushels of No. 1 corn at \$1.00 per bushel; the corn is to be delivered in June. By the time of delivery, the market price of No. 1 corn has risen to \$2.00 per bushel. The corn delivered by the seller does not conform to the contract since its quality is only No. 3. At the high price level of June, the No. 3 corn will sell for \$1.50, which is 25 per cent less than the value of No. 1 corn. Under article 46 the buyer may reduce the price "in the same proportion" as the value of the goods has been diminished because of the lack of conformity; consequently, it would seem that the reduction in price would be 25 per cent of \$1.00, or \$0.25 per bushel.⁸⁵

150. Are the results that emerge from the rather complex formula set forth in article 46 consistent with acceptable principles for measuring damages for breach of contract? One such principle is that, to the extent practicable, the injured party should be placed in the same position as would have resulted from performance of the contract. Presumably this principle would be applied with respect to damage claims under article 82. Article 46 may not be wholly consistent with that principle. In the above example, if No. 1 corn had been delivered, the buyer would have received corn worth

\$2.00 per bushel.⁸⁶ Instead, he received corn worth \$1.50 per bushel and a claim (or price reduction) of \$0.25. This would be \$0.25 less than the value that would have resulted from full performance of the contract. The more significant problem, however, is the establishment of conflicting tests for measuring the buyer's claim.

151. The results that emerge from the formula embodied in article 46 also seem inconsistent with other parts of ULIS. On the facts of the example (assuming that delivering corn of only No. 3 quality constitutes a fundamental breach of contract) the buyer could refuse to take the corn—i.e., "avoid the contract". In that event, under ULIS 84 (1), he could recover damages "equal to the difference between the price fixed by the contract and the current price on the date on which the contract was avoided". Since avoidance of the contract would normally occur after arrival of the goods (and after the rise in price to \$2.00 per bushel), the buyer could recover the "current price" of \$2.00 less the contract price of \$1.00. This would give the buyer the full benefit of the rise in price, whereas the formula of ULIS 46 would not. Consequently, buyers in situations like that of the illustration would be well advised to "avoid the contract" rather than to accept the goods and reduce the price (or make a claim). "Avoidance" of the contract is usually wasteful because of the costs of reshipment and redispotion of the goods. Consequently, it seems unwise to establish a system of remedies that encourages such "avoidance".

152. The foregoing analysis suggests that separate standards for measuring the buyer's claim should not be set forth in articles 46 and 82. If the "proportion of the value" standard of article 46 is deemed to be correct, it should be incorporated in article 82, so that the value of the claim would not depend on the irrelevant question of whether the buyer had paid the price.⁸⁷ On the assumption that there will be only one standard for measuring the buyer's claim because of non-conformity of the goods (e.g. article 82 as in ULIS or as revised), article 46 might be rewritten as follows:

Article 46 (alternative A)

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

⁸⁶ The buyer, of course, profits from the rise in price, but that is intrinsic in fixed-price contracts; the chance of gain from a rise in price is matched by a chance of loss from a price decline. Where sharp price changes are likely, merchants sometimes cancel such chances of gain or loss by "hedging" contracts. Responsibility under the "hedging" contract makes it all the more important to receive offsetting protection for price changes from the other party to the sales contract.

⁸⁷ It is also difficult to understand why, under ULIS 46, the buyer should have no right to deduct damages for non-conformity of the goods when the buyer has "obtained performance of the contract by the seller". "Performance" cannot, of course, mean performance in accordance with the contract, for this reading would make the reference to "lack of conformity" meaningless. If "performance" is read as delivery of goods, the section is also rendered meaningless.

⁸⁵ Article 46 speaks of the proportion whereby "the value of the goods at the time of the conclusion of the contract has been diminished" by the non-conformity. This formula may be somewhat difficult to apply in practice. Normally, the non-conformity will be unknown to both parties at the time of the conclusion of the contract, and will be ascertained (as in the example) only on arrival of the goods. The example is based on an assumption of fact (which, of course, would be subject to proof in specific cases) that if No. 3 corn sells at 25 per cent less than the price of No. 1 corn at a \$2.00 price level, the same percentage discount would also apply at a \$1.00 price level.

Article 47 (ULIS) (R.6)

"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.)"

Comments

153. The above provision is the same as article 47 of ULIS, which the Working Group adopted without change (report on third session, annex I, para. 29).

154. The reference to "unascertained goods" refers to transactions in which specific goods were not identified at the time of the making of the contract. (See the distinction between sales of "specific" and "unascertained" goods in ULIS 42 (1) (b) and (c). Cf. ULIS 23 (2) and 98.) Thus, article 47 would seem to be applicable although the seller, subsequent to the contract, has appropriated specific goods to the contract (ULIS 19 (3) and 98 (2)); to make the article inapplicable in such situations would deprive the provision of much of its significance. If this interpretation is correct, the article would have substantially the same meaning, and would be relieved of a troublesome problem of interpretation, if the word of "unascertained" goods were deleted.

155. Article 47 deals with the right of the buyer to reject "the excess quantity". It is often not feasible to reject only the excess—as where the seller tenders single bill of lading covering the total shipment in exchange for payment of the entire shipment. In such cases, the issue presumably would be whether the tender constitutes a fundamental breach which would justify rejection ("avoidance of the contract") as to the entire delivery. (See article 43, *supra*.)

Article 48 (ULIS) (R.7)

"[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.]"

Comments

156. The Working Group at the third session noted that ULIS 48 is closely related to the provisions on anticipatory breach set forth in ULIS 75-77. Consequently, it was decided to defer action on article 48 until the Working Group takes up articles 75 to 77 (report on third session, annex II, paras. 117-120).

Action on articles 49 to 55

157. The following will sum up action taken or proposed with respect to the remaining articles of chapter III:

(a) *Article 49*: this provision on limitation of actions was deleted by the Working Group in response to a decision by UNCITRAL; see para. 102 (b), *supra*.

(b) *Article 50*: this provision on delivery of documents is revised and transferred to article 23; see paras. 21-26 and 97, *supra*.

(c) *Article 51*: these separate remedial provisions on delivery of documents would presumably be deleted if article 50 is transferred to article 23.

(d) *Article 52*: this provision on the seller's obligation to transfer property (S.14) is revised and placed prior to the remedial provisions of articles 41 *et seq.*; see paras. 93-101, *supra*.

(e) *Article 53*: this article parallels article 34, which the Working Group decided should be deleted; see report on third session, annex II, paras. 56-61, and comments *supra* at paras. 62-64. Presumably the Working Group's decision with respect to article 34 would also apply to article 53.

(f) *Article 54*: the substance of article 54 was transferred to article 21 as drafted at the third session of the Working Group (ULIS 54 (1) became article 21 (1) (first sentence); ULIS 54 (2) became article 21 (2)).

(g) *Article 55*: these remedial provisions applicable to article 54 would become unnecessary as a result of the above action with respect to article 54.

Consolidated remedial provisions available to the buyer for all types of breaches of contract by the seller

158. The foregoing examination of specific articles has required preliminary analysis of the six sets of remedial provisions contained in chapter III of ULIS. (See *supra* at paras 93-101.) As has been noted, the Working Group at its third session merged the separate remedial provisions on date of performance and place of performance (paras. 27-29, *supra*). The Working Group's action transferring provisions on contracts of carriage to related provisions on delivery (paras. 17-18 *supra*), and closely related rearrangements suggested herein (paras. 21-23, 93-101, *supra*), eliminate the need for three additional sets of remedial provisions. As a result, there remain two sets of remedial provisions: (1) remedies for failure of the seller to perform certain obligations with respect to delivery (articles 24-27 at paras. 27-56, *supra*); (2) remedies for failure to deliver conforming goods and to transfer title to the goods (articles 41-46 at paras. 111-152, *supra*).

159. These consolidations have led to a more nearly unified and a much less complex structure than in ULIS. However, problems persist because of the remaining dichotomy between (1) non-delivery (including delay) and (2) non-conformity.

160. As has been mentioned in the analysis of specific articles, these two areas overlap. Thus, if the seller delivers only part of the goods, the non-arrival of the balance might either be regarded as (1) non-delivery (or delay) with respect to those goods (articles 20 *et seq.*, subject to remedies under articles 24 *et seq.*) or (2) a non-conforming delivery (article 33: "part only"; "lesser quantity", subject to remedies under articles 41 *et seq.*). The Working Group has taken steps to reduce the divergencies between the two sets of remedial provisions and further measures have been suggested herein (paras. 44-51, *supra*). However, not all of the divergencies have been removed; as

a result, there is still opportunity for litigation resulting from problems of classification. In addition, analysis of articles 43 and 44 showed that problems of both non-conformity of the goods and delay in performance (in making repairs or in supplying substitute goods) must be approached on a unified basis in the light of the total situation facing the parties (see paras. 132-133 *supra*).

161. For these reasons, the Working Group may wish to consider establishing a single set of remedial provisions applicable to breach of the sales contract by the seller. If this were done, all of the substantive obligations of the seller (designated herein as S.1-S.14) would be set forth consecutively followed by a single set of remedial provisions.

162. To facilitate consideration of this possibility, following is a tentative draft. The draft follows closely the substance and form of the two sets of remedial provisions as considered by the Working Group at its third session. For ease of reference, the articles of the consolidated draft bear the same numbers as the provisions on breach for non-conformity (articles 41 *et seq.*). The relationship between the new consolidation and the provisions on breach for non-delivery (articles 24 *et seq.*) is indicated by references following the provisions.

Tentative draft of consolidated remedial provisions applicable generally to breach of the sales contract by the seller

Article 41 (R.1)

"Where the seller fails to perform any of his obligations under the contract of sale and the present Law, 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."

Comments

163. This draft embodies the parallel provisions of articles 24 and 41. The underscored language is employed so that none of the seller's obligations would fall outside this unified set of provisions.

164. ULIS 24 (3) provided that the seller may not apply to a court or arbitral tribunal to grant him a period of grace. No such provision appears in connexion with the remedies for non-conformity (articles 41 *et seq.*) although problems of delay arise when the seller seeks to "cure" a non-conforming delivery (ULIS 44 (1)). The failure to give general applicability to article 24 (3) may be an oversight. This provision could either be included as a second paragraph of the above article 41 (R.1), or added to article 43. In this tentative draft the latter alternative is suggested.

Article 42 (R.2)

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. [See ULIS 16 and art. VII of the 1964 Convention.]

"(2) The buyer shall not, however, 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. [See ULIS 25, 42 (1) (c).]"

Comments

165. The present report considers alternative formulations with respect to the buyer's right to require performance ("specific performance"). (See paras. 117-127, *supra*.) In the interest of simplicity only one of these alternatives is set forth here, but the other alternatives would be equally suitable for a consolidated set of remedies. Certainly, one rule on this subject should apply to (a) refusal to deliver any goods; (b) indefinite delay in delivering goods; (c) delivery of a shipment which is worthless (i) in whole or (ii) in part; (d) delivery of a machine which includes a vital part which is inoperative and therefore required replacement or repair.

Article 43 (R.3)

"1. Where the failure by the seller to perform any of his obligations under the contract of sale and the present Law amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract avoided.

"2. After the date for the delivery of the goods, 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 other failure to perform his obligations, but only of the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under the contract of sale and the present Law does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for such performance. If at the expiration of the additional period the seller has not performed such obligation, the buyer, by prompt notice to the seller, may declare the contract avoided.

"4. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace."

Comments

166. The first three paragraphs of the above provision are based on the redraft of ULIS 43 and 44 which was discussed above at paras. 128-142.

167. The first paragraph, on avoidance of the contract for fundamental breach, carries forward the substance of paragraph 1 of the above redraft of ULIS 43 and 44 and the comparable provision in article 25 (1) on failure to deliver. (See paras. 34-35, *supra*.) Cf. ULIS 26 (1) (date); 30 (1) (place); 43 (date and non-conformity); 52 (3) (title); 55 (1) (a) (general).

168. As has been noted in connexion with the redraft of ULIS 43 and 44 (paras. 130-136, *supra*), the second

paragraph is based on ULIS 43. This provision of ULIS illustrates the inescapable interplay of problems of time of delivery and non-conformity of the goods, and provides an example of the value of consolidating the remedial provisions applicable to such problems.

169. The third paragraph consolidates the important *Nachfrist* principle, which reduces uncertainty as to the buyer's right to avoid the contract and which appears in ULIS at articles 27 (2) (date), 32 (2) (place) and 44 (2) (cure of defective delivery). (See para. 137, *supra*.)

170. The fourth paragraph is the same as ULIS 24 (3) (date and place). As has been noted above at paragraph 162, ULIS probably was intended generally to bar applications to tribunals for periods of grace; the more limited scope of ULIS 24 (3) seems to have been an accidental by-product of the fragmentation of the remedial provisions of ULIS.

Article 44 (R.4)

"If the seller fails to perform any of his obligations under the contract of sale and the present Law and the buyer requests the seller to perform such obligation, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, within a reasonable time, unless the seller refuses to perform his obligation within that time."

Comments

171. The above provision follows closely article 25 (4) as drafted by the Working Group at its third session. (See paras. 34-42, *supra*.) This redraft clarified similar provisions in ULIS 26 (4). Under the existing structure, the provision would apply only to breaches by the seller with respect to date and place of performance; however, the provision would seem to have equal or greater value as applied to requests by the buyer to supply a missing quantity of a non-conforming shipment or to repair or replace defective goods. Cf. ULIS 42 (2). The above general provision would avoid such a gap in the remedial structure.

Article 45 (R.5)

"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."

Comments

172. The above article is the same as the important provision of ULIS 45 which the Working Group decided should be adopted without change. (See paras. 143-145, *supra*.) Placing this provision in a unified set of remedial

provisions avoids the danger of a gap which would result if an indefinite delay with respect to delivery of part of the goods would be treated as a problem governed by the remedial provisions on date and place (articles 24 *et seq.*), since these articles lack any provision like that of article 45.

173. The cross-references in ULIS 45 to articles 43 and 44 related to provisions now consolidated as article 43. However, it may not be necessary to change this cross-reference, since article 44, above (based on article 25 (4) of the Working Group redraft), would also need to be taken into account in connexion with article 45.

Article 46 (R.6)

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

Comments

174. The reasons for this revision of ULIS 46 have been set forth at paras. 146-152, *supra*. No such provision appears among the remedies applicable to breach as to date and place (articles 24 *et seq.*). This appears to be another accidental consequence of establishing separate remedial provisions: if delay in delivery has damaged the buyer it would not be realistic to expect the buyer to remit the full price, and then sue for damages for the delay.

Article 47 (R.7)

"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."

Comments

175. As has been noted (para. 152, *supra*) the above provision is the same as ULIS 47, which was approved by the Working Group. No problem seems to arise from its inclusion in a consolidated set of remedial provisions.

Article 48

[176. As has been noted, the Working Group postponed action on ULIS 48 until it considers the related provisions on anticipatory breach in ULIS 75-77. If it is decided to retain a separate provision like ULIS 48, its inclusion in a consolidated set of remedies would avoid a gap in the law. No comparable provision appears in the remedies for breach as to date or place; advance knowledge of a serious delay in delivery could present a problem for the buyer that would be comparable to advance knowledge that some or all of the goods would be missing or would not conform to the contract.]

*Summary of reasons for unifying
the remedial provisions of ULIS*

177. The reasons for establishing a single, unified set of remedial provisions may be briefly summarized as follows:

(a) A unified structure closes several accidental gaps in the buyer's remedies for breach of contract by the seller (see e.g., paras. 164, 170, 171, 172, 174 and 176 *supra*.)

(b) Unifying the remedial provisions avoids the need for complex statutory cross-references where (e.g.) there is an inescapable interplay between problems of time for performance and quality of performance. (See, e.g., paras. 132-133 and 160, *supra*.) As a result, the unified provisions can be written with greater simplicity and clarity.

(c) All the substantive provisions on what the seller *shall do* can be placed together. (These comprise 14 articles: S.1-S.14.) In ULIS, five complex and unnecessary sets of remedial provisions interrupt the presentation of the seller's duties. A unified presentation of these substantive duties makes it easier for merchants to understand—and to follow—their obligations.

(d) Five sets of remedial provisions become unnecessary. As a result, chapter III is not only made simpler but is reduced in length by over one fifth. The length and complexity of ULIS have been the subject of widespread comment. Meeting these criticisms should be of assistance in facilitating the more widespread adoption of the Uniform Law.

**3. Progress report of the Working Group on the International Sale of Goods on the work of its fourth session
(New York, 22 January-2 February 1973) (A/CN.9/75) ***

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* 20 February 1973.

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 1969. The Working Group consists of the following 14 members of the Commission: Austria, Brazil, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

2. The terms of reference of the Working Group are set out in paragraph 38 of the report of the Commission on its second session.¹

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); UNCITRAL Yearbook, vol. I: 1968-1970, part two, II, A.

3. The Commission at its fourth session decided, *inter alia*, that "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 . . .".

4. The Working Group held its fourth session at the Headquarters of the United Nations in New York from 22 January to 2 February 1973. All members of the Working Group were represented except Kenya and Tunisia.

5. The session was also attended by observers from Australia, Norway, Romania, and from the following international organizations: The Hague Conference on Private International Law and the International Chamber of Commerce (ICC).

6. The following documents were placed before the Working Group:

(a) Provisional agenda (A/CN.9/WG.2/R.1)

(b) Analysis of comments and proposals by Governments relating to articles 56 to 70 of ULIS: note by the Secretary-General (A/CN.9/WG.2/WP.15).*

(c) Text of comments and proposals by representatives of members of the Working Group on articles 56 to 70 ULIS (A/CN.9/WG.2/WP.15/Add.1).

(d) Obligations of the seller in an international sale of goods; consolidation of work done by the Working Group and suggested solutions for unresolved problems: report of the Secretary-General (A/CN.9/WG.2/WP.16).**

(e) Text of studies and proposals by the representatives of the USSR, Japan and Austria relating to certain obligations of the seller (A/CN.9/WG.2/WP.16/Add.1).

(f) Comments by the representative of Hungary on articles 24 to 32 of ULIS (A/CN.9/WG.2/WP.16/Add.2).

(g) Amendments proposed by the observer for Norway for the revision of chapter III of ULIS (A/CN.9/WG.2/IV/CRP.1).

(h) Amendments proposed by the observer for Norway for the revision of chapter IV of ULIS (A/CN.9/WG.2/IV/CRP.2).

7. The session of the Working Group was opened by the Legal Counsel of the United Nations.

8. The Working Group adopted the following agenda:

(1) Election of officers

(2) Adoption of the agenda

(3) Continuation of consideration of articles 18-55 of ULIS

(4) Consideration of articles 56-70 of ULIS

(5) Future work

(6) Adoption of the report.

9. At its first meeting, held on 22 January 1973, the Working Group, by acclamation, elected the following officers:

Chairman: Prof. Jorge Barrera-Graf (Mexico)

Rapporteur: Dr. Roland Loewe (Austria)

10. In the course of its deliberations, the Working Group set up Drafting Parties to which various articles were assigned.

11. The text of articles 18-70 as adopted or as deferred for further consideration appears in annex I to this report.

I. CONTINUATION OF CONSIDERATION OF ARTICLES 18-55 OF ULIS

12. The Working Group at its third session decided that at the present session "it would continue consideration of those articles on the agenda of the [third] session, on which no final decision was taken . . .". At that session, the Working Group had on its agenda articles 1-55 of ULIS.

13. In deciding on the agenda, the Working Group, however, agreed that at the present session it would not deal with articles 1-17, but that it would only continue its consideration of articles 18-55. The Working Group took as a basis for its work the report of the Secretary-General, contained in document A/CN.9/WG.2/WP.16, annexed to this report.*

14. This progress report sets out in paragraphs 15-149 the main trends of opinions expressed on each of the above articles and the action taken thereon.

Article 18

15. The Working Group decided to adopt, with slight drafting changes, the text prepared at its third session. The text as adopted reads:

"The seller shall deliver 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

16. The text of this article as tentatively drafted at the third session of the Working Group 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."

17. Some representatives were of the opinion that this article was superfluous since the acts that the seller was required to do in order to deliver the goods as provided in article 18, were set out in articles 20-23.

18. It was also pointed out that the above text contradicted article 20; under article 19 delivery was defined as to consist of the seller's doing *all acts* that were necessary to enable the buyer to take over the goods, while under article 20 the same concept was defined as

* Reproduced in this volume, part two, I, A, 1 above.

** Reproduced in this volume, part two, I, A, 2 above.

* Reproduced in this volume, part two, I, A, 2 above.

handing over of the goods to the carrier or placing them at the disposal of the buyer. This contradiction created uncertainty as to when delivery could be considered to be effected.

19. One observer expressed the view that the definition of delivery contained in article 19 would lead to the undesirable result that delivery would be considered to have been effected only when the seller sent to the buyer the necessary documents that would enable him to take over the goods, even though the seller had previously handed over the goods to the carrier.

20. The Working Group referred the text of article 19 to a Drafting Party (I) consisting of the representatives of Austria, Hungary and the observer for ICC for consideration in the light of the above comments.

21. On the recommendation of this Drafting Party, the Working Group *decided* to delete article 19.

Article 20

22. The Working Group considered this article in the light of the text provisionally adopted at its third session. The text reads:

"[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.]"

23. Several representatives suggested that the words in subparagraph (a) "... and no other place for delivery has been agreed upon ..." be deleted, since under the general provision in article 5 the agreement of the parties always prevailed over the provisions of the Law.

24. One observer objected to the above proposal on the ground that, in the absence of these words, the interpretation of undefined delivery terms used in the contract would become uncertain and suggested that in order to make the provision in subparagraph (a) clearer, the words "or term" should be inserted after the word "place".

25. It was also suggested that in subparagraph (a) the reference to the "carrier" should read "the first carrier" in view of the fact that in many cases, especially in cases of combined transport, several carriers were involved.

26. The Working Group requested the Drafting Party to which article 19 had been referred (see paragraph 20 above), to consider whether the deletion of that article would require changes in the language of article 20.

27. In the light of the above comments and the recommendations of Drafting Party I, the Working Group *decided*:

(a) To delete the words in subparagraph (a) "... and no other place for delivery has been agreed upon ...";

(b) To insert in subparagraph (b) after the words "specific stock" the word "or" which was omitted from the original text by oversight.

28. The Working Group did not find it necessary to refer in subparagraph (a) to the "first carrier" instead of "carrier" since the seller always hand over the goods to the first carrier.

29. The text of article 20, as adopted, reads:

"Delivery shall be effected:

(a) Where the contract of sale involves the carriage of goods, 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 or 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

30. No comments having been made with respect to this article, the Working Group adopted the text as prepared at its third session. The text as adopted reads as follows:

"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."

Article 22

31. The text of this article as prepared at the third session of the Working Group reads:

"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."

32. It was suggested that paragraph (a) of this article was superfluous since under the general rule the agreement of the parties prevailed over the provisions of the Law. On the other hand, the view was expressed that although this provision was, strictly speaking, not necessary, nevertheless its inclusion in the context of this article would be useful.

33. The Working Group decided to substitute the words "deliver the goods" for the bracketed language in the opening phrase of the article and to adopt the article with this amendment. The text as adopted reads:

"The seller shall deliver the goods:

"(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

34. It was suggested in the Secretary-General's report that the text of article 50 of ULIS relating to handing over of documents as revised in a study by the representative of Japan (see A/CN.9/WG.2/WP.16/Add.1) should be included in the Law as article 23 immediately following the articles dealing with delivery (see annex II, paras. 21-26).

35. The Working Group decided to adopt the proposed text as suggested above. The text reads:

"Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage."

Articles 24-32

36. The Working Group decided to incorporate these articles in a single unified set of remedial articles for reasons mentioned in paras. 78-82 of this report.

Article 33

37. The text of this article, as drafted by the Working Group at its third session, reads:

"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.]

"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."

38. Some representatives suggested that paragraph 2 of this article should be transferred to an appropriate place within one of the articles that deal with remedies of the buyer. One representative was of the opinion that the paragraph should be kept at its present place in article 33. On the other hand, several other representatives expressed the view that this paragraph was superfluous and should be deleted.

39. One representative suggested that paragraph 1 bis of this article should include a provision concerning conformity of the goods with brochures, catalogues and other publications issued by the seller.

40. Different views were expressed as to whether the requirements listed in paragraph 1 bis were cumulative or alternative. Most representatives, however, were of the opinion that these requirements were cumulative.

41. One representative pointed out that subparagraph 1 bis (b) did not determine the time when the particular purpose for which the goods were intended to fit should be made known to the seller. It was also suggested that the clause should apply only when the buyer relied on the seller's expertise.

42. Several representatives suggested that in view of the fact that article 36 established an exception to the implied warranties contained in article 33, article 36 should be incorporated in article 33.

43. The Working Group decided to delete paragraph 2 of article 33. The Working Group further established a Drafting Party (VI) consisting of the representative of Austria and the observers for Norway and The Hague Conference to prepare, in the light of the above comments, a revised text for article 33 which would incorporate the provisions of article 36.

44. After consideration of the text proposed by the Drafting Party and an alternative draft submitted by one representative, the Working Group adopted the following text for 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 and which, where not inconsistent with the contract:

"(a) are fit for the purposes for which goods of the same description would ordinarily be used;

"(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

"(c) possess the qualities of goods which the seller has held out to the buyer as a sample or model;

"(d) are contained or packaged in the manner usual for such goods.

"2. The seller shall not be liable under subparagraphs (a) to (d) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect."

Article 34

45. No action with respect to this article was required since the Working Group at its third session decided to delete it.

Article 35

46. The Working Group considered this article on the basis of the text prepared at its third session. The text reads:

"1. Whether the goods are in conformity with the contract shall be determined by their condition at the time when the 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.]"

47. The Working Group had before it two proposals relating to paragraph 2 of this article. Under one proposal, paragraph 2 would be replaced by the language contained in paragraph 68 of annex II to this report in order to provide for the seller's liability for breach of guarantee in respect of the goods. According to the second proposal (A/CN.9/WG.2/IV/CRP.1), paragraph 2 would be incorporated in paragraph 1 and the second paragraph of this article would be the original text of paragraph 2 of article 35, which makes the seller liable for the consequences of any lack of conformity which has occurred after the risk passed, if the seller was responsible for such lack of conformity.

48. Several representatives expressed the view that it was not clear whether paragraph 2 of the text reproduced in paragraph 46 above was intended to make the seller liable for consequential loss suffered by the buyer or for latent defects. It was pointed out that the question of consequential loss was governed by the articles relating to damages and that the problem of latent defects was dealt with in article 39.

49. Some representatives had doubts as to whether it was necessary to provide in the law for the seller's liability in respect of a breach of guarantee since such liability would always arise from an express contractual provision.

50. Several representatives were opposed to the inclusion of the original text of paragraph 2 of article 35 of ULIS on the ground that the lack of conformity referred to in this paragraph might also arise from a breach of a non-contractual obligation of the seller.

51. The Working Group referred the article to a Drafting Party (III) consisting of the representatives of Hungary, Japan, the United Kingdom and the USSR.

52. On the recommendation of the Drafting Party, the Working Group adopted the following text for this article:

"1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [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 also be liable for any lack of conformity which occurs after the time indicated in paragraph 1 of this article and is due to a breach of any of the obligations of the seller, including a breach of an express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period."

53. With respect to the bracketed sentence in paragraph 1, the Working Group maintained its decision at the third session to postpone its consideration pending final action in connexion with later articles on passing of risk.

Article 36

54. This article has been incorporated into article 33 (see paras. 42-44 above).

Article 37

55. The text of this article had been approved by the Working Group at its third session. However, in view of a decision by the Working Group that, whenever appropriate, the expression "handed over" should be replaced by the word "delivered", the text was amended accordingly. The text as adopted reads:

"If the seller has delivered 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 delivered, 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

56. The working Group, at its third session, adopted paragraphs 1, 2 and 3 of this article and placed paragraph 4 between square brackets for further consideration. The text of the article reads:

"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.]"

57. Doubt was expressed as to whether paragraph 4 of this article would be consistent in all cases with the expectations of the parties or with commercial practice. The view was also expressed that it was not clear whether the usages referred to in this articles meant the international usages within the meaning of article 9 or local usages by way of exception to that article.

58. Some representatives also pointed out that no reference should be made to the agreement of the parties on the methods of inspection since such agreement could not override mandatory rules of the local law.

59. In view of the above comments several representatives suggested that paragraph 4 should be deleted.

60. Other representatives were of the opinion that the methods of inspection were an important question on which competing rules existed. A clear choice as to the applicables rules should be made in the Law. These representatives were therefore opposed to the deletion of paragraph 4.

61. One representative suggested that the opportunity to examine the goods should also be governed by this paragraph. Other representatives had difficulty with this proposal because of the ambiguity of the word "opportunity" in this context. To avoid this ambiguity, the representative concerned suggested that the expression "The precise time and" should be included at the beginning of the paragraph.

62. Another representative agreed that the question of the method of examination might be regulated by the Law, but suggested that in this case such questions should be governed by the law of the seller.

63. The Working Group reaffirmed its decision to adopt without change paragraphs 1, 2 and 3 of article 38 and it decided to delete paragraph 4.

Article 39

64. The Working Group at its third session approved with slight changes the original text of article 39 of ULIS. The text as adopted reads:

"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."

65. A member of the Working Group in a study submitted to the present session (A/CN.9/WG.2/WP.16/Add.1/Annex I) suggested that the last phrase of paragraph 1 of this article should be replaced by the following text:

"If a lack of conformity of the goods constituted a breach of a guarantee referred to in paragraph 2 of article 35, the buyer shall lose the right to rely on such lack of conformity if he has not given notice thereof to the seller within [30] days upon expiration of the period of guarantee [provided the lack of conformity was discovered during that period]."

66. In the Secretary-General's report the question was raised whether paragraph 1 of this article which provides for a cut-off period of two years was consistent with the policy established by the Commission in article 10 (2) of the draft convention on prescription (limitation) in the international sale of goods (see annex II, paras. 88-90). Article 10 (2) of that draft convention reads:

"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."

67. Several representatives expressed the view that there was no conflict between the two provisions; article 39 (1) of ULIS dealt with a time-limit within which notice of lack of conformity of the goods should be given to the seller, while article 10 (2) of the draft convention on prescription established a limitation period within

which an existing claim could be brought before a Tribunal. It was also pointed out that article 1 (2) of the draft convention on prescription expressly provided that the convention would not affect time-limits within which a party was required to give notice as a condition for the acquisition or exercise of his claim.

68. Several other representatives were of the opinion that if no formal conflict between the two provisions existed, as least a clash of policy was created and that it was desirable that the Commission itself should attempt to resolve this problem. In this connexion the suggestion was made that the Commission should postpone decision on this question pending final action on article 10 (2) of the draft convention on prescription by the projected United Nations Conference thereon.

69. One observer expressed the view that any cut-off period beyond the two years established in paragraph 1 of article 39 would not be acceptable to business community.

70. In view of the above comments, the Working Group decided to defer action on this question.

71. With respect to the proposal mentioned in paragraph 65 above, the Working Group agreed in principle to replace the last phrase in paragraph 1 of this article, "unless the lack of conformity constituted a breach of a guarantee covering a longer period", with the provision contained in the above proposal. However, since several drafting changes in the proposed text were suggested, the Working Group referred the drafting of that text to a Drafting Party (V) consisting of the representatives of Japan and the USSR and the observer for Norway.

72. The Drafting Party submitted two alternative proposals. On examination of these two alternatives, the Working Group concluded that both proposals were not free from difficulties. The Working Group therefore decided to take as basis for its consideration the last phrase in paragraph 1 of article 39 reproduced in paragraph 64 above.

73. Some representatives suggested that the words "longer period" should be replaced by the words "different period" appearing at the end of the phrase in question. In the view of those representatives, the guarantee was an express term in the agreement of the parties which determined the time during which the seller was liable for a lack of conformity and should prevail over the provisions of the law. If therefore followed that the liability of the seller should depend on whether notice of the lack of conformity was given within the period covered by the guarantee, irrespective of whether that period was shorter or longer than the cut-off period of two years provided in article 39.

74. On the other hand, some representatives were of the opinion that in absence of a contrary provision in the contract, the mere fact that the parties had agreed on a shorter period of guarantee should not deprive the buyer from the right to rely on the cut-off period provided in this article. These representatives, therefore, were in favour of maintaining the original expression "longer period".

75. Other representatives suggested that no reference to guarantee should be made in this article; the liability of the seller for breach of a guarantee raised different issues from those dealt with in article 39 and should, therefore, be provided for in a separate article.

76. Since no consensus could be reached on this question, the Working Group decided to put both words "longer" and "different" between square brackets in the text and deferred final action thereon.

77. The text of this article as adopted reads:

"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] [different] 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

78. No action with respect to this article was required in view of the fact that the Working Group at its third session decided to adopt the original text of article 40 of ULIS without change. The text reads:

"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."

Articles 24-32, 41-49, 51-52 (2)-(4) and 55: remedies of the buyer for breach of contract

79. The Working Group at its third session decided to consolidate the provisions relating to the buyer's remedies in respect of the seller's breach of the contract as regards date and place of delivery which are dealt with in separate articles of ULIS. On the basis of this merger two alternatives, which carried the consolidation of these remedial articles even further, were submitted in the Secretary-General's report.

80. The first alternative would create two separate sets of consolidated articles; one set would consist of the article consolidated by the Working Group for remedies as regards time and place of delivery (annex II, paras. 27-57), while the other would consolidate the

articles as regards remedies for failure to deliver conforming goods and to transfer title therein (annex II, paras. 111-155).

81. The second alternative would present a single unified set of remedial provisions as regards breaches of all obligations of the seller (annex II, paras. 163-177). According to the Secretary-General's report, this second alternative would have the advantage of avoiding problems of classification involved in the first alternative and accidental gaps that might occur therein. A unified system would also make for simplicity and clarity (for summary of the reasons mentioned in the report, see annex II, para. 177).

82. In the light of the above, the Working Group decided to take as a basis for its consideration of the buyer's remedies, the text of articles 41-48 as suggested in the Secretary-General's report for a single unified set of remedies.

Article 41

83. In the Secretary-General's report it was suggested that the text of this article, which originally dealt with the remedies of the buyer for failure of the goods to conform with the contract, should be reworded to cover the breach of any obligation of the seller. To this end the following text was proposed in the report:

"Where the seller fails to perform any of his obligations under the contract of sale and the present Law, 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."

84. One observer suggested that the words "subject to the requirements of due notice to the seller" be inserted before the word "may" in the opening phrase of this article. The same observer also suggested that paragraph 4 of article 43, as proposed in paragraph 165 of the Secretary-General's report, which provides that the seller shall not be entitled to a period of grace, should become paragraph 2 of this article.

85. Several representatives were of the opinion that the above-quoted text was acceptable and that it was not necessary to refer to any requirement of notice in this article.

86. The Working Group adopted the above text and decided that paragraph 4 of article 43 of the text suggested in paragraph 165 of the Secretary-General's report should become paragraph 2 of this article. The text as adopted reads:

"1. Where the seller fails to perform any of his obligations under the contract of sale and the present Law, 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.

"2. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace."

Article 42

87. The Working Group at its third session adopted the following text for this article:

"The buyer shall retain the right to performance of the contract, unless he has declared the contract avoided under this Law."

88. It was noted in the report of the Secretary-General that according to the Working Group's report on its third session the above text was not intended to deal with the question whether the court should compel specific performance; that question was dealt with in article 16 of ULIS and in article VII of the Convention of 1964 to which the Uniform Law was attached.

89. In this connexion it was expressed in the Secretary-General's report that the articles outlining the buyer's remedies should make some reference to the remedy of specific performance and it was noted that the limits which the procedural rules of the forum may set on the right to such remedy may also be set out in the same articles. On the basis of this consideration, the following two alternatives for article 42 were submitted in the report:

Alternative A

"(1) The buyer may require the seller to perform the contract if specific performance would be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law. (See ULIS 16 and art. VII of 1964 Convention.)

"(2) The buyer shall not, however, 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. (See ULIS 25, 42 (1) (c).)"

Alternative B

"The buyer may require the seller to perform the contract unless it is in conformity with usage and reasonably possible for the buyer to purchase goods to replace those to which the contract relates. (See ULIS 25, 42 (1) (c).)"

90. Some representatives were of the opinion that alternative A was not acceptable because it would allow the buyer to require specific performance only in cases where such request was in conformity with the law of the forum. In the view of these representatives the limits of the right to request specific performance should be determined by the Uniform Law itself.

91. Two observers expressed the view that any reference to national law in this setting would introduce an element of uncertainty in the Law and would encourage forum-shopping. It was suggested in this connexion that, as in original ULIS, article 42 should clearly specify the cases where the buyer may require performance in kind; the reference to the law of the forum was especially unsatisfactory in cases of non-conformity since the parties would not know which court would ultimately be called upon to decide the case.

92. One observer suggested that a distinction should be made between the right of the buyer to request performance and the enforceability of such right. The

Uniform Law should only provide for the right and the question of enforceability should be dealt with in the Convention. This latter suggestion was supported by another observer.

93. Several representatives stated that it would be difficult for countries belonging to the common law system to adopt alternative B or any similar provision, because the law of their countries made the remedy of specific performance discretionary and residual and did not recognize a general right to require specific performance.

94. One observer expressed the view that the text of this article should expressly state that the buyer may not require performance if he declared the contract avoided or the price reduced. In this connexion, several representatives raised the question whether other acts or declarations by the buyer should have the same effect.

95. Several representatives also agreed with the same observer that the buyer should have the right to require replacement of defective goods only if the lack of conformity amounted to a fundamental breach, because such remedy might be even more severe for the seller than avoidance of the contract. For this reason, it was suggested that the requirement of prompt notice by the buyer should also apply to this situation.

96. The Working Group referred the article to a Drafting Party (VI) consisting of the representatives of Austria, Japan and the United Kingdom and the observers for Norway and the International Chamber of Commerce.

97. On the recommendation of the Drafting Party, the Working Group adopted the following text for article 42:

Article 42

"1. The buyer has the right to require the seller to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the buyer has acted inconsistently with that right by avoiding the contract under article 44, or by reducing the price under article 45 [or by notifying the seller that he will himself cure the lack of conformity].

"2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after prompt notice."

Articles 43 and 44

98. On the basis of articles 43 and 44 as redrafted by the Working Group at its third session it was suggested in the Secretary-General's report (see annex II, paras. 128-142) that article 43 should, within the single unified remedial system, read as follows:

"1. Where the failure by the seller to perform any of his obligations under the contract of sale and the

present Law amounts to a fundamental breach of contract, the buyer, by prompt notice to the seller, may declare the contract avoided.

"2. After the date for the delivery of the goods, 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 other failure to perform his obligations, but only if the delay in taking such action does not constitute a fundamental breach of contract [and such action does not cause the buyer either unreasonable inconvenience or unreasonable expense].

"3. Although the failure by the seller to perform his obligations under the contract of sale and the present Law does not constitute a fundamental breach, the buyer may fix an additional period of time of reasonable length for such performance. If at the expiration of the additional period the seller has not performed such obligation, the buyer, by prompt notice to the seller, may declare the contract avoided.

"4. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace."

99. On the basis of article 25 (4), as drafted by the Working Group at its third session, it was also suggested (see annex II, para. 171) that the provision of that paragraph should be broadened to apply not only to breaches by the seller with respect to date and place of performance, but also to requests by the buyer to supply a missing quantity of a conforming shipment or to repair or replace defective goods. The following text was, therefore, proposed in the Secretary-General's report for article 44:

"If the seller fails to perform any of his obligations under the contract of sale and the present Law and the buyer requests the seller to perform such obligation, the buyer cannot declare the contract [avoided] before the expiration of any time indicated in the request, or, if no time is indicated, of a reasonable time, unless the seller refuses to perform his obligation within that time."

100. Some representatives expressed the view that the requirement of prompt notice contained in paragraph 1 of article 43 above might be suitable in cases of failure of the goods to conform to the contract, but might be too stringent in the case of non-delivery. It was suggested that under this provision the buyer might be held to have failed to give prompt notice while he was reasonably awaiting late delivery by the seller.

101. Several representatives advanced the view that the suggested language in paragraph 3 of article 43 was not acceptable since it would enable the buyer to convert a minor lack of conformity into a fundamental breach by using the *Nachfrist* system provided in the paragraph and avoid the contract if the seller did not perform within the additional period. It was therefore suggested that, in such cases, the buyer should be able to avoid the contract only if the failure to perform within the additional period amounted to a fundamental breach.

102. One representative pointed out that if paragraph 3 of article 43 above were construed to apply only when the seller's breach was not fundamental, a curious result would ensue: the buyer who suffered a fundamental breach would not be able to require performance within an additional period if he so desired. His only remedy in such cases would be to avoid the contract promptly.

103. One representative suggested that the above ambiguity would be resolved if the opening word "although" at the beginning of paragraph 3 of article 43 should be replaced by the words "whether or not".

104. Another representative pointed out that the proposed text of article 43 did not mention the right of the buyer to remedy the defect himself at the seller's expense.

105. With respect to article 44, some representatives suggested that it should be merged with article 43. One observer submitted a proposal to change the structure and, to a certain extent, the content of articles 43 and 44.

106. One representative suggested that there was a need to indicate in article 44 that the period of time which the buyer might fix in his request for performance should be reasonable. Another representative was of the opinion that no such requirement should be made since the buyer, under this article, was already entitled to avoid the contract without giving additional time for performance. The buyer should therefore be at liberty to set the additional period in the manner he deemed fit.

107. In the light of the above comments and proposals, the Working Group referred articles 43 and 44 to a Drafting Party (VII), consisting of the representatives of France, the United States of America and the USSR and the observers for Norway and the International Chamber of Commerce.

108. On the basis of the recommendations of this Drafting Party, the Working Group decided to adopt, with several stylistic changes, the proposal submitted by the Drafting Party for articles 43 and 44. The text as adopted by the Working Group reads:

Article 43

"Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may resort to any remedy available to him under the present law."

Article 43 bis

"1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the

buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 44 or the price reduced in accordance with article 45 [or has notified the seller that he will himself cure the lack of conformity].

"2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision."

Article 44

"1. The buyer may by notice to the seller declare the contract avoided:

"(a) Where the failure by the seller to perform any of his obligations under the contract of sale and the present law amounts to a fundamental breach of contract, or

"(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43.

"2. The buyer shall lose his right to declare the contract avoided if he does not give notice thereof to the seller within a reasonable time:

"(a) Where the seller has not delivered the goods [or documents] on time, after the buyer has been informed that the goods [or documents] have been delivered late or has been requested by the seller to make his decision under article [43 *bis*, paragraph 2];

"(b) In all other cases, after the buyer has discovered the failure by the seller to perform or ought to have discovered it, or, where the buyer has requested the seller to perform, after the expiration of the period of time referred to in article 43."

109. The square brackets placed around the language in paragraph 1 of article 43 *bis*, relating to curing of defects in the goods by the buyer himself, were intended to indicate that no final action was taken by the Working Group on this question. Similarly, the placing between square brackets of the words "or documents" in subparagraph 2 (a) of article 44 above was intended to serve the same purpose. The representative of Japan was requested to prepare a study on the latter question.

110. Some representatives and one observer expressed the view that the requirement in paragraph 1 of article 43 *bis* above, relating to fundamental breach, would unnecessarily restrict the seller's right to cure failure to perform his obligations, and should therefore be deleted; the requirement that such right should not cause the buyer any unreasonable inconvenience or unreasonable expense was sufficient.

111. One representative suggested that the last phrase in article 43 *bis* commencing with the word "unless" was unnecessary and should be deleted.

112. One observer suggested that the words "within a reasonable time", where they first appear in paragraph 2 of article 43 *bis*, in so far as they related to non-delivery should be substituted by the word "promptly". This observer further suggested that the same change should be made in article 43.

113. One representative, supported by one observer, suggested that any right of the buyer to cure defects himself and its repercussions on the remedial system should be made the subject of a separate study.

114. One representative made the general observation that the changes in the remedial system introduced by the new articles 42, 43, 43 *bis*, and 44 were of a rather fundamental character and might need further thorough analysis and eventual adjustment. This view was shared by one observer.

Article 45

115. The Working Group at its third session adopted without change the original text of this article in ULIS. It was suggested in the Secretary-General's report (see annex II, paras. 172-173) that this text should be maintained in the consolidated articles on remedies of the buyer.

116. One observer suggested that the order of articles 45 and 46 should be reversed.

117. The Working Group decided to adopt article 45 of ULIS as article 46, without change. The text as adopted reads:

Article 46

"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, 43 *bis*, 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

118. It was suggested in the Secretary-General's report (see annex II, paras. 146-152) that in view of the objections to the original text of article 46 (see A/CN.9/62/Add.1, paras. 109-114 *) this article should be redrafted as follows:

"The buyer [on notifying the seller of his intention to do so] may deduct all or any part of the damages resulting from any breach of the contract from any part of the price due under the same contract."

119. Most representatives who spoke on the issue agreed that the uniform law should provide for the remedy of reduction of price because it was widely used, especially in civil law countries.

120. One representative expressed the view that the right of the buyer to reduce the price should be limited to breaches of contract in respect of non-conformity of the goods. The same representative also pointed out that although in actual business practice it was difficult to, draw a distinction between price reduction and damages from a juridical point of view the two remedies were distinct and should be dealt with separately in the law.

121. Another representative stated that an important difference between price reduction and damages was that for a reduction in price it was not necessary to prove fault while damages could only be recovered if fault was proven. One observer supported this view and added that the right to reduce the price was not even subject to the conditions laid down in article 74 of ULIS.

122. Different views were expressed on the question whether the buyer should be able to seek both damages and price reduction. Some representatives were of the opinion that the buyer should be given the right in certain cases to claim damages as well as price reduction.

123. One representative doubted whether it was wise to establish a system of self-help in the law. In his opinion recourse to the judgement of a court was better than self-help measures.

124. The Working Group referred this article to a Drafting Party (VIII) consisting of the representatives of Hungary, Japan, the United Kingdom and the USSR.

125. On the basis of the text recommended by the Drafting Party, the Working Group, taking also into account its decision to revise the order of articles 45 and 46 (see paragraphs 116 and 117 above), adopted the following text as article 45:

Article 45

"Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity."

126. It was understood that the phrase "the buyer may declare the price to be reduced" not only authorized the buyer to withhold the designated portion of the price but also served as a basis for the buyer to recover the designated portion of the price that had been paid.

Article 47

127. The Working Group at its third session decided to adopt article 47 of ULIS without change. The text of that article reads:

"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."

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, annex II.

128. It was suggested in the Secretary-General's report that the word "unascertained" in the first sentence of the above text should be deleted in order to make the provision applicable to cases where the seller has, subsequent to the conclusion of the contract, appropriated specific goods to the contract (see annex II, para. 154).

129. One observer suggested that article 27 of ULIS as drafted by the Working Group at its third session should be included in this article as paragraph 1.

130. In the light of the above, the Working Group decided to adopt the text of this article with the above modifications. The text as adopted reads:

"1. Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

"2. Where the seller has proffered to the buyer a quantity of 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

131. Article 48 of ULIS reads:

"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."

132. The Working Group at its third session postponed action on article 48 of ULIS until it considered the related provisions on anticipatory breach in ULIS (articles 75-77).

133. It was recommended in the Secretary-General's report that this article be included in the consolidated set of remedies (see annex II, para. 176).

134. The Working Group provisionally approved the above recommendation and decided to postpone final action on this article until it considered articles 75-77 on anticipatory breach.

Article 49

135. The Commission at its third session decided to delete this article on the ground that it deals with matters which came within the scope of the draft convention on prescription (see A/8017, para. 34 *).

Article 50

136. The provision of this article relating to delivery of documents has been transferred in a revised form to article 23 (see paras. 34-35 above).

Article 51

137. As a result of the consolidation of the article relating to remedies of the buyer, this article was rendered unnecessary and was, consequently, deleted.

Article 52

138. The Working Group at its third session deferred final action on this article. The text of the article reads:

"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 becomes aware or ought to have become aware of the right or claim of the third person in respect of the goods.]"

139. In view of the substantial criticism that was made against this article at the third session of the Working Group (see paras. 128-138 of A/CN.9/62/Add.1 *) the following language for paragraph 1 of the article was suggested in the Secretary-General's report (see annex II, paras. 102 and 108):

"1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim."

140. The same report also discussed certain drafting problems that were presented by making special provision for a request by the buyer in the setting of the article. A tentative draft provision on this topic was set forth as follows:

"2. Unless the seller already knows of the right or claim of the third person, the buyer shall notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third

* UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, annex II.

persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract."

141. All representatives who spoke on this article agreed that paragraph 1 of the above draft was an improvement on the original text.

142. One representative, however, expressed doubt as to the necessity of the use of the word "claim" in addition to the word "right". It was also stated that, under the present language of the paragraph even an unfounded claim by a third party would give the buyer the right to avoid the contract. On the other hand the view was expressed that it was important to retain the word "claim" without any qualification since otherwise the buyer would have to show that the right was a just and founded claim, and an outstanding claim (even before adjudication) could make it hazardous and impractical to use the goods.

143. One observer suggested that paragraph 2 of this article was unnecessary in view of the fact that articles 41-44 dealing with notice and remedies would govern the situations envisaged in this paragraph. The same observer also stated that the word "shall" where it first appeared in this paragraph would make it a duty on the part of the buyer to request the seller to remedy the defect in title instead of an option. He further submitted that it would be possible to distinguish between property claims and claims purporting to forbid a certain specified use.

144. Two observers noted that the word "claim" in this article was intended to cover claims which might prove unfounded. This word "claim", however, did not cover claims based on administrative regulations or industrial property rights; these would have to be considered under article 33. They further expressed the view that, as in paragraph 3 of article 52 of ULIS, the buyer should have the right to avoid the contract only if the claim resulted in a fundamental breach of the contract, especially in the case of contractually based claims which related to a restriction on a specific use of the goods.

145. The Working Group decided to substitute the word "may" for "shall" where this word first appears in the text reproduced in paragraph 138 above and adopted, with this amendment, the text suggested in the Secretary-General's report. The text as adopted reads:

"1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

"2. Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract."

Article 53

146. It was suggested in paragraph 157 of the Secretary-General's Report that this article should be deleted because it paralleled with article 34 which the Working Group at its third session had decided to delete.

147. The Working Group decided to delete article 53.

Article 54

148. The substance of this article has been transferred to article 21. (See paragraph 30 above.)

Article 55

149. The substance of this article has been incorporated in articles 41-48.

II. CONSIDERATION OF ARTICLES 56-70 OF ULIS

Article 56

150. The Working Group decided to adopt without change the original text of ULIS for this article. The text of this article reads:

"The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present Law."

Article 57

151. Article 57 of ULIS provides:

"Where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract."

152. Some representatives noted that this article dealing with questions differently resolved in various countries might be construed as establishing validity of contracts which did not contain any indication as to the price, since, according to article 8 of the Uniform Law, the Law was not concerned with the formation of the contract only to the extent where not "otherwise expressly provided therein". In such circumstances the application of this article might lead in practice to considerable uncertainty and even injustices where a buyer might be held bound to pay a price "generally charged by the seller" of which the buyer, in the course of negotiations, had no idea whatsoever. These representatives suggested to delete the article.

153. Several other representatives also pointed out that by article 8 of ULIS the questions of formation of the contract and its validity were expressly excluded from the scope of the law. In the view of these representatives article 57 applied only if the applicable law outside ULIS recognized that the contract was validly concluded. This was also emphasized by the opening words of article 57: "Where a contract has been concluded". The opinion was also expressed that the deletion of this article would result in a lack of uniformity because in such cases national

laws which recognized the valid conclusion of the contract would apply their own rule relating to the method of determining the price for international sales contracts.

154. One observer proposed to add at the end of the provision in this article the phrase "unless this price is unreasonable" so that the seller should not be allowed to demand an exorbitant price.

155. Some representatives stated that it would be difficult to determine whether the price generally charged by the seller was or was not unreasonable and expressed preference for the proposal of one representative that the phrase "... or, in the absence of such a price, the one prevailing in the market at the time of the conclusion of the contract" should be added at the end of the provision, so that the buyer should pay the prevailing market price where the price generally charged by the seller was not ascertainable.

156. One representative also suggested that the following paragraph should be added: "Payment of the price consists of the delivery to the seller, or to another person indicated by the seller, of the monies or documents provided for in the contract."

157. Several representatives were of the opinion that the paragraph suggested above was, in most cases, self-evident, and in certain cases, such as bankruptcy of the seller, might create difficulties.

158. The same representative also suggested that article 57 should also include the following paragraph: "In the case considered in the preceding paragraph, reference shall be assumed to have been made to the currency of the seller's country."

159. Several representatives found it difficult to accept the above proposal. One reason was that the question of international payments should be left outside the purview of the law. It was also mentioned that the suggested provision was nothing more than a rule of interpretation of the contract, and that such a rule should not fall within the scope of the law.

160. The Working Group set up a Drafting Party (IX) consisting of the representatives of Austria, Mexico and the United Kingdom; this Drafting Party was requested to present a redraft for article 57 of ULIS.

161. The Working Group adopted, with certain amendments, the text proposed by the Drafting Party. The text as adopted reads:

"Where a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time."

162. The Working Group requested the representative of Mexico to study the question of the currency of payment mentioned in paragraphs 158 and 159 above with a view to submitting a new proposal at a subsequent session of the Working Group.

163. One representative expressed the view that the approach of the common law and civil law might be reconciled if the opening phrase of the adopted text read "where in contracting a sale the parties do not ..." instead of "where a contract has been concluded".

164. One observer proposed that the adopted text should be changed in such a way as to make the price prevailing in the market the principal price and the price generally charged by the seller applicable only where the market price was not ascertainable. This proposal was supported by one representative.

Article 58

165. Article 58 of ULIS reads:

"Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight."

166. Some representatives suggested that the words "in case of doubt" were too vague and should be replaced by the words "unless otherwise agreed by the parties".

167. Other representatives were of the opinion that the provision in this article was useful and should be retained without change.

168. Some other representatives expressed the view that this article dealt only with matters of interpretation which might be covered by usages applicable under article 9 of ULIS, and should therefore be deleted.

169. One representative proposed that the following paragraph should be added to article 58:

"1. When the currency indicated in the contract for the payment of the price gives rise to doubts, the currency of the country of the seller shall be deemed to be applicable."

170. Some representatives were of the opinion that the language of the proposed new paragraph was ambiguous and might be construed to mean the exact opposite of what was intended.

171. In view of the above comments, the Working Group deferred action on this article until its next session.

Article 59

172. Article 59 of ULIS reads:

"1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.

"2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller."

173. One representative suggested that the following paragraph should be added to the above article:

"3. The buyer shall comply with all the requirements of his national laws in order to permit the seller to receive the price as provided in the contract."

174. One representative was of the opinion that the proposed new paragraph touched on important questions relating to governmental refusal to allow a transfer of money to be made which, in certain circumstances, might create an exemption from liability. This representative therefore suggested that the proposal should be dealt with in connexion with article 74 of ULIS.

175. Some representatives were of the opinion that the proposed new paragraph was a natural consequence of paragraph 1 and that it dealt only with the question who should comply with the formalities required for the transfer of the money to the seller. In the view of these representatives, the proposed paragraph should be merged with paragraph 2.

176. Other representatives were of the opinion that if the proposed new paragraph simply dealt with the question who should comply with the formalities required for the transfer of money this paragraph would be redundant since paragraph 1 of the article impliedly covered this question.

177. In view of the above comments the Working Group decided to adopt paragraphs 1 and 2 of article 59 of ULIS without change, and postponed consideration of the above proposal pending submission of a revised draft by the representative concerned.

Articles 60-70

178. The Working Group decided to defer consideration of these articles until its fifth session.

III. FUTURE WORK

179. The Working Group took note of the views expressed at the fifth session of the Commission and in the Sixth Committee during the twenty-seventh session of the General Assembly, suggesting that in order to accelerate its work the Working Group should hold, if possible, longer and more frequent sessions.

180. The Working Group agreed that the frequency and length of its sessions could only be decided in view of the frequency and length of the sessions of other subsidiary bodies of the Commission, and the financial implications of extended or further sessions of this Working Group. It therefore decided to submit this question to the Commission for consideration at its sixth session.

181. The Working Group decided that at its next session it would consider articles 60-90 of ULIS.

182. On the recommendation of the Chairman, the Working Group requested the representatives of the countries mentioned below to examine articles 71 to 90 of ULIS as allocated below and to submit their comments and proposals thereon to the Secretariat in time for analysis and circulation to members of the Working Group before its fifth session. The above articles were allocated as follows:

Articles 71-73: USSR. In collaboration with Austria, Brazil and the United Kingdom.

Article 74: United Kingdom. In collaboration with Austria, Ghana, Japan and the USSR.

Articles 75-77: United States of America. In collaboration with France, Hungary, Iran and Japan.

Articles 78-81: France. In collaboration with Hungary, Tunisia and the United States of America.

Articles 82-90: Mexico. In collaboration with Austria, India and Japan.

183. The Working Group invited the representatives of all its members and observers to submit to the Secretariat any comments and proposals on the above articles of ULIS which they might wish the Working Group to consider at its next session.

ANNEX I

Revised text of articles 18-70 of the Uniform Law *

Article 18

The seller shall deliver 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

(Deleted)

Article 20

Delivery shall be effected:

(a) Where the contract of sale involves the carriage of goods, 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 or to be manufactured or produced and the parties knew that the goods 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.

* Square brackets indicate that no final decision was taken by the Working Group on provisions so bracketed.

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 22

The seller shall deliver the goods:

(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

Where the contract or usage requires the seller to deliver documents relating to the goods, he shall tender such documents at the time and place required by the contract or by usage.

Article 24-32

(Incorporated into articles 41-48)

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 and which, where not inconsistent with the contract,

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of contracting, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

2. The seller shall not be liable under subparagraphs (a) to (d) of the preceding paragraph for any defect if at the time of contracting the buyer knew, or could not have been unaware of, such defect.

Article 34

(Deleted)

Article 35

1. The seller shall be liable in accordance with the contract and the present Law for any lack of conformity which exists at the time when the risk passes, even though such lack of conformity becomes apparent only after that time. [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 also be liable for any lack of conformity which occurs after the time indicated in paragraph 1 of this article and is due to a breach of any of the obligations of the seller,

including a breach of an express guarantee that the goods will remain fit their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specified period.

Article 36

(Incorporated into article 33)

Article 37

If the seller has delivered 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 delivered, 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.

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] [different] 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.

Article 41

1. Where the seller fails to perform any of his obligations under the contract of sale and the present Law, 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.

2. In no case shall the seller be entitled to apply to a court or arbitral tribunal to grant him a period of grace.

Article 42

1. The buyer has the right to require the seller to perform the contract to the extent that specific performance could be required by the court under its own law in respect of similar contracts of sale not governed by the Uniform Law, unless the buyer has acted inconsistently with that right by avoiding the contract under article 44 or, by reducing the price under article 45 [or by notifying the seller that he will himself cure the lack of conformity].

2. However, where the goods do not conform with the contract, the buyer may require the seller to deliver substitute goods only when the lack of conformity constitutes a fundamental breach and after prompt notice.

Article 43

Where the buyer requests the seller to perform, the buyer may fix an additional period of time of reasonable length for delivery or for curing of the defect or other breach. If the seller does not comply with the request within the additional period, or where the buyer has not fixed such a period, within a period of reasonable time, or if the seller already before the expiration of the relevant period of time declares that he will not comply with the request, the buyer may report to any remedy available to him under the present law.

Article [43 bis]

1. The seller may, even after the date for delivery, cure any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 44 or the price reduced in accordance with article 45 [or has notified the seller that he will himself cure the lack of conformity].

2. If the seller requests the buyer to make known his decision under the preceding paragraph, and the buyer does not comply within a reasonable time, the seller may perform provided that he does so before the expiration of any time indicated in the request, or if no time is indicated, within a reasonable time. Notice by the seller that he will perform within a specified period of time shall be presumed to include a request under the present paragraph that the buyer make known his decision.

Article 44

1. The buyer may by notice to the seller declare the contract avoided:

(a) Where the failure by the seller to perform any of his obligations under the contract of sale and the present law amounts to a fundamental breach of contract, or

(b) Where the seller has not delivered the goods within an additional period of time fixed by the buyer in accordance with article 43.

2. The buyer shall lose his right to declare the contract avoided if he does not give notice thereof to the seller within a reasonable time:

(a) Where the seller has not delivered the goods [or documents] on time, after the buyer has been informed that the goods [or documents] have been delivered late or has been requested by the seller to make his decision under article [43 bis, paragraph 2];

(b) In all other cases, after the buyer has discovered the failure by the seller to perform or ought to have discovered it, or, where the buyer has requested the seller to perform, after the expiration of the period of time referred to in article 43.

Article 45

Where the goods do not conform with the contract, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of contracting has been diminished because of such non-conformity.

Article 46

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, 43 bis, 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 47

1. Where the seller tenders delivery of the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

2. Where the seller has proffered to the buyer a quantity of 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

(Deleted)

Article 50

(Transferred to article 23)

Article 51

(Deleted)

Article 52

1. The seller shall deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim.

2. Unless the seller already knows of the right or claim of the third person, the buyer may notify the seller of such right or claim and request that within a reasonable time the goods shall be freed therefrom or other goods free from all rights or claims of third persons shall be delivered to him by the seller. Failure by the seller within such period to take appropriate action in response to the request shall amount to a fundamental breach of contract.

Article 53

(Deleted)

Article 54

(Transferred to article 21)

Article 55

(Incorporated into articles 41-48)

Article 56

The buyer shall pay the price for the goods and take delivery of them as required by the contract and the present law.

Article 57

Where a contract has been concluded but does not state a price or expressly or impliedly make provision for the determination of the price of the goods, the buyer shall be bound to pay the price generally charged by the seller at the time of contracting; if no such price is ascertainable, the buyer shall be bound to pay the price generally prevailing for such goods sold under comparable circumstances at that time.

Article 58

[Where the price is fixed according to the weight of the goods, it shall, in case of doubt, be determined by the net weight.]

Article 59

1. The buyer shall pay the price to the seller at the seller's place of business or, if he does not have a place of business, at his habitual residence, or, where the payment is to be made against the handing over of the goods or of documents, at the place where such handing over takes place.

2. Where, in consequence of a change in the place of business or habitual residence of the seller subsequent to the conclusion of the contract, the expenses incidental to payment are increased, such increase shall be borne by the seller.

Article 60

Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any other formality, pay the price at that date.

Article 61

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.

Article 62

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.

Article 63

1. Where the contract is avoided because of failure to pay the price, the seller shall have the right to claim damages in accordance with articles 84 to 87.

2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with articles 82 and 83.

Article 64

In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price.

Article 65

Taking delivery consists in the buyer's doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over.

Article 66

1. Where the buyer's failure to take delivery of the goods in accordance with the contract amounts to a fundamental breach of the contract or gives the seller good grounds for fearing that the buyer will not pay the price, the seller may declare the contract avoided.

2. Where the failure to take delivery of the goods 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 taken delivery of the goods at the expiration of the additional period, the seller may declare the contract avoided, provided that he does so promptly.

Article 67

1. If the contract reserves to the buyer the right subsequently to determine the form, measurement or other features of the goods (sale by specification) and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may declare the contract avoided, provided that he does so promptly, or make the specification himself in accordance with the requirements of the buyer in so far as these are known to him.

2. If the seller makes the specification himself, he shall inform the buyer of the details thereof and shall fix a reasonable period of time within which the buyer may submit a different specification. If the buyer fails to do so the specification made by the seller shall be binding.

Article 68

1. Where the contract is avoided because of the failure of the buyer to accept delivery of the goods or to make a specification, the seller shall have the right to claim damages in accordance with articles 84 to 87.

2. Where the contract is not avoided, the seller shall have the right to claim damages in accordance with article 82.

Article 69

The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee.

Article 70

1. If the buyer fails to perform any obligation other than those referred to in sections I and II of this chapter, the seller 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 seller may also require performance by the buyer of his obligation, unless the contract is avoided.

ANNEX II

Report of the Secretary-General on obligations of the seller in an international sale of goods: consolidation of work done by the Working Group and suggested solutions for unresolved problems

[For the text, see document A/CN.9/WG.2/WP.16 reproduced in this volume, in the preceding section: part two, I, A, 2]

4. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
<i>Working Group on the International Sale of Goods, fourth session</i>	
Text of comments and proposals by representatives of members of the Working Group on articles 56 to 70 of ULIS	A/CN.9/WG.2/WP.15/Add.1
Text of studies and proposals by the representatives of the USSR, Japan and Austria relating to certain obligations of the seller	A/CN.9/WG.2/WP.16/Add.1
Comments by the representative of Hungary on articles 24 to 32 of ULIS	A/CN.9/WG.2/WP.16/Add.2
Provisional agenda	A/CN.9/WG.2/R.1
Amendments proposed by Norway for the revision of chapter III of ULIS	A/CN.9/WG.2/IV/CRP.1
Amendments proposed by Norway for the revision of chapter IV of ULIS	A/CN.9/WG.2/IV/CRP.2
Norway: Tentative draft of consolidated remedial provisions applicable generally to breach by the seller (based on document A/CN.9/WG.2/WP.16, pages 53-56)	A/CN.9/WG.2/IV/CRP.3
Autriche et France: proposition tendant à modifier le texte français du projet d'article 33 (A/CN.9/WG.2/WP.16, p. 22)	A/CN.9/WG.2/IV/CRP.4 *
Incorporation of article 36 into article 33 of ULIS (proposal by Drafting Group VI)	A/CN.9/WG.2/IV/CRP.5
Article 42 (proposal by Drafting Party VI)	A/CN.9/WG.2/IV/CRP.6
United States of America: proposal concerning article 33	A/CN.9/WG.2/IV/CRP.7
Article 35 (proposal by Drafting Party III)	A/CN.9/WG.2/IV/CRP.8/Rev.1
Drafting Party VIII: proposed article 46	A/CN.9/WG.2/IV/CRP.9
Article 39 (proposal by Drafting Party V)	A/CN.9/WG.2/IV/CRP.10
Article 57 (proposal by Drafting Party IX)	A/CN.9/WG.2/IV/CRP.11
Draft progress report of the Working Group on the International Sale of Goods on the work of its fourth session	A/CN.9/WG.2/IV/CRP.12 and Add.1, 2 and 3
Article 57 (proposal by the representative of Mexico and the observer for the Hague Conference)	A/CN.9/WG.2/IV/CRP.13
Articles 43 and 44 (proposal by Drafting Party VII)	A/CN.9/WG.2/IV/CRP.14
List of participants	A/CN.9/WG.2/IV/CRP.15

* French only.

B. General conditions of sale and standard contracts

*Report of the Secretary-General: the feasibility of developing general conditions of sale embracing a wide scope of commodities (A/CN.9/78) **

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* 16 March 1973.

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I. INTRODUCTION

1. The Commission at its third session requested the Secretary-General:

"To commence a study on the feasibility of developing general conditions embracing a wider scope of commodities. The study should take into account, *inter alia*, the conclusions in [a progress report to be submitted at the fourth session], referred to in paragraph 1 above, and the analysis of the General Conditions of the Economic Commission for Europe, to be submitted by the representative of Japan."¹

2. Pursuant to this request, the Secretary-General submitted to the Commission at its fourth session a report

comprising the first phase of the study on the feasibility of developing general conditions embracing a wider scope of commodities.² This phase of the study was directed towards the identification and analysis of the issues that were dealt with in the general conditions the text of which appears in document A/CN.9/R.6.

3. In the light of this report the Commission requested the Secretary-General "to continue the study on the feasibility of developing general conditions embracing a wider scope of commodities, and to submit the study, if possible, to the Commission at its fifth session".³

¹ A/CN.9/54; UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

² 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)*, para. 102 (b); UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

³ 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. 106; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

4. In response to this decision, the Secretary-General submitted to the Commission at its fifth session a progress report on the second phase of the feasibility study.⁴ On the basis of this report the Commission requested 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."⁵

5. The present report completes the feasibility study referred to above. The Secretary-General has also completed the preparation of a first draft of a set of "general" general conditions. It was considered, however, that for reasons set forth in paragraph 198 below, such a draft should only be submitted to the Commission after consultations with trade associations and other organizations concerned in different regions of the world, and revision of the draft to take account of such consultation.

II. METHOD OF ANALYSIS AND STRUCTURE OF THE STUDY

6. It will be recalled that the principal object of the first phase of the feasibility study, as submitted to the Commission at its fourth session, was to identify the issues that are usually contained in existing general conditions which are applicable to a wide scope of commodities. It will also be recalled that as a result of that study, the Secretary-General reached the following tentative conclusions:

(a) Although not all of the issues identified in the study are contained in every set of general conditions or relate to all kinds of commodities, this circumstance alone would not necessarily prevent the inclusion of such issues in a scheme of "general" general conditions; where a provision is appropriate only for a particular commodity or type of commodity, a restricted applicability of the provision could be provided for in the text of the general conditions.

(b) It was not necessary to draw up separate general conditions forms in order to cover different delivery terms such as f.o.b. or c.i.f.; the interpretation of all these alternative terms might be included in one set of general conditions, and the parties would agree as to which term should apply to their contract, instead of agreeing on the form which should govern their contract.

(c) The feasibility of drawing up a set of "general" general conditions did not depend on a decision at this stage as to which issues should be covered in such a scheme, but rather on whether it was possible to develop

a formulation on basic issues that could be included in general conditions of unrestricted applicability.

7. In order to test the validity of those tentative conclusions, the present study analyses a number of general conditions relating to different types of commodities. The purpose of this analysis is twofold:

(a) To compare the issues which are dealt with in "general" general conditions with those dealt with in general conditions of restricted scope, and

(b) To compare the provisions embodied in both types of general conditions with a view to providing adequate source-material for drawing up uniform provisions on the various issues involved, that would be applicable to all commodities or to a wide range of commodities.

8. For this purpose, part III of the present report analyses the provisions of ECE general conditions relating to cereals (general conditions Nos. 1A to 8B), and from that analysis, draws conclusions for use in the consideration of the feasibility and desirability of drawing up "general" general conditions.

9. Part IV of the study carries the analysis further by comparing the above formulations with general conditions relating to other agricultural products, processed agricultural foods, timber, rubber, minerals and different kinds of manufactured and engineering goods. These general conditions are listed in annex II. Part V of the present study sets forth the final conclusions and sets forth certain recommendations with respect to future work on the subject of general conditions of sale and standard contracts.

III. ANALYSIS OF THE ECE GENERAL CONDITIONS RELATING TO CEREALS

A. General observations

10. The United Nations Economic Commission for Europe (ECE) has drawn up 16 different forms for the sale of cereals. Eight of these relate to sales on c.i.f. (maritime) basis, two to sales on f.o.b. (maritime) basis, two to sales by rail; the remaining four relate to sales by inland waterways (two on c.i.f. basis and two on f.o.b. basis). All of these general conditions are listed in annex I to this report.

11. It is noted that ECE general conditions relating to cereals deal, in one way or another and in a more detailed manner, with the same issues which were identified in the preliminary study⁶ with two exceptions: for the passing of property and the formation of the contract. It should be noted, however, that these ECE formulations do not need to provide for the formation of the contract because they have been drawn up as standard contract forms and not as general conditions.

⁴ A/CN.9/69.

⁵ 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)*, para. 43; UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

⁶ A/CN.9/54, section D; UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

12. The provisions in the various ECE general conditions relating to cereals are similar, except for certain differences most of which are necessitated by the specific characteristics of the mode of transport or the chosen trade terms, e.g. c.i.f. or f.o.b., reciprocal or non-reciprocal, etc. These differences are set out in paragraphs 13 to 22 below.

B. *Reciprocal and non-reciprocal contracts*

13. These general conditions distinguish between reciprocal and non-reciprocal contracts so that where the quality of the goods delivered does not correspond to the agreed quality:

(a) Under a reciprocal contract, the buyer is entitled to an allowance if the quality is lower than the one agreed upon, and has to pay the seller an allowance if the quality is higher;

(b) Under a non-reciprocal contract, the buyer is entitled to an allowance if the quality is lower than the one agreed upon, but is under no obligation to pay the seller such an allowance if the quality is higher.

14. All reciprocal contracts, therefore, contain additional provisions to the effect that the buyer shall pay the seller a certain allowance if the actual quality of the goods delivered is better than the quality agreed upon in the contract.

C. *Condition final at shipment and rye terms (conditions guaranteed at discharge): shipping weight final, and full out-turn*

15. The above terms indicate whether the condition of the goods is guaranteed, and the final weight determined, at the port of shipment or on discharge. The relevant provisions relating to these terms differ accordingly.

16. It should be noted that while in the case of maritime transport on c.i.f. basis specific forms are drawn for each of the above two possibilities, no separate forms exist in the case of transport by inland waterways or by rail. In the latter cases a blank space is provided to be filled out by the parties in order to indicate the place (of shipment or of discharge) where the weight and the condition of the goods should be determined.

D. *Mode of transport: maritime, inland waterways and rail*

17. The ECE general conditions under consideration deal only with three modes of transport, viz. maritime, inland waterways and rail; they do not deal with other modes of transport, such as road or air.

18. As indicated in paragraph 10 above, there are separate contracts only for c.i.f. and f.o.b. terms in case of maritime and inland waterways transport. Consequently, no contract forms exist for other trade terms used in international trade contracts, providing for maritime or inland waterways transport, such as c.&f., ex quay, ex ship, and f.a.s.

19. No separate forms are drawn up for different trade terms used in cases of transport by rail. Thus, the

same forms are applicable to sales concluded on the bases of such trade terms as "free on rail", "carriage paid to", "carriage paid to the named point of a frontier of the exporting country", and "delivered at".

20. There are several differences in the provisions contained in the various forms relating to maritime, inland waterways and rail transport which result directly from the difference in the mode of transport. These include the following:

(a) In maritime contract forms, there are provisions relating to the shipment of the goods, such as those indicating the type of vessel to be used, possibility of deviations, and the minimum load that could be shipped in one vessel. No such provision can be found in forms for inland waterways contracts, nor of course, for rail contracts.

(b) In maritime contracts, if the parties agree to determine the weight of the goods by joint verification and the buyer fails to appear on that occasion, the bill of lading weight would be deemed final. In inland waterways contracts, if either of the parties is absent on such occasion, the weighing will be carried out either by sworn weighers or in accordance with the custom of the port of shipment. In the case of railway transport, if either of the parties is absent, the weight established by the railway shall be deemed final.

(c) The number of days within which the seller is required to inform the buyer of the date of shipment is, in a maritime contract, two working days to 10 calendar days, depending on the point of shipment and/or point of discharge; in inland waterways contracts the period is two or five working days, depending on whether the distance between the ports of shipment and discharge exceeds 200 kilometres; in rail contracts the period is one working day or as agreed between the parties.

21. On the other hand, there are differences in the provisions that do not seem to be directly or necessarily connected with the particular mode of transport. The following may be mentioned:

(a) In a maritime contract, the seller is entitled to a tolerance on shipment amounting to 10 per cent in the case of cargoes, and 5 per cent in the case of parcels. In an inland waterways contract, the maximum amount of tolerance is 5 per cent and in a rail contract, 2 per cent.

(b) In c.i.f. maritime contracts, there are provisions on the ownership and disposition of the bags in which the goods are delivered. No such provisions exist in either contracts relating to rail or inland waterways (c.i.f. and f.o.b.) or in f.o.b. maritime contracts.

(c) In a c.i.f. maritime contract, if the buyer exercises his right of rejection of the goods, then he is not entitled to require replacement of the goods or to claim any other remedy normally accorded a non-defaulting party. In case of c.i.f. inland waterways and rail contracts, there is no such limitation, the question of additional remedies being left to arbitration if the parties fail to agree thereon.

(d) While maritime and inland waterways contracts define the expressions "immediate shipment" as six working days and "prompt shipment" as 21 running days, rail contracts define "immediate dispatch" as four days and

"prompt dispatch" as eight days. These time-limits run, in the case of maritime and inland waterways contracts, from the date of the contract, and in the case of rail contracts, from the receipt by the seller of the instructions for dispatch sent by the buyer.

(e) Rail contracts, in addition to the terms mentioned in (d) above, also define the expressions "at disposal dispatch", "specified period dispatch", "dispatch spread over several months", and "dispatch spread over a single month"; these expressions are not found in the other two types of contracts.

E. *c.i.f., f.o.b., and other standard trade terms*

22. The main differences between *c.i.f.*, *f.o.b.* and rail standard trade terms, as used in the ECE General Conditions for Cereals, are as follows:

(a) In *c.i.f.* and rail contracts, the *seller* is entitled to a tolerance on shipment, while in *f.o.b.* contracts, it is the *buyer* who can claim such tolerance.

(b) *c.i.f.* contracts contain provisions as to shipment, e.g., type of vessel, deviation clauses, etc. *f.o.b.* contracts do not contain such clauses; instead they include provisions as to the buyer's obligations to provide the vessel or space therein.

(c) *c.i.f.* contracts contain provisions concerning the documents the seller must present to the buyer—both as to the type of documents and the time of presentation. Similar provisions are found in rail contracts; the difference relates only to the type of documents to be presented. *f.o.b.* contracts do not specify the documents to be presented.

(d) *c.i.f.* contracts also contain detailed provisions on the type of insurance the *seller* must take out, while in *f.o.b.* contracts it is the *buyer* who has to take out the insurance. In rail contracts, a blank space is provided for the agreement of the parties on this issue.

(e) In *c.i.f.* contract forms there is a provision that the *discharge* of the goods will be at buyer's expense. No such provision exists in *f.o.b.* and rail contracts. *f.o.b.* contracts, however, contain a blank space for agreement of the parties on the terms of *loading*.

(f) In *c.i.f.* and rail contracts, there is a provision enabling the *seller* to extend the time allowed for shipment while in *f.o.b.* contracts it is the *buyer* who enjoys such a right.

(g) As is mentioned in paragraph 21 (c) above, where the *buyer* avails himself of his right to reject the goods, under *c.i.f.* contracts he is not entitled to any further remedies, while in rail contracts any additional remedy is subject to agreement or arbitration. In *f.o.b.* contracts no such limitations exist.

F. *General observations on ECE general conditions*

23. In the light of the above analysis of ECE general conditions relating to cereals, the following general observations can be made:

(a) These general conditions are not comprehensive enough to cover all trade terms that are used in the international sales of cereals, nor do they provide for all modes

of transport (see paras. 17 and 18). This means that if the parties wish to use a trade term other than *f.o.b.* of *c.i.f.*, or if they wish the goods to be carried by a mode or transport other than maritime, inland waterways or rail, then the ECE general conditions cannot be used for that purpose. It seems, therefore, that General Conditions covering all modes of transport and all or a wide variety of trade terms would be of more use to the business community.

(b) The differences between the provisions of the various general conditions under consideration do not seem to justify the use of separate contract forms for each trade term, condition or mode of transport. It also seems that the multiplicity of those forms could conveniently be reduced by accommodating the competing provisions relating to the various trade terms, conditions or mode of transport within one set of general conditions. The fact that this method was largely used in respect of trade terms and conditions used in the forms relating to rail transport seems to indicate that such a scheme is feasible. If this method is used, the parties will have to indicate which term, condition or mode of transport they wish to employ instead of choosing the appropriate form from among the 16 different forms that are now provided by ECE. The danger of uncertainty that might be created by the failure of the parties to indicate which term, condition or mode of transport is to be used can be avoided by a provision in the unified form addressed to this contingency.

(c) The fact that certain provisions which are not necessarily or directly related to the mode of transport or the chosen trade term appear only in certain forms and not in others seems to be fortuitous; for instance, the provisions mentioned in paragraphs 21 (a) and 21 (b), and the commencement of the time-limit mentioned in paragraph 21 (d). If so, it might be advisable to have the same provisions included in all forms except where the provision is applicable only in respect of a certain form covering a specific mode of transport, trade term or condition.

(d) The fact that the separate general conditions have been drawn up for different modes of transport and/or different trade terms does not seem to justify a difference in the remedies of the *buyer* in case of rejection (see para. 21 (c) above). The uniformity of provisions on the rights and obligations of the parties, wherever possible, would greatly enhance their awareness of such rights and obligations, and thereby help in avoiding misunderstanding and dispute.

IV. ANALYSIS OF PROVISIONS CONTAINED IN DIFFERENT GENERAL CONDITIONS FORMS

24. As was explained in paragraph 9 above, this part of the present report analyses the provisions, relating to various issues, which are contained in a number of general conditions. Annex II below lists the general conditions analysed in this report. It will be noted that they fall into five main categories:

A. "General" general conditions

- B. General conditions relating to all or to a group of agricultural products
- C. General conditions relating to a group of non-agricultural commodities
- D. General conditions relating to a specific agricultural product
- E. General conditions relating to specific non-agricultural commodities

25. The annex provides identifying symbols for each formulation. For example, the nine "general" general conditions (category A, above) are identified as A.1, A.2, etc.; the 18 general conditions relating to all, or to a group of agricultural products (category B, above) are identified as B.1, B.2, etc. In this report, these various general conditions will usually be referred to by the identifying symbols rather than by their titles.

26. The issues that are discussed in this part of this report are not necessarily contained in all the general conditions listed in annex II. Most of them, however, are contained in many of the formulations under consideration. The remaining issues are dealt with because they seem to be important even though they appear in a few formulations only.

27. It should be noted that the provisions that are analysed in this part of the report relate more or less to the same issues as those that were identified in the previous study, contained in document A/CN.9/54.* However, some of the issues identified in that document are dealt with in the present study under another title or have been divided and dealt with under two or more titles.

28. It should also be noted that the references to formulations given below are merely illustrative and not exhaustive.

29. This analysis, however, does not deal with specific provisions that are applicable only to a particular commodity, such as provisions relating to the allowable moisture content or the required germinating capacity of certain agricultural products.

A. Formation of contract

30. Questions relating to the formation of contract are dealt with in several general conditions (e.g., A.3, B.16, B.20, C.1, C.3, C.5, D.1, E.1, E.2). Standard contracts (as contrasted with general conditions) usually do not contain such provisions—for example, the contract forms prepared by the Economic Commission for Europe for the sale of cereals (B.16, B.17, B.18, B.19).

31. The main issues relating to formation of contracts that are dealt with in the formulations under consideration are: binding effect of the offer, time of acceptance, effect of negotiations prior to the conclusion of the contract, form of the contract, and finally, validity of actions by brokers and agents.

32. With regard to the binding effect (i.e., irrevocability) of the offer, there are certain differences in the adopted solutions. According to A.3, all offers are deemed to be binding on the offerer unless otherwise expressly specified in the offer; formulation B.6, on the contrary, provides that offers are always understood "without engagement"; B.20 chooses a middle course by declaring that offers sent by telegram or telex are firm while those sent in writing are not binding.

33. Under some formulations an offer is considered accepted at the time when the written acceptance is sent by the offeree (C.1, C.2, C.4) and under others at the time when the acceptance is received by the offerer (A.3, E.1, E.2).

34. B.16, B.17, B.18, B.19, E.1, E.2 and E.5 provide that after formation of the contract all previous negotiations, oral or in writing, that are contrary to the contract shall cease to have effect. According to A.3, all such negotiations, whether or not they are contrary to the contract, shall become null and void.

35. Some formulations require the contract to be in writing (A.3, C.3). Others recognize oral transactions but call for written confirmation. According to B.16 and B.20, only written confirmations are valid, while under C.8 failure to confirm the contract in writing does not affect the validity thereof.

36. A few formulations also provide for the validity of the actions of brokers or agents. Under some of these formulations the contract may be concluded and signed by a duly authorized representative or agent (E.1, E.2), under others such contracts can only be considered as valid if confirmed by the principal himself (B.6, C.3, C.5). D.1 requires the broker to disclose in all cases, the names of the buyer and the seller to the other party; D.2, on the other hand, provides that this should be done only in certain specified cases.

B. Licences

37. The following issues are dealt with under the heading of licences: which party should obtain the export or import licence, and the effects of delay, refusal or withdrawal of a licence by governmental authority.

38. Many formulations (e.g., B.16, B.18, B.19, B.20, D.3, E.3, E.6) require each party to obtain a licence required in his country. Other formulations (e.g., A.1 in respect of contracts on c.i.f., c.&f., ex ship, and f.c.p. to basis, A.2 and B.17) provide only that export licences shall be obtained by the seller, and import licences by the buyer. Still other formulations (A.1 in respect of contracts on f.o.r., f.a.s. and ex quay basis, A.2, A.9, B.1 in respect of contracts on duty paid basis, and D.8) depending on the trade term used, provide that the seller has to provide the import licence and the buyer, the export licence.

39. Under most general conditions, delay, refusal or withdrawal of a required licence by governmental authority permits either party to cancel the contract (B.6, B.20, E.3, E.6) or to regard the contract as null and void (A.9, C.1). However, formulations E.1 and E.2 distinguish be-

* UNCITRAL Yearbook, vol. II: 1971, part two, I, B, 1.

tween the effects of refusal, delay and withdrawal. In case of delay, the contract is considered null and void; refusal and withdrawal after the ship is chartered or the goods are dispatched is regarded as a ground for relief, while withdrawal before chartering of the ship or dispatch of the goods gives rise to a right of rescission of the contract.

40. A radically different solution is adopted by all ECE general conditions for the sale of cereals (e.g., B.16, B.17, B.18, B.19). These general conditions regard as default any failure to obtain the required licence for any reason whatsoever, except for a general prohibition of imports or exports which is imposed after the conclusion of the contract.

C. Taxes, duties and fees

41. All general conditions which have not been drawn for sale on a specific trade term (e.g., A.3, A.8, B.4, B.5, D.4, D.6, E.1, E.2, E.4, E.5) as well as those which are based on the trade terms f.o.b., c.&f., or c.i.f. (A.1, B.2, B.3, B.8, B.16, B.17, B.18, D.3, D.5, D.7), provide that all taxes, duties and fees levied in seller's country or in country of origin are to be paid by the seller, and those levied in the buyer's country or country of destination are to be paid by the buyer.

42. Under general conditions drawn up for sale on a specific trade term other than f.o.b., c.&f., or c.i.f., the question which party is responsible for payment of taxes, duties and fees depends on the conditions of the trade term. Thus in general conditions based on f.o.r. and ex works (A.1) or frontier basis (A.2), the buyer has to pay the taxes, duties and fees levied in the country of dispatch or shipment. In general conditions on "delivered..." basis (A.2 and B.1), the seller also has to pay the taxes, duties and fees levied in the country of destination. In the case of sale on ex wagon (B.1) or ex ship basis (A.1), the provision in respect of f.o.b., c.&f. and c.i.f. mentioned in the previous paragraph seems to apply.

43. The general conditions that deal with fluctuations in the rate of duties, taxes and fees, stipulate (with one exception) that such fluctuations should be at buyer's account (A.8, D.1, D.4, D.5); D.8 provides that the buyer is not affected by fluctuations in taxes, duties and fees originally payable by the seller.

D. Quantity: tolerance; determination of quantity delivered

44. Most general conditions that are drawn up for the sale of goods in bulk allow the seller or the buyer, depending on who provides the means of transport, to deliver or to require delivery of goods, as the case may be, more or less than the agreed quantity up to a certain percentage. According to the majority of these general conditions (e.g. A.5, B.2, B.4, B.5, B.8, B.10, B.11, D.9, D.10) the amount of this tolerance is up to 5 per cent. According to other general conditions, the amount of tolerance varies from 2 to 15 per cent (e.g., B.14, B.15, B.19, D.4, E.3, E.5, E.6). In certain formulations the percentage of the tolerance allowed depends on whether the quantity is stated to be "about", "circa" or "approximate"

(B.1, C.7, C.9, D.20), or to be shipped as a "full cargo" (e.g., B.9).

45. Where tolerance is applicable, under some formulations (B.6, B.7, B.13, B.14, B.15, B.16, B.17), the excess or deficiency in the quantity delivered is to be settled at contract price; under other formulations, partly at contract price and partly at market price (B.11, B.18, B.19).

46. Many general conditions include provisions that deal with the determination of the quantity of the goods actually delivered. These general conditions differ as to whether this quantity should be determined at the time of shipment or at the time of discharge. Thus, formulations A.3, B.1, B.2, B.16, B.17, C.9, provide that the quantity should be determined at the time of shipment, while formulations B.4, B.5, B.12, D.6, D.7, D.9, D.10, require that the quantity should be determined at discharge. However, some general conditions, for instance B.18, B.19 and D.3, expressly leave the question open for agreement of the parties.

47. Several general conditions provide that the quantity should be determined by a specified public authority or independent agency, for instance, B.2, B.4, B.10, D.9, D.10 and C.9. Several formulations provide that the seller or the buyer, as the case may be, has the right to attend or supervise the determination of the quantity which takes place in the country of the other party (B.4, B.5, B.8, D.3, D.7, D.9, D.10 and C.9).

48. Other formulations provide that the quantity indicated in the bill of lading or railway bill shall be deemed to be the actual quantity delivered (A.3, B.1, B.8, B.16, B.17, B.19 and D.3). Some general conditions also provide for the possibility that the parties or their representatives jointly establish the quantity delivered (B.1, B.16, B.17, B.18 and B.19).

49. A few general conditions contain provisions as to the determination of tare weight and that a certain percentage should be deducted as tare from the weight of the quantity delivered (B.1, B.2, B.3, D.3 and C.7).

E. Quality of the goods and verification thereof

50. Most general conditions relating to agricultural goods provide that the goods delivered should be of fair average quality (A.3, B.1, B.7, B.11, B.14, B.15, B.16, B.17, B.18, B.19, D.1, D.6, D.9, D.10). Other general conditions require that the goods should be in sound marketable condition (B.4, B.20, D.2). In respect of non-agricultural goods, some formulations provide that the goods should conform "to the standards in use in the exporting country in respect of quality, assortment, size or marking" (E.1) or that this should correspond to goods usually delivered by the seller (E.3) or "the usual average quality existing in the seller's country for the delivery of the given type of goods and corresponding to [its] purpose" (A.3).

51. Several general conditions provide that in case of sale by sample, the goods must correspond exactly to the sample, while in case of sale by type sample, the correspondence need only be approximate (B.20, C.7, C.8, C.9, D.3).

52. Some general conditions require that the seller should provide the buyer with evidence of the quality of the goods by way of a declaration or other appropriate certificate (A.1, A.3, B.20). According to A.8, the seller has to submit the certificate upon the buyer's request. Under formulations C.2 and C.4, the verification of quality shall be done at the seller's works in the presence of the buyer.

53. Many general conditions provide for the verification of the quality of the goods by the buyer or his representative at the time and place of shipment (e.g., B.8, B.17, B.18, B.19 and D.8). Other formulations require that such verification should be done at destination (A.6, B.11, B.12, B.20, B.21, D.3, D.19). Under some of these general conditions, the place of verification is also determinable by agreement of the parties (B.16, B.17, B.18, B.19, E.2).

54. Several general conditions provide that where the method of inspection is agreed upon by the parties or the inspection is carried out by a certain official agency, the findings shall be final and may not be contested by the parties (e.g., A.4, A.9, B.16, B.17, B.18, B.19, E.1).

55. Most general conditions relating to agricultural products contain provisions which require verification of the quality by way of samples. The method of taking the samples as well as their examination are governed by detailed provisions which, in many respects, differ from one another (D.7, B.9, B.10, B.20, B.21, B.11, B.8, D.3). Similar provisions are contained in C.9, which deals with the sale of vegetable and animal oils, fats, etc.

F. Packing

56. Several formulations leave the question of the mode of packing to the parties to determine in the manner they agree upon (B.2, B.3, B.8, B.16, B.17, B.18, B.19). Some general conditions, however, determine the mode of packing by reference to what is customary in the circumstances (A.1, A.2, A.3, C.8). Formulation A.3 requires that packing should assure safety of the goods during transportation and under usual handling. A few formulations relating to agricultural commodities provide that the goods should be delivered in bags of a certain description (B.5, B.6, B.20).

57. A number of general conditions also contain a provision to the effect that the packing material is the property of the buyer, the cost of packing having already been included in the price (e.g., B.16, C.1, C.2, C.4, C.5).

G. Place and time of delivery

58. A few general conditions provide that delivery is effected either by handing the goods over to the buyer or by informing him that the goods have been placed at his disposal (C.3, C.5). Other general conditions make the place of delivery dependent on who pays for the carriage of the goods; where it is the duty of the seller to pay, he has to deliver the goods at the place of destination; on the other hand, where the carriage is paid for by the buyer, the seller has to deliver the goods at the place of shipment (B.1, C.7).

59. A number of formulations provide that in case the contract does not designate the place of delivery, that place will be the place of business of the seller (B.6, C.1, C.2, C.4, C.5, C.8). According to E.3, however, the seller has to deliver the goods free alongside the vessel.

60. Many formulations contain provisions defining the meaning of certain expressions generally used in international trade to indicate the time-limit within which the goods are to be shipped. These definitions, however, differ from one another. Thus, for instance,

(a) "Immediate delivery" means delivery within:

- 3 running days from the conclusion of the contract (B.9, B.10);
- 6 working days from the day following the date of the conclusion of the contract (B.16, B.17);
- 4 working days from receipt of shipping instructions from buyer (B.19);
- 7 days in case of transport by rail and 10 days in case of transport by steamer (B.20);
- 15 days from the day following the date of the sale (D.3);

(b) "Prompt delivery" means delivery within:

- 8 working days (B.19) after receipt of shipping instructions;
- 10 days in case of delivery by rail, and 14 to 30 days in case of delivery by sea, depending on the distance, "on receipt of shipping instructions from the buyer, or after learning of the granting of any necessary licences, or after the opening of an agreed credit" (B.20);
- 10 days from the date of the conclusion of the contract, but 3 days in case of local sales, e.g., sale at a commodity exchange (B.1);
- 21 running days from the day following the date of the conclusion of the contract (B.16, B.18).

61. Several general conditions contain provisions that deal with one aspect or another of the time of delivery. Thus, D.3 provides that where no time for delivery is fixed in the contract, delivery is understood to be "prompt", that is, within 30 days from the date of sale, while under E.4, the buyer has to give instructions for "prompt" delivery within 10 weeks from the date of the contract. Under C.2 and C.4, on the other hand, the time is to be determined by agreement by the parties after six months from the date of the contract.

62. Where the contract provides for a delivery period, that period commences to run from the later of: (a) the date of the formation of the contract or (b) the date of the receipt by seller of the advance payment agreed in the contract (C.1), or the date on which the seller receives notice of issuance of the import licence (C.2, C.4). C.4 also provides that if the execution of the contract depends on plans, specifications or information to be supplied by the buyer, the commencement of the period may be delayed until the receipt of such documents.

63. Formulations B.9, B.10, D.9 and D.10 contain provisions in the calculation of periods expressed in months or half months.

64. Many general conditions stipulate that the party who has to provide the means of transport may, by notifying the other party, extend the delivery time. Most of these formulations allow an extension of up to 8 days (B.5, B.6, B.12, B.13, B.14, B.15, B.16, B.18, D.7) while others allow 3 days (B.9), 15 days (B.4), or one month (B.8, C.1). General conditions B.5, B.6, B.12, B.14 and D.7 allow extension of the delivery time only if the contract period for shipment is not more than 31 days.

65. A great number of the general conditions mentioned in the above paragraph provide that if it is the seller who extends the period, he has to pay a penalty, the amount of which depends on the length of the extension (B.5, B.6, B.12, B.13, B.14, B.15, B.16, B.18, D.7).

66. Under A.3, the seller may postpone delivery of the goods in cases where the buyer does not provide him in time with the data necessary for the production of the goods or if he later changes these data.

67. Several general conditions deal with the question whether delivery can be effected in instalments. A.9 allows delivery in instalments in all cases. According to B.1, delivery may be made in instalments where the contract is on "ex quay" or "delivered..." basis, or where the seller has to provide for the carriage of the goods. C.7 allows delivery in instalments in the latter two cases, while C.9 allows such delivery where the contract is on c.&f. or c.i.f. basis. B.16 allows delivery in instalments only where the contracted quantity is more than 50 tons (of cereals). On the other hand, some general conditions do not permit delivery in instalments except with the consent of the buyer (e.g., A.3). Under B.1 and C.7, however, the seller has to deliver the goods in parts where the buyer requests him to do so.

68. Several general conditions stipulate that where the goods are delivered in more than one shipment, each shipment shall be deemed to be a separate contract (A.9, B.16, B.18, B.19, D.7, D.9, D.10). According to B.16, B.18, B.19, D.9 and D.10, each separate shipment will have to comply with the provisions governing the whole contract.

H. Trade terms

69. Several general conditions of sale are based on one or more specific trade terms, such as c.&f., c.i.f., f.o.b., etc. At the same time there are a number of general conditions the use of which is not confined to contracts based on any specific trade term. However, some formulations falling within the second category do contain definitions for various trade terms that the parties might use in their contract.

70. Among the formulations that are under consideration in this report, two sets deal exclusively with the interpretation of certain trade terms. Formulation A.1 (Incoterms 1953, prepared by the International Chamber of Commerce (ICC)) deal with the interpretation of the following trade terms: ex works, f.o.r., f.a.s., f.o.b., c.&f., c.i.f., freight or carriage paid to, ex ship and ex quay. The other set is A.2 (also prepared by the International Chamber of Commerce) which deals with the

interpretation of two trade terms: "Delivered at frontier" and "Delivered... duty paid".

71. Unlike the above formulations prepared by ICC for the interpretation of trade terms, general conditions C.7 includes the interpretation of a number of trade terms in a different manner. This form sets out the issues relating to a sales transaction (e.g., quality, delivery, lack of conformity, remedies) and lays down alternative solutions to each issue according to several trade terms which the parties may use in their contract, e.g., f.a.s., f.o.b., c.&f., c.i.f., ex quay, ex warehouse, subject to approval, free on buyer's scale.

72. A similar method is used in other general conditions forms but in a more restricted manner. Thus, formulations C.1, C.2 and C.4, prepared by the United Nations Economic Commission for Europe, adopt this method only with respect to the passing of risk. With respect to other issues, this form does not provide for the interpretation of trade terms.

73. Some general conditions, which are not drawn up for contracts based on one or more specific trade terms, incorporate by reference the interpretations given in formulation A.1 (Incoterms 1953), for example, A.9, B.20 and C.2 (the last only with respect to passing of risk).

74. Other formulations define certain trade terms in varying degrees of detail, and in a manner which, in several respects, differs from the interpretations given in Incoterms. Many of these formulations also define a number of trade terms that are not dealt with in the ICC interpretations, referred to in paragraph 70 above.

75. The most comprehensive of these definitions are those found in A.3 (CMEA general conditions). In respect of each trade term dealt with therein, this formulation includes not only provisions relating to payment of expenses of transportation and the passing of risk but also the time when the property in the goods passes and the exact moment when delivery is considered to be effected. These general conditions also define the parties' obligations in respect of carriage of goods by air and by post, neither of which situations is covered by the ICC interpretations or any other formulation under consideration.

76. Some general conditions forms that are not specifically drawn up on the basis of any trade term seem to indicate that they can be used only with respect to one or more specific trade terms. For instance, B.5 (drawn up by the Grain and Feed Trade Association) seems to be applicable only to contracts on c.i.f. basis, while A.8 seems to be applicable to contracts on f.o.b., c.&f. or c.i.f. basis.

I. Insurance

77. Almost all general conditions drawn up for contracts on c.i.f. basis or which are applicable to such contracts include detailed provisions on insurance which the seller has to take out. In respect of contracts on f.o.b. or c.&f. basis, many formulations require the buyer to take out insurance on the goods before their loading, for

example, A.5, B.7, B.17, B.22, D.3. Formulations relating to contracts on other trade terms do not contain provisions as to insurance.

78. As to which kinds of risks the insurance policy should cover, the general conditions under consideration contain different rules. In respect of ordinary or usual risks, some formulations require that the insurance policy should be on W.A. terms (Institute Cargo Clauses), for instance, A.8, B.5, B.6, B.18, B.20, C.9, D.3, D.10. Other general conditions require f.p.a. (free from particular average) insurance, for example, A.9, B.14, B.15, B.16, D.5.

79. With respect to special risks such as war, riot, or strikes, the rules also differ from one another. Most formulations require the seller in cases of c.i.f. contracts to include coverage against war risks and, according to some, also against strikes, mines, riots, and civil commotions (e.g., B.5, B.6, B.11). However, under A.9 the seller may, at his option, ensure the goods against war risks, and under B.18 the seller has to take out such insurance if requested by the buyer. On the other hand, formulation B.3 requires that the parties should agree as to insurance against certain special risks, including theft, pilferage, leakage and breakage.

80. The rules also differ as to who should pay for the cost of insurance against special risks. According to formulations B.5, B.6, B.13, B.14, B.16, C.9, D.3, D.7, etc., the seller pays the premium up to one half of 1 per cent of the value of the goods, and the buyer pays the remainder, if any. According to B.9, however, the seller pays up to one quarter of 1 per cent, and according to D.5, up to 10 per cent. Under formulations B.7, B.20, D.5 and D.10, it is the seller who pays the full premium of such insurance, while under formulations A.1, B.2, B.4, E.3 and others, such premium is for buyer's account.

81. Furthermore, the rules also differ as to the amount of insurance to be taken out. Formulations E.4 and E.5 require that the insurance should cover the amount of the invoice only. Formulations B.5, B.6, B.13, B.14, B.15 and D.7 require covering the amount of the invoice plus 2 per cent; B.4, B.9, C.8, C.9, and D.5 require the invoice amount plus 5 per cent; A.9, B.20 and D.3 require the invoice amount plus 10 per cent.

J. Documentation

82. Most general conditions contain provisions concerning the documents that relate to the performance of the contract of sale. These documents may be classified in four basic categories: (a) documents that are required for the exportation or importation of the goods, other than licences and other governmental authorizations, which were dealt with in paragraphs 37-40 above; (b) documents that are needed by the buyer for taking over the goods; (c) documents relating to erection, repair or maintenance of engineering goods; and (d) documents relating to payment.

83. With respect to documents under (a) above, formulation A.1 (Incoterms) provides, in respect of each trade term, that it is the buyer who should obtain all

documents (except for the certificate of origin and the consular invoice) which he may need for the transit, the importation and, where delivery is in the seller's country, the exportation of the goods; the seller is required to render every assistance to the buyer in obtaining those documents. On the other hand, the seller has to provide the buyer, at the latter's request and expense, with the certificate of origin and the consular invoice. Formulations B.18, D.9 and D.10 contain a similar rule providing that all certificates that are required and obtainable in the country of shipment and/or origin should be provided by seller at buyer's expense.

84. Regarding documents under paragraph 82 (b) above, general conditions A.1 specify, in respect of several trade terms, the documents which the seller has to provide in order to enable the buyer to take delivery of the goods. For contracts on f.o.r. basis, these documents are "the usual transport documents" which the seller has to provide; for contracts on c.&f. and c.i.f. basis, the documents consist of a clean Bill of Lading, the invoice of the goods and, in case of c.i.f. contracts, the insurance policy, for contracts on "ex ship" or "ex quay" basis, the documents also include the delivery order and "any other documents which may be necessary to enable the buyer to take delivery of the goods".

85. Several general conditions relating to plant and machinery include a provision for the delivery to the buyer of certain technical documents (see para. 82 (c) above). Thus, formulations C.2 and C.4 require the seller to supply drawings and other technical data for the erection, commissioning, operation and management of the delivered goods. According to A.3, the technical documents furnished by the seller must be in accordance with the practice existing in the corresponding branch of industry in the seller country. Formulation C.3 requires the supply of drawings with respect to erection of, and laying of the foundations for, the machinery, while C.1 provides that the seller has to provide the buyer with instruction leaflets relating to the use and maintenance of the goods.

86. Several general conditions which provide for the supply of technical documents also stipulate that such documents remain the exclusive property of the seller and may not, without his consent, be utilized by the buyer for any purpose other than the one for which they were handed over, and that the buyer may not transmit or communicate these documents to a third party (A.3, C.2, C.3, C.4 and C.5).

K. Transportation of the goods

87. Several general conditions contain provisions relating to the obligation of the seller in respect of transportation of the goods where, under the contract, he is bound to arrange for such transportation.

88. Formulation D.3 contains a provision similar to that of article 54 of ULIS, stipulating that the seller has to conclude, with due diligence and on the customary terms and conditions, the contract for the carriage of the goods by usual route to the agreed port of destination. Some general conditions provide for the type of vessel

the seller may use for the transportation of the goods. For instance, B.5, B.6 and D.7 require that the ship should be "a first-class steamer and/or power engine ship classed not lower than 100 A.1 or British Corporation B.S. or top classification in American, French, Italian, Norwegian, West German or other equal ranking Registers". Under B.9, the ship must be "a good seaworthy ship, suitable for the transport of [grain] and for which insurance can be covered at the normal premium".

89. Most general conditions provide that the goods can be shipped direct or indirect, with or without trans-shipment (B.4, B.11, B.16, C.9, D.3, D.4, D.7, D.9 and D.10). A.9, however, does not mention the possibility of indirect shipment but allows trans-shipment. A.6, on the other hand, expressly excludes trans-shipment and required direct shipment to the port of destination.

L. Shipping data; instructions; notices; date of shipment

90. Several general conditions require the buyer, where he is obliged to provide for the transport of the goods, to notify the seller of the shipping data. Thus, formulation A.1, in respect of contracts on f.a.s. basis, provides that the buyer shall give the seller due notice of the name of the vessel, the loading berth, and the delivery date to the vessel. According to B.2, the buyer has to notify the seller of the name, capacity and expected date of the arrival of the vessel 30 days before shipment. Formulation A.5 provides that the buyer should, at the beginning of the month preceding the "shipping month" notify the seller of the name and nationality of the ship, the loading port, the scheduled date of arrival, the quantity for loading and the name of the consignee. Formulations E.1 and E.2, on the other hand, require notification of the name of the ship and her tonnage only.

91. Several general conditions contain provisions as to the shipping instructions which the buyer has to give to the seller. For instance, formulation A.1 provides that in case of contracts on f.o.r. basis the buyer must give the seller "the necessary instructions for dispatch", while under A.2, in case of contracts on "delivered . . ." basis, the buyer has to inform the seller of the address of the final destination of the goods in the country of importation. Formulation B.6 also requires the buyer to give the seller the necessary information for the execution of the contract. Under E.6 the buyer has to give "full loading orders", and under A.3, in respect of goods which are to be carried by rail, he has to give "tariff declaration", "the point where the goods cross the border in the seller's country, the consignee, as well as the station of destination".

92. The general conditions in question differ as to the time-limit within which the shipping instructions must be given. Thus, such instructions have to be sent:

Under formulation A.1, in respect of contracts on f.o.r. basis, "in time";

Under B.6, "in good time";

Under B.9, "before loading has been completed";

Under D.8, in time "to reach the seller, not less than two clear working days prior to the day in which [the goods are] required to be sent to the wharf"; and

Under E.6, in time to be "in the agent's hands not later than 12 days before the time of shipment stipulated in the contract"; and

Under A.3, in case of carriage by sea, 55 days before the delivery date.

93. Other general conditions set different time-limits within which the shipping instructions must be sent by the buyer according to the term used for indicating the time within which the seller must deliver the goods.⁷ Thus:

For "immediate delivery" the shipping instructions must be given at the time of closing the contract (D.3), within 24 hours (B.19), and within 3 working days (B.20);

For "prompt delivery", at the time of closing the contract (D.3), and within 8 working days (B.19, B.20);

For delivery within a given period, 3 working days before the date indicated in the contract (B.19, B.20);

For delivery within a specified time-limit, the 15th of the month prior to the month of shipment (D.3), and on the first working day of the period (B.19, B.20).

94. Most general conditions under consideration require the seller to inform the buyer of the time of the shipment of the goods. However, the time-limit within which such information must be given to the buyer differs from one set of general conditions to the other.

95. While some general conditions simply provide that such information should be given "without delay" or use some similar term (A.1, B.17, C.9, D.9 and D.10), others require that the information should be sent in good time to enable the buyer to take the necessary steps for customs clearance and acceptance of the goods (E.1 and E.2). The majority of the general conditions, however, set definite periods of time within which such information must be furnished (A.4, A.5, B.1, B.2, B.9, B.11, B.13, B.14, B.15, B.16, B.18, D.3, E.1, E.2, etc.). These periods range from 7 days before commencement of loading (A.3, where freight space is to be furnished by the seller) to 28 days from the date of the bill of lading (D.4) and to 10 days from "the sailing date" of the steamer (D.5). Some general conditions leave the determination of the time to the agreement of the parties (B.5, B.6, B.12, C.9).

96. Many general conditions forms determine which date should be considered the date of shipment. Most of the general conditions that involve carriage by sea provide that the date of the bill of lading should, in the absence of evidence to the contrary, be deemed to be the date of shipment (A.8, B.5, B.6, B.9, B.11, B.13, B.14, B.15, B.16, C.9, D.3, D.7, D.9, D.10, E.1, E.2, etc.). Formulation B.4 provides that where the bill of lading does not state that the goods were actually loaded, the date of the customs clearance mentioned in the certificate of origin shall be deemed to be the date of shipment.

97. Formulation A.1 provides that, in respect of f.a.s. and f.o.b. contracts, the seller must provide the customary clean document in proof of delivery of the goods.

⁷ For the interpretation of some of these terms, see paragraph 60 above.

98. A special rule in respect of plant and machinery is provided for in formulation A.3. Under this formulation, if the times of delivery of component parts of plant or machinery are not fixed in the contract, then the date of effectuating delivery of the plant or machinery shall be the date of delivery of the last part of the plant or machine without which the given unit cannot be put into operation.

99. In respect of transport by rail, formulation B.19 provides that the date of dispatch shall be the date on which the goods were handed over to the railway, while according to E.1 and E.2, the date of the way bill is deemed to be the date of dispatch.

M. Guarantee

100. A number of general conditions relating to machinery and other engineering goods contain provisions concerning guarantees in respect of the goods.

101. The guarantee extends to faulty design, material or workmanship (C.1, C.2, C.3, C.4 and C.5). Under formulation A.3 the guarantee also extends to those characteristics of the goods which are defined in the contract.

102. Some of the general conditions also specify the period of the guarantee. Thus, under C.5, for the sale of gear wheels the period of the guarantee is six months, while under C.1, for the sale of durable consumer goods and other engineering stock articles, the period extends to 12 months from the date on which the risk passes, or six months from the date of the sale of the goods to the first end user, whichever expires first.

103. Formulation A.3 establishes different periods for the guarantee depending on the basic types of goods involved. According to this formulation, the period of the guarantee is:

- (a) For articles of precision, 9 months from date of delivery;
- (b) For small machinery and apparatus, and for small and medium installations, 12 months from date of putting into operation, but not more than 15 months from date of delivery;
- (c) For big machinery and large-scale installations, the same as under (b) above, except that the period shall not be more than 24 months from the date of delivery.

104. Formulations A.3, C.2, C.4 and C.5 provide that the guarantee period shall be extended by any period during which the goods could not be used because of a defect therein.

105. The provisions concerning the guarantee in respect of replaced or repaired goods or parts thereof differ. According to C.2, C.4 and C.5, these goods will be subject to a new guarantee of the same length of time as that relating to the original goods. On the other hand, C.3 provides that no guarantee is made in respect of replacements for defective goods. Under A.3, "a new guarantee period for replacements may be established in the contract, with account taken of international practice".

106. All general conditions which include a provision relating to the guarantee in respect of the goods provide that it is the seller who, at his option, determines whether the defect in the goods should be eliminated by replacement or by repair and whether the repair should be done at the place where the defective goods are situated or at his place of business. However, while formulations C.1, C.2, C.3, C.4, and C.5 provide that the return of the defective goods to the seller for repair or replacement should be at buyer's expense, general conditions A.3 stipulate that all expenses connected with such return should be borne by seller.

N. Passing of risk

107. According to formulations A.3 and C.3, risk passes at the moment when delivery is effected. Formulations B.1, C.7, D.8, E.1 and E.2 provide that risk passes when the buyer is bound to take delivery.

108. Several general conditions determine, with respect to certain trade terms, the time when the risk passes in the same manner as in Incoterms. For instance, formulations A.3, B.16, B.17, B.18, C.1, E.1 and E.2 also provide that in respect of trade terms f.o.b., c.i.f., and c.&f., the risk passes when the goods actually pass the ship's rail at the port of shipment. However, according to formulations A.8, D.9 and D.10, the risk passes only at the time when the goods are delivered on board the ship, and under formulation E.3, when the "goods are loaded into lighters for shipment after the receipt of notice from the vessel of her expected arrival". Under formulation D.3, the risk passes when the seller brings the goods to the port of shipment.

109. An exception to the Incoterms rule mentioned in the above paragraph is contained in formulations B.16 and B.18 which provide that where the contract is concluded after the time when the goods actually passed the ship's rail at the port of shipment, the risk shall pass from the seller to the buyer on the conclusion of the contract.

110. Similarly, the Incoterms rule relating to passing of risk in case of contracts on ex works basis is adopted in formulations C.1, F.1 and E.2. The latter two formulations also contain the Incoterms rules relating to contracts on f.a.s. or ex quay basis.

111. Several general conditions also determine the time when the risk passes in respect of contracts based on trade terms that are not covered by Incoterms. For instance, C.1, E.1, and E.2 provide that, in sales free on lorry or barge, the risk shall pass when the carrier, as in the case of sale "free on wagon", takes over the loaded vehicle or craft. Under A.3, in sales free on buyer's lorry the risk passes at the moment of receipt of the goods from the seller's means of transport unto the buyer's means of transport.

112. Certain formulations provide for passing of the risk in case of sales based on trade terms that are not covered by Incoterms: for instance, "free at frontier" (E.1 and E.2), "delivered at frontier" (C.1), "delivered at frontier of exporting country" (B.19 and C.1), "delivered

to frontier of country of transit" and "delivered to frontier of country of importation" (B.19), "delivered at" (B.19), "free delivered (agreed frontier post of importing country or agreed point in the interior of importing country)" (C.1, E.1 and E.2), and "f.o.r. border of the seller's country" (A.3).

O. Payment

113. Most general conditions contain provisions relating to payment. These include provisions concerning the amount, method, and time of payment.

114. The amount of payment the buyer has to make consists not only of the price but of the freight, insurance, cost of packing etc., depending on the term of delivery employed and other terms of the contract and/or of the applicable general conditions.

115. In respect of goods the price of which is payable according to their weight, some general conditions provide that the price should be calculated on the basis of the net weight (B.8, B.11). However, according to B.16, where the goods are shipped in bags, the price is calculated on the basis of the gross weight. According to C.1, C.2 and C.4, the prices shown in price lists and catalogues are deemed to apply to unpacked goods, while prices quoted in tenders and in the contract include the cost of packing.

116. Several formulations provide that if the quantity delivered is less than that stated in the bill of lading, the difference shall be paid for by the seller, and if the quantity is more, by the buyer, at contract price (B.13, B.14, B.15). According to B.9, any difference between the contract quantity and the delivered quantity should be settled at the price "ruling on the day of shipment" and according to B.10, at the market price on the day of delivery. Under E.1 and E.2, however, if the difference between the contract quantity and the delivered quantity does not exceed 10 per cent, this difference will be settled at contract price.

117. A number of general conditions contain provisions on the effect of increase or reduction in the rates of transport occurring subsequent to the making of the contract. According to B.21, such changes are at the account of the party who bears the cost of the transport. Under D.6, however, any rise or fall in the rate of freight is at seller's account. Formulations B.13, B.14 and B.15 refer only to reduction of freight rates, which will be to buyer's benefit.

118. The general conditions under consideration adopt basically three different approaches with respect to the method of payment. The first is to leave the question open for agreement by the parties. The second is to include detailed provisions relating to one or more methods of payment which the parties may agree on. The third approach is to provide for a certain method of payment; most of these latter provisions require that payment should be made in cash, against documents or by a letter of credit.

119. Formulations C.1, C.2 and C.4 leave the question of the method of payment to the agreement of the parties.

Formulations B.20 and D.4, however, though basically following this approach, limit the parties' freedom of choice to specific methods of payment listed therein.

120. The formulations which adopt the second approach, described in paragraph 118 above, usually contain provisions relating to payment against documents or by letter of credit, should the parties agree on one of those methods of payment (A.8, B.6, C.7, D.3).

121. Formulations B.1, B.4 and D.8, adopting the third approach, provide that the payment should be made in cash, while formulations B.4, B.5, B.6, B.9, B.13, B.14, B.15, D.3 and D.7 require that payment be effected against documents. Some of the latter formulations specify the documents that need to be presented for payment, for instance, formulation B.4.

122. Of the formulations that provide for payment by letter of credit, formulation A.6 requires that the letter should be "irrevocable", and formulation D.5 that it should be "confirmed and irrevocable". However, under A.9 it has to be "confirmed, irrevocable and without recourse", and under A.5 "irrevocable, assignable and divisible". According to formulation A.4, the letter of credit must be "irrevocable, confirmed, transferable, assignable and divisible", and, finally, under B.2 and B.3, it should be "confirmed, divisible, irrevocable and unrestricted".

123. The validity of the letter of credit must exceed the ultimate date of shipment by at least 15 days under general conditions A.9 and D.3; under A.8, by 30 days. Any unreasonable delay on the part of the buyer in opening the letter of credit entitles the seller to prolong the period of shipment to the same extent.

124. Several general conditions include a provision to the effect that if the seller fails to present any document that is required for payment, payment should nevertheless be made against an appropriate bank guarantee (B.4, B.5, B.6, B.13, B.14, B.15, D.3, D.7).

125. Some general conditions contain provisions as to when payment should be made. Thus, under formulation B.20, payment must be made immediately on the date agreed; under B.9 payment must be made by the day following the presentation of the documents. B.4 provides that payment should be made, under all circumstances, within 90 days from the date of the bill of lading. In case of sale on ex works basis, formulation C.1 requires that payment should be made within 30 days after seller's notification that the goods have been placed at buyer's disposal. However, formulation C.5, dealing with the sale of gear wheels and gear boxes, provides that payment should be made as follows:

(a) One third at the time of placing the order;

(b) One third during performance of the contract, but not later than the time when the goods are placed at the disposal of the buyer; and

(c) One third within 30 days after the goods have been placed at the buyer's disposal.

126. Formulation A.8 includes the provision that, irrespective of the method of payment agreed between

the parties, the buyer shall remain responsible for the payment of the full value of all goods shipped in accordance with the contract. Formulation B.6 provides that if the parties are not in agreement with respect to a part of the goods to be delivered, or if delivery of the whole of the goods has not been made, the buyer must in any case pay for the quantity received or the quantity regarding which the parties are in agreement.

127. A few general conditions provide that in case of late payment, the buyer has to pay interest on the amount in arrears. Under A.3, the rate of interest is 4 per cent; under C.8 it is 2 per cent above the discount rate in the Federal Republic of Germany. According to C.3 and C.5, the interest rate follows the rates of the Bank of France.

P. Notification of claims

128. Many general conditions fix the time within which the buyer has to submit his claims relating to the quantity and/or quality of the goods. Under A.8, this period has to be agreed upon by the parties at the time contracting; under B.1 the period is three working days from the date on which the goods have been tendered, under D.6 it is 21 days from the final date of discharge, and under A.9 it is 30 days from the arrival of the goods at the destination. Other formulations set different dates depending on whether this claim relates to quantity or quality.

129. With respect to quantity, the following periods are established in the different general conditions: two working days from the measuring of the goods (C.7); six working days following the arrival of the goods at destination (B.6); 14 business days from the final date of landing and/or warehousing at the final port of destination (D.3); three months from the date of delivery (A.3).

130. On the other hand, the following periods are established for claims relating to quality:

Immediately after discharge (C.9); or immediately after taking over the goods in case of sale on ex quay or ex warehouse basis, provided that this requirement is brought to the notice of the buyer; otherwise, the claim has to be submitted immediately after arrival (B.1);

Three working days in respect of on-the-spot sale (C.7), or from the receipt of the goods if the defect is patent and from discovery if the defect is latent (B.20);

Five working days after arrival of the goods (C.8), or after the goods have become available for inspection (D.10);

Seven calendar days after the goods become available for inspection (D.9); or after receipt of the goods if the defect is patent or eight weeks and three months depending on the type of the goods, if the defect is latent (E.4 and E.5);

Seven business days from the date of delivery of samples to the buyer (D.3);

Twelve days from arrival of the goods at destination if the defect is patent, and 45 days if the defect is latent (germinative quality) (B.6);

Six months from the date of delivery, or, in relation to goods for which a guarantee is given, not later than 30 days from the expiration of the guarantee period (A.3).

131. Some general conditions include specific provisions as to the form and content of a claim by the buyer. Thus, formulations A.3, B.6, E.1 and E.2 provide that the claim must be in writing. E.1 and E.2 require that the claim contain all the necessary particulars concerning the quantity of goods in respect of which the claim is made, as well as the reasons for making it. On the other hand, formulation A.3 lists in detail the particulars that must be set forth in the claim by the buyer, including his choice of remedy. Should any of the required data be omitted from the claim, the seller is required to notify the buyer without delay of the absence of such data. Failure by the seller to do so would preclude him from subsequently arguing that the claim was incomplete.

132. Formulation B.6 provides that a claim in respect of quality of the goods shall not be valid unless it is subsequently supported by certificates of analysis issued by official stations concerning samples drawn by sworn samplers or qualified officials from goods still under the seller's seal.

133. Several general conditions provide that if the buyer fails to notify the seller or to forward full particulars of his claim within the specified period, he shall be deemed to have waived the claim (e.g., A.9, B.1, E.3, E.6).

134. A number of general conditions also contain provisions as to the time and method of investigating a claim made by the buyer. Thus, formulation A.3 provides that the seller must investigate and answer the buyer's claim within the time specified in the contract, and if no time is stipulated in the contract, within not more than 90 days in respect of complete plants and installations, and 60 days in all other cases. If the seller fails to answer the buyer's claim within the specified time or within any additional period agreed between the parties, and the buyer resorts to arbitration, the seller has to bear all costs of arbitration irrespective of the outcome of the case.

Q. Remedies for default with respect to delivery

135. The remedies for default in respect of delivery that are available to the non-defaulting party differ widely from one formulation to the other. Some of these general conditions provide for separate remedies for delay in delivery and for non-delivery. Others have a uniform system of remedies applicable to all types of default. Furthermore, several general conditions provide that before invoking any remedy, the non-defaulting party has to grant an additional period for performance. Other formulations provide that in case of delay, the seller has to pay a certain penalty, the amount of which depends on the length of the delay, and the buyer cannot invoke any other remedy until he exhausts the maximum of that penalty.

136. Most of the general conditions that provide for an additional period for performance apply the same rule to defaults by either buyer or seller (B.1, B.20, C.7, C.8). Formulation C.1, however, requires the granting of an

additional period only in case of default by the seller. A slightly different approach is adopted by formulation A.3, according to which the buyer cannot invoke other remedies for non-delivery unless a certain period of time has elapsed.

137. Some general conditions indicate the length of the additional period. Under B.20 the additional period is normally 7 days; under B.1, that period cannot be shorter than 3 working days; under C.8, it cannot be shorter than 3 working days in case of immediate delivery, and 6 days in all other cases. According to C.1, in the absence of agreement between the parties, the period is one month.

138. Formulations A.3 and B.20 establish an exception to the *Nachfrist* rule mentioned in paragraph 135 above, in cases where the defaulting party notifies the other party in writing that he will not fulfil the contractual obligation or where the contract has been concluded "with definite delivery time" (contracts for a time, i.e. where time is of the essence), under B.20, however, the latter qualification should be expressly mentioned in the contract.

139. As indicated in paragraph 135 above, several general conditions provide for the payment of a penalty or a reduction in price in case of late delivery. Thus, formulations A.8, C.2 and C.4 provide that the price shall be reduced by a certain percentage agreed upon by the parties at the time of contracting.

140. Under formulation A.3 a penalty has to be paid by the seller in the amount of 0.05 per cent for each day of delay during the first 30 days, 0.08 per cent for each day during the next 30 days and 0.12 per cent for each day beyond 60 days; the total amount of the penalty should in no case exceed 8 per cent of the value of the delayed goods. Under formulation A.6, however, the amount of the penalty is 1 per cent of the value of the undelivered goods if the delay does not exceed two weeks; this penalty increases by 1 per cent for every two weeks of delay thereafter, provided, however, that the total penalty should not exceed 5 per cent.

141. Paragraphs 142 to 150 below give some examples of the remedies that are available to the non-defaulting party, subject, of course, to the granting of a *Nachfrist* or the exhaustion of the maximum penalty, where such requirements are applicable.

142. Under formulations C.2 and C.4, the buyer may by notice in writing require the seller to deliver the goods within a reasonable additional time which he may fix in the notice. If the seller fails to deliver the goods within that period, the buyer is entitled, by notice in writing and without requiring the consent of any court, to terminate the contract in respect of the undelivered goods; in addition, he may claim damages.

143. According to C.1, the buyer is entitled to terminate the contract by notice in writing, both in respect of all goods undelivered and in respect of goods which though delivered cannot be properly used without the undelivered goods. Furthermore, the buyer is entitled, to the exclusion of any other remedy for delay in delivery,

to recover any payment which he has made in respect of the above goods as well as any expenses properly incurred in performing the contract.

144. Under C.9, the non-defaulting party may, by immediate notice to the seller, "and without prejudice to his right for fulfilment":

(a) Cancel the contract or the unfulfilled part thereof, and renounce any further claim, or

(b) Sell or buy, with ordinary prudence, the goods or documents for the account of the defaulting party and claim the difference in price, if any, or

(c) Have independent brokers fix the market value of the goods on the day when the default became known or on the expiry of any extension. The difference in price resulting therefrom should be immediately paid by the defaulter;

(d) In addition to (b) and (c), claim damages in special circumstances.

145. According to formulations E.1 and E.2, the buyer may choose between maintaining the contract, subject to the seller's liability for any justifiable additional expense resulting from the delay, and by notice terminating the contract without the consent of any court. In the latter case, the buyer may also claim damages.

146. Under A.3, the buyer may, after the expiry of the period mentioned in paragraph 137 above, refuse performance of the contract in respect of the undelivered part of the goods as well as in respect of those delivered parts which cannot be used without the undelivered part. In such a case, the seller has to refund all payments made by the buyer with interest of 4 per cent per annum.

147. Under A.8, the buyer may either cancel the contract in respect of the non-delivered goods and claim any excess over the contract price of the market price prevailing in the country of shipment for goods of the same description at shipment time or accept the goods with an allowance to be mutually agreed upon.

148. According to A.6, in case of delay for more than 10 weeks, the buyer may cancel the contract in respect of the undelivered part of the goods.

149. Under E.3 and E.6, and in case of non-delivery, the seller has to pay as liquidated damages a sum equal to 10 per cent of the c.i.f. value of the non-delivered goods; under D.5, the liquidated damages equal 1 per cent of the contract or market price on the date of default, whichever is the higher.

150. According to B.20 and C.8, the contract or any part thereof which remains unfulfilled is considered as cancelled unless one of the parties has issued a reminder within 30 days according to B.20, and within three months according to C.8, from the last delivery date. B.20 further provides that in such a case neither party is entitled to damages.

151. Formulations B.16, B.18 and B.19 provide that failure by the seller to dispatch one lot within the contractual time-limit shall not give the buyer the right to refuse the other lots; the seller also remains responsible

for delivering such other lots within the contractual time-limits.

152. Several general conditions provide for seller's remedies where the buyer fails to take delivery or is late in taking delivery.

153. Thus under A.2 in cases of contracts on "delivered..." or "delivered at frontier" basis, if the buyer fails to take delivery of the goods as soon as they have been duly put at his disposal, he has to bear all the risks of the goods and pay any additional expenses incurred because of such failure. According to C.7, if the buyer is late in taking delivery, the seller may, after the expiry of an additional period which he should grant, either sell the goods by public auction or have them sold through an authorized broker at buyer's account. Under C.1, the seller has to arrange for the storage of the goods at the risk and cost of the buyer; he may also recover any expenses properly incurred in performing the contract. Formulations C.2 and C.4, in addition to requiring the seller to store the goods at the risk and cost of the buyer, provide that he should insure the goods at buyer's cost. Furthermore, under the latter formulations, if the buyer fails to accept delivery within a reasonable time set in a notice in writing by the seller, the latter may, by a further notice in writing, and without the consent of any court, terminate the contract in respect of the undelivered part of the goods and recover from the buyer any loss suffered by reason of the buyer's failure to take delivery of the goods.

R. Remedies for lack of conformity of the goods

154. Most general conditions relating to agricultural products and other goods sold in bulk contain a provision which makes a certain allowance (reduction in price) the primary remedy for lack of conformity of the goods. According to B.11, the amount of the allowance is to be fixed by mutual agreement or by arbitration, and according to D.5, by arbitration only; under formulations B.13, B.14 and B.15 "due allowance shall be made for the time of year in which the shipment took place". Many formulations fix the amount of the allowance to be made depending on the extent of the deficiency in quality, e.g. B.9, B.10, B.12, B.16, B.17, B.18, D.4.

155. Under formulation D.5, in certain cases a penalty is payable by the seller in addition to the allowance to be made. The amount of the penalty equals 50 per cent of the allowance. Formulation A.3 also provides for the payment of a penalty in cases where the buyer requests the seller to eliminate the defect in the goods. This penalty is to cover the period from the date when the claim is made to the date when the defect is eliminated either by repair or replacement, and it is to be calculated at the same rate as in cases of delay in delivery (see para. 140 above).

156. Some general conditions make the remedy of the buyer dependent on the extent of the deficiency in the quality of the goods. Thus, under B.16, B.17 and B.18, in cases where the allowance would exceed 10 per cent of the contract price, the buyer may reject the goods and claim damages. Under C.7, where the difference between the value of the goods delivered and the contract price

is less than 10 per cent, the buyer may only claim a reduction in price; where, however, the difference exceeds that limit, he may terminate the contract and claim damages. According to B.6, where, in case of sales "as per sample", the deficiency in value is less than 5 per cent, or, in case of sales, "as per type", less than 7 per cent, the buyer may only claim an allowance; if, however, the deficiency exceeds the above percentages, he may demand cancellation of the contract and claim damages. According to B.12, if foreign material mixed with the goods exceeds 5 per cent, the buyer may reject such goods, and the contract shall be null and void in respect of the rejected quantity.

157. Under formulations A.5 and A.6, the only remedy that is available to the buyer for any deficiency in quality (or quantity) is compensation.

158. Under A.3, the buyer may demand either elimination of the defect by the seller or reduction in the price. If he requires elimination of the defect, the seller has, at his own expense, to repair the goods or replace them. However, if he fails to eliminate the defect, the buyer shall have the right to eliminate them himself and claim the actual expenses from the seller to the extent that they are justifiable.

159. According to C.9, in case of defect in quality, the buyer is entitled only to a reduction in price. However, in cases where the contract provides that certain characteristics of the goods will not reach a certain minimum or will not exceed a certain maximum, and that condition is not fulfilled, the buyer may cancel the contract or demand replacement of the goods or claim damages for non-performance.

160. Under formulations B.13, B.14 and B.15, the difference in quality does not entitle the buyer to reject the goods except under an arbitration award.

S. Remedies for non-performance of other obligations

161. Several general conditions contain provisions in respect of seller's remedies in case the buyer fails to give shipping instructions in time. According to A.1 (Incoterms, in respect of ex works, f.o.b., c.&f., c.i.f., f.a.s. and "freight and carriage paid to..." contracts) the buyer must bear the additional cost incurred and all risks of the goods from the date of expiration of the period for giving such instructions. Under formulation A.3, the seller may place the goods in storage at the buyer's risk and expense. According to B.1, the seller may (a) ship the goods and demand performance of the contract by the buyer, or (b) request instructions by the buyer, or (c) terminate the contract or (d) claim damages for non-performance. In cases (b), (c) and (d) the seller has to give notice that he will not ship the goods at least three days prior to exercising any of these rights.

162. Under E.1 and E.2, if the buyer does not give loading instructions the seller may nevertheless load the goods at his own discretion. According to A.8 and A.9, where the seller does not get the shipping instructions he will not be held responsible for late shipment; A.8 also provides that the seller is entitled to charge interest on

the price at 6 per cent per annum from the contractual shipment date to the date of the bill of lading, or to cancel the contract and claim damages if he does not receive the instructions within one month from the contractual shipment date.

163. Some general conditions also provide remedies for failure by the seller to notify the buyer of the fact that shipment of the goods has been effected, or for non-observance of shipping instructions by the seller. Thus, formulation A.3 provides that the seller shall pay a certain penalty in case of failure to notify the buyer of the effectuation of shipment, and shall reimburse the buyer for all expenses incurred by the latter in case of non-observance of the shipping instructions. According to D.3, however, the seller simply reimburses the buyer for all expenses the latter may have incurred as a result of the seller's failure to inform him of particulars relating to effectuation of shipment. Under formulation B.1, in cases of a sale of floating goods or goods to be carried by sea, failure by the seller to notify the buyer of the particulars of the shipment entitles the buyer, after the expiry of an additional period of three days, to terminate the contract or to claim damages.

T. Remedies of the seller in respect of delay in payment by the buyer

164. Several general conditions provide that where the buyer fails to effect payment in time, the seller may postpone fulfilment of his own obligations until payment is made (A.8, C.1, C.2, C.4, E.4 and E.5). In addition, formulation C.1 provides that the seller may recover, after a written notice to buyer, interest on the sum due at the rate of 6 per cent. Should the buyer fail to effect payment within an additional period agreed by the parties, or, failing such agreement, within one month from the date on which payment became due, the seller may, by notice in writing, and to the exclusion of any other remedy, terminate the contract. Under C.2 and C.4, however, if the seller gives notice to the buyer within a reasonable time, he may claim interest on the sum due, and if at the end of the additional period fixed in the contract the buyer still fails to pay, the seller may, by notice in writing and without the consent of any court, terminate the contract and claim damages.

165. Formulations E.1 and E.2 provide that where the buyer fails to make any payment due before delivery, or to open a letter of credit, the seller may choose between maintaining the contract and terminating it. In the latter case, the seller has to give notice to the buyer within 15 calendar days from the date on which payment was due, specifying the date after which he will regard the contract as discharged. The seller may also claim damages in addition to reimbursement of additional expenses incurred by him through buyer's delay. Termination of the contract by the seller on due notice in cases where the buyer fails to effect payment in time is also provided for in formulations C.7, D.8, D.9 and D.10.

166. The only formulation that grants the seller the right of stoppage *in transitu* is A.8. Under this formulation, if the buyer fails to make payment within a certain

period after presentation of seller's draft or bill covering goods shipped in accordance with the contract, the seller may, *inter alia*, "dispose of the goods already shipped under the contract to private sale or public auction on buyer's account and risk and without notice to the buyer . . .".

U. Relief

167. Most general conditions contain provisions relating to the circumstances which relieve the parties of their liability for non-performance of their obligations.

168. While some general conditions define these circumstances in general terms, many formulations list, in varying degrees of detail, the particular events which fall within the scope of these circumstances. Thus, formulation A.3 describes the relief circumstances as "circumstances of insuperable force" and defines them as "circumstances which arose after the conclusion of the contract as a result of events of an extraordinary character, unforeseen and unavoidable by the party". Formulation A.9 provides that the seller shall not be responsible for damage resulting from any cause without his actual fault and privity and without the fault or neglect of his agents or servants. Furthermore, while formulation A.6 relieves the seller of liability for delay in shipment caused by circumstances beyond his control, formulations E.1 and E.2 define cases of relief as any circumstance, beyond the control of the parties, which a diligent party could not have avoided and the consequences of which he could not have prevented, provided that this circumstance intervenes after the formation of the contract and prevents its fulfilment whether wholly or partially.

169. On the other hand, many formulations enumerate two or more of the following specific events as a definition of *force majeure* or simply as causes for relief where they result in delay in performance or give rise to impossibility of performance whether wholly or partially: state of war, severe floods, fires, natural disasters, droughts, ice, strike, lock-out, act of God, riot, civil commotion, breakdown of machinery, mobilization, requisition or acquisition by government, currency restrictions, prohibition of import or export, shortage of transport or general shortage of materials, restrictions in the use of power, pestilence, refusal to issue export or import licence, blockade, embargoes, insurrection, sabotage, plague or other epidemic, quarantine, typhoons, hurricanes, tidal waves, lightning, shortage of labour, and other causes beyond the control of the parties (A.4, A.6, A.8, A.9, B.5, B.6, B.7, B.8, C.2, C.6, D.1, D.7, E.3, E.4, E.5, E.6, etc.).

170. A special case of relief is contained in formulation E.4. According to this formulation the buyer is relieved of his obligation to take delivery of the contracted goods not yet manufactured by the seller when the buyer's works or factory is destroyed by fire or any other cause beyond his control.

171. Formulation D.2 provides that if the contract becomes illegal by English law or by the law of the country from which the goods are to be shipped or the country of the destination of the goods, the contract shall be cancelled without allowance to either party, and any

money which was paid shall be repaid in accordance with the provisions of the United Kingdom Law Reform (Frustration of Contracts) Act, 1943.

172. A great number of general conditions require the party who intends to claim a case of relief to notify the other party of the occurrence of the relieving event; many of these formulations also require notification of the cessation of such event (for instance, A.3, B.16, B.17, B.19, C.1, C.2, C.4, C.7, E.1, E.2, E.4, E.5).

173. The time-limit within which the notification should be made differs widely. Thus, the notification should be made:

- immediately or without delay (A.3, A.4, A.6, A.8, B.16, B.17, B.19, B.21, C.1, C.2, C.4, C.7, E.1 and E.2);
- within a reasonable time (D.3, D.9, D.10, E.5);
- within seven days from occurrence of the relieving event (B.6, B.12, D.7, E.4);
- within two days (Sundays and holidays excepted) after the last day of guaranteed time for shipment (B.7, B.13, B.14 and B.15);
- within seven days after the end of the contractual shipping period (D.5 and D.6).

174. Several formulations also require the furnishing of proof of the occurrence of the relieving event (e.g., A.3, A.4, A.6, B.7, B.13, B.14, B.15, B.16, B.17, B.19, D.3, D.9).

175. Almost all formulations contain provisions relating to the consequences of the occurrence of a relieving event. Some general conditions, however, draw a distinction between cases where performance is rendered totally or partially impossible and cases where performance is simply delayed.

176. All formulations that contain provisions on relief provide that where performance is rendered absolutely impossible, the contract shall be "cancelled" or deemed to be "null and void" to the extent of that impossibility (A.8, B.3, B.4, B.10, B.11, B.13, B.14, B.15, B.16, B.17, B.18, B.19, E.3, E.4, E.5).

177. Formulation C.1, on the other hand, provides that if the performance of the contract within a reasonable time becomes impossible, either party may terminate the contract by notice to the other party.

178. Divergent solutions are adopted in different general conditions in cases where the interrupting cause is of a temporary nature. The following are a few examples:

- If the interruption of hindrance lasts more than 30 days, the contract may be cancelled (A.4, B.4, B.9, B.10, B.12, C.9, E.4, E.5);
- Under A.9, the same result follows after lapse of a reasonable time;
- Under D.5 and D.6, after 60 days;
- If the interruption lasts more than five or eight months, depending on the period allowed for delivery, either party may terminate the contract (A.3);
- Under D.9, D.10 and E.6, the contract becomes null and void if the interruption lasts more than six weeks;
- According to E.5 and E.3, the delivery time will be extended to the same extent as the length of the interruption;

A similar solution of extension of delivery time is adopted in B.7, B.14 and B.15, but only if the interruption is caused by a strike, riot or lock-out within the last 28 days of the delivery period.

Under B.18 and, with slight differences, under B.16, B.17 and B.19, the extension solution applies if the cause arises during the last 28 days of the period and is the result of an event other than official stoppage of navigation for such reasons as ice, floods or shallow water. Failure to deliver after the extended date is considered as default;

Under B.1, the delivery period is suspended for the duration of the interruption;

Under B.3, the parties will have to agree on amendment, extension or cancellation of the contract.

V. Miscellaneous provisions

179. Almost all general conditions provide that disputes which could not be amicably settled by the parties should be submitted to arbitration by a specified tribunal, usually according to the arbitration rules adopted by the trade association, commodity exchange or other similar organization which drew up the particular general conditions form.

180. Many formulations also include provisions relating to the measure of damages that a non-defaulting party could claim. Some general conditions also contain provisions relating to one or more of the following issues: bankruptcy, prescription, assignment, applicable law and "string" (successive) contracts.

V. CONCLUSIONS AND FUTURE WORK

A. Conclusions

181. As stated in paragraph 7 above, one of the purposes of the present analysis is to compare the issues dealt with in "general" general conditions with those included in general conditions with a restricted scope, that is, those relating to a group of commodities or a specific commodity.

182. It will be noted from this analysis that none of the general conditions under consideration covers all issues or settles all the questions dealt with in part IV of this study.

183. In a few cases, the absence in certain formulations of provisions on specific issues or problems is due to the specific kind or nature of the goods to which the particular formulation applies. For instance, though most formulations for agricultural products contain provisions relating to the percentage of the allowable tolerance (see paras. 44-45), formulations for engineering goods of course do not. On the other hand, general conditions for plant and machinery include provisions relating to the guarantee with respect to the quality or performance of the goods for a specific period (see paras. 100-106), while formulations for agricultural products do not.

184. In most cases, however, the absence of provisions on a certain issue or problem does not appear to be related

to the kind or nature of the goods. For instance, formulation C.6 (drawn up by the Federation of Oils, Seeds and Fats Associations for contracts "for general business") contains provisions only on payment, delay, bankruptcy, domicile, arbitration and non-business days. Similarly, formulation A.4 (Sino-Japanese Trade Contracts for Imports to Japan) includes provisions only on the terms of payment and of shipment, inspection, arbitration and *force majeure*. Thus, in all general conditions many questions relating to the sale transaction remain unsettled.

185. It will also be noted that of the nine "general" general considerations listed under category A in annex II, seven formulations apply only to sales in a specific geographical area or between two specific countries. The remaining two (A.1 and A.2) deal only with interpretation of trade terms and are used only in certain parts of the world. Consequently there are at present no universally applicable general conditions for the sale of a wide range of commodities. Furthermore, many of the existing forms that cover a certain group or a specific kind of commodity apply only to a restricted number of trade terms.

186. These circumstances seem to point up the need for a set of truly "general" general conditions that could be used in international trade among the various regions of the world.

187. The fact that most formulations do not include provisions on several issues relating to the sale transaction may not by itself affect the feasibility of drawing up a set of "general" general conditions covering a wide range of issues. Such a set of general conditions might facilitate the conclusion of contracts of sale and help to minimize the possibility of disputes.

188. Similarly, the feasibility of drawing up such a set of general conditions might not be affected by the fact that in certain cases a provision on a particular issue would not be appropriate for certain kinds of goods. In such cases, a restricted applicability of the relevant provision might be provided for in the text.

189. In the earlier part of this study (see para. 6 above), and in the conclusion reached in the analysis of ECE general conditions relating to cereals in respect of trade terms (see para. 23 (c)), it was suggested that there was no need to have separate general conditions forms for each trade term (f.o.b., c.i.f., c.&f., etc.) and mode of transport. The analysis in part IV of the present report also supports this view. The provisions relating to various trade terms and modes of transport could be set forth as alternatives in a single "general" general conditions form; in such a case the parties would choose which trade term or mode of transport would apply to their contract, in the same manner as they now choose the form that applies to the agreed trade term or mode of transport.

190. With respect to the substance of the provisions that might be included in a new set of "general" general conditions, it may be recalled that provisions in existing general conditions that are applicable only to a particular commodity (see para. 29 above) have been excluded from the present analysis. In view of the fact that such provision

are required only in connexion with certain commodities and that they embrace a small number of the issues to be settled in the sale of such commodities, it is considered that they do not fit in a scheme of "general" general conditions that would be applicable to a wide range of commodities. Such questions could be left outside the scope of the "general" general conditions, to be settled either by the agreement of the parties or by including them in special annexes to the general form.

191. It will be recalled that the earlier part of the present study led to the tentative conclusion that the feasibility of drawing up a set of "general" general conditions depended, to a large measure, on whether it was possible to develop solutions on basic issues that could be applicable to a wide range of commodities (see para. 6 (c)). The analysis of the provisions relating to the various issues dealt with in parts III and IV of this report shows that there is a great variety of solutions in respect of each issue in the existing formulations. At first sight it could appear that this diversity in solutions might have resulted from the difference in the nature of the commodities dealt with in the various formulations. However, a closer examination seems to indicate that, in many instances, these differences are due to the fact that the various formulations were drawn up, independently of each other and at different times, by different organizations.

192. Support for this conclusion may be found in the fact that different solutions have been adopted in the various formulations for issues which by their very nature have no connexion with the kind of goods covered by the particular formulation, such as formation of the contract, licences, taxes, duties and fees, interpretation of trade terms, passing of risk (see for instance paras. 33, 35, 36, 38, 43, 70-72, 108).

193. The above conclusion may also be supported by the fact that different solutions have been adopted on certain issues relating to the same kind of commodities. For instance, in the case of tolerance, which is applicable only in respect of goods sold in bulk, the amount of tolerance that is allowed in the various forms differs greatly (see para. 44). Similarly, the interpretations of expressions relating to the time of delivery, such as "immediate delivery", "prompt delivery", etc., which are found mainly in formulations relating to agricultural products, also differ widely (see para. 60 above).

194. In a limited number of cases, however, the difference in the provisions relating to some issues is to a certain extent due to the difference in the kind of goods involved; for example, the time within which the buyer has to notify the seller of his claim may be different for perishable goods and for machinery. The same is true in respect of the provision, usually found in formulations relating to agricultural products and other goods that have a quoted market price, that the damage payable to the buyer in case of non-delivery shall consist of the difference between the contract price and the market price at the time of the breach; such provision, of course, cannot be applied in respect of goods that are not readily available in the market.

195. This circumstance, however, does not seem to affect materially the feasibility of preparing a set of "general" general conditions. Since each of these competing provisions generally relates to a large group of commodities, it might be possible to accommodate them within the uniform general conditions form by indicating under the relevant issue the particular solution that should apply in the case of each group of commodities.

196. The preliminary first draft of a set of general conditions referred to in paragraph 5 above has been drawn up in the light of the above considerations and suggested guidelines.

197. These "general" general conditions are not intended to replace any of the existing formulations. The set of general conditions that might emerge from this preliminary draft would of course be used only if chosen by the parties, who would be free to amend, alter or abolish any of its provisions, either by detailed agreement or by reference to provisions in any existing formulation. Thus, the uniform general conditions could also be used to fill in the gaps in existing formulations to the extent that the parties concerned found them suitable for that purpose.

B. Future work

198. In the light of the above conclusions and suggested guidelines, and in view of the work done on the preliminary first draft, it appears feasible to draw up a set of "general" general conditions that would be applicable at least to a wide range of commodities. However, the preparation of a final draft of uniform general conditions would require the co-operation of trade associations, chambers of commerce and other similar organizations in different regions, since only they would be in a position to determine which of the competing rules relating to the various issues would be most appropriate for such a scheme.

199. The Commission might therefore wish to request the Secretary-General to set up a group of experts that would be representative of the various organizations mentioned in paragraph 198 above. The immediate task of this group would be to assist the Secretariat in the preparation of a final draft to be submitted to the Commission.

200. The Commission might also wish to request the Secretary-General to report to the Commission at its seventh session on the progress made on this project.

ANNEX I

Standard forms of contract in the sale of cereals drawn up under the auspices of the United Nations Economic Commission for Europe

No.

- | | |
|----|---|
| 1A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Weight and condition—final at shipment. |
| 1B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Weight and condition—final at shipment. |

No.

- | | |
|----|---|
| 2A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Condition final at shipment; Full out-turn. |
| 2B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Condition final at shipment; Full out-turn. |
| 3A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final. |
| 3B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Shipping weight final. |
| 4A | c.i.f. (maritime); Non-reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge). |
| 4B | c.i.f. (maritime); Reciprocal; Cargoes and parcels; Rye terms (condition guaranteed at discharge); Full out-turn. |
| 5A | f.o.b. (maritime); Non-reciprocal; Cargoes and parcels. |
| 5B | f.o.b. (maritime); Reciprocal; Cargoes and parcels. |
| 6A | Consignment by rail in complete wagon loads; Non-reciprocal. |
| 6B | Consignment by rail in complete wagon loads; Reciprocal. |
| 7A | c.i.f. (Inland Waterway); Non-reciprocal. |
| 7B | c.i.f. (Inland Waterway); Reciprocal. |
| 8A | f.o.b. (Inland Waterway); Non-reciprocal. |
| 8B | f.o.b. (Inland Waterway); Reciprocal. |

ANNEX II

List of general conditions analysed in part IV of the report

A. "General" general conditions

Identifying symbol	Title
A.1	Incoterms 1953—International Rules for the Interpretation of Trade Terms (International Chamber of Commerce)
A.2	International Rules for the Interpretation of the Terms: <ul style="list-style-type: none"> I. "Delivered at frontier . . . (named place of delivery at frontier)" II. "Delivered . . . (named place of destination in the country of information) duty paid" (International Chamber of Commerce)
A.3	General Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (GCD, CMEA 1968)
A.4	Sino-Japanese Trade Contracts: (a) Friendly Trade Import Contract (Import to Japan)
A.5	Sino-Japanese Trade Contracts: (b) L-T Trade Import Contract (Import to Japan)
A.6	Sino-Japanese Trade Contracts: (c) Friendly Trade Export Contract (Export from Japan)
A.7	Contract of Sale Form between China and Viet-Nam
A.8	Model contract form for use in foreign trade contracts (The Indian Council of Arbitration)
A.9	General Terms and Conditions for the Sale of Sundries (Japan International Trade Arbitration Association)

B. General conditions relating to all or a group of agricultural products

- | | |
|-----|---|
| B.1 | Geschäftsbedingungen des Waren-Vereins der Hamburger Börse e.V. |
|-----|---|

Identifying symbol	Title	Identifying symbol	Title
B.2	Standard form of contract for sale of Burma products on f.o.b. basis	C.3	Conditions générales de vente—Matériels d'importation (Chambre syndicale des négociants importateurs de matériel de travaux publics et de manutention)
B.3	Standard form of contract for sale of Burma products on c.i.f. basis	C.4	General conditions for the supply for export of railway rolling stock and internal combustion engine locomotives (the International Association of Rolling Stock Builders (AICMR) and the European Builders of Internal Combustion Engine Locomotives (CELT))
B.4	Conditions générales de vente en CAF pour les produits de Madagascar (café exceptés) (Fédération nationale des syndicats d'importateurs et d'exportateurs de l'Afrique orientale)	C.5	Conditions générales de vente (Syndicat national des fabricants d'engrenages et constructeurs d'organes de transmission)
B.5	General Contract No. 1 (The Grain and Feed Trade Association)	C.6	Contract for general business, No. 12 (Federation of Oils, Seeds and Fats Associations Ltd.)
B.6	General Contract No. 1 (The Cattle Food Trade Association)	C.7	Geschäftsbedingungen des Vereins des Deutschen Einfuhr-grosshandels von Harz, Terpentinöl und Lack-rohstoffen e.V.
B.7	f.o.b. Contract No. 64 (London Corn Trade Association Ltd.)	C.8	Allgemeine Verkaufs- und Lieferungsbedingungen für pflanzliche und tierische Öle, Fette, Fettsäuren und Trane (Verband des Deutschen Grosshandels mit Ölen, Fetten und Ölröhrstoffen e.V. Grofor, Hamburg)
B.8	General Contract f.o.b. terms for goods in bags or bulk, No. 119 (The Grain and Feed Trade Association)	C.9	c.i.f. Contract terms for vegetable and animal oils and fats, fatty acids, acid oils and marine oils (Association of German Importers, Exporters and Wholesalers in Oils, Fats and Raw Materials of Oil)
B.9	Copenhagen Contract for Transactions in Grain "free on board"		
B.10	Copenhagen Contract for Transactions in Grain "including freight" (c.f.) or "including freight and insurance" (c.i.f.)		
B.11	Contract for . . . Basis—Delivered Terms ex ship, No. 81 (The Incorporated Oil Seed Association)		
B.12	Contract for full container loads (FCLs), No. 107 (The Grain and Feed Trade Association)		
B.13	Canadian and United States of America grain contract, cargoes, tale quale, No. 27 (London Corn Trade Association Ltd.)		
B.14	La Plata grain contract, cargoes, rye terms, No. 32 (London Corn Trade Association Ltd.)		
B.15	Black Sea and Danubian grain contract, cargoes, tale quale, No. 48 (London Corn Trade Association Ltd.)		
B.16	Contract for the sale of cereals No. 1B—c.i.f. (maritime); Reciprocal cargoes and parcels; Weight and condition—final at shipment (United Nations Economic Commission for Europe)		
B.17	Contract for the sale of cereals No. 5B—f.o.b. (maritime); Reciprocal, cargoes and parcels (United Nations Economic Commission for Europe)		
B.18	Contract for the sale of cereals No. 7A (inland waterway)—non-reciprocal (United Nations Economic Commission for Europe)		
B.19	Contract for the sale of cereals No. 6A—consignment by rail in complete wagon loads—non-reciprocal (United Nations Economic Commission for Europe)		
B.20	FIS Rules and Usages for the international trade in agricultural seeds (Fédération internationale du commerce des semences)		
B.21	FIS Rules and Usages for the international trade in vegetable seeds, root seeds, mangel seeds, peas, dwarf and broad bean seeds (Fédération internationale du commerce des semences)		
	<i>C. General conditions relating to a group of non-agricultural commodities</i>		<i>D. General conditions relating to a specific agricultural product</i>
C.1	General conditions of sale for the import and export of durable consumer goods and of other engineering stock articles, No. 730 (United Nations Economic Commission for Europe)	D.1	General conditions for international dealings in potatoes (United Nations Economic Commission for Europe)
C.2	General conditions for the supply of plant and machinery for export, No. 188 (United Nations Economic Commission for Europe)	D.2	Conditions of sale (The Coffee Trade Federation)
		D.3	f.o.b., c.&f. and c.i.f. Contract (The Coffee Trade Federation)
		D.4	The London Jute Association Contract
		D.5	Contract form for the purchase/sale of Thai mesta fibre (Indian Jute Mills Association/Thai Jute Association)
		D.6	Agreement between the Jute Association of Thailand and the Japan Jute Association
		D.7	Contract for feeding fish meal, c.i.f. terms, No. 10 (The Grain and Feed Trade Association, Ltd.)
		D.8	Conditions of sale of rubber f.o.b. Colombo (The Ceylon Chamber of Commerce)
		D.9	International f.o.b. contract for hides No. 1 (International Council of Hide and Skin Sellers' Associations and the International Council of Tanners)
		D.10	International c.i.f., c.&f. contract for hides No. 14 (International Council of Hide and Skin Sellers' Associations and the International Council of Tanners)
			<i>E. General conditions relating to specific non-agricultural commodities</i>
		E.1	General conditions for export and import of sawn softwood, No. 410 (United Nations Economic Commission for Europe)
		E.2	General conditions for the export and import of hardwood logs and sawn hardwood from the temperate zone (United Nations Economic Commission for Europe)

<i>Identifying symbol</i>	<i>Title</i>	<i>Identifying symbol</i>	<i>Title</i>
E.3	"Uniform" general terms, conditions and warranties 1964 (Timber Trade Federation of the United Kingdom, The Finnish Sawmill Owners' Association and the Swedish Wood Exporters' Association)	E.6	"Albion" general terms, conditions and warranties 1964 (Timber Trade Federation of the United Kingdom, the Finnish Sawmill Owners' Association and the Swedish Wood Exporters' Association)
E.4	General trade rules (adopted by the Norwegian, Swedish and Finnish Paper Makers' Associations and agreed to by the National Association of Wholesale Stationers and Paper Merchants, the United Kingdom Paper Bag Association and the United British (wholesale) Paper Bag Makers' Association)	E.7	General terms and conditions for machines (Japan International Trade Arbitration Association)
E.5	General trade rules for sale to overseas markets (adopted by the Norwegian, Finnish and Swedish Paper Makers' Associations and agreed upon by the Norwegian Oversea Exporters' Association and the Swedish Transmarine Export Union)	E.8	Draft model contract (Fédération européenne des importateurs de machines de bureau)
		E.9	Conditions of sale and resale for export cargo shipments (National Coal Board of the United Kingdom)
		E.10	Convention Fabrique Commerce, Contrat de coopération (Union nationale des négociants en chaussures en gros)

II. INTERNATIONAL PAYMENTS

Negotiable instruments

1. *Working Group on International Negotiable Instruments; draft uniform law on international bills of exchange and promissory notes: report of the Working Group on the work of its first session (Geneva, 8-19 January 1973) (A/CN.9/77)**

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* 30 January 1973.

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 In response to that decision, a report entitled "Draft uniform law on international bills of exchange and commentary"

(A/CN.9/67)* was placed before the Commission at its fifth session. The draft was concerned with bills of exchange in the narrow sense of the term and did not include within its scope promissory notes and cheques. Throughout the preparatory stages leading up to the formulation of the draft, consultations were held with international organizations having a special interest in the matter and information on present-day commercial practices was obtained by means of questionnaires and interviews.

2. At its fifth session, the Commission took note of the result of inquiries made by the Secretariat amongst banking and trade circles concerning the use and importance of promissory notes in international trade and requested the Secretary-General "to modify the draft uniform law on international bills of exchange with a

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), para. 35 (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.

* UNCITRAL Yearbook, vol. III: 1972, part two, II, 1.

view to extending its application to international promissory notes". The Commission requested that the draft uniform law so modified be submitted to the Working Group² which it established at that session.³

3. The Working Group on International Negotiable Instruments consists of the following eight members of the Commission: 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.

4. Under the Commission's decision, the terms of reference of the Working Group are:

- (1) "To prepare a final draft uniform law on international bills of exchange and international promissory notes", and
- (2) "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."

5. The Working Group held its first session in the United Nations Office at Geneva from 8 to 19 January 1973. With the exception of India, all the members of the Working Group were represented. The session was also attended by observers from the following members of the Commission: Austria, Argentina, Brazil, Iran, Japan, Kenya and Romania, and by observers from the International Monetary Fund, Hague Conference on Private International Law, International Bank for Economic Co-operation, International Institute for the Unification of Private Law (UNIDROIT), Bank for International Settlements, Commission of the European Communities and International Chamber of Commerce.

6. The Working Group elected the following officers:
Chairman Mr. Moshen Chafik (Egypt)
Rapporteur . . . Mr. Roberto Luis Mantilla-Molina (Mexico)

7. The Working Group had before it a report of the Secretary-General entitled "Draft uniform law on international bills of exchange and international promissory notes, and commentary" (A/CN.9/WG.IV/WP.2) * which was prepared in response to the above-mentioned decision of the Commission taken at its fifth session. The Working Group also had before it a working paper prepared by the Secretariat (A/CN.9/WG.IV/R.1).

* For the text of the draft uniform law on international bills of exchange and international promissory notes, see next section (part two, II, 2).

² Report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), para. 61 (2) (c) (UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

³ *Ibid.*, para. 61 (1) (a).

DELIBERATIONS AND CONCLUSIONS

8. With regard to its working methods, the Working Group decided that it would, at its first session, concentrate its work on the substance of the draft uniform law. The Group requested the Secretariat to prepare a revised draft of those articles in respect of which its deliberations would indicate modifications of substance or of style. The Group also decided to postpone consideration of the scope of application of the uniform law until a later stage of its work and it commenced its discussion of the provisions of the draft uniform law with part three of the draft (transfer and negotiation). In the course of its session, the Working Group considered articles 12 to 40 of the draft uniform law and articles 5 and 6 (interpretation) in so far as they relate to those articles. A summary of the Group's deliberations in respect of these articles and its conclusions are set forth in paragraphs 10 to 135 of this report.

9. At the close of its session, the Working Group expressed its appreciation to the Secretariat for the highly competent draft and commentary embodied in document A/CN.9/WG.IV/WP.2 and observed that this material provided the Group with an excellent basis for its work. The Working Group also expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments. The experience and judgement made available by the Study Group to the Secretariat has helped to place the draft on a sound and practical basis. The Working Group expressed the hope that the members of the Study Group would continue to make their services available to the Working Group and to the Secretariat during the remaining phases of the current project.

A. Transfer and negotiation (articles 12 to 22)

Article 12

The transfer of an instrument vests in the transferee the rights to and upon the instruments that the transferor had.

10. The draft uniform law makes a distinction between the transfer of an instrument and its negotiation. Under article 12, the effect of the transfer of an instrument, with or without endorsement, is that the transferee has the same rights to and upon the instrument as the transferor. It follows from this provision that a transferee has the rights of a holder or of a protected holder if his transferor was a holder or a protected holder.

11. During the consideration of article 12, it became apparent that the implications of the rule set forth in that article can only be fully ascertained in the context of other provisions of the draft uniform law in which the concept of transfer is relevant. Therefore, the comments referred to below are of a preliminary nature, and the Working Group will reconsider article 12 at a later stage of its work.

12. There was considerable support in the Working Group for the view that the uniform law should deal only with the legal effects of the transfer of an instrument by endorsement, or by mere delivery in the case of an instrument on which the last endorsement is in blank. Under this view, the effects of a transfer without endorsement and the effects of an assignment should be left to the applicable national law.

13. The opinion was expressed that the Secretariat should consider the possibility of eliminating from the draft the concept of transfer without endorsement and instead should seek to achieve the principal results of article 12 in another way and in the context of other articles. The following specific solutions were suggested for incorporation into other articles of the draft:

(a) If an instrument is transferred by a holder without the necessary endorsement, the transferee would have the rights of a holder, even where the transferor refuses or is unable to make the endorsement;

(b) If an instrument is paid by the drawer and the drawer receives the instrument without endorsement, such drawer should be able to transfer his rights to another person;

(c) If an instrument is endorsed by a protected holder to a person who is not himself a protected holder, such person should have the rights of a protected holder, subject to the provision of article 25 (2), according to which such endorsee shall not have the rights of a protected holder if he "has participated in a transaction which gives rise to a claim to, or a defence upon, the instrument".

Article 13

(1) An instrument is negotiated when it is transferred

(a) By endorsement and delivery of the instrument by the endorser to the endorsee, or

(b) By mere delivery of the instrument but only if the last endorsement is in blank.

(2) Negotiation shall be effective to render the transferee a holder even though the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would subject the transferee to claims to the instrument or to defences as to liability thereon.

14. Under article 13, an instrument is negotiated when it is endorsed by the holder and delivered by him to the endorsee or, if the last endorsement is in blank, when it is delivered. Under paragraph (2) of article 13, an instrument is negotiated even though negotiation is effected by a person without capacity, etc.

15. The Working Group found itself in agreement with the substance of the article, but made a number of suggestions designed to improve clarity.

16. It was pointed out that this article, in combination with the definition of holder in article 5 (b), should make clear that any person in possession of an instrument of which the last endorsement is in blank (e.g. a finder or a thief of a bearer instrument) is a holder. Further, it should be made clear that negotiation is not the only way

by which a person can become a holder; for instance the payee of an instrument is a holder although the instrument is not negotiated to him.

17. It was also suggested that an attempt should be made to eliminate from the draft the terms "negotiate" and "negotiation" and to employ instead the concepts of endorsement and delivery.

18. The question was raised whether the uniform law should give the effects of negotiation to an endorsement made after maturity. In this connexion, it was suggested that the uniform law should follow the approach of article 20 of the Geneva Uniform Law of Bills of Exchange.⁴

Article 14

Where an instrument is transferred without an endorsement necessary to make the transferee a holder, the transferee is entitled to require the transferor to endorse the instrument to him.

19. The lack of a necessary endorsement would seriously impair the rights of the transferee and would prevent further negotiation of the instrument. The purpose of this article is to confer on the transferee a statutory right to require the transferor to make the necessary endorsement. The procedures for enforcement of such right is left to national law.

20. Various comments were made concerning this article. The view was expressed that the uniform law should not grant a statutory right to the transferee to require an endorsement from his transferor, but that this question should be governed by the contractual relationship of the parties outside the instrument. According to another view, article 14 would only be effective if it specified the sanctions in the case of non-compliance by the transferor. For instance, the transferor might be made liable to pay compensation for any damages sustained by the transferee; such damages could be presumed to be the amount of the instrument, to be reduced by whatever the transferor could show by way of mitigation.

21. It was pointed out that uniform law should specify that a transferee who had obtained the required endorsement should become a holder only at the time when the endorsement was made.

22. It was noted that article 14 did not impose an excessive burden on the transferor since he may fulfil his obligations under the article by endorsing the instrument "without recourse". It was further noted that the advantage of article 14 was twofold:

⁴ "An endorsement after maturity has the same effects as an endorsement before maturity. Nevertheless, an endorsement after protest for non-payment, or after the expiration of the limit of time fixed for drawing up the protest, operates only as an ordinary assignment."

"Failing proof to the contrary, an endorsement without date is deemed to have been placed on the bill before the expiration of the limit of time fixed for drawing up the protest."

- (i) In some countries, in the absence of statutory rules, there may be no effective remedy for a refusal to make the necessary endorsement;
- (ii) It would be reasonable to imply a promise to supply a necessary endorsement. Article 14 is useful in giving a statutory right that would be equivalent to a contractual right based on such an implied promise.

23. The view was expressed that article 14 could provide that the transferee would be entitled to sign the endorsement as an agent of the transferor, but only in the case where there is an established agency relationship between the parties, such as between a depositary bank and its client.

24. It was suggested by one representative that the Secretariat give consideration to the question whether a bailee or agent should have the right to compel an endorsement when he has not given value.

Article 15

The holder of an instrument endorsed in blank may convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other person.

25. The purpose of article 15 is to make clear that a holder may convert a blank endorsement into a special endorsement, without an additional signature but by the mere addition of the name of a person to whom the instrument is payable.

26. It was pointed out that article 14 of the Geneva Uniform Law on Bills of Exchange sets forth, in addition to the provision of article 15 of the Draft Uniform Law, two further provisions, namely, the holder may (a) re-endorse the instrument in blank, or to some other person, and (b) transfer the instrument to a third person without filling up the blank, and without endorsing it. It was suggested that consideration be given to including the substance of these provisions.

Article 16

When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement, words prohibiting transfer, such as "not transferable", "not negotiable", "not to order", or words of similar import, the instrument cannot be negotiated except for purposes of collection.

27. Article 16 enables the drawer, the maker or an endorser to prevent negotiation of the instrument by the person who took the instrument from him.

28. The view was expressed that the basic objective of this article might be achieved by providing that, when an instrument is marked "not negotiable", parties subsequent to the party who took such an instrument would not have the status of "holder". In this connexion it was suggested that, if possible, the objective of the article should be achieved without stating that the instrument cannot be "negotiated".

29. According to another view, article 16 should make separate provision for the effect of "not negotiable" clauses added by (1) the drawer or the maker, and (2) an endorser.

30. It was felt that article 16 should specify the legal effects of an endorsement made contrary to a stipulation prohibiting negotiation.

31. One representative took the view that article 16 should not be retained; if it were retained, the article should state explicitly that an instrument containing words prohibiting negotiation cannot be endorsed.

Article 17

An endorsement purporting to negotiate an instrument subject to a condition shall be effective to negotiate the instrument irrespective of whether the condition is fulfilled.

32. Under article 17, an endorsement which makes the negotiation of an instrument subject to a condition is effective as an endorsement even though the condition may not be fulfilled.

33. Under one view, article 17 should state clearly, as a matter of policy, that an endorsement must be unconditional; if an endorsement was nevertheless made subject to a condition, the condition should be deemed not to be written. It was pointed out, in this connexion, that such wording could be interpreted to mean that the condition was ineffective between the endorser and his immediate endorsee; this was held to be undesirable. Any such formulation should be qualified: a conditional endorsement is deemed not to be written except as between the endorser and his endorsee.

34. The Working Group decided that the uniform law should take into account the following objectives:

(a) The fact that a remote holder knew about the non-fulfilment of the condition, or did not inquire whether or not it was fulfilled, shall not prevent such holder from being a protected holder if he otherwise so qualifies.

(b) The non-fulfilment of the condition cannot be raised as a defence by the party who endorsed conditionally against a remote holder, even if such holder is not a protected holder.

(c) A party who endorsed conditionally may assert the non-fulfilment of the condition against his immediate endorsee.

Article 18

An endorsement purporting to transfer only a part of the sum payable shall be ineffective as an endorsement.

35. This article would render ineffective endorsements such as "Pay one half of the sum due to A" or "Pay one half to A and one half to B".

36. The Working Group expressed agreement with article 18. Under one view the Secretariat should specify in the commentary to the article that an endorsement to two or more endorsees together (pay A and B) or in the

alternative (pay A or B) is not a partial endorsement. The question whether the endorsement of an instrument paid in part for the unpaid residue is a partial endorsement was left open.

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 instrument.

37. The legal relationships amongst endorsers may depend on the sequence in which the endorsements were added. (See articles 41 and 78 (1).) In view of this circumstance, article 19 establishes a presumption of fact as to the time sequence amongst endorsements appearing on an instrument, namely that each endorsement was made in the order in which it appears.

38. It was suggested that article 19 should contain a further provision establishing a presumption that the endorsers are liable to one another in the order in which they have in fact endorsed.

39. The view was also expressed that a provision under which endorsers would be required to number their endorsement in a consecutive order might clarify the factual issue. The question was raised, however, whether it would be practicable to develop an appropriate sanction for non-compliance with such a rule.

40. Under one view, the uniform law should state explicitly that endorsements would appear on the back of the instrument only. The Working Group agreed to consider this question in connexion with the provisions governing guarantee (articles 43 to 45).

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 instrument, the endorsee

(a) May only endorse the instrument on the same terms; and

(b) May exercise all the rights arising out of the instrument 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 instrument to any subsequent holder.

41. This article deals with the endorsement for collection. The basic assumption is that the endorsee for collection acts as an agent of his endorser. It follows from this that:

(a) The endorsee for collection has the same rights as his endorser (i.e. he cannot be a protected holder in his own right);

(b) The endorser for collection is not liable on the instrument to his endorsee;

(c) The endorsee for collection cannot further endorse the instrument, except for collection.

42. There was general agreement that when an endorsee for collection endorsed an instrument without indicating that the endorsement was for collection, the earlier endorsement, indicating that the instrument should only be handled for collection, would govern the further endorsement.

43. It was also agreed that the commentary to the article should specify that the provision that the endorsee "may exercise all the rights arising out of the instrument" included, unless otherwise agreed, the right to bring an action on the instrument in court.

44. It was understood that if the endorsee for collection paid, before collection, the amount of the instrument to his endorser, this fact would not result in the endorsee's becoming a protected holder. However, it was noted that if the instrument was dishonoured, the provisions of the law would not impair whatever contractual rights might exist outside the instrument between the principal and his agent (the endorsee for collection).

45. A drafting suggestion was made concerning the opening phrases of paragraph (1) of article 20, namely that the concept of an endorsement for collection should be identified before reference is made to "an endorsement for collection".

46. The question was raised whether a collecting bank which before collecting an instrument has credited the account of the endorser would be governed by article 20. It was noted that this would indeed be the case, but that the collecting bank could protect itself by bringing an action against the endorser for reimbursement or it could have asked for a full endorsement. In the latter event, the bank could qualify as a protected holder and would have rights on the bill against the endorser.

Article 21

Where an instrument 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 instrument.

47. This article permits a drawer who received the instrument to re-issue the instrument to the payee or, if the instrument was endorsed to the drawer, to endorse it to another person. Similarly, any party prior to the holder who paid the instrument may further transfer and, if the instrument was endorsed to him, transfer or endorse it.

48. It was recalled that the question whether an instrument can be negotiated after protest for non-payment, or after payment, had not yet been settled by the Working Group; the Group reserved its decision on this point. It was noted that under the approach followed by the draft uniform law, a holder who took the instrument after protest for non-payment could become a protected holder.

49. Doubts were raised in the Working Group whether the use of the terms "transfer" and "transferred" in article 21 was advisable. The Group decided to reconsider this question in the context of article 12.

50. The view was expressed that article 21 should provide that the drawee cannot negotiate the instrument after maturity.

Article 22

(1) A person who acquires an instrument through what appears on the face of the instrument 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 maker 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 instrument 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 instrument.

51. Under this article, a forged endorsement or an endorsement signed without authority is effective as an endorsement, provided that such an endorsement is part of what appears on the face of the instrument to be an uninterrupted series of endorsements. Consequently, the person who so acquired the instrument becomes the "holder". Under article 23, persons who sign the instrument undertake to pay the "holder"; a "holder" may acquire the status of "protected holder", and take the instrument free of claims and defences in accordance with the rules of article 25. In addition, under article 70 a party is discharged of liability when he pays, *inter alia*, a "holder". Thus, by virtue of article 22, a person whose endorsement is forged may lose his rights to and upon the instrument. However, the article, in paragraph (2), confers on the drawer or maker or the person whose endorsement was forged, a statutory right to recover compensation not only from the forger but also from a person who took the instrument from the forger. As a result, the financial risk consequent upon forgery is borne by the forger or, more significantly, by the person who took from the forger. (The latter, in international transactions, is usually a bank.) The article thus preserves the substance of the maxim "know your endorser", whilst giving protection to most of the parties who take an instrument that is regular on its face.

52. The Working Group expressed agreement with the general policy underlying article 22. In its view, the article constitutes a reasonable compromise between the sharply diverging approaches to the problem of forged endorsements at present found in the various legal systems. The observations made by members of the Working Groups and by observers were therefore mainly directed to clarification and improvement of the basic approach embodied in the draft.

53. The question was put as to the result achieved in the following case. The payee endorses the instrument in blank, the instrument is stolen and subsequently negotiated by the thief to A by means of a forged signature. On these facts it was pointed out that both the thief and A are holders, not because of article 22 but because they comply with the definition of a "holder" given in article 5 (b). Article 22 was intended to apply only to cases where the person who takes from the forger is not a holder because he did not take the instrument through an uninterrupted series of authentic endorsements, as required under article 5 (5) and (6). Article 22 must be considered as an exception to the definition of "holder" set forth in article 5 (5) and (6).

54. Attention was directed to the closing clause of paragraph (1): "provided that such person was without knowledge of the forgery . . .". The following case was put: following a forgery, an instrument is endorsed to A, who qualifies as a "holder" under article 22. A then endorses to B, who knew of the forgery. It was suggested that the above language barred B from being a "holder", and that this was undesirable since B should succeed to the status of "holder" held by his endorser, A. In response, it was noted that article 22 (1), standing alone, would lead to this result. However, the person B who took with knowledge of the forgery would, under article 12, have the rights of a holder because his endorser A was a holder. The Working Group concluded that such a person should be a holder in his own right.

55. It was also noted that if the proviso concerning lack of knowledge should be retained, it should be made clear that this proviso related only to lack of knowledge at the time at which a person took his instrument; knowledge acquired at a later time was irrelevant.

56. Under one view, article 22 (1) should distinguish between the case of an endorsement forged by a thief and an endorsement made by an agent without authority. In the first case, the thief usually could not easily be found or, if found, would be insolvent, whilst in the second case the agent could be easily identified. It was noted that, under the draft uniform law, the agent acting without authority would not only be liable to pay compensation under article 22 (2), but also would be liable on his own signature to any subsequent party. The risk of the forgery would thus be borne by the agent.

57. The Working Group also agreed that it should be made clear that article 22 is subject to the rule obtaining under article 28 (a) and (b), according to which a forged signature on an instrument imposes liability on the person whose signature was forged if such person ratified the signature or behaved in such a way as to represent expressly or by implication to the holder that the signature is genuine. Secondly, the commentary to article 22 should point out that the compensation to which paragraph (2) establishes a right is subject to the rules of the applicable national law under which compensation may be reduced in the case of negligence by the claimant.

58. The Working Group was agreed that the provisions set forth in article 22 (3) were fully covered by articles 28 and 30 and should therefore be deleted.

59. The Working Group requested its secretariat to consider relocating article 22 at a more appropriate place in the draft uniform law.

B. Holder and protected holder: definition and rights
(articles 5, 6, and 23 to 26)

I. Definition of "holder"

Article 5 (5) (a) and 5 (6)

(5) (a) "Endorsement" means a signature, or a signature accompanied by a statement designating the person to whom the instrument is payable, which is placed on the instrument 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 instrument is payable to any person in possession thereof;

(6) "Holder" means the payee or the endorsee of an instrument who is in possession thereof.

60. Under the draft uniform law, the concept of "holder" is relevant in, *inter alia*, the following contexts:

(a) Being a holder is a necessary element of the status of a protected holder (article 5 (9)),

(b) A person signing an instrument undertakes to pay to the holder thereof (article 23);

(c) A party to an instrument is discharged by payment to the holder (article 70 (1)).

Under article 5 (6), a holder is the payee or an endorsee (see article 5 (5) (a)) in possession of the instrument.

61. The Working Group was agreed that the definition of "holder" should include the possessor of an instrument on which the last endorsement was in blank. It was noted that the present draft was designed to reach this result by means of the definition of "endorsement", but that this definition was not linked with sufficient certainty to the concept of "endorsee" in article 5 (6). The Group decided that a more explicit provision was needed.

62. The Working Group considered whether the definition of "holder" should include also a "guarantor" (article 43) who has paid the instrument and is in possession thereof. The Group concluded that the definition of "holder" should not be expanded in this manner, since the guarantor should not be given the right to endorse the instrument. The only rights of a guarantor who has paid should be to require payment from the person whose payment he guaranteed and parties liable to that person. Such is explicitly provided in article 45. The Working Group concluded that this was the most acceptable approach to the problem.

63. The Working Group also considered whether a drawer who pays the instrument and who acquires the instrument without an endorsement to him should be a "holder". For reasons similar to those stated in the preced-

ing paragraph, the Group concluded that the definition of "holder" should not be expanded to include this situation.

64. The Working Group considered that, since the definition of "holder" included the "endorsee" in possession of the instrument, the draft uniform law would gain in clarity if it included a definition of "endorsee".

II. Definition of "protected holder"

Article 5 (9)

(9) "Protected holder" means the holder of an instrument which, on the face of it, appears to be complete and regular and not overdue, provided that such holder was, when taking the instrument, without knowledge of any claims or defences affecting the instrument 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 instrument].

65. Special protection is given under the draft uniform law to a "protected holder" (article 35). In general, a protected holder takes the instrument free from claims and defences. Under article 5 (9), a holder of an instrument will qualify as a protected holder if the instrument appears on its face to be complete and not overdue and if he took the instrument without knowledge of any claims or defences. Article 6 states when a person is considered to have "knowledge".

66. The Working Group was of the opinion that the present definition of protected holder might not deal adequately with the following case. The drawer draws a bill on the drawee payable to himself; the bill is accepted by the drawee. The underlying transaction is the future delivery of goods by the drawer to the acceptor. The drawer fails to deliver. It could be argued that under article 5 (a), the drawer-payee is a protected holder and that therefore the acceptor could not raise against him a defence based on the non-delivery of the goods. The Group concluded that this result would not be desirable. If the acceptor could not raise the defence of non-performance against the action by the drawer-payee on the bill, he would be obliged to pay the bill and bring a separate action on the underlying transaction outside the bill. The Working Group concluded that the rules applicable to a "protected holder" should not preclude defences, as in the above case, of persons with whom the holder has dealt.

67. The Working Group was agreed that the point of time relevant to the status of a protected holder is the moment at which a person acquires the instrument. If at that moment the instrument is not overdue and the person

has no knowledge of any claim or defences, the holder of the instrument qualifies as a protected holder; the fact that the instrument became overdue in the hands of a protected holder after he took it or the fact that, subsequent to the taking, he gained knowledge of a claim or defence does not affect his status. It was agreed that the language of article 5 (9) should be rephrased to express this rule with greater clarity.

68. It was pointed out that the draft uniform law in article 5 (9) (definition of "protected holder"), requires that the protected holder be the holder of an *instrument*, i.e., a writing which complies with the formal requisites set forth in article 1 (2) or article 1 (3). In addition, article 5 (9) requires that the instrument appear to be *complete* on its face. The view was expressed that the latter requirement was unnecessary in view of the requirement that the writing be an *instrument* within article 1 (2) or article 1 (3). Consideration was given to the following case: an instrument is drawn payable at a specified date but the space for stating the date of issue is left blank. It was concluded that a person taking such instrument should be able to qualify as a protected holder although the instrument was not "complete" within the meaning of article 5 (9). With regard to the "date of issue", under one view the mention of that date should be included amongst the formal requisites set forth in article 1 (2) or article 1 (3). Under this approach, a person taking a writing which lacked such mention would not qualify as a protected holder since he is not the holder of an "instrument". The Working Group decided to deal with the question as to whether the date of issue should be a formal requisite in connexion with the consideration of article 1.

69. The Working Group agreed that the definition of "protected holder" should not be expanded to include the requirement that the holder must take the instrument "for value".

70. The Working Group considered the definition of "knowledge" in article 6. It was agreed that *actual* knowledge about claims or defences at the time of taking the instrument should prevent a holder from being a protected holder. The Group did not reach a consensus with regard to the question whether negligence or the absence of "good faith" should also prevent a holder from being a protected holder. The Working Group was of the view that this question presented difficult issues of policy and that consideration of the importance of negligence and good faith under the main legal systems would be helpful in reaching a final decision on the matter. The Group therefore requested the Secretariat to analyse such considerations for use by the Working Group in its further consideration of the advisability of including negligence or the absence of good faith within the definition of "protected holder".

71. The Working Group also concluded that if only the element of actual knowledge were retained, the definition of "protected holder" could conveniently refer to the requirement of actual knowledge. If this were done, there would be no need for a separate definition of "knowledge" in connexion with defining the status of "protected holder".

III. *The presumption that every holder is a protected holder*

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.

72. This article sets forth the presumption that a holder is a protected holder. It suffices therefore for a person to prove that he is a holder in order to benefit *prima facie* from all the rights to and upon the instrument. It follows that the burden to establish the existence of a claim or a defence rests upon the obligor. Under article 26 (2), when the obligor has established his claim or defence, the holder must prove that he is a protected holder.

73. The Working Group expressed agreement with the rule that every holder is presumed to be a protected holder, until the contrary is proved. However, the Working Group was divided on the question of who should bear the burden of proof if the obligor established the existence of a defence. Should it fall to the holder (plaintiff) to prove that he is a protected holder? Or should it fall to the obligor (defendant) to prove that the holder is not a protected holder? The first view, followed in paragraph 2 of the article, was opposed on the ground that it would be virtually impossible, under the procedure of civil law countries, for the holder to establish the "negative fact" that he took the instrument without knowledge of a claim or defence. The second view was opposed on the ground that the obligor would rarely be in a position to prove the existence of knowledge on the part of a remote holder resident in a distant country.

74. The Working Group, after discussing the above views and having considered the possibility of leaving to national law the question as to who should bring the proof that the holder is or is not a protected holder concluded that:

- (a) Paragraph 1 should be retained but the words "until the contrary is proved" should be added;
- (b) Paragraph (2) should be deleted;
- (c) Paragraph 1 should be redrafted in such a way so as not to compel the conclusion that the burden of proof of the "negative fact" of absence of knowledge of a claim or defence should fall to the holder.

IV. *The rights of a protected holder*

Article 25

- (1) The rights to and upon an instrument of a protected holder are free from:
 - (a) Any claim to the instrument on the part of any person; and
 - (b) Any defence of any party, except defences based on circumstances which render the obligation on the instrument of such party null and void; and

(c) Any defence based on discharge or on the absence of liability on the ground that the instrument was dishonoured by non-acceptance or by non-payment or was not duly protested.

(2) The transfer of an instrument by a protected holder shall not vest 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 instrument.

75. Under article 25, a protected holder is free from any claims to the instrument and also is free from any defence as to his liability on the instrument, subject to limited exceptions defined in paragraph (1) (b). In nearly every case, the holder of an international bill of exchange or promissory note will clearly qualify as a protected holder (see the discussion of articles 5 (9) and 26 at paras. 64 to 73 *supra*). The strong protection which article 25 gives to the protected holder thus provides the foundation for the security of international transactions, which is a central objective of the uniform law.

76. Under paragraph (1) (a) of the article, a claim to the instrument cannot be brought against a protected holder. The Working Group approved of this rule. The Working Group was also in agreement with the basic rule of subparagraph (b) under which parties sued on the instrument cannot set up defences against the protected holder. Attention was directed to the exception set forth in subparagraph (b) with respect to defences which render an obligation on the instrument "null and void". The Working Group concluded that this provision did not make immediately clear what defences were involved and might be given an application that was too broad. The suggestion was made that the exception to the general rule set forth in paragraph (1) (b) should specifically enumerate the defences which cannot be overcome by a protected holder. To this end, the Group invited representatives to submit lists of defences available under their national law against a protected holder. The Working Group decided that it would reconsider subparagraph (b) in the light of the analysis of national rules on this question. The Working Group further requested the Secretariat, in redrafting article 25, to consider the view that there is no need for the provision in subparagraph (c) that the protected holder takes the instrument free from "any defence based on discharge", since this rule was implicit in the basic rule of subparagraph (b) that a protected holder takes the instrument free from "any defence of any party". The Working Group decided to postpone further consideration of the provision of subparagraph (c) on the failure to protest dishonour until its discussion of part five of the draft (articles 46-68) concerning presentment, dishonour and recourse.

77. Paragraph (2) of the article is based on the premise that the draft would contain a general rule that when a protected holder, A, negotiates the instrument to another person, B, B would receive the rights of the protected holder A (see article 12, *supra*, at paras. 10 to 13). The objective of such a "shelter" rule is to enable the protected holder to receive the full benefit of his protected status by being able freely to negotiate the instrument. Paragraph (2) of article 25 sets forth an exception to this "shelter"

rule where the transferee "has participated in a transaction which gives rise to a claim to, or a defence upon, the instrument". The Working Group expressed agreement with the result which paragraph (2) seeks to achieve, namely, that a person who has participated in a transaction which gives rise to a claim to the instrument or to a defence thereon, should not benefit from the fact that he took the instrument from a protected holder. The suggestion was made that a further exception to the "shelter" rule should be added to prevent a person who took the instrument from a protected holder from enjoying the rights of a protected holder if, when a previous party to the instrument, he *knew* about a claim or a defence. The following example was given: P, by fraud, induces the drawer to draw an instrument payable to P; P endorses to A who knows about the fraud; A endorses to B who is a protected holder; B endorses to A. It was observed that such cases would be rare. The Working Group was of the opinion that special provision should not be made in paragraph (2) for this unusual situation.

78. The Working Group was unable to reach consensus as to the desirability of including the "shelter" rule in the uniform law. Under one view, the "shelter" rule should be retained since, as has been mentioned above, it enables a protected holder to negotiate the instruments freely and because it is necessary to complete the protection of the protected holder. According to the opposite view, the "shelter" rule should be eliminated and be replaced by a rule under which the rights of a person who takes an instrument should be ascertained independent from the rights of the person from whom he took the instrument. Under yet another view, the uniform law should, in so far as the application of the "shelter" rule is concerned distinguish between defences on the one hand and claims on the other. In respect of defences, the "shelter" rule should be retained. However in respect of claims to the instrument, the "shelter" rule should not be applicable and a person who had been dispossessed of an instrument should be able to claim the instrument from any person, including a person who took from a protected holder if he acquired the instrument in bad faith or with gross negligence.

V. The rights of a holder

Article 24

(1) The rights to and upon an instrument of a holder who is not a protected holder are subject to:

- (a) Any valid claim to the instrument on the part of any person; and
- (b) Any defence of any party which would be available under a contract or available under this Law.

(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 instrument.

(3) A party may not avoid liability to a holder on the ground that a third person has a valid claim to the instrument unless such person himself has claimed

the instrument from the holder and informed such party thereof.

79. Article 24 deals with the rights of a holder who, for any one of various possible reasons (article 5 (9)), does not achieve the status of a "protected holder" (article 25). Such a holder, unlike the protected holder, does not take the instrument free from claims and defences. Paragraphs (2) and (3) of article 24 set forth two exceptions to this rule.

80. The Working Group, after discussion, agreed that the draft uniform law should contain an article concerning the rights of a holder on the lines of the proposed draft article.

81. The Working Group concluded that the exception in paragraph (2) with respect to defences "based on legal relations not connected with the instrument" might lead to misinterpretation, and requested the Secretariat to redraft article 24 so as to assure the following results:

(a) The party to an instrument should be able to interpose a defence in a case like the following: P, by fraud, induces the drawer to issue the instrument to the payee, P; P endorses the instrument to A, who is not a protected holder. Article 24 should make it clear that the drawer can interpose the defence of fraud in an action on the instrument by A.

(b) The party liable on the instrument should be able to interpose a defence based on the fact that the transaction underlying the instrument was not performed. The following example was given: the seller of goods (drawer) draws a bill of exchange on the buyer (drawee) payable to himself; the bill is accepted by the drawee pursuant to the contract of sale under which the seller undertook to deliver the goods at a future date; the goods are not delivered; the drawer-payee endorses the bill to A after the time for the delivery of the goods has passed. If A is not a protected holder, article 24 should make it clear that the acceptor can interpose the defence of non-performance of the underlying contract in an action on the bill by A.

(c) The party liable on the instrument should not be able to interpose a defence in situations illustrated by the following example: the drawer, D, issues an instrument to the payee, P, to pay for goods which P sold to D. Because of another transaction between P and D, P owes D an amount equal to that of the instrument. The payee, P, endorses the instrument to A, who is not a protected holder. Article 24 should make it clear that the drawer D, cannot interpose in an action by A the defence of set-off, which he could interpose, under some legal systems, in an action by the payee. It was noted that in this example the defence which D would attempt (unsuccessfully) to assert against the holder was not connected with either (a) the instrument held by P or (b) the underlying transaction that gave rise to the instrument.

82. The Working Group approved the substance of the exception in paragraph (3) restricting the right of one party, A, to avoid liability to the holder, B, on the ground that a third person, T, had a claim to the instrument (the defence of *jus tertii*).

C. *Rights and liabilities of the signatories of an instrument (articles 27 to 40)*

Article 27

(1) A person is not liable on an instrument 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 it in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.

83. This article sets forth the basic principle that a person is not liable on an instrument unless he signs it. The article also provides that a signature, in order to be effective as a signature, need not be handwritten but may be a facsimile, perforation, symbol or by any other mechanical means.

84. The Working Group expressed agreement with paragraphs (1) and (2) of article 27, but suggested that paragraph (1) should specify that its provisions are subject to articles 28 and 30.

85. Opinions were divided on the question whether a signature could be other than handwritten. It was noted that, by virtue of paragraph (3), the Courts of Contracting Parties to the Convention setting forth the uniform law would be obliged to consider a signature as defined in paragraph (3) as adequate to impose liability on an international negotiable instrument. The uniform rule of the Convention would apply to such international instruments rather than any rule of national law. The Working Group concluded that it was important to establish a uniform rule as to what type of signature would be acceptable; in view of the large number of international instruments that must be handled, it was not practicable to apply varying local rules.

86. It was noted that article 27 (3) did not impose a duty on persons signing the international negotiable instrument to sign otherwise than in handwriting. It was also observed that a person would be free to refuse to take, accept or guarantee an instrument if he found that a signature on the instrument was not satisfactory to him because (for example) it was made by perforations or a facsimile rather than in handwriting. Whether a refusal to accept an instrument was wrongful depended on rules (such as the contract) that lay outside the uniform law.

87. There was general agreement that the law should provide that endorsements could be effected by facsimile, stamp or similar means that would expedite the process of executing large numbers of signatures. The suggestion was made that the privilege of signing by such mechanical means should be restricted to banks; on the other hand it was noted that it would be difficult to establish a definition of "bank" that would be capable of application in all countries.

88. Under one view, the signature of certain parties—the drawer, the acceptor, the guarantor and the maker—should only be valid if in handwriting. It was suggested

that these signatures were of special importance; requiring these signatures to be in handwriting provided some protection of authenticity. On the other hand, it was reported that in actual practice most signatures were unknown, except to the bank handling the instrument on behalf of the party signing, and often were illegible. In addition, more significant protection against possible forging was derived from the known responsibility of an immediate party on the instrument. In this connexion, attention was directed to the rules on the effect of forged endorsements in article 22. In addition, attention was drawn to the trend toward mechanical processing of documents, and it was suggested that the draft uniform rules should be sufficiently flexible to accommodate further development in this direction. The possibility of the electronic issuance of documents (as by teletype) should also be taken into account. Most representatives concluded that the rules of paragraph (3) should apply not only to endorsements, but also to the signatures of the acceptor, guarantor and maker.

89. One representative noted his reservation to the rule of paragraph (3), pending consideration of the feasibility of deviating from the current rule of his national law requiring that signatures be executed in handwriting.

Article 28

A forged signature on an instrument 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.

90. This article states the general rule that a person whose signature was forged is not liable on the instrument. Under the article, this rule is subject to two exceptions:

- (a) A person whose signature is forged is liable on the instrument if he ratified the signature;
- (b) A person who behaved in such a way as to represent to a holder without knowledge of the forgery that the signature is genuine is liable on the forged signature.

91. The Working Group considered whether the provisions of this article should apply both to signatures that are forged and to signatures made by an agent without authority. The Group was of the opinion that the application of the exceptions to agency raised questions which were part of the general law of agency, for example, the scope of the agent's authority, the apparent authority of an agent, ways in which ratification takes place, etc. All such questions were dealt with in considerable detail in national laws on agency and it would, in the view of the Group, not be feasible to deal satisfactorily with them in a law on negotiable instruments. Therefore, the Working Group concluded that article 28 should apply only to forged signatures. For this reason, the Working Group requested the Secretariat:

(a) To redraft paragraph (a) so as to make it applicable to the "adoption" of a forged signature (as contrasted with "ratification"); and

(b) To delete in paragraph (b) the words "or was made by an agent with authority".

92. The Working Group further concluded that article 28 should also apply to cases where a signature was forged by the wrongful use of a stamp or facsimile.

93. The Working Group considered that paragraph (b) of article 28 raised the difficult question of what sanction should be applied in the case where a person, by his conduct, had deceived a holder into believing that the signature was genuine. According to one view, paragraph (b) was too rigid in making such person liable on the instrument for the amount of the instrument whilst exempting him from any liability on the instrument if the holder had knowledge of the forgery. Under this view, a more balanced approach would be to divide the risk consequent upon forgery between the person whose signature was forged and the holder in terms of the negligence of each. According to another view, the rule set forth in paragraph (b) was correct in that an action for damages outside the instrument would possibly fall short of the legitimate expectancy of the holder without knowledge to have rights on the instrument for the full amount of the instrument. On the other hand, a holder who had taken the instrument with knowledge of the forgery should not be able to impose any liability on the instrument upon the person whose signature was forged. However, under the same view, the rule set forth in paragraph (b) of the article should not be construed so as to prevent a person who took the instrument negligently from bringing an action for damages outside the instrument against the person who by his conduct had given the holder reason to believe that the signature was genuine. Thus, paragraph (b) of the article safeguarded the expectation of the holder without knowledge that he would have full rights on the instrument, whilst it also permitted an equitable division of risk based upon the behaviour of the parties.

94. The Working Group was agreed that the solution to be adopted eventually could be based upon a reference to the general law of negligence or estoppel or could find its place within the uniform law. The Secretariat was requested to draft a suitable formulation which would take into account the various views expressed within the Working Group.

Article 31

- (1) Any party to a bill and any party to a note [except the maker] may exclude or limit his liability by an express stipulation on the instrument.
- (2) Such exclusion or limitation of liability shall be effective only with respect to the party making the stipulation.

95. This article defines the circumstances under which a party may exclude or limit his liability by an express stipulation on the instrument.

96. One issue calling for decision is whether the drawer of a bill may exclude his liability in the event the

bill is not accepted or is not paid. The Geneva Convention (ULB) in article 9 provides that a stipulation by the drawer "by which he releases himself from the guarantee of payment is deemed not to be written (*non écrite*)". A contrary rule is set forth in the Bills of Exchange Act (article 16 (1) and in the United States Uniform Commercial Code (section 3-413 (2)).

97. As is explained more fully in the commentary on this article of the draft (A/CN.9/WG.IV/WP.2), inquiries amongst banking and trade institutions revealed that, although it is not common for bills to be drawn "without recourse", this practice is sometimes followed in international transactions, particularly under letters of credit which may permit bills drawn in this manner. For these reasons, article 31 of the draft uniform law does not prohibit the practice of drawing without recourse.

98. The Working Group approved this approach. Attention was drawn to the ICC Uniform Customs and Practice for Documentary Credits (1962 revision)¹ which in article 3 recognizes the use of without recourse drafts. It was also observed that a "without recourse" draft accompanied by documents controlling delivery of the goods (i.e., a bill of lading) was of commercial significance since the goods stood as security for intermediate parties if the draft should be dishonoured. However, it was noted that the proposed solution would modify considerably the banking practice of certain countries.

99. Somewhat different considerations are presented by the question whether the maker of a note can exclude or limit his liability. The Working Group concluded that there would be a basic inconsistency between the maker's unconditional promise to pay a definite sum of money, required under article 1 (3) (b) of the draft, and an attempt by him to exclude or limit the liability. Consequently the square brackets in paragraph (1) around the words "except the maker" should be removed. Various redrafting suggestions were made with regard to the limitation and exclusion by the different parties to an instrument of their liability. One of these suggestions was to the effect that article 31 of the draft should be eliminated and that the question as to whether a party can limit or exclude his liability should be dealt with in the articles governing the liability of each of these parties.

100. The Working Group was also agreed that the question of limitation of liability by an acceptor would not be dealt with in article 31, but would be handled under article 39, which deals with qualified acceptances. It was understood that an attempt by an acceptor to exclude his liability would be inconsistent with acceptance, and that a limitation of liability would be a qualified acceptance.

101. The Working Group agreed that the endorser could exclude or limit his liability. The effect of an endorsement on condition is governed by article 17.

102. The Working Group approved the approach of paragraph (2), whereby an exclusion or limitation of liability by one party would be effective only with respect to that party: the liability of other parties would not be affected. The following example was given: the drawer, D, draws a bill payable to P. The payee, P, endorses the bill to A "without recourse". A endorses the bill to B. The bill is dishonoured by the drawee, E. The holder, B, does not have a right of recourse against P, but does have a right of recourse against A and against D.

Article 29

- (1) Where an instrument has been materially altered:
 - (a) Parties who have signed the instrument subsequent to the material alteration shall be liable thereon according to the terms of the altered text; and
 - (b) Parties who have signed the instrument before the material alteration shall be liable thereon 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 instrument of any party in any respect.

103. Under article 29, a modification in the written undertaking on the instrument constitutes a material alteration. By virtue of this article, parties having signed after the alteration are liable on the instrument according to the altered text. Parties having signed before the alteration remain liable on the instrument according to the original text. The latter rule is subject to the two exceptions set forth in paragraph (1) (b) (i) and (ii).

104. It was noted that in international payment transactions cases of material alteration of instruments, made without the agreement of the parties involved, occurred only rarely in practice. Quite frequently, bills of exchange are accompanied by documents, such as bills of lading, insurance policies or invoices, which make an alteration of the terms of the bill immediately obvious. On the other hand, it happens quite often that the holder and the acceptor of an instrument agree to defer payment by a prorogation of the maturity date.

105. It was further noted that for the purposes of article 29, the time at which the text of an instrument had been altered was of vital importance, but that it was not always easy to prove such point of time. In this connexion, the suggestion was made that, in re-drafting article 29, consideration should be given to the possibility of establishing a presumption under which, until the contrary is proved, every signatory of an altered instrument is presumed to have signed it before the material alteration.

¹ *Register of Texts of Conventions and other Instruments Concerning International Trade Law* (United Nations Publication Sales No. E.71.V.3), vol. I, chapter II, B.

106. The Working Group requested the Secretariat to point out, in the commentary on article 29, that the article does not apply to cases of forgery.

107. The Working Group considered this question: when it is asserted that a party has consented to an alteration and that he is liable in accordance with the altered text, may such consent be proved by evidence outside the instrument? Or, on the contrary, must the consent appear from the face of the instrument? The Working Group requested the Secretariat to consider this question when redrafting article 29. In this connexion, the suggestion was made that paragraph 1 (b) (ii) should be deleted.

108. The Working Group was agreed that paragraph (1) (b) (ii) of article 29 and article 28 (b) raised identical questions of policy and that therefore the modifications decided upon in respect of article 28 (b) should also apply in the case of paragraph (1) (b) (ii) of article 29.

Article 30

(1) An instrument may be signed by an agent.

(2) The signature on an instrument by an agent, with authority to sign, and showing on the instrument that he is signing in a representative capacity, imposes liability thereon on the person represented and not on the agent.

(3) The signature on an instrument by an agent without authority to sign, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity, imposes liability on the instrument on such agent and not on the person whom the agent purports to represent.

(4) An agent who is liable pursuant to paragraph (3) and who pays the instrument shall have the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

109. Article 30 deals with the liability on an instrument of an agent or of the person whom the agent represents, or purports to represent, when the instrument has been signed by an agent.

110. The Working Group was in agreement with the results achieved by article 30. However, the Group concluded that paragraph (2) of the article should make clear that the person represented, rather than the agent, is liable only when the signature shows (1) that the agent is signing in a representative capacity, and (2) designates the person on behalf of whom he is signing. For example, a signature that merely states "A, as agent" would be insufficient to make the unnamed principal (rather than the agent) liable on the instrument, and the agent would be liable.

111. The Working Group considered the question of the liability of a person who signs an instrument without indicating that he signs in a representative capacity when his signature (without any designation that he is an agent) is written under or in the immediate vicinity of the name of a corporation. The following example was given: on the instrument, at the place where the signature of the

drawer usually is put, the words "XYZ Corporation" appear in print or in perforation; under the name of the corporation the signature "John Jones" appears. The question arises whether John Jones has signed as an agent on behalf of XYZ Corporation or as a co-drawer. The Working Group concluded that in such a case there should be no statutory rule that the agent must add the words "director", "cashier", etc., in order to show that he had been signing in a representative capacity. Article 30 should make clear that whether the agent signs in a representative capacity was a question to be decided on the basis of the facts of the particular case as they appear from the face of the instrument; evidence outside the instrument would not be relevant.

112. The Working Group considered whether the provision set forth in paragraph (4) of article 30 should be retained and, if so, whether the provision should distinguish between an agent without authority who signed with knowledge of the fact that he was signing without authority and an agent who had no such knowledge. The following example was given: the agent of the payee endorses a bill of exchange without authority and knows that he signs without authority; the bill is dishonoured and the endorsee has recourse against the agent under paragraph (3) of the article; the agent pays the amount of the bill. This question arises: can the agent exercise a right of recourse against the drawer? The Working Group concluded that he should be able to do so and that, consequently

(a) Paragraph (4) of article 30 should be retained, and

(b) No distinction should be made between an agent signing innocently and an agent signing with knowledge of the fact that he signs without authority.

Article 32

A person signing an instrument shall be liable thereon as an endorser unless the instrument clearly indicates that he signed in some other capacity.

113. This article is concerned with the problems presented by signatures which from the face (front and back) of the instrument cannot be identified as the signature of a drawer, acceptor, or "guarantor" (*avaliste*) under article 43, or as a signature necessary to establish a chain of endorsements. An example of the latter is presented by the following series of endorsements following the issuance of a bill to P: (1) Pay to A, (Signed) P; (2) (Signed) X; (3) Pay to B, (Signed) A; (4) (Signed) B; (5) (Signed) Y; (6) Pay to D, (Signed) C. In this series of endorsements it will be noted that the signature of X is not necessary to establish the chain of endorsements leading to B, and the signature of Y is not necessary to establish the chain of endorsements leading to D. Such signatures, sometimes referred to as "anomalous endorsements", present various problems: to whom is the signer liable? What position in the sequence of liability on the instrument results from such a signature? What are the rights of such a signatory when he pays the holder?

114. It was agreed that such signatures present problems that are closely related to the problems posed by signatures that are accompanied by words such as

"guaranteed", "*aval*", "good as *aval*" or words of similar import. Signatures accompanied by such identifying words are dealt with in articles 43 to 45. The Working Group decided that the signatures embraced within article 32 should be dealt with in connexion with particles 43 to 45 and that the text of article 32 should be deleted. In this connexion, the Working Group decided further that the scope of articles 43 to 45 should be broadened by deleting from article 43 (2) the provision that a "guarantee" is effected only by a signature which is accompanied by the words "guaranteed", "*aval*", "good as *aval*" or by words of similar import. It was further agreed that, in the above example, the position of Y in the sequence of liability would be given further consideration under articles 43 to 45.

115. It was noted that dealing with the "anomalous" signatures, now governed by article 32, in connexion with articles 43 to 45 would make applicable the rule of article 45 that a guarantor, when he pays the instrument, shall have rights on the instrument not only against the party guaranteed but also "against those who are liable" on the instrument to the guaranteed party. It was agreed that this was the proper approach. The holder who has been paid by the guarantor should not be entitled to receive payment a second time. The only satisfactory solution is to transfer rights on the instrument to the person who pays the holder. (See also article 70 (2) (a person paying an instrument is entitled to receive the instrument).)

Article 33

- (1) All drawers, acceptors, endorsers and guarantors of a bill are jointly and severally liable thereon.
- (2) All makers, endorsers and guarantors of a note are jointly and severally liable thereon.

116. The above article was intended to make clear (1) that each of the stated parties to an international instrument is individually liable on the instrument and (2) that bringing an action against one of the parties does not prevent the bringing of an action against other parties.

117. It was pointed out that the expression "jointly and severally liable", although employed in article 47 (para. 1) of the Geneva Uniform Law (ULB), has connotations in some legal systems that are inconsistent with the rules prescribed elsewhere in the draft uniform law. For example, joint and several liability may imply that the party who pays has a right of contribution from all other parties; this right may be inconsistent with the rules of the uniform law establishing rights against prior parties to the instrument. In addition, it was suggested that this language of article 33 may be inconsistent with other provisions of the draft that liability is conditional upon presentment, dishonour, and protest as specified in part five of the draft. Consequently, it was agreed that the expression "jointly and severally liable" should not be employed in the revision of this article.

118. Attention was directed to the second and fourth paragraphs of article 47 of the Geneva Uniform Law (ULB). It was suggested that these paragraphs clearly express the results that were intended by the above draft

article 33. It was agreed that in redrafting article 33 consideration should be given to these provisions of the Geneva Uniform Law.

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 (b) 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.

119. Article 34 lays down what is the liability of the drawer of the international bill of exchange. Under the article, the drawer is liable to the holder, upon dishonour of the bill and upon any necessary protest, for the amount of the bill and any interest and expenses.

120. The Working Group expressed provisional agreement with article 34. However, it was decided that the part of article dealing with the drawer's liability to parties subsequent to himself who are in possession of the bill and who are discharged of liability thereon, should be examined after consideration of the articles of the draft concerning discharge (part six).

Article 34 bis

The maker engages that he will pay to the holder

- (a) At maturity, the amount of the note;
- (b) After maturity, the amount of the note and any interest and expenses which may be claimed under article 67 (b) or 68.

121. Article 34 bis states the basic rules on the liability of the maker of an international promissory note. The maker's liability, like that of the acceptor, is a primary liability, i.e., his liability is not subject to presentment for payment or to any protest of dishonour for non-payment by a party subsequent to the maker.

122. The Working Group approved this article.

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.

123. Article 35 lays down the general rule that the drawee is not liable on the instrument until he accepts it. Paragraph (2) is intended to make clear that the drawing of a bill of exchange or its endorsement does not of itself operate as a transfer or an assignment to the holder of any funds in the hands of the drawee.

124. The Working Group was in agreement with the substance of article 35. With regard to paragraph (2), the Group decided that:

(a) Consideration should be given to whether the reference to "funds in the hands of the drawee" should be supplemented by language making clear that the drawing or endorsement of a bill does not of itself operate as a transfer or assignments of rights outside the instrument.

(b) The French text of paragraph (2) should be modified as follows:

(i) The word "*fonds*" should be replaced by another term indicating clearly that the drawing or endorsement of a bill shall not of itself transfer the rights to payment arising from the underlying transaction to the holder (*créance*).

(ii) The words "*ne vaut pas*" should be replaced by the words "*n'emporte pas de plein droit*".

(c) The provision should not be interpreted as preventing a drawer or an endorser from transferring or assigning the "funds" by a clause on the bill or by an agreement outside the bill. The effect of such a clause or agreement would be governed by the applicable national law. However, one observer suggested that it would still be necessary to consider whether the effect of an agreement outside the bill would be governed solely by the applicable national law.

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.

125. Article 36 specifies that the liability of the acceptor is a primary liability, i.e. it is not subject to presentment for payment or to the making of a protest in the event of dishonour of the bill by him.

126. It was noted that article 36 should make clear that the acceptor is also liable to the drawer who paid the bill. Subject to this clarification, the Working Group expressed agreement with article 36.

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.

127. An acceptance must be in writing and may be effected by the signature of the drawee on the bill.

128. The Working Group expressed agreement with the provision set forth in article 37, subject to the amendment that an acceptance may be effected by the drawee's signature alone only if placed on the front of the instrument (*au recto*). In the view of the Group this amendment would clarify the rules governing the following case: the signature of the drawee is placed on the back of the instrument without any indication that it is an acceptance, the signature is not part of the regular chain of endorsements. In the view of the Group, as a result of its amendment, such a signature would be that of a guarantor ("*avaliste*").

Article 38

(1) A bill may be accepted

(a) Before it 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.

129. Under article 38, a signature will be effective as an acceptance although it has been made before the document became a bill. Under paragraph (2), the holder of a bill drawn payable at a fixed period after sight may insert the date of acceptance if the acceptor has omitted to do so. Under paragraph (3), on acceptance of such a bill after dishonour by non-acceptance the holder is entitled to have the acceptance dated as of the date of the first presentment.

130. The Working Group expressed agreement with the provision of article 38, subject to the following amendments:

(a) In paragraph (2) it should be specified that it is the duty of the acceptor to date his acceptance. On refusal by the acceptor, the drawer, before the issue of the bill, or the holder would have the right to insert the date of acceptance.

(b) Paragraph (3) should specify that the acceptance should be dated as of the date when the holder presented the bill first for acceptance.

Articles 39 and 40

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.

131. These articles provide that when the drawee refuses to give a general acceptance (i.e. an acceptance to pay the bill according to its terms), and the holder does not take the qualified acceptance offered by the drawee, the bill is dishonoured by non-acceptance. This rule is subject to the exception that, if the drawee offers to accept the bill for only part of its amount (partial acceptance), the holder must take the partial acceptance and the bill is dishonoured for the amount not accepted.

132. The Working Group, after discussion, concluded that articles 39 and 40 should be revised along the following lines:

(a) These articles should provide that an acceptance must be unconditional and that a conditional acceptance binds the acceptor on the bill according to the terms of his acceptance. However, a conditional acceptance must be considered as a dishonour of the bill by non-acceptance.

(b) A holder should not be obliged to take a partial acceptance. If he does not take the partial acceptance, the bill is dishonoured by non-acceptance.

- (c) (i) In the case of a bill indicating the place of payment but not domiciled with an agent of the drawee in that place, an acceptance indicating such an agent in that place is not a qualified acceptance
- (ii) In the case of a bill indicating the place of payment and domiciled with an agent of the drawee in that place, an acceptance indicating another agent within the same place is a qualified acceptance
- (iii) In the case of a bill on which the place of payment is specified, an acceptance indicating a place other than the place so specified is a qualified acceptance
- (iv) The results under (i) and (ii) should also obtain when by virtue of article 53 (f) (ii) or (iii) the place of payment is the address of the drawee or his principal place of business.

133. The Working Group was agreed that in all cases of qualified acceptance, the holder has the option either to take the qualified acceptance or to consider the bill as dishonoured by non-acceptance.

134. In formulating a revised draft based on the above objectives, the Secretariat was requested to give further consideration to the interpretation of the "place" of payment. It was suggested that in this connexion reference should be made to commercial practice with respect to such payment.

135. One representative suggested that article 39 be deleted in view of the fact that it was of little practical relevance.

CONSIDERATION OF THE DESIRABILITY OF PREPARING UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

136. In response to the view expressed by some representatives during the fifth session of the Commission that uniform rules should be drawn up also for other negotiable instruments used to settle international transactions, the Commission further requested 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".

137. The Working Group decided to defer consideration of this question until a future session in order to permit inquiries to be made regarding the use of cheques in international payment transactions and the problems presented, under current commercial practice, by divergencies between the rules of the principal legal systems.

138. The Working Group requested the Secretariat to conduct such inquiries as might be appropriate to elicit the above information, and to present the results thereof and such recommendations as it may wish to make to the Working Group at a future session.

FUTURE WORK

139. The Working Group gave consideration to the timing of its second session. The Group was of the unanimous opinion that in view of the progress achieved at the present session, its second session should be held as soon as possible. Some representatives expressed the view that the second session should be held in the course of 1973. Others were of the opinion that consideration of the time and place for the second session should be left for decision by the Commission at its forthcoming sixth session, which will convene on 2 April 1973.

2. *Report of the Secretary-General, annex (A/CN.9/WG.IV/WP.2): * text of the Draft Uniform Law on International Bills of Exchange and International Promissory Notes*

Part One. Sphere of application; form

Article 1

(1) This Law shall apply to international bills of exchange and to international promissory notes.

(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.

(3) An international promissory note is a written instrument which

(a) Contains, in the text thereof, the words "Against this International Promissory Note, made subject to the Convention of . . . , I promise to pay . . ." (or words of similar import); and

(b) Contains an unconditional promise whereby one person (the maker) engages 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 maker; and

(e) Shows that it is made in a country other than the country of the payee or of the place where payment is to be made.

Article 2

The incorrectness of statements made on an instrument for the purpose of paragraph (2) (e) or (3) (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 or an international promissory note pursuant to paragraph (2) (e) or (3) (e) 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 or of a note endorsed in blank;

(2) "Bill" means an international bill of exchange governed by this Law;

(3) "Note" means an international promissory note governed by this Law;

(4) "Instrument" means an international bill of exchange or an international promissory note governed by this Law;

(5) (a) "Endorsement" means a signature or a signature accompanied by a statement designating the person to whom the instrument is payable, which is placed on the instrument 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 instrument is payable to any person in possession thereof;

(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 instrument is payable to any person in possession thereof;

(c) "Special endorsement" means an endorsement which specifies the person to whom the instrument is payable;

(6) "Holder" means the payee or the endorsee of an instrument who is in possession thereof;

(7) "Issue" means the first transfer of an instrument to a person who takes it as a holder;

(8) "Party" means a party to an instrument;

(9) "Protected holder" means the holder of an instrument which, on the face of it, appears to be complete and regular and not overdue, provided that such holder was, when taking the instrument without knowledge of any claims or defences affecting the instrument or of the fact that it was dishonoured.

* 21 November 1972. This text is similar to the text of the Draft Uniform Law on International Bills of Exchange (A/CN.9/67; UNCITRAL Yearbook, vol. III: 1972, part two, II, 1), except that its provisions now extend to promissory notes (see decision by UNCITRAL at its fourth session, UNCITRAL Yearbook, vol. III: 1972, part one, II, A, para. 61 (2) (c)). For this reason the commentary on the Draft Uniform Law (A/CN.9/WG.IV/WP.2) was not reproduced here.

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 this part] [or if he has been informed thereof or if the fact appears from the face of the instrument].

SECTION 2. INTERPRETATION FOR FORMAL REQUIREMENTS

Article 7

The sum payable by an instrument 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 instrument.

Article 8

(1) If there is a discrepancy between the amount of the instrument 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 instrument is specified in a currency having the same designation but a different value in the country where it was drawn or made 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 instrument].]

(3) Where an instrument 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 instrument [and if the instrument is undated, from the issue thereof].

(4) Where an instrument 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) An instrument 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) An instrument which is accepted or endorsed or guaranteed after maturity is an instrument 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) A note 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 as a fixed period after the date of the note; [or]

[(b) by instalments at successive dates, even when it is stipulated in the note that upon default in payment of any instalment the unpaid balance shall become due immediately.]

(5) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date stated on the instrument regardless of whether instrument 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) A note may

(a) Be made by two or more makers,

(b) Be payable to two or more payees.

(3) If an instrument 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 instrument may exercise the rights of a holder. In any other case the instrument 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 a writing which

(a) Contains, in the text thereof, the words "pay against this international bill of exchange, drawn subject to the Convention of . . .", or the words "against this international promissory note, made subject to the Convention of . . . I promise to pay . . ." (or words of similar import), and

(b) Is signed by the drawer or the maker, but which lacks elements pertaining to one or more of the other requirements set out in article 1 (2) or 1 (3) shall be presumed to have received authority from the drawer or the maker to insert such elements, and the instrument so completed is effective as a bill or as a note;

(2) When such a writing 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 instrument without knowledge of the lack of authority.

Part Three. Transfer and negotiation*Article 12*

The transfer of an instrument vests in the transferee the rights to and upon the instrument that the transferor had.

Article 13

(1) An instrument is negotiated when it is transferred

(a) By endorsement and delivery of the instrument by the endorser to the endorsee, or

(b) By mere delivery of the instrument but only if the last endorsement is in blank.

(2) Negotiation shall be effective to render the transferee a holder even though the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would subject the transferee to claims to the instrument or to defences as to liability thereon.

Article 14

Where an instrument is transferred without an endorsement necessary to make the transferee a holder, the transferee is entitled to require the transferor to endorse the instrument to him.

Article 15

The holder of an instrument endorsed in blank may convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other person.

Article 16

When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement, words prohibiting transfer, such as "not transferable", "not negotiable", "not to order", or words of similar import, the instrument cannot be negotiated except for purposes of collection.

Article 17

An endorsement purporting to negotiate an instrument subject to a condition shall be effective to negotiate the instrument 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 instrument.

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 instrument, the endorsee

(a) May only endorse the instrument on the same terms; and

(b) May exercise all the rights arising out of the instrument 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 instrument to any subsequent holder.

Article 21

Where an instrument 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 instrument.

Article 22

(1) A person who acquires an instrument through what appears on the face of the instrument 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 maker 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 instrument 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 instrument.

Part Four. Rights and liabilities**SECTION 1. THE RIGHTS OF A HOLDER
AND A PROTECTED HOLDER***Article 23*

A person who signs an instrument is liable to the holder thereof in accordance with the provisions of this Law.

Article 24

(1) The rights on an instrument of a holder who is not a protected holder are subject to

(a) Any valid claim to the instrument on the part of any person; and

(b) Any defence of any party which would be available under a contract or available under this Law.

(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 instrument.

(3) A party may not avoid liability to a holder on the ground that a third person has a valid claim to the instrument, unless such person himself has claimed the instrument from the holder and informed such party thereof.

Article 25

(1) The rights on an instrument of a protected holder are free from

(a) Any claim to the instrument on the part of any person; and

(b) Any defence of any party, except defences based on circumstances which render the obligation on the instrument of such party null and void; and

(c) Any defence based on discharge or on the absence of liability on the ground that the instrument was dishonoured by non-acceptance or by non-payment or was not duly protested.

(2) The transfer of an instrument by a protected holder shall not vest 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 instrument.

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 an instrument unless he signs it.

(2) A person who signs in a name which is not his own shall be liable as if he 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 an instrument 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 an instrument has been materially altered:

(a) Parties who have signed the instrument subsequent to the material alteration shall be liable thereon according to the terms of the altered text; and

(b) Parties who have signed the instrument before the material alteration shall be liable thereon 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 instrument of any party in any respect.

Article 30

(1) An instrument may be signed by an agent.

(2) The signature on an instrument by an agent, with authority to sign, and showing on the instrument that he is signing in a representative capacity, imposes liability thereon on the person represented and not on the agent.

(3) The signature on an instrument by an agent without authority to sign, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity, imposes liability on the instrument on such agent and not on the person whom the agent purports to represent.

(4) An agent who is liable pursuant to paragraph (3) and who pays the instrument shall have the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

Article 31

(1) Any party to a bill and any party to a note [except the maker] may exclude or limit his liability by an express stipulation on the instrument.

(2) Such exclusion or limitation of liability shall be effective only with respect to the party making the stipulation.

Article 32

A person signing an instrument shall be liable thereon as an endorser unless the instrument clearly indicates that he signed in some other capacity.

Article 33

(1) All drawers, acceptors, endorsers and guarantors of a bill are jointly and severally liable thereon.

(2) All makers, endorsers and guarantors of a note 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 article 67 (b) 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 MAKER

Article 34 bis

The maker engages that he will pay to the holder

(a) At maturity, the amount of the note;

(b) After maturity, the amount of the note and any interest and expenses which may be claimed under article 67 (b) or 68.

D. 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 article 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 it 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 related 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.

E. THE ENDORSER

Article 41

The endorser engages that upon dishonour of the bill by non-acceptance or non-payment or upon dishonour of the note by non-payment, and upon any necessary protest, he will pay the amount of the instrument, 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 instrument and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

Article 42

(1) Any person who negotiates an instrument 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 instrument was forged or unauthorized; or

(b) The instrument 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 or the note is dishonoured by non-payment.

(2) Liability on account of any defect mentioned in paragraph (1) shall be incurred only to a holder who took the instrument without knowledge of such defect.

F. THE GUARANTOR

Article 43

(1) Payment of an instrument may be guaranteed, as to the whole or part of its amount, by any person who may or may not be a party.

(2) A guarantee must be written on the instrument 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, in the case of a bill, or the maker, in the case of a note.

Article 44

(1) A guarantor shall be liable on the instrument 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 instrument 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 instrument.

Article 45

The guarantor, when he pays the instrument, shall have rights thereon 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.]

(2) The holder may present for acceptance any other 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.

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 endorsers and the guarantors 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 endorsers and the guarantors.

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 of a note for payment shall be necessary in order to render an endorser or his guarantor liable on the note.

(3) Presentment for payment shall not be necessary to render the acceptor liable.

Article 53

An instrument is duly presented for payment if it is presented in accordance with the following rules:

(a) The holder of an instrument must present the instrument for payment to the drawee or to the acceptor or to the maker, as the case may be.

(b) Where a bill is drawn upon or accepted by two or more drawees, or where a note is signed by two or more makers, it shall be sufficient to present the instrument to any one of them; if a place of payment is specified, presentment shall be made at that place.

(c) Where the drawee or the acceptor or the maker 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) An instrument 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) An instrument which is payable on demand must be presented for payment within one year of its stated date and if the instrument is undated within one year of the issue thereof.

(f) An instrument must be presented for payment:

(i) At the place of payment specified on the instrument; or

(ii) Where no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or

(iii) Where no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or residence of the drawee or the acceptor or the maker.

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, the maker, an endorser or a guarantor has waived presentment expressly or by implication; such waiver shall bind only the party who made it;

(b) Where an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(c) Where an instrument 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 or the maker of a note, after the issue thereof, is in the course of insolvency proceedings in the country where presentment is to be made;

(e) As regards a bill, where the 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

(1) If a bill is not duly presented for payment, the drawer, the endorsers, and their guarantors shall not be liable on the bill.

(2) If a note is not duly presented for payment, the endorsers and their guarantors shall not be liable on the note.

Article 56

(1) An instrument 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 instrument 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.

(3) Where a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the endorsers and their guarantors.

SECTION 3. RECOURSE

Article 57

Where a bill has been dishonoured by non-acceptance or by non-payment or where a note has been dishonoured by non-payment, the holder may exercise his right of recourse only after the bill or note 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 instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument 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 instrument 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 or payment of the note was refused. The statement shall specify

(a) The person at whose request the instrument is protested.

(b) The place and date of protest; and

(c) The cause or reason for protesting the instrument, the demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

(4) An authenticated protest may

(a) Be made on the instrument itself; or

(b) Be made as a separate document, in which case it must clearly identify the instrument that has been dishonoured.

Article 59

(1) Protest for dishonour of a bill 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) Protest for dishonour of a note by non-payment must be made on the day on which the note is dishonoured or on one of the two business days which follow.

[(3) An authenticated protest must be effected at the place where the instrument has been dishonoured.]

Article 60

(1) 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.

(2) If a note which must be protested for non-payment is not duly protested, the endorsers and their guarantors shall not be liable on the note.

Article 61

(1) Delay in protesting a bill for dishonour by non-acceptance or by non-payment or a note for dishonour 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, the maker, 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 an instrument payable on demand, where the cause of delay continues to operate beyond 30 days after 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 instrument 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) Where a note has been dishonoured by non-payment, due notice of dishonour must be given to the endorsers and their guarantors.

(3) 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 instrument.

(4) Notice operates for the benefit of all parties who have a right of recourse on the instrument against the party notified.

Article 63

Notice of dishonour may be given in writing or orally and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument 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 instrument 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 instrument].

Article 67

The holder may recover from any party liable,

(a) At maturity: the amount of the instrument;

(b) After maturity: the amount of the instrument, 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.

Article 68

A party who takes up and pays an instrument 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 an instrument is discharged by:

(a) Payment in accordance with articles 70 to 75 or 80;

(b) Renunciation in accordance with article 76;

(c) Reacquisition of the instrument 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 instrument 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 instrument 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 an instrument in accordance with paragraph (1) shall deliver the receipted instrument and any authenticated protest to the person making the payment.

Article 71

(1) The holder may take partial payment from the drawee or the acceptor or the maker. In that case

(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

(b) The instrument shall be considered as dishonoured by non-payment as to the amount unpaid.

(2) The drawee or the acceptor or the maker making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

(3) When an instrument has been paid in part, a party who pays the unpaid amount shall be discharged of his liability thereon, and the person receiving the payment shall deliver the receipted instrument 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 instrument was duly presented for payment in accordance with article 53 (f).

[(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (f), the instrument shall be considered as dishonoured by non-payment.]

Article 73

(1) Where an instrument has been materially altered as to its amount, any person who pays the instrument pursuant to such alteration without knowledge of the alteration shall have the right to recover the amount by which the instrument was raised from the party who so altered the instrument or from any subsequent party, except a party who was without knowledge of the alteration at the time he transferred or negotiated the instrument.

(2) In any other case of alteration which is material, as defined in article 29 (2), any person who pays the instrument 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 instrument, or from any subsequent party except a party who was without knowledge of the alteration at the time he transferred or negotiated the instrument.

(3) Where the signature of the drawer or the maker has been forged, any person who pays the instrument 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 of the maker, or from any party subsequent to the drawer or the maker except a party who was without knowledge of the forgery at the time he transferred or negotiated the instrument.

Article 74

(Alternative A)

(1) (a) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable may be paid in the currency of that country.

(b) When such instrument is paid in the currency of the country where payment takes place, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

(2) Where such instrument is dishonoured by non-acceptance or by non-payment, the sum payable shall be paid in the currency of the country where payment takes place. In that case, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of the maturity or the day of payment.

(3) The provisions of paragraphs (1) and (2) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in a specified currency.

Article 74

(Alternative B)

(1) Where an instrument is made payable in a currency which is not that of the country where payment takes place, the sum payable shall be paid in the currency stated on the instrument.

(2) (a) The provision of paragraph (1) shall not apply when the drawer or maker has stipulated on the instrument that payment be made in the currency of the country payment takes place. In that case, the amount payable shall be calculated according to the rate of exchange on the day of maturity or, if so specified, according to the rate of exchange indicated on the instrument.

(b) When an instrument containing such a stipulation is dishonoured by non-acceptance or by non-payment, the holder may at his option demand from the party liable that the amount payable shall be calculated according to the rate of exchange on the day of dishonour, or the day of maturity, or the day of payment.

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 paragraphs (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 instrument if the holder, at or after maturity, writes on the instrument an unconditional renunciation of his rights thereon against such party.

(2) Such renunciation shall not affect the right to the instrument 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 instrument 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 an instrument, 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 instrument 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 instrument. 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 in due course be submitted to the Working Group.]

Part Eight. Lost instruments

Article 80

(1) Where an instrument is lost [whether by destruction, wrongful detention or otherwise] the person who lost the instrument shall, subject to the provisions of paragraphs (2) and (3) of this article, have the same right to payment which he would have had if he had been in possession of the instrument.

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, para. 4.

(2) (a) A person claiming payment of a lost instrument shall establish in writing to the satisfaction of the party from whom he claims payment

(i) The fact that, when in possession of the instrument, he had a right to payment;

(ii) The facts which prevent production of the instrument; and

(iii) The contents of the lost instrument.

(b) The party from whom payment of a lost instrument is claimed may request the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

(c) The kind of security and its terms shall be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

(d) Where security cannot be given, the Court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under articles 67 and 68, with the Court or any other competent authority. Such deposit shall be considered as payment to the person claiming payment.

Article 81

(1) A party who has paid a lost instrument, and to whom the instrument is subsequently presented for payment by another person, shall notify the person to whom he paid of such presentment.

(2) Such notification shall be given on the day the instrument is presented or on one of the two business days which follow and shall state the name of the person presenting the instrument and the date and place of presentment.

(3) Failure to notify shall render the party who has paid the lost instrument liable for any damages that the person whom he paid may suffer from such failure (provided that the total amount of the damages shall not exceed the amount of the instrument).

Article 82

(1) A party who has paid a lost instrument and who is subsequently discharged of his liability on the instrument shall have the right

(a) Where security was given, to indemnify himself; or

(b) Where the amount was deposited with a Court or other competent authority, to reclaim the amount so deposited.

(2) Where the amount was deposited with a Court or other competent authority and was not reclaimed under paragraph (1) (b) of this article within the period of time provided by article 70, the person for whose benefit the amount was deposited may request the Court which ordered the deposit to order that the amount deposited be paid out to him. The Court shall grant such request upon such terms and conditions as it may require.

Article 83

A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a copy of the lost instrument or a writing establishing the elements of the lost instrument pertaining to the requirements set out in article 1 (2) or (3).

Article 84

A person receiving payment of a lost instrument in accordance with article 80 shall deliver to the person paying the writing required under article 80 (2) (a) (iii) receipted by him.

Article 85

A party who paid a lost instrument in accordance with article 80 shall, upon due proof of such payment have the same rights which he would have had if he had been in possession of the instrument.

Article 86

[(a) Where an instrument was lost by the payee or by his endorsee for collection whether by destruction, wrongful detention or otherwise, the payee, upon due

proof of the fact that he or his endorsee for collection lost the instrument, shall have the right to request the drawer or the maker to issue a duplicate of the lost instrument. The drawer or maker, upon issuing such duplicate may request the payee to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

(b) The kind of security and its terms shall be determined by agreement between the drawer or maker issuing a duplicate of a lost instrument and the payee. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

(c) (i) The drawer or the maker when issuing a duplicate of a lost bill or note may write on the face thereof the word "duplicate" (or words of similar import).

(ii) Where an instrument is marked as being a duplicate, it shall be considered as an instrument under this law, provided that a duplicate of a lost bill or note cannot be negotiated except for purposes of collection.

(d) Refusal by the drawer or maker to issue a duplicate of a lost instrument shall render the drawer or maker liable for any damages that the payee may suffer from such refusal (provided that the total amount of the damages shall not exceed the amount of the lost instrument).]

3. *List of relevant documents not reproduced in the present volume*

<i>Title or description</i>	<i>Document reference</i>
<i>Working Group on International Negotiable Instruments, first session</i>	
Provisional agenda.....	A/CN.9/WG.IV/WP.1
Draft uniform law on international bills of exchange and international promissory notes, and commentary: report of the Secretary-General	A/CN.9/WG.IV/WP.2
Consideration of the draft uniform law on international bills of exchange and international promissory notes: working paper prepared by the Secretariat.....	A/CN.9/WG.IV/R.1
Draft report of the Working Group on International Negotiable Instruments on the work of its first session	A/CN.9/WG.IV/CRP.1 and Add.1
Defences available against protected holder ...	A/CN.9/WG.IV/CRP.2
Bankers' commercial credits	
International payments: revision of the Uniform Customs and Practice for Documentary Credits. Note by the Secretary-General	A/CN.9/L.23

III. INTERNATIONAL COMMERCIAL ARBITRATION

1. *Report of the Secretary-General: summary of comments by members of the Commission on the proposals of the Special Rapporteur on international commercial arbitration (A/CN.9/79) **

INTRODUCTION

1. The United Nations Commission on International Trade Law, at its first session, included international commercial arbitration among the priority items on its work programme.

2. At its second session, the Commission 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.¹ The Special Rapporteur submitted his final report to the Commission at its fifth session.²

3. At the fifth session, the Commission considered the above report and adopted 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 report and to invite them to submit to the Secretariat:

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

"(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."

4. Pursuant to the request contained in paragraph 1 of the above decision, the Secretary-General, in a *note*

verbale of 23 June 1972, informed the States members of the Commission of the proposals made by the Special Rapporteur in his report and invited them to communicate their comments and proposals thereon by replying to a questionnaire annexed to the *note verbale*.

5. The following members of the Commission have replied to the questionnaire: Egypt, Australia, Belgium, France, Hungary, Japan, Poland, Romania, Tunisia and the USSR.

6. Part I of the report reproduces the proposals of the Special Rapporteur, the questions relating thereto in the questionnaire mentioned in paragraph 4 above, and summaries of the replies to those questions including the comments, suggestions and observations contained therein.

7. Part II of the report sets forth proposals of the Secretary-General regarding further work in this field of unification, as requested in paragraph 1 of the above decision.

I. SUMMARY OF THE COMMENTS AND PROPOSALS ON THE PROPOSALS OF THE SPECIAL RAPPORTEUR

Promotion of the ratification of the 1958 United Nations Convention

8. *Proposal A:*

UNCITRAL should recommend that States which have not yet ratified, or adhered to, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, should do so.

9. *Question (1): Should UNCITRAL make a recommendation as to the ratification of the 1958 United Nations Convention?*

10. All countries which answered the questionnaire agreed with the proposal.

11. *Question (2): If so, in what form should this recommendation be made in order to make it as effective as possible?*

* 9 March 1973.

¹ *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), para. 112; UNCITRAL Yearbook, Vol. I: 1968-1970, part two, II, A.*

² Document A/CN.9/64; UNCITRAL Yearbook, Vol. III: 1972, part two, III.

12. The following proposals were made:

Belgium: The Secretary-General should draw the attention of the interested States to the advantages presented by the Convention.

France: Recommendation by the General Assembly.

Hungary: The Secretary-General should inform the States concerned of the benefits of adhesion to the Convention for the promotion of international trade.

Poland: Resolution of the General Assembly or, at least, resolution of the Commission approved by the General Assembly.

Romania: Resolution of the General Assembly.

Tunisia: Resolution by UNCITRAL.

USSR: Appeal by the United Nations.

*Promotion of ratification
of the 1961 European Convention*

13. *Proposal B:*

UNCITRAL should recommend that States which have not yet ratified, or adhered to, the 1961 European Convention on International Commercial Arbitration, should do so.

14. *Question (3): Should UNCITRAL make a recommendation as to the ratification of the 1961 European Convention?*

15. Belgium, Egypt, France, Hungary, Poland and the USSR supported the proposal of the Special Rapporteur. Australia expressed the view that a recommendation as to the ratification of the 1961 European Convention should not be made at this stage, while Japan suggested that UNCITRAL should consider the proposal only if it would conclude that unification of the rules of international commercial arbitration is not feasible.

16. *Question (4): If so, in what form should this recommendation be made in order to make it as effective as possible?*

17. Belgium, France, Hungary, and Poland gave the same reply to this question as to Question (3) in paragraph 14 above. Romania suggested that the recommendation should be made by a resolution of the United Nations Economic Commission for Europe. According to the USSR the recommendation should be formulated by UNCITRAL either alone or in co-operation with other United Nations bodies, such as the United Nations Economic Commission for Europe.

*Establishment of a study group for the unification
of arbitration rules*

18. *Proposal C:*

UNCITRAL should establish a study group or working group which, alone or in co-operation with the representatives of interested arbitration centres, would examine:

1. The desirability of drawing up a model set of arbitration rules containing basic provisions, which arbitration centres could incorporate into their rules, and

2. The feasibility of unification and simplification of national rules on arbitration and the enforcement of arbitral awards, with a view to limiting judicial control over arbitral awards and reducing the means of recourse against enforcement orders. In the view of the Special Rapporteur, this aim could be best achieved by the drawing up of a uniform or model law applicable to disputes arising from international trade, which would contain certain basic norms with regard to such matters as the form of the arbitration agreement and its effects, principles for the establishment of the arbitral tribunal, the possibility of choosing a foreign arbitrator, the finality of arbitral awards, and the possibility of choice between arbitration according to the rules of law and arbitration according to equity.

19. *Question (5): Should UNCITRAL include in its programme of work the drawing up of a model set of arbitration rules for the purpose suggested in Proposal C?*

20. Austria, Belgium, Hungary, Japan, Poland, Romania and Tunisia gave a positive answer to this question. According to the USSR, the Commission should include in its programme of work not the drawing up of a model set of arbitration rules but the consideration of the desirability of such work. France objected to the proposal and suggested that, in accordance with resolution 708 (XXVII) of the Economic and Social Council, the task of preparation of arbitration rules should be carried out on a regional basis.

21. Australia and the USSR in their replies emphasized the need for co-operation with existing arbitration centres in the work mentioned above. Belgium noted that, in view of national legislation applicable to arbitration, a set of uniform arbitration rules should only have the character of a recommended text for optional use by persons who have recourse to arbitration.

22. *Question (6): Should UNCITRAL include in its programme of work the examination of the feasibility of unification and simplification of national rules on arbitration as suggested in Proposal C?*

23. Australia, Egypt, Hungary, Japan, Poland, Romania and Tunisia gave positive answers to this question; the answers of Belgium and France were in the negative. The USSR expressed the view that the problems to which Proposal C was addressed could in large measure be met by an increase in the number of States parties to the 1958 and 1961 Conventions mentioned in paragraphs 8 and 13 above.

24. Australia suggested that the feasibility study should examine existing uniform laws to ascertain whether they were acceptable to the countries for whom they were prepared and, if not, why not. At the same time, it pointed out that any limitation of judicial control, as suggested by the Special Rapporteur, might meet with some resistance

in Common Law countries. As noted in the reply, it was a general principle in those countries that the arbitrator had to judge in accordance with the rules of law and, consequently, if so directed by the Court, he had to submit any question of law for the opinion of the Court; furthermore, it was a principle of public policy in those countries that the jurisdiction of the Court could not be ousted by an arbitration clause.

25. In opposing the proposal, France expressed the view that unification of national rules on arbitration could not be achieved on a world-wide level and pointed out that attempts at unification even at a regional level often were unsuccessful. In this connexion it referred to the delay in ratification of the European Convention providing a Uniform Law on Arbitration, drawn up by the Council of Europe in 1966. Belgium also pointed out that the above Convention was signed by only two States and ratified by one.

26. *Question (7): If the answer to either question (5) or (6) is yes, and it is considered that interested arbitration centres should co-operate in the work, which of such centres in the country or the region of the respondent should be invited to co-operate?*

27. The following information was provided in response to this question:

- Australia: Australian Chamber of Commerce
Commercial Practices Committee of the Australian Council of the International Chamber of Commerce
ECAFE Commercial Arbitration Centre
- Belgium: Centre belge pour l'étude de la pratique de l'arbitrage national et international (CEPANI)
- Hungary: Presidium of the Court of Arbitration constituted at the Hungarian Chamber of Commerce
- Poland: Polish Chamber of Foreign Trade
- Romania: Romanian Chamber of Commerce
- USSR: Chamber of Commerce and Industry of the USSR

Promotion of co-operation among arbitration centres and other organizations concerned

28. *Proposal D:*

UNCITRAL should invite Governments, and governmental and non-governmental organizations, to support and encourage the establishment of regular and systematic bilateral and multi-lateral co-operation among arbitration centres and other organizations concerned, with a view to advancing the balanced use of arbitration facilities in both developed and developing countries and in trade between countries having different economic systems. With respect to regions where there are no arbitration organizations or where the existing organizations are insufficiently developed, the United Nations should provide the technical and material assistance needed for establishing or strengthening of such organizations.

29. *Question (8): Should UNCITRAL set itself the task suggested by the Special Rapporteur of promoting a balanced use of arbitration facilities?*

30. All countries which replied to the questionnaire, except France, gave a positive answer to this question. Poland, while agreeing with the proposal that the Commission should set itself the task of promoting a balanced use of arbitration facilities, expressed the view that "UNCITRAL should be the Protector and Co-ordinator in this respect whereas the organizations concerned should be immediately engaged therein". The USSR noted that the development of co-operation among arbitration centres could contribute to a wider use of arbitration for the settlement of disputes arising in international trade.

31. France objected to the proposal on the ground that UNCITRAL did not appear to be the most appropriate organ for the advancement of a more balanced use of arbitration facilities. Co-operation among arbitration centres should basically be the task of, and promoted by, the arbitration centres themselves. UNCITRAL could recommend to these centres that they should recall and give effect to the resolution incorporated in the Final Act of the 1958 United Nations Conference on International Commercial Arbitration³ and the resolution of the

³ The resolution reads:

"The Conference,
"Believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field.

"Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

"Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

"Expresses the following views with respect to the principal matters dealt with in the note of the Secretary-General:

"1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations, and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts;

"2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade; and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

"3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

"4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appro-

(Continued on next page.)

Economic and Social Council referred to in paragraph 20 above.

32. *Question (9): If the answer to question (8) is yes, is the promotion of co-operation among arbitration organizations an appropriate means to the furtherance of a more balanced use of arbitration facilities?*

33. Except for France, whose reply is referred to in paragraph 31 above, all countries gave a positive answer to this question. Hungary noted that co-operation among arbitration centres could be usefully promoted by organizing the exchange of information and experience.

34. *Question (10): Is there an existing arbitration centre or other organization concerned with international trade arbitration in the country or region of the respondent whose co-operation would be useful for the above purpose? If so, which is that organization?*

35. The following answers were given:

Australia: ECAFE Commercial Arbitration Centre

Belgium: Centre belge pour l'étude de la pratique de l'arbitrage national et international (CEPANI)

France: International Chamber of Commerce

Hungary: Presidium of the Court of Arbitration constituted at the Hungarian Chamber of Commerce

Japan: Japan Commercial Arbitration Association

Poland: Polish Chamber of Foreign Trade

Romania: Romanian Chamber of Commerce

USSR: Chamber of Commerce and Industry of the USSR

36. *Question (11): If there is no such existing organization would it be useful to establish such an organization? If so, should that organization be established on a national level or on a regional level?*

37. Egypt stated that there was no existing arbitration centre concerned with international trade arbitration in that country.

(Foot-note 3 continued.)

appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

"5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations, and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

"Expresses the wish that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

"Suggests that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations;

"Requests that the Secretary-General submit this resolution to the appropriate organs of the United Nations."

38. *Question (12): What, if any, assistance could UNCITRAL give to the Governments concerned in the establishment of new arbitration centres or the strengthening of existing centres if such strengthening is needed?*

39. Australia suggested that it might be possible for UNCITRAL to give assistance by advising on the setting up of a model as well as on operations, procedures and previous experience of similar centres in other countries. France expressed the view that in addition to the important role that the Economic Commissions had to play in this field, the United Nations should give technical assistance and material to the countries concerned and promote the above tasks also by dissemination of documentation, organization of seminars for arbitrators and establishment of fellowships at major arbitration centres. It noted further that the International Chamber of Commerce could also help the countries concerned by establishing a greater number of national committees and furnishing assistance to its international secretariat. The rendering of technical assistance by the United Nations was also suggested by Belgium and Romania. Romania further suggested that the Commission and, in a more general way, the United Nations might recommend to Governments that they should encourage regular and systematic co-operation among existing arbitration centres and the establishment of new arbitration centres in countries where no such centres existed.

Establishment of an International Organization of Commercial Arbitration

40. *Proposal E:*

UNCITRAL should encourage and sponsor the establishment by non-governmental organizations of an International Organization of Commercial Arbitration. The organization would have for its main object the promotion, on a universal scale, of co-operation among organizations concerned with international commercial arbitration; its tasks would include the creation of a permanent framework for such co-operation, the establishment of a documentation and information centre, the publication of an international journal, 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. The organization would not have executive power with regard to its member organizations and would not interfere with bilateral or regional multilateral co-operation.

41. *Question (13): Should UNCITRAL take steps to promote co-operation among arbitration organizations?*

42. Australia, Belgium, Egypt, Hungary, Japan, Poland and Romania gave a positive answer to this question. France held that the Commission's activity should be limited to encouraging co-operation among arbitration organizations. The USSR held that, in principle, the proposal to study various methods of promoting co-operation among arbitration organizations was worthy of attention.

43. *Question (14): If the answer to question (13) is yes, would the establishment of an International Organization of Commercial Arbitration by non-governmental organizations be an appropriate means to this end?*

44. Egypt, Hungary, Romania and Tunisia gave positive answers to this question. Australia also agreed, in principle, with the concept of the establishment of an International Organization of Commercial Arbitration subject, however, to the comment that before taking a final position it would have to consider the questions of financing the organization and whether the organization should be governmental, non-governmental, or a combination of both.

45. Poland expressed the view that the organizations concerned should be encouraged to create an International Organization of Commercial Arbitration. The USSR pointed out that at the Fourth International Congress on Arbitration, which was held in Moscow in October 1972, an International Organizing Committee was created in order to prepare for the Fifth Congress; this Committee was instructed to prepare, *inter alia*, a report on the most effective forms of co-operation among arbitration organizations and other organizations concerned with arbitration as regards exchanging information and knowledge on the development of international commercial arbitration.⁴

46. Belgium objected to the creation of an International Organization of Commercial Arbitration. France held that the Commission should not directly promote, nor patronize the creation of a world-wide organization. In case, however, that such an international organization would be created, it should be a non-governmental organization similar to those existing organizations which would create it and which would become the parties thereof.

47. *Question (15): If the answer to question (14) is affirmative, should the functions of such an organization be those set out in Proposal E, or should the organization have other functions?*

48. Egypt, Hungary, Poland and Tunisia agreed that the functions of the International Organization should be those suggested by the Special Rapporteur in Proposal E as set out in paragraph 40 above. Romania expressed the view that the organization should be confined to those functions referred to above only at the beginning of its activity; later it should carry out tasks which the participating non-governmental organizations might confer on it in the light of the experience they have gained in the meantime. According to the comments made by Australia, the functions suggested by the Special Rapporteur seemed to be appropriate but they required further consideration. In France's opinion the International Organization might be given the task of being a permanent centre of documentation and information.

49. *Question (16): If the establishment of an International Organization does not seem to be the most appropriate means for the promotion of co-operation among arbitration centres, should some other means or approach be considered?*

50. Belgium suggested that the Congresses on Arbitration (see the comments of the USSR in paragraph 45 above) should be held under the auspices of UNCITRAL and the decisions of the Congresses should be submitted to the Commission. France pointed out that the problems which the Special Rapporteur had brought to light in his report, seemed to be the result of disparities and deficiencies which existed in certain regions in respect of international arbitration. In the view of France, these disparities and deficiencies might best be studied at the level of the regional economic commissions and other regional organizations. Romania suggested that UNCITRAL should examine the possibility of carrying out itself some of the tasks attributed to the International Organization.

Publication of Arbitral Awards

51. Proposal F:

The United Nations should publish a compilation of those arbitral awards having the greatest significance for international trade.

52. *Question (17): Should the United Nations publish arbitral awards in the field of international trade?*

53. Egypt, Hungary, Poland, Romania and Tunisia gave positive answers to this question. France expressed the view that publication of arbitral awards by the United Nations or by the suggested world-wide organization would be desirable. Belgium and Japan also agreed that the United Nations should publish arbitral awards rendered in the field of international trade only in cases where the interested parties do not object to such publication. The USSR suggested that the question of publication of arbitral awards should be considered in the light of the answers given to the questions in paragraphs 29, 30, 33 and 34 above. Australia noted that it could only express its final views after resolution of the problems: (a) who would pay for the publication and (b) how would the awards be obtained by the United Nations.

54. *Question (18): If the answer to question (17) is affirmative, could the respondent's Government provide, or arrange to provide, the United Nations with the text of such awards rendered in its country?*

55. Belgium agreed to submit awards rendered through the intermediary of CEPANI (Centre belge pour l'étude de la pratique de l'arbitrage national et international). France stated that it could only submit the text of those judgements which were made by French courts in deciding appeals brought against arbitral awards and the text of those arbitral awards which institutionalized arbitral tribunals would be willing to communicate to it. Hungary stated that the Court of Arbitration constituted at the Hungarian Chamber of Commerce was willing to provide the United Nations with a review of publishable awards. Romania expressed its agreement that arbitral awards be communicated to the United Nations.

⁴ It is noted in this connexion that the Secretariat of the Congress, with the agreement of the UNCITRAL Secretariat, circulated the Report of the Special Rapporteur to participants of the Congress. The Special Rapporteur introduced the Report to the Congress.

Questions regarding other activity of UNCITRAL in the field of international commercial arbitration

56. *Question (19): Are there other steps not mentioned in the proposals of the Special Rapporteur which UNCITRAL should undertake in order to promote unification and harmonization of the law of international commercial arbitration?*

Question (20): What other suggestions and observations has His Excellency's Government regarding unification and harmonization of law in this field?

57. Belgium expressed the view that the United Nations should undertake all appropriate steps for the promotion and facilitation of international arbitration but should not prepare new international instruments. France was also of the opinion that there were already sufficient international instruments in this field and, therefore, it did not seem advisable, at least for the time being, to propose the preparation of further such instruments. Furthermore, France expressed the view that institutionalization of arbitration has changed the original contractual character of arbitration and the free choice of arbitrators; it should, therefore, be considered whether it would not be a more appropriate task for UNCITRAL to encourage the use and promote the role of national courts in the settlement of international commercial disputes. Romania suggested consideration of the feasibility and desirability of further extension of the geographical sphere of the 1961 European Convention on International Commercial Arbitration.

II. FURTHER WORK

58. As appears from part I of this report, all the proposals of the Special Rapporteur were supported by the majority of the States which replied to the questionnaire referred to in paragraph 4 above. However, the Commission might wish to consider whether the attempt to implement simultaneously all of the proposals of the Special Rapporteur would call for an amount of preparatory and substantive work by the Commission and its secretariat that could not be carried out in view of the other priority items on the Commission's agenda. Therefore, the Commission might wish to consider which proposals should be implemented at the present time.

59. One of the proposals of the Special Rapporteur that the Commission might wish to consider at this stage is the promotion of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (proposal A). It will be recalled (para. 10 above) that this proposal was supported by all States which replied to the questionnaire.

60. In this connexion, the Commission may wish to recall that pursuant to its decision at the first session⁶ the Secretary-General, by a *note verbale* addressed to States Members of the United Nations, drew attention to the 1958 Convention and invited such States to consider

the possibility of adhering to the Convention. Consequently, a recommendation by the Secretary-General to adhere to the Convention, as suggested by some States, would only be a repetition of this previous action. In view of the favourable impact which a wider acceptance of the 1958 Convention may have on the unification of the law of international commercial arbitration, the Commission might wish to suggest to the General Assembly that it pass a resolution at its next session, recommending that States which have not yet ratified, or adhere to, the 1958 Convention should do so.

61. The Special Rapporteur also proposed promotion of the 1961 European Convention on International Commercial Arbitration (proposal B). This proposal (para. 13 above) was supported in all the replies from States belonging to the region. It may be doubtful whether the procedure suggested in respect of the 1958 United Nations Convention would be equally appropriate to the promotion of the acceptance of the 1961 European Convention. The latter Convention was drawn up under the auspices of the Economic Commission for Europe; the countries which may accede to it are the members of that Commission and those States which have been admitted in a consultative capacity to the Commission or which may participate in certain of its activities.

62. Consequently, it would seem more appropriate to invite the Economic Commission for Europe to recommend that States which may accede to the 1961 European Convention on International Commercial Arbitration should do so by ratifying or adhering to it, or to take any other appropriate steps directed to this objective.

63. The Special Rapporteur, in proposal C (para. 18 above) suggested that the Commission should establish a study group (or working group) to examine the desirability of drawing up a set of basic arbitration rules which arbitration centres would incorporate into their rules. The Secretary-General in his questionnaire invited the members of the Commission to comment on the possibility of including the preparation of such rules in the Commission's programme of work. As reported in paragraph 20 above, all but two of the countries replying agreed with that proposal, one country supported the proposal of the Special Rapporteur that the desirability of such rules be considered, and one suggested that the task of drawing up uniform rules should be entrusted to the regional economic commissions.

64. It ought to be mentioned in this connexion that there are two existing sets of arbitration rules drawn up by regional economic commissions: the European Arbitration Rules prepared by the Economic Commission for Europe in 1966 and the ECAFE Rules prepared by the Economic Commission for Asia and the Far East in 1966. Neither of these sets of uniform rules was intended to replace, or to be incorporated into, the rules of existing arbitration centres; instead, they were drawn up for use in *ad hoc* arbitration cases, if chosen by the parties.⁸

⁶ Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 33, UNCITRAL Yearbook, vol. I: 1968-1970, part two, I, A.

⁸ It may be noted that the 1972 trade agreements between the United States of America and the USSR and between the United States of America and Poland provide that disputes between parties to a contract should be settled by arbitration on the basis of the European Rules.

65. In view of the experience gained in respect of the above regional uniform rules, the Commission might wish to consider whether the drawing up of a set of arbitration rules for world-wide use in *ad hoc* arbitration would not be the most appropriate method for the realization of the Special Rapporteur's proposal C.1. It would seem that such a set of rules could immediately be used, if chosen by the parties, in *ad hoc* arbitration. In addition, such uniform rules for *ad hoc* arbitration might be found useful if it should be decided at a later stage to give further attention to the harmonization of the rules of existing arbitration centres. Thus, such uniform rules could, even before their acceptance by existing arbitration centres, contribute to the unification of commercial arbitration, not only in those regions where uniform arbitration rules and appropriate arbitration centres already exist but also in other countries and regions and in inter-regional trade.

66. Should the Commission agree with the considerations in paragraph 65 above, it may wish to request the Secretary-General, in consultation with the regional economic commissions of the United Nations and existing international arbitration centres, and giving due consideration to the European and ECAFE Arbitration Rules, to prepare a draft set of uniform arbitration rules for optional use in international trade. On completion of such a draft, the Commission might wish to consider

the establishment of a working group on international commercial arbitration to review the draft and to make its recommendations to the Commission.

67. The drawing up of a set of uniform rules for world-wide use, as suggested in paragraphs 65 and 66 above, may also contribute to the realization of the Special Rapporteur's further proposal that the Commission should promote the balanced use of arbitration facilities in both developed and developing countries and in trade involving countries having different economic systems (see proposal D in para. 28 above). Such a set of uniform rules, like the European and ECAFE Rules, presumably would include provisions (in the absence of agreement by the parties) on the venue of arbitration and the appointment of arbitrators by paying due attention to the use of existing appointing authorities and international arbitration centres concerned with disputes arising from international trade. It may be expected that recourse to such rules prepared for world-wide use would result in a more balanced use of arbitrators from the various regions of the world and may contribute to a more balanced use of existing arbitration facilities.

68. In view of the considerations in paragraph 58 above, the Commission may wish to consider at a later session what further work it should undertake in this field.

2. List of relevant documents not reproduced in the present volume

Title or description	Document reference
International commercial arbitration: proposal of the Drafting Group	A/CN.9/VI/CRP.2

IV. INTERNATIONAL LEGISLATION ON SHIPPING

1. *Report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session (Geneva, 25 September-6 October 1972) (A/CN.9/74) **

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* 12 October 1972.

INTRODUCTION

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law (UNCITRAL) 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: Argentina, Australia, Belgium, Brazil, 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 third session (31 January to 11 February 1972) considered the following subjects: I. The period of carrier's responsibility (before and during loading, during and after discharge); II. Responsibility for deck cargoes and live animals; III. Clauses in bills of lading confining jurisdiction over

claims to a selected forum; IV. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and the carrier.¹ At the close of the third session, the Working Group noted that it had been unable to take final action on some of the subjects assigned to it for consideration at that session, and that it would be advisable to hold a special session to complete work on those remaining subjects, with priority given to the basic question of the carrier's responsibility.² UNCTRAL at its fifth session (10 April to 5 May 1972) requested the Secretary-General to convene a special session of the Working Group in Geneva for two weeks, if feasible in the autumn of 1972, for the

¹ 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, UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein cited as Working Group report on third session).

² Working Group, report on third session, para. 72.

completion of its work on areas left unfinished by it at its third session.³

3. Accordingly, the Working Group held its fourth (special) session in Geneva from 25 September to 6 October 1972.

4. Twenty members of the Working Group were represented at the session.⁴ The session was also attended by observers from Mexico and the following intergovernmental and non-governmental organizations: the United Nations Conference on Trade and Development (UNCTAD), the Inter-Governmental Maritime Consultative Organization (IMCO), the International Institute for the Unification of Private Law (UNIDROIT), the International Chamber of Commerce, the International Chamber of Shipping, the International Union of Marine Insurance and the International Maritime Committee.

5. The Working Group, by acclamation, elected the following officers:

Chairman: Mr. José Domingo Ray (Argentina)
Vice Chairman: Mr Stanislaw Suchorzewski (Poland)
Rapporteur: Mr Mohsen Chafik (Egypt)

6. The documents placed before the Working Group were:

(a) Provisional agenda and annotations (A/CN.9/WG.III/WP.8);

(b) Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier—working paper by the Secretariat (A/CN.9/WG.III/WP.6);

(c) Arbitration clauses—working paper by the Secretariat (A/CN.9/WG.III/WP.7);

(d) International legislation on shipping—report of the Working Group on the work of its third session (31 January to 11 February 1972) (A/CN.9/63); *

(e) Responsibility of ocean carriers for cargo: bills of lading—report of the Secretary-General (A/CN.9/63/Add.1); **

(f) 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-III).

7. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda

* UNCITRAL Yearbook, vol. III: 1972, part two, IV.

** *Ibid.*, Annex.

³ Report of the United Nations Commission on International Trade Law on the work of its fifth session (1972) (herein cited UNCITRAL, report on fifth session (1972)), *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

⁴ All members of the Working Group were represented at the session with the exception of Zaire.

4. Consideration of the substantive items selected by the third session of the Working Group to be dealt with by the special session

5. Future work

6. Adoption of the report.

8. The Working Group used as its working documents the following working papers, which are annexed to this report:

Annex I. Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier—working paper by the Secretariat (A/CN.9/WG.III/WP.6) * and

Annex II. Arbitration clauses in bills of lading—working paper by the Secretariat (A/CN.9/WG.III/WP.7). **

9. The Working Group took action on the following subjects: I. Basic rules governing the responsibility of the carrier; II. Arbitration clauses; III. Future work.

I. BASIC RULES GOVERNING THE RESPONSIBILITY OF THE CARRIER

A. Introduction

10. The resolution of UNCITRAL defining the subjects to be examined by the Working Group concluded that the examination of rules and practices concerning bills of lading:

“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: ...

“(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...”⁵

* Reproduced in this Yearbook, part two, IV, 2, below.

** Reproduced in this Yearbook, part two, IV, 3, below.

⁵ 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 fourth session (1971)), *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 18* (A/8417), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A. The resolution of UNCITRAL, in defining the field of work, quoted the resolution adopted in 1970 by the UNCTAD Working Group on International Shipping Legislation. “Convention” in the resolution refers to the International Convention for the Unification of Certain Rules Relating to Bills of Lading (League of Nations, *Treaty Series*, Vol. CXX, p. 157, No. 2764, reproduced in Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, ch. II, 1 (United Nations publication, Sales No. E.73.V.3)), often referred to as the Brussels Convention of 1924. The substantive provisions are often referred to as the Hague Rules.

11. Under the programme of work established by this Working Group, the Secretary-General was requested to prepare a report that would include an analysis of "alternative approaches to the basic policy decisions that must be taken in order to implement the objectives... with special reference to establishing a balanced allocation of risks between cargo owner and the carrier..."⁶ the analysis thus requested was set forth in the report of the Secretary-General which was considered by the Working Group at its third session.⁷

12. The Working Group at its third session considered alternative approaches to achieving the objectives set forth in the UNCITRAL resolution (para. 10, *supra*). The discussions of the varying considerations are summarized in the report of the session.⁸ The report concluded as follows:

"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 agreed that the above should be considered further."

13. Accordingly, further consideration of this subject was given priority at the present session of the Working Group. The working paper prepared by the Secretariat to assist in such consideration⁹ proposed texts based, in the alternative, on the structure of the Brussels Convention of 1924 (the Hague Rules) and

on the approach of conventions governing international transport of goods by air, rail and road.¹⁰

B. *Unified, affirmative rules on carrier's responsibility*

14. The Working Group compared the approach of the Brussels Convention of 1924 (the Hague Rules) with that of other conventions governing international transport of goods with regard to the statement of the responsibility of the carrier.

15. It was noted in the working paper prepared by the Secretariat¹¹ that the Brussels Convention deals specifically with various aspects of the carrier's duties. Thus article 3 (1) states that the carrier shall exercise due diligence to (a) make the ship seaworthy; (b) properly man, equip and supply the ship, and (c) make specified parts of the ship in which the goods are carried fit and safe for their reception, carriage and preservation. These obligations, under article 3 (1), apply "*before and at the beginning of the voyage*". As a consequence it has been held that the carrier's responsibility under this provision (e.g., as regards the seaworthiness of the ship) does not extend throughout the voyage. Article 3 (2) sets forth a more general rule that the carrier shall properly and carefully handle, care for, and perform other specified duties as to the cargo, but this obligation is subject to various exceptions in article 4. For example, article 4 (2) (a) relieves the carrier of responsibility for neglect or fault of the master and other agents and servants of the carrier "in the navigation or in the management of the ship"; article 4 (2) (b) relieves the carrier of responsibility for the fault of certain of his agents or servants in case of loss or damage to cargo resulting from fire.¹²

16. Some representatives observed that, in contrast to the Brussels Convention, other conventions governing international transport of goods state the responsibility of the carrier in more affirmative and unified terms. With regard to the provision in article 3 (1) it was noted that the carrier's duty to make the ship seaworthy should extend throughout the voyage.

17. Some members of the Working Group expressed the view that any changes from the structure and approach of the Brussels Convention should be made with caution. These provisions have been the subject of extended experience and interpretation which should not be discarded.

⁶ This programme of work was approved by the Commission at its fourth session, UNCITRAL, report on fourth session (1971), para. 22, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

⁷ Report by the Secretary-General on the "Responsibility of ocean carriers for cargo: bills of lading", A/CN.9/63/Add.1 (hereinafter referred to as report of the Secretary-General). The first three parts of the report of the Secretary-General were addressed to the first three topics considered by the Working Group at its third session, as listed in para. 2, above. Part four, "Approaches to the basic policy decisions concerning allocation of risks between the cargo owner and the carrier", appears at paras. 150-269 of the report (A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.)

⁸ Working Group, report on third session (A/CN.9/63, paras. 58-71; UNCITRAL Yearbook, vol. III: 1972, part two, IV).

⁹ The working paper (A/CN.9/WG.III(IV)/WP.6) appears as annex 1 to this report; reproduced in this volume, part two, IV, 2 below.

¹⁰ The Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention); 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). The relevant provisions of these conventions were discussed in the report of the Secretary-General, at paras. 215-235.

¹¹ A/CN.9/WG.III/WP.6, paras. 6-11.

¹² Removal of responsibility for certain agents or servants results from the phrase in article 4 (2) (b): "the actual fact or privity of the carrier". See report of the Secretary-General (at paras. 163-166) and the working paper (A/CN.9/WG.III(IV)/WP.6), para. 8.

18. Some members also suggested that the above-mentioned exceptions in article 4 (2) (a) and (b) were, at least in part, justified. The exception in article 4 (2) (a) for fault of agents or servants of the carrier in "navigation ... of the ship" was appropriate in view of the special problems of maritime transport, and the catastrophic losses that could result from collision at sea. Some of these representatives noted, however, that they did not support retention of the exception in article 4 (2) (a) for responsibility for fault in "management of the ship", because this exception had led to ambiguities and conflicts in relation to the carrier's obligation of due care for the cargo. But in any event, it was stated that an exception for no navigational fault should be preserved.¹³ In support of this view it was stated that legal responsibility for acts of the carrier's agents is based on a fault in choosing the agent. However, ocean carriers do not have a free choice of the maritime employees and during the voyage the carrier does not control navigational operations by the captain, pilot and crew. It was also noted that the legal situation with respect to navigational faults under the Brussels Convention was definite and clear. On the other hand, making the carrier liable for fault in cases of collision, shipwreck, stranding or sinking would lead to protracted and expensive litigation. Consequently the shipper would still need to be protected by cargo insurance; such double protection for the shipper would add to the total cost of carriage. One representative pointed out that the effect of deleting these exceptions might be virtually to abolish general average, a practice of very long standing. Furthermore, carriers would be less likely to give guarantees to salvors on behalf of the cargo for claims against the cargo. Consequently there was a risk that in some circumstances salvage operations might not be undertaken in cases where they now would be. Another representative expressed doubt that there was any connexion between the proposed rules on liability and the operation of general average and salvage.

19. Some members also stressed the importance of retaining the exception in article 4 (2) (b), which relieves the carrier of liability for fault of certain of his agents or servants when cargo is lost or damaged because of fire. It was stated that ship-board fires often originate from the cargo, which may be subject to spontaneous combustion; and in many cases the cause of the fire is impossible to determine.

20. It was also stated that the transfer to the carrier of responsibility for fault with respect to navigation and fire would materially increase the costs of the carrier with resulting increases in freight rates which would not be fully offset by reductions in the shipper's cargo insurance. Some representatives suggested that insurance of concentrated risks was, as a practical matter, more

costly over-all than when these risks were shared among a large number of cargo insurers.¹⁴ On the other hand, some representatives suggested that the insurance of concentrated risks would lead to a reduction in insurance costs.

21. One member of the Working Group favouring in general a presumed fault rule mentioned that investigations made in his country indicated that a deletion of the navigational error and fire exceptions would result in a substantial transfer of risks from cargo insurers, to liability insurers, perhaps so as to double payment for cargo claims from liability insurers. The magnitude of this redistribution between the two groups of insurers made it difficult to assess the economic consequences thereof, but the risk for an increase of the over-all costs of insurance could not be entirely disregarded and might deserve further consideration.

22. Most members of the Working Group expressed the view that ocean carriers should be responsible for loss or damage to cargo that results from the fault of the carrier or of his agents or servants. The exceptions from the principle found in the Brussels Convention of 1924 responded to conditions of ocean transport in an earlier day which no longer exist due to improvement in ships, in navigation and in communication. In their view, the Brussels Convention of 1924 preserved rules, prepared by the ocean carriers in their own interest, which shippers had lacked the strength to oppose. Attention was also drawn to the high cost of cargo insurance which resulted from the restricted responsibility of ocean carriers; it was observed that these costs interfered with the access of commodities to world markets. Doubt was expressed concerning the suggestion that increasing the responsibility of the carrier for loss or damage to cargo would increase the over-all costs of carriage. It was recalled that similar fears had been expressed in connexion with increased responsibility of air carriers, but that these fears did not materialize. In this connexion, it was noted that techniques of distributing risks through insurance had been thoroughly developed and that the insurance industry was competitive. Consequently the ocean carriers and the insurers of the carriers and of cargo would be able to cope with changes in the rules governing carrier liability.

C. The "catalogue of exceptions"

23. Consideration was also given to paragraphs (c) through (p) of article 4 (2)—the so-called "catalogue of exceptions". It was noted that these 14 paragraphs constituted an attempt to set forth circumstances in which the carrier would not be considered to be at fault, and thus did not have effect that was independent of the general principle that the carrier would only be responsible for fault.

¹³ One proposal (A/CN.9/WG.III(IV)/CRP.9) suggested the inclusion of the following:

"In the case of shipwreck, stranding or collision the carrier will not be liable when the incident arises or results from a fault or neglect of the captain, [a member of] the crew or pilot in a navigational operation".

¹⁴ One representative stated that, after careful study, it had been estimated in his country that freight rates would increase by 1-2 per cent while cargo insurance premiums would decrease by 5-10 per cent; in general the former was around twice the latter so that the net effect of the changes proposed would be an increase in the costs to shippers of 0.5 to 1 per cent of the freight rate.

24. It was generally agreed that this attempt was not satisfactory, since it was not possible to describe fully or accurately the circumstances constituting fault or lack of fault in the numerous situations that arise in ocean carriage; consequently these exceptions had produced uncertainty and litigation.

25. There was general support for eliminating the "catalogue of exceptions", with the possible exception of paragraph (1), "saving or attempting to save life or property at sea". It was noted that the principle of paragraph (1) could be considered at the next session of the Working Group in connexion with "deviation" under article 4 (4), which also deals with the saving or attempting to save life at sea.

D. Unified rule on burden of proof

26. The report of the Secretary-General, considered by the Working Group at its third session, analysed the rules of the Brussels Convention on burden of proof and the relevant case law.¹⁵ It was noted that the Brussels Convention had dealt specifically with questions of burden of proof in only a few limited situations, and that courts had reached conflicting conclusions with respect to many of the Convention's provisions. Attention was also directed to problems that had arisen when fault by the carrier concurred with some other cause to produce loss or damage. The rules on burden of proof in this situation were subject to widespread conflict and uncertainty; it was suggested that a unified rule should be established to deal with this problem.¹⁶ As has been noted (para. 12, *supra*), most representatives at the third session supported "simplification and unification of the rules on burden of proof".¹⁷

27. At the present session, there was general support for implementing the above objective. It was observed that usually the carrier is in a better position than the shipper to know and present evidence concerning the circumstances leading to loss or damage to the goods, and consequently that he should bear the burden of proving that the loss resulted from circumstances other than his own fault or neglect. On the other hand, it was noted that in some circumstances it would be difficult for the carrier to establish the cause of loss, and that this would be particularly true where the loss results from fire (see para. 19, *supra*).

E. Drafting Party

28. The Working Group concluded that the foregoing discussions indicated sufficient basis for agreement so that a Drafting Party should be constituted to prepare

a text expressing the rules on the carrier's responsibility and on burden of proof on a unified and affirmative basis. Accordingly, a Drafting Party was constituted¹⁸ which, after having considered the subject presented the following report:

PART I OF THE REPORT OF THE DRAFTING PARTY: CARRIER'S RESPONSIBILITY

1. Discussion in the Working Group supported the approach that articles 3 and 4 for the 1924 Brussels Convention dealing with the basic question of the carrier's responsibility should be revised to state an affirmative rule of responsibility based on fault and a unified burden of proof rule. The Drafting Party herewith proposes legislative texts to implement these objectives and to achieve a compromise text.

2. Most members of the Drafting Party expressed the view that there should be no qualification of these basic principles, and that consequently all the specific exemptions contained in article 4 (2) should be deleted. On the other hand, some members were of the view that some or all of the substance of articles 4 (2) (a) and (b) should be retained. In the interest of reaching agreement on a compromise text shall would be generally acceptable, the Drafting Party has formulated the text, set out below, which establishes the affirmative general rule of responsibility based on fault and sets out a unified burden of proof rule subject to a qualification with respect to loss or damage resulting from fire (see para. 3 (2) below).

3. Accordingly the Drafting Party recommends that the following text be placed before the Working Group:

"(1) The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

"(2) In case of fire, the carrier shall be liable, provided the claimant proves that the fire arose due to fault or negligence on the part of the carrier, his servants or agents.

"(3) Where fault or negligence on the part of the carrier, his servants or agents, concurs with another cause to produce

¹⁵ Report of the Secretary-General, paras. 166-177, 236-237 and 256-269.

¹⁶ Report of the Secretary-General, paras. 167-171 and 267 and the working paper by the Secretariat (A/CN.9/WG.III/WP.6) at paras. 12-18.

¹⁷ Working Group, report on third session, para. 70, quoted above in the text at para. 12. A general statement as to reservations and doubts concerning the conclusions reached at the third session is also quoted at para. 12 above.

¹⁸ The Drafting Party was composed of the representatives of Argentina, Egypt, France, India, Japan, Nigeria, Norway, Spain, United Republic of Tanzania, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics and the United States of America. The Drafting Party elected as Chairman Mr. E. Chr. Selvig (Norway).

loss or damage, the carrier shall be liable only for that portion of the loss or damage attributable to such fault or negligence, provided that the carrier bears the burden of proving the amount of loss or damage not attributable thereto."

4. The Drafting Party recommends the foregoing text as a compromise of the divergent views on the subject of carrier's responsibility.

5. The text prepared by the Drafting Party would replace articles 3 (1) and 3 (2) and articles 4 (1) and 4 (2) of the Brussels Convention of 1924.

6. The Drafting Party further recommends that the question of "saving or attempting to save life or property at sea" (article 4 (2) (1)) be considered at the February 1973 session, in connexion with the consideration of "deviation" under article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea.

F. Consideration of the report of the Drafting Party

29. In introducing the foregoing report of the Drafting Party, it was observed that the proposed provision had been developed by the Drafting Party in a spirit of compromise. It was noted that some members had preferred a text that would contain no exceptions from the general rule of paragraph (1), while other members had preferred that the text include specific exceptions from carrier responsibility for both fire and navigational error. In spite of these divergent views, members of the Drafting Party, in order to secure general agreement, had joined in recommending the compromise text set forth in the report. This text included no exception for navigational fault but in paragraph (2) set forth a special rule on the burden of proof in case of fire.

30. It was also observed that, although questions might be raised as to certain of the provisions in the proposal, the text presented by the Drafting Party achieved remarkable simplification and clarification of complex and ambiguous provisions of the Brussels Convention. Accordingly, the Drafting Party had been of the opinion that it was not desirable to retain the exemplification of exonerations in the "catalogue of exceptions" (cf. paras. 23-24). Furthermore, the Drafting Party had considered that a general rule based on presumption of fault made it unnecessary to list the most important obligations of the carrier in article 3 (1) and (2) of the Convention since, according to the general rule, the carrier would have to perform all his obligations under the contract of carriage with due care.

31. Some members of the Working Group indicated dissatisfaction with the rule of paragraph (2) which, in cases of fire, placed on the shipper the burden of proving that the carrier was at fault. It was suggested that the carrier was in a better position than the shipper to present evidence concerning the cause and handling of a fire in the course of carriage, and that it would

be so difficult for the shipper to prove his case that the recommended provision was tantamount to the exception set forth in article 4 (2) (b) of the Brussels Convention.

32. One representative stated that although, in the spirit of compromise, he could accept a special provision dealing with the burden of proof in the case of fire, the burden placed upon the shipper should be ameliorated with respect to certain circumstances that are known only by the carrier. Consequently, consideration should be given to the following substitute for paragraph (2):

"However, if the loss or damage is caused by fire, the carrier shall not be liable if he proves that the ship had adequate means to prevent it, and that when the fire occurred, he, his agents and servants took all reasonable measures to avoid the fire and to reduce its consequences, unless the claimant proves the fault or neglect of the carrier, his agents or servants."

Another representative stated that, although he supported the compromise text, if another text should be prepared he would prefer the above proposal.

33. Other representatives noted that loss by fire and explosion presented special problems that justified special treatment; fire in the course of ocean carriage usually originates with the cargo, which may be subject to spontaneous combustion. In addition, it is difficult for the carrier to establish the precise origin of a fire.

34. Some representatives stated that the proposal for an exception in the case of navigational fault should have been adopted. Others stated that they were opposed to such an exception, and had accepted the special provision of paragraph (2) dealing with burden of proof in cases of fire as part of an over-all compromise on the general issue of special exceptions in favour of the carrier. If an exception for navigational fault should be included they would not be able to support the compromise provision with respect to burden of proof in cases of fire.

35. One representative objected to the provisions of paragraph (3) dealing with concurrent causes of loss or damage. The concluding proviso presented difficulties by stating the carrier's burden in negative terms and, in general, placed on the carrier a heavy burden of proving the amount of the loss or damage that was not attributable to his fault.

36. Most members of the Working Group indicated their support for the substance of the compromise text on carrier's responsibility that had been developed by the Drafting Party.

37. In this connexion, it was noted that the Working Group may wish to consider specific aspects of the compromise text in the light of further facts that may become available with respect to the practical consequences of the proposed rules, their effect on general average and salvage operations, and the relationship between these provisions and the future action of the Working Group with respect to unit limitation of liability.

II. ARBITRATION CLAUSES

A. Introduction

38. The resolution adopted by UNCITRAL at its fourth session listed "jurisdiction" among the subjects to be examined by the Working Group.¹⁹ The report of the Secretary-General (A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex) pursuant to the programme of work established by the Working Group, included a section on "Clauses of bills of lading confining jurisdiction over claims to a selected forum"; this examination included choice of judicial forum clauses (paras. 75-126) and arbitration clauses (paras. 127-148).

39. The Working Group at its third session considered alternative approaches with respect to adding provisions to the Brussels Convention of 1924 (The Hague Rules) (a) on the choice of places where judicial and arbitration proceedings may be brought, and (b) on assuring that the Hague Rules would be applied in such proceedings. A preliminary draft on choice of forum clauses was adopted by the Working Group,²⁰ according to which the plaintiff in an action retains certain options as to where he can bring his suit, notwithstanding the inclusion in the bill of lading of a clause specifying where suit may be brought. On the other hand, after a claim has arisen, any place designated in an agreement between the parties would be effective.

40. The Working Group, at its third session, also discussed the question of arbitration clauses (report, paras. 50-57). Consideration was given to proposals set forth in the report of the Secretary-General and to proposals made by members of the Working Group during the course of the session. There was general support within the Working Group for inclusion of a provision in the Hague Rules that would deal with the place where arbitration may be held and that would assure that the Hague Rules would always be applied in arbitration proceedings. However, there was insufficient time at the third session to complete action on the subject and the Working Group decided to defer action until the present session (report, para. 57).

B. Consideration of arbitration clauses at fourth session

41. At the present session, the Working Group gave further consideration to the subject of arbitration clauses in bills of lading. A working paper prepared by the Secretariat²¹ analysed alternative provisions which consisted of the proposals made by members of the Working Group at the third session,²² and proposals set out in

the report of the Secretary-General (paras. 136, 141, 147).

42. The six proposals set out in the Secretariat working paper (designated therein as draft proposals A through F) contained certain common characteristics but diverged widely with regard to a number of important aspects of the subject. Common characteristics of all the proposals were (a) that under all of them there would be no impediment to the power of the parties after a dispute has arisen to agree on any place where arbitration might be held, and (b) that the rules of the Convention shall apply to all arbitration proceedings. All but one of the draft proposals embodied the principle of the validity of arbitration clauses in bills of lading. On the other hand, the draft proposals diverged with respect to the manner of determining the place for arbitration; there were significant differences with respect to the extent to which the bill of lading could determine the place for arbitration, and the effect of the designation of the place by an arbitral body.

43. The Working Group discussed the various approaches embodied in draft proposals A through F. It was agreed, to begin with, that once a dispute under a contract of carriage has arisen the parties should be free to agree to arbitrate the dispute and to specify the site of the arbitration proceedings; such agreements for the settling of a current dispute would not present those elements of adhesion contracts that usually characterize the contract of carriage. The Working Group also generally agreed that any provision on arbitration that might be added to the Convention should provide that the Convention must be applied in all arbitration proceedings.

44. Most representatives expressed views that favoured the addition of a provision to the Convention permitting the inclusion of arbitration clauses in bills of lading. Many representatives stated that their support of such a provision in the Convention depended on the extent to which the claimant would be assured a convenient place for arbitration. These representatives generally favoured the approach taken by the Working Group at its third session with respect to choice of forum clauses; this approach was followed in draft proposal E set out in the Secretariat working paper (para. 20). Such an approach would give the claimant the option of choosing the place of arbitration from among several places specified in the Convention, including the States within whose territories were located the port of loading and the port of discharge. However, in the view of other representatives difficulties might arise, particularly for land-locked States, if the permissible places for arbitration were confined to the States of the ports of loading and discharge.

45. Some representatives favoured the approach of draft proposals A and B. A convention provision following this approach would permit the designation in the bill of lading either of a specific place where arbitration must take place, or of an arbitral body which would, in turn, designate the place of arbitration. It was indicated by one of these representatives that in the context of international trade, concern with the

¹⁹ UNCITRAL, report on fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

²⁰ Working Group, report on third session (A/CN.9/63), para. 39, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

²¹ A/CN.9/WG.III/WP.7. The working paper is annexed to this report as annex 2, reproduced in this volume, part two, IV, 3, below.

²² Working Group, report on third session, paras. 54-56.

adhesion adamant in contracts of carriage should not be given undue importance since, in the case of liner transport, there is a trend toward increasing consultation between ship owners and cargo owners.

46. Some other representatives indicated their initial support for the approach taken in draft proposal F. Under this approach arbitration would be permitted only in cases where, after the dispute has arisen, the parties agree to arbitrate. The parties could then choose any place as the site of the arbitration proceedings. It was indicated by these representatives that the contract of carriage must still be considered to be an adhesion contract; the party which drafts the contract should not have the freedom to impose on the shipper a place for arbitration which would in most cases be inconvenient for the shipper or consignee. In the view of these representatives, this serious problem could be avoided if the possibility of arbitrating the dispute were left to the specific agreement of the parties once the dispute arose. In this connexion, one representative pointed out that in any discussion aimed at resolving the problem the interests of the developing countries, and in particular of small break-bulk shippers, must be taken into account.

C. Drafting Party

47. It was generally agreed that, although differing views had been expressed on a solution to the problems presented by the subject of arbitration clauses, there was sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party having considered the subject, presented the following report:

PART II OF THE REPORT OF THE DRAFTING PARTY ARBITRATION CLAUSES

1. The Drafting Party considered the addition to the Brussels Convention of 1924 of a provision on arbitration clauses. A number of differing views on the subject were expressed by members of the Drafting Party. However, in the course of the discussion it was possible to reach a general consensus which is reflected in the legislative text set out in paragraph 2 below.

2. The Drafting Party recommends the following provision on arbitration clauses.

Proposed draft provision

"(1) Subject to the rules of this article, any clause or agreement referring disputes that may arise under a contract of carriage to arbitration shall be allowed.

"(2) The arbitration proceedings shall, at the option of the plaintiff, be instituted at one of the following places:

"(a) A place in a State within whose territory, is situated

(i) The port of loading or the port of discharge, or

(ii) The principal place of business of the defendant or, in the absence thereof, the ordinary residence of the defendant, or

(iii) 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

"(b) Any other place designated in the arbitration clause or agreement.

"(3) The arbitrator(s) or arbitration tribunal shall apply the rules of this Convention.

"(4) The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

"(5) Nothing in this article shall affect the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage has arisen."

Notes on the proposed draft revision

3. With respect to paragraph (2) of the proposed draft provision, the Drafting Party discussed the issue of whether arbitration proceedings should be brought only in States which are parties to the Convention. Under such a requirement the plaintiff would be able to choose from among the places set out in paragraph (2), but only if the place chosen was within a State party to the Convention (Contracting State). A majority of the members of the Drafting Party favoured a solution that would require that arbitration proceedings be brought in a Contracting State but that this requirement should come into being only after a substantial number of States have become parties to the Convention. A formulation reflecting this view was put forward by a member of the Drafting Party. It reads as follows:

"(6) The word "State" within the meaning of this article shall be deemed to mean "Contracting State" at such time as [] States of which [] shall each have a total tonnage of not less than [] tons of shipping, have become parties to this Convention."

The Drafting Party approves the substance of this proposed text, but recommends that its specific wording and place in the text should be given further consideration at a later stage.

4. The Drafting Party notes that in paragraph (2) of the proposed draft provision it is intended that the plaintiff shall, in exercising his option, have the choice of any of the places specified in subparagraphs (a) and (b).

D. Consideration of the report of the Drafting Party

48. The Working Group considered the above-quoted report of the Drafting Party. The report of the Drafting Party, including the proposed draft provision, received the approval of the majority of the Working Group.

49. Some representatives stated that they had agreed to the compromise reached by the Working Group, although they preferred the approach taken in draft proposal F above. In this connexion, several observations were made by these representatives. It was indicated that among the choices provided in paragraph (2) of the draft proposal was one under which the plaintiff can select the place that may have been specified in the bill of lading (para. (2) (b)). The possibility of making this choice would give a plaintiff carrier the opportunity to choose a place, inserted by him in the bill of lading, that may oblige a cargo owner defendant to have to defend in a place that is inconvenient for him. Some representatives reserved their position with respect to paragraph (2) (b) of the proposed draft provision. It was also observed that the use of the words "plaintiff" and "defendant" are not satisfactory in the context of arbitration as they could be applied to both the carrier and the cargo owner, without distinction. It might be desirable to substitute terms that would more appropriately indicate the roles of the parties in the dispute. Some representatives also observed that "due process of law" must be followed in both the procedure of arbitration and in the selection of arbitrators; the arbitrator or arbitration body should not be appointed before the occurrence of the event which caused the claim to arise. These representatives explained that some of these points were issues of public policy.

50. However, other representatives reminded the Working Group that the text of the draft provision on arbitration clauses was the result of a careful compromise among initially divergent positions. It was pointed out that the plaintiff is usually the cargo owner and that paragraph (2) of the proposed draft provision provide the plaintiff with a number of choices or places where arbitration proceedings could be brought. These include places (e.g., the States of the port of loading and the port of discharge) which normally are convenient for the cargo owners and are fair to both parties since they are related to the carriage or goods.

51. It was emphasized that the place designated in the bill of lading would only be one of the choices available to the plaintiff. The availability of all the choices specified in article 2 is assured by paragraph (4) of the proposed draft provision under which, *inter alia*, any attempt to reduce the number of choices available to the plaintiff in paragraph (2) would be null and void (*supra*, para. 47).²³

52. These representatives stated that they continued to be of the opinion that provisions on arbitration, if any, should be based on giving full effect to arbitration clauses and agreements contained in contracts of carriage, provided the contract stipulates that the substantive rules of the Convention shall be applied in all arbitration proceedings, and that arbitration proceedings shall be held in States parties to the Convention.

In the view of these representatives the provisions contained in the present proposed draft provision may give rise to serious difficulties in shipping operations.

III. FUTURE WORK

53. The Working Group considered topics for future work as set forth in item 5 of the annotations to the provisional agenda (A/CN.9/WG.III/WP.8). The annotations noted that the Working Group, at its third session,²⁴ had decided that the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session should be taken up at the February 1973 session of the Working Group.²⁵

54. Those subjects, which will be considered in a report by the Secretary-General, are the following: (1) trans-shipment; (2) deviation; (3) the period of limitation; (4) definitions under article I of Convention ("carrier", "contract of carriage", "ship"); (5) elimination of invalid clauses in bills of lading; (6) unit limitation of liability.

55. It was generally agreed that the subjects which are most closely related to the basic question of carrier's responsibility should be taken up first. Accordingly, priority should be given to unit limitation of liability, trans-shipment, and deviation.

56. Attention was drawn to the recommendation made by UNCITRAL at its fifth session²⁶ that the Working Group should keep in mind the possibility of preparing a new convention instead of merely revising and amplifying the Brussels Convention of 1924. Accordingly, the Working Group agreed that the "Memorandum concerning the structure of a possible new convention on the carriage of goods by sea",²⁷ submitted by a member of the Working Group should be discussed at the fifth session of the Working Group.

57. One representative suggested that, in considering its future work, the Working Group should bear in mind a number of other possible subjects for examination, including charter parties as they bear on liability questions resolved in this draft, a maritime arbitration code, *in rem* jurisdiction and attachment proceedings as they bear on the draft on jurisdiction, clauses other limitation of liability systems such as those contained in certain other maritime conventions as they bear on the package or unit limitations, and rules concerning combined transport contracts. Another representative had reservations concerning the examination of these subjects and considered that the Working Group should first study the other subjects relating to the contract of carriage of goods by sea which are not enumerated in the

²⁴ Working Group, report on the third session, para. 73, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

²⁵ UNCITRAL, report on the fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

²⁶ UNCITRAL, report on the fifth session (1972), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A.

²⁷ A/CN.9/WG.III(IV)/CRP.1.

²³ One representative suggested that the intent of the provision would be clearer if, at paragraph 2, line 2, the word "either" should be inserted between the words "at" and "one".

UNCITRAL resolution. It was suggested by another representative that questions regarding the definition of servants and agents should be studied by the Working Group. The observer for UNCTAD informed the Working Group that the subject of charter parties would be discussed by the UNCTAD Working Group on International Shipping Legislation at its next session; he also informed the Working Group of the interest taken by UNCTAD in the subject of the combined transport of goods. The observer for the International Maritime Consultative Organization (IMCO) reported that

the revision of the 1957 Convention on the limitation of the liability of shipowners had been placed on the agenda of his organization; the observer of UNIDROIT noted his organization's continuing interest in the subject of the combined transport of goods.

58. The Working Group decided that its fifth session, to be held in New York, will meet from 5 to 16 February 1973. It was agreed that a working period of two weeks would be more effective than the three-week period that had been initially projected for this session.

2. *Working paper by the Secretariat, annex I to the report Working Group (A/CN.9/74: * approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier*

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* 12 October 1972.

INTRODUCTION

1. At its third session, held in Geneva from 31 January to 11 February 1972, the Working Group commenced consideration of the last and most general item on its agenda, approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier. The report of the Working Group¹ on this matter concluded as follows:

"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."

2. Most representatives at the third session of the Working Group expressed the view that a special session for consideration of the remaining topics should be held, with priority given to the basic question of carrier responsibility. The Commission at its fifth session (A/8717, para. 51) * approved such a special session and noted that "the Working Group should give priority in its work to the basic question of the carrier's responsibility...".

3. This working paper is prepared to assist the Working Group in its consideration of this priority question.² The underlying considerations have already been fully developed in documents that have been previously submitted to the Working Group: the report of the Secretary-General entitled "Responsibility of ocean carriers for cargo: bills of lading" (A/CN.9/63/Add.1) ** (hereinafter referred to as report of the Secretary-General) and the report of the UNCTAD secretariat entitled "Bills of

lading" (TD/B/C.4/ISL/6/Rev.1) (hereinafter referred to as the report of the UNCTAD secretariat). This Working Paper describes and discusses changes in the Hague Rules that would implement a general policy of carrier liability for fault and a unified burden of proof formula.³ Parts I, II and III examine alternative approaches for implementing the above objectives within the basic framework of the Hague Rules. Part IV considers ways in which these objectives might be implemented through provisions designed to parallel existing international air, rail and road carrier conventions.

I. DISCUSSION DIRECTED TO THE IMPLEMENTATION OF A GENERAL POLICY OF CARRIER LIABILITY FOR FAULT

A. Introduction

4. The provisions of the Hague Rules which bear the major burden of allocating the risk of cargo loss and damage between the cargo owner and carrier are found in articles 3 and 4 of the Brussels Convention of 1924. Article 3 sets out the carrier's obligations to cargo:

"1. The carrier shall be bound 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.

"2. Subject to the provisions of article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Article 4 (1) and (2) set out a variety of exceptions to the carrier's article 3 obligations.⁴

³ Several specific exceptions to carrier liability for fault are not treated in this paper because they have been considered in earlier reports to the Working Group: live animals (art. 1 (b)); deck cargo (art. 1 (b)); and provisions dealing with the carrier's period of responsibility (art. 1 (e)). Two other widely enacted provisions of maritime law which might be considered to exonerate a carrier from liability for the consequences of its fault are also omitted from this paper. One of these provisions is the limitation of liability provisions (art. 4 (5)) of the Brussels Convention of 1924 containing the package or unit limitation. A study on this subject will be part of a report of the Secretary-General that will be presented to the fifth session of the Working Group. Another such provision is the over-all limitation of shipowners' liability incorporated in the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships (1957). For a description of the nature of the over-all shipowners' limitation see report of the Secretary-General, para. 201.

Article 4

"1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from

(Continued on next page.)

* UNCITRAL Yearbook, vol. III: 1972, part one, II, A. **

** *Ibid.*, part two, IV, annex.

¹ 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 (hereinafter referred to as report of the Working Group) (A/CN.9/63, UNCITRAL Yearbook, vol. III: 1972, part two, IV).

² In the course of the third session of the Working Group some members expressed their hope that the Secretariat would be able to prepare a working paper for use by the Working Group in its consideration of this subject. The Secretariat indicated that every effort would be made to respond to this request. The Secretariat acknowledges assistance from Robert Hellawell, Professor of Law, Columbia University.

5. Part IV of the report of the Secretary-General analyses these provisions and their varying interpretations. It describes in some detail the extent to which the Hague Rules depart from the fault principle, approved by a majority of the Working Group. To summarize briefly, articles 3 and 4 for the most part hold carrier liable to the shipper for loss or damage to cargo caused by fault of the carrier and its employees. There are two major exceptions to this: error in navigation and management of the ship (art. 4 (2) (a)) and fire (art. 4 (2) (b)).

B. *Means to implement general policies considered by the third session of the Working Group*

(1) *Navigation and management*

6. The report of the Working Group concluded that work should include "simplification and strengthening of the fault 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 article[s] 4 (2) (a) . . .)". This is the provision which relieves carrier of liability for negligent navigation or management of the ship. The various considerations underlying the conclusion that this provision should be removed are set out in the report of the Secretary-General and need not be repeated here.⁵

7. If the Working Group decides that carriers should be liable to shippers for damage caused by negligent navigation or management, it should consider whether implementation of this policy can be accomplished simply

by deleting article 4 (2) (a) or whether an affirmative provision should also be added. It should be noted here that if article 4 (2) (a) is deleted it is possible that courts would reach the result intended by the Working Group without any such affirmative provision. Thus, as described in the report of the Secretary-General (paras. 244-245), when a claimant proves that cargo was delivered to the ship in good condition and returned at destination in damaged condition, the carrier normally has the burden of proving that it comes within some particular exemption. With article 4 (2) (a) removed a carrier at fault with regard to navigation or management could not fit within any exemption provision and, therefore, would probably be held liable. However, as was mentioned earlier, the structure of the Brussels Convention sets out the carriers' obligations in article 3 and the exceptions to those obligations in article 4. There is now, of course, no obligation in article 3 (or elsewhere in the Brussels Convention) as to navigation and management, and consequently the intended result of carrier's liability would be left somewhat speculative by the mere deletion of article 4 (2) (a). A specific obligation on navigation and management in article 3 would be in accord with the structure of the Convention and would eliminate any doubt as to the outcome. A new article 3 (3) might read as follows:

"3. The carrier shall properly and carefully navigate and manage the ship."

(2) *Fire*

8. The other provision of article 4 which is inconsistent with the general principle of carrier liability for fault is section 2 (b), the fire provision. As is explained more fully in the report of the Secretary-General (paras. 163-166) the import of section 2 (b) is that the negligence of carrier's employees, leading to a fire, will not necessarily result in carrier liability; the fault must be that of the 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.⁶ But whether or not all cases would so draw the line, it is clear that the shipowner will not be held responsible for the negligence of all of his employees. There does not appear to be any peculiarity to loss or damage from fire which demands this unique rule. Policy considerations seem about the same for fire losses as for other types of losses. That is, considerations of insurance, economics, fairness and friction, as discussed in the report of the Secretary-General (paras. 246 and 178-214) all seem to bear on liability for fire loss in about the same manner as on liability for other types of losses. It should be pointed out, however, that it is often difficult or impossible for the carrier to establish the cause of shipboard fires. At the third session of the Working Group it was asserted that in such cases, without the fire exception (and with the burden of proof) carrier will be, in a sense, subject to something like strict liability.⁷ However, the cargo

(Foot-note continued.)

unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.

"2. Neither the carrier nor the ship shall be responsible for loss or damage 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 navigable waters;

"(d) Act of God;

"(e) Act of war;

"(f) Act of public enemies;

"(g) Arrest or restraint of princes, rulers or people, or seizure under legal process;

"(h) Quarantine restrictions;

"(i) Act or omission of the shipper or owner of the goods, his agent or representative;

"(j) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

"(k) Riots and civil commotions;

"(l) Saving or attempting to save life or property at sea;

"(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;

"(n) Insufficiency of packing;

"(o) Insufficiency or inadequacy of marks;

"(p) Latent defects not discoverable by due diligence;

"(q) Any other 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, 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."

⁵ For example at paras. 240-43.

⁶ Tetley, *Marine Cargo Claims* 112 (1965); *Earle v. Stoddart*, 287 U.S. 420, 425 (1932); *Gilmore and Black, the Law of Admiralty* 698 (1957).

⁷ Report of the Working Group, para. 65.

owner is generally in an even poorer position to establish the cause of a shipboard fire and, accordingly, a contrary rule would seem to leave the cargo owner without recourse regardless of the fault of the carrier. In any event, if there is to be a general rule that carriers are liable for loss or damage to cargo caused by the fault of the carrier or its employees, it would follow that the fire provision should be eliminated.

(3) *Seaworthiness during the voyage*

9. Section 1 of article 3 spells out carrier's obligation to provide a seaworthy ship but limits the obligation by the language—"before and at the beginning of the voyage".

10. Thus a carrier does not violate its obligations under section 1 by allowing the ship to become unseaworthy after commencement of a voyage⁹ even if carrier was negligent. Such negligence under present law would most likely be considered negligence in the management of the ship, with the result that carrier would have no liability for loss or damage to cargo.

11. Under the changes in articles 3 and 4 proposed thus far, carrier would, of course, be liable for damage to cargo caused by negligent management of the ship as well as by negligent care of cargo. Consequently, if those changes are adopted, the limitation of carrier's duty to provide a seaworthy ship to the period "before and at the beginning of the voyage" is probably not of great consequence. Any fault of the carrier rendering the ship unseaworthy during the voyage would most likely be held a fault in management or in care of cargo, for either one of which carrier would be liable. However, there is always the possibility of a gap—of some act of negligence making the ship unseaworthy which some court might hold was neither an act of management or navigation nor care of cargo. To allow a carrier to escape liability for such an act would be contrary to a general policy of carrier liability for fault. Consideration should be given to amending article 3 (1) to guard against any such gap. The beginning of article 3 (1) might be amended to read as follows:

"The carrier shall be bound before, [and] at the beginning of and throughout the voyage to exercise due diligence to:"

(4) *Removing ambiguities that arise when carrier's fault concurs with an article 4 exception*

(a) *Introduction*

12. The result under the Hague Rules is unclear when a fault of the carrier combines with an article 4 (2) exception. This requires some explanation. First, consider exceptions (e) through (o) which involve the overwhelming force of third parties, fault of the shipper or the goods, or an attempt to save life or property at sea. Normally, if one of these situations, or exceptions, causes

the loss the result is clear. Thus, if loss or damage to cargo results from a delay caused by quarantine restrictions, normally no carrier fault is involved; and exemption of the carrier under (h) is consistent with the principle of carrier liability only for fault. But suppose that carrier's negligence had in some fashion caused the quarantine. Or suppose that carrier's negligence in incorrectly storing the cargo contributed or added to the damage. The Hague Rules are not clearly addressed to this situation. Which prevails, the carrier's article 3 obligations or the article 4 (2) exceptions?

13. A common view in these situations is that the exception will not exonerate the carrier.⁹ Where carrier's fault has caused the exception to occur, carrier will usually be held liable for the entire damage. And where carrier's fault concurs with the exception—for example, cheese is damaged by a combination of quarantine delay in a hot harbour and improper storage—carrier will commonly be held responsible for that portion of the damage attributable to its fault, or for all of the damage if that portion cannot be singled out. However, while the above is a common interpretation of exceptions (e) through (o), it is not universal. Some jurisdictions take a contrary view and in others the result is unclear.

14. Other exceptions present a very similar situation. Thus, the perils of the sea exception (c) and the act of God exception (d) have been interpreted by some courts to have an inherent no-fault requirement. Those courts have held that unless the carrier has exercised due diligence to protect against the particular peril involved, be it high sea or lightning, the exception will not apply and the carrier will be liable.¹⁰ But in other courts the result is different or unclear.¹¹

15. At the third session of the Working Group, most representatives were of the view that the responsibility of the carrier should be based on fault and that uncertainties should be clarified or eliminated.¹² The present article 4 (2) exceptions, when combined with carrier fault, create uncertainty and the possibility of carrier fault without liability. Alternative approaches to this problem are given below. The first alternative would add a provision dealing with those kinds of situations where carrier's fault may combine with an article 4 (2) exception and would provide an appropriate rule of liability in such cases. Apart from adding such a provision the first alternative would leave the article 4 (2) exceptions as they are now. The second alternative would eliminate all of the specific article 4 (2) exceptions.

⁹ See report of the Secretary-General, paras. 167-171, 267.

¹⁰ See report of the Secretary-General, para. 159.

¹¹ There remain two additional provisions to be noted: the latent defect exception (art. 4 (2) (p)) expressly requires that the defect be "not discoverable by due diligence". And article 4 (1) exempts carrier from liability for loss or damage resulting from unseaworthiness "unless caused by want of due diligence . . .". By reason of their explicit language these are the two clearest provisions on the matter of carrier's concurring fault.

¹² Report of the Working Group, para. 70, quoted at para. 1, above.

⁸ A common rule is that the voyage commences with respect to each item of cargo when the ship breaks ground at the port at which that item of cargo was loaded.

(b) *First alternative: adding a clarifying provision to article 4*

16. A new provision,¹³ such as the following, might be added to article 4 immediately after article 4 (2) (q):

"Provided, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

"(i) caused or brought about the occurrence of the exception or exceptions; or

"(ii) concurred with the occurrence of the exception or exceptions; however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

(c) *The second alternative: elimination of exceptions*

17. A second alternative for eliminating the ambiguities and difficulties described above (at paras. 12-14) would eliminate all the specific exceptions, leaving only one general or catch-all exception similar to the present article 4 (2) (q).¹⁴ That general exception clearly exonerates carrier from liability for all loss or damage arising or resulting from all causes whatsoever—except the fault of the carrier; this provision would appear to be sufficient to implement a policy of carrier liability for fault. The specific exceptions are superfluous.¹⁵ Article 4 (2) (q) removes all danger that carrier will be held liable for any loss or damage if it is not at fault. It appears that elimination of the specific exceptions is preferable to the first alternative because it is a simpler and more certain way to implement a general system of carrier liability for fault. Leaving in unnecessary specific provisions is likely to cause confusion. (The discussion on burden of proof in part II (paras. 21-31) of this working paper will further illustrate the redundancy of the specific exceptions and will indicate their potentiality for confusion.)

18. To make the rule in the case of concurring negligence clear, under this alternative a provision such as the following could be considered as article 4 (2):

"2. Where carriers' fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault."

¹³ The text of the provisions resulting from this alternative and the changes proposed in sections 1-3, above, of this part of the working paper appears below at para. 34 (alternative proposal A).

¹⁴ The text of the provisions resulting from this alternative appears below, para. 35 (alternative proposal B).

¹⁵ Note that the article 4 (2) (1) exception "Saving or attempting to save life or property at sea" seems unnecessary on the ground that this conduct in itself would not seem to constitute fault and carrier is liable only for the consequences of fault (article 4 (2) (q)). Any doubt on this issue could be removed in connexion with review of the deviation provision which makes specific reference to saving life or property at sea.

(d) *The "subject to" qualification to article 3 (2)*

19. Whichever of the above alternatives is chosen, a change should also be considered in article 3 (2). This section, which sets out the carrier's duties regarding care of cargo, begins with the clause: "subject to the provisions of article 4...". It appears desirable to eliminate the quoted words.

20. This clause might appear to be innocuous, but can present serious difficulty if independent meaning is ascribed to it. One construction of the "subject to" clause would be to conclude that it adds nothing to the law on the ground that it merely means that article 4 should be given effect. However, this would be obvious without the clause. Thus, the argument that independent meaning must be given to these words could lead a court to conclude that if a carrier fit within one of the article 4 (2) exceptions it had no obligation to exercise proper care of the cargo. This would, of course, be contrary to a liability for fault principle. If either of the two foregoing alternatives is adopted it is unlikely that many courts would so interpret the "subject to..." language. But since the phrase serves no useful purpose and can lead to confusion, consideration should be given to its elimination.

II. CHANGES TO BE CONSIDERED IN IMPLEMENTATION OF A UNIFORM BURDEN OF PROOF SYSTEM

21. As is explained more fully in the report of the Secretary-General (paras. 167-177) the Brussels Convention of 1924 contains no unified burden of proof system. Some provisions have their own express burden of proof rules¹⁶ but for the most part the Convention is silent on the matter. As a result, courts have developed several different burden of proof rules. The rule used may vary with the particular exception relied upon and with the jurisdiction in which the case is brought. Under many circumstances it is quite unclear what the rule on burden of proof is. Moreover, it does not appear that any consistent or rational policy can account for the varying burden of proof rules currently used in articles 3 and 4 cases.

22. At the third session of the Working Group there was substantial support for simplification and unification of the rules on burden of proof and for careful consideration of the burden of proof proposal in paragraph 269 of the report of the Secretary-General.¹⁷ That proposal would add a provision to article 4 (2) as follows:

"The burden of proof shall be on the claimant to show:

"(a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

"(b) that the loss or damage took place during the period for which carrier is responsible;

¹⁶ Foot-note 12, above.

¹⁷ See report of the Working Group at para. 70 (c) quoted at para. 1, above. Three minor changes were made in the proposal as it appeared in the report of the Secretary-General: "shipper" was changed to "claimant"; "(b) the contract" was eliminated as unnecessary; the words "to avoid liability" were added for clarity.

- "(c) the physical extent of the loss or damage;
 "(d) the monetary value of the loss or damage.

The burden of proof shall be on the carrier as to all other matters: to avoid liability 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."

The proposal is based on considerations described in the report of the Secretary-General,¹⁸ including the desirability of placing the burden of proof upon the party most likely to have knowledge of the facts—generally the carrier. Another important consideration is the need to clarify and simplify the present burden of proof rules which are now complicated, uncertain and, therefore, wasteful.

23. This section will analyse the textual changes to be made in article 4, if the burden of proof proposal in paragraph 269 of the report of the Secretary-General is adopted.

24. *Exceptions (e) through (o).* It is necessary first to consider the article 4 exceptions in paragraphs (e) through (o) in relationship to the above unified burden of proof proposal. These involve the overwhelming force of third parties, fault of the shipper or the goods or an attempt to save life or property at sea. No single statement can be made as to burden of proof in relation to all of these exceptions in all jurisdictions—indeed, the existence of confusing and varying rules on burden of proof under the present Hague Rules is an important reason for change and simplification. However, a common rule is that carrier has the burden of proving itself within the exception and, if carrier succeeds, the burden then passes back to cargo owner to prove that the carrier's fault caused the excepted act or concurred with the excepted act in producing the loss or damage.¹⁹

25. This burden of proof formula is clearly inconsistent with the proposed unified provision on burden of proof. If the proposed provision is adopted, therefore, two courses are open: these alternatives are analogous to the two alternatives of part I, section 4 of this working paper (paras. 16-18, *supra*).

26. Under the first alternative, language would be added to the unified burden of proof provision making it clear that it applies in all cases, whether or not one of the article 4 (2) exceptions is also applicable. The following underlined words could be added: "The burden of proof shall be on the carrier as to all other matters, whether or not one or more of the provisions in article 4 (2) is applicable."²⁰

27. Under the second alternative, the specific exceptions, article 4 (2) (e) through 4 (2) (o) could be eliminated. This may be the preferable alternative. With a new unified burden of proof provision the exceptions should no longer

play a role in the burden of proof. And if a general liability for fault rule is adopted the exceptions will no longer have any substantive effect on liability: they will all be subsumed in the general catch-all provision based on the present article 4 (2) (g). Accordingly, the (e) through (o) exceptions would be left with no function.

28. Provisions without function invite misinterpretation and confusion. A court faced with a large array of specific exceptions will be reluctant to conclude that they have no meaning or function. It will be recalled that these exceptions present difficulties in effecting a general policy of carrier liability for fault (see paras. 12-14, *supra*). These exceptions also present difficulties with respect to burden of proof. It seems likely that some courts will attempt to attribute meaning to the surplus exception provisions—an effort that is likely to lead to results that are unintended by the draftsmen. Accordingly, if the proposed burden of proof provision is adopted and the liability for fault is implemented, serious consideration should be given to eliminating exceptions (e) through (o).

29. *Exceptions (c), (d), and (p).* The perils of the sea exception (c) and the act of God exception (d) may differ from the (e) through (o) exceptions as to burden of proof in one respect. They have sometimes been interpreted to require the carrier to prove its lack of negligence before it will be considered to fit within the exception.²¹ The burden of proof, therefore, stays with the carrier once the cargo owner has carried its initial burden of showing the loss. To the extent courts follow this pattern there would be no inconsistency between these provisions and the proposed burden of proof scheme. Nor would there be any inconsistency with a general liability for fault policy. This may suggest that the exceptions are innocuous and should be left intact. However, there is no certainty that all (or even most) courts will follow this pattern.²² Thus, these provisions really present the same problems and alternatives as the (e) through (o) exceptions. The choice is between the previously suggested addition to the burden of proof language²³ and elimination of (c) and (d). Elimination appears to be the better alternative: as non-functional surplus the (c) and (d) exceptions would have the same potential for mischief as the (e) through (o) exceptions.

30. The latent defect exception reads, "(p) Latent defects not discoverable by due diligence". The text appears to require that the carrier show due diligence, and thereby bear the burden of proof, for the exception to apply. However, relying on such a textual analysis seems less certain than the suggested explicit provisions on burden of proof. Thus, again the choice is between the previously suggested addition to the burden of proof language and the elimination of (p).

¹⁸ Report of the Secretary-General, para. 173.

²² 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).

²³ Viz., "whether or not one or more of the provisions in article 4 (2) is applicable."

¹⁹ See paras. 256-265.

²⁰ Report of the Secretary-General, paras. 167-171.

²¹ The text in its fuller setting appears at para. 34, below.

31. *Unseaworthiness: article 4 (1).* Article 4 (1) provides that carrier will not be liable for loss or damage resulting from unseaworthiness unless there was a want of due diligence. It contains its own express burden of proof provision as follows:

"Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article."

The burden of proof provision does not appear inconsistent with the proposed uniform burden of proof scheme. Nor does the substantive provision appear to be inconsistent with a general policy of carrier liability for fault. It is equally clear, however, that article 4 (1) would be redundant if the uniform burden of proof scheme and the general policy of liability for fault were adopted. Thus article 4 (1) poses in its purest form the question of whether a provision without apparent function should be eliminated. Its potential for harm seems slight; but its potential for usefulness appears to be negligible. Given this situation the elimination of article 4 (1) seems to be indicated.

32. *The catch-all exception: article 4 (2) (g).* Article 4 (2) (g) (the general, or catch-all, exception) also has its own burden of proof provision. Like article 4 (1), article 4 (2) (g) is consistent with the proposed uniform scheme but would be redundant if the uniform scheme is adopted. Accordingly, it seems preferable to eliminate the burden of proof provision from article 4 (2) (g).

III. COMPILATION OF ALTERNATIVE PROPOSED TEXTUAL CHANGES IN ARTICLES 3 AND 4

33. This part sets out those provisions of articles 3 and 4 of the Hague Rules that have been discussed in this working paper and shows all suggested changes. Alternative proposal A shows the suggested changes on the assumption that the specific exceptions (article 4 (2) (c) through (p)) remain in the Convention. Alternative proposal B shows the suggested changes on the assumption that those exceptions are deleted. In both alternatives, suggested deletions from the present text of the Brussels Convention are enclosed in brackets; suggested additions are in italics.

34. *Alternative proposal A.*

Article 3

(1) The carrier shall be bound before, [and] at the beginning of *and throughout* the voyage to exercise due diligence to:²⁴

- (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 goods are carried, fit and safe for their reception, carriage and preservation.

²⁴ These proposed changes are discussed at paras. 9-11, above.

(2) [Subject to the provisions of article 4,]²⁵ The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) *The carrier shall properly and carefully navigate and manage the ship.*²⁶

Article 4

[(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.]²⁷

[2] (1) Neither the carrier nor the ship shall be responsible for loss or damage 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;]²⁸
- [(b) Fire, unless caused by the actual fault or privity of the carrier;]²⁹
- [(c) (a) Perils, dangers and accidents of the sea or other navigable waters;
- [(d) (b) Act of God;
- [(e) (c) Act of war;
- [(f) (d) Act of public enemies;
- [(g) (e) Arrest or restraint of princes, rulers or people, or seizure under legal process;
- [(h) (f) Quarantine restrictions;
- [(i) (g) Act or omission of the shipper or owner of the goods, his agent or representative;
- [(j) (h) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;
- [(k) (i) Riots and civil commotions;
- [(l) (j) Saving or attempting to save life or property at sea;
- [(m) (k) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;
- [(n) (l) Insufficiency of packing;
- [(o) (m) Insufficiency or inadequacy of marks;
- [(p) (n) Latent defects not discoverable by due diligence;
- [(q) (o) Any other 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 [but the burden of proof shall be on the person

²⁵ This proposed deletion is discussed at paras. 19-20, above.

²⁶ This proposed addition is discussed at para. 9, above.

²⁷ This proposed deletion is discussed at para. 31, above.

²⁸ This proposed deletion is discussed at paras. 6-7, above.

²⁹ This proposed deletion is discussed at para. 8, above.

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];³⁰

provides, however, that the occurrence of one or more of the foregoing exceptions shall not relieve carrier of responsibility for any of the loss or damage arising or resulting therefrom if carrier's fault or want of due diligence:

- (i) *caused or brought about the occurrence of the exception or exceptions; or*
- (ii) *concurred with the occurrence of the exception or exceptions; however, carrier shall be liable only for that portion of the loss or damage attributable to its fault provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault.*³¹
- (2) *The burden of proof shall be on the shipper to show:*
 - (a) *That the claimant is the owner of the goods or is otherwise entitled to make the claim;*
 - (b) *That the loss or damage took place during the period for which the carrier is responsible;*
 - (c) *The physical extent of the loss or damage;*
 - (d) *The monetary value of the loss or damage.*

*The burden of proof shall be on the carrier as to all other matters, whether or not one or more of the provisions in article 4 (2) is applicable; to avoid liability 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.*³²

35. Alternative proposal B.

Article 3

(1) The carrier shall be bound before, [and] at the beginning of and throughout the voyage to exercise due diligence to:³³

- (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 goods are carried, fit and safe for their reception, carriage and preservation.

(2) [Subject to the provisions of article 4,]³⁴ The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

(3) *The carrier shall properly and carefully navigate and manage the ship.*³⁵

Article 4³⁶

[2] (1) Neither the carrier nor the ship shall be responsible for loss or damage [arising or resulting from:]

[(q) Any other] *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 [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].*³⁷

(2) *Where carrier's fault concurs with another cause to produce loss or damage, carrier shall be liable only for that portion of the loss or damage attributable to its fault, provided that carrier bears the burden of proving the amount of loss or damage not attributable to its fault.*

(3) *The burden of proof shall be on the claimant to show:*

- (a) *That the claimant is the owner of the goods or is otherwise entitled to make the claim;*
- (b) *That the loss or damage took place during the period for which the carrier is responsible;*
- (c) *The physical extent of the loss or damage;*
- (d) *The monetary value of the loss or damage.*

*The burden of proof shall be on the carrier as to all other matters: to avoid liability 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.*³⁸

IV. STANDARDS OF LIABILITY BASED ON CONVENTIONS GOVERNING OTHER MODES OF TRANSPORT OF GOODS

A. Introduction

36. The report of the Secretary-General describes 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.³⁹ These are the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention),⁴⁰ the International Convention Concerning the Carriage of Goods by Rail (CIM)⁴¹ and the Convention on the Contract for the International Carriage of Goods by Road (CMR).⁴² The pattern of the liability provisions of the three conventions is very similar. One section states what appears to be a rule of strict liability, seemingly holding carrier liable for all loss or damage to the goods

³⁶ Article 4 (1) and 4 (2) (a) through (p) are deleted. These proposed deletions are discussed at paras. 17, 24, 27-31, above. The full text of articles 3 and 4 is found at above, para. 4 and foot-note 4.

³⁷ These proposed changes are discussed at para. 32, above.

³⁸ These proposed changes are discussed at paras. 21-23, above.

³⁹ Report of the Secretary-General, paras. 215-230.

⁴⁰ *Ibid.*, paras. 216-221.

⁴¹ *Ibid.*, paras. 222-226.

⁴² *Ibid.*, paras. 227-230.

³⁰ This proposed deletion is discussed at para. 32, above.

³¹ This proposed addition is discussed at paras. 12-16, above.

³² These proposed additions are discussed at paras. 21-23, 26, above.

³³ These proposed changes are discussed at paras. 9-11, above.

³⁴ This proposed deletion is discussed at paras. 19-20, above.

³⁵ This proposed addition is discussed at para. 7, above.

during the period of carriage. A second section, however, in effect cuts down carrier liability to something like a fault or negligence standard. For example article 18 (1) of the Warsaw Convention provides:

"The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any . . . goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

And article 20 (1) cuts the broad rule down as follows:

"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."

The language of article 20 (1) has been interpreted to require a standard of reasonable care only.⁴³

B. Substantive provisions based on other international conventions

37. If the approach of the three conventions were followed in amending the Hague Rules article 3 (1) imposing a duty on carrier to provide a seaworthy ship and article 3 (2) requiring the carrier, *inter alia*, to carefully load, handle and discharge the goods, would both be deleted. In their place would be a new article 3 (1) such as the following:

"The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier."

38. The above provision was modelled on article 17 (1) of CMR but would not be significantly different if modelled on the counterpart provisions of either CIM or the Warsaw Convention.⁴⁴

39. Article 4 (1) and (2) would also be deleted. They could be replaced by a provision from one of the three conventions as follows:

However, the carrier shall not be liable if:

(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 [carrier] . . . could not avoid and the consequences of which it was unable to prevent";

(c) [Road: The CMR Convention] the loss or damage resulted "through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent".^{45a}

⁴³ *Ibid.*, paras. 217-218.

⁴⁴ It will be noted that this draft provision omits the references to delay which was found in the CMR and CIM Conventions since the effect of delay may be an item for separate consideration.

^{45a} Both the CIM and CMR Conventions relieve the carrier for loss or damage arising from the "special risks inherent" in specified circumstances. See the report of the Secretary-General at paras. 222 (note 186) and 229 (note 190). Some of these specified

C. Burden of proof

40. The general rule under all three conventions is that carrier bears the burden of proof. There are certain exceptions to this general rule, described in the report of the Secretary-General,⁴⁶ which are different under each convention and presumably are based on the particular conditions of each mode of carriage. The unified burden of proof arrangement proposed in paragraph 269 of the report of the Secretary-General is like the scheme of the three conventions in placing the burden of proof on the carrier as a general rule. Paragraph 269 differs from the three conventions much as they differ among themselves—that is, in the particular exceptions to the general burden of proof rule. There does not seem to be any good reason why the particular exceptions of either air, rail or road should be followed. Probably such detail should depend on the conditions and practices of each particular mode of carriage. However, paragraph 269, in generally placing the burden on carrier, is exactly in line with the central thrust of the burden of proof provisions of all three conventions.

D. Compilation of provisions on carrier's liability based on the other international conventions

41. This section sets out suggested substantive provisions regarding carrier's liability based on the Warsaw Convention and the CMR and CIM Conventions. The second part of the provision includes alternative language based on (1) the Warsaw Convention and (2) the CMR and CIM Conventions. The unified burden of proof provision (in para. 4) is taken from the draft proposed in part II of this working paper. It will be noted that this draft burden of proof provision is in line with the draft proposed in paragraph 269 of the report of the Secretary-General.

42. Alternative proposal C.

"(3) The carrier shall be liable for all loss or damage to the goods carried occurring while in the charge of the carrier."⁴⁶

"However, the carrier shall not be liable if . . .

"[Alternative C (1) based on the Warsaw Convention] 'he and his agents have taken all necessary measures to avoid the damages or it was impossible for him or them to take such measures'.

"[Alternative C (2) based on the CIM and CMR Conventions] 'the loss or damage resulted through circumstances which the carrier could not avoid and the consequences of which he was unable to prevent'.⁴⁷

circumstances are similar to the carriage of goods on deck, and the carriage of live animals which were considered at the third meeting of the Working Group. Any such special circumstances requiring particular treatment could be dealt with by provisions which would supplement the rules establishing the basis for liability.

⁴⁶ See report of the Secretary-General, paras. 225-226, 230.

⁴⁶ This proposed provision is discussed at paras. 36-38, above.

⁴⁷ These alternative provisions are proposed in para. 39, above.

"(4) The burden of proof shall be on the claimant to show:

"(a) that the claimant is the owner of the goods or is otherwise entitled to make the claim;

"(b) that the loss or damage took place during the period for which carrier is responsible;

"(c) the physical extent of the loss or damage;

"(d) the monetary value of the loss or damage.

"The burden of proof shall be on the carrier as to all other matters: to avoid liability 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."⁴⁸

E. Comparison of rules based on other transport conventions with provisions based on the Hague Rules

43. The liability rules of the three conventions seem very similar in effect to the liability rules suggested earlier in this paper. All appear to rest, essentially, on a liability for fault system. But the approaches are different. The three conventions first state a flat rule of carrier liability for loss or damage to the goods carried during the relevant time period. Then a general exception is provided which appears in effect to reduce carrier liability to a fault standard.

44. The liability system described earlier in this paper, which we might call a modified Hague Rules system, has quite a different pattern. It states the obligations of carriers in a much more limited way than the flat initial

rules of the three conventions. The modified Hague Rules system requires only that the carrier exercise "due diligence" to make the ship seaworthy, and that it "properly and carefully" care for the cargo and navigate and manage the ship. Thus article 4, in excusing carrier for damage arising without fault or neglect, can be regarded as reinforcement of the terms "due diligence" and "properly and carefully" rather than as an exception.

45. Certainly both systems are pointed in the same direction—toward a liability for fault rule—and appear to come out in approximately the same place. It is difficult to say which would require a higher standard of care on the part of the carrier, or whether there would be any difference in this respect.

46. It may be difficult to predict the interpretations that maritime courts would give the words of the three conventions. Since the draft based on the Hague Rules departs less in form from the traditional statutory language it may raise fewer doubts as to how courts will interpret the language in the setting of the carriage of goods by sea.

47. On the other hand adopting the system of one of the three conventions might facilitate the making of contracts for combined transport operations and the preparation of uniform rules applicable to such contracts. Under the existing régimes attempts at unification of the rules of liability encounter serious difficulties because of the differences in liability rules for the various modes of carriage. To the extent that the liability rules regarding carriage of goods by sea may be brought closer to the rules of other types of carriage, these problems would be alleviated.⁴⁹

⁴⁸ This proposed provision is discussed at paras. 21-23 and 40, above.

⁴⁹ See report of the Working Group, para. 64.

3. Working paper by the Secretariat, annex II to the report of the Working Group (A/CN.9/74): * arbitration clauses in bills of lading

I. INTRODUCTION

1. The Working Group, at its third session, considered the question of arbitration clauses in bills of lading. There was general support within the Working Group for inclusion of a provision in the Hague Rules¹ that would deal with the place where arbitration proceedings

may be held, and that would assure that the Hague Rules would always be applied in arbitration proceedings.²

2. The Working Group's consideration was directed at proposals set forth in the report of the Secretary-General on "responsibility of ocean carriers for cargo: bills of lading"³ and further proposals made by members of the Working Group during the course of the session.⁴

* 12 October 1972.

¹ References to the "Hague Rules" or to "the Convention" are to the International Convention for the Unification of Certain Rules relating to Bills of Lading, 1924, League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764, reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

² Report of the Working Group on International Legislation on Shipping on the work of its third session (hereinafter, report of the Working Group), A/CN.9/63, para. 52, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

³ Hereinafter, report of the Secretary-General, A/CN.9/63/Add.1, paras. 127 to 149, UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.

⁴ Report of the Working Group, paras. 54-56.

3. To facilitate this further consideration of the question of arbitration clauses in bills of lading this working paper will analyse and compare the various proposals presented.^{4a}

4. The problems to which the draft proposals on arbitration were addressed were similar to those discussed in connexion with choice of judicial forum clauses (see in particular paras. 75 to 85 of the report of the Secretary-General). The report of the Secretary-General pointed out that choice of forum clauses in bills of lading are normally prepared by carriers in the interest of their convenience in presenting their defences to cargo owners' claims. 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 full and fair presentation of their claims. The objectives which provided the bases for the draft proposals, made in connexion with choice of forum clauses, were: "(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 in the Convention".⁵ It should be noted that the Working Group, at the third session, drafted a provision on choice of forum clauses to meet the problems raised in the report of the Secretary-General.⁶

II. DRAFT PROPOSALS

5. In the interest of an orderly development of the subject this working paper will take up first the draft proposals that would least limit the freedom of the party (normally the carrier) who draws up the bill of lading to choose the place where arbitration proceedings may be brought.

A. *Provision permitting arbitration clauses to be inserted in bills of lading—with minimal limitation regarding the choice of a place for arbitration*

6. The following draft was submitted at the third session of the Working Group:

[Draft proposal A]

"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."⁷

^{4a} It should be noted that at an appropriate stage consideration would have to be given to the relationship between the rules on arbitration and the claimant's right to arrest the ship as a provisional or protective measure to ensure payment of any amount that may be awarded to the claimant in the arbitration. Consideration might be given to provisions comparable to those developed in the context of choice of judicial forum at paras. 39 (3), 47 and 48 of the report of the Working Group.

⁵ Report of the Secretary-General, para. 97.

⁶ Report of the Working Group, para. 39, subparagraph 3.

⁷ Para. 55, "Alternative I". A foot-note to this draft stated: "Cf. art. 32 of the Warsaw Convention (para. 134 of the Secretary-General's report) and draft proposal E (para. 147 of the report)."

7. Draft proposal A would appear to have two principal elements: (a) the specific inclusion in the Hague Rules of the principle of the validity of arbitration clauses in bills of lading; (b) ensuring the application of the Hague Rules in any arbitration proceedings.

8. This draft proposal would permit any choice of a place of arbitration to be made so long as it was within a contracting State.⁸ It would not appear that this provision is addressed to the question of the convenience of the parties. The extent to which this provision would restrict the place of arbitration would depend on the course of ratifications and accessions. In early years when few States have ratified the Convention the provision would often interfere with the freedom of the drafters of the bill of lading to select a particular place. At later stages, the provision would have little effect in controlling the place for arbitration.

9. It will be noted that a requirement that actions before courts can only be brought in a contracting State was included in the provision on choice of forum clauses that was approved by the Working Group. However, the inclusion of this requirement was questioned in the Working Group (report, para. 44), where it was observed that it might defeat the underlying purpose of the draft provision which is meant to give the claimant a choice of a number of jurisdictions in which to bring suit. Further, as is indicated above, it has been argued that as it can be expected that it will take some time for the new Convention to gain wide acceptance, the requirement that any arbitration proceeding must take place in a contracting State would mean that the places where arbitration could be held would be severely limited. Places that would be most convenient for the parties might thereby be excluded. In evaluating this provision it might be useful to give further attention to the connexion between the place of arbitration and the extent to which the arbitrator applies the rules of the Convention. It will be noted that other draft proposals placed before the Working Group employ a different technique to bring about application of the rules of the Convention by the arbitrator; these proposals provide that the contract must direct the arbitrator to apply the provisions of the Hague Rules.⁹

B. *Provision limiting the places where arbitration may be brought but imposing minimal restriction on the power of a body or person designated in the arbitration clause to select the place for arbitration*

10. Two draft proposals set limits to the number of alternative places where arbitration may be brought. However, they impose no restriction on the power of the person or body designated in the arbitration clause to select the place for arbitration.

⁸ The same requirement is to be found in draft proposals B and E, below.

⁹ This technique is used in subparagraph (a) of draft proposal B, and paragraph 2 of draft proposal E, below.

11. The first of these proposals was made by a member of the Working Group.¹⁰ It reads as follows:

[Draft proposal B]

"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,

"(b) Shall hold the [arbitration] proceeding within a contracting State at one of the places referred to in [the said] article [...] or at the place chosen by such arbitral body or arbitrators."¹¹

12. Draft proposal B would, in the first part of its subparagraph (b) permit the selection by the arbitral body or arbitrators designated in the contract¹² of any place for arbitration that is listed as permissible in the choice of forum provision.¹³ This would presumably include the principal place of business of the defendant (the carrier). It would appear, however, that unlike the choice of forum provision draft that the Working Group approved, draft proposal B would not give the claimant the choice of any of the permissible places listed at the time that he institutes his proceeding.¹⁴

13. Draft proposal B, as is indicated in the second part of its subparagraph (b), gives free rein to the body or person selected in the arbitration clause to decide on the place where the arbitration proceedings will take place. An argument in favour of giving the designating person or body such freedom is that normally the designating body or person will take into account the convenience of both parties.¹⁵ A problem of construction might arise when the contract specifies arbitration by a body that under its rules (or legislation) sits at a specified place.¹⁶ If such a body does not have the power to select a place, taking into account the convenience of the parties, the issue might arise whether the place for arbitration has been "chosen" by such a body. In any event, it would seem that the selection of such a body in the contract would present issues of policy comparable to the designation in the contract of a place for arbitration.

14. The requirement that the arbitration proceeding must be held within a contracting State would introduce

a similar problem to that discussed above in paragraph 9 in connexion with draft proposal A.

15. The second draft proposal along the lines set out in paragraph 12 above is a merger of draft proposals D and E in the report of the Secretary-General (paras. 141 and 147). The draft proposal reads as follows:

[Draft proposal C]

"1. The contract of carriage may contain a provision for arbitration only if that provision states¹⁷ that this Convention shall be applied in the arbitration proceedings.

"2. An arbitration proceeding initiated pursuant to an arbitration clause in the contract of carriage must be held:

"[(a) Within the State of the domicile or permanent of residence of the plaintiff if the defendant has a place of business in that State; or]^{17a}

"(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.

"3. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place for arbitration."

16. As a practical matter since neither draft proposal B nor draft proposal C set any limitation on the designating body or person, it would appear that the limitations listed in the draft proposals might be circumvented by the use of a designating body or person. In this connexion one important distinction between draft proposal B and draft proposal C would appear to be that the latter does not include the carrier's principal place of business as one of the permissible places where an arbitration proceeding may be brought. However, as has been pointed out above, this restriction might be circumvented by making use of a designating body or person.

C. *Provision specifying alternative places where arbitration may be brought*

17. This draft provision consists of a merger of draft proposals C and E, set out in paragraphs 136 and 147 of the report of the Secretary-General. It will be noted that this provision would restrict the place for arbitration

¹⁰ In the report of the Working Group (para. 55) this draft proposal was an alternative to the proposal that appears in this Working Paper as draft proposal A.

¹¹ Report of the Working Group, para. 55, "Alternative II".

¹² It would appear that the draft proposal assumes that the contract would always designate an arbitral body or arbitrators.

¹³ See proposed draft provision on choice of forum, report of the Working Group, para. 39.

¹⁴ It is assumed that this draft proposal would contain language excluding the following choice set out in the provision on choice of forum adopted by the Working Group: "(e) a place designated in the contract of carriage". In the context of draft proposal B, such a clause would further weaken the draft provision.

¹⁵ Report of the Secretary-General, paras. 138 and 140.

¹⁶ Report of the Secretary-General, foot-note 118.

¹⁷ The following words might be added: "or it is otherwise provided in the contract of carriage...". This would permit use of the arbitration clause in the bill of lading in cases where the specific choice of the Convention is not made in the arbitration clause but is made in a clause paramount which the courts might consider to apply to arbitration or which might itself mention arbitration.

^{17a} This clause is set out in brackets because of a number of problems that would arise if it were included; these problems are discussed in the report of the Secretary-General in connexion with choice of forum clauses (para. 116). It will be noted that the Working Group did not include this provision in its draft on choice of forum clauses (para. 39 (3)).

that may be selected in the contract of carriage or by a body, person or procedure specified in the contract. The draft provision reads as follows:

[Draft proposal D]

"1. The contract of carriage may contain a provision for arbitration only if that provision states¹⁸ that this Convention shall be applied in the arbitration proceedings.

"2. 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]^{18a}

"(b) The place where the goods were delivered to the carrier; or

"(c) The place designated for delivery to the consignee.

"3. After a dispute has arisen the parties may enter into an agreement selecting the territory of any State as the place for arbitration."

18. The basic objective of draft proposal D, like draft proposals B and C, is to protect the cargo owner from having to bring arbitration proceedings in a place which is inconvenient for him. However, this draft proposal allows less latitude in the contract for a choice of a place for arbitration since the selection must be made from among places which have some connexion with the transaction and are likely to be convenient for the claimant. The report of the Secretary-General in paragraph 137 deals with the reasons why it is desirable that the principal place of business of the carrier not be included in the set of permissible places in paragraph 2 of draft proposal D. It directs attention to complaints made that the carrier normally specifies in standard bills of lading that all claims must be brought for adjudication to the carrier's place of business.¹⁹

19. The carrier's principal place of business or any other place that falls outside the permissible places in paragraph 2 of draft proposal D can, by virtue of paragraph 3, be selected by the parties after a dispute has arisen. Such an agreement would not be subject to the abuses of adhesion contracts since the claimant has the opportunity to negotiate concerning the place for arbitration.²⁰ By the same token, if the body or person designated in the contract wishes to have the arbitration proceedings conducted in a place other than those set out in paragraph 2 of draft proposal D, the parties to the dispute can be asked to agree to select the place desired by the designating body or person.²¹ As a practical matter, even when the bill of lading provides for a place for

arbitration other than places listed under paragraph 2 of draft proposal D, the claimant may decide that it is convenient for him to arbitrate in the place designated. This may particularly be the case when the claimant's insurance company has been subrogated to the claim. Under such circumstances it would seem that the parties would be able to agree on the mutually desired place, on the basis of paragraph 3 of draft proposal D.

D. *Provision specifying alternative places where, at the option of the claimant, arbitration may be brought*

20. One provision introduced in the course of the session of the Working Group reflects the view that the approach to arbitration clauses should be the same as the one adopted by the Working Group with regard to choice of forum clauses.²² The draft proposal along these lines reads as follows:

[Draft proposal E]

"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*."

21. The approach taken in draft proposal E calls for a provision that permits the insertion of an arbitration clause in a bill of lading but gives the claimant the right to choose his arbitral forum.²³ Under draft proposal E (unlike the preceding draft proposals) the claimant is provided with choices as to the places for arbitration which he may exercise when the dispute arises.

22. Under a provision set out in brackets in paragraph 1 (d) of draft proposal E, when the person or body designated in the arbitration clause has selected a place, the claimant has the option to accept or reject that selection. Such an arrangement would mean that the

¹⁸ See foot-note 17, above, where the suggestion is made that the following words be added: "... or otherwise provided in the contract of carriage".

^{18a} See foot-note 17a above.

¹⁹ Report of the Secretary-General, para. 137.

²⁰ *Ibid.*, para. 139.

²¹ *Ibid.*, para. 138.

²² Report of the Working Group, paras. 39 and 41.

²³ Report of the Working Group, para. 54.

person or body designated in the bill of lading would have to submit their choice of a place to the claimant who could reject the place submitted. This power by the plaintiff might well complicate the process of selection of an appropriate person and place.

23. The requirement in draft proposal E that the arbitration proceedings must be held in a contracting State is found in both paragraph 1 (arbitration clause) and paragraph 3 (agreement after dispute has arisen). Discussion of this requirement and its possible drawbacks is to be found in paragraph 9 above.

E. Some comparisons between draft proposal D and draft proposal E

24. Draft proposal D, above, limits the choice of a specific place that a person or body designated in the bill of lading may make, but provides that such a selection is binding. Under draft proposal E the choice made by such a person or body is merely one of many among which the claimant may choose.

25. It may be argued that the flexibility that draft proposal E gives in making it possible for the claimant to choose the principal place of business of the carrier (paragraph 1 (b)) or the place designated in the contract (paragraph 1 (d)), is no greater than that of draft proposal D. Under draft proposal D if the claimant wishes to have the arbitration proceedings brought at the carrier's principal place of business he can presumably gain the carrier's agreement to this when the dispute arises. He could also presumably gain the carrier's agreement to

any other place which the carrier would have chosen if he were free to do so.

F. Provision which would confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose

26. A provision whose purpose is to confine recourse to arbitration to cases where the parties agreed to arbitration after the dispute arose was presented to the Working Group. It reads as follows:

[Draft proposal F]

"Notwithstanding the provision of the preceding paragraph, after the cocurrence 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."²⁴

27. Draft proposal F was meant to be read in conjunction with the draft provision on choice of forum clauses. This draft proposal would bring about the invalidity of all arbitration clauses in bills of lading.²⁵

²⁴ Report of the Working Group, para. 56.

²⁵ See report of the Secretary-General, para. 132, which discusses the widespread favour enjoyed by arbitration as an efficient and inexpensive process for the settlement of disputes. It should be noted that this draft proposal would also effect such clauses in charter parties when they are incorporated into bills of lading.

4. Report of the Secretary-General, second report on responsibility of ocean carriers for cargo: bills of lading (A/CN.9/76/Add.1) *

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* 21 March 1973.

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GENERAL INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its fifth session (1972) decided that its Working Group on International Legislation on Shipping should continue its work under the terms of reference set forth in the resolution the Commission has adopted at its fourth session.¹ This resolution concluded 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."

The Commission's resolution also listed, in subparagraphs (a) to (i) of paragraph 2, a series of areas which "among others, should be considered for revision and amplification".²

2. The Working Group at its third and fourth (special) sessions used as its working document the report by the Secretary-General on "responsibility of ocean carriers for cargo: bills of lading".³ At these sessions, the Work-

ing Group examined and reached decisions on the following topics: the period of carrier's responsibility (before and during loading, during and after discharge); responsibility for deck cargoes and live animals; clauses of bills of lading confining jurisdiction over claims to a selected forum; approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier.⁴

3. The Working Group, at its third session, decided that the fifth session should be devoted to a consideration of the remaining topics listed in the resolution adopted by UNCITRAL at its fourth session.⁵ These remaining topics are: unit limitation of liability, trans-shipment, deviation, the period of limitation, definitions under article I of the Convention and elimination of invalid clauses in bills of lading. The Secretary-General was requested "to prepare a report setting forth proposals, indicating possible solutions" with respect to these topics.⁶ To provide material needed in the preparation of the report, the Secretary-General was also requested "to invite comments and suggestions from governments and from international and intergovernmental organizations active in the field".⁷ Accordingly, a questionnaire was prepared and circulated to governments and to the organizations described in the above-quoted decision.⁸

4. The present report was prepared in response to the above request by the Working Group and is submitted for consideration at the fifth session of the Working Group. The report includes references to numerous replies to the above-mentioned questionnaire⁹ and also draws on the report on bills of lading of the Secretariat of the United Nations Conference on Trade and Development (UNCTAD), which was placed before the UNCTAD and UNCITRAL Working Groups.¹⁰

5. The Working Group at its fourth session concluded that "the subjects which are most closely related to the basic question of carrier's responsibility should be taken up first". Accordingly, priority should be given to unit limitation of liability, trans-shipment and deviation.¹¹ The

¹ 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)* (herein referred to as UNCITRAL, report on the fifth session (1972)), para. 51, UNCITRAL Yearbook, vol. III: 1972, part one, II, A; 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 (herein referred to as UNCITRAL, report of the fourth session (1971), UNCITRAL Yearbook, vol. II: 1971, part one, II, A). The resolution adopted at the fourth session of the Commission quoted from the resolution of the United Nations Conference on Trade and Development (UNCTAD) Working Group on International Shipping Legislation on the subject: report of the UNCTAD Working Group on International Shipping Legislation on its second session (TD/B/C.4/86).

² The areas listed in the resolution adopted at the fourth session of the Commission are as follows:

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

"(b) The scheme of responsibilities and liabilities, and rights and immunities, incorporated in articles III and IV of the Convention as amended by the Protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;

"(c) Burden of proof;

"(d) Jurisdiction;

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

"(f) Extension of the period of limitation;

"(g) Definitions under article I of the Convention;

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

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

³ A/CN.9/63/Add.1, UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex (herein referred to as the first report by the Secretary-General on responsibility of ocean carriers for cargo). At the fourth session of the Working Group, two working papers prepared by the Secretariat were submitted: "Approaches to basic policy decisions concerning allocation of risks between the cargo owner and carrier" (A/CN.9/WG.III/WP.6); "Arbitration clauses" (A/CN.9/WG.III/WP.7). These working papers are reproduced in this volume, part two, IV, 2 and 3 above.

⁴ Report of the Working Group on International Legislation on Shipping on the work of its third session (Geneva, 31 January to 11 February, 1972) (A/CN.9/63, UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein referred to as report of the Working Group, third session); report of the Working Group on International Legislation on shipping on the work of its fourth (special) session (Geneva, 25 September to 6 October 1972) (A/CN.9/74, reproduced in this volume, part two, IV, 1, above) (herein referred to as report of the Working Group, fourth session).

⁵ Report of the Working Group, third session, para. 73.

⁶ *Ibid.*, para. 74.

⁷ *Ibid.*, para. 75.

⁸ A copy of the questionnaire appears as an appendix following part six of the present report.

⁹ It is expected that additional replies will be received subsequent to the preparation of this report. Copies of the replies in their original languages will be available to the members of the Working Group.

¹⁰ Document TD/B/C.4/ISL/6/Rev.1 (United Nations publication, Sales No. 72.II.D.2).

¹¹ Report of the Working Group, fourth session, para. 55.

order of presentation in the present report takes account of this decision. The present report is presented under the following headings:

- Part one: Unit limitation of liability
Part two: Trans-shipment

- Part three: Deviation
Part four: The period of limitation
Part five: Definitions under article 1 of the Convention
Part six: Elimination of invalid clauses in bills of lading.

PART ONE: UNIT LIMITATION OF LIABILITY

A. Introduction

1. This part of the report responds to the decision of the Commission, made in response to the recommendation of this Working Group, to consider "unit limitation of liability".¹ The legal instruments requiring examination are the International Convention for the Unification of Certain Rules relating to Bills of Lading² and the 1968 Protocol to amend that Convention.³

1. The limitation rule contained in the 1924 Brussels Convention

2. Article 4 (5) of the Brussels Convention states that:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . .".⁴

3. It will be noted that this provision establishes a maximum carriers' liability of "100 pounds sterling per package or unit" of goods lost or damaged; carriers may

not stipulate for lower limitation amounts.⁵ It applies unless the bill of lading establishes a higher limitation amount, or unless the "nature and value" of the goods are declared by the shipper and inserted in the bill of lading, an option that is rarely used.

4. The limitation rule contained in article 4 (5) of the Brussels Convention consists of two elements: (a) the quantitative basis of calculation, i.e. the number of "packages" or "units" and (b) the monetary limitation amount. Each of these elements has raised problems.

5. (a) The first element, embodied in the expression, "package or unit", has proved to be difficult to apply to many types of cargoes. This problem and possible means of resolving it will be explored more fully in section B (para. 10 *et seq.*, *infra*). (b) The monetary limitation amount⁶ of "100 pounds sterling" has remained unchanged for 49 years, despite inflation and currency devaluations that have eroded its current value to a fraction of its original value.⁷ Accordingly, when the Brussels Convention came under re-examination by the CMI during the 1960s, there was broad support for an amendment raising the limitation amount stipulated in article 4 (5).

2. The limitation rule contained in the 1968 Brussels Protocol

6. The amendment developed by the CMI is contained in Article 2 (a) of the 1968 Brussels Protocol,⁸ which

¹ See the general introduction, above, at para. 3 and foot-note 2.

² Hereinafter cited as the "Brussels Convention", League of Nations *Treaty Series*, vol. CXX, p. 157, No. 2764, reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3). The substantive provisions of this Convention are often referred to as the "Hague Rules".

³ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed at Brussels on 25 August 1924 (hereinafter cited as "the Brussels Protocol" or merely "the Protocol"). This Protocol was adopted by the 12th session of the Brussels Diplomatic Conference on Maritime Law, 16-27 May 1967 and 19-24 February 1968, on the basis of a draft produced by the Comité Maritime International (hereinafter "CMI") at its 26th session, held in Stockholm in 1963, commonly known as the "Visby Rules". The Protocol is reproduced in the Register of Texts of Conventions and Other Instruments concerning International Trade Law, vol. II, chap. II, 1. Articles 2 and 3 of the Brussels Protocol, relating to limitation of liability, are set out in appendix II.

⁴ Article 4 (5) continues:

"This declaration if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

"By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above-named.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading."

⁵ See the third paragraph of article 4 (5) (note 4 above) and article 3 (8), which states that: "Any clause . . . lessening . . . liability otherwise than as provided in this Convention, shall be null and void and of no effect."

⁶ Throughout this part of the report, the term "monetary amount" is used to indicate the monetary figure given in the limitation of liability provision, and the term "basis of calculation" is used to indicate the quantitative measurement of goods lost or damaged—whether "packages", "units", "weight", "volume" or some other measurement—by which the limitation amount is multiplied.

⁷ A 4 per cent average rate of inflation over the 49-year period is a reasonable assumption. At that rate, the current value of 100 pounds sterling in 1924 is 683 pounds sterling; at a more conservative estimate of a 3 per cent average rate of inflation, the figure is 425 pounds sterling; at 2 per cent—a conservative estimate indeed—the current value equals 264 pounds sterling. See A. J. Merrett and Allen Sykes, *The Finance and Analysis of Capital Projects*, London 1963, p. 510. Most replies to the questionnaire concluded that the monetary limitation amount contained in article 4 (5) was unsatisfactory. The reply of the USSR pointed out that the monetary limitation amount is at present much lower in real terms than it was when established in 1924. On the other hand, the reply of Turkey concluded that the limitation amount in article 4 (5) was satisfactory.

⁸ The Brussels Protocol contains other provisions with respect to limitation of liability, which will be considered at a later point in this report.

states that:

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. 10,000 per package or unit or frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher."

7. Article 2 (d) of the Protocol adds the following clarification:

"(d) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900' . . ."

8. The Protocol's "package or unit" monetary limitation amount of 10,000 francs Poincaré equals approximately 307 pounds sterling (\$US 799, or new French frs. 4,099); the "per kilo" amount of 30 francs Poincaré equals approximately .90 pounds sterling (\$US 2.40 or French frs. 12.30). Thus significant elements of Protocol article 2 (a) include: (1) raising the monetary limitation "per package or unit" from 100 pounds sterling to 10,000 francs of defined gold content—a level approximately 2.5 times that of the 1924 Convention; (2) retention of the phrase "package or unit"; and (3) addition of an alternative ceiling of 30 francs per kilo of gross weight of goods lost or damaged.

9. In the paragraphs that follow, article 2 (a) of the Brussels Protocol will be examined more fully in the context of alternative approaches to the development of a limitation of liability rule.

* The monetary unit described in this subparagraph is widely known as the "franc Poincaré", and is hereinafter referred to by that term or by the shorter designation "franc P."

At the official price of gold of \$US 38 = 1 troy ounce of gold, by definition:

Fr. P. 1 = approx. \$US .0799 (£.03) (new French frs. 41)

Frs. P. 10,000 = \$US 799 (£307) (French frs. 4,099)

Frs. P. 30 = \$US 2.40 (£.90) (French frs. 12.30)

Frs. P. 30/kg. = \$US 1.09/lb. (£42/lb.) (French frs. 5.6/lb.)

At present, however, the official price and the market price of gold differ very significantly: on 20 September 1972 the market price of gold at Zürich was \$US 65 an ounce. At the market price of gold, the values expressed in frs. Poincaré are as follows:

Fr. P. 1 = approx. \$US .137 (£.053) (French frs. .70)

Frs. P. 10,000 = \$US 1,370 (£527) (French frs. 7,028)

Frs. P. 30 = \$US 4.11 (£1.58) (French frs. 21.1)

Frs. P. 30/kg. = \$US 1.87/lb. (£72/lb.) (French frs. 9.6/lb.)

The Protocol's drafters intended that national laws enacting the Protocol retain the statement of the limitation amount in francs Poincaré, instead of converting the equivalent of that amount into national currencies. This is indicated by the Protocol's deletion of the words "or the equivalent of that sum in other currency" that appear in article 4 (5) of the Brussels Convention, and by the sentence following the definition of "franc" (Poincaré) in article 2 (d) of the Protocol: "The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case". Moreover, the chairman of the Working Party on article 2 (1) at the 1967-1968 Diplomatic Conference reported that the limitation expressed in francs Poincaré was "an amount to which it will henceforth be necessary to refer in all countries which shall have signed and ratified the Protocol—since the possibility for the States to express this limitation in national currency no longer exists". "Report by Professor Van Ryn, Chairman of the Working Party on paragraph 1 of article 2 of the Visby Rules", in *Conférence Diplomatique de Droit Maritime, Douzième Session (1ère phase), Bruxelles, 1967*, p. 716.

B. Alternative approaches to a limitation of liability rule

10. This section analyses alternative approaches to a limitation of liability rule and considers these questions: (1) Does article 2 (a) of the Brussels Protocol provide a satisfactory structure for such a rule? (2) Can article 2 (a) be improved through clarifying amendments? (3) Would an approach different from that contained in Protocol article 2 (a) be preferable?

1. The 1968 Brussels Protocol: alternative "package or unit" and "per kilo" rules

11. As was noted above, article 2 (a) of the Protocol contains alternative limitation rules—one calculated "per package or unit" and the other calculated "per kilo"—and stipulates that the higher amount under those rules is to be applied. Apparently the "package or unit" rule is intended to apply to relatively light cargoes, and the "per kilo" rule to heavier ones. More specifically, if a package or unit weighs 334 kilos or more, the total limitation calculated under the "per kilo" rule exceeds frs. P. 10,000, and thus becomes the applicable limitation.

12. Nevertheless, certain interpretive difficulties in the operation of the Protocol's alternative rules may be foreseeable. For example, it is difficult to apply the words "package or unit" in article IV (5) of the Brussels Convention to the following types of cargoes: (1) items partially encased or crated (for example, tractors partially covered with planking or timber held together with steel bands); (2) large, uncrated items (for example automobiles, railroad locomotives or heavy machinery); (3) bulk cargoes (for example, grains and liquids); (4) unitized cargoes (such as those carried in containers). The problems presented by these four types of cargo will now be considered.

Cargo-type 1: partially encased items

13. With respect to cargo-type 1, the issue is whether a partially encased item of cargo is a "package" or whether it is a "unit". This may be of substantial importance because the word "unit" may mean either:

(a) The physical unit in which cargo is shipped (i.e. "shipping unit");¹⁰ or

(b) The unit of quantity, weight or volume on which the freight charges for the goods are calculated (i.e. "freight unit")¹¹

¹⁰ The "shipping unit" is specifically designated in the Italian Code of Navigation, article 423, which uses the term "unit of cargo" ("unite di carico"), the same is probably indicated by the words "package or other unit of cargo" contained in the Scandinavian Maritime Code which applies to the carriage of goods by sea with respect to Denmark, Finland, Norway and Sweden.

¹¹ This concept can be further subdivided into: (1) the unit described in a particular bill of lading as the basis for the calculation of freight, i.e. the "declared freight unit"; or (2) the unit customarily used for the calculation of freight for goods of the same type, i.e. the "customary freight unit". The United States Carriage of Goods by Sea Act, article 4 (5), explicitly adopts the "customary freight unit" by establishing a limitation "per package . . . or in the case of goods not shipped in packages, per customary freight unit". Article 105 of the Swiss Maritime Code also used the words "freight unit". See also article 165 of the Merchant Shipping Code of the USSR.

14. If "unit" means *shipping unit* (alternative (a) above), problems presented by the phrase "package or unit" are minimized, because both terms designate a single, physically distinct object. The limitation of liability for such an object would be calculated either on the basis of one "package or [shipping] unit", or on the basis of the number of kilos of the object's gross weight, depending upon whether its weight exceeded 334 kilos.

15. On the other hand, a "*freight unit*" (alternative (b) above) is based not on the physical divisibility of the cargo item, but on a measurement such as the ton, kilo or cubic metre. Consequently, the limitation of liability often will vary greatly depending upon whether it is measured in "packages" or in "freight units".¹² For example, a 30-ton, partially covered locomotive may be one "package" or 30 "freight units" (where freight is charged by the ton). In such a case, the limitation under the Protocol may be:

(1) "*Per package or unit*"

- (a) 10,000 francs P. for 1 "package"; or
- (b) 300,000 francs P. for 30 "freight units" at 10,000 francs per "unit"; or

(2) "*Per kilo*": Approximately 818,160 francs P. for 30 tons of weight at 30 francs per kilo.

16. Thus, in cases involving partially covered or encased cargoes, the words "package or unit" in article 2 (a) of the Brussels Protocol may lead to disputes on the following points: (1) whether an item of cargo constitutes one "package", one "shipping unit", or several "freight units"; (2) whether the "package or unit" or the "per kilo" rule yields a higher limitation of liability. The large number of ways of preparing cargo for shipment make prediction difficult.¹³

¹² See, for example, *Mitsubishi International Corp. v. S.S. Palmetto State*, 311 F. 2d 382 (1962), where a roll of steel weighing 32 1/2 tons but fully boxed and completely enclosed in a wooden case was damaged to the extent of \$31,000, and was held to be a "package" under article IV(5) of the United States' Carriage of Goods by Sea Act, with the result that the shipowner's liability was limited to \$500. Had this cargo not been held to be a "package", the limitation of liability would have been measured in "freight units", which presumably would have been tons, so that the total limitation would have been 32 1/2 times \$500, or \$16,250. Compare *Gulf Italia Co. v. American Export Lines*, 263 F. 2d 135 (1959), where it was held that a tractor weighing 34.6 tons constituted 34.6 "freight units", with a limitation amount of 34.6 x \$500 or \$17,300, instead of one "package" with a limitation amount of \$500. See also René Rodière, *Traité général de droit maritime*, Paris, 1968, p. 302.

¹³ The issue of whether an item of cargo is a "package" or a "freight unit" is a fertile source of dispute and litigation. For some close questions, see *Gulf Italia Company v. American Export Lines, Inc.*, op. cit., where a caterpillar tractor was prepared for shipment by putting waterproof papering over some of its parts, and by partially encasing the superstructure with wooden planking; however the tread portions of the tractor were uncovered and the tractor was not attached to a skid. Held: that the tractor did not constitute a "package". However, in *Aluminios Pozuelo Ltd. v. S. S. Navigator*, 277 F. Supp. 1008 (1967), a press weighing 6,200 pounds and bolted to a skid approximately twice the size of the base of the press was held to be a "package".

Cargo-types 2 and 3: large, uncrated items and bulk cargoes

17. Cargo-types (2) and (3), noted above, give rise to fewer alternative interpretations. An uncrated railroad locomotive (type 2) can not readily be called a "package"; such is even more difficult with respect to a tanker load of oil (type 3). Consequently, courts generally have applied the term "unit" to such cargoes. However, the question remains as to whether these cargoes should be calculated in "shipping units" or "freight units", with the attendant difficulties described above.

Cargo-type 4: containers

18. Questions have arisen in many jurisdictions concerning the application of the words "package or unit" to containerized cargo. Should the container be considered the single relevant "package" or "unit" for purposes of the limitation of liability provisions, regardless of the number of items inside? Or should the limitation amount apply to *each item of cargo* inside the container? These questions are not resolved by the basic limitation provision in article 2 (a) of the Protocol. Instead, article 2 (c) contains a special provision designed to clarify the point, which states:

"(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned; except as aforesaid such article of transport shall be considered the package or unit."¹⁴

19. This article has given rise to the question whether the container itself should be counted a "package or unit" in addition to the items inside, when the number of "packages" or "units" are "enumerated in the Bill of Lading...".¹⁵

20. The question of whether the container itself should be counted as a "package or unit" could be resolved by amending the text of the Brussels Protocol's article 2 (c). Such an amendment is set forth below: (words to be added are italicized; words to be deleted are in square brackets; optional words are in parentheses):

¹⁴ The reply of the Federal Republic of Germany called this provision "the best solution that can be obtained". The reply of Australia stated that this provision constitutes a "distinct improvement", which should be "retained in any further amendment of the Hague Rules". The reply of Czechoslovakia considered this provision to be a "satisfactory solution for the time being". On the other hand, the reply of Sweden, while conceding that article 2 (c) was "a step forward", stated that it was "unnecessarily complicated and gives rise to certain difficulties of interpretation".

¹⁵ A further point left unresolved by article 2 (c) is whether carriers should be allowed to impose additional *ad valorem* freight charges when the items inside a container are individually valued. See John L. DeGurse, Jr., "The Container Clause in article 4 (5) of the 1968 Protocol to the Hague Rules", 2, *Journal of Maritime Law and Commerce* 131, October 1970.

Draft amendment of article 2 (c)

"Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport plus *the article of transport itself* (when such article is supplied by the shipper) shall be deemed the number of packages or units for the purpose of this paragraph [as far as these packages or units are concerned]; except as aforesaid such article of transport shall be considered the package or unit."

This proposal is reflected in the proposed draft limitation rule, set out at paragraph 59 below.¹⁶

21. A special provision relating to containers is necessary only if the "package or unit" alternative limitation rule is retained. If a limitation rule based only on weight is adopted, then the provision contained in article 2 (c) of the Brussels Protocol and quoted above would lose its significance. For this reason, the entire provision on containers has been placed in parenthesis (meaning that it is optional) in the proposed draft limitation rule, set out below.

22. To summarize, despite the Protocol's alternative "per kilo" limitation rule, it would presumably still be necessary to determine the number of "packages" or "units" in many cases, in order to know whether the "package or unit" or the "per kilo" rule produced the higher (and hence the applicable) total limitation. This would present the interpretive difficulties described above with respect to the words "package or unit".¹⁷ Accordingly, if the Working Group should decide that article 2 (a) of the Protocol provides a suitable basic structure for a limitation provision, it may wish to consider one or more of the clarifying amendments to that article set forth below.

23. Under the first of these clarifying amendments, the words "per package" might be made the primary basis of limitation, with a subsidiary limitation "per freight unit" for goods not shipped in "packages". Such a clarification might be achieved by amending article 2 (a) of the Protocol to read as follows:

Alternative I

"... neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (a) frs. — per package *or, in the case of goods not shipped in packages, per freight unit* or (b) frs. — per kilo of gross weight of the goods lost or damaged, whichever is the higher". (Emphasis added.)

¹⁶ See also paras. 23-28.

¹⁷ Several replies to the questionnaire expressed dissatisfaction with the words "package or unit". See the replies of Australia, Czechoslovakia, Norway, Sweden, the Federal Republic of Germany, Iraq and the USSR.

24. This text, which is used in the United States Carriage of Goods by Sea Act,¹⁸ would resolve ambiguities with respect to whether the word "unit" means "freight" or "shipping" unit. However, use of the term "freight unit" may involve significant disadvantages. First, as was pointed out above, the term "freight unit" itself is somewhat ambiguous, since it could mean either the "customary" freight unit for a particular type of cargo, or the "actual" freight unit specified in the bill of lading.¹⁹ Second, use of "freight unit" would cause the total limitation to fluctuate arbitrarily, according to whether the freight charges were calculated "per kilo", "per ton" or as a single, lump-sum freight for the entire cargo. Third, this method of calculating the limitation of liability might give carriers the opportunity to regulate their own limitations of liability by the manner in which they state their freight charges. Fourth, because freight charges frequently are based upon the weight of the goods, use of the "freight unit", in the many cases of goods not carried in "packages", would merely provide alternative limitation rules both based upon weight, such as, for example, "per ton" (the freight unit) and "per kilo" (the alternative limitation rule already stated in article 2 (a)).

25. For these reasons, the Working Group may find that use of the words "freight unit" in article 2 (a) is not a satisfactory solution to the interpretive problems of that article.

26. The words "or other shipping unit" might be added to article 2 (a) of the Protocol so that the limitation rule would state:

Alternative II-A

"... neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. — per package *or other shipping unit* or frs. — per kilo of gross weight of the goods lost or damaged, whichever is the higher."

27. Alternatively, the words "per package" might be deleted, so that the provision would state:

Alternative II-B

"... in an amount exceeding the equivalent of frs. — *per shipping unit* ...".

28. Alternatives II-A and II-B would eliminate ambiguities with respect to the meaning of the word "unit". They would also clearly identify the "10,000 franc" alternative with a physically divisible item of cargo, as

¹⁸ 46 U.S.C. 1304 (5). The reply of Australia endorsed the words "customary freight unit" as appearing to provide a better basis of calculation than the present words "package or unit". On the other hand, the reply of Czechoslovakia, while noting that the words "package or unit" were unsatisfactory, stated that the phrase "customary freight unit" has not resolved interpretive problems satisfactorily. The reply of the Federal Republic of Germany stated that the words "package or unit" were unsatisfactory, but added that article 2 (a) of the Protocol should remain as it is because there was apparently no more suitable formulation.

¹⁹ See foot-note 11, above.

probably was intended by the drafters of article 2 (a).²⁰ If the basic structure of article 2 (a) is to be retained, with merely a clarifying amendment, then one of the two suggestions to employ the "shipping unit" concept, set out above, may be a suitable solution.

29. However, such a clarifying amendment, while helpful, may not go far enough toward meeting the requirements of an adequate limitation of liability rule. For example, it would not resolve the interpretive problems relating to containers,²¹ which would still have to be treated in a separate provision. In addition, retaining the "package or unit" test would maintain the existing disparity between the rules on limitation of liability for sea carriage and those of other modes of transport.²² Both these weaknesses represent a failure to deal in a single provision with two of the most current trends in shipping: containerization and combined or through transport.

30. Moreover, interpretive problems may arise, not from the words "package or unit", but instead from the structure of article 2 (a)'s alternative limitation rules. Take, for example, the loss or damage to a shipment under one bill of lading of several "packages" or "units" of differing weights. In such a case, it is not clear whether the "higher" amount under the two alternative limitation rules should apply to each individual "package" or "unit" or to the affected shipment considered as a whole. Thus, if a cargo of five "packages", one weighing 1,000 kilos and four weighing 150 kilos, should be lost or damaged, the following limitation figures appear to be possible under the Protocol:

(1) Frs. 50,000 (5 units at frs. 10,000 per unit);

(2) Frs. 70,000 (1,000 kilos \times frs. 30 for 1 unit; frs. 10,000 per unit for 4 units).

31. If the "higher" alternative limitation rule is to be applied to the cargo as a whole, then alternative (1) "package or unit", would apply in the example given above; if the "higher" rule is to apply to each "unit" individually, then alternative (2) above would apply.

32. For the reasons given above, the Working Group may find that the problems arising under article 2 (a) of the Brussels Protocol cannot be resolved adequately merely by clarifying the existing language, and it may wish to consider other approaches to a limitation of liability rule.

2. A limitation rule based upon weight only

33. Three major transport conventions contain limitation provisions based only upon the weight of the goods

lost or damaged. The relevant provisions of those conventions are as follows:

Warsaw Convention, art. 22 (2): "In the carriage of . . . goods, the liability of the carrier is limited to a sum of 250 francs per kilogramme . . .".²³

CIM Convention

Article 31 (1): [in respect of total or partial loss of goods] "Compensation shall not . . . exceed 100 francs per kilogramme of gross weight short . . .".²⁴

Article 33: [in the case of damage to goods] "the compensation shall not . . . exceed:

"(a) If the whole consignment has been damaged, the amount payable in the case of total loss;

"(b) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected."

CMR Convention

Articles 23 (3) and 25 (2) are the same as the above-quoted provisions of the CIM Convention, except for the monetary limit which is stated as "25 francs per kilogramme of gross weight short".²⁵

34. Basing limitation on weight ("per kilo") would make the Brussels Convention conform with the bases used in other major transport conventions.²⁶ This approach would eliminate the ambiguous words "package or unit", and might achieve a better proportionality between the amount of freight payable and the carrier's maximum liability.²⁷ It would also resolve interpretive problems relating to containers, since the weight of the container would be the only relevant factor in calculating the total limitation.

35. In order to adopt a "per kilo" basis of limitation, the words "10,000 francs per package or unit or" might be deleted from article 2 (a) of the Brussels Protocol, so that the provision would read:

Alternative III-A

" . . . neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in

²⁰ Under subparagraph (4) of art. 22, "the sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrammes gold of millesimal fineness 900". These sums may be converted into any national currency in round figures."

²⁴ Art. 56 states that: "The amounts stated in francs in this Convention or the Annexes thereto shall be deemed to relate to the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". This monetary unit, known as the franc "Germinal", is approximately five times more valuable than the franc "Poincaré" that is used in the Warsaw Convention and the Brussels Protocol. The limitation amount of 100 francs "Germinal" established in art. 31 (1) of the CIM Convention is worth approximately 496 francs "Poincaré".

²⁵ This subparagraph continues: "'Franc' means the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900'."

²⁶ A limitation system based only upon weight was proposed in the replies of Norway and Sweden. A limitation based upon weight or "cubic dimension" was endorsed by Australia with respect to bulk cargoes.

²⁷ Ordinarily, freight is charged per weight or volume measurement of the goods, rather than per package or unit. E. Selvig, "The Unit Limitation of Carriers' Liability", in K. Grönfors, ed., *Six Lectures on the Hague Rules*, Stockholm, 1965, p. 119.

²⁰ This conclusion appears to be justified by the fact that the "package or unit" alternative in article 2 (a) is designed to apply to light, valuable cargoes, more specifically to cargoes weighing less than 334 kilos and worth more than 30 francs P. per kilo. By this reasoning, what is important is the weight and worth of the physical object carried (the "shipping unit") and not the manner in which freight is calculated (the "freight unit").

²¹ See para. 18, above.

²² All other major transport conventions use a "per kilo" rule for calculating the limitation of liability. For the exact wording of those conventions, see para. 33 below.

connexion with the goods in an amount exceeding the equivalent of frs. — per kilo of gross weight of the goods lost or damaged".²⁸

36. It must be recognized that a limitation based solely on the weight of "the goods lost or damaged" does not wholly avoid problems of classification. For example, suppose that a bag of grain weighing 100 kilos is torn and loses 30 kilos in the course of shipment. Should the limitation of liability be computed on the basis of the "loss" of part (30 kilos) or on the basis of "damage" to the entire package (100 kilos)? Similar questions might arise (e.g.) in a shipment of a carton containing 10 typewriters, each of which weighs 10 kilos. If the carton is broken and 3 typewriters are lost, should the limitation of liability be based on: (a) the "loss" of 3 typewriters (30 kilos) or (b) "damage" to the entire carton (100 kilos)? Other variations could arise, as where 10 separate packages are shipped under one bill of lading and 3 packages are lost, or where part of a bulk shipment (e.g. grain carried loose in a hold) is lost or damaged.

37. Under alternative III-A above, which is based on the language of article 2 (a) of the 1968 Brussels Protocol, the concept of "damage" to "goods" could provide a basis for approaching these problems. A bag of grain that has been torn and that has lost some of its contents has been "damaged" for commercial purposes; consequently, the limitation on liability probably should be based on the total weight of the bag. On the other hand, if a part of a bulk shipment of grain is lost or damaged the commercial value of the balance of the shipment has not been impaired.

38. It would be helpful if the approach for solving such problems could be more clearly indicated in the text of the legislative provision. To this end, consideration might be given to a draft based on the provisions of the CIM and CMR Conventions (*supra*) which distinguish between loss and damage. Such a draft might provide:

Alternative III-B

"... neither the carrier nor the ship shall in any event be or become liable:

(a) In respect of *total or partial loss* of the goods in an amount exceeding the equivalent of frs. — per kilo of gross weight *short*;

(b) In respect of *damage* to the goods:

(i) If the whole consignment has been damaged, the amount payable in case of total loss;

(ii) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.

39. Should a "per kilo" limitation rule be adopted, the Working Group might wish to consider the addition of a provision establishing a specified minimum liability. A provision stating that "the minimum gross weight of such goods shall be deemed to be ... kilos" has been suggested in the replies to the Secretariat's questionnaire.²⁹ It will be noted that such a provision would have special significance in relation to a light-weight shipment of goods of relatively high value, and would enable the shipper to recover for actual loss or damage up to the minimum prescribed therein.

40. At present, the weight is not always indicated on the bill of lading; accordingly, if a limitation rule based only upon weight is adopted, a corresponding amendment to article 3 (3) (b) of the Brussels Convention might be desirable. Article 3 (3) (b) requires the carrier to issue, on demand of the shipper, a bill of lading showing "either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper" (emphasis added). The Working Group might wish to consider amending article 3 (3) (b) to state:

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

"...

"(b) the number of packages or pieces or the quantity, as the case may be, *and the weight*, as furnished in writing by the shipper." (Emphasis added.)

3. Other approaches

41. Proposals for limitation of liability rules containing other bases of calculation than those discussed above have gained support from time to time. Two examples of these proposals are set out below:

(a) *A limitation based upon "weight or volume"*

42. The CMI Sub-Committee on Bills of Lading considered a limitation system based upon "weight or volume" as one of the alternative ways of amending article 4 (5). In commenting upon the report of the Sub-Committee, one national maritime law association specifically endorsed this alternative and suggested the following draft provision for implementing it:

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of ... francs *per ton or per 40 cubic feet at the option of the claimant*, each franc consisting of 65.5 milligrammes of gold of millesimal fineness 900', unless the nature and value of such goods have been

²⁸ During the 1967-1968 Brussels Diplomatic Conference, similar drafts were proposed, separately, by Finland, Norway and Sweden, on one hand, and by the United States on the other. See respectively, Diplomatic Conference on Maritime Law, XII Session (2nd Phase), Brussels, 1968, *Documents*, Vol. I, Doc. No. 4, 6.10.67; and Conférence Diplomatique de Droit Maritime, Douzième session (1ère phase), Bruxelles, 1967, *Procès-Verbaux, Documents préliminaires, Documents de travail*, p. 685.

²⁹ Inclusion of such a provision was supported in the reply of Norway to the Secretariat's questionnaire; the possibility of such a provision was raised in the reply of Sweden. A provision for a presumed minimum gross weight is contained in the Draft Convention on Combined Transports (TCM) (1971), article 10 (3). CTC IV/18, TRANS/374, annex II.

declared by the shipper before shipment and inserted in the bill of lading".³⁰ (Emphasis added.)

(b) *A limitation based upon the freight paid*

43. At the Hague Rules Conference in 1923, the French carriers proposed a limitation amount equal to 10 times the freight paid.³¹ This basis was not discussed at the 1968 Diplomatic Conference.

4. *Summary of proposals for a basic limitation of liability rule*

44. The principal proposals for a basic limitation of liability rule, as discussed in the preceding paragraphs, are set out below. Words to be added are italicized; words to be deleted are contained in square brackets.

Alternative I

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (a) — per package or *in the case of goods not shipped in packages, per freight unit* or (b) — per kilo of gross weight of the goods lost or damaged, whichever is the higher."³²

Alternative II

Variant A

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (a) — per package or *other shipping unit* or (b) — per kilo of gross weight of the goods lost or damaged, whichever is the higher."³³

Variant B

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of (a) — per [package or] *shipping unit* or (b) — per kilo of gross weight of the goods lost or damaged, whichever is the higher."³⁴

Alternative III

Variant A

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of [frs. — per package or unit or] . . . per kilo of gross weight of the goods lost or damaged."³⁵

Alternative III-B

Variant B

" . . . neither the carrier nor the ship shall in any event be or become liable:

(a) In respect of *total or partial loss* of the goods in an amount exceeding the equivalent of frs. — per kilo of gross weight *short*;

(b) In respect of *damage* to the goods:

(i) If the whole consignment has been damaged, the amount payable in case of total loss;

(ii) If part only of the consignment has been damaged, the amount payable in the case of loss of the part affected.³⁶

C. *Other points to consider in presenting a complete limitation rule*

45. In addition to the principal limitation of liability rule, the Working Group may wish to consider other points which relate to limitation of liability and which might be included in a complete text on that subject. A number of such points are listed and described briefly in this section.

1. *Definition of the relevant monetary unit*

46. Article 9 of the Brussels Convention provides that: "The monetary units mentioned in this Convention are to be taken to be gold value.

"Those contracting States in which the pound sterling is not a monetary unit reserve to themselves the right of translating the sums indicated in this Convention in terms of pound sterling into terms of their own monetary system in round figures . . .".

Apparently this provision was added to the Brussels Convention in order to promote uniformity among the limitation amounts in different national legislations. In fact, however, national limitation amounts vary widely, as is illustrated by the list of national limitation amounts in appendix I.

47. The Brussels Protocol provides a more precise definition of the relevant monetary unit than that con-

³⁰ Italian Maritime Law Association, comments on the report of the International Sub-Committee, International Maritime Committee, XXVI Conference, Stockholm, 1963, *Proceedings*, p. 130.

³¹ See Rodière, *op. cit.*, p. 417.

³² Discussed at paras. 23-25 above.

³³ Discussed at paras. 26-31 above.

³⁴ *Ibid.*

³⁵ Discussed at paras. 35-37.

³⁶ Discussed at paras. 38-40 above.

tained in the Brussels Convention. Article 2 (d) of the Brussels Protocol states:³⁷

"(d) A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900'. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case."³⁸

2. Application of the limitation rules to servants and agents of the carrier

48. Under article 4 (5) of the Brussels Convention, "neither the carrier nor the ship" is to be liable for more than the limitation amount in the absence of a declaration of value by the cargo owner. Article 1 (a) defines the "carrier" as including "the owner or the charterer who enters into a contract of carriage with a 'shipper'". Thus the Brussels Convention does not expressly limit the liability of servants or agents of the carrier, and in many jurisdictions the courts have declined to extend the coverage of article 4 (5) to those parties by interpretation.³⁹

49. Article 3 of the Brussels Protocol contains the following provisions, which would extend the application of the limitation of liability to servants and agents:

"2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention."⁴⁰

³⁷ Article 4 of the Brussels Protocol deletes the existing article 9 of the Brussels Convention.

³⁸ Cf. Warsaw Convention, article 22 (4), which also adopts the franc Poincaré; also CIM Convention, article 56, and CMR Convention, article 23 (3), which adopt instead the gold franc

"Germinal", defined in both Conventions as "weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". Cf. also Hague Protocol, article XI (5): "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of judgements." The reply of the Federal Republic of Germany stated that the date of conversion of the franc Poincaré into national currencies should not be left to national courts, but should instead be prescribed in the Convention as the date on which a claim arises.

³⁹ The dominant rule appears to be that the carrier may validly stipulate in his bill of lading that his servants and agents shall have the benefit of the limitation of liability (as well as the other provisions of the contract of carriage). However, in order to be effective, such a stipulation must state very clearly the carrier's intention to extend the limitation provision. See *Bernard Screen Printing v. Meyer Line*, 1971 A.M.C. 1887; cf. *Cabot Corporation v. S.S. Mormacswan*, 1971 A.M.C. 1130. See also U.S.A., *Robert C. Herd and Co. v. Krowill Machinery Corp.* (1959 A.M.C. 879; 79 S. Ct. 766; 359 U.S. 297; France: 1959 D.M.F. 587; C.A. Aix 18.3.1958. U.K.: *Midlands Silicones Ltd. v. Scruttons Ltd.* [1959] 1 Lloyd's Rep. 289, QB [1960] 1 Lloyd's Rep. 571 C.A. Australia: *Wilson v. Darling Island Stevedoring Company* [1956] 1 Lloyd's Rep. 346. See generally, Selvig, *Unit Limitation*, op. cit., 157 et seq.

⁴⁰ Cf. Article 25A (1) of the Warsaw Convention (added by article XIV (1) of the Hague Protocol), which extends the limitation of liability provision to a servant or agent "if he proves that he acted within the scope of his employment...".

"3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention."⁴¹

This provision is retained in the proposed limitation of liability rule, set out *infra* at paragraph 59.

50. While the provision quoted above would add a useful clarification, it may be possible as a drafting matter to include servants and agents in the principal limitation rule, so that a separate rule for servants and agents would be unnecessary. Thus the basic limitation rule might state as follows:

"... Neither the carrier or his servants and agents nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding...".

This drafting suggestion is incorporated in the proposal for a rounded limitation of liability rule, set out at paragraph 59 below. Should this method of drafting be adopted, it might be useful to retain article 3 (3) of the Brussels Protocol, quoted above, as a separate provision. This is done in the above-mentioned proposal.

3. Effect of wilfully or recklessly caused loss or damage

51. Uncertainties have arisen concerning the effect of extreme negligence or wilful misconduct of the carrier, his servants or agents on the limitation of liability provisions of article 4 (5).⁴² The Brussels Protocol contains rules with respect to loss or damage caused recklessly or wilfully. Articles 2 (e) and 3 (4) of the Protocol provide:

"2 (e) — Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result."⁴³

"..."

"3 (4) ... a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent

⁴¹ Article 25A (2) of the Warsaw Convention contains the same rule.

⁴² These uncertainties have centred around the question of whether the words "in any event" should give carriers the right to limit their liability even in cases involving wilful or reckless conduct.

⁴³ Article 25 of the Warsaw Convention deprives the carrier of the right to limit his liability if damage is caused by his "wilful misconduct" or that of an agent acting within the scope of his employment. This provision is amended by article XIII of the Hague Protocol, which states that "the limitation of liability... shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". Article 29 of the CMR Convention uses the term "wilful misconduct". Article 37 of the CIM Convention provides that in cases of "wilful misconduct or gross negligence... full compensation shall be payable for the damage proved not exceeding twice" the maximum that would otherwise be payable under limitation rules.

to cause damage or recklessly and with knowledge that damage would probably result."⁴⁴

52. It will be noted that the above provisions distinguish between "an act or omission of the *carrier*" (article 2 (e)) and "an act or omission of the *servant or agent*" (article 3 (4)). Because of this distinction, it may be doubtful whether the limitation on the liability of the *carrier* would be applicable when damage is done intentionally by a *servant or agent*. As has been noted in the first report of the Secretary-General, a distinction between acts of "the carrier" and acts of its "servants and agents" is difficult to draw in the setting of modern business organizations, and appears to be inconsistent with current legal developments with respect to the responsibility of business entities. See first report of the Secretary-General (A/W.9/63/Add.1) * paras. 153-156, 163-166. The Working Group at its fourth session, in establishing affirmative, unified rules for the responsibility of the carrier, omitted provisions of the Hague Rules that draw a distinction between the "carrier" and his "servants or agents". Report on the fourth session, para. 28.

53. Under article 25 (2) of the Warsaw Convention, the carrier may not avail himself of various protective provisions, including those on limitation of liability, for specified wilful misconduct by "any agent of the carrier acting within the scope of his employment". Article XIII of the Hague Protocol to this Convention similarly removes the limits of liability for specified acts "of the carrier, his servants or agents". Under Article 29 (4) of the CMR Convention, the carrier may not avail himself of the provisions that exclude or limit his liability if wilful conduct or default "is committed by the agents or servants of the carrier or by any other persons of whose services he makes use for the performance of the carriage, when such agents, servants, or other persons are acting within the scope of their employment. Cf. Articles 37 and 40 of the CIM Convention.

54. The Convention governing the liability of ocean carriers would be brought into conformity with the approach of other transport conventions by the following draft, which combines Articles 2 (e) and 3 (4) of the Brussels Protocol (new language is italicized):

"Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier, *or of any of his servants or agents (within the course of his employment)*, done with intent to cause damage, or recklessly and with knowledge that damage would probably result. *Nor shall the servant or agent be entitled to the benefit of such provisions with respect to such an act or omission on his part.*"

* UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.

⁴⁴ Article 25 (a) (3) of the Warsaw Convention deprives servants and agents of the limitation rules "if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result". Article 29 (2) of the CMR Convention deprives servants and agents of the right to limit their personal liabilities if it is proved that damage was caused by their "wilful misconduct".

55. One reply to the Secretariat's questionnaire recommended an "unbreakable" limitation rule, which would apply regardless of the cause of the loss or damage.⁴⁵ An "unbreakable" limitation would avoid the litigation and uncertainty that result from claims that the act or omission resulting in damage was done intentionally or recklessly. However, it is probable that such a rule could only be considered in the context of a relatively high monetary limitation amount. If the Working Group should approve this approach, a draft provision could be formulated in a future report in connexion with discussion of specific monetary limitations.

4. *An over-all ceiling upon carriers' liability*

56. Under the "per kilo" rule in article 2 (a) of the Protocol, there is no upper limit upon the amount to which the maximum liability can rise in cases involving exceptionally heavy cargoes. The lack of such an over-all limit was discussed at the 1968 Diplomatic Conference, where several delegations submitted proposals designed to establish such a limitation.⁴⁶

57. These proposals eventually were rejected, however, principally on the grounds that they were unnecessary and redundant in view of the existence of the 1957 Convention on global limitation of liability,⁴⁷ and because they might unduly limit recoveries in some cases.⁴⁸

58. The decision of the 1968 Diplomatic Conference to reject proposals for an over-all upper limit to carrier's liability was in conformity with the approach of other

⁴⁵ See the reply of Norway to the questionnaire on bills of lading.

⁴⁶ See, for example, proposal of Denmark, Federal Republic of Germany, Japan and the Netherlands, in Diplomatic Conference on Maritime Law, XII Session, 2nd Phase, Brussels, 1968, *Verbatim Reports*, vol. 21-2, p. 104.

⁴⁷ International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, signed at Brussels on 10 October 1957. This Convention allows the carrier to limit his liability to frs. 1,000 for each ton of the ship's tonnage in cases of property claims (frs. 3,000 per ton for claims resulting from loss of life and personal injury), unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner. This Convention supplements, and is not replaced by, the Brussels Convention.

⁴⁸ At the 1968 Diplomatic Conference, Sir Kenneth Diplock, head of the British delegation and member of the drafting Committee on Protocol article 2 (a), made the following comments regarding an over-all ceiling on carriers' liability: "We did produce a draft which set out... ceilings... The scheme... was... too complicated to appeal to the majority of nations... and when the figure selected was the highest thought of, 200,000 francs, it became clear to those of us who voted against that proposal that it would cause injustice which might well make many nations refuse to adhere to the Convention. As a matter of arithmetic, at 30 francs per kilo the figure of 200,000 francs is reached at 6.6 tons. Already many containers carry 20 tons, and some carry over 30 tons. In the result, the amount of recovery of anyone with goods in a container not specifically enumerated as packages would depend upon the size of the container in which it happened to be placed. If it was a 6.6-ton container or less, he would get the full amount of 30 [francs per kilogram], if it was a 21-ton container he would only get one-third that amount. If it was a 33-ton container, he would only get one-fifth the amount... That does not seem to make good sense from the shipper's point of view, or indeed from that of the carrier." See *Verbatim Reports*, vol. 21-2, pp. 151-152.

major transport conventions, all of which establish much higher "per kilo" limitation amounts and do not specify such upper limits. It may also be noted the proposals were to set an upper limit "per package or unit", and this would give rise to the ambiguities discussed above in connexion with those terms.

5. *Summary of proposals for a complete limitation of liability rule*

59. The various provisions that may be necessary to present a rounded limitation of liability rule are set out below in the form of a draft text. Optional words are in parentheses.

Alternative provisions are presented for subparagraph (a):

(a) Alternative I

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier or his servants and agents, nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of — per (package or other) shipping unit or — per kilo of gross weight of the goods lost or damaged, whichever is the higher.

Alternative II

"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier or his servants and agents nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of — per kilo of gross weight of the goods lost or damaged."

(b) "A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case."

(c)⁴⁹ ("Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport plus the *article of transport itself* (when such article is supplied by the shipper) shall be deemed the number of packages or units for the purpose of this paragraph [as far as these packages or units are concerned], except as aforesaid such article of transport shall be considered the package or unit.")

(d) The declaration mentioned in subparagraph (a) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

(e) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that subparagraph.

(f) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier, or of any of his servants or agents (within the course of his employment), done with intent to cause damage, or recklessly and with knowledge that damage would probably result. Nor shall the servant or agent be entitled to the benefit of such provisions with respect to such an act or omission on his part.

(g) The aggregate of the amounts recoverable from the carrier, and from his servants and agents, shall in no case exceed the limit provided for in this Convention.

(h) Neither the carrier or his servants and agents nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

D. *Principles to consider in establishing a limitation amount*

60. Throughout this report the limitation amount has been left blank on the assumption that the question of specific amounts would be taken up at a future time. Nevertheless, the Working Group may wish to consider *principles* for establishing an appropriate limitation amount. This section indicates alternative principles for consideration by the Working Group.

1. *Restoration of the value of the original limitation amount in 1924*

61. The Brussels Convention established in 1924 a limitation amount of "100 pounds sterling" per package or unit. As was noted above,⁵⁰ the real value of that amount has been severely eroded by inflation during the intervening 49 years, so that the current value of "100 pounds sterling" is only a fraction of the 1924 value.⁵¹ It has been generally recognized that the Brussels Protocol's package or unit limitation amount of "frs. 10,000 Poincaré does not restore the original value of "100 pounds sterling".⁵² Accordingly, the Working Group may wish to consider whether restoration of the 1924 value of 100 pounds sterling would be a suitable principle for establishing a new limitation amount.

⁵⁰ See para. 5 above.

⁵¹ See foot-note 7 above.

⁵² The chairman of the Working Party on Limitation of Liability at the 1968 Diplomatic Conference conceded that frs. 10,000 "... is 20 or 25 per cent lower than the 100 pounds in gold adopted in 1924, but it is certainly an appreciable improvement on the level to which the limit has in fact fallen in the different countries." *Conférence Diplomatique de Droit Maritime*, op. cit., 1967, p. 716.

⁴⁹ This provision appears in parentheses because it would be unnecessary if a limitation rule based only on weight—as is suggested in alternative II under (a) above—should be adopted.

2. Comparison with other transport conventions

62. A comparison of the limitation amounts in other major transport conventions would appear to furnish useful guidance. Such a comparison reveals that the Brussels Protocol's "per kilo" limitation amount is much lower than the "per kilo" limitation amounts of other transport conventions, as illustrated in the following table:

TABLE I

Convention	Limitation (frs. per kg.)	Percentage of Brussels Protocol amount
Brussels Protocol	30	100
Warsaw Convention ^a	250	833
CIM Convention ^b	496	1,650
CIM Convention, Draft Revision ^c	238	825
CMR Convention ^d	123	414

^a Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929, 137 League of Nations, Treaty Series 11, Article 22. There are certain qualifications and exceptions to the basic rules of all Conventions quoted herein.

^b International Convention Concerning the Carriage of Goods by Rail (CIM), signed at Berne, 25 October 1952, United Nations, Treaty Series, vol. 241, article 31, p. 427. The actual amount stated in article 31 is "100 francs per kilogramme", but the franc is defined in article 56 as "the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". This monetary unit, sometimes called the "Franc Germinal", is approximately five times as valuable as the Franc Poincaré. To facilitate comparison, the CIM limitation amount of frs. 100 "Germinal" has been converted into Francs Poincaré in table I above. See also Protocol of 25 February 1961 and Protocol A of 29 April 1964, article 31.

^c Draft amendments to the CIM Convention were adopted 7 February 1970 at the 7th Conference for Revision of the CIM Convention, held in Berne. See Office central des transports internationaux par chemin de fer, Berne, "Rapport de Gestion", 1970, p. 6. One of these amendments reduces the limitation amount from 100 to 500 francs "Germinal". The amendments drafted in 1970 have not yet come into force.

^d Convention on the Contract for the International Carriage of Goods by Road (CMR), signed at Geneva, 19 May 1956, United Nations, Treaty Series, vol. 399, article 23, p. 210. Article 23 actually states a limitation amount of "25 francs per kilogram" but, like article 56 of the CIM Convention (see note 3 above), defines the franc as "the gold franc weighing $\frac{10}{31}$ of a gramme and being of millesimal fineness 900". As was done with the CIM Convention, the CMR limitation amount of 25 francs "Germinal" has been converted into francs Poincaré in the above table, in order to facilitate comparison.

APPENDIX I

Limitation amounts "per package or unit"
in selected countries

Country	Limitation amount	Official equivalent in £ sterling	Rounded equivalent in US \$
Australia ^a	\$400 Australian	47	122
Belgium	17,500 Belgian francs	150	370
Canada	\$500 Canadian	192	500
Denmark	1,800 Danish kroner	99	257
Finland ^b	600 new Finnish marks	56	146
France	2,000 francs	150	390
Federal Republic of Germany	1,250 DM	149	388
Greece	8,000 drachmas	102	264
Ireland	£100	101	261
Italy	200,000 lire	131	340
Japan	100,000 yen	123	230
Netherlands	1,250 florins	148	385
Norway	1,800 Norwegian kroner	104	270
Portugal	12,500 escudos	138	359
Spain	5,000 pesetas	31	80
Sweden	1,800 Swedish kronor	145	378
Switzerland	2,000 Swiss francs	203	528
United Kingdom ^c	£100	100	260
United States	\$500	192	500
USSR ^d	250 roubles	115	300

SOURCE OF EXCHANGE RATES: International Monetary Fund, *International Financial Statistics*, May 1972, p. 6.

^a The Secretary-General has been advised that in 1957 an agreement was entered into in Australia between the major shipholders, insurers and shippers whereby the limitation amount was increased from £100 Australian to £200 Australian currency (now \$400 Australian).

^b For claimants domiciled in a foreign State, the limitation amount is 18,000 old Finnish marks in gold (about 1,800 new Finnish marks) if there is a reciprocal agreement between Finland and the foreign State in question that this higher limit will apply as between vessels belonging to the respective States.

^c British cargo interests, shipowners and insurers concluded in 1950 an agreement that the limitation amount be increased to £200 "lawful money" (British Maritime Law Association Agreement of 1950—popularly known as the "Gold Clause Agreement"). This agreement governs all disputes arising between parties to it, provided that such disputes are heard in the United Kingdom.

^d Crédit Suisse, *Bulletin*, April/May 1972, p. 31.

APPENDIX II

Texts of article 4 (5) of the 1924 Brussels Convention and
articles 2 and 3 of the 1968 Brussels Protocol

A. *International Convention for the Unification of certain Rules of Law relating to Bills of Lading, signed at Brussels on 26 August 1924*

4 (5) "Neither the carrier nor the ship shall in any event by or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

"This declaration, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

"By agreement between the carrier, master or agent of the carrier and the shipper, another maximum amount than that mentioned in this paragraph may be fixed provided that such maximum shall not be less than the figure above named.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading."

B. *Protocol to amend the International Convention for the unification of certain rules of law relating to bills of lading, signed at Brussels on 25 August 1924*

Article 2. Article 4, paragraph 5 shall be deleted and replaced by the following:

(a) Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the Bill of Lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with the goods in an amount exceeding the equivalent of frs. 10,000 per package or unit or frs. 30 per kilo of gross weight of the goods lost or damaged, whichever is the higher.

(b) The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.

The value of the goods shall be fixed according to the commodity exchange price, or, if there be no such price, according to the current market price, or, if there be no commodity exchange price or current market price, by reference to the normal value of goods of the same kind and quality.

(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of package or units for the purpose of this paragraph as far as these packages or units

are concerned, except as aforesaid such article transport shall be considered the package or unit.

(d) A franc means a unit consisting of 67.5 milligrammes of gold of millesimal fineness 900. The date of conversion of the sum awarded into national currencies shall be governed by the law of the Court seized of the case.

(e) Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.

(f) The declaration mentioned in subparagraph (a) of this paragraph, if embodied in the bill of lading, shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

(g) By agreement between the carrier, master or agent of the carrier and the shipper other maximum amounts than those mentioned in subparagraph (a) of this paragraph may be fixed, provided that no maximum amount so fixed shall be less than the appropriate maximum mentioned in that subparagraph.

(h) Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading.

Article 3. Between articles 4 and 5 of the Convention shall be inserted the following article 4 bis:

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor), such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier, and such servants and agents, shall in no case exceed the limit provided for in this Convention.

4. Nevertheless, a servant or agent of the carrier shall not be entitled to avail himself of the provisions of this article, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

PART TWO: TRANS-SHIPMENT

A. *Introduction: types of bills of lading*

1. As has been noted in the general introduction to this report, the topics selected for examination by the Commission included the use of "trans-shipment" clauses in bills of lading.

2. "Trans-shipment" takes place when, during the transport of goods under a contract of carriage the carrier who contracted with the shipper (herein termed the "contracting carrier") transfers the goods to another carrier (herein termed the "on-carrier", or "successive carrier"). Trans-shipment may occur in various settings; it is important to distinguish between two different types of trans-shipment provisions.

3. The first type (often called a "through bill of lading") states a "Port of Discharge" at which it is specifically agreed that trans-shipment shall take place. For example,

a consignor in Bombay who is sending goods to Tokyo may make a contract with a contracting carrier to carry goods in his vessel to Sydney, and at Sydney to trans-ship the goods with an on-carrier for the voyage from Sydney to Tokyo. Under such an arrangement, the face of the Bill of Lading would be filled in as follows: "Vessel: S.S. *Alicia*; Port of Loading: *Bombay*; Port of Discharge: *Sydney*; Final Destination: *Tokyo*."

4. Included among the printed provisions on the back of the bill of lading may be language such as the following:

"Whether expressly agreed beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessels either belonging to the carrier or other.... When the ultimate destination at which the Carrier may have engaged to deliver the goods is other than the vessel's

port of discharge, the Carrier acts as Forwarding Agent only.

"The responsibility of the carrier shall be limited to the part of the transport performed by him on vessels under his management and no claim will be acknowledged by the Carrier for damage or loss arising during any other part of the transport even though the freight for the whole transport has been collected by him."¹

5. The significant feature of the above bill of lading is that the transfer of responsibility for carriage from the contracting carrier to an on-carrier at an intermediate point (e.g. at Sydney) was specifically provided for in the contract of carriage. It will be noted that the bill of lading provided that in connexion with this transfer of responsibility the contracting carrier acts only as agents for the owner of the goods in arranging for the forwarding of the goods. According to a leading authority in such a case "it appears that the port of discharge for trans-shipment must be considered as an alternative port of discharge under the contract; thenceforward the contract of carriage covered by the bill of lading, it is submitted, terminates and the Hague Rules cease to apply to the carrier who has been a party to it".²

6. The second type of bill of lading does not designate an intermediate port of discharge. For example, in a shipment of goods from Bombay to Tokyo, the blanks on the front of the bill of lading would be filled in as follows: "Vessel: *S.S. Alicia*; Port of loading: *Bombay*; Port of Discharge: *Tokyo*".

7. However, the terms of carriage set out on the back of the bill of lading usually include a clause to the effect that the carrier is entitled to trans-ship the goods. For example, the CONLINE bill of lading provides in section 6:

"whether expressly arranged beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by the said or other vessel or vessels either belonging to the carrier or other, or by other means of transport, proceeding either directly or indirectly to such port and to carry the goods or part of them beyond their port of destination, and to trans-ship, land and store the goods either on shore or afloat and re-ship and forward the same at the carrier's expense but at the merchant's risk".³

8. Many bills of lading also contain language, usually within the clause authorizing trans-shipment, to the effect that the contracting carrier and each on-

carrier is liable for loss or damage to the goods only while the goods are in his hands. There are a number of variations of this type of clause. The CONLINE bill includes the following:

"... The responsibility of the carrier shall be limited to the part of the transport performed in his own vessel or vessels, and the carrier shall not be liable for damage and/or loss arising during any other part of the transport, even though the freight for the whole transport has been collected by him" (Section 6).

9. A similar objective is reflected in clauses stating that the cargo is deemed to be delivered when the cargo leaves the contracting carrier's ship. An example of such a clause is the following:

"All responsibility of the carrier in any capacity shall altogether cease and the goods shall be deemed delivered by it under this bill of lading and this contract of carriage be deemed fully performed on actual or constructive delivery of the goods for any such person or on-carrier at port of discharge or elsewhere in case of an earlier substitution, trans-shipment or on-carriage."⁴

10. On the other hand, under at least one standard form bill of lading the contracting carrier expressly assumes liability for on-carriage under the following language:

"The goods or part thereof may be carried by the named or other vessels, whether belonging to the Line or others, and should circumstances in the opinion of the carrier, Master or Agent render trans-shipment desirable or expedient may be trans-shipped at any port or ports, place or places whatsoever, and while in course of trans-shipment may be placed or stored in craft or ashore and may be re-shipped or forwarded or returned by land and/or air at carrier's option and expense, all as part of the contract voyage and all provisions of this Bill of Lading shall continue to apply."⁵

B. Law and practice applicable to trans-shipment clauses

11. There is at present no international legislation addressed directly to trans-shipment by ocean carriers. In the absence of specific provision in the Brussels Convention of 1924, recourse might be made in some situations to the general requirement in article 3 (2) that the carrier "shall properly and carefully... carry, keep, care for and discharge the goods carried", as buttressed by the provision of article 3 (8) nullifying contractual provisions that purport to reduce the liability of the carrier as set forth in the Convention. However, it does not appear that these provisions are used in any consistent manner to regulate trans-shipment by carriers under the typical trans-shipment clauses in bills of lading.

¹ CONLINE-THRU BILL, Liner terms approved by the Baltic and International Maritime Conference. UNCTAD Secretariat Report on Bills of Lading (TD/B/C.4/ISL/6/Rev.1), annex III, part B at section 6.

² Carver, *Carriage by Sea* (12th ed., 1971), pp. 276, 277.

³ Here and elsewhere, unless otherwise noted, emphasis has been supplied. The standard trans-shipment clauses are summarized in the reply of Australia to the questionnaire at para. 9. Connected portions of the Conline bill of lading were quoted at para. 4, above. See UNCTAD Secretariat Report on Bills of Lading, op. cit. above, note 1.

⁴ Gronfors, *On-Carriage in Swedish Maritime Law*, in *Six Lectures on the Hague Rules* (Gronfors, ed., 1967), p. 52.

⁵ Transatlantic, *Australian Homeward B/L 3 (d)* (emphasis added). See Gronfors, *ibid.*, at p. 52. The approach of this standard bill of lading is specifically favoured in the Czechoslovakian reply to the questionnaire. This approach is reflected in draft proposals in part G, below.

12. Consequently it is generally assumed that trans-shipment clauses will be given effect to limit the carrier's responsibility to the part of the contract voyage during which the goods were on his vessel and before the trans-shipment of the goods to an on-carrier.⁶

13. Under existing practice when trans-shipment takes place the on-carrier either issues a bill of lading or gives the contracting carrier a clean receipt for the goods.⁷ Usually the on-carrier issues its own bills of lading. A number of standard trans-shipment clauses, such as may be found in the ALAMAR and in the P and I standard bills of lading, specifically provide that upon trans-shipment the bill of lading of the contracting carrier shall cease to be effective and shall be replaced for the remaining portion of the carriage by that of the on-carrier. However, it is uncertain whether provisions in the on-carrier's bill of lading, which differ from the original bill of lading and which may operate to the detriment of the cargo owner, supersede the provisions of the original bill of lading. Such provisions of the bill of lading could include the clauses on choice of forum and the monetary amount applicable in determining the limitation of liability. An essential issue on which there appears to be no consistent practice is whether the convention remains applicable to the entire voyage or whether the application of the Convention is decided on the basis of the law applicable to each bill of lading issued during the carriage.⁸

14. The question of the responsibility for the transfer by lighter, or otherwise, from the ship of one carrier to the ship of the other and for storage ashore or on board a vessel until the on-carrier takes the goods aboard his vessel, does not appear to have been settled in practice.⁹ In this connexion, some bills of lading simply state that the responsibility of the carrier shall be limited to the portion of the carriage performed in his vessels (CONLINE Bill of Lading). Under the present convention, it could be argued that under article 1 (e) the carrier's responsibility continues only until the goods are discharged from his ship, and that under article 7 the carrier could make any agreement "prior to the loading on, and subsequent to the discharge from the ship on which the goods are carried by sea". Other bills of lading, such as the P and I standard bill of lading, are more explicit in providing that during the trans-ship-

ment the cargo owner shall bear the risk of loss or damage and that in addition he shall bear the cost of storage during the trans-shipment.¹⁰

C. Problems arising under present law and practice

15. Trans-shipment clauses respond to the interest of carriers: (1) to permit maximum flexibility with respect to the routing of their vessels and (2) to limit as narrowly as possible the period during which the carrier would be responsible for damage or loss to the goods.

16. On the other hand, the extent to which bills of lading respond to the above interests create problems for the cargo owner.¹¹

17. Under present practice, when the bill of lading contains a typical trans-shipment clause, the cargo owner can only recover from the carrier in whose hands the goods were when the damage or loss occurred. However, the cargo owner often does not know where the loss or damage occurred. In this situation, it has been suggested, he should bring actions against all the carriers involved in the carriage. Otherwise he will have to bring action against each carrier until responsibility is established.¹²

18. The cargo owner is also left with uncertainty with regard to loss or damage that may be claimed to have occurred during the trans-shipment of the goods from one carrier to another. Under existing clauses, the cargo owner may be forced to bring his claim against the owners of lighters, port authorities, and warehouse operations in the port of trans-shipment. The port of trans-shipment may be far from the cargo owner and ordinarily will have had no direct contact with, and may not even know, the parties involved in the trans-shipment.

19. As has been noted, it is not clear whether the provisions of an on-carrier's bill of lading supersede the original bill of lading. The cargo owner is not certain as to what law will be applied to regulate the on-carriage. The on-carriage bill of lading may be issued in a state which is not party to the Convention. In this event, provisions in the initial bill of lading stating that the contract of carriage ends on trans-shipment may lead to the conclusion that the "new" contract of carriage is not governed by the Convention.

D. Provisions of conventions governing carriage by air, road and rail

20. In considering legislative provisions to deal with the problems presented by trans-shipment, the following basic questions call for attention:

(a) To what point should the contracting carriage be responsible under the contract of carriage?

⁶ Scrutton on Charter Parties (17th ed.), p. 418 states that a liberty to trans-ship does not come within the prohibition of article 3 (8) of the Hague Rules "seemingly provided that trans-shipment is reasonable and not inconsistent with proper carriage". Scrutton cites the English case of *Marcellino Gonzalez y Compania v. James Nourse Limited* (1936) 1 K. B. 565 for this proposition. It would appear that the problems relating to the validity of the trans-shipment clause are closely related to the most common adverse effect of trans-shipment, that is to say economic loss to the cargo owner due to delay.

⁷ Tetley, *Marine Cargo Claims* (1965), p. 255.

⁸ Knauth, *Ocean Bills of Lading* at pp. 229-230.

⁹ See Powers, *A Practical Guide to Bills of Lading* (1966), 87. In the leading case in the United States, however, "The Lighter Sydney", 114 F. 2d 72, the court relying on the Harter Act stated "the shipper had been issued a through bill of lading and after doing this the main carriers could not contract against their liability during transshipment".

¹⁰ See annex III to the UNCTAD Secretariat Report on Bills of Lading.

¹¹ See the replies to the questionnaire from Australia, Austria, Chile, Czechoslovakia, Denmark, Federal Republic of Germany, Iraq, Khmer Republic, Sweden and Turkey.

¹² Tetley, *op. cit.* above, pp. 255-257.

(b) Should the on-carrier (more particularly, the final or "delivering" carrier) be responsible for loss or damage occurring prior to transshipment to him? Or should he be responsible only for loss or damage occurring during his leg of the carriage?

(c) Should the on-carrier's responsibility be governed by the terms of the initial contract of carriage and by the Convention?

21. Legislative solutions to these (and related) problems appear in international conventions applicable to carriage by air, by rail and by road. In these conventions, various problems are dealt with in one article, or in related articles that need to be read as a unit. Hence, the provisions of each convention dealing with this group of problems will be set forth below. Thereafter, separate attention will be given to each issue.

1. Carriage by air: the Warsaw Convention

22. The Convention for the implication of certain Rules relating to International Transportation by Air, 1929 (The Warsaw Convention)¹³ provides in article 1 (3):

"A carriage to be performed by several successive air carriers is deemed, for the purpose of this Convention, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts..."

23. Article 30 of this Convention deals with the right of action with respect to passengers, luggage or goods "in the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1..." (quoted above). Paragraph 1 of this article continues that in the case of such carriage:

"... each carrier who accepts passengers, luggage or goods is subject to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision".

24. With respect to responsibility for goods (as contrasted with passengers), a broader rule of responsibility is set forth in paragraph 3 of article 30, which provides:¹⁴

"3. As regards... goods, the... consignor will have a right of action against the first carrier and the... consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss damage or delay took place. These carriers will be jointly and severally liable to... the consignor or consignee."

2. Carriage by road: the CMR Convention

25. The Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)¹⁵ includes the following:

Article 34: "If carriage governed by a single contract is performed by successive road carriers, each of them shall be responsible for the performance of the whole operation, the second carrier and each succeeding carrier becoming a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note."

Article 36: "Except in the case of a counter-claim or a set-off raised in an action concerning a claim based on the same contract of carriage, legal proceedings in respect of liability for loss, damage or delay may only be brought against the first carrier, the last carrier or the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred; an action may be brought at the same time against several of these carriers."

3. Carriage by rail: CIM Convention

26. The International Convention concerning the Carriage of Goods by rail (CIM) 1952 (CIM Convention)¹⁶ includes the following:

"Article 26. Collective responsibility of railways"

"1. The railway which has accepted goods for carriage with the consignment note shall be responsible for 'ensuring that carriage is effected' over the entire route up to delivery.

"2. Each succeeding railway, by the act of taking over the goods with the original consignment note, shall participate in the performance of the contract of carriage in accordance with the terms of that document, and shall be subject to the resulting obligations..."

Article 43: Railways against whom an action may be brought. Jurisdiction

[Paragraphs 1 and 2 deal with action to recover sums paid under the contract of carriage and actions in respect of 'cash on delivery' charges.]

"3. Other actions arising from the contract of carriage may only be brought against the forwarding railway, the railway of destination or the railway on which the cause of action arose..."

E. Responsibility of the contracting carrier

27. It will have been noted that the conventions governing carriage by air, road and rail hold the first (i.e. the contracting) carrier responsible for the carriage to the point of destination, even though parts of such

¹³ League of Nations, *Treaty Series*, vol. CXXXVII, p. 13.

¹⁴ Article 30 (3) applies the same rules to goods and to the luggage of a passenger. The references to luggage are omitted in the quotation of article 30 (3).

¹⁵ United Nations, *Treaty Series*, vol. 399, No. 5742.

¹⁶ United Nations, *Treaty Series*, vol. 241, No. 3442.

carriage may be performed by other carriers.¹⁷ Under the Warsaw Convention (article 1 (3)), even if the parties contract for air carriage "under the form of... a series of contracts", the contract is deemed to be one undivided carriage "if it has been regarded by the parties as a single operation". By virtue of article 30 (3), as regards carriage of goods, the consignor apparently can hold the first carrier responsible for loss or damage during carriage by the succeeding carriers.

28. Under the Road (CMR) Convention (article 34) if "carriage governed by a single contract is performed by successive road carriers" each carrier "shall be responsible for the performance of the whole operation". And under article 36, the first carrier is responsible not only to the consignor (as in the Warsaw Convention), but also to the consignee.¹⁸

29. Similarly, under article 26 or the Rail (CIM) Convention: "The railway which has accepted goods for carriage with the consignment note shall be responsible for ensuring that carriage is effected over the entire route up to delivery."

30. Making the first (or "contracting") carrier legally responsible to the shipper for loss or damage caused by an on-carrier does not, of course, mean that the contracting carrier will bear this loss. If the on-carrier caused the loss, he would be legally bound to indemnify the contracting carrier. And if a claim which is pressed against the contracting carrier reaches litigation, it would be normal for the contracting carrier to invite the on-carrier to assume the defence of the action.¹⁹

31. Consequently the issue is not who should bear the loss. Rather, the issue is establishing the most efficient mechanism to assure that the party who caused the loss should reimburse the cargo owner. In many cases the cargo owner cannot readily ascertain which of successive carriers was responsible for the loss.²⁰ Indeed, the question may be in dispute among the carriers. The carriers are normally in a better position to deal

with this question than is the cargo owner. The conventions governing carriage by air, road and rail reflect the view that it is more efficient for such questions to be settled among the carriers than to force the cargo owner to choose between (1) bringing simultaneous actions against different defendants²¹ and (2) running the risk that an initial action will fail on the ground that the wrong carrier was selected—possibly at a late date when evidence has become stale or the period of limitations has expired.

F. Responsibility of the on-carrier; The delivering carrier

32. It will be noted that the conventions governing carriage by air, road and rail also make "the last carrier" responsible to the cargo owner for loss or damage (to goods) even though this loss or damage may not have occurred during his leg of the transport.²²

33. The underlying considerations are similar to those applicable to the responsibility of the initial (or contracting) carrier. In both situations, the issue is establishing the most efficient mechanism for transferring the loss to the carrier who is at fault. The last, or delivering, carrier in many cases stands in a particularly important spot in the chain of responsibility. Damage to goods usually comes to light only then the goods arrive destination and are examined by the consignee. When trans-shipment occurs, it is more likely that the port of delivery is a regular port-of-call for the final carrier than for the initial (contracting) carrier. In such situations, it would be more feasible for the consignee to press a claim (and, if necessary, institute action) against the delivering carrier than against the initial carrier or against an intermediate carrier.

34. The three transport conventions also provide that the rules of the convention remain in force until the point of delivery to the consignee. These conventions also provide that on-carriers take over the contract of carriage under the terms of the contract between the consignor and the contracting carrier. Thus, under article 30 (1) of the Warsaw Convention (quoted above in paragraphs 23), "each carrier who accepts goods... is deemed to be one of the contracting parties to the contract of carriage...". Under article 34 of the Road (CMR) Convention (quoted above in paragraph 25) each succeeding carrier becomes "a party to the contract of carriage, under the terms of the consignment note, by reason of his acceptance of the goods and the consignment note". A similar rule is established by article 26 (2) of the Rail (CIM) Convention (quoted above in paragraph 26).

¹⁷ Subject to minor exceptions the conventions do not regulate carriage by different types of transit. Thus, the Warsaw Convention deals with successive air carriers.

¹⁸ This provision would be relevant if the consignee chooses not to rely exclusively on the liability which the convention also imposes on "the last carrier" and on "the carrier who was performing that portion of the carriage during which the event causing the loss, damage or delay occurred".

¹⁹ The reply to the questionnaire by the International Union of Marine Insurance notes that the existence of a trans-shipment clause in the bill of lading has no effect on the rating of the cargo insurance and generally is not known to the cargo insurer. It is further noted that such a clause may influence the possibility of recourse action by the marine insurer against the carrier. However, as recoveries against carriers are performed only when negligence seems to be evident, and the amounts recovered represent only a very small portion of the claims paid, a trans-shipment clause has no major effect on the costs for cargo insurance. Compare the reply of Sweden, which suggests that trans-shipment practices affect the cost of insurance.

²⁰ The practical problems of securing redress from an on-carrier are discussed in the replies of Czechoslovakia and of the Khmer Republic.

²¹ Such are the vagaries of litigation that, at least in some legal systems, it is possible for the action against carrier A to fail on the ground that carrier B was responsible, and for the action against carrier B (usually in a different jurisdiction) to fail on the ground that the responsible party is carrier A.

²² Under article 30 (3) of the Warsaw Convention the last carrier is responsible to the "consignee who is entitled to delivery". No such limitation appears in article 36 of the Road (CMR) Convention or in article 43 (3) of the Rail (CIM) Convention.

G. Alternative draft provisions

1. Definition of "port of discharge"

35. Problems of trans-shipment under the Brussels Convention of 1924 could be dealt with in various ways. Indeed, the rules developed by the Working Group, at its third session, to regulate the period of the carrier's responsibility might overcome some of the problems presented by trans-shipment clauses.²³ Thus article 1 (e) on "carriage of goods" was revised to state:

"(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."

Paragraph (ii), as drafted by the Working Group, defined the point of delivery in a manner that might make it difficult to give effect to a trans-shipment clause.

36. However, the effect to be given trans-shipment clauses was not discussed by the Working Group at the third session, and it must be assumed that the revision of article 1 (e) does not embody a decision on this question. In any event, the problem of trans-shipment seems sufficiently important and complex to call for statutory provisions addressed specifically to this question.²⁴

37. It will be noted that "carriage of goods", under the above definition prepared by the Working Group, continues while the goods are in the charge of the carrier at the port of loading, during the carriage "and at the port of discharge". Trans-shipment clauses would raise the question whether transfer of the goods to an on-carrier makes the port where that transfer occurs the "port of discharge". Therefore, it might be advisable to supplement the revision of article 1 (e) with a provision addressed to this question.

Draft definition of "port of discharge" under article 1 (e)

Alternative A

The "port of discharge" is the port of final destination specified in the contract of carriage.

Alternative B

The "port of discharge" is the port specified in the contract of carriage for termination of the carrier's obligations under the contract.

38. Alternative A is intended to bring this part of the Convention into line with the policy of the other

transport conventions. Extending the contract of carriage to the "port of final destination specified in the contract of carriage" would continue the responsibility of the contracting carrier (and the applicability of the convention) even though the contract of carriage stated that at a specified intermediate port the carriage would be continued by a second carrier. (See the discussion of the through bill of lading at paragraphs 3-5, *supra*.) As has been indicated in part E (paragraphs 27-31), this is the result reached under other transport conventions.²⁵

39. Alternative B would allow the contracting carrier's responsibility to come to an end at an intermediate port which is "specified in the contract of carriage for termination of the carrier's obligation under the contract". However, since the intermediate port must be "specified in the contract", alternative B would not give effect to a general clause that the carrier could terminate his responsibility by delivering the goods to a second carrier at a point the carrier would choose.²⁶

40. An intermediate position, between that of Alternative A and Alternative B, is set forth in Alternative C, which follows. This draft takes account of the reply of the International Chamber of Shipping to the effect that legislation should not interfere with the contractual arrangement in through bills "since the shipper has full knowledge of the carriers who will ship his cargo". This reply contrasts bills of lading where there is a "named second carrier" with bills of lading where "the first carrier alone is named". For the latter situation, it was suggested that clarification of the carrier's responsibility might be considered. The second sentence in the following draft is addressed to this suggestion.

Alternative C

The "port of discharge" is the port of final destination specified in the contract of carriage. However a specified intermediate port shall be the port of discharge if the

²³ Report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

²⁴ Amendment of the Brussels Convention to limit the effectiveness of trans-shipment clauses is suggested in the replies to the questionnaire from Australia, Austria, Chile, Czechoslovakia, Denmark, Federal Republic of Germany, Iraq, Khmer Republic, Norway, Sweden and Turkey. The reply of the USSR outlines provisions which might be adopted if the Working Group considers it necessary to formulate provisions on this question in a draft convention. Such provisions include the following: (1) The trans-shipment must be advisable and necessary under the circumstances; (2) The carrier must notify the cargo-owner; (3) In the course of the trans-shipment, the carrier must take due care of the goods; (4) The carrier must exercise due care with respect to delivery of the goods to the port of destination as soon as possible.

²⁵ Responsibility for the contracting carrier until the goods reach the port of destination was suggested in the replies of Austria, Chile, Czechoslovakia, the Federal Republic of Germany, Iraq, and the Khmer Republic.

²⁶ The reply of Norway to the questionnaire describes draft legislation, prepared in consultation with other Nordic countries, which includes provisions implementing the principle that the contracting carrier shall be liable for performance of the entire carriage from the port of departure to the port of carriage as determined by the contract. It is noted that, as a consequence, the contracting carrier would be vicariously liable for any carrier whose services he makes use of in the performance of the carriage. This reply notes that other principles embodied in the draft legislation include the following: the contracting carrier shall not be entitled to exempt himself from liability for loss or damage occurring while the goods are in the custody of another carrier except in cases where the parties have expressly agreed, or based their contract on the apparent assumption, that the carriage for the whole or a specified part shall be performed by another carrier. See also the reply of Sweden.

The draft provision of alternative B appears similar to this latter principle. However, the draft does not contain language based on circumstances in which the parties have based their contract on the "apparent assumption" that all or part of the carriage would be performed by another carrier. In the absence of the text of the draft legislation discussed in the Norwegian reply, it has been difficult to ascertain what language could express this thought with the requisite clarity.

contract of carriage provides for delivery of the goods at that port to a named carrier.

2. *Draft provisions on responsibility of initial and successive carriers.*

41. Clarifying the term "port of discharge" would not dispose of all the problems that arise on trans-shipment. It may therefore be advisable to consider draft provisions addressed directly to the responsibility of the first and succeeding carriers.

Alternative D

If the contract of carriage is performed by more than one carrier, the first carrier [and the last carrier] shall be responsible to the owner of the goods for performance of the contract of carriage. Any [intermediate] [succeeding] carrier shall be responsible for performance of that part of the contract of carriage undertaken by him.

42. The above draft is intended to embody the substance of the rules on responsibility set forth in article 36 of the road (CMR) Convention (quoted in paragraph 25) and in article 43 (3) of the Rail (CIM) Convention

(quoted in paragraph 26). Considerations that underlie the approach of these conventions have been summarized in Part E (paras. 27-31) and Part F (paras. 32-34) of this study. The provision that the first (contracting) carrier "shall be responsible to the owner of the goods for performance of the contract of carriage" is designed to implement the suggestion made in replies to the questionnaire, that the contracting carrier should be vicariously for any other carrier whose services are employed in the performance of the carriage.²⁷

43. Conformity with the approach of the other transport conventions would call for retention in the first sentence of the bracketed words "[and the last carrier]" and for the retention in the second sentence of the bracketed word "[intermediate]" rather than "succeeding". On the other hand, if the last carrier is not to be given the same responsibility as the contracting carrier, the bracketed words "[and the last carrier]" in the first sentence should be deleted; in the second sentence the bracketed word "[intermediate]" should be deleted and the word "succeeding" retained in its place.

²⁷ See the replies summarized in foot-notes 25 and 26, above

PART THREE: DEVIATION

A. INTRODUCTION

1. This part of the report responds to the request of the Working Group to consider the problems arising from the present formulation of the rule on deviation in the Brussels Convention of 1924.¹ Article 4 (4) of the Convention reads as follows:

"4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."

2. Criticism has been levelled at this provision of the Convention for not setting forth an adequate definition of deviation, the limits within which deviation is justified and the consequences of unjustified deviation. Various solutions to remedy the defects of the present text have been proposed by many of the Governments who have replied to the questionnaire on bills of lading. Other Governments have indicated their dissatisfaction with one or other parts of article 4 (4) of the Convention. The alternative approaches that have been suggested for dealing with deviation will be set out in this report, together with alternative proposals for modifying the present rules on the subject.

B. *The "deviation" provision of the convention in the setting of the structure of the convention and customary provisions of the contract of carriage*

3. The relationship between the provision on "deviation" and the other rules of the Convention is complex. The consideration in this study of proposals for modification of article 4 (4) may be aided by a brief introduction to typical commercial and legal settings which bring article 4 (4) into play.

4. This provision, of course, becomes relevant only in the setting of a claim to a cargo owner that he has suffered loss or damage because of breach by the carrier of the contract of carriage or of the rules of the Convention. For example, the goods may have arrived in a damaged condition because of delays in transit that caused spoilage of the goods or caused economic loss because the goods were not available to meet the consignee's economic needs or to fulfil his contractual obligations. In such a case, the consignee's claim may be based on breach by the carrier of his obligation under article 3 (2) to "properly and carefully . . . carry [and] care for . . . the goods . . .". Or the claim might be based on breach by the carrier of an express or (more likely) an implied undertaking in the contract as to the time for delivery. In response to these claims, the carrier might show that the delay resulted from a "reasonable deviation" which under article 4 (4) "shall not be deemed to be an infringement or breach of the convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom".

¹ See the general introduction to this report at para. 2.

5. In other cases, the deviation may result in loss or damage because the ship may have run aground, or encountered a severe storm.

6. In still other cases, the goods may not be carried to the destination stated in the contract of carriage, but instead may be unloaded at an intermediate port. The delay while further transportation is found may cause the goods to spoil or deteriorate; or the consignee may be required to pay added expenses for storage at the intermediate port, or for transportation to the agreed destination. In such cases, also, the carrier may assert that delivery at a port other than the agreed destination was a "reasonable deviation" under article 4 (4) so that the carrier "shall not be liable for any loss or damage resulting therefrom".

7. Attempts to apply the concept of "deviation" face this basic difficulty: the contract of carriage usually specifies neither the route the ship shall follow nor the date of arrival. Instead, any undertaking by the carrier as to the route often must be based on customary practices for the ship or of the line—and in the setting of liner carriage such practices may include considerable flexibility as to routing.

8. In the consideration of proposals with respect to the "deviation" provisions of article 4 (4) it will also be helpful to bear in mind certain of the decisions reached by the Working Group at its fourth session (25 September-6 October 1972). At this session the Working Group decided that the 1924 Brussels Convention should be revised to state an affirmative rule of responsibility based on fault, and a unified rule on burden of proof. Both principles were embodied in the first subparagraph of the draft text, prepared by the Drafting Party and approved in substance by most members of the Working Group:²

"1. The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences."

9. The Drafting Party also concluded that under the unified rule on responsibility and burden of proof, it would not be necessary to retain the "catalogue of exceptions", contained in the 14 paragraphs (c) through (p), which attempted to list circumstances in which the carrier would not be responsible. However, the Drafting Party recommended that paragraph (1) in this list, "saving or attempting to save life or property at sea", be "considered at the February 1973 session, in connexion with the consideration of deviation under article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea".³

C. The present legal rules and practice on deviation

10. The present legal rules on deviation are derived from the case law of the national courts, article 4 (4) of the Convention and, in the case of certain countries, from national legislation, which either modifies article 4 (4) of the Convention or uses another approach to deal with deviation. In practice the drafters of bills of lading include clauses whose purpose is to reduce or even remove the possibility that the rules on deviation will be applied by defining the contractual route as widely as possible. These clauses will be considered below in connexion with the definition of deviation.

1. Definition of deviation

11. Deviation has generally been defined as a departure from the expected route for the voyage not provided for either by the contract of carriage or by trade customs. According to a leading textbook on the subject "in the absence of express stipulations to the contrary, the owner of a vessel, whether a liner or general ship or a ship chartered for a particular voyage, impliedly undertakes to proceed in that ship by a usual and reasonable route without unjustifiable departure from that route and without unreasonable delay. *Prima facie* the route is the direct geographical route; but evidence is admissible to prove what route is usual and reasonable for the particular ship at the material time, provided that it does not involve any inconsistency with the express words of the contract. A route may be a usual and reasonable route though followed only by ships of a particular line and though recently adopted."⁴

12. Bills of lading generally contain a clause variously called a "scope of voyage" or "deviation", clause whose purpose is to define the scope of the voyage sufficiently widely so that although the ship may depart from the direct or usual route, such a departure will be considered a part of the contractual route and therefore not a deviation. Such a "scope of the voyage clause" is set forth in Section 5 of the CONLINE Bill of Lading, which provides:

"the contract is for liner service and the voyage herein undertaken shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical, usual or ordinary route or order, even though in proceeding, thereto, the vessel may sail beyond the port of discharge or in a direction contrary thereto or depart from the direct or customary route. The vessel may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The vessel may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once; (it) may, either with or without the goods

² Report on fourth session (A/CN.9/74, reproduced in this volume, part two, IV, 1, above), paras. 28, 36.

³ *Ibid.*, para. 28 (b). See also paras. 23-25, 30. As to approval by the Working Group see para. 36.

⁴ Scrutton on Charter parties and Bills of Lading, 17th ed. (1964), p. 259. See Gilmore and Black, *The Law of Admiralty* (1957), p. 156; Katsigeras, *Le Déroutement en Droit Maritime Comparé* (1970), pp. 8-11. Katsigeras distinguishes between nautical customs and trade customs, both of which are elements in determining the usual and reasonable route.

on board, and before or after proceeding towards the port of discharge, adjust compasses, dry-dock, go on ways or to repair yards, shift berths, undergo de-gaussing, wiping or similar measures, take fuel or stores, land stowaways, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage."⁵

13. The P and I model bill of lading in its "voyage" clause, in addition to language similar to that set forth above, also provides that:

"... all such routes, ports, places, sailings and actions shall be deemed to be included within the contractual and intended voyage and any departure in pursuance of the liberties hereby conferred shall not be deemed a deviation in law; the liberties hereby conferred shall not be considered as restricted by any words in this Bill of Lading, whether written or printed or by any circumstances attending or preceding the shipment of the Goods or by the nature of the Goods or construed by reference to whether any departure pursuant to such liberties would or would not frustrate the object of this Bill of Lading, any custom or rule of law notwithstanding and notwithstanding unseaworthiness or unfitness of the vessel at the commencement or at any stage of the voyage."⁶

14. Although it would appear that "deviating" from the contractual voyage as contemplated in the "deviation clauses" above is hardly possible, courts have decided that such clauses must be restrictively interpreted and that such interpretation must be consistent with the requirement of article 3 (2) that the carrier shall properly care for the goods, and the restriction under article 3 (8) that any clause in the contract of carriage relieving the carrier of liability for loss or damage or lessening such liability shall be null and void. Generally the standard applied in deciding on the validity of "deviation" clauses has been their reasonableness taking into account the circumstances and the interest of the parties.⁷

15. The concept of deviation has also been used in cases where the cargo is discharged in a port other than the port of destination. However, bills of lading usually include a clause authorizing discharge of the goods in a port other than the port of destination. For example, the CONLINE liner bill of lading provides in sections 16 (c) and (d):

"(c) Should it appear that epidemics, quarantine, ice-labour troubles, labour obstructions, strikes, lock-outs, any of which on board or on shore—difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or in any other safe and convenient port.

"(d) The discharge under the provisions of this clause of any cargo for which a bill of lading has been issued shall be deemed due fulfilment of the contract...."

16. The courts have generally considered such clauses to be valid. In a leading English case, when a ship, prevented by a strike from reaching the port of destination named in the contract, proceeded to a substituted port of discharge in accordance with a clause in the bill of lading, it was held that there was no "deviation" but only a "change of voyage".⁸ It has been suggested that in these cases the essential point is that since the reason for the change in the voyage was specifically provided for in the contract, the change itself fulfils the contractual obligation of the carrier.⁹

2. Deviation to save life or property at sea

17. Article 4 (4) of the Brussels Convention provides that "any deviation in saving or attempting to save life or property at sea... shall not be deemed to be an infringement or breach of this convention or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom".

18. The carrier's freedom from liability when he deviates to save life at sea has given rise to no controversy. The freedom from liability in deviating to save property, when this action is not taken in connexion with the saving of life, has been criticized on the ground that it permits the carrier to gain substantial profit which is often accompanied by loss or damage to the goods on the ship.¹⁰

3. Reasonable deviation

19. Article 4 (4) of the Brussels Convention of 1924, provides that "... any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom...".

20. Whether a deviation is reasonable or not has been left for the courts to decide on the basis of the facts in the specific case. No specific formulation of the definition of reasonable deviation has been made, but in the leading English case of *Stag Line v. Foscolo Mango and Co.* the following general criteria were set out:

"A deviation may and is often caused by fortuitous circumstances never contemplated by the original parties to the contract and may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest of neither; as for instance, where the presence of a passenger or a member of the ship or crew was urgently required after the voyage had begun, on a matter of material importance; or where some person

⁵ See UNCTAD secretariat report on bills of lading, annex III.

⁶ *Ibid.*

⁷ See Gilmore and Black, *the Law of Admiralty* (1957), pp. 157-158.

⁸ *Renton v. Palmyra* (1955), 2 L.L. Rep. 722, affirmed by House of Lords (1956), 2 L.L. Rep. 329. See Dor., op. cit. at p. 45.

⁹ Katsigeras, op. cit., at p. 56.

¹⁰ See Katsigeras, op. cit., at pp. 24-25.

on board was a fugitive from justice and there were urgent reasons for his immediate appearance. The true test seems to be, what departure from the contract voyage might a prudent person, controlling the voyage at the time, make and maintain having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned but without obligation to consider the interests of any as conclusive."¹¹

21. In the above case, *Stag Line v. Foscolo Mango and Co.*, a bill of lading for goods shipped from Swansea to Constantinople gave "liberty to call at any ports in any order for bunkering or other purposes all as part of the contract voyage". When the vessel sailed from Swansea engineers were taken on board to test certain newly installed machinery. The ship deviated to St. Ives in order to land the engineers after their tests had been completed. It was held that the deviation did not come within the clause. The words "other purposes" should be construed in their context as meaning calls a port for some purpose having relation to the contract voyage. The engineers had been taken on board quite independently from any purposes connected with the contract voyage. The Court stated:

"The purposes intended are business purposes which would be contemplated by the parties as arising in carrying out the contemplated voyage of the ship. This might include in a contract other than a contract to carry a full and complete cargo a right to call at a port or ports on the geographical course to load or discharge cargo for other shippers. It would probably include a right to call for orders. But I cannot think that it would include a right such as was sought to be exercised in the present case to land servants of the shipowners or others who were on board at the start to adjust machinery, and were landed for their own and their owners' convenience because they could not be transferred to any ingoing vessel."¹²

22. Examples abound of judgements determining whether in a given situation the deviation by the carrier was reasonable or unreasonable. A few examples may suffice to give an idea of the variety of situations in which the courts are called upon to decide whether the deviation was reasonable. Deviation to take on fuel has given rise to much case law. If such deviation takes place on the usual route of the voyage envisaged it will generally be considered reasonable. On the other hand, where there was a deviation of four miles from the contracted and usual route for the purpose of filling the ship's bunkers to their capacity, since the shipowners wanted to ensure that the maximum quantity of fuel would be left over on the completion of the voyage so the fuel could be used by the ship in a new voyage, the deviation was considered to be unreasonable.¹³ Deviation because of strikes, quarantine at the port of destination, and the outbreak of war necessitating rerouting have been

considered reasonable.¹⁴ However, discharge of cargo in Puerto Rico instead of Havana because of fear that the cargo would be confiscated was not considered to be reasonable, despite the inclusion of clauses in the bill of lading that, *inter alia*, permitted the carrier to discharge goods into a safe place in order to prevent seizure or detention; the court concluded that the political situation was well known when the bills of lading were signed.¹⁵

23. In cases of necessity a deviation will generally be considered to be reasonable; these might include storms, icebergs or other dangers of navigation, or injured seamen.¹⁶ It has been held that "where a vessel sails in flagrant unseaworthy condition and is forced to return to port for repairs she is guilty of a deviation".¹⁷ Generally, it would appear that a deviation which in itself might be considered to be reasonable becomes unreasonable if it was necessitated by a fault of the carrier.¹⁸

24. The rules on what is reasonable deviation are affected in some countries by legislation on the subject that either (1) attempt to set out limits for what is permissible deviation, or (2) approach the question of what is permissible deviation in another manner.

25. The United States Carriage of Goods by Sea Act sets out in Section 4 (4) the same language as Article 4 (4) of the Brussels Convention of 1924, with the addition of the following:

"... provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable."¹⁹

26. A leading authority observes that "the rationale of the rule... seems to be that the carrier ought not to be allowed to deviate with no other motive than the increase of his own revenues; thus, the proof required to overcome the *prima facie* unreasonableness of such a deviation would have to show something more than mere reasonableness from the point of view of the carrier.... Of course this proviso does not imply that any deviation, other than for the two purposes above is 'reasonable'; it simply makes it easier to establish unreasonableness in the named cases".²⁰

27. In France the Law of 1966 which, in general, incorporates the rules of the Brussels Convention of 1924 does not mention deviation, except that the list

¹¹ *Stag Line v. Foscolo Mango and Co.* (1932), AC 328.

¹² *Id.* at 341.

¹³ *The Macedon* (1955), LLL L Rep. 459.

¹⁴ See Katsigeras, *op. cit.*, pp. 40-41, Tetley, *op. cit.*, at p. 206. (Carriers have been held liable for damage caused by delay due to deviation.) Scrutton, *op. cit.*, at p. 266.

¹⁵ *The Ruth Ann*, AMC 1962, p. 117.

¹⁶ Scrutton, *op. cit.*, at p. 267, Katsigeras, *op. cit.*, at p. 41.

¹⁷ Tetley, *op. cit.*, at p. 206, citing cases.

¹⁸ Katsigeras, *op. cit.*, at p. 30, who cites a United States Supreme Court case and a House of Lords case.

¹⁹ 46 USCA SECTIONS 1300-1315. The same provision is to be found in the laws of Liberia and the Philippines, see Katsigeras, *op. cit.*, at p. 47.

²⁰ Gilmore and Black, *op. cit.*, at pp. 158-159.

of exemptions from liability includes saving, or an attempt to save, lives or property at sea or deviation for such purpose.²¹ Although the law itself does not mention deviation, the result under the French law is similar to that under Article 4 (4). Although the master of the ship must proceed by the usual route to the place of destination, the general rules of law permits certain deviations that are reasonable.²²

4. Burden of proof

28. Under Article 4 (4) of the Convention, the burden of proof for proving the reasonableness of the deviation does not appear to be placed wholly on either the shoulders of the carrier or of the cargo owner. It has been pointed out that if there is a rule on burden of proof as to deviation, the rule *probably* is that (i) the carrier may present evidence that the voyage followed the customary pattern as to route and time and that the loss took place on that route; (ii) the cargo owner must present evidence that the deviation took place and (iii) the carrier must show that the deviation was reasonable.²³ Under the approach of the French law, discussed above at paragraph 27, the carrier will have to show that he did not commit a fault in deviating. This is essentially the same burden as proving that the deviation was reasonable.²⁴

5. Legal effect of deviation

29. Two sharply different approaches are presently used in dealing with the legal effect of deviation.

30. The first approach is that of Article 4 (4) of the Brussels Convention of 1924 which has as its purpose the exculpation of the carrier from responsibility for the loss or damage to goods, under the standard set forth in the Convention for such responsibility, when he has deviated from the route to save lives and property or when he has effected a reasonable deviation.

31. The second approach, followed in the Common law countries, is that unjustified "deviation"²⁵ is a

fundamental breach of the contract of carriage which deprives the carrier of the exemptions from liability set out in certain clauses of the bill of lading as well as from certain provisions of the Convention. Under English law, the carrier is considered to have responsibility of a *common carrier*, but his responsibility is limited by the limitation of liability rules of Article 4 (5) of the Brussels Convention of 1924.²⁶ In the United States an unjustified "deviation" renders the carrier an insurer of the goods; moreover, since he loses the protection of the bill of lading clauses and the rules of the Convention he will not be entitled to rely on Article 4 (5) of the Convention to limit the upper reach of his liability.²⁷

D. Proposed alternatives for dealing with "deviation"

1. Maintaining the present Convention rule on deviation with the addition of language specifying limits on what is reasonable deviation

(a) Substantive rule

32. Under this proposed alternative Article 4 (4), the present rule of the Convention on deviation, would be maintained. In addition, however, language such as is found in the United States Carriage of Goods Act (Section 4 (4)) would be added to state specific limits on what is reasonable deviation.²⁸

33. The proposed draft would read as follows:

Draft proposal A

Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom, provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, *prima facie*, be regarded as unreasonable.

The proviso would respond to the desire that the carrier ought not to be permitted to deviate for the sole purpose of increasing his profits.

(b) Burden of proof rule

34. It has been suggested that a positive rule on burden of proof should be introduced into the provision

²¹ Law No. 66420, 18 June 1966, Art. 27 (i). The Italian *Codice della Navigazione* and the Laws of Lebanon, Syria, Indonesia and Surinam are to the same effect. See Katsigeras, *op. cit.*, at p. 48.

²² Rodière, *Traité général de droit maritime*, pp. 230, 231. Katsigeras, *op. cit.*, at pp. 48-49.

²³ See Tetley, *op. cit.*, at p. 209.

²⁴ Katsigeras, *op. cit.*, at p. 49.

²⁵ In the United States and possibly in England (Scrutton, *op. cit.*, at p. 260) the concept of deviation has been extended to deal with unjustified acts of the carrier where no change of route is involved. A leading authority in the United States has explained that the concept of deviation has been thus extended "on the theory that various forms of misconduct of the carrier are so serious as to amount to a departure from the whole course of the contract, with the consequence that the bills of lading protection is ousted, as in the case of deviation properly so called". Gilmore and Black, *op. cit.*, at p. 161. Examples of such "deviation" from the contract are: carriage on deck (when carriage under deck is required), over-carriage, unreasonable delay. The consequences of these serious intentional breaches of the contract of carriage should, it would appear, be dealt with in a general rule on the consequences of intentional acts. In this connexion it would be

relevant to examine Article 2 (e) of the Brussels Protocol of 1968 which removes the benefit of the limitation of liability "if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result".

²⁶ Chorley and Giles, *Shipping Law* (1970), p. 187.

²⁷ Gilmore and Black, *op. cit.*, at pp. 156-160.

²⁸ See replies to the questionnaire from Turkey, Austria and Denmark. The reply from the Government of Denmark states: "The existing Danish legislation in this area which is based upon Article 4 (4) of the Brussels Convention of 1924 has not given rise to difficulties in practice and must on the whole be considered as satisfactory. For this reason it is not deemed necessary to change the convention in this respect, and it is feared that an attempt to define the limits within which deviation from the expected route of the ship will be permitted will raise great difficulties."

of deviation.²⁹ The general practice regarding burden of proof has been discussed above at paragraph 28. A positive rule on the burden of proof that would appear to be consistent with present practice would be the following:

Draft proposal B

The carrier shall bear the burden of proving that the deviation was reasonable.

This proposal should be examined in the light of the burden of proof rule adopted by the Working Group and set out above at paragraph 8.

2. *Setting forth a definition of deviation in the Convention*

35. Consideration has been given to the possibility of setting forth a definition of "deviation" in the Convention.³⁰ This examination has disclosed that a vital aspect of the central problem of deviation, in its practical application, is the question of responsibility for delay. Problems regarding delay, however, may result from circumstances other than deviation; consequently, it may be necessary to consider a general rule that gives effect to the time for delivery that is expected under the contract of carriage. The basic question of responsibility for delay has not been included in the specific topics for examination by the Working Group, and has not yet been studied. This topic, however, has been suggested for future work. It would seem appropriate to approach any future attempt to define "deviation" as part of the possible examination of the basic question of responsibility for delay.³¹

3. *No separate Convention provision on deviation and a Convention provision setting forth a general rule on the saving of life and property at sea.*

(a) *No separate Convention provision on deviation*

36. One approach would delete the provision on deviation set forth in Article 4 (4) of the Brussels Convention of 1924. Under this approach the carrier would be liable for the loss or damage resulting from deviation, if such deviation cannot be justified by the carrier, on the basis of the general standard of carrier liability. Thus, under the basic rule of liability adopted by the Working Group at its fourth session and quoted above at paragraph 3, the carrier is liable for all loss or damage to the goods "unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences".

²⁹ See reply to the questionnaire by the USSR and the UNCTAD Secretariat Report on Bills of Lading at para. 260.

³⁰ Such a proposal is supported in the reply of Czechoslovakia to the questionnaire.

³¹ See paragraph 3 above for example of the basic relationship of delay to deviation.

This approach is also suggested in the Norwegian reply to the questionnaire.³²

(b) *Provision in the Convention setting forth a general rule on the saving of life and property at sea*

37. As has been set out above at paragraph 9 the Drafting Party of the Working Group, at the fourth Session of the Working Group, recommended that "saving or attempting to save life or property at sea" be "considered at the February 1973 session, in connexion with the consideration of 'deviation' under Article 4 (4), which also, *inter alia*, deals with saving or attempting to save life or property at sea".

38. The effect of the proposal to delete Article 4 (4), if combined with the elimination of paragraph (1) of the "Catalogue" of exceptions in Article 4 (2) of the Convention, would result in the absence of any rule regarding the saving of life or property at sea.

39. Retention of the rule with respect to the saving of life at sea has widespread approval. On the other hand, an unqualified immunity from liability for loss to the ship's cargo resulting from saving property has been criticized on the ground that its result could permit the shipowner to engage in the saving of property for his own profit and to the detriment of the cargo carried on his ship. It has been suggested in the Swedish reply to the questionnaire that the carrier should only undertake to save property at sea if it is reasonable to do so.

40. Alternative draft proposals, that would assume the deletion of Article 4 (4), might read as follows:

Draft proposal C

The carrier shall not be liable for loss or damage resulting from measures to save life and [from reasonable measures to save] property at sea.

Draft proposal D

The carrier shall not be liable for loss or damage resulting from reasonable measures to save life or property at sea.

³² The Norwegian reply observes that, "it may be questioned whether in liner trade, the concept of deviation of the Convention Article 4 (4) add much to what already follows from the general rule as regards the duties of the carrier, including the duty of proper carriage, contained in its Article 3 (2). In the submission of the Norwegian Government the test of reasonable deviation and the test of proper carriage are for all practical purposes identical, both requiring that due regard be had to the cargo owner's interest in safe and expedient carriage of the goods to the destination, and both imposing liability on the carrier for failure to do so. The implication is that the provision as regards deviation could—as the more special one—be deleted as superfluous. On the other hand, in view of the importance of the problems involved, the carrier's duty of proper carriage should perhaps be expressed in a more explicit and accentuated form in the new rules on the carriage of goods by sea."

PART FOUR: THE PERIOD OF LIMITATION

A. Introduction

1. As was noted in the general introduction to this report, the programme of work on international shipping legislation developed at the fourth session of UNCITRAL included the topic "extension of the period of limitation".¹ The resolution adopted by UNCITRAL also established general objectives which included the "removal of such uncertainties and ambiguities as exist and at establishing a balanced allocation of risks between the cargo owner and carrier...". Consequently, the present study considers these objectives in the examination of the period of limitation for suit by the cargo-owner against the carrier.

2. The Brussels Convention of 1924, in article 3, paragraph 6, sets forth rules on two distinct issues: (1) the giving of notice to the carrier of loss or damage; and (2) a period of limitation for instituting suit against the carrier. This second issue, which is the subject of the present study, appears in the fourth subparagraph of article 3, paragraph 6, which provides:

"6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.

"If the loss or damage is not apparent, the notice must be given within three days of the delivery of the goods.

"The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

..."

3. The above provision on limitation in the 1924 Convention should be read with article 1, paragraphs 2 and 3 of the Brussels Protocol of 1968, which provides:

"2. In article 3, paragraph 6, subparagraph 4 shall be replaced by:

"Subject to paragraph 6 *bis* the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. *This period may, however, be extended if the parties so agree after the cause of action has arisen.*"

"3. In article 3, after paragraph 6, shall be added the following paragraph 6 *bis*:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

It will be noted that the Protocol of 1968 would modify the rules of the 1924 Convention in two respects: (1) by explicitly authorizing agreements extending the period of limitation; (2) by assuring a limited period for indemnity actions. These issues will be discussed later in this study.

B. Types of claims barred by limitation

1. Problems of construction with respect to the scope of the present rules

4. The limitation provisions of the Brussels Convention of 1924 gave rise to serious problems of construction with respect to types of claims to be governed by those provisions. The Brussels Protocol of 1968 has alleviated but has not wholly solved these problems. The Working Group may wish to consider whether the scope of the limitation provisions can further be clarified.

5. The Brussels Convention of 1924 states that the carrier and the ship shall be discharged from "all liability in respect of *loss or damage*..." unless suit is brought within a prescribed period. (See the fourth subparagraph of article 3 (6), quoted above at para. 2.) The Brussels Protocol of 1968 would replace the above-quoted expression by: "all liability *whatsoever* in respect of the goods...". (See article 1 (2) of the Protocol, quoted above at para. 3.) In comparing these provisions, it will be noted that the Protocol adds the word "whatsoever"; the Protocol also deletes the words "loss or damage" and employs, instead, the expression "in respect of the goods". By these modifications the Protocol would broaden somewhat the scope of the limitation rules as set forth in the earlier Convention.

6. The words "loss or damage" in the Brussels Convention of 1924 carried the possible implication that the limitation rules were confined to claims based on physical loss or damage, and excluded claims for financial loss resulting from delay in delivery (where there was no "loss or damage" to goods).² Arguments for the narrow scope of the limitation provision are reinforced by the

¹ See the general introduction, at para. 2; UNCITRAL, report on the fourth session (1971), para. 19; UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

² See: Carver, *Carriage by Sea*, vol. I, paras. 224-229; Manca, *International Maritime Law*, vol. II, p. 216; Scrutton, *Charter parties*, pp. 416-417; See: *Commercio Transito Internazionale v. Lykes Bros.*, 157 A.M.C. 1188 (limitation rule governs claims for delay); *Contra: United Merchants and Manufact. v. U.S. Lines*, 126 N.Y.S. 2d 560.

position of this provision in the Brussels Convention as one subparagraph in article 3, paragraph 6, which deals for the most part with the "notice of loss or damage" to be given to the carrier "before or at the time of the removal of the goods into the custody of the persons entitled to delivery". (These provisions of art. 3, para. 6 are quoted in para. 2 above.) Other provisions in article 3, paragraph 6, relate to whether the "loss or damage" is "apparent", and deal with the consequences of a "joint survey or inspection" of the goods. These references to physical "loss or damage" in the first three subparagraphs of paragraph 6 reinforce the argument that the fourth subparagraph, on limitation with respect to "loss or damage", deals with *physical* loss.

7. On the other hand, the rules of article 4 (2) setting forth exemptions from liability "for loss or damage" have not been so limited.³ A broader scope is also given to article 3 (8), which bars contracts relieving the carrier "from liability for loss or damage to or in connexion with goods . . .".

8. Consideration of policy also favours a broad reading of the rules on limitation. The objectives of speedy settlement of claims, of certainty in legal relationships and of unification of law would scarcely be served by providing that claims for physical loss would be governed by the limitation rules of the Convention while closely related claims based on the contract of carriage (such as claims for delay) would be governed by the varying rules of national law.

9. As has been noted, the language of the Protocol of 1968—"discharged from all liability *whatsoever* in respect of the goods"—may broaden the scope of the rules on limitation. However, the concluding phrase "in respect of the goods" might be construed as preserving the implication of physical damage to goods (as contrasted with economic loss to the owner).

10. The basic period of limitation under article 46 (1) of the Rail (CIM) Convention governs "an action arising out of the contract of carriage". Under article 32 (1) of the Road (CMR) Convention the basic period applies to "an action arising out of carriage under this convention". In addition, both conventions refer specifically to the limitation period applicable to "partial loss, damage or delay in delivery".

2. Possible clarification of the scope of the rules on limitation

11. The Working Group may find it desirable to retain as much as possible of the language of article III, paragraph 6 of the Convention of 1924, as modified by the 1968 Protocol. For instance, the reference to discharge from liability of "the carrier and the ship" has special significance in relation to maritime actions that are brought *in rem* against the ship.

12. Alternative draft provisions, based on the language of the 1968 Brussels Protocol, but adapted to incorporate relevant language of the Road (CMR) Convention, are as follows:

³ See Scrutton at pp. 416-417, citing *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co.* (1959), A.C.

Alternative A

(a) The carrier and the ship shall be discharged from all liability whatsoever in respect of carriage of the goods [under this convention] unless suit is brought. . . .

Alternative B

(b) The carrier and the ship shall be discharged from all liability whatsoever arising out of the contract of carriage, unless suit is brought. . . .

3. Applicability of the period of limitation to arbitration

13. It does not appear to be clear from the case law in many jurisdictions whether the expression "suit" as used in article 3 (6) (4) of the Brussels Convention is confined to an action at law or whether it also includes arbitration proceedings.⁴ It is important for the claimant to know whether an arbitration clause (either contained in bills of lading or incorporated by reference) is subject to the period of limitation of the Brussels Convention.

14. The Working Group may wish to consider whether the draft provision should specify that the term "suit" includes arbitration proceedings.⁵ A draft provision that supplements Alternative A, above, with a provision on arbitration is as follows:

Draft provision on the scope of the rules on limitation⁶

(a) The carrier and the ship shall be discharged from all liability whatsoever in respect of carriage of goods unless suit is brought or arbitration proceedings are initiated within [one year] of the commencement of the period of limitation.

4. Claims based on tort or on wilful misconduct

15. Neither the Brussels Convention of 1924 nor the 1968 Protocol include specific provisions in the limitation rules dealing with actions based on tort or on wilful misconduct. As has been noted, the 1968 Protocol broadened the language of the limitation rules to embrace "all liability *whatsoever* in respect of the goods". However, the concluding phrase "in respect of the goods" could be used as a basis for limiting the scope of the provision.

⁴ Although "arbitration has, in modern times, been regarded as a legal proceeding . . .", see United Nations Secretariat memorandum on arbitral procedure, A/CN.4/35 of 21 November 1950, para. 85, p. 174, in *Yearbook of the International Law Commission*, vol. II, 1950.

⁵ Many replies to the questionnaire endorsed the view that arbitral proceedings should be placed on an equal footing with judicial proceedings for the purpose of limitation of action. This is the general tenor of the replies of the Governments of Argentina, Australia, Czechoslovakia, Norway and Sweden. In this connexion the Government of Czechoslovakia suggests in its reply a possible provision which would read "... unless suit is brought or arbitration proceedings are initiated in accordance with the Rules governing the arbitration, within one year after delivery of the goods or . . .". On the other hand, the reply of the Government of Iraq observed that the term "suit" may be defined to exclude arbitration proceedings.

⁶ This draft and proposals relating to other aspects of the period of limitation are consolidated in the Draft Provisions on the Period of Limitation in section G at para. 68, below.

16. The 1968 Protocol in article 3 provided that a new article 4 *bis* should be inserted between articles 4 and 5 of the Convention. The new article states:

"The defences and limits of liability provided for in this Convention should apply in any action against the carrier in respect of *loss or damage to goods* covered by a contract of carriage, whether the action be founded in contract or in tort."

17. The Rail (CIM) and Road (CMR) Conventions contain specific provisions governing the limitation of actions based on wilful misconduct. Thus, both conventions establish a basic limitation period of one year, but provide that the period shall be *three years*:⁷

(a) *CIM*, article 46 (1) (c): in the case of "an action for loss or damage caused by wilful misconduct".

(b) *CMR*, article 32 (1): "in the case of wilful misconduct, or such default as in accordance with the law of the court or tribunal seized of the case, is considered as equivalent to wilful misconduct".

18. The treatment of claims based on wilful misconduct can be approached as either a question of (1) the scope of the limitation rules or (2) the length of the period.

19. With respect to the first question—the scope of the rules—as we have seen, both the Rail (CIM) and Road (CMR) Conventions do not exclude claims based on wilful misconduct from the limitation provisions. There are reasons of policy that support this approach. In practice, it may often be difficult to predict whether a court will conclude that the alleged conduct on which the claim is based could be characterized as "wilful misconduct", or at least "such default as . . . is considered as equivalent to wilful misconduct". Predictability and uniformity might be jeopardized if the varying rules of national law were applicable to such claims.

20. Litigation over the elusive boundary-line surrounding claims of "wilful misconduct" (and the temptation to avoid the barrier of the expired period of limitation by casting one's claim in such terms on the basis of doubtful or false evidence⁸) would be avoided if the same limitation period were applicable to all types of claims. Whether this approach would be unfair to claimants can best be decided in connexion with the length of the basic period of limitation,⁹ which will be considered in section D of this study at paragraph 46, below.

⁷ Cf. article 25 of the Warsaw Convention of 1929 on International Carriage by Air (general exclusion of provisions of the Convention which "exclude or limit" the carrier's liability). See also articles 2 (e) and 3 (4) of the Brussels Protocol of 1968 (removal of limitation of liability) discussed in part one of this report (Unit Limitation of Liability), section C (3), at para. 51.

⁸ The ability, in practice, to appraise such evidence of course diminishes with the passage of time. It might be thought that the passage of time would make it more difficult to prove a false claim; however, there may be truth in the unpleasant saying of legal practice that "a liar's memory is always fresh".

⁹ The adequacy of the basic limitation period is also affected by whether it would be possible to suspend the running of the period by a written claim. See section D (2), at paras. 51-53, below.

C. Commencement of the period

21. Under both the Convention of 1924 and the Protocol of 1968, the period of limitation commences "after delivery of the goods or the date when the goods should have been delivered".¹⁰ To avoid litigation and the loss of rights, the day from which the period of limitation runs needs to be clearly defined; the question arises whether the present rule meets these objectives. Replies to the questionnaire indicated that consideration should be given to prescribing more definite starting points for the inception of the period of limitation.¹¹

1. The practical situation

22. In considering the appropriate starting point for the period of limitation it would be helpful to take account of what happens in practice when a cargo-owner applies for delivery of his goods at or about the agreed or implied time for delivery in the contract of carriage.

23. In most cases, the entire shipment arrives in due time, and none of the goods is damaged. The situations in which claims arise include the following: (a) the entire consignment of goods covered by a bill of lading has arrived but all or part is damaged; (b) part or all of the consignment is missing; when only part is missing, some or all of the goods that are delivered may be damaged.

24. The situation described under (a) above does not ordinarily present serious difficulty with respect to the commencement of the period of limitation, since the period would clearly run from the date of "delivery" of the goods. This issue will be discussed further at paragraphs 26 *et seq.*, below.

25. The most serious problems arise under (b), when delivery of part or all of the goods covered by a bill of lading is delayed or the goods are lost,¹² since a substantial period (months, and occasionally a year or more¹³) may pass before the carrier provides the cargo-owner with definite information about the whereabouts and plans for delivery of the missing goods, or before the carrier definitely reports that the goods have been lost.¹⁴ The issues with respect to the running of the period of limitation in this setting are explored in paragraphs 32 *et seq.*, *infra*.

¹⁰ The use of the word "delivery" instead of "discharge" appears to be intentional, because discharge is used elsewhere in the Convention, for example, articles 2, 3 (2), 6 and 7. Tetley, *Marine Cargo Claims*, 1968. *Milikowsky Brothers v. Kapman's Bevrachtingsbedrijf*, 1969, A.M.C. 111.

¹¹ See, e.g., the replies of Australia (para. 59), Czechoslovakia, Federal Republic of Germany, Iraq, Norway and Turkey. But cf. replies of Sweden and Austria.

¹² Loss or delay to goods may be caused by loss of, or accident to, the carrying ship, frustration of the voyage or deviation from the contractual itinerary. Goods are also frequently lost or delayed as a result of trans-shipment, misdelivery, overcarriage or pilferage.

¹³ See UNCTAD report on bills of lading (United Nations publication, Sales No. 72.II.D.2), "Section C. How cargo claims arise and are settled", paras. 27-43; also Note in BIMCO Circular for December 1962, p. 10021.

¹⁴ Information about the goods or acceptance or denial of a claim may be communicated to the cargo owner on different dates for different consignments relating to the same bill of lading.

2. Analysis of the terms "delivery of the goods" and "date when the goods should have been delivered"

(a) "Delivery of the goods"

26. Interpretation and application of this phrase does not appear to have caused serious problems.¹⁵ In the preparation of a revised text, if the period of limitation should continue to commence from "delivery" of the goods, account must be taken of the definition of that term in paragraph (i) of article 1 (e), as prepared by the Working Group at its third session.¹⁶ The proposed revision of article 1 (e) is as follows:

- "(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."

27. In the draft provisions on the commencement of the period of limitation, which appears at paragraph 39, below,¹⁷ specific reference is made to the provisions on the time of delivery by the carrier as set forth in subparagraphs a to c of paragraph (ii) of the above-quoted revision of article 1 (e).

28. It will be noted that this definition includes not only a "Handing over the goods to the consignee", but also, under paragraphs b and c, certain other acts of which the consignee may not necessarily have knowledge. The Working Group may wish to consider whether a prudent

consignee would keep himself advised as to the disposition of the goods, or whether delivery under paragraphs b and c should start the period of limitation only when the consignee has knowledge, or when notice has been sent to him, as to these acts.

(b) "Date when the goods should have been delivered"

29. The interpretation and application of this clause have caused several problems, and two principal questions would appear to need clarification:

- (1) What class of claims is governed by this clause?
- (2) When does the period of limitation commence in respect of such claims?

30. With respect to the first question, writers have stated that the "date when the goods should have been delivered" is applicable when a cargo-owner sues for "the loss of the goods",¹⁸ "in event of the total loss of goods",¹⁹ or "non-delivery" of goods.²⁰ These general views support what would appear to be implied from the very words of the clause—that this provision is to be applied when goods have not been delivered, but fail to answer all of the problems that arise in practice. It appears to be reasonably clear from the case-law in most jurisdictions that the clause applies to claims for total loss of goods; but it is not so clear whether, and if so, how exactly, this language may also be applied to claims for loss of only part of the goods covered by a bill of lading.

31. The case-law also fails to give a clear answer to the second question: when does the period of limitation commence for lost or undelivered goods? The relevant jurisprudence is described as "mixed", and supports various approaches: (1) the carrier's declaration or advice of non-delivery; (2) delivery of most of the goods; (3) the date when arrival was expected.²¹

32. Besides the uncertainties as to the legal position, the cargo-owner may also face many practical difficulties when he claims for undelivered goods. As has been noted (para. 25, above), the cargo-owner cannot always assume that his missing goods are in fact irretrievably lost, or that they will not be delivered. Instead, after the expected time of delivery, the cargo-owner must await information from the carrier as to the fate of the goods. During this period he may have grounds to hope for eventual delivery, but cannot be sure of whether, or when, this may occur.

¹⁸ Chorley and Giles Shipping Law, 176.

¹⁹ Manca, op. cit., 238.

²⁰ Tetley, op. cit., 199.

²¹ Tetley, op. cit., 199. The general trend of decisions appears to favour time running either from the date when the carrier has declared that he cannot deliver the goods or "from the date when the delivery of most of the shipment took place", op. cit., 200. It is an indication of the considerable uncertainty that prevails in identifying the inception point for the commencement of the period of limitation in cases of non-delivery of goods, that a leading authority states: "... the best rule for a claimant to follow is to sue within one year of the day the vessel or shipment should have arrived and not within one year of advice that delivery is impossible", Tetley, op. cit., p. 200. This advice is given despite the fact that in several jurisdictions the period of limitation actually commences from the date of advice that delivery is impossible, Tetley, op. cit., p. 200, foot-note 10.

¹⁵ See, e.g., cases cited in Tetley, op. cit., 198, and in Manca, International Maritime Law, vol. II, 238. See also *Western Gear Corporation v. States Marine Lines Inc.*, 362, Fed. Rep., 2d series (1966), 331: "Wherever there is an actual delivery of goods in performance by the carrier of its obligations under the contract of carriage, the time to sue runs from the date of delivery rather than from the date 'when the goods should have been delivered'."

¹⁶ A/CN.9/63, paras. 14-15. "The replies of the Governments of Argentina, Czechoslovakia, Federal Republic of Germany and the USSR drew attention to the draft provision on article 1 (e)."

¹⁷ This and other draft proposals are consolidated in the draft provisions on the period of limitation which appear in para. 68.

33. During this period of uncertainty the cargo-owner is placed in a dilemma. He may not know whether the period of limitation, in respect of goods which he is still expecting, may already have commenced,²² or whether the period will commence from the day he receives notification as to the fate of the goods, or from the day the claim may be denied or from the day when the goods are eventually delivered. These uncertainties expose the cargo-owner to two principal risks. First, he may unwittingly exhaust a substantial part (or all) of the period of limitation by remaining passive while awaiting information about his goods. Secondly, he may incur what might turn out to be unnecessary expenditure in commencing suit prematurely merely to keep the period alive, whereas it may not have been necessary for him to institute suit for this purpose had the law been clear.

34. The "date when the goods should have been delivered" thus fails to distinguish among various situations which may arise in practice. These include:

(a) Partial delivery of the goods when the balance of the consignment covered by the same bill of lading is still expected to be delivered.

(b) Partial delivery of the goods when it is known that the balance of the consignment covered by the same bill of lading will never be delivered.

(c) Delay in delivery of all the goods covered by the same bill of lading while delivery is still expected.

(d) Non-delivery when it is known that none of the goods will be delivered.

35. The "date when the goods *should have been delivered*" is particularly difficult to apply in the setting of ocean shipping, since the contract of carriage often does not specify a date at which the carrier is obliged to deliver the goods.

3. Commencement of the limitation period in other transport conventions

36. Some of the above problems with respect to the commencement of the limitation period have been faced in the other transport conventions. Particularly helpful is the distinction, mentioned above at paragraph 23, between (1) total loss of the goods and (2) partial loss, damage or delay. This distinction is drawn in article 46 of the International Convention concerning the Carriage of Goods by Rail (CIM)²³ and in article 32 of the Convention on the International Carriage of Goods by Road (CMR).²⁴

²² As might be the case, for example, if events show that the expected goods cannot be delivered, since the period of limitation might then run from whatever might be the hypothetical or notional date held in a particular jurisdiction to signify "the date when the goods should have been delivered" in the ordinary course of events had the goods not been unavailable for delivery.

²³ International Convention concerning the carriage of goods by rail (CIM). Done at Berne, 25 October 1952. United Nations, *Treaty Series*, vol. 241.

²⁴ Convention on the contract for the international carriage of goods by road (CMR). Done at Geneva on 19 May 1956. United Nations, *Treaty Series*, vol. 399. Cf. Convention for the unification of certain rules relating to international carriage by

37. Article 32 of the Convention on the contract for the international carriage of goods by road (CMR) provides:

"1. . . . The period of limitation shall begin to run:

"(a) In the case of partial loss, damage or delay in delivery, from the date of delivery;

"(b) In the case of total loss, from the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from the date on which the goods were taken over by the carrier;

"(c) In all other cases, on the expiry of a period of three months after the making of the contract of carriage.

The day on which the period of limitation begins to run shall not be included in the period."

38. Article 46 of the International Convention concerning the Carriage of Goods by Rail (CIM) provides:

"2. The period of limitation shall begin to run:

"(a) In actions for compensation for partial loss, damage or delay in delivery: from the date of actual delivery;

"(b) In actions for compensation for total loss: from the thirtieth day after the expiry of the transit period;

" . . .

"(h) In all other cases: from the date when the right of action accrues.

"The day on which the period of limitation begins to run shall not be included in the period."

4. Proposed draft provision on the commencement of the limitation period

39. The Working Group may wish to prepare a draft provision on the commencement of the period of limitation which, like the Rail (CIM) and Road (CMR) conventions, distinguishes between (1) partial loss or damage or delay and (2) total loss of the goods covered by the contract of carriage. Such a draft provision is as follows:

Draft provision on commencement of the period²⁵

(b) The period of limitation shall commence:

(i) In actions for compensation for [loss] [non-delivery] of part of the goods covered by the contract of carriage, for damage, or for delay in delivery: from the last date on which the carrier has deliv-

air. Signed at Warsaw, 12 October 1929. League of Nations, *Treaty Series*, vol. CXXXVII. The Warsaw Convention of 1929 in article 29 provides that the limitation period shall be "reckoned from the date of arrival at destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped". In view of the relatively brief periods for air transit, the above general provision probably presents fewer serious problems in practice than arise in the case of carriage by sea or (to a lesser degree) by rail or by road.

²⁵ This draft, and proposals relating to other aspects of the period of limitation, are consolidated in the draft provisions on the period of limitation which are set forth in section G at paragraph 68, below.

ered any of such goods. The date of such delivery shall be determined on the basis of the provisions of subparagraphs (a)-(c) of paragraph (ii) of article [].²⁶

- (ii) In actions for compensation for [loss] [non-delivery] of all of the goods covered by the contract of carriage: from [the stated date for delivery or, in the absence of such a stated date,] the [ninetieth] day after the time the carrier has taken over the goods.²⁷

The day on which the period of limitation begins to run shall not be included in the period.

40. Article 32 (1) of the Road (CMR) Convention (quoted in paragraph 37 above), and the similar provision in article 46 (2) of the Rail (CIM) Convention, distinguish between "partial loss" and "total loss" of the goods.

The above draft also uses this language, but suggests by bracketed language that the term "non-delivery" might be employed in place of "loss". Either term would appear to be satisfactory, but the expression "non-delivery" may more precisely express both the factual and legal situation.

41. The Road (CMR) and Rail (CIM) Conventions contrast "partial loss" and "total loss". The expression "partial loss" is presumably intended to embrace situations of *total* loss of *some* of the packages or units covered by the contract of carriage. However, since there might be room for doubt on this point, the above draft explicitly refers to loss (or non-delivery) "of part of the goods covered by the contract of carriage".

42. For partial loss, and for damage or delay, the Road (CMR) Convention provides that the limitation period shall run "from the date of delivery". This provision may give rise to doubt when parts of a single consignment arrive at different times—possibly as a result of trans-shipment or misdelivery of part of the goods. To avoid uncertainty, and the possible need for piecemeal litigation, the draft provides that the period shall commence "from the last date on which the carrier has delivered any of such goods" covered by the contract of carriage.

43. It will be noted that the phrase "in actions for compensation for" in subparagraphs (i) and (ii) of the draft is taken from article 46 (2) (a) and (b) of the Rail (CIM) Convention.

44. For cases of total loss under the Rail (CIM) Convention, the period commences "from the thirtieth day after the expiry of the transit period". The Road (CMR) Convention refers to "the thirtieth day after the expiry of the agreed time-limit or where there is no agreed time-limit from the sixtieth day from which the goods were taken over by the carrier". Under contracts

for ocean carriage there may be neither a specified "transit period" (CIM) nor an "agreed time-limit" (CMR). Consequently, it would seem advisable (as in the CMR Convention) to provide an alternative point for the commencement of the period. The draft, consequently, provides in paragraph (ii) that where there is no stated date for delivery, the period will commence from "the [ninetieth] day after the time the carrier has taken over the goods". The latter expression, "the time the carrier has taken over the goods", is, of course, drawn from the rules of article 1 (e) on the commencement of the period of the carrier's responsibility, as drafted by the Working Group: report on third session (A/CN.9/63), * para. 14.

45. The Road (CMR) Convention provides that in cases of total loss, the period does not commence until 60 days from the date on which the carrier has taken over the goods. This 60-day period from the date the carrier has taken over the goods takes account of the period while the consignee is waiting for delivery, so that the period of limitation for non-delivery in most cases would not be shorter than the period of limitation for damage to goods that are delivered. Transit periods for ocean carriage and, more particularly, the periods of uncertainty in cases of misdelivery may be longer than that for road or rail carriage. The Working Group may wish to consider whether the 90-day period set forth in the draft is adequate.²⁸

D. The length of the period

46. Establishment of the length of the period of limitation requires the conciliation of conflicting considerations.²⁹ On the one hand, the period must be adequate to allow investigation of claims, negotiations, and the bringing of legal proceedings. On the other hand, the period should not be so long that evidence of facts may be lost or blurred by the passage of time, and thereby undermine the certainty desired for commercial transactions.³⁰

47. Article 3 (6) (4) of the Brussels Convention requires that the claimant bring his suit against the carrier or the ship for loss or damage of goods within one year after delivery of the goods or the date when they should have been delivered. This one-year period is left unchanged

* UNCITRAL Yearbook, vol. III: 1972, part two, IV.

²⁶ The adequacy of this period, like the adequacy of the basic period of limitation, may be effected by the decision of the Working Group as to whether a written claim would suspend the running of the period until the carrier rejects the claim. See section D (2) at paras. 51-53, below.

²⁹ Report of the Working Group on time limits and limitations (prescription) in the international sale of goods, on its third session, A/CN.9/73, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3, para. 1 of Commentary on art. 8.

³⁰ Chorley and Giles, *op. cit.*, 175-176: "Generally speaking, English law allows claims for damages to be made at any time within six years, but trade calls for a shorter period for businessmen must know for certain what claims may be made against them. Actions on many commercial contracts must, therefore be brought within a far shorter period, and the contract of affreightment is no exception. Clearly, a shipowner will want to make his own inquiries before vital evidence is lost, and to do so claims against him must be made promptly."

²⁶ See the proposed revision of article 1 (e). Report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

²⁷ The expression "the time the carrier has taken over the goods" is employed in the revision of article 1 (e) at paragraph (ii). *Ibid.*, para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

by article 1 (2) of the Brussels Protocol; however, provision is made to extend the period by mutual agreement of the parties to the dispute once the cause of action has arisen.

48. There are indications that a one-year period of limitation has not been found in practice to be generally satisfactory. Organized groups of carriers, shippers and insurers have concluded that a one-year limitation may in certain instances be an insufficient period of time for investigation of claims, for negotiation between parties and for other measures necessary before action can be brought against the carrier. As a consequence, an agreement of a private nature (commonly known as the "Gold Clause Agreement"), providing in effect for a two-year period, was negotiated between carriers, shippers, and insurers operating in major international ocean trades.³¹

49. Suggestions and proposals regarding the length of the period of limitation were made in a number of replies to the questionnaire. The replies of the Governments of Australia and Sweden indicate that consideration might be given to extending the period of limitation to two years to bring it in line with article 29 of the Warsaw Convention. The reply of the Government of Austria observes that in view of the fact that in most cases suits have to be brought in a foreign country, even another continent, a two-year period would be more appropriate. On the other hand, the replies of Argentina, Federal Republic of Germany, Iraq, Norway and Czechoslovakia indicate that the one-year period is generally satisfactory.

1. *The length of the period in other transport conventions*

50. The 1929 Warsaw Convention for International Carriage by Air provides (article 29) a basic limitation period of two years. The Road (CMR) and Rail (CIM) Conventions provide a basic period of one year. However, as we have seen (para. 17, above), both extend the period to three years for cases of wilful misconduct.

2. *Suspension of limitation period pending denial of claim*

51. Both the Road (CMR) and Rail (CIM) Conventions contain a further provision that may be of great practical significance to ameliorate problems presented by the shortness of the basic limitation period. Article 32 (2) of the Road (CMR) Convention provides:

"A written claim shall suspend the period of limitation until such date as the carrier rejects the claim by notification in writing and returns the documents attached thereto. If a part of the claim is admitted the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply and of the return of the documents, shall rest with the party relying upon these facts. The running

of the period of limitation shall not be suspended by further claims having the same object".

Substantially the same provision appears as article 46 (3) of the Rail (CIM) Convention.

52. The above provision would appear to have considerable merit to avoid ghastly litigation (or the loss of rights) when time is needed by the carrier to investigate a claim and respond thereto.³² The making of a claim in writing appears to be a standard, and reasonable, step in the adjustment of transport losses (see article 3 (6) of the Brussels Convention of 1924), and it seems reasonable that a brief period of limitation should not be shortened or extinguished by the carrier's delay in rejecting the claim. Consequently, the Working Group may wish to consider the following draft provision, which is modelled closely on article 32 (2) of the Road (CMR) Convention and article 46 (3) of the Rail (CIM) Convention.

Draft provision suspending period pending action on claim

(d) A written claim shall suspend the running of the period of limitation until such date as the carrier rejects the claim by notification in writing. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply, shall rest with the party relying upon those facts. The running of the period of limitation shall not be suspended by further claims having the same object.

53. The above draft does not include the provision of the other transport conventions that the period remains in suspension until the carrier "returns the documents attached" to the claim. The papers that comprise the "documents" that must be presented in connexion with a claim are defined under article 41 of the Rail (CIM) Convention. On the other hand, no such definition appears in the Brussels Convention of 1924 or the 1968 Protocol. As a result, there may be grounds for dispute as to whether letters asserting or pressing the claim and various types of material submitted in support of the claim are "documents attached" to the claim which must be returned by the carrier to recommence the running of the period. For example, litigation could arise over whether an unreturned letter was a "document" attached to the claim, so that the period of limitation never expired. Such questions could undermine the predictability and stability of legal relationships which is an objective of the rules on limitation.

³¹ "British Maritime Law Association Agreement, 1950 (Gold Clause Agreement)" dated London, Liverpool, Glasgow, 1 August 1950. "Explanatory Notes" dated 31 December 1954. Reprinted in Tetley, *op. cit.*, at 313. The relevant provisions will be found in paragraphs 4 and 5 of the Agreement and the notes on clause 4 in the Explanatory Notes.

³² The reply of the Government of Czechoslovakia discusses this question and points to the existing practice under the CMR and CIM Conventions. The reply suggests that the period of limitation should cease to run for a period of, say, three-six months from the moment the claim is made, unless a reply to the claim is given before the expiration of that time. On the other hand, the reply of the Government of Austria states that details regarding suspension or interruption of the period should be left to domestic law, unless an attempt is made to solve these questions in a simplified form in the Convention itself.

E. Agreement modifying the period

1. Shortening of the period by agreement

54. The period of limitation specified in the Brussels Convention cannot be shortened by agreement of the parties. Such an agreement is held in most jurisdictions to contravene the provisions of article 3 (8) of the Convention which denies effect to agreements which lessen the carrier's liability otherwise as provided by the Convention.³³

2. Extension of the period

55. It is not unusual for parties to a dispute concerning loss or damage of cargo to stipulate a longer period of limitation for the institution of an action. An extension of the period of limitation may prevent the hasty institution of a suit close to the end of the period when the parties are still negotiating with a view to a settlement without legal proceedings. The claimant may ask for a waiver or an extension of the time allowed by the Convention when additional information must be obtained before the negotiations can be concluded. The practical need for agreements to extend the period of limitation is indicated by the "Gold Clause Agreement" to which reference has been made in paragraph 45, above.

56. Doubts have been expressed as to the validity of such agreements extending the limitation period.³⁴ However, such doubts appear to have been removed under the Brussels Protocol. Under article 1 (2), the revised paragraph 6 *bis* would conclude with the following sentence:

"... This period [i.e. one year] may, however, be extended if the parties so agree after the cause of action has arisen".

This provision allows an extension of the limitation period if the agreement to extend is made "after the cause

of action has arisen". A limit as regards the length of the extension is not mentioned so that the parties to the dispute are free to extend at their discretion.³⁵

57. Replies have indicated that the provision of the Brussels Protocol cited above is a useful addition to the Brussels Convention and that it should be retained.³⁶ The Working Group may wish to consider whether such a provision should be retained in a future Convention.

3. Possible drafting of a provision on extension

58. Under the Brussels Protocol of 1968 the period may be extended "if the parties so agree". In the setting of some languages and legal systems it might be argued that the word "agree" requires a bilateral contractual undertaking, and would not give effect to a unilateral declaration or waiver by the carrier that the period would be extended. To avoid the possibility of such a narrow and unintended application, the Draft Convention on Prescription (Limitation) in the International Sale of Goods, as approved by UNCITRAL at its fifth session, refers in article 21 (2) to extension of the period "by a declaration in writing".³⁷

59. The requirement that the declaration (or agreement) extending the period be made in writing does not appear in the Brussels Protocol. The reasons for the requirement in the draft Convention on Prescription that the declaration (or agreement) be in writing are explained as follows in the Commentary to the draft Convention.³⁸

"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."

60. A provision based on the Protocol, but modified to conform with the draft Convention on Prescription, might read as follows:

Draft provisions on extension of the period

Alternative A

(c) The period of limitation may be extended by the carrier after the cause of action has arisen by a [written] declaration or agreement.

³³ See *Buxton v. Rederi*, 1939 A.M.C. 815; *The Zarembo*, 1942 A.M.C. 544; *Comm. Rouen*, 19.6.1951, 19 Rev. Scaepel, 41; *Coventry Sheppard v. Larrinaga S.S. Co.*, 73 Ll.L.Rep. 256; *Comm. Anvers*, 7.8.1931, 1931 J.P.A. 420; *BGH*, 18.2.1958, 29 BGHZ, 120; *Trib. Rotterdam*, 24.6.1949, 1950 N.J., 538. However, the position is different as regards a shorter period of limitation for claims relating to freight, demurrage, general average contribution and for other matters which the Brussels Convention of 1924 has left outside its scope. Accordingly, a clause stipulating that suit for freight shall be subject to a six-month period of limitation has been held to be valid. See *Piazza v. West Coast Line*, 1951 A.M.C. 168; *Goulondris v. Goldman*, 1957 Ll.L.Rep. 207; *Cour d'Appel Trieste*, 5.4.1952, 1953 D.M.F. 464. See also *S. Dor*, op. cit., 78.

The reply of the Government of Sweden indicates that agreements shortening the period should not be allowed and that it would be desirable that this be clarified in article 3 (8) of the Convention.

³⁴ *Astle, Shipowners' Cargo Liabilities and Immunities*, 184, "If the parties concerned are the actual cargo owners and the carrier, the question may arise as to whether the agreement is valid having regard to the provisions of Article V, in that surrender of the right by the carrier has not been embodied in the bill of lading". *Manca*, op. cit., vol. 2, 264, "Under some laws, such a stipulation [i.e. the agreement to extend the period] is null and void inasmuch as it involves renunciation to the prescription still running, which is forbidden, whilst only the prescription already accrued can be waived (for instance, Article 2937, 2nd paragraph, of the Italian Civil Code states that the renunciation to the prescription is allowed only when it is exhausted)".

³⁵ *Manca*, op. cit., vol. 2, 264.

³⁶ Replies supporting the retention of this provision are those of Australia, Czechoslovakia, Iraq, Norway and Sweden. In its reply the Government of Czechoslovakia suggests that the parties to the contract should be entitled to agree on an extension of the period before the accident that causes the loss or damage to the goods occurs.

³⁷ UNCITRAL, Report on the fifth session (1972) (A/8717), para. 21, UNCITRAL Yearbook, vol. III: 1972, part one, II, A. See also para. 2 of the commentary on the draft convention, A/CN.9/73, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3, commentary on article 21. It is assumed that a "declaration" could be made in an agreement, and the intention to give equal effect to a "declaration or agreement" is shown by article 21 (1) of the Draft Convention on Prescription.

³⁸ A/CN.9/73, commentary on article 21 at para. 2, UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

61. Retaining the words "or agreement" may not be necessary since an extension in an "agreement" would also be a "declaration". However, the retention of these words may be advisable in the interest of clarity and continuity with the earlier provision.

62. If the Working Group should not require a writing, the draft could follow closely the structure of the provision of the Protocol, and might read as follows:

Alternative B

(c) The period of limitation may be extended by a declaration by the carrier or by agreement of the parties after the cause of action has arisen.³⁹

F. Recourse action (action for indemnity against a third person)

63. An ocean carrier, to whom a claim for loss or damage of the goods is presented, may have a right to recover for all or part of the shipper's claim. This may arise from a contract the carrier has with a party who participates in the performance of his contract, or with a liability insurer. The existence and amount of the recourse action may be known only after the final judicial decision fixing the amount of compensation payable or the settlement of the claim. If the shipper or consignee presents his claim to the carrier near the end of the period of limitation, the recourse action by the ocean carrier against the third party may fail, and this irrespective of the merits of his claim, because the one-year limit for bringing such an action has been reached. The question then arises whether the ocean carrier should have the benefit of an extension of the one-year limitation period to bring his action against third parties.

64. The Brussels Convention, in contrast to other transport conventions,⁴⁰ has no provision on recourse actions and leaves it to national law to solve this problem.⁴¹

³⁹ If the Working Group should prefer the form of expression in alternative B and would also wish to require a writing, considerations of syntax (which required the rephrasing reflected in alternative A) might make it necessary to add a further sentence to alternative B. This sentence might read: "The declaration or agreement shall be in writing". If a writing is required, in the final preparation of the convention consideration might be given to article 1 (3) (g) of the draft Convention on Prescription which includes the following definition: "'Writing' includes telegram or telex".

⁴⁰ For example the CMR. Provisions on the relations between successive carriers will be found in articles 34 through 40 of that Convention. Article 39 (4) provides that: "The provisions of article 32 shall apply to claims between carriers. The period of limitation shall, however, begin to run either on the date of the final judicial decision fixing the amount of compensation payable under the provisions of this Convention, or, if there is no such judicial decision, from the actual date of payment."

⁴¹ For example, article 487 of the Netherlands Commercial Code provides, *inter alia*, "if the carrier on his part is party to a contract with another carrier, the former's claim against the latter shall not become barred until three months have elapsed after he himself has paid or has been sued, provided one of these events has taken place within the said term of one year". See also article 32 of Law 66-420 of France.

65. Article 1 (3) of the Brussels Protocol of 1968 provides for the amendment of the 1924 Convention by the insertion, after article 3 (6), of the following paragraph 6 *bis*:

"An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought with the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself."

66. An action for indemnity may thus be brought within the time allowed by the law of the court seized of the case, on the condition, however, that the time allowed shall not be less than three months.

67. The replies to the questionnaire indicate that the provision of the Brussels Protocol cited above is a useful addition to the Brussels Convention and that it should be retained.⁴² Consequently, this provision is included in the consolidated set of draft provisions (section G, below, at para. 68). A slight stylistic modification might be considered: replacing the word "year" in the first sentence by "period of limitation". This change is indicated by underscoring in the draft provision which appears as paragraph (e) in the draft provisions in section G, below.

G. Consolidation of draft provisions on the period of limitation

68. Draft provisions on various aspects of the period of limitation have been presented and discussed in this study. To assist the Working Group in examining these provisions in relationship to each other they are presented in the following consolidated form.

Draft provisions on the period of limitation

Article 3

6 *bis* (a) The carrier and the ship shall be discharged from all liability whatsoever in respect of carriage of the goods unless suit is brought or arbitration proceedings are initiated within [one year] [two years] of the commencement of the period of limitation.⁴³

⁴² This is the tenor of the replies of Austria, Australia, Czechoslovakia, Federal Republic of Germany, Iraq, Norway and Sweden. The Australian reply states that "while three months is not a long time, it is probably sufficient given the circumstances in which such actions will arise". The Czechoslovak reply, while it considers article 1 (3) of the 1968 Protocol an improvement, suggests the following re-drafting of that provision: "... if brought within ... months commencing from the day ... or within a longer time allowed by the law of the court or arbitration having jurisdiction to decide upon the issue". On the other hand, the reply of the Government of Turkey indicates that the period for recourse action should be one year.

⁴³ See section B at paras. 4-14, above. The above draft appears at paragraph 14.

(b) The period of limitation shall commence:⁴⁴

- (i) in actions for compensation for [loss] [non-delivery] of part of the goods covered by the contract of carriage, for damage, or for delay in delivery: from the last date on which the carrier has delivered any of such goods. The date of such delivery shall be determined on the basis of the provisions of sub-paragraphs (a)-(c) of paragraphs (ii) of article [].⁴⁵
- (ii) in actions for compensation for [loss] [non-delivery] of all of the goods covered by the contract of carriage: from [the stated date for delivery or, in the absence of such a stated date], the [ninetieth] day after the time the carrier has taken over the goods.⁴⁶

The day on which the period of limitation begins to run shall not be included in the period.

⁴⁴ See section C at paras. 21-45, above. This draft provision appears at paragraph 39 and is discussed at paras. 39-45.

⁴⁵ See the proposed revision of article 1 (e). Report on the third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

⁴⁶ The expression "the time the carrier has taken over the goods" is employed in the revision of article 1 (e) at paragraph (ii). See report on third session (A/CN.9/63), para. 14, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

(c) The period of limitation may be extended by the carrier after the cause of action has arisen by a [written] declaration or agreement.⁴⁷

(d) A written claim shall suspend the running of the period of limitation until such date as the carrier rejects the claim by notification in writing. If a part of the claim is admitted, the period of limitation shall start to run again only in respect of that part of the claim still in dispute. The burden of proof of the receipt of the claim, or of the reply, shall rest with the party relying upon those facts. The running of the period of limitation shall not be suspended by further claims having the same object.⁴⁸

(e) An action for indemnity against a third person may be brought even after the expiration of the *period of limitation* provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than [three months], commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.⁴⁹

⁴⁷ See section E at paras. 54-62, above. The above text is based on alternative A at para. 60.

⁴⁸ See section D (2) at paras. 51-53, above.

⁴⁹ See section F at paras. 63-67, above.

PART FIVE: DEFINITIONS UNDER ARTICLE 1 OF THE CONVENTION

A. Introduction

1. This part of the reports responds to the decision of the Commission, made in response, to the recommendation of this Working Group, to consider "definitions under article I of the Convention".¹ Article 1 of the International Convention for the Unification of Certain Rules relating to Bills of Lading² contains five definitions, two of which have been considered already by this Working Group at its third session.³ The three definitions remaining for consideration are those of "carrier" (article 1 (a)), "contract of carriage" (article 1 (b)) and "ship" (article 1 (d)).

B. Definition of "carrier":⁴ problems and proposed solution

2. Article 1 (a) states that:

"'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper."

3. Thus the term "carrier" designates the person who is responsible to the cargo owner for the performance of the "contract" of carriage and who is subject to the terms of the Brussels Convention.⁵ That person may be a shipowner, a charterer or some other person,⁶ depending upon the circumstances of a particular case.

¹ UNCITRAL, report on fourth session (1971), para. 19, UNCITRAL Yearbook, vol. II: 1971, part one, II, A. See also Working Group on International Legislation on Shipping, report on third session A/CN.9/63 (1972), para. 73, UNCITRAL Yearbook, vol. III: 1972, part two, IV.

² Hereinafter cited as the Brussels Convention. League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764; reproduced in *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

³ Definitions already taken up are: 1 (c) — "Goods" and 1 (e) — "Carriage of goods". See report of the Secretary-General on the responsibility of ocean carriers for cargo: bills of lading, A/CN.9/63/Add.1, UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex; and Working Group report on third session (1972), UNCITRAL Yearbook, vol. III: 1972, part two, IV.

⁴ The definition of "carrier" may require further consideration at a later time, in light of action that may be taken by the Working Group with respect to problems arising in cases of "trans-shipment". The relationship between the definition of "carrier" and trans-shipment is not considered in this part of the report; instead, see part 2, which deals specifically with "trans-shipment".

⁵ Throughout the remainder of the Brussels Convention, the terms "carrier" and "shipper" are used to indicate the parties to the contract of carriage, whose rights and duties are defined in the Convention.

⁶ The word "includes" indicates that the specific designations of the "owner" and "charterer" are not meant to be exhaustive. Shipping and forwarding agents may also, under certain types of contractual arrangements, be considered "carriers". See "Bills of lading", report by the UNCTAD secretariat (document TD/B/C.4/ISL/6; United Nations publication, Sales No. 72.II.D.2), paragraphs 180 *et seq.*

4. It is extremely important that the "carrier" be readily identifiable on the face of the bill of lading, so that the bill of lading holder—frequently a bona fide purchaser who takes the bill after it is issued—can know from whom to seek recovery should the goods be lost or damaged. Any difficulties in identifying the "carrier" may not only cause loss to an individual cargo owner, but also may impair the utility of the bill of lading as a commercial document of title. The reply of Australia to the secretariat's questionnaire proposed that, in order to emphasize the point that persons other than shipowners and charterers might be considered "carriers", the definition of "carrier" be amended to read as follows: "carrier" includes the owner, the charterer or any other person who enters into a contract of carriage with a shipper" (emphasis added). The reply of the USSR proposed that an amended definition of the term "carrier" stated that "carrier" signifies the shipowner, the charterer or any other person who, acting on his own behalf, concludes with a shipper a contract for the carriage of goods".

5. No problems arise over identification of the "carrier" where the shipping line named in the bill of lading and the shipowner are the same company. In some cases, however, the line named in the bill of lading is a time or voyage charterer⁷ of the ship on which the goods covered by the bill of lading are carried, and there is considerable uncertainty as to whether the charterer or the shipowner should be considered the "carrier". In such cases, a shipping line that charters ships to supplement its own fleet may issue bills of lading headed with its own name and address regardless of whether the consignor's goods are loaded onto ships that are chartered by the line. These bills of lading may be signed "for the master"⁸ and contain a "demise clause" or identity of carrier clause, of which the following are examples:

(a) "If the ocean vessel is not owned or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary), this bill of lading shall take effect only as a contract with the owner or demise charterer as the case may be as principal made through the agency of the said company or line who

act as agents only and shall be under no responsibility whatsoever in respect thereof" (emphasis added).

(b) "The contract evidenced by this bill of lading is between the merchant and the owner of the vessel named herein (or substitute) and it is therefore agreed that said ship owner only shall be liable for any damage or loss due to any breach or non performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel seaworthiness. If despite the foregoing, it is adjudged that any other is the carrier and/or bailee of the goods shipped hereunder, all limitations of and exonerations from liability provided for by law or by this bill of lading shall be available to such other. It is further understood and agreed that as the Line, company or agents who has executed this bill of lading for and on behalf of the master is not a principal in the transaction, said Line, company or agents shall not be under any liability arising out of the contract of carriage, neither as carrier nor as bailee of the goods"¹⁰ (emphasis added).

6. The bona fide purchaser of the goods, upon taking up the bill of lading, notes that it was issued under the name of a reputable shipping line, and sees nothing to indicate that the "carrier" is anyone other than the line. If the goods arrive short or damaged, then the bill of lading holder notifies the line named in the bill. At that point, he discovers that the line disclaims all liability for the goods, on the ground that the line was merely an agent who arranged a contract of carriage between the shipper and the shipowner. This contention is supported by the "demise clause" and the traditional doctrine that the signature of a bill of lading "for the master" binds the shipowner, not the voyage or time charterer.

7. In essence, these are the factual circumstances of several cases that have arisen in recent years.¹¹

8. A cargo owner faced with this situation may choose among several possible courses of action: (a) he may initiate legal action against both the shipowner and the charterer, which may mean maintaining separate actions in different countries; or (b) he may take action against either the shipowner or the charterer, facing long and costly delays, while the preliminary issue of

⁷ A voyage charter is a contract for the use of a ship for the carriage of goods on a single voyage or several specified voyages. It may be contrasted with a time charter, which is a contract for the use of a ship for the carriage of goods during a specific period of time, and a demise (or bare-boat) charter, which transfers not only the use but also the entire operational control of a ship, usually for a specific period of time. Under most voyage and time charters, the master and crew remain servants and agents of the shipowner in all matters relating to operational control of the vessel; the charterer has only the use, or commercial control, of the vessel.

⁸ A bill of lading ordinarily is signed "for the master" by the shipowner's agent. Traditionally, a signature "for the master" binds the ship in rem and (except in cases of demise charters) binds the shipowner, as the master's employer, in personam. See A. W. Knauth, *The American Law of Ocean Bills of Lading*, Baltimore, 1953, p. 179. See also Hugo Tibergh, "Who is the Hague Rule Carrier?", in *Six Lectures on the Hague Rules*, Kurt Grönfors, ed., Göteborg, 1967, p. 131.

⁹ See the "Model All-Purpose Liner Bill of Lading", developed by a "P and I Club", set out in Singh and Colinaux, *Shipowners* (Vol. 13 of *British Shipping Laws*) London, Stevens and Sons, 1967, p. 317.

¹⁰ See the bill of lading form used by the Baltice and International Conference, known as the "Conline Bill" clause 17, set out in "Bills of Lading", Report by the UNCTAD Secretariat, op. cit., Appendix III, pp. 14 et seq.; and in Andrée Chao, "Réflexions sur la 'Identity of Carrier Clause'", *Le Droit Maritime Français*, 1967, pp. 12 et seq.

¹¹ See, for example, *Stockholms Sjöförsäkrings Aktiebolag v. Stockholms Rederiaktiebolag Svea (The Lulu)*, ND 1960, 349 SCS; *NJA 1960 742*; *Christiania Sjöförsäkringselskab v. Det Bergenske Dampskibsselskab As Time Charterer of the Steamship Lysaker (The Lysaker)*, ND 1955, 85 SCN; Appel Bruxelles 1^{er} mars 1963, J.P.A. 63, 329; Com. Anvers 18 Dec. 1962, J.P.A. 63, 367; See also Chao, "Réflexions sur la 'Identity of Carrier Clause'", op. cit., and Tibergh, "Who is the Hague Rules Carrier?", op. cit.

whether the defendant is the proper party is resolved, and risking loss on that preliminary issue after the one-year statute of limitations¹² has run—thereby preventing a suit against the other, “proper” party. He may even find that the courts of one country dismiss his action because the *charterer* is not the proper defendant, and the courts of another country dismiss it because the *ship* is not the proper defendant.¹³

9. These problems arise because shipping lines use bills of lading that disclaim liability in the event that the ship is chartered, but that fail to indicate (1) whether the ship is in fact chartered; and if so, (2) the name and address of the shipowner.¹⁴ The Working Group may find it helpful to consider the advisability of amending the Brussels Convention to require inclusion of those two points of information in the bill of lading.

10. Other transport conventions require that the name of the carrier¹⁵ be given in the transport documents. For example, the Warsaw Convention,¹⁶ article 8, states that:

“The air consignment note shall contain the following particulars:

“... ”

“(e) The name and address of the first carrier;”

Articles 9 provides that:

“... If the air consignment note does not contain all the particulars set out in Article 8 [including the ‘name and address of the first carrier’]... the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.”

The CMR Convention,¹⁷ article 6 (6), states that:

“The consignment note shall contain the following particulars:

“... ”

“(b) the name of the forwarding railway;

“(c) The name of the railway and station of destination...”

The CMR Convention,¹⁸ article 6 (1), stipulates that:

¹² See article III (6) of the Brussels Convention, which is discussed in part four of this report.

¹³ This was the result in *The Lulu*, cited in note 11, above.

¹⁴ In some cases, courts have held that demise clauses which fail to identify adequately the shipowner are invalid and that, in such cases, the charterer is the “carrier” who is liable under the Brussels Convention. However, this is not an adequate solution on an international scale. The results in such cases depend upon the particular factual circumstances and are by no means uniform, and the continued use of such bills of lading causes unnecessary uncertainty and litigation.

¹⁵ Because these other conventions do not define the term “carrier”, it is uncertain whether they use that term to mean only the owner or—as in the Brussels Convention—whether the term “carrier” may mean the owner or some other party who enters into a contract of carriage with a shipper.

¹⁶ Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929.

¹⁷ International Convention on the Transport of Goods by Rail, signed at Berne, 25 February 1961.

¹⁸ Convention on the Contract for the International Carriage of Goods by Road, signed at Geneva, 19 May 1956.

“1. The consignment note shall contain the following particulars:

“... ”

“(c) The name and address of the carrier...”

11. An amendment to require the bill of lading to state (a) whether the ship is chartered; and if so, (b) the name and address of the shipowner, might be added immediately after the present Article 3 (3) of the Brussels Convention. At present, Article 3 (3) states:

“3. After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

“(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner, as should ordinarily remain legible until the end of the voyage;

“(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;¹⁹

“(c) The apparent order and condition of the goods;”

12. The following draft provision might be added immediately after article 3 (3):

“3 (3) *bis*. The bill of lading [or any similar document of title] shall state the name and address of the carrier. If the ship is chartered, the bill of lading [or any similar document of title] shall so state and shall give the name and address of the shipowner. If the bill of lading [or any similar document of title] does not contain all the information required by this subparagraph, the person issuing the bill of lading shall be responsible for the good under the terms of this Convention.”

13. These amendments would put the bill of lading holder on notice that the line whose name appeared at the head of the bill of lading was not necessarily the “carrier”, and would provide him with the information necessary to discover which party was properly the “carrier”.

14. The sanction contained in the last sentence of the proposed article 3 (3) *bis* is intended to impose joint contractual responsibility upon the charterer and the shipowner for failure to provide the information required by that amendment. Such a sanction would be supportable on grounds of fundamental fairness: the charterer who arranges for shipment clearly knows whether the ship is chartered, and if so, to whom. This rule would also be consistent with the widely held legal doctrine

¹⁹ For proposed amendment to article 3 (3) (b), see part one: Unit limitation of liability, at paragraph 40.

that an agent for an undisclosed principal is jointly liable with his principal.²⁰

C. Definition of "contract of carriage"

15. Article 1 (b) states that:

"Contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same."

16. The UNCTAD secretariat report on bills of lading suggested that

"The phrase '*in so far as such document relates to the carriage of goods by sea*' would have to be amended if it should be decided to extend the Rules to the period when the goods are in the carrier's custody before loading and after discharge"²¹ (emphasis added).

17. The Working Group at its third session extended the coverage of the Brussels Convention to periods before loading and after discharge, by revising the definition of "carriage of goods" in article 1 (e) to state, in part, that:

"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."

18. Because of this revision, the Working Group may find that the existing phrase "*in so far as such document relates to the carriage of goods by sea*" (emphasis added) is broad enough to cover situations in which goods are in the charge of the carrier before loading and after discharge. Accordingly, revision of the definition of "contract of carriage" in article 1 (b) may be unnecessary.

19. On the other hand, the Working Group may wish to conform the language of article 1 (b) with that of article 1 (e). One approach would be by amending article 1 (b) to delete the words "by sea" and to add the words "as defined in this Convention", so that article 1 (b) would read:

(Words to be deleted are in square brackets; words to be added are in italics.)

"Contract of carriage' applies only to contracts of carriage covered by bills of lading or any similar document of title, in so far as such document relates to the carriage of goods [by sea] *as defined in this Convention* . . ."

²⁰ The replies of Austria and Czechoslovakia proposed that a signatory of a bill of lading who does not disclose to the cargo owner that he is acting as an agent for the shipowner should be liable under the terms of the bill of lading.

²¹ See "Bills of lading: report of the UNCTAD secretariat", op. cit., para. 186.

20. A second approach would call for amending the revised article 1 (e) to define "carriage of goods *by sea*", instead of merely "carriage of goods".²²

D. Definition of ship

21. Article 1 (d) of the Brussels Convention states that:

"Ship means any vessel used for the carriage of goods by sea."

The UNCTAD secretariat report on bills of lading²³ noted that this definition does not include barges, lighters or similar craft used to transport goods from the carrying ship to the shore during loading and discharging operations. That report concluded that:

"It seems desirable that the Rules should apply to lightering operations when the carrier owns or operates the barges or lighters as part of his contract of carriage. If so, the definition of 'ship' could be amended to include such craft."

22. This suggestion relates not only to the type of vessel to which the Brussels Convention applies, but also to the question of whether the Convention applies during loading and discharging operations. That question was discussed at length during the third session of the Working Group²⁴ which adopted the following revision to article 1 (e), designed to clarify the period of the Convention's application:

"[Revision of article 1 (a) "carriage of goods"]

"(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

²² The replies of Norway and Sweden proposed an additional amendment to article 1 (b), stating that the provisions of the Convention are to remain applicable notwithstanding the absence, irregularity or loss of the transport document. The reply of the Federal Republic of Germany stated that it probably was not necessary to extend the coverage of the Hague Rules to contracts of carriage for which no bill of lading has been issued, because bills of lading are issued for virtually every carriage of goods by sea.

²³ Op. cit., para. 189.

²⁴ See Working Group report on third session, 31 January to 11 February 1972 (A/CN.9/63), paras. 11 to 21, UNCITRAL Yearbook, vol. III: 1972, part two, IV. See also "Responsibility of ocean carriers for cargo: bills of lading", A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex. The question of whether the Convention applies during loading and discharging operations was discussed in connexion with the larger problem of the period of ocean carriers' responsibility under the Brussels Convention.

the disposal of the consignee in accordance with the contract or with the 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." ²⁵

23. The Working Group may find that this revision, by extending the coverage of the Convention to the "period during which the goods are in the charge of the carrier", resolves any uncertainties with respect to whether the Convention applies to barge or lightering operations conducted by the carrier under his contract of carriage. Accordingly, revision of the definition of "ship" in article 1 (d) may be unnecessary.

²⁵ Working Group on International Legislation on Shipping, report on third session, 31 January to 11 February 1972, op. cit., para. 14.

PART SIX: ELIMINATION OF INVALID CLAUSES IN BILLS OF LADING

A. Introduction

1. In response to the programme of work developed at the fourth session of UNCITRAL,¹ this part of the report deals with the "elimination of invalid clauses in bills of lading".

2. The central function of the Brussels Convention is to lay down basic requirements from which ocean carriers may not derogate in the contract of carriage.² This objective is implemented by article 3 (8), which reads as follows:

"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. A benefit of insurance clause in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

¹ 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, UNCITRAL Yearbook, vol. II: 1971, part one, II, A.

² Articles prohibiting "invalid" clauses are also contained in some other international transport conventions, as follows:

Article 32 of the Warsaw (Air) Convention provides in part:

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 the Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. . . .

Article 41 of the Road (CMR) Convention provides:

1. Subject to the provisions of article 40, any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void. The nullity of such a stipulation shall not involve the nullity of the other provisions of the contract.

2. In particular, a benefit of insurance in favour of the carrier or any other similar clause, or any clause shifting the burden of proof shall be null and void.

3. However, the mere establishment of international legislation that invalidates clauses in bills of lading does not, in the absence of sanctions of other effective controlling measures, in itself prevent carriers from including such clauses, and it appears that bills of lading often contain provisions that are clearly invalid and others that are of questionable validity under the Convention.³

4. The inclusion of invalid clauses in bills of lading causes uncertainty in the minds of cargo owners as to their rights and liabilities. Their removal "would facilitate trade, because their continued inclusion [in bills of lading] has the following onerous effects: (a) the clauses mislead cargo interests, thus causing them to drop the pursuit of valid claims, (b) they present an excuse for prolonging discussion and negotiation of claims which otherwise might have been settled promptly, and (c) they encourage unnecessary litigation".⁴

5. Most of the replies of Governments to the questionnaire confirm that shippers' rights are impaired by carriers' use of invalid clauses, and that measures need to be undertaken to deter or prevent carriers from continuing the practice. However, while some respondents acknowledge the problem, they doubt whether a more effective measure than that contained in article 3 (8) is feasible.⁵ One Government suggested that article 3 (8) offered "a too restricted interpretation" as it related to "the rules of liability only".⁶ The Governments of two countries suggested that the problem of invalid clauses could best be approached through "actions taken by

³ Dor. Bill of Lading Clauses and the International Convention of 1924 (2d ed. 1960), page 41.

⁴ "Bills of lading", report by the secretariat of UNCTAD, TD/B/C.4/ISL/6/Rev.1 (United Nations publication, Sales No. 72.II.D.2), para. 295.

⁵ See e.g., the reply of the Government of Australia. The reply of the Government of Turkey observed that the present situation with respect to invalid clauses is satisfactory.

⁶ See the reply of Sweden which submitted that the Convention "should include a general provision on the nullity of clauses in a bill of lading which directly or indirectly, derogate from the provisions of the Convention".

persons and organizations representing the various transport interests".⁷

6. In view of these replies, and of the difficulties that are inherent in the topic, it may be appropriate for the Working Group to consider at this stage the general lines of policy that should govern further work on the subject of "invalid clauses".

B. *Alternatives approaches*

7. It would appear that several not necessarily exclusive, approaches to the problem might be considered:

(a) Making the mandatory requirements of the Convention as clear and explicit as possible.

(b) Specifying in the text of the Convention itself that certain types of clauses are invalid.

(c) Introducing sanctions to penalize the use of invalid clauses.

(d) Requiring the inclusion, in bills of lading subject to the Convention, of a clause drawing attention to the invalidity under the Convention of any agreement that is inconsistent with the mandatory rules of the Convention.

8. The approach under (a) above, making the mandatory requirements of the Convention as clear and explicit as possible, can be of value in minimizing the impact of invalid clauses. If a bill of lading contains a clause that is clearly invalid under the Convention, that clause cannot readily be abused to persuade the cargo owner to drop or to compromise a valid claim—at least if the cargo owner is aware of his legal rights under the Convention. (Approaches to this latter problem will be considered at paragraph 13, below.) Removing ambiguities latent in the Brussels Convention of 1924 and the 1968 Protocol is an objective specified in the UNCTAD and UNCITRAL resolutions, and one to which the Working Group has been addressing itself. Success in this work is thus relevant to the topic of "invalid clauses".

9. As was noted in paragraph 7 (b), one possible approach would be to specify in the text of the Convention that certain clauses are invalid.⁸ This approach is used at one point in the present Convention—by the specific reference to "benefit of insurance" clauses in article 3 (8) (see paragraph 2 above). A wider use of this approach might be useful to brand the most flagrant violation of the provisions of the Convention as indisputably void; the rulings implied in the listing of invalid clauses might also help to make clear and explicit the principles of the Convention.

10. The Working Group may wish also to consider certain difficulties that are inherent in branding specificity

clauses as "invalid". One basic difficulty is that many clauses are "invalid" when applied to some factual situation but are "valid" when applied to other situations.⁹ Defining the circumstances in which a clause is invalid can only be done by the statement of a substantive rule—a function which is central to the Working Group's primary task of revising and clarifying the mandatory rules of the Convention.¹⁰ Moreover, if certain clauses in current use should be identified as invalid, it is possible that legal draftsmen could prepare different wording to achieve similar ends—and defend the new clauses on the ground that they are not among the clauses specifically prescribed by the Convention.¹¹

11. The third approach—introducing sanctions to penalize the use of invalid clauses—invites the question whether the penalties would attach to (i) the use of specifically outlawed clauses or (ii) the use of any clause that was inconsistent with a provision of the Convention. The first approach would present the difficulties of identifying specific clauses, as discussed in the preceding paragraph. The second approach—setting forth sanctions for the use of *any* contract clause might be held inconsistent with a rule of the Convention—would have to take account of the possibility that the implications of the rules of the Convention, in some of its applications, would not be perfectly clear. Thus, such a general rule might lead to sanctions where an adverse construction of the Convention was not anticipated and, in some cases, might inhibit the development of contractual solutions for problems where the precise meaning of the Convention is in doubt.

12. It is conceivable that these difficulties might be minimized by applying the sanctions only where the agreement was "clearly" or "plainly" in violation of the Convention; however, such a test might prove difficult of application. As an alternative, the difficulties presented by sanctions for any "invalid" clauses might be minimized if the applicable sanctions were relatively light. Consideration might be given to a provision modelled on article 7 (3) of the Road (CMR) Convention, whereby "the carrier shall be liable for all expenses, loss

⁹ One example is given in the UNCTAD secretariat report, "Bills of lading", para. 296 and note 290. It is there noted that a clause that freight is earned "vessel and/or goods lost or not lost" is invalid where the carrier is legally responsible for the loss, but is valid where the carrier is not legally responsible.

¹⁰ It might be suggested that the reference to "benefit of insurance" clauses in article 3 (8) shows that it is generally feasible to brand specific clauses as invalid. On the other hand, this provision may not be typical. In the first place, the "benefit of insurance" issue may be more clear-cut than most. In the second place, a substantive rule that the shipper has the right to retain the proceeds of his insurance might not be protected from a contractual provision to the contrary under the present language of article 3 (8) of the 1924 Convention since such a contract might not be deemed to be "a clause relieving the carrier from liability". This is essentially a problem of the language and scope of article 3 (8) to which attention could be given in a general review or revision of the Convention.

¹¹ The replies of the Governments of the Federal Republic of Germany and the USSR indicated that the attempt to identify invalid clauses was not practical. Various other replies expressed general doubts as to the feasibility of special measures to deal with invalid clauses.

⁷ See, for example, the reply of Sweden. Similarly the Norwegian Government took the view that "the problems involved should be given serious consideration by the various organizations engaged in elaborating standard transport documents for carriage of goods by sea".

⁸ See the suggestion made to this effect in "The carriage of goods by sea", by Professor E. R. Hardy-Ivamy, "Current Legal Problems", London, 1960, pp. 216-217, cited in UNCTAD secretariat report on bills of lading, para. 298.

and damage" resulting from the inclusion of an invalid (or "clearly" invalid) clause in the contract of carriage.¹²

13. The approach mentioned in paragraph 7 (d), above, responds to the view that invalid clauses are particularly susceptible of abuse when the cargo owner is not aware of the provisions of the Convention which invalidate such clauses. It seems possible that some cargo owners, particularly cargo owners who are not a part of a large business establishment, might feel that they were bound by a provision in the contract of carriage which would appear clearly to bar their claim. To alert such persons to their rights, consideration might be given to a provision that contracts of carriage subject to the Convention must state that any provision of the contract that is inconsistent with the Convention cannot be given effect.¹³

¹² One attractive feature of a rule based on the CMR Convention is that the causal connexion between the invalid clause and the resulting loss would avoid the argument that sanctions would be invalid in some hypothetical or unlikely situation. The sanction of loss of limitation of liability, provided in article 9 of the Warsaw Convention, lacks this causal connexion, and may be unduly harsh in situations where the invalidity of the contract clause may be in doubt.

¹³ Such a required statement probably should stress the possible invalidity of contractual provisions more clearly than does

14. Such a "requirement" would be meaningless unless failure to include the required provision in the contract of carriage is subject to a sanction. It seems that there could be little excuse for failing to include such a prescribed statement in the contract of carriage. Consequently, it might be appropriate to follow article 9 of the 1929 Warsaw (Air) Convention, which states that if the air consignment note fails to contain particulars specified in article 8 (including "a statement that the carriage is subject to the rules relating to liability established by this Convention"), "the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability".

15. A requirement that the contract of carriage alert the cargo owner to the protection afforded by the Convention (paragraph 13, above) probably would provide only modest assistance to minimize the abuse of invalid clauses. But if the Working Group should conclude that alternative measures are not feasible, this minimal approach to the problem may be worthy of attention.

article 6 (1) (k) of the Road (CMR) Convention, which requires that the consignment note contain "a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention".

5. Report of the Working Group on International Legislation on Shipping on the work of its fifth session (New York, 5-16 February 1973) (A/CN.9/76) *

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* 28 February 1973.

Introduction

1. The Working Group on International Legislation on Shipping was established by the United Nations Commission on International Trade Law (UNCITRAL) 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: Argentina, Australia, Belgium, Brazil, 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. At its third session,¹ the Working Group decided to devote the fifth session to a consideration of those topics listed in the resolution adopted by UNCITRAL at its fourth session that had not yet received consideration by the Working Group at its fourth session.² These remaining topics were: (1) unit limitation of liability; (2) trans-shipment; (3) deviation; (4) the period of limitation; (5) definitions under article 1 of the convention; and (6) elimination of invalid clauses in bills of lading.

3. The Working Group held its fifth session in New York from 5 to 16 February 1973.

4. Seventeen members of the Working Group were represented at the session.³ The session was also attended by the following members of the Commission: Guyana and Iran, and by observers from the following international, intergovernmental and non-governmental organizations: The United Nations Conference on Trade and Development (UNCTAD), the Inter-Governmental Maritime Consultative Organization (IMCO), The International Chamber of Commerce, the International Chamber of Shipping, the International Maritime Committee and the International Union of Marine Insurance.

5. The Working Group, by acclamation, elected the following officers:

Chairman: Mr. José Domingo Ray (Argentina)
Vice-Chairman: Mr. Stanislaw Suchorzewski (Poland)
Rapporteur: Mr. L. H. Khoo (Singapore).

6. The following documents were placed before the Working Group:

(1) Provisional agenda and annotations (A/CN.9/WG.III/R.2)

(2) "Memorandum concerning the structure of a possible new convention on the carriage of goods by sea", submitted by the Norwegian delegation (A/CN.9/WG.III/WP.9)

(3) Report by the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills of lading" (unit limitation of liability; trans-shipment; deviation; the period of limitation, definitions, invalid clauses) (A/CN.9/WG.III/WP.10, vols. I-III) *

(4) Replies of Governments and international organizations to the second questionnaire on responsibility of carriers for loss or damage to cargo in the context of bills of lading (A/CN.9/WG.III/WP.10/Add.1 and Add.2)

(5) Report by the Secretary-General entitled "Identification of problem areas in the field of ocean bills of lading for possible further study (A/CN.9/WG.III/R.1).

7. The Working Group adopted the following agenda:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. Consideration of the substantive items selected by the third and fourth sessions of the Working Group to be dealt with by the fifth session
5. Future work
6. Adoption of the report.

8. The Working Group decided to use the report of the Secretary-General entitled "Second report on responsibility of ocean carriers for cargo: bills of lading" (hereinafter referred to as the second report of the Secretary-General (A/CN.9/WG.III/WP.10, vols. I-III)) as its working document. In that report the Secretary-General examined the following topics: unit limitation of liability (part one); trans-shipment (part two); deviation (part three); the period of limitation (part four); definitions under article 1 of the convention (part five); elimination of invalid clauses in bills of lading (part six). The report of the Secretary-General is annexed to the present report in an addendum (A/CN.9/76/Add.1).*

I. Unit limitation of liability

A. INTRODUCTION

9. The areas for study established by the Commission include "unit limitation of liability". This subject was considered in part one of the second report of the Secretary-General (A/CN.9/76/Add.1).* In response to suggestions made at the fourth session of the Working Group, the report was directed primarily at the structure and approach of the rules on limitation of liability, as contrasted with the monetary level of the limitations.

¹ 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; UNCITRAL Yearbook, vol. III: 1972, part two, IV) (herein cited as Working Group, report on third session).

² 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, UNCITRAL Yearbook, vol. II: 1971, part one, II, A (herein referred to as UNCITRAL, report on the fourth session (1971)), report of the Working Group on International Legislation on Shipping on the work of its fourth (special) session held in Geneva from 25 September to 6 October 1972 (A/CN.9/74, reproduced in this volume, part two, IV, 1, above) (herein cited as Working Group, report on fourth session).

³ All members of the Working Group were represented at the session with the exception of Chile, Ghana, Spain, and Zaire.

* Reproduced in this volume, part two, IV, 4, above.

10. As was noted in the report, article 4 (5) of the Brussels Convention of 1924 established an upper limit on the liability of the carrier or ship of 100 pounds sterling "per package or unit".⁴ The Brussels Protocol of 1968 would replace this single standard with a double standard. Under article 2 (a) of the Protocol the limit on liability was either: (1) frs. 10,000 "per package or unit" or (2) frs. 30 "per kilo of gross weight of the goods lost or damaged" whichever was higher.⁵ It was noted that the first of these standards was applicable to relatively light packages or units; if a package or unit weighed 334 kilos or more, the second standard produced the higher (and therefore the applicable) limitation.

11. The report (part one, paras. 12-31) discussed problems of interpretation that had been presented by the "package or unit" standard and set forth three alternative drafts addressed to these problems. Under alternative I (*id.*, para. 23), when goods were not shipped in a "package" (e.g., bulk cargo), the applicable standard would be the "freight unit". The report (*id.*, para. 24) analysed problems of interpretation that could arise under a "freight unit" standard, and in alternatives II-A and II-B set forth language whereby this standard would not be applicable: the language suggested in alternative II-A was "per package or other shipping unit" and in alternative II-B "per shipping unit".

12. The report also discussed problems presented in containerized transport under the "package or unit" standard. The basic question was whether the container constituted a single package or unit regardless of the number of items inside, or whether each item of cargo inside the container constituted a package or unit (*id.*, para. 18). Attention was drawn to the provision of article 2 (c) of the Brussels Protocol which states:

"(c) Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the Bill of Lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned; except as aforesaid such article of transport shall be considered the package or unit."

13. In connexion with article 2 (c), attention was drawn in the report to the question whether the container itself, when supplied by the shipper, would constitute an additional package or unit so that the limit of liability would be increased when such a container was damaged or lost in the course of shipment. A draft amendment was presented to clarify this question (report, part one, para. 20).

⁴ International Convention for the Unification of Certain Rules Relating to Bills of Lading (League of Nations, *Treaty Series*, vol. CXX, p. 157, No. 2764), reproduced in the Register of Texts of Conventions and other Instruments concerning International Trade Law, vol. II, chap. II, 1 (United Nations publication, Sales No. E.73.V.3).

⁵ Protocol to Amend the International Convention for the Unification of Certain Rules Relating to Bills of Lading, adopted February 1968, reproduced in the Register of Texts of Conventions and other Instruments concerning International Trade Law, vol. II, chap. II, 1.

14. The report also directed attention to proposals that the "package or unit" standard should not be employed for purposes of limitation of liability; under these proposals the weight ("frs.— per kilo") would provide the sole standard.

15. Attention was also directed to problems of interpretation that might arise under the provision of the Brussels Protocol prescribing a monetary limit "per kilo of gross weight of the goods lost or damaged". It was suggested that it might be useful to distinguish between (1) total and partial loss of the goods and (2) damage to goods; a draft provision to this effect, based on provisions of the International Convention concerning the Carriage of Goods by Rail (CIM Convention)⁶ and the Convention on the Contract for the International Carriage of Goods by Road (CMR Convention)⁷ was set forth in the report (alternative III-B; report, part one, para. 38). It was indicated that clarification along these lines might be useful regardless of whether a standard based on the weight of the goods would be the sole standard, or would be part of a double standard.

B. DISCUSSION BY THE WORKING GROUP

(1) THE BASIC LIMITATION OF LIABILITY RULE

16. The Working Group considered the approaches that had been set forth in the alternative proposals in the report of the Secretary-General. It was generally agreed that any system for determining the upper limit of carrier liability should include a weight standard (frs.— per kilo). Several representatives favoured the adoption of weight as the sole standard for limiting the carrier's liability. One representative indicated that either a system based on weight alone or a system based on weight and packages or units such as that provided for in article 2 (a) of the 1968 Brussels Protocol would be acceptable.

17. Those representatives who favoured weight as the single standard for determining the limit of the carrier's liability indicated that the limitation system adopted must be simple and clear, so that it would not promote litigation. From this point of view the "package or unit" standard of the Brussels Convention of 1924 had proved to be unsatisfactory; in addition, divergent interpretations had resulted. Moreover, since inter-modal transport was on the increase, limitation rules for maritime carriers should be in harmony with the weight limitation system which is used in other fields of transport. One of these representatives stated that there was no experience with the dual system, since the 1968 Brussels Protocol had not come into effect, while a weight only system had worked well in other fields of transport and had not led to a great deal of litigation; on the other hand the package or unit limitation had caused difficulties in practice, being productive of litigation. This representative also pointed to the inherent injustice of the dual system which focused on the size and form of goods rather than on their quantity or value.

⁶ United Nations, *Treaty Series*, vol. 241, No. 3442.

⁷ *Ibid.*, vol. 399, No. 3742.

It was suggested that under a single weight standard, the problem of high-value cargo with low weight could be solved by establishing a specified minimum limit on liability.

18. However, most representatives favoured maintaining the dual system embodied in article 2 (a) of the 1968 Brussels Protocol. These representatives pointed out that such a system had the advantage of flexibility in that it took account of packages that were relatively light but were of substantial value: a single system based on weight alone might operate to the shipper's detriment in the case of high-value, low-weight cargo. In addition, such a system would make it necessary to state the weight of every package shipped.

(2) PROVISION DEALING WITH CONTAINERS

19. Related to the limit of liability "per package or unit" was the question of the effect of consolidating packages within a container. There was general agreement that if the system of limitation of liability included the "package or unit" standard, such a standard would need to be supplemented by a provision on containers following the general lines of article 2 (c) of the 1968 Brussels Protocol (quoted at paragraph 12, above).

20. One representative proposed a provision on containers that only the weight standard would be applicable where the shipper (as contrasted with the carrier) had packed the container. Other representatives who favoured the dual system stated that such a provision would be incompatible with the dual system, and it was suggested that this proposal would discriminate against shippers who pack containers, often with the encouragement of carriers.

(3) OTHER ISSUES

21. The Working Group considered whether the rules on the limitation of liability should apply to servants and agents of the carrier. There was general support by the Working Group for a rule based on article 3 (2) of the 1968 Brussels Protocol, whereby the servant or agent is entitled to avail himself of the same limits of liability as the carrier.

22. The Working Group also discussed the question whether the limitations on liability, should be removed with respect to damage caused intentionally or recklessly, or by other serious misconduct. One issue was whether serious misconduct of the carrier's agents or servants should break the limitation on liability applicable to the carrier. Several representatives considered that the carrier should be fully responsible for such conduct by his agents or servants acting within the scope of their employment; it was suggested that any other rule would be difficult to apply since modern carriers perform most of their activities through agents and servants. On the other hand, several representatives stated that the limitation of liability applicable to the carrier should not be broken because of acts by the carrier's agents or servants. Although many types of serious misconduct (such as theft) would not be performed in the scope of the employment of the servants or agents, in the setting of serious misconduct the "scope of employment" test was

difficult to apply. As regards theft, certain representatives considered that it could be committed "in the scope of employment" of a servant or agent.

23. The distinction between intentional conduct and reckless conduct was discussed by the Working Group. It was indicated by some representatives that both these types of conduct by either the carrier or his servants or agents should deprive the carrier of the protection or the provisions on limitations on liability. Other representatives favoured limiting removal of the limit to cases of intentional conduct or wilful misconduct on the ground that a rule referring to "reckless" conduct was vague and difficult to apply.

24. It was suggested that an alternative method for dealing with the question would be to raise the limitation limit and to delete any provision dealing with removal of the limit. It was pointed out that acceptance of such a proposal for an "unbreakable" limitation would depend on the sum set as the upper limit.

25. The consequences of misstatements by the shipper of the nature and value of the goods were also discussed by the Working Group in connexion with article 2 (h) of the 1968 Brussels Protocol which provides that the carrier shall not be responsible for loss or damage to goods if their nature or value has been knowingly misstated by the shipper in the bill of lading. It was pointed out that such a rule, if applied literally, was too harsh since it would free the carrier from liability for any fault on his part. It was suggested that a correct interpretation of the rule would be that such misstatement by the shipper would merely invalidate the shipper's declaration of the nature and value of the goods. It was further suggested that the rules of national law might be adequate for his purpose.

C. REPORT OF THE DRAFTING PARTY

26. The Working Group, after a discussion of alternative approaches to the limitation of liability of carriers, decided to constitute a Drafting Party to prepare texts on this subject as well as on the other subjects that were to be considered at the fifth session.⁸ The report of the Drafting Party on the limitation of liability of carrier, with to amendments to the text of the proposed draft provisions made by the Working Group,⁹ is as follows:

⁸ The Drafting Party was composed of the representatives of Argentina, France, India, Japan, Nigeria, Norway, United Republic of Tanzania, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics and United States of America. The Drafting Party elected as Chairman Mr. E. Chr. Selvig (Norway).

⁹ The amendments made by the Working Group are the following: (a) the provision that had originally appeared as paragraph 5 of article A became article C; consequently, paragraph 6 of article A became paragraph 5; (b) the brackets that had been placed around paragraph 1 of article B were removed. The earlier use of the brackets is reflected in paragraph 12 of the report of the Drafting Party. The Working Group also decided to delete the following words appearing originally as the second sentence of paragraph 3 of article B: "However, additional compensation may be recovered from the carrier or any such person according to the provision of paragraph [5 of article A]" (now article C).

PART I OF THE REPORT OF THE DRAFTING PARTY:
UNIT LIMITATION OF LIABILITY

1. The draft set forth below is designed to implement the following decisions taken by the Working Group:

(a) The Working Group decided to maintain the dual system of limitation of liability, adopted in article 2 of the 1968 Brussels Protocol, whereby the limit of the carrier's liability is determined on the basis of a specific amount (1) per package or unit or (2) per kilo or gross weight of the goods lost or damaged, whichever is higher.

(b) The Working Group agreed that the Convention should take into account the use of containers and accordingly decided to maintain the principle set out in article 2 (c) of the 1968 Brussels Protocol which gave effect to the enumeration in the bill of lading of packages or units packed in the container. The Working Group also decided that an article of transport, such as a container, where supplied by the shipper, should be considered to be a separate package; this rule should be followed regardless of whether the packages or units were enumerated in the bill of lading.

2. The Drafting Party recommends the following text to implement these objectives:

Article A

1. The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to francs per package or other shipping unit or francs per kilo of gross weight of the goods lost or damaged, whichever is the higher.

2. For the purpose of calculating which amount is the higher in accordance with paragraph 1, the following rules shall apply:

(a) Where a container, pallet or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading as packed in such article of transport shall be deemed packages or shipping units. Except as aforesaid the goods in such article of transport shall be deemed one shipping unit.

(b) In cases where the article of transport itself has been lost or damaged, that article of transport shall, when not owned or otherwise supplied by the carrier, be considered one separate shipping unit.

3. A franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900.

4. The amount referred to in paragraph 1 of this article shall be converted into the national currency of the State of the court or arbitration tribunal seized of the case on the basis of the official value of that currency by reference to the unit defined in paragraph 3 of this article on the date of the judgement or arbitration award. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purposes of this Convention.

[5. By agreement between the carrier and the shipper a limit of liability exceeding that provided for in paragraph 1 may be fixed.]

Article B

1. The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of, damage (or delay) to the goods covered by a contract of carriage whether the action be founded in contract or in tort.

2. If such an action is brought against a servant or agent of the carrier, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this Convention.

3. The aggregate of the amounts recoverable from the carrier and any persons referred to in the preceding paragraph, shall not exceed the limits of liability provided for in this Convention.

Article C

The carrier shall not be entitled to the benefit of the limitation of liability provided for in paragraph 1 of article A if it is proved that the damage was caused by wilful misconduct of the carrier, or of any of his servants or agents acting within the scope of their employment. Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by wilful misconduct on his part.

Notes on the proposed draft provisions

3. With respect to paragraph 1 of article A, the Drafting Party has considered the drafting of a more detailed text aimed at drawing a clear distinction between liability for (1) total or partial loss and (2) damage to all or part of the goods. However, it has been decided that the present text is adequate and that a more detailed draft would not be an improvement on the language of the Brussels Protocol.

4. Paragraph 2 of article A serves as a further definition of the alternative in paragraph 1 with respect to "package or other shipping unit" and does not exclude recourse to the alternative based on gross weight. This paragraph embodies the principal aim of article 2 (c) of the 1968 Brussels Protocol, namely, to avoid the reduction of the carrier's liability when individual packages are consolidated in containers. This paragraph also provides that when the container itself, if not owned or otherwise supplied by the carrier, is lost or damaged, the container is counted as a separate unit.

5. The representatives of Nigeria and Norway have reserved their position with respect to paragraphs 1 and 2 of article A and have proposed replacing these paragraphs with the following provision:

"The liability of the carrier for loss of or damage to the goods shall be limited to an amount equivalent to [] francs per kilo of gross weight of the goods lost or damaged."

6. Paragraph 3 of article A of the proposed draft follows the language of the first sentence of article 2 (d) of the 1968 Brussels Protocol.

7. Paragraph 4 of article A concerns matters dealt with in the second sentence of article 2 (d) of the 1968 Brussels Protocol. The drafting Party noted that the Brussels Protocol left the date of conversion of the sum awarded to the law of the court seized of the case. In the interest of uniformity the proposed draft specifies that the conversion shall take place on the date when the judgement or arbitral award is rendered. The draft also refers to conversion, into the national currency of the State of the court or arbitral tribunal seized of the case, on the basis of the official value of that currency. One representative has reserved his position with respect to the inclusion in the concept of an official value of that currency as the basis for conversion.

8. The Drafting Party has considered the inclusion of language that would specify a date for conversion into national currency in cases where the parties settle the claim without resorting to judicial litigation or arbitration. This approach has not been adopted by the Drafting Party. It is noted, in this connexion, that the approach followed by the Drafting Party, in concerning itself only with judicial or arbitral situations, follows the pattern of other conventions in the field.

9. Paragraph 5 of article A specifies that the carrier and shipper may by agreement raise the limit of the carrier's liability. This paragraph picks up the substance of the first part of article 2 (a) and article 2 (g) of the Brussels Protocol. This provision is set in brackets on the ground such language may not be necessary in view of the general rule on the right of the carrier to agree to an increase of his liability which is embodied in article 5 of the Brussels Convention of 1924. However, this bracketed language is set forth at this point pending action on general provisions concerning the carrier's right to increase his liability.

10. The Drafting Party has concluded that it is not necessary to set forth a rule dealing with the evidentiary consequences of a declaration or other agreement as to the value of the goods (article 2 (f) of the Brussels Protocol).

11. The Drafting Party has also considered whether to retain a rule such as that set forth in article 2 (h) of the Brussels Protocol which provides: "Neither the carrier nor the ship shall be responsible in any event for loss or damage to, or in connexion with, goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading." It has been considered by the Drafting Party that a rule such as that of article 2 (h) of the Protocol might be construed to mean that where the shipper has knowingly misstated the nature or value of the goods he cannot recover any part of his loss even if the loss resulted from fault on the part of the carrier. In this connexion, the Drafting Party has concluded that this problem is dealt with by the general rules of law of each country that would deny effect to agreements for a higher value obtained by misrepresentation.

12. Paragraph 1 of article B of the draft is set out in brackets because it was not considered by the Working Group and thus examination of the rule embodied

within it was not in the Drafting Party's terms of reference. This provision is an integral part of the 1968 Brussels Protocol (article 3 (1)) and it was agreed that it should be included tentatively herein to present a draft text that is as complete as possible.¹⁰

13. Paragraph 2 of article B of the draft is generally based on article 3 (2) of the 1968 Brussels Protocol. However, it incorporates language which is consistent with article C of this draft in that the servant or agent is entitled to avail himself of the limitation of liability only if he proves that he acted within the scope of his employment.

14. Paragraph 3 of article B takes up the substance of article 3 (3) of the 1968 Brussels Protocol.

15. Article C responds to problems regarding circumstances when the limitation of liability will not apply. This article is a departure from the articles 2 (e) and 3 (4) of the 1968 Brussels Protocol in that under the language of article C the carrier may not limit his liability for the acts of his servants and agents when such acts are caused by wilful misconduct on their part. The use of the concept of "wilful misconduct" has been agreed to as the most acceptable compromise for setting the standard for measuring the type of activity that would remove the limitation to liability.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

27. The Working Group considered the above-quoted report of the Drafting Party.¹¹ The report of the Drafting Party, including the proposed draft provisions, was approved by a majority of the Working Group.

28. The following comments, proposals and reservations were made with respect to several paragraphs of the proposed draft provisions:

(a) With respect to paragraph 2 of article A one representative reserved his position and proposed the following alternative text:

"Notwithstanding paragraph 1, where a container, pallet or similar article of transport is used to consolidate, goods the amount based upon the package or other shipping unit in paragraph 1 shall not be used as the basis for the limit of liability of the carrier or his servants, and agents, or the ship."

(b) With respect to paragraph 4 of article A, one representative reserved his position and stated that such a provision would create litigation since it leaves room for much dispute. This representative stated in particular that the provision does not provide for a general conversion into a national currency such as provided for in the Warsaw Convention and in other conventions.

¹⁰ See foot-note 9 above.

¹¹ See foot-note 9 above.

(c) With respect to article C, several representatives reserved their positions. It was indicated that this provision would cause many complications and was unfair to the carrier because of the vicarious liability of the carrier for the wilful misconduct of his servants and agents imposed therein. Some representatives stated their preference for the approach taken in articles 2 (e) and 3 (4) of the 1968 Brussels Protocol. Observers of international non-governmental organizations, supporting the maintenance of the provisions of the 1968 Brussels Protocol, indicated that the words "within the scope of their employment" would cause serious difficulties of interpretation, thus giving rise to much litigation. They were also of the opinion that the proposed provision was contrary to the modern trend in favour of unbreakable limits, and would result in higher insurance premiums being payable than at present. It was pointed out that this provision was the result of negotiations in the Drafting Party as reflected in paragraph 15 of the report of the Drafting Party on this subject. Two representatives thought that this article might not be necessary if a sufficiently high limit of liability was ultimately provided for in article A; however, one for these representatives disagreed with the conclusions of the said observers as to higher insurance premiums. Another representative was of the opinion that this article should be confined to damage done with intent to cause damage. However, the Working Group was generally in favour of this article as a suitable compromise solution to the problem.

29. One representative, supported by one other representative, proposed the addition of three new paragraphs to article A of the proposed draft provisions. The additions would read as follows:

"6. Where the value of the goods has been declared by the shipper before their receipt by the carrier and inserted in the bill of lading, the limits of liability, provided for in paragraph 1, shall not be applied and such declaration embodied in the bill of lading shall be *prima facie* evidence of the value of such goods.

"7. If a value, which is remarkably higher than the actual value of the goods, has been knowingly misstated by the shipper in the bill of lading, the carrier shall not be responsible for any loss or damage to the goods.

"8. Unless the exact nature (or descriptions) of the value of the goods has been furnished in writing by the shipper before they are received by the carrier, the carrier shall not be responsible for any loss or damage to the goods."

The representative who introduced this proposal stated that it would provide the necessary general principles on the declaration of value by shippers and was aimed at preventing wilful misstatements by shippers. On the other hand, all other representatives who spoke expressed their opposition to the inclusion of these proposed paragraphs. It was stated that these paragraphs would lead to more difficulties than solutions. It was also observed that the question of misrepresentations by the shipper, such as deliberate misstatements by the shipper of the value of the goods, should be left to

national law. One representative declared his opposition to what were in his opinion essentially penal provisions. It was also pointed out that the Drafting Party had carefully considered the inclusion of such a provision but that it had rejected it (paragraphs 10 and 11 of part I of the report of the Drafting Party).

II. Trans-shipment

A. INTRODUCTION

30. Problems presented by trans-shipment were examined in part two of the second report of the Secretary-General.¹² In the report, the legal issues and alternative solutions were analysed in the setting of the following two situations:

(a) In one situation, typified by the standard "through" bill of lading, trans-shipment to a second carrier is specifically agreed upon at the time of shipment. For example, a shipper in Bombay who is sending goods to Tokyo may make a contract with a carrier whereby the contracting carrier agrees to carry the goods in his vessel to Sydney and at Sydney to trans-ship the goods to an on-carrier for the carriage from Sydney to Tokyo. Under such an arrangement the face of the bill of lading would be filled in as follows: "Port of loading: *Bombay*; port of discharge: *Sydney*; final destination: *Tokyo*". The report further noted that such a bill of lading would commonly include clauses to the effect that, with respect to carriage beyond the vessel's port of discharge (e.g., Sydney), the contracting carrier acts as forwarding agent only, and shall not be responsible for loss or damage, even though freight for the whole transport has been collected by him.

(b) In the second situation, the contract of carriage makes no specific arrangement for trans-shipment. For example, when goods are shipped from Bombay, with Tokyo as the final destination, the face of the bill of lading would be filled in as follows: "Port of loading: *Bombay*; port of discharge: *Tokyo*". However, the report noted that the bill of lading would commonly include general clauses that "whether expressly arranged for beforehand or otherwise, the carrier shall be at liberty to carry the goods to their port of destination by vessels belonging to the carrier or other" with the responsibility of the contracting carrier "limited to the part of the transport performed in his own vessel or vessels."

31. The report of the Secretary-General noted that the Brussels Convention of 1924 and the Brussels Protocol of 1968 contain no provisions dealing with the effect of such trans-shipment clauses. Where, for example, goods are shipped at port A (e.g., Bombay), trans-shipped to another carrier at port B (e.g., Sydney) and unloaded at their final destination at port C (e.g., Tokyo), the following issues were discussed: (1) Should the responsibility of the contracting carrier end at the point of trans-shipment (port B), or should it continue to the

¹² A/CN.9/76/Add.1, part two, reproduced in this volume, part two, IV, 4, above.

port of final destination (port C)? (2) What rules should govern the responsibility of the on-carrier with respect to the carriage from port B to port C? For example, if the State of port A is a party to the international convention but the State of port B is not a party, does a provision in the bill of lading that the initial carriage ends at port B lead to the conclusion that the convention is inapplicable to the carriage from port B to port C? (b) If the convention is applicable throughout the carriage, should the on-carrier (and more particularly the final, or delivering, carrier) be responsible to the cargo owner under the rules of the Convention for the carriage from B to C? Or should the delivering carrier be responsible for the carriage from A to C, subject to reimbursement from the contracting carrier (or an intermediate, connecting carrier) for loss caused by that carrier?

32. The report of the Secretary-General (part two, paras. 20-26) analysed statutory rules dealing with the foregoing questions which are contained in the international conventions governing carriage by air (the Warsaw Convention), by road (the CMR Convention) and by rail (the CIM Convention). The report (*id.*, paras. 35-40) set forth alternative draft texts related to the rules on the period of the carrier's responsibility developed by the Working Group at its third session.¹³ Under one alternative (alternative A) the contracting carrier would be responsible under the convention for the carriage from the port of shipment (port A) to the port of final destination (port C) under the typical "through" bill of lading, described in paragraph 30 (a) above as well as after trans-shipment under a general "liberty" (or option) clause, described in paragraph 30 (b), above. Under a second alternative provision (alternative B), the contracting carrier would be responsible for the entire carriage only when trans-shipment occurred under a general "liberty" (or option) clause; under this draft, the responsibility of the contracting carrier ended when trans-shipment was effected pursuant to an arrangement specifically provided for in the bill of lading—as in the through bill of lading that was described in paragraph 30 (b). The report also set forth (*id.*, para 41) a draft provision on the responsibility of on-carriers under the convention.

B. DISCUSSION BY THE WORKING GROUP

33. The Working Group discussed the responsibility of the contracting carrier after trans-shipment under the two types of arrangements described in paragraphs 30 (a) and 30 (b), *supra*. First, attention was given to trans-shipment effected by the contracting carrier under a general "liberty" (or option) clause. (See paragraph 30 (b), *supra*.) It was generally agreed that while such a trans-shipment, effected under reasonable circumstances, might be authorized under the contract, the contracting carrier should remain responsible to the cargo owner, under the rules of the Convention, for the entire carriage. If goods were damaged after such trans-shipment, the cost of reimbursing the cargo owner would not remain

with the contracting carrier, since the contracting carrier would normally have a right of recourse against the actual carrier (sometimes termed a "pre-carrier" or "on-carrier").

34. Where trans-shipment for a designated part of the carriage had been specifically agreed to in the contract of carriage (as under the through bill of lading described in paragraph 30 (a)), several representatives expressed the view that the responsibility of the contracting carrier should terminate on trans-shipment. It was noted that no rule of law required carriers to issue through bills of lading. If the contracting carrier should be made responsible for the entire carriage the carrier might decline to issue such through bills; as a consequence a document that had proved to be useful in connexion with the transfer and financing of goods in the course of shipment might not be fully available.

35. Several representatives expressed the view that these fears would not materialize. The contracting carrier would continue to find it financially and commercially advantageous to issue through bills of lading. In those cases where damage occurred after trans-shipment, the contracting carrier, even if he must reimburse the shipper, would have a right of reimbursement from the actual carrier. In transport involving a series of carriers, it was more efficient for the carriers to handle the allocation of losses among themselves than to require the shipper to attempt to discover at which stage the damage occurred and to press a claim against an actual carrier, who may be remote from the shipper and who may claim that the goods had been damaged before trans-shipment. In this connexion, attention was drawn to the increasing use of containers, which enhanced the shipper's difficulty of ascertaining which of a series of carriers was responsible for damage to the goods.

36. In response, it was observed that the general rule on burden of proof adopted by the Working Group would assist the shipper when there was doubt as to which of a series of carriers was responsible for damage to cargo, but on the other hand doubts were expressed on the adequacy of the burden of proof in this regard.

37. The Working Group also considered the question of the responsibility of the actual carrier. It was generally agreed that in both types of trans-shipment discussed above, the actual carrier should be responsible to the cargo owner under the convention for damage or loss occurring while the goods were in his charge. Where the contracting carrier was also responsible, the cargo owner would have a choice with respect to his claim but, of course, could not recover twice for the same loss.

C. REPORT OF THE DRAFTING PARTY

38. It was generally agreed, that although differing views had been expressed with respect to some aspects of the subject, there was sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party, having considered the subject, presented the following report:

¹³ Working Group, report on third session, para. 14.

PART II OF THE REPORT OF THE DRAFTING PARTY:
TRANS-SHIPMENT

1. The Drafting Party had acted on the following bases: (a) the Working Group decided that the contracting carrier shall be responsible for the entire carriage even if, in accordance with a trans-shipment-option clause, he entrusted the performance of a part of the carriage to another person; (b) in the Working Group, divergent opinions were expressed as to whether the same rule should apply even if the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by another carrier. In the course of negotiations in the Drafting Party, it appeared that general consensus could be reached on the rules applicable in both these cases on the basis of the proposed draft provisions which follow.

2. The Drafting Party recommends the following provision on trans-shipment:

Article D

1. Where the carrier has exercised an option provided for in the contract of carriage to entrust the performance of the carriage or a part thereof to an actual carrier, the carrier shall nevertheless remain responsible for the entire carriage according to the provisions of this Convention.

2. The actual carrier also shall be responsible for the carriage performed by him according to the provisions of this Convention.

3. The aggregate of the amounts recoverable from the carrier and the actual carrier shall not exceed the limits provided for in this Convention.

4. Nothing in this article shall prejudice any right of recourse as between the carrier and the actual carrier.

Article E

[1. Where the contract of carriage provides that a designated part of the carriage covered by the contract shall be performed by a person other than the carrier (through bill of lading), the responsibility of the carrier and of the actual carrier shall be determined in accordance with the provisions of article D.

2. However, the carrier may exonerate himself from liability for loss of, damage (or delay) to the goods caused by events occurring while the goods are in the charge of the actual carrier provided that the burden of proving that any such loss, damage (or delay) was so caused, shall rest upon the carrier.]*

Notes on the proposed draft provisions

3. With respect to paragraph 1 of article D, the Drafting Party recommends that the words "carrier" and "actual carrier" be specifically defined in article 1 of the Convention. "Carrier" would be defined as the person who has contracted with the shipper; "actual carrier" would be defined as any other carrier involved in the performance of the carriage.

* The square brackets were added pursuant to a decision of the Working Group. See para. 43 below.

4. Paragraph 2 of article D is meant to assure the cargo-owner the right to bring a claim against an actual carrier, as well as against the contracting carrier, provided that the loss or damage occurred while the goods were in the charge of the actual carrier.

5. Paragraphs 3 and 4 are self-explanatory.

6. Paragraph 1 of article E (subject to the exception in para. 2) makes applicable the rules of article D whereby (*inter alia*) the carrier is responsible for the entire carriage (para. 1) and the "actual" carrier is responsible for the carriage performed by him, in cases where trans-shipment is specifically agreed to in the bill of lading (through bill of lading).

7. Paragraph 2 of article E provides that the contracting carrier shall be exonerated from liability if he proves that the loss or damage (or delay) was caused by events occurring while the goods were in the charge of the actual carrier. This provision has been accepted as a part of a compromise between various views expressed in the Working Group relating to the regulation of carriers' liability in cases of carriage under through bills of lading.

D. CONSIDERATION OF THE REPORT
OF THE DRAFTING PARTY

39. The Working Group considered the above-quoted report of the Drafting Party and approved article D of the proposed draft provisions.

40. With respect to article D, one representative indicated that he understood that the term "actual carrier" meant the carrier who would substitute for the contracting carrier in the performance of all or part of the contract of carriage. This term should be defined when the study of definitions is undertaken during the next session.

41. With respect to article E of the draft text proposed by the Drafting Group, objections to paragraph 2 of that article were raised by many representatives. It was stated that this provision was not in fact a compromise, as had been stated in paragraph 7 of the Drafting Party's notes (under para. 38 above), but embodied the point of view of those representatives who favoured permitting the contracting carrier to limit his liability under a through bill of lading to only part of the carriage. It was stated that such a result would be inconsistent with the expectations of the shipper to whom the through bill of lading was issued by the contracting carrier.

42. On the other hand, it was stated by other representatives that article E provided significant advantages to the cargo owner for the following reasons: (a) the provisions of the article would encourage the continued use of the through bill of lading rather than forcing each carrier to issue a bill of lading for his part of the carriage; consequently, the shipper would be able to obtain a negotiable bill of lading which would cover the entire carriage; (b) in addition, the contracting carrier would not escape from liability unless he proved that the

events causing loss occurred while the goods were in the hands of the actual carrier; (c) moreover, according to the provisions of article E the carrier would also be responsible for loss or damage arising during the entire terminal period in the trans-shipment port, while he would not be so responsible if he felt that he could not assume responsibility for the goods during the on-carriage and consequently issued a bill of lading covering only the carriage to the trans-shipment port. However, several other representatives were of the view that the carrier is responsible for the goods in the port of trans-shipment until they have been taken in charge by the actual carrier.

43. In view of the opposition to paragraph 2 of article E, some representatives urged its deletion and others suggested that it should be placed in brackets so that a rule on the subject could be reformulated at a future session of the Working Group. Other representatives stated that if it were decided to use brackets, such brackets should be placed around all of article E since it was understood that several members of the Drafting Party had agreed to paragraph 1 of article E only if it included paragraph 2. However, it was pointed out that since a majority of the members of the Working Group did not approve of paragraph 2 of article E in its present formulation, placing the article in brackets might give the erroneous impression of conditional approval. One representative, supported by other representatives, stated a preference for using the word "exempt" instead of "exonerate" in the first line of paragraph 2 of article E, if the whole question was to be reopened. It was decided that the report of the Drafting Party should be set forth as presented to the Working Group subject to placing brackets around the text of article E, but that it be indicated that there were more members of the Working Group opposed to paragraph 2 of article E than there were members who favoured its inclusion.

44. One representative introduced a provision to replace paragraph 2 of article E, which might be considered as a compromise when, at a future session, the Working Group completed action on the subject. The provision that was proposed by this representative reads as follows:

Article E

(2) The carrier may exonerate himself from liability for loss of or damage to goods caused by events occurring while such goods were in the charge of the actual carrier subject to the following conditions:

- A. (1) Where the actual carrier has been held liable for damage to cargo and the judgement therefor has been satisfied, or
- (2) Where the actual carrier has been properly subjected to legal proceedings at the instance of the shipper or consignee pursuant to article (), or
- (3) Where the actual carrier has been properly subjected to arbitration proceedings at the instance of the shipper or consignee, pursuant to article ().
- B. The burden of providing that any such loss or damage was so caused is upon the carrier.

III. Deviation

A. INTRODUCTION

45. Part three of the second report of the Secretary-General, in analysing this topic, noted that article 4 (4) of the Brussels Convention of 1924 provided that the carrier "shall not be liable for any loss or damage" resulting from (1) "any reasonable deviation" or (2) "any deviation in saving or attempting to save life or property at sea".¹⁴ It was suggested that these two provisions raised distinct issues.

46. With respect to the first of these provisions, it was noted that the rule freeing the carrier from responsibility for "any reasonable deviation" had proved to be difficult to construe and apply. One reason was that the route for the carriage was usually not specified; hence there was a basic difficulty in defining the point of departure for a "deviation". It was also noted that the most serious practical consequence of a deviation was delay in arrival of the goods; such delay could cause (a) physical damage to the goods (e.g., spoilage of perishable cargo) or (b) economic loss apart from physical damage (e.g. loss resulting from inability to use or to resell the goods). The report noted that the Brussels Convention of 1924 contained no provision on the responsibility of ocean carriers for delay, and drew attention to the suggestion that the subject of delay be given separate consideration by the Working Group.¹⁵

47. With respect to the provision of article 4 (4) of the Convention of 1924 freeing the carrier of liability for loss or damage resulting from "any reasonable deviation" (as contrasted with the provision on saving life and property at sea), the report of the Secretary-General drew attention to alternative solutions which included: (1) a presumption that deviation for certain specified purposes would be *prima facie* unreasonable (para. 33); (2) a provision that the carrier shall bear the burden of proving that the deviation was reasonable (para. 34); and (3) deletion of the above-quoted general provision on deviation in article 4 (4), coupled with consideration of a provision directed to the carrier's responsibility for delay (paras. 35-36).¹⁶

¹⁴ A/CN.9/76/Add.1, part III; reproduced in this volume, part two, IV, 4, above.

¹⁵ Report of the Secretary-General on identification of problem areas in the field of ocean bills of lading for possible further study, A/CN.9/WG.III/R.1, paras. 6-8.

¹⁶ The second report of the Secretary-General noted (part III, para. 31) that in some countries the concept of "deviation" was not confined to departure from the expected geographical route, but might be applied to various types of breach of contract which were deemed to be so serious that the carrier should be deprived of the protection of any of the provisions of the bill of lading or of the Hague Rules (e.g., limitation of the amount of liability, prescriptive limits on the time for bringing suit). The report did not consider these doctrines as within the present topic of deviation and, in the interest of uniform application of the law, suggested (foot-note 25) that the effect of serious, intentional breach of contract be dealt with specifically under the relevant portions of the convention. See, e.g., the second report of the Secretary-General: part one: limitation of liability, at section C.3 (paras. 51-55) (effect of wilful or reckless misconduct); part four: the period of limitation, at section B.4 (paras. 15-20) (claims based on tort or on wilful conduct).

48. In connexion with this third alternative, attention was directed to the general rule on responsibility and burden of proof, as approved by the Working Group at the fourth session,¹⁷ which states as follows:

"1. The carrier shall be liable for all loss of or damage to goods carried if the occurrence which caused the loss or damage took place while the goods were in his charge as defined in article [], unless the carrier proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences."

49. It was noted that, under this provision, the carrier would be responsible for loss of or damage to goods resulting from deviation (as well as from other causes) unless the carrier "proves that he, his servants and agents took all measures that could reasonably be required to avoid the occurrence or its consequences". The question was raised as to whether there was need for special provisions concerning carrier's responsibility in case of deviation and burden of proof, in addition to the general provision on carrier's responsibility noted above, and whether the subject of deviation might be treated as part of the general question of responsibility for delay.

B. DISCUSSION BY THE WORKING GROUP

50. The Working Group discussed the problems to which article 4 (4) of the Brussels Convention had given rise and which had been described in the Report of the Secretary-General (see paras. 45-49 above).

51. It was pointed out by several representatives that the provision in article 4 (4) exempting the carrier from liability for "any reasonable deviation" had given rise to many difficulties and was unsatisfactory. It was indicated by these representatives that the general rule on responsibility that had been adopted by the Working Group, and which is quoted above at paragraph 48 would solve the problems to which article 4 (4) was directed without encountering the difficulties of construction which had arisen under the present convention provision. Under this approach whether deviation should be permitted would depend on whether such deviation could meet the test established in the general rule on responsibility and burden of proof. It was further stated that a provision on delay, which could be considered by the Working Group at a later stage, would meet many of the problems raised in connexion with deviation. However, some representatives indicated their preference for including a specific provision on deviation.

52. Some representatives stated that in their national systems the term "deviation" was used to describe serious breaches of contract outside the area of geographical deviation (see foot-note 16 above). However, it was generally agreed by the Working Group that only geographical deviation was being considered. In this connexion, it was observed that the consequences of

serious breach of contract could be more appropriately dealt with by provisions, on, *inter alia*, limitation of liability and time limitation.

53. Many representatives stated that although they agreed that deviation itself should not be the subject of a separate article of the Convention, they favoured retention of a provision which would deal with carriers' responsibility in connexion with the saving of life and property at sea. The Working Group discussed alternative draft proposals on this subject as set forth in part three of the Second Report of the Secretary-General, at paragraph 40. Some representatives also expressed the view that the provision which would permit, *inter alia*, deviation to save lives and property at sea, should deal more restrictively with the latter than with the former.

C. REPORT OF THE DRAFTING PARTY

54. Following discussion by the Working Group, this subject was referred to the Drafting Party. The report of the Drafting Party is as follows:

PART THREE OF THE REPORT OF THE DRAFTING PARTY: DEVIATION

1. In response to the views expressed in the Working Group, the Drafting Party has discussed whether a separate provision on geographical deviation is necessary in view of the general rules on the carrier's liability which have been adopted by the Working Group. The Drafting Party has agreed that there is no longer any need for such a general provision on geographical deviation, but that a particular provision relating to the saving of life and property at sea should be added to the article containing the general rules on carrier's liability (preferably as a new paragraph 3) (A/CN.9/74, para. 28).*

2. Accordingly the Drafting Party recommends the following provision:

The carrier shall not be liable for loss or damage resulting from measures to save life and from reasonable measures to save property at sea.

D. CONSIDERATION OF THE REPORT OF THE DRAFTING PARTY

55. The Working Group adopted the above report of the Drafting Party, including the proposed draft provision.

IV. The Period of limitation

A. INTRODUCTION

56. The period of limitation applicable to legal proceedings against the carrier is discussed in part four of the Second Report of the Secretary-General. It was noted in the report that a provision on the subject

¹⁷ Working Group, report on fourth session, reproduced in this volume, part two, IV, 1, above; paras. 28 and 36.

* Reproduced in this volume, part two, IV, 1, above.

was set forth in article 3 (6) (paragraph four) of the Brussels Convention of 1924 and that certain modifications would be effected by article 1, paragraphs 2 and 3, of the Brussels Protocol of 1968.

57. The report discussed problems presented by these provisions in the following areas: (1) Ambiguity with respect to the applicability of the limitation provisions to claims for delay, and claims based on tort (paragraphs 4-12); (2) Applicability of the period of limitation to arbitration proceedings (paragraphs 13-14); (3) Commencement of the period of limitation, with special reference to the problems that have arisen when part or all of the goods have been lost by the carrier (paragraphs 21-45); (4) The length of the period of limitation (paragraphs 46-53); (5) Agreements modifying the period (paragraphs 54-62); and (6) The period applicable to actions for indemnity brought by a carrier against a third person, such as another carrier who participates in the performance of the contract or a liability insurer (paragraphs 63-67). Draft provisions dealing with these questions were set forth, and were presented in consolidated form at paragraph 68 of the report.

B. DISCUSSION BY THE WORKING GROUP

58. The Working Group considered the approaches that had been set forth in the alternative proposals in the Second Report of the Secretary-General. The Working Group noted that there were certain issues concerning the period of limitation which were interrelated. These included: the length of the basic period of limitation, the effect of wilful or other serious misconduct on the part of the carrier, commencement of the period of limitation, and the possible suspension or interruption of the period of limitation as a result of a written claim.

59. With respect to types of claims to be covered by the rules on limitation, the majority was of the view that the scope of the Brussels Convention of 1924 (art. 3 (6), subpara. 4) as amended by article 1 (2) (3) of the Brussels Protocol of 1968 should be rephrased to make it clear that all types of claims of the shipper against the carrier, whether based on contract or tort, were included. Concerning claims arising from wilful misconduct of the carrier, some representatives noted that CIM article 46 (1) (c) and CMR article 32 (1) provided a longer period for such claims and suggested the adoption of this approach. This view was not accepted by the majority because of the likelihood of dispute over whether the loss resulted from wilful or other serious misconduct; such disputes would undermine the simplicity and definiteness required for the limitation rule.

60. Some representatives supported a proposal, based on CIM article 46 (3) and CMR article 32 (2), to suspend the running of the period of limitation, where a written claim was submitted to the carrier, until the carrier rejected such claim by notification in writing. In the opinion of some of those representatives, suspension of the period was necessary for the protection of the shipper, particularly where the period of limitation was relatively short. According to one representative,

a provision on suspension by a written claim was particularly desirable for those States whose national laws did not contain any provision on interruption or suspension of the period. Another representative indicated that there must be some provision for cases where parties withdrew legal proceedings for the purpose of negotiation. However, the majority of the Working Group was of the view that the question of interruption or suspension should be left to national law. In this connexion, it was noted that the provision to allow suspension by a written claim may lead to litigation. It was also observed that the provision might have little value since, if the carrier was not prepared to agree to an extension, he would probably reject the claim automatically. It was also noted if a provision on suspension by a written claim were adopted, the maximum time-limit for such an extension should also be provided. It was also felt that the meaning of suspension or interruption needed further clarification.

61. With regard to the provision on extension of the period as provided in article 3 (2) of the Brussels Protocol of 1968, the Working Group agreed that the parties should be allowed to agree upon an extension of the period. It was also agreed that a declaration by the carrier to extend the period should be given the same effect. Most representatives were of the view that such a declaration or agreement must be in writing. In this connexion, some representatives indicated that the Working Group should follow more closely the terminology and approach used in the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (A/CN.9/73).*

62. With respect to the commencement of the period of limitation, it was generally agreed that, under the present Convention, cases of total non-delivery or loss of the goods presented problems that required attention.

63. It was agreed that, while the Brussels Protocol of 1968 provided that "suit" must be brought within the period of limitation, the same rule should also be applied to arbitral proceedings.

64. With respect to the length of the period of limitation, nine representatives were in favour of a one-year period and six representatives favoured a two-year period. However, some representatives who favoured a one-year period indicated their willingness, as a compromise, to accept a two-year period if that period were supported by the majority.

C. REPORT OF THE DRAFTING PARTY

65. The Working Group concluded that the foregoing discussions indicated sufficient basis for agreement to warrant referring the subject to the Drafting Party. The Drafting Party, having considered the subject, presented the following report:

* UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

PART IV OF THE REPORT OF THE DRAFTING PARTY:
PERIOD OF LIMITATION

1. The Drafting Party recommends the following provision on the period of limitation:

Article F

1. The carrier shall be discharged from all liability whatsoever relating to carriage under this Convention unless legal or arbitral proceedings are initiated within [one year] [two years].

(a) in the case of partial loss of or damage to the goods, or delay,¹⁸ from the last day on which the carrier has delivered any of the goods covered by the contract;

(b) in all other cases, from the [ninetieth] day after the time the carrier has taken over the goods or, if he has not done so, the time the contract was made.

2. The day on which the period of limitation begins to run shall not be included in the period.

3. The period of limitation may be extended by a declaration of the carrier or by agreement of the parties after the cause of action has arisen. The declaration or agreement shall be in writing.

4. An action for indemnity against a third person may be brought even after the expiration of the period of limitation provided for in the preceding paragraphs if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall not be less than [ninety days] commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.

Notes on the proposed draft provision

2. The language of paragraph 1 "all liability whatsoever relating to carriage under the Convention" was employed to make clear the broad scope of the rules on limitation, so as to include all types of claims, whether based in contract or in tort.

3. With respect to the length of the period of limitation, members of the Drafting Party were divided as to whether the period should be one year or two years. Consequently, both periods are set forth in brackets. In the discussion among all present at the meeting, seven representatives expressed the opinion that the period of limitation should be one year. Six representatives stated that the period should be two years. In addition, two representatives, while preferring one year, stated that they could accept two years as a compromise.

4. Paragraphs 1 (a) and 1 (b) on the commencement of the period draw a distinction between (a) cases where some (or all) of the goods are delivered and (b) all other cases (such as the total loss of the goods or failure by the carrier to take over the goods).

5. It was noted that paragraph 2 was based on provisions in the CMR and CIM conventions. A sug-

gestion that the last day of the period should not be counted has not been adopted on the ground that this view is inconsistent with the approach of many legal systems.

6. Paragraph 3, on extension of the period by a declaration of the carrier or agreement of the parties does not apply to provisions of the contract of carriage but only to a declaration or agreement made after the cause of action has arisen. The majority of the Drafting Party supported the second sentence, which provides that the declaration or agreement shall be in writing.

7. Paragraph 4 adopts the provision of article 1 (3) of the Brussels Protocol of 1968, except for substitution of "[ninety days]" for "three months".

D. CONSIDERATION OF THE REPORT
OF THE DRAFTING PARTY

66. The Working Group considered the above-quoted report of the Drafting Party. The report of the Drafting Party, including the proposed draft provision, received the approval of the majority of the Working Group.

67. The following comments and proposals were made with respect to the proposed draft provision:

(a) With respect to paragraph 1 of article F, one representative indicated that the scope of application of this provision required clarification with respect to the provision that the period of limitation applied only to the shipper's claims against the carrier. It was noted that the period of limitation for claims of the carrier against the shipper, such as claims for freight charges, were governed by the rules of national law. Another representative observed that the Brussels Convention of 1924 contained provision on the liability of the shipper to the carrier, and stated that it would be unfortunate to leave claims by the carrier subject to divergent periods of limitation under national laws.

(b) With respect to the same paragraph, one representative stated that the concept of "legal proceedings" should be clarified, taking into account the approach of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (A/CN.9/73).*

(c) With respect to paragraph 3 of article F, one representative was of the view that this provision should be reformulated in line with the relevant provisions of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods (1972).¹⁹

(d) With respect to the length of the period of limitation, the observer of the International Union of Marine Insurance, supported by the observer of the International Chamber of Commerce, expressed the view that

* UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

¹⁹ Article 21 (2) of the Convention provides in part: "The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor..." (A/CN.9/73; UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3).

¹⁸ See para. 72 below.

a one-year period of limitation should be maintained on the ground that a two-year period would promote extended negotiations on cargo claims. However, a number of representatives stated that they did not share that opinion. One representative noted that marine insurers by contract required claims by shippers to be presented promptly to them, and that in his opinion marine insurers would benefit from a longer period of limitation since, by subrogation, they stood in the position of shippers with respect to claims against the carriers.²⁰

68. One representative proposed the addition of the following paragraph to article F of the proposed draft provisions:

"5. Any legal proceeding instituted in a tribunal which is competent pursuant to article (X) of this Convention shall interrupt the period of limitation in any other jurisdiction where a legal proceeding may be brought under the above article."

The representative who introduced this proposal stated that this provision would ensure added protection for the shipper when he institutes a legal proceeding before a court and could subsequently, in accordance with the Convention, institute another proceeding in another jurisdiction. In this situation the running of the period of limitation should be interrupted at the time of the institution of the first legal proceeding. This representative recognized that the proposed text would need to be modified to make it applicable to arbitral proceedings.

69. Another representative, while generally agreeing with the desirability of such a provision, proposed an alternative approach to this problem and suggested the addition to article F of the proposed draft provision:

"Legal or arbitral proceedings initiated in a court or tribunal of another State pursuant to articles (X) and (Y) of this Convention shall in any Contracting State, for the purposes of interruption of the period of limitation, be given the same effect as if the legal or arbitral proceedings has been initiated in that Contracting State."

70. Other representatives expressed their interest in these proposals but indicated that careful examination of the question was needed because these proposals entail many complicated legal problems which could not be considered within the time available at the present session of the Working Group. Some representatives saw difficulties in these proposals and were opposed to them in principle. One representative pointed out that these proposals might indefinitely prolong the limitation period applicable to bringing a new proceeding in another jurisdiction. Another representative was of the view that the use of the term "interrupt" or "interruption" was susceptible of divergent interpretations, particularly in those States which were not familiar with that Civil Law concept. Another representative suggested that it might be necessary to provide for cases

where legal proceedings were brought before *fori* which lacked competence. It was also noted that the approach of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods, which had a comprehensive coverage of these questions (e.g. arts. 15, 16 and 29), may be useful in formulating rules on these questions.

71. It was agreed that further consideration should be given to these proposals, and that they should be taken up at a future session of the Working Group.

72. In paragraph 1 (a) of article F, reference is made to claims for delay on the ground that such claims should be subject to limitation rules regardless of whether the Convention lays down rules on liability for delay. However, it was agreed that this question should be reconsidered in connexion with the Working Group's examination of the rules on liability for delay.

V. Future work

73. The Working Group noted that it had taken action on four of the six substantive topics on its agenda for the present session (see para. 7 above). It was agreed that definitions under article I of the Convention and the elimination of invalid clauses would be taken up at the sixth session of the Working Group and that parts five and six of the second Report on the Responsibility of Ocean Carriers for Cargo (A/CN.9/76/Add.1) * would be used as the working document.

74. It was recalled that the Working Group had not completed its work on the topics of deck cargo and live animals which had been examined at the third session (Working Group, report on the third session, paras. 23-29 and 30-34). The Working Group decided that these topics would be placed on the agenda for the sixth session. It was expected that a study on live animals, to be submitted by the International Institute for the Unification of Private Law (UNIDROIT), would be available for use by the Working Group in considering the subject.

75. The Working Group then examined the report of the Secretary-General on the identification of problem areas in the field of ocean bills of lading for possible further study (A/CN.9/WG.III/R.1). It was decided that the sixth session should consider the following topics identified in the above report: the liability of the carrier for delay (paras. 6-8), and the scope of application of the Convention (paras. 9-11). It was decided that, with respect to the topic of delay, the Secretary-General should be requested to prepare a report setting forth proposals, indicating possible solutions; with respect to the scope of the application of the Convention, the Working Group decided to request the Secretariat to prepare a short working paper directing attention to the provisions of the Brussels Convention of 1924 and the Brussels Protocol of 1968. The Working Group requested

²⁰ See also para. 28 above.

* Reproduced in this volume, part two, IV, 4, above.

comments and suggestions from the members of the Working Group and from the observers at the present session on the topics to be considered at the next session and expressed the hope that such comments and suggestions could be transmitted to the Secretariat sufficiently in advance of the session so that they may be used in the preparation of the necessary documentation.

76. The Working Group decided that the topics to be examined at the sixth session should be considered in the following order: (a) definitions under article I; (b) elimination of invalid clauses; (c) deck cargo and live animals; (d) liability of the carrier for delay; and (e) scope of application of the Convention.

77. For its seventh session the Working Group requested the Secretary-General to prepare a report on the required contents and legal effects of the contract

of carriage (see A/CN.9/WG.III/R.1, para. 13). In this connexion, the Secretary-General was also requested to give consideration to the terms of the bill of lading, to reserve clauses, letters of guarantee given by the shipper and to the bill of lading as a negotiable instrument. The Working Group also decided that questionnaires on the subject, to be examined by the Working Group, might be circulated to the extent found necessary by the Secretary-General.

78. The Working Group decided to recommend to the United Nations Commission on International Trade Law at its sixth session that, subject to the consideration at that time of financial implications, the sixth session of the Working Group be held in Geneva from 27 August to 7 September 1973 and that the Working Group's seventh session be held in New York in February 1974.

6. List of relevant documents not reproduced in the present volume

<i>Title or description</i>	<i>Document reference</i>
<i>Working Group on International Legislation on Shipping, fourth session</i>	
Provisional agenda and annotations	A/CN.9/WG.III/WP.8
Memorandum concerning the structure of a possible new convention on the carriage of goods by sea, submitted by the Norwegian delegation	A/CN.9/WG.III(IV)/CRP.1
Amendment proposed by France	A/CN.9/WG.III(IV)/CRP.2
New text of Articles III and IV, proposal by the United States	A/CN.9/WG.III(IV)/CRP.3
Amendment proposed by Norway	A/CN.9/WG.III(IV)/CRP.4
Amendments proposed by Egypt	A/CN.9/WG.III(IV)/CRP.5
Action taken by the drafting party	A/CN.9/WG.III(IV)/CRP.6
Alternative texts relating to burden of proof	A/CN.9/WG.III(IV)/CRP.7
Draft report of the drafting party: carrier's responsibility	A/CN.9/WG.III(IV)/CRP.8 and Corr.1
Text proposed by the Belgian delegation	A/CN.9/WG.III(IV)/CRP.9
Texts proposed by France: Arbitration	A/CN.9/WG.III(IV)/CRP.10
Lists of participants	A/CN.9/WG.III(IV)/CRP.11
Part II of the draft report of the drafting party: Arbitration clauses	A/CN.9/WG.III(IV)/CRP.12
Draft report of the Working Group on the work of its fourth session	A/CN.9/WG.III(IV)/CRP.15 and Add.1 to 3
<i>Working Group on International Legislation on Shipping, fifth session</i>	
Memorandum concerning the structure of a possible new convention on the carriage of goods by sea, submitted by the Norwegian delegation	A/CN.9/WG.III(V)/WP.9
Replies to the second questionnaire on bills of lading submitted by Governments and international organizations for consideration by the Working Group	A/CN.9/WG.III/V/WP.10/ Add.1 and 2
Identification of problem areas in the field of ocean bills of lading for possible further study: report by the Secretary-General	A/CN.9/WG.III/R.1
Provisional agenda and annotations	A/CN.9/WG.III/R.2
Proposal submitted by Japan	A/CN.9/WG.III(V)/CRP.1
Paper submitted by the Norwegian delegation: principles of trans-shipment and substitution	A/CN.9/WG.III(V)/CRP.2

<i>Title or description</i>	<i>Document reference</i>
Draft provisions—I: limitation of liability	A/CN.9/WG.III(V)/CRP.3
Comments of the International Chamber of Commerce, the International Chamber of Shipping, the International Union of Marine Insurance and the International Maritime Committee regarding circumstances under which the Convention should allow limitations to be broken	A/CN.9/WG.III(V)/CRP.4
Part I of the report of the drafting party: unit limitation of liability.....	A/CN.9/WG.III(V)/CRP.5
Proposal submitted by Japan	A/CN.9/WG.III(V)/CRP.6
Draft report of the Working Group on the work of its fifth session	A/CN.9/WG.III(V)/CRP.8 and Adds.1 to 5
Part II of the report of the drafting party: trans-shipment	A/CN.9/WG.III(V)/CRP.9
Part III of the report of the drafting party: period of limitation	A/CN.9/WG.III(V)/CRP.10
Proposal of the delegation of France: period of limitation	A/CN.9/WG.III(V)/CRP.11
United States proposal concerning trans-shipment ...	A/CN.9/WG.III(V)/CRP.12
Comments of the International Union of Marine Insurance supported by the International Chamber of Commerce on "periods of limitation"	A/CN.9/WG.III(V)/CRP.13

V. ACTIVITIES OF OTHER ORGANIZATIONS

Report of the Secretary-General: current activities of international organizations relating to the harmonization and unification of international trade law (A/CN.9/82) *

INTRODUCTION

1. The United Nations Commission on International Trade Law at its third session requested the Secretary-General "to submit reports to the annual sessions of the Commission on the current work of international organizations in matters included in the programme of work of the Commission".¹

2. In accordance with the above decision reports were submitted to the Commission at the fourth session in 1971 (A/CN.9/59) and at the fifth session, in 1972, (A/CN.9/71). The present report, prepared for the sixth session (1973), is based on information submitted by international organizations concerning their current work.² In many cases, the present report includes information on progress with respect to projects for which background material is included in earlier reports.³

* 27 March 1973.

¹ Report of the United Nations Commission on International Trade Law on the work of its third session, *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17* (A/8017), para. 172; UNCITRAL Yearbook, vol. I: 1968-1970, part two, III, A.

² Information received from some international organizations has not been included because that information concerned activities unrelated to the work of UNCITRAL or because it described activities other than current projects.

³ Background material may be found in the reports presented to the fourth session (A/CN.9/59) and the fifth session (A/CN.9/71) and in the following: *Digest of legal activities of international organizations and other international institutions*, published by the International Institute for the Unification of Private Law (UNIDROIT); *Progressive development of the law of international trade*, report by the Secretary-General (1966), *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 88, document A/6396, paras. 26-189. (UNCITRAL Yearbook, vol. I, part one, II, B); *Survey of the activities of organizations concerned with harmonization and unification of the law of international trade*, note by the Secretary-General, 19 January 1968 (A/CN.9/5); and replies from organizations regarding their current activities in the subjects of international trade within the Commission's work programme, note by the Secretary-General, 1 April 1970 (UNCITRAL/III/CRP.2).

I. UNITED NATIONS ORGANS AND SPECIALIZED AGENCIES

A. United Nations Economic Commission for Europe (ECE)

General conditions for sale of agricultural products

3. Progress on various projects of the ECE has been described in earlier reports.⁴ Draft texts referred to in paragraph 3 of document A/CN.9/71 have been acted upon by the Group of experts on international trade practices relating to agricultural products as follows: (a) the draft text on general conditions for international dealings in fresh fruit and fresh vegetables has been adopted (October 1972) and will be published under the symbol AGRI/WP.1/GE.7/35; (b) the greater part of the draft text on general conditions for international dealings in dry and dried fruit has been adopted. The text will be officially adopted by April 1973 and will be published under the symbol AGRI/WP.1/GCS/16/Rev.2; (c) the text on general conditions for international dealings in potatoes will be examined in a second reading in 1973 (AGRI/WP.1/GCS/24/Rev.1). The general conditions for international sale of citrus fruit adopted in 1958 will also be re-examined (No. 312). When all these general conditions are adopted, it is envisaged that they be published in one document which would list clauses usable for all categories of products and additional clauses for each of the particular categories of products. It is expected that this will provide a basis for further extension of these general conditions to other agricultural products which have not heretofore been considered. Rules of evaluation to supplement the above drafts have been the subjects

⁴ See note by the Secretary-General A/CN.9/5, paras. 14-16; replies from organizations regarding their current activities in the subjects of international trade within the Commission's work programme, UNCITRAL/III/CRP.2; reports of the Secretary-General on current activities of international organizations related to the harmonization and unification of international trade law, A/CN.9/59, para. 4 and A/CN.9/71, paras. 3 and 4.

of examination in regard to trade in potatoes, fresh fruit and fresh vegetables (AGRI/WP.1/GCS/29), and adoption of some rules for these two categories are expected in 1973. These rules would also be examined in relation to trade in dry and dried fruit and citrus fruit.

Arbitration

4. Rules of arbitration for international dealings in agricultural products have been under study and will be re-examined in October 1973 with a view to eventual adoption for all sales of agricultural products which are subject to general conditions.

Contracts for establishment of industrial complexes and for industrial co-operation

5. The group of experts on international contract practices in industry adopted in November 1972 a guide on drawing up contracts for establishment of large industrial complexes (TRADE/WP.5/23). A guide on drawing up contracts for industrial co-operation will be considered after discussions at the next session of ECE (April 1973).

B. International Civil Aviation Organization (ICAO)

Question of revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955: (a) cargo; (b) mail; (c) automatic insurance)

6. The Sub-Committee on Revision of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955: (a) cargo; (b) mail; (c) automatic insurance, was established at the nineteenth session of the Legal Committee in May 1972. The Sub-Committee met in Montreal from 20 September to 4 October 1972. The following problems were discussed by the Sub-Committee: (A) *cargo*: (1) The system of liability for damage and carrier's defences; (2) the limit of liability for damage, including the question whether or not this limit will be unbreakable; (3) the system of liability for delay; (4) the limit of liability for delay, including the problem as to whether or not this limit will be unbreakable; (5) the documentation problem (articles 5-11 of the Warsaw Convention); (6) the rights of the consignor and consignee, especially the carrier's right to diversion (articles 12-15 of the Warsaw Convention); (7) possible conflicts between the Warsaw/Hague system as revised and the forthcoming convention on international combined transport of goods, including the question of amendments to the Warsaw Convention in order to prevent such conflicts; (8) whether the new instrument should be (a) a protocol to amend the Warsaw Convention or (b) a new convention which would incorporate the wording of the Warsaw Convention as amended at The Hague and at Guatemala City, including also forthcoming amendments concerning cargo; (B) *air mail*; (C) *automatic insurance*. The report of this Sub-Committee (LC/SC. Warsaw (1972)—report) will be placed before the Legal Committee for further action.

C. United Nations Conference on Trade and Development (UNCTAD)

Liner conference practices

7. The UNCTAD secretariat prepared a report entitled "The regulation of liner conferences (a code of conduct for the liner conference system)"⁵ which was submitted at the third session of the UNCTAD Working Group on International Shipping Legislation, held from 5 to 18 January 1972. This report analysed the history of the regulation of liner conferences, described various systems of regulation and suggested basic elements for a code of conduct for liner conferences.

8. On the basis of this report, the Working Group on International Shipping Legislation passed a unanimous resolution which transmitted the question to the third session of the United Nations Conference on Trade and Development, held in Santiago, Chile, from 13 April to 21 May 1972. At this Conference a draft code of conduct for liner conferences prepared by developing countries was submitted for consideration by the Fourth Committee of the Conference.

9. The Conference subsequently adopted by majority vote resolution 66 (III),⁶ which noted that there was an urgent need to adopt and implement a universally acceptable code of conduct for liner conferences which took fully into account the special needs and problems of developing countries. This resolution also recommended that the General Assembly at its twenty-seventh session convene, as early as possible in 1973, a conference of plenipotentiaries for the purpose of adopting a code of conduct for liner conferences, and it recommended to the General Assembly certain other guidelines for the preparation of such a code of conduct.

10. In response to these recommendations of the UNCTAD Conference, the General Assembly, at its twenty-seventh session, adopted resolution 3035 (XXVII), which requested the Secretary-General of the United Nations to convene, under the auspices of UNCTAD, a conference of plenipotentiaries as early as possible in 1973 to consider and adopt a convention or any other multilateral legally binding instrument on a code of conduct for liner conferences. The resolution further established, under the auspices of UNCTAD, a preparatory committee of 48 members for the purpose of preparing a draft convention on a code of conduct for liner conferences for submission to the conference of plenipotentiaries. The Secretary-General of UNCTAD subsequently scheduled the first session of the Preparatory Committee for 8-26 January 1973, the second session for 4-29 June 1973, and the conference of plenipotentiaries for 14 November to 12 December 1973.

Charter parties

11. The next priority subject on the work programme of the UNCTAD Working Group on International

⁵ United Nations publication, Sales No. E.72.II.D.13.

⁶ TD/III/RES/66.

Shipping Legislation is that of charter parties, which will be discussed at the fourth session of the Working Group, scheduled to take place in 1974. A report on the legal, commercial and economic aspects of charter parties and chartering practice is currently being prepared by the UNCTAD secretariat for submission to the UNCTAD Working Group at its fourth session.

Combined transport convention

12. The Committee on Shipping of UNCTAD, at its second special session, held in July 1972, adopted a resolution entitled "The draft Convention on the International Combined Transport of Goods" ("TCM Convention").⁷ That resolution stated *inter alia* that, prior to the adoption of any combined transport convention, its implications for developing countries should be studied thoroughly. It also noted that the draft TCM Convention, prepared by the Joint IMCO/ECE meetings, had been elaborated without the full and adequate participation of the developing countries, and any future discussion of a convention on international combined transport must fully meet certain specified criteria.

13. In a resolution of 23 January 1973,⁸ the Economic and Social Council endorsed the recommendations of the United Nations/IMCO Conference on International Container Traffic⁹ that further studies, bearing in mind particularly the needs and requirements of developing countries, be carried out and completed by the end of 1974 by UNCTAD on all the relevant aspects of international combined transport of goods; these studies are to be done in co-ordination with the regional economic commissions and with the co-operation of the appropriate regional and subregional bodies and other international organizations, in particular the Inter-Governmental Maritime Consultative Organization and the International Civil Aviation Organization. The resolution also requests the Trade and Development Board of UNCTAD to establish an intergovernmental preparatory group for the elaboration of a preliminary draft convention on international intermodal transport, and to authorize that group to meet as early as possible in 1973. The preparatory group is to make its conclusions available to the Economic and Social Council early in 1975, with a view to the convening by the end of 1975 of a plenipotentiary conference to finalize a convention on international intermodal transport on the basis of the draft prepared by the preparatory group.

Co-operation with UNCITRAL

14. Members of the joint UNCTAD/United Nations Office of Legal Affairs Shipping Legislation Unit prepared studies on the subjects of "The period of ocean carrier's responsibility", and "Responsibility for deck

cargoes and live animals", which were among the subjects included in the working paper entitled "Responsibility of ocean carriers for cargo: bills of lading".¹⁰ This working paper was submitted to the third and fourth (special) sessions of the UNCITRAL Working Group on International Legislation on Shipping. Members of the Joint Unit also prepared studies on the subjects of "Unit limitation of liability", "Definitions under article 1 of the Convention", "The period of limitation", and "Invalid clauses", which were among those subjects included in the working paper entitled "Second report on responsibility of ocean carriers for cargo: bills of lading",¹¹ which was submitted to the fifth session of the UNCITRAL Working Group on International Legislation on Shipping.

15. The Chief of the Joint Unit attended, as observer for UNCTAD, the third, fourth (special) and fifth sessions of the UNCITRAL Working Group on International Legislation on Shipping, and the fourth and fifth sessions of the UNCITRAL Commission. Members of the Joint Unit assisted the UNCITRAL secretariat in servicing the third and fourth (special) sessions of the UNCITRAL Working Group on International Legislation on Shipping.

Technical assistance

16. The secretariat of UNCTAD, as part of its programme on technical assistance, and in co-operation with other bodies in the United Nations system, participates in a programme to assist developing countries in legal matters connected with maritime transport.

D. Inter-Governmental Maritime Consultative Organization (IMCO)

International legislation on shipping

17. Earlier stages of work on this subject were described in the reports submitted to the fourth and fifth sessions of UNCITRAL (A/CN.9/59 para. 12 and A/CN.9/71 paras. 9 and 10). IMCO continues to participate in the work of UNCITRAL on this subject.

{E. International Monetary Fund (IMF)}¹²

International negotiable instruments

18. Members of the staff of the Fund have been participating in work in respect to a draft uniform law on international bills of exchange and promissory notes which is under preparation by UNCITRAL.¹³

¹⁰ A/CN.9/63/Add.1; UNCITRAL Yearbook, vol. III: 1972, part two, IV, annex.

¹¹ A/CN.9/76/Add.1, reproduced in this volume, part two, IV, 4, above.

¹² The activities of the IMF in the area of training and assistance were set out in the report of the Secretary-General, submitted to the fifth session of UNCITRAL, on training and assistance in the field of international trade law (A/CN.9/65, para. 12 (d)).

¹³ For participation of international organizations in the preparation of the draft uniform law, see A/CN.9/WG.IV/WP.2, introduction at para. 3, note 6 and A/CN.9/77, para. 5, reproduced in this volume, part two, II, 1, above.

⁷ Resolution 20 (S-II), contained in document TD/B/C.4/100.

⁸ E/RES/1734(LIV).

⁹ Resolution No. 7, contained in the report of the Third Main Committee of the United Nations/IMCO Conference on International Container Traffic, document E/CONF.59/39/Rev.1.

II. INTERGOVERNMENTAL ORGANIZATIONS

A. Asian-African Legal Consultative Committee

Uniform rules governing the international sale of goods

19. This topic was included in the programme of work of this Committee in 1969 at the suggestion of the Governments of Ghana and India. Since then it has been on the agenda of the Committee's annual sessions and considerable discussion on this item took place at the Committee's sessions held at Accra in 1970 and at Colombo in 1971. It has now been entrusted to a Standing Sub-Committee composed of Japan, India, Nigeria, Ghana, Egypt, Pakistan and Sri Lanka for detailed consideration. The subject was taken up by the Sub-Committee during the fourteenth session of the Committee held at New Delhi from 10 to 18 January 1973. The work of UNCITRAL on this subject was reviewed. The Sub-Committee considered the revised text of articles 1-55 of the Uniform Law on the International Sale of Goods contained in document A/CN.9/62/Add.2,* as prepared by the Working Group of UNCITRAL. It was noted that no final decision had been taken on number of articles in the revised text. The Sub-Committee therefore considered it premature to discuss the revised text, and postponed consideration of the matter until the revised text had reached a greater degree of finality.

Prescription (limitation) in the international sale of goods

20. A study of the UNCITRAL draft convention on prescription (limitation) in the international sale of goods was prepared by the secretariat (Brief of documents on international sale of goods, fourteenth session); during the fourteenth session of the Committee the Standing Sub-Committee considered this draft convention in detail. The observer for UNCITRAL was present and the commentary prepared by the UNCITRAL secretariat on the draft convention (A/CN.9/73)** was also placed before the Sub-Committee. The Sub-Committee presented a report to the Committee which included general approval of the approach of the draft convention as a workable compromise subject to certain specific suggestions with regard to the revision of the text of the draft convention. This report is now being circulated for comments to all member States and other States of the Asian-African region. Any relevant comments received from member States will be analysed and forwarded to the UNCITRAL secretariat.

General conditions of sale

21. A draft standard form of FOB contract for use by buyers and sellers of commodities of the Asian-African region has been prepared (Brief of documents on international sale of goods, thirteenth session, Lagos). The full account of this work is contained in the report

submitted to the fifth session of UNCITRAL (A/CN.9/71, paras. 12 and 13). Further comments from Governments on this project have been received and it is hoped that another draft of a standard contract dealing with the buying and selling of plant and machinery will be prepared by the secretariat during the coming year.

International negotiable instruments

22. The Committee has not taken up this subject for consideration as it is still under detailed consideration by the UNCITRAL Working Group on International Negotiable Instruments. At an appropriate stage it is the intention of the Committee to consider the final proposals made by UNCITRAL and to assist member Governments with comments and suggestions.

International commercial arbitration

23. An outline study on this subject dealing with specific topics of special interest to the Asian-African region has been prepared by the secretariat and has been circulated to member Governments. Collection of material in regard to the study is in progress and it is hoped to complete certain portions of the subject this year. It will then be submitted for consideration to member Governments.

International legislation on shipping

24. The subject of bills of lading together with the work done by UNCITRAL on this topic, is under detailed consideration. The secretariat also expects to complete a study on liner conferences.

B. Asian Development Bank

Credit and security arrangements

25. For the past three years the Bank has been associated with the Law Association of Asia and the Western Pacific (LAWASIA) in a project involving a study of the credit and security arrangements available to national development banks and similar financial institutions situated in certain member countries. All work on the project is completed except for the country report on Australia and the final integrated report, which are expected to be finalized in about April of this year. The publication of the first volume of the reports is expected soon.

C. Bank for International Settlements

International negotiable instruments

26. The Bank has been participating in work in respect to a draft uniform law on international bills of exchange and promissory notes which is being prepared by UNCITRAL.¹⁴

* UNCITRAL Yearbook, vol. III: 1972, part two, I, A, 5, annex III.

** UNCITRAL Yearbook, vol. III: 1972, part two, I, B, 3.

¹⁴ For participation of international organizations in the preparation of the draft uniform law, see A/CN.9/WG.IV/WP.2, introduction, para. 3, note 6 and A/CN.9/77, para. 3, reproduced in this volume, part two, II, 1, above.

D. Commission of the European communities (EEC)

Instalment sales

27. Work on this subject has been described in the reports submitted to the fourth and fifth sessions of UNCITRAL (A/CN.9/59, para. 18 and A/CN.9/71, para. 16).

Guaranties and securities

28. Earlier stages of work on this subject are described in the report to the fifth session of UNCITRAL (A/CN.9/71, para. 18). The Community has published a comparative law study which has served as a basis for the work in progress on suretyship and personal sureties, under the title: Harmonization of legislation, 1971, number 14. Security interests in real and personal property are also presently the subject of preparatory work.

Commercial arbitration

29. The Commission has recently presented a draft relating to arbitration of disputes resulting from the making and performance of public contracts financed by the European Development Fund.

Multinational corporations

30. A Convention on Mutual Recognition of Companies and Legal Entities was signed by the six original member States of the EEC on 29 February 1968. The legal basis for this Convention is found in article 220 of the Treaty Establishing the European Economic Community (EEC Treaty).

31. A draft convention on international merger of private companies has been prepared. The legal basis for this draft convention is also found in article 220 of the EEC Treaty.

32. On 30 June 1970 a proposal was made concerning a regulation of the Council bearing on the status of private European companies. The proposal was in reference to article 235 of the EEC Treaty.

Commercial agency

33. Earlier stages of work on this subject were described in a report to the fourth session of UNCITRAL (A/CN.9/59, para. 20). A directive concerning the status of commercial agents in the Community is now in the course of preparation.

Bankruptcy

34. Work on the draft convention on bankruptcy and analogous procedures was described in the report submitted to the fifth session of UNCITRAL (A/CN.9/71, para. 17).

E. Council of Europe

International aspects of the legal protection of the rights of creditors

35. This subject has been examined by the European Committee on Legal Co-operation (CCJ) at its meeting

in December 1972. Earlier stages of the project are described in the reports submitted at the fourth and fifth sessions of UNCITRAL (A/CN.9/59, para. 21 and A/CN.9/71, para. 19). Having considered the activities in progress under the aegis of the European Community on the subject the CCJ decided not to take an official position on the subject for the time being. The Committee will await a study at the 8th Conference of European Ministers of Justice on the future role of the Council of Europe in this domain and, in particular, the problems presented by the overlapping of activities of international organizations.

Harmonization of certain rules relating to the place of payment in matters of money liabilities

36. Earlier stages in the preparation of the European Convention on the place for Payment in Matters of Money Liabilities were described in the reports submitted to earlier sessions of UNCITRAL (A/CN.9/59, para. 22, and A/CN.9/71, para. 20). The Convention was opened for signature by member States in May 1972 and has been signed by Austria, the Federal Republic of Germany, and the Netherlands.

Uniform rules in the field of "time limits"

37. Earlier stages of work on "time limits" and related areas were described in the reports submitted to the fourth and fifth sessions of UNCITRAL (A/CN.9/59, para. 23, and A/CN.9/71, paras. 21 and 22). The European Convention on the Computation of Time-Limits, was opened for signature on 16 May 1972 and has been signed by Austria, France, Belgium, the Federal Republic of Germany, Italy, Luxembourg and Sweden.

38. Work is also in progress in the matters of extinctive prescription. A sub-committee of CCJ has been assigned to study, in the light of the UNCITRAL Draft Convention on Prescription (Limitation) in the International Sale of Goods, the draft rules to extinctive prescription in civil and commercial matters—a draft prepared by the sub-committee of the CCJ in charge of harmonizing basic legal concepts—with a view to possible harmonization of the two drafts.

Recognition and enforcement of foreign judgements in private and commercial matters

39. Earlier stages of work on the preparation of a guide of practice on the subject have been described in the reports submitted at the fourth and fifth sessions of UNCITRAL (A/CN.9/59, para. 24, and A/CN.9/71, para. 23). The guide is still in the course of preparation and it is expected that the CCJ will, at its meeting in December 1973, be called on to examine the official text of the guide with a view to authorizing its publication.

Harmonization of rules on investment funds

40. Earlier stages of work on this subject were described in the reports to UNCITRAL at the fourth and fifth sessions (A/CN.9/59, para. 26, and A/CN.9/71, para. 24). On 19 September 1972 the Committee of Ministers adopted its resolution (72) 28 relating to in-

vestment funds (national). On 12 December 1972 the Committee adopted resolution (72) 50 relating to foreign institutions for collective investment.

Manufacturer's liability

41. Earlier stages of work on this subject were described in the report to the fifth session of UNCITRAL (A/CN.9/71, para. 25). The committee of experts established by the CCJ, held its first meeting in November 1972. After a general examination of the problem, the committee drew up an evaluation of all the questions which have arisen within the framework of its authority (i.e., to propose measures with a view towards harmonizing the substantive laws of the member States). The general tendency shown by the work of the first meeting was in favour of establishing a system of objective liability which takes into consideration the interests of both consumers and manufacturers.

F. Council for Mutual Economic Assistance (CMEA)

Convention on the Settlement by Arbitration of Civil Law Disputes Arising out of Relations Concerned with Economic, Scientific and Technological Co-operation

42. The above Convention, which was described in the report submitted at the fifth session of UNCITRAL (A/CN.9/71, para. 26), was signed by the CMEA member countries in Moscow on 26 May 1972 and has been ratified by Bulgaria, the German Democratic Republic, Hungary and Mongolia. The Convention will enter into force on the 90th day following the date of the deposit of the fifth instrument of ratification.

Uniform rules for arbitration courts

43. In January 1972 the Executive Committee of CMEA directed the Legal Conference of Representatives of CMEA member countries to prepare draft uniform rules for arbitration courts attached to the Chambers of Commerce of the member countries of CMEA. These rules are to cover such matters as the harmonization and unification of certain rules pertaining to such courts. The first draft of the uniform arbitration court statute has been prepared. This draft includes uniform rules relating to the following questions: the competence of arbitration courts; their working procedures; the composition of arbitration courts; the order of and time limitations in respect of arbitration proceedings; court fees for arbitration; the expenses of the arbitration body and costs borne by the parties. It is anticipated that the final text of the uniform arbitration court statute will be ready by the end of 1973.

Model provisions concerning conditions for the establishment and activities of international economic organizations in member countries of CMEA

44. The Model Provisions were prepared by the Legal Conference of representatives of CMEA member countries and were approved by the Executive Committee in January 1973. The Model Provisions contain uniform rules concerning the establishment, membership, organ-

izational structure and legal status of the property and economic activities of international economic organizations (enterprises, combines, central profit-and-loss accounting boards, scientific research and project design organizations, foreign trade organizations and other legal entities which, in conformity with the law of their countries, engage in economic activities in their own name and assume liability therefor. It is intended that the member countries of CMEA will take the Model Provisions into consideration, to the extent they see fit, in establishing international economic organizations by international agreements and in drafting national normative acts concerning matters relating to the establishment and activities of such organizations.

General conditions of servicing and assembly

45. Earlier stages of the work of CMEA in this field were described in the report submitted at the fifth session of UNCITRAL (A/CN.9/71, para. 30). CMEA's Standing Commission on Foreign Trade submitted proposals on this subject to the Council's Executive Committee for its consideration. These proposals are designed to make these general conditions responsive to the growing demands for technical servicing of machines and equipment delivered in trade among the member countries of CMEA, particularly by defining more clearly the rights and obligations of sellers and buyers, and by including the obligations of the sellers of machinery and equipment in respect of spare parts.

General conditions of delivery of goods between organizations of the member countries of CMEA

46. On instructions from the Executive Committee of CMEA, the Legal Conference of representatives of CMEA member countries is continuing work on the preparation of unified rules with respect to the substantive responsibility of economic organizations for non-performance or inadequate performance of mutual obligations; it is expected that these rules will be included in the General Conditions of Delivery, CMEA, 1968.

International legislation on shipping

47. Earlier stages of work in this field were described in the report submitted to the fifth session of UNCITRAL (A/CN.9/71, paras. 28 and 29). The General Conditions for the reciprocal provision of marine tonnage and foreign trade cargoes of member countries of CMEA (drafted by the Conference of Managers of Chartering and Shipowning Organizations of Member Countries of CMEA) were approved in September 1972 by the CMEA Standing Commission on Transport. The General Conditions are to be applied in all relations between the appropriate agencies or organizations of the member countries of CMEA in conducting negotiations, signing protocols and agreements and concluding contracts and separate contractual arrangements relating to the provision of marine tonnage which may be supplied for the purpose of loading foreign trade cargoes after 31 December 1972. The Standing Commission on Transport is preparing a draft multipartite agreement on the joint use of containers in international shipping.

Legal protection of intellectual property

48. An agreement on the legal protection of inventions, industrial and generally useful designs and trademarks, in relation to economic, scientific and technical co-operation, is being drafted by the Conference of Directors of Patent Offices of the Member Countries of CMEA.

G. *Inter-American Juridical Committee*
(*Organization of American States*)

The Inter-American Specialized Conference on Private International Law

49. Earlier stages of work by the Committee were described in the report submitted at the previous session of UNCITRAL (A/CN.9/71, paras. 36 and 37). The general secretariat of the Organization of American States is preparing the above-mentioned Conference convoked by resolution AG/RES.48 (1-0/71). The Conference is to be held prior to 1974. Among the subjects on the agenda are the following: international buying and selling of commodities, bills of exchange, cheques and promissory notes of international circulation, international commercial arbitration, and international maritime transport with special reference to bills of lading.¹⁶

H. *The International Bank for*
Economic Co-operation (IBEC)

*International payments*¹⁶

50. The Bank submitted information on recent modifications made with respect to trade settlements in transferable roubles between the eight member countries of the Council for Mutual Economic Assistance, which are also members of IBEC.

I. *International Institute for the Unification*
of Private Law (UNIDROIT)

The progressive codification of the law of contracts

51. A preliminary report on the possibilities of unifying the rules of law concerning the formation of contracts and their conditions of validity was presented to the Governing Council of UNIDROIT by Prof. Popescu, Rapporteur, in May 1972 (document U.D.P. 1972 — Etudes: L — Droit des obligations, Doc. 3). The Governing Council requested the secretariat of UNIDROIT to continue with this preliminary research and to prepare a study of comparative law on the non-performance of contracts and the sanctions for non-performance. This study is being prepared.

¹⁶ For participation in the preparation of the draft uniform law on international bills of exchange and promissory notes which is undertaken by UNCITRAL, see A/CN.9/WG.IV/WP.2, introduction, para. 3, note 6 and A/CN.9/77, para. 3; reproduced in this volume, part two, II, 1, above.

¹⁷ For participants in the preparation of the draft uniform law, see *ibid.*

The preliminary draft law for the unification of certain rules relating to validity of contracts of international sale of goods

52. The Governing Council of UNIDROIT revised and approved the above-mentioned preliminary draft law together with the explanatory report prepared by the Max-Planck Institut für ausländisches und internationales Privatrecht (document U.D.P. 1072 — Etudes XVI/B—Doc. 20 et 21). This draft which comprises 16 articles, is a complement to ULIS and regulates the régime of avoidance for mistake, fraud and threat. It will be distributed at the next session of UNCITRAL.

Draft uniform law on the protection of the bona-fide purchaser of goods

53. This draft of 11 articles, elaborated by a Working Committee and approved in 1968 by UNIDROIT's Governing Council, sets out a certain number of rules aimed at ensuring the protection of the *bona fide* purchaser should the seller not have the right to sell the goods concerned. The text and an explanatory report of this draft (document U.D.P. 1968—Etude XLV, Doc. 37) have been sent to the Governments of the member States of UNIDROIT which were invited to express their opinion on the subject. Their observations will be examined by a committee of governmental experts which will meet in June 1973. In the event of an agreement on the revised text, this draft could be presented before a diplomatic conference for the elaboration of a convention.

Draft uniform law on agency of an international character in the sale and purchase of goods

54. This draft is the result of extended study. It was revised by a Committee of governmental experts which amalgamated two drafts previously drawn up by Working committees. This draft comprises 37 articles and defines the legal relationships deriving from the contract of agency (including the contract of "commission") between the principal, the agent and the contracting party. Its sphere of application is limited to agency for the sale of goods. A diplomatic conference to finalize the draft into a convention could be convened in the near future.

The legal status of air-cushion propelled vehicles (especially sea-going vehicles, e.g. hovercraft and naviplanes)

55. UNIDROIT has studied the situation of the law in different countries on this subject. The results obtained through this study are being examined and will shortly be laid before a working party. The working party will present a programme for international legislation to a committee of governmental experts. This programme will be elaborated with the collaboration of the Inter-Governmental Maritime Consultative Organization.

The transport of live animals

56. On behalf of UNCITRAL and within the framework of the UNCITRAL Working Group on Inter-

national Legislation on Shipping, the secretariat of UNIDROIT undertook a study of the problems connected with the transport of live animals and, in particular, of conditions in which the transport of live animals could be included in the sphere of application of the Hague Rules.

River transport

57. In close collaboration with the Economic Commission for Europe of the United Nations, UNIDROIT is progressing in the elaboration of conventions on river transport: the contract for the carriage of passengers and luggage by inland waterway (C.V.N.); the limitation of the liability of boat owners (C.L.N.); the contract for the carriage of goods by inland waterway (C.M.N.).

Road transport

58. On behalf of the United Nations Economic Commission for Europe, UNIDROIT prepared a preliminary draft convention relating to the contract for the international carriage of passengers and luggage by road (C.V.R.). The work on this subject which is now being done by the ECE/UN Inland Transport Committee is based on this text.

III. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

A. *International Chamber of Commerce (ICC)*

International sale of goods

59. The ICC is continuing the work on this subject as described in the reports submitted at the fourth and fifth sessions of UNCITRAL (A/CN.9/59, para. 43, and A/CN.9/71, para. 63).

International payments

60. The ICC is continuing the work outlined in the report submitted at the fifth session of UNCITRAL (A/CN.9/71, para. 64). On the subject of documentary credits, the ICC has completed a first draft revision of its uniform customs and practices for documentary credits (Brochure No. 222). The documents have been distributed for consideration and comment to the ICC national committees and to interested circles in countries not represented in ICC through the UNCITRAL secretariat.

International commercial arbitration

61. The ICC is (a) examining the results of the IVth International Arbitration Congress (Moscow, 1972) and (b) continuing studies for a revision of its Rules of Conciliation and Arbitration.

International legislation on shipping

62. Earlier stages of work on this subject were described in the reports submitted at the fourth and fifth sessions of UNCITRAL (A/CN.9/59, paras. 45

and 46, and A/CN.9/71, para. 66). The ICC's International Bureau of Transport Users has submitted a reply to the UNCITRAL's questionnaire of June 1972 on the revision of the Brussels Convention of 1924.¹⁷

Agency

63. The ICC continues to participate in the studies and meetings of UNIDROIT on the subject.

B. *International Union of Marine Insurance (IUMI)*

International legislation on shipping

64. The Union participates in the work of UNCITRAL on the subject, and also attends meetings of related sessions of the Economic and Social Council, UNCTAD, and ECE/IMCO. Among the recent publications of the Union are "Summary of Arguments in Support of the Current System of Risk Allocation between Carrier and Cargo Owner" by the Carriers Liability Committee (October 1972) and "Time-Bar on Cargo Claims" by the Cargo Loss Prevention Committee (December 1969). The Union has also published in several languages "Tables of Practical Equivalents" of cargo insurance clauses which are used in many marine insurance markets. It is hoped that this publication will assist banks, carriers and consignees as well as Governments as a reference book.

65. The subject of general average, which establishes specific responsibilities for marine insurance, has been on the agenda of the Union for many years, and several significant reports have been submitted to its annual conference.

C. *International Law Association (ILA)*

International commercial arbitration

66. The Committee on International Commercial Arbitration continues to work on the development of methods to increase the use of arbitration for the settlement of disputes arising out of government contracts with foreign-owned firms.

Foreign investments in the developing countries

67. The study of this subject has been carried on by the Committee on Foreign Investments in the Developing Countries. The final revised text of a model contract for the establishment by foreign capital of textile enterprises in a developing country will be submitted to the 56th Conference.

Extra-territorial application of restrictive trade legislation

68. The ILA, at its 55th Conference in August 1972, adopted certain principles of international law as guidelines to the resolution of problems concerning the assumption and exercise of jurisdiction by States in connexion with restrictive trade practices.

¹⁷ This reply is contained in document A/CN.9/WG.III/WP.10/Add.2.

CHECK LIST OF UNCITRAL DOCUMENTS

Documents of the sixth session of the Commission

<i>Title or description</i>	<i>Document reference</i>
A. GENERAL SERIES	
International legislation on shipping: report of the Working Group on the work of its fourth (special) session held in Geneva from 25 September to 6 October 1972	A/CN.9/74
Progress report of the Working Group on the International Sale of goods on the work of its fourth session (New York, 22 January-2 February 1973)	A/CN.9/75
International legislation on shipping: report of the Working Group on the work of its fifth session, held in New York from 5 to 16 February 1973	A/CN.9/76
Responsibility of ocean carriers for cargo: bills of lading; second report of the Secretary-General	A/CN.9/76/Add.1
International payments: Negotiable Instruments: Draft Uniform Law on International Bills of Exchange and International Promissory Notes: report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973)	A/CN.9/77
General conditions of sale and standard contracts: report of the Secretary-General	A/CN.9/78
International commercial arbitration: summary of the comments by members of the Commission on the proposals of the Special Rapporteur: report of the Secretary-General	A/CN.9/79 and Add. 1
Training and assistance in the field of international trade law: report of the Secretary-General	A/CN.9/80
The establishment of a union for <i>jus commune</i> in matters of international trade — analysis of comments and observations by Governments: report of the Secretary-General	A/CN.9/81
Current activities of international organizations related to the harmonization and unification of international trade law: report of the Secretary-General	A/CN.9/82
Multinational enterprises: note by the Secretary-General	A/CN.9/83
Provisional agenda, notes on the provisional agenda, and tentative schedule of meetings: note by the Secretary-General	A/CN.9/84
Summary records of the sixth session of the Commission	A/CN.9/SR.126 to 142

B. LIMITED SERIES

International payments: revision of the Uniform Customs and Practice for Documentary Credits: note by the Secretary-General	A/CN.9/L.23
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<i>Title or description</i>	<i>Document reference</i>
Uniform rules relating to the validity of contracts of international sale of goods: note by the Secretary-General	A/CN.9/L.24
C. RESTRICTED SERIES	
Draft report of the United Nations Commission on International Trade Law on the work of its sixth session (2 to 13 April 1973)	A/CN.9/VI/CRP.1 and Add.1 to 9
International commercial arbitration: proposal of the Drafting Group	A/CN.9/VI/CRP.2
D. INFORMATION SERIES	
List of delegations	A/CN.9/INF.5

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Incorporation of Article 36 into 33 of ULIS (proposal by Drafting Group VI)	A/CN.9/WG.2/IV/CRP.5
Article 42 (proposal by Drafting Party VI)	A/CN.9/WG.2/IV/CRP.6

* French only.

<i>Title or description</i>	<i>Document reference</i>
United States of America: proposal concerning article 33	A/CN.9/WG.2/IV/CRP.7
Drafting Party III: proposed article 35	A/CN.9/WG.2/IV/CRP.8/Rev.1
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Title or description

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